IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 3694/2018

In the matter between:

ADRIANA MARTHA MARIA DE BRUIN	Applicant
and	
MARIUS STOFFBERG N.O.	First Respondent
MARIUS STOFFBERG	Second Respondent
MARIA ALICIA DU TOIT	Third Respondent
JOHANNES JACOBUS DU TOIT	Fourth Respondent
MARIA ALICIA DU TOIT N.O.	Fifth Respondent
JOHANNES JACOBUS DU TOIT N.O.	Sixth Respondent
ARMORY BOERDERY CC	Seventh Respondent
MASTER OF THE HIGH COURT, BLOEMFONTEIN	Eighth Respondent
JOHANNES CHRISTIAAN DE WET COEN	Ninth Respondent
ZANRI JOUBERT	Tenth Respondent
HAROLD WILSON COEN	Eleventh Respondent

SBRO BROKER/FINANCIAL SERVICES (PTY) LTD
(Registration number 2001/0103379/07) Twelfth Respondent

HERMANUS SAMUEL MARAIS Thirteenth Respondent

HEARD ON: 17 OCTOBER 2019

JUDGMENT BY: C REINDERS, J

DELIVERED ON: 23 JANUARY 2020

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[1] The Master of the High Court in Bloemfontein on the 24th of May 2017 accepted a written and signed document as last Will (the Will) of Adriana Martha Maria du Toit (the deceased) who passed on the 25th of April 2017.

[2] The Applicant is one of the deceased's daughters. She avers that the Will accepted by the Master (and dated 12th October 2011) is invalid. The Master is cited as the Eight Respondent in the application. Suffice to say that the Master initially opposed the application. After negotiations the Master filed a notice to abide.

[3] The deceased had three biological daughters of which two survived her, one being the Applicant and the other cited as Third Respondent. The Third Respondent, married to the Fourth Respondent, is also cited as Fifth Respondent in her representative capacity as trustee of the trust known as the JA du Toit Kindertrust (the Trust). The predeceased daughter's children are cited as the Ninth, Tenth and Eleventh Respondents.

[4] The Will is annexed to the founding papers and consists of two pages. The Will reads as follows:

"

TESTAMENT

Ek die ondergetekende,

ADRIANA MARTHA MARIA DU TOIT
Identiteitsnommer [...]

weduwee herroep hiermee alle testament en kodisille voorheen deur my gemaak en verklaar hiermee my testament te wees.

1. **AFSTERWE VAN DIE TESTATRISE**

Ek bemaak my netto totale boedel as volg:-

1.1 Aan die trustees van die **JJ du TOIT KINDERTRUST (IT 440/11)** om die bemaking ooreenkomstig die bepalings van die trustakte tot voordeel van die trustbegunstigdes te administreer:

1.1.1 Alle plaaseiendom in my naam geregistreer;

1.1.2 My belang en enige leningsrekening in Armory Boerdery BK, wat nie in terme van die koop- en verkoopooreenkoms met my skoonseun, Johannes Jacobus Du Toit aan gemelde skoonseun verkoop word nie.

1.2 'n Kontantlegaat van R40,000 (Veertig Duisend Rand alleen) elk in afsonderlike testamentere trusts vir die kinders van my oorlede dogter;

1.3 Die restant van my boedel in gelyke dele tussen my oorblywende kinders.

2. **TRUSTBEPALINGS**

Indien enige van ons erfgename nog nie die ouderdom van 21 (een en twintig)jaar bereik het nie, sal sy of haar erfenis in trust berus in ons trustee aan wie ons die volgende magte en pligte opdra:

2.1 Om enige bates te aanvaar, te beheer en te administreer;

2.2 Om in belang van die trust, in sy diskresie, die bates te verhuur, te verkoop of te gelde te maak, of om enige roerende en onroerende eiendom te huur of aan te koop.

2.3 Om in belang van die trust enige kontant op sodanige wyse te bele soos wat hy mag goeddink, sonder om tot erkende trustee-sekuriteite beperk te word. Die trustee word hiermee ook gemagtig om enige belegging op te roep en die opbrengs ooreenkomstig die voorafgaande bepalings te belê.

2.4 Om ter uitvoering van enige bepalings van hierdie trust enige som geld te leen en en om enige vorm van sekuriteit te verskaf vir die behoorlike terugbetaling daarvan, insluitende die mag om enige bates van die trust te verpand, te belas of met ‘n verband te beswaar.

2.5 Om soveel van die inkomste en indien nodig, van die kapitaal soos wat hy na sy goeddunke nodig mag ag, aan te wend vir onderhoud, opvoeding en geleerdheid van die begunstigde of vir enige ander doel in sy of haar belang. Enige inkomste wat nie vir die voormelde doeleindes benodig word nie, mag gekapitaliseer word.

2.6 Om die trust te beeindig wanneer die begunstigde die ouderdom van 21 (een en twintig) jaar bereik en die kapitaal tesame met enige opgelope inkomste aan hom of haar oor te maak en/of te betaal.

3. BESKERMING VAN VOORDELE

Enige voordeel wat kragtens hierdie testament of ‘n kodisil daartoe aan ‘n begunstigde toeval asook enige inkomste daaruit verdien sal uitgesluit wees van die regsgevolge van sy of haar toekomstige huwelik.

4. EKSEKUTEUR

Ek benoem **MARIUS STOFFBERG** van die firma **STOFFBERG BOTHA RELINGHUYS en ODENDAAL** as my eksekuteur, vry van die verpligting om sekuriteit te verskaf. ”

[4] On face value the document was signed by the deceased on the 12th October 2011 at Bethlehem in the presence of the witnesses. The document suggests that the two witnesses signed the document at the same time all in one another’s presence.

[5] Citing twelve respondents the Applicant by way of notice of motion issued on the 23rd July 2018 seeks relief in what is termed “PART A” and “PART B” of the notice of motion.

[5.1] Under PART A the Applicant claims the following relief:

“1. That the purported Will of the late ADRIANA MARTHA MARIA DU TOIT, Identity number [….], dated 12 October 2011, be declared invalid, subject, as provided for in Section 2A of the Wills Act, Act no.7 of 1953, despite its invalidity it comprises, in terms of Sub-Section (c)…….*another document* which was drafted or caused to be drafted,

by which the late ADRIANA MARTHA MARIA DU TOIT, intended to revoke all previous Wills which were concluded by her;

IN THE ALTERNATIVE TO PRAYER 1 IN THIS PART A:-

1. That the Will of the late ADRIANA MARTHA MARIA DU TOIT, Identity number […], dated 12 October 2011, be declared valid, subject to the following further orders:-
   1.1 That clause 1.1 of the Will of the late ADRIANA MARTHA MARIA DU TOIT be declared invalid and of no force or effect;

   1.2 That clause 1.2 of the Will of the late ADRIANA MARTHA MARIA DU TOIT be declared invalid and of no force or effect;

   1.3 That clause 2 of the Will of the late ADRIANA MARTHA MARIA DU TOIT be declared invalid and of no force or effect;

   1.4 That the entire estate of the Will of the late ADRIANA MARTHA MARIA DU TOIT be distributed as provided in clause 1.3 of the Will of the late ADRIANA MARTHA MARIA DU TOIT, in equal shares to:-

      1.4.1 the Applicant, as to 1/3 (one/third);
      1.4.2 the Third Respondent, as to 1/3 (one/third);
      1.4.3 the children of the late SUSANNA MARGARETHA COEN, the Applicant's sister, as to 1/3 (one/third);

   1.5 That the appointment of the Second Respondent as Executor nominated in terms of clause 4 of the Will of the late ADRIANA MARTHA MARIA DU TOIT be declared invalid;

   1.6 That an Executor be nominated by the President of the Law Society of the Free State and appointed by the Master of the High Court;

2. That the Sales Agreement in terms of which the late ADRIANA MARTHA MARIA DU TOIT purportedly sold a part of her member's interest in ARMORY BOERDERY CC to JOHANNES JACOBUS DU TOIT, dated 12 October 2011, be declared void *ab initio* and of no force and effect.

3. Ordering the Second, Third and Fourth Respondents and any Respondent who opposed the Relief in this Part A, to pay the Applicant's costs of this Application jointly and severally, on a scale as between Attorney and own client, including the costs of two Counsel.

4. Granting the Applicant further and /or alternative relief."

[5.2] Under Part B, the Applicant moves for orders in terms of Rule 53 of the Uniform Rules of Court for the review and setting aside of decisions made by the Master of the High Court, Bloemfontein in respect of the Will of the deceased.

[6] The First to Seventh and Twelfth Respondents (collectively the Respondents) opposed the application and filed answering affidavits.

[7] Advocate Snijders who appeared on behalf of the Applicant also prepared and filed heads of argument. Advocate Snellenburg SC representing the mentioned opposing Respondents likewise filed heads of argument. I am indebted to council for their comprehensive heads which I found very helpful.

[8] The Applicant's more relevant allegations may be summarised as follows:

[8.1] The Will is invalid in that the testatrix did not exercise her free will when attesting same. This is so due to the duress and undue influence exerted by the Third and Fourth Respondents. In addition the will, the membership interest in the Seventh Respondent (the Close Corporation Armory Boerdery CC) and the life insurance over the deceased's life (issued by Second Respondent) were all part of a "scheme" to alienate the deceased's property and to benefit the Third and Fourth Respondents as well as the executor appointed in terms of the will, namely the Second Respondent. The Second Respondent, so applicant avers, is a further beneficiary of the scheme who benefitted from the life insurance and his appointment as executor.

[8.2] The prescribed statutory formalities of the Wills Act 7 of 1953 (the Wills Act) have not been complied with and the terms in any event are vague, uncertain and unenforceable, especially with reference to the terms of the Trust.

[8.3] The Buy-and-Sell Agreement ("Koop-en Verkoopooreenkoms" dated 12 October 2011) to which reference is made in the Will is not enforceable as the essentialia of an agreement of sale is absent.

[8.4] The Second Respondent should in any event be removed as executor on the grounds that he sold the insurance, advised on the buy and sell agreement, wrote the will and was nominated as executor. As such he is disqualified in terms of section 54 of the Administration of Estates Act 66 of 1965 (the Administration of

Estates Act) and due to the roll that he played in the duress and the undue influence scheme with Third and Fourth Respondents.

[9] In support of the allegation that the formalities were not complied with the Applicant explains how the Second Respondent came to the farm with the document already drafted. The deceased according to Applicant complained afterwards that she did not understand the contents of the document. Third and Fourth Respondents threatened that in the event of deceased not signing the Will they would move from the farm and leave deceased at her own mercy. The deceased was intimidated to the extent that she did not have the courage to obtain legal representation or to revoke her will as she feared Third and Fourth Respondents would discover what she had done. The deceased was entirely dependent on Third and Fourth Respondents as to where she lived, what vehicle she could drive, her income and allowances to spend. The deceased complained that she might as well die as the Fourth Respondent had taken everything deceased and her husband had worked for.

[10] The Respondents strenuously deny these allegations. The Respondents aver that the Will (and the sales agreement and trust deed) was drafted by the deceased's attorney according to her instructions. An affidavit of the attorney Petrus Cornelius Swanepoel confirms the evidence. The affidavit reveals that Mr Swanepoel is an admitted attorney, practising as such at attorneys Symington and De Kok, Bloemfontein. It is noteworthy to mention that Applicant in her replying affidavit concedes that Swanepoel might have drafted the Will, but avers that if this occurred it was on

instructions as to its terms taken from those who participated in the scheme which includes the Second Respondent as well as the Twelfth Respondent, the company known as SPBRO Broker/Financial Services (Pty) Ltd. The evidence of the Respondents reveal that the Will was signed at Bethlehem by the deceased and in the presence of two independent witnesses as required by the Wills Act.

[11] In my view the relief sought by the Applicant is final in nature. She chose to approach court by way of motion proceedings. The test to be applied is therefore the test set out in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*** at 634 e- 635 C (the Plascon-Evans rule). In essence I have to look at the respondent's version.

Compare: ***National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)*** at para [26].

[12] It could not be reasonably contended that I should reject the Respondents' versions outright as farfetched or clearly untenable. I was not requested to refer the matter for oral evidence.

[13] In my view the Applicant knew or should have known that a serious dispute was bound to develop on the papers. In fact, this was evident from the written complaint lodged by the Applicant's attorneys with the Master and the response thereto by the Respondents' attorneys, before the application was issued. The Applicant however elected to proceed by way of motion proceedings and not action proceedings. On a question by me in this regard Mr Snijders in my view did not furnish me with a

convincing answer. The way I understood his argument it would serve no purpose to hear oral evidence as the Respondents could not dispute the discussions between the Applicant and deceased. This is presumably so as none of the Respondents were present when the discussions took place. He conceded that in motion proceedings it is difficult to test the veracity of the evidence. This argument does not find favour with me.

As mentioned in motion proceedings I am bound to adjudicate the matter on the principles enunciated in Plascon-Evans. In action proceedings the witnesses testify *viva voce*, can be interrogated and cross-examined and the court, having seen the witnesses, can make credibility findings. The court is then in the favourable position to reject or accept evidence whilst the final question would be whether the plaintiff has proved its case on a preponderance of probabilities. *In casu* there is much to be said for the contentions on behalf of Respondents that the Applicant's case is based on uncorroborated hearsay evidence of remarks the deceased allegedly made to Applicant. If the matter is adjudicated on Respondents' version, much of the Applicant's evidence is unreliable and wrong. It simply is not true that the Second Respondent drew the will, came to the farm and unduly influenced the deceased to sign same. Much is likewise to be said that the hearsay evidence statements cannot be tested, that no particularity is supplied regarding when and where the statements were made, nor are any of the statements corroborated. The contention that the Applicant's explanation for waiting until the deceased has passed before coming forward is untenable, has a ring of truth. This is so in particular bearing in mind that the

deceased had lived on her own amongst her peers in an old age home, for some time before her passing, where she could at any time have amended, varied or revoked the Will without anybody having had knowledge thereof.

[14] I have no doubt that when the Master was confronted by what was purported to be the last will and testament of the deceased dated 12 October 2011, the Master had no choice but to so accept as on face value the document complied with the provisions of the Wills Act.

[15] There is no evidence justifying court to find the will to be invalid or to find that the deeming provisions of the Wills Act had not been complied with. On the contrary, applying the Plascon-Evans test the evidence by the attorney Mr Swanepoel proves not only proper compliance with the Act, but also that the Will recorded the deceased's last wishes (therefore exercising her free will without duress and/or undue influence).

[16] I find no basis to declare any of the paragraphs of the Will invalid or of no force and effect. The Master does not appear to have any difficulty in interpreting the Will and neither do I. The cardinal rule is to give effect to the wishes of the testator and the will should be so construed as to ascertain from the language used therein the true intention of the testator.

See: ***Raubenheimer v Raubenheimer 2012 (5) SA 290 (SCA)*** at para [23].

[17] I could find no grounds which indicate that the executor has any conflict of interest justifying his removal as executor from the estate. The mere fact that the executor earned commission on policies that the executor wrote as broker during the deceased's lifetime does not suffice or constitute any or sufficient grounds for his removal.

[18] I agree with Mr Snellenburg SC that as far as the Sale-and-Buy Agreement is concerned the Applicant has not shown any *locus standi* to attack same. Nor has she any good grounds to do so.

[19] For the reasons aforementioned none of the relief sought can be granted. Mr Snellenburg SC contended that the application stands to be dismissed with costs on the scale as between attorney and client. It was pointed out that the joinder of the executor in person and of the Twelfth Respondent constitutes a misjoinder and there exists no reason why either of these Respondents should be out of pocket because they were erroneously joined in the proceedings. He referred me to the judgment of ***Swartbooi and Others v Brink and Others 2006 (1) SA 203 (CC)*** at para [27] and the authority referred to therein.

[20] A cost order is ultimately in the discretion of the trial court. *In casu* I am not convinced that a punitive cost order needs to issue, should I dismiss the application as I intend to do.

[21] For the above reasons I grant the following order:

The application is dismissed with costs.

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C. REINDERS, J

On behalf of the Applicant:	Adv J P Snijders Instructed by: Halse Havemann & Lloyd Randburg c/o Phatshoane Henny Inc BLOEMFONTEIN
On behalf of the 1st to 7th And 12th Respondents:	Adv N Snellenburg SC Instructed by: Lovius Block BLOEMFONTEIN