IN THE HIGH COURT OF SOUTH AFRICA, KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO.:10838/11

SUSAN RUFINA VAN STRAATEN	**Applicant**
versus	
BIRGIT OTTMAN	**First Respondent**
HEIDI SCHMITT	**Second Respondent**
HEINER FRISCH JR.	**Third Respondent**
BRUCE McDONAL FOREST N.O	**Fourth Respondent**
MASTER OF THE KWAZULU-NATAL HIGH COURT-DURBAN	**Fifth Respondent**

JUDGMENT

VAN ZÿL, J.:

1. This is an application wherein the applicant seeks an order to declare a manuscript document, allegedly in the hand of the deceased, to be the last will and testament of the deceased and as such to have her earlier will and codicil thereto, as accepted by the Master of the High Court, set aside as having been revoked.

2. On Sunday 26 June 2011 the late Helene Erika Slack (born Frisch), a widow, died of natural causes at her home at 16 Rolling Hills Country Club, uMhlanga Rocks, KwaZulu-Natal. She left behind in the study of her home a red plastic envelope and a note addressed to the applicant who lived at 134 Rolling Hills Country Club, another unit in the same development. The note, in manuscript and attached to the founding affidavit as annexure "D", read as follows;

> "*Susan, please look after my affairs when I'm not able to anymore. If you are not able to let Robert White handle it. Thank you. Love Helene Slack, 16 RHCC"*

Lower down on the same page of the note appeared a further paragraph, apparently intended as an instruction or a request to pass the red envelope and its contents on to Mr Robert White, as follows:

> "*The red plastic envelope is for Robert White after you had a look at everything first*"

3. The Robert White referred to in the note was a reference to Mr Robert Findlay White, an attorney of the firm Meumann & White, attorneys who practised *inter alia* at uMhlanga Rocks and who the deceased had in the past instructed with regard to her affairs, including the preparation of a will and a subsequent codicil thereto.

4. According to the applicant she came upon the note and the envelope in the deceased's study when she went there on Monday June 26th to sort out the deceased's personal belongings. According to her the envelope contained personal belongings of the deceased, including a manuscript letter, a copy of which is annexed to the founding affidavit as annexure "A" (the original having been lodged with the Master, being the fifth respondent) which read as follows:

> "*Dear Sue, thank you for making my last days so incredibly comfortable.*
>
> *Mr Rob White, Meumann & White.*
>
> *Dear Rob, so quick everything is changing. I don't know what the future brings but Susan van Straaten is a long time friend of mine. I definitely want her to have my unit at 16 Rolling Hills, my shares at Investec, furniture, car and jewellery* to be hers after my death.*
> *The car in Germany & moneys in Germany shall stay in Germany and be divided between my 2 Nices (sic) & Neffew (sic).*
>
> **and Investment.*

Well, I hope for the while being it's the right thing of mine to let you know. Depends now how long I shall be here in this wonderful world.

17 June 2011

Helene Erika Slack nee Frisch
16 Rolling Hills CC
4319 Umhlanga Rocks

Born: 24 7. 1937"

5. In providing background to her finding the envelope, the applicant explained that she and the deceased had met some fifteen years earlier at the Rolling Hills Country Club, a gated estate where they both resided. They became friendly and their friendship grew with the passage of time. During May 2011 the deceased confided in the applicant that she had been diagnosed with cancer and that her condition was terminal. According to the applicant the deceased asked to come and stay with her and for the applicant to care for her. She explained that this was because the deceased, being of German extraction and having had no children of her own, had no family in South Africa.

6. The applicant agreed and the deceased moved in with her. She assisted and cared for the deceased, helped her where necessary to attend doctors' appointments and for her admission to the uMhlanga Hospital for the period 23 to 24 May 2011. During this period she also "ran errands" for the deceased, such as attending to the payment of bills. The papers are silent as to the exact condition of the deceased during the period of her stay with the applicant and thus the degree of assistance required or actually provided for her day to day care.

7. On 21 June 2011 and at her own request the deceased returned home to her housing unit in the estate. It was there that she passed away on June 26th, but details of the circumstances of her passing and the actual cause of her death are not stated. Also unclear is what assistance the deceased may have required or what support facilities

were available to the deceased upon her return home. Indeed, although it was known that her condition was terminal, it remains unclear whether her early death was anticipated at the time when she returned home. There is likewise little information on what transpired or how the deceased occupied herself from the time she returned home and until her death.

8. The applicant contends that in writing the letters, respectively annexures "D" and "A" referred to above, the deceased intended the latter as her final will, to the exclusion of and thus revoking her previous testamentary dispositions.

9. The first and second respondents, being the nieces of the deceased, together with her nephew the third respondent, deny these allegations. The fourth respondent is the executor in the estate of the deceased who has not actively opposed the relief sought and the Master, as the fifth respondent, has abided the decision of the Court.

10. The first, second and third respondents are siblings and the children of the brother of the deceased. They all reside in the Federal Republic of Germany so that they are unable, of their own knowledge, to dispute the averments made by the applicant regarding her relationship with the deceased or the events preceding her death. They questioned, however, whether the deceased was the author of the two letters (annexures "A" and "D") or, if she were then whether she had the necessary mental competency to validly make a testamentary disposition so shortly before her death.

11. Insofar as the applicant however alleged that there was an estrangement between the deceased and her family in Germany, the first three respondents denied that this was so. Having been castigated by the applicant in reply for their alleged failure to provide supporting evidence for their claims of continued contact with the

deceased, the first respondent delivered a further answering affidavit wherein she provided copies of some of the correspondence which originated from the deceased and explained that many other letters were destroyed because it was not foreseen that they might be required in the future. For the same reason no records were kept of telephonic conversations involving the deceased and her relatives in Germany.

12. The first respondent agreed that the deceased had visited Germany in 2009 when her family had contact with her. They are unaware that she again did so in 2010, as claimed by the applicant. They were also unaware of the terminal illness with which the deceased had been diagnosed and speculated that she may not have told them in order to avoid upsetting them because they were far away and prevented by distance from rendering any effective assistance.

13. Insofar as the applicant suggested that the deceased was motivated to change her existing will in order to disinherit her brothers' children by reason of a dispute with her brother regarding their mother's estate, the first respondent pointed out that her grandmother had died as far back as 1978. Accordingly, so she said, her grandmother's death could not have motivated a change in the deceased's will during 2011. Since she said that the deceased used her inheritance from her mother to purchase a flat in Chieming in Germany which she used when visiting Germany and in later years sold again, the suggestion is that her mother's estate must have been settled many years prior to her own death.

14. The documentation put up by the first respondent is also of some significance. If accepted, they establish that the applicant cannot be correct in her claim that the relationship between the deceased and her brother had soured to the extent where they no longer communicated with each other.

15. By way of a letter dated 8 April 2008 the deceased purported to forward to her brother their father's diary of the latter's early years and prior to his marriage to their mother. The letter is friendly and addressed (in translated form) to "Dear Heiner, Traudel and all your young people".

16. The envelope of another of the letters has the particulars of both the deceased's brother and his wife as the addressees and the sender is reflected as the deceased. It is postmarked 28 December 2010, some six months prior to the death of the deceased. The accompanying letter is again addressed to "Dear Traudel, dear Heiner & young people!", thanked them for their Xmas card, wished them well for the new year and pointed out that the reason their birthday card to her had been returned undelivered was because of the different ways the numerals "1" and "7" are depicted in German and English. In the concluding paragraph the deceased extended her regards also to her brother's children and calling them by their first names. This was clearly a reference to the first, second and third respondents.

17. None of this suggests an estrangement of long standing as between the deceased and her family in Germany, with the exception of "Gaby", with whom she said in her letter that she had lost contact. This, presumably, is a reference to Gabriele Reich, the person who in terms of the codicil to the earlier will of the deceased, was removed as a beneficiary.

18. The deceased had during her working lifetime been a secretary and was alleged to have been orderly in the manner in which she conducted her affairs. She had earlier signed a will prepared by ABSA Trust Limited on 14 January 2006 and wherein she had named the first, second and third respondents as beneficiaries together with Ms Reich.

19. Subsequently she signed a will on 10 January 2008. This will appears to have been prepared for her by Mr Attorney White of the firm Meumann & White and the same beneficiaries appeared therein. By codicil signed on 7 October 2009 the deceased removed Ms Reich as a beneficiary, thus leaving as sole beneficiaries the first, second and third respondents to whom she referred as her family members.

20. Mr Attorney White deposed to an affidavit wherein he confirmed that he prepared the will of 10 January 2008 as well as the codicil of 7 October 2009 on the instructions of the deceased and that the deceased on each occasion attended at his firm's uMhlanga offices to sign.

21. According to the witness he received a telephone call from an unspecified person shortly after the death of the deceased informing him that the deceased had left instructions "*to change her will*". The deceased never mentioned the applicant to him. Whilst he was careful not to express any opinion on whether the deceased understood the formalities associated with the making of a will, he was clear that he would on each of the occasions have explained such formalities to her.

22. As regards the manner in which the deceased gave him instructions to prepare the will and the codicil Mr White indicated that he was unable to say in what manner he was instructed to prepare the will of the deceased which she signed on 10 January 2008. However, as regards the codicil he said that she instructed him by email, a copy of which he attached to his affidavit.

23. The attached copy of the email indicates the sender as the deceased, the addressee as Mr White, the date of sending as 5 October 2009 and an instruction under the subject heading of "*Change of Will*" and the heading of the note itself was "*re: Adjustment to my will.*". In the body

of the email Mr White was requested to change the will of the deceased by deleting the name of Ms Gabriele Reich nee Goeke born 24 May 1959. She also provided some details of changes to her assets in Germany.

24. Importantly, in this email the deceased demonstrated an awareness for the formalities required with regard to testamentary documents and suggested that, once the documentation had been processed, that she attend at the uMhlanga offices of Meumann & White in order to sign.

25. Clearly the document (annexure "A" to the founding affidavit and fully set out above), does not comply with the formalities required in terms of s2(1)(a) of the Wills Act 7 of 1953. According to the report of the Master it was for this reason that he rejected the document when it was tendered to him. It therefore falls to the provisions of s2(3) to determine whether the document could be rendered acceptable and the Master directed by this Court to accept it for purposes thereof. S2(3) provides as follows:

> "*If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act 66 of 1965, as a will, although it does not comply with all the formalities for the execution or amendment of will referred to in ss(1)*
> "

26. The section requires that it be shown that the deceased drafted or executed the document in question and has since died. In particular, however, it needs to be shown that the deceased intended, at the time of so drafting or executing the document, for it to be his or her will (De Reszke v Maras and Others 2006 (2) SA 277 (SCA) at 281 H-I).

27. However, there is a difference between the formalities for the making a will and the capacity to do so. As Thirion J pointed out in Harlow v Becker NO and Others 1998 (4) SA 639 (D) at page 646 B-E, the Master in terms of s2(3) only administratively accepts the document for the purposes of the Administration of Estates Act but does not thereby give validity to the document as a will.

28. In the present matter the first, second and third respondents sought to cast doubt upon the fact that the disputed document was written in the hand of the deceased. However, they failed to counter the evidence of Mr M J Irving, a Forensic Document Examiner of many years standing and who concluded that the deceased had written the document in question. The said respondents further sought to question the capacity of the deceased to have validly drafted or executed the disputed document. But their challenge in this regard also falls short of the mark. There is no evidence that the deceased was mentally enfeebled on 17 June 2011 when the document was apparently prepared. The onus of establishing that a person who executed a testamentary document did not at that time have the requisite testamentary capacity to do so rests upon the party contesting the validity of the document (Harlow v Becker NO (supra) at page 647D). Therefore no material factual disputes emerge in this regard.

29. However, it is clear that the party who seeks an order in terms of s2(3) of the Wills Act 7 of 1953 bears the onus of satisfying the court that the person who drafted or executed the disputed document intended it as his or her will, or an amendment of his or her will (Harlow v Becker NO (supra) at page 647C-D). In the present matter the applicant therefore bears the onus of demonstrating that the deceased intended the disputed document (annexure “A”) as her will.

30. In Van Wetten and Ano v Bosch and Ors 2004 (1) SA 348 (SCA) Lewis JA in para 16 at page 354 I expressed the view that;

> "*…, the real question to be addressed at this stage is not what the document means, but whether the deceased intended it to be his will at all. That enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.*"

31. Objectively the deceased had no reason to change her longstanding nomination of her nieces and nephew as her heirs. The probabilities weigh against the severe estrangement between the deceased and her brother and his children contended for by the applicant. It is also interesting to note that the letter to Attorney White (annexure "A") bears the date 17 June 2011. That is, at a time before the deceased relinquished the applicant's hospitality and returned home on 21 June 2011.

32. The first respondent in her answering affidavit drew attention to the state of mind of the deceased at the time she decided to return to her own home. According to the first respondent the contents of the note to the applicant (annexure "D") suggest that the deceased had in mind further assistance from the applicant once her condition had deteriorated to the extent where she was no longer able to take care of her own affairs by herself, but not after her death. This suggests that the two documents (annexures "A" and "D") were not prepared for publication only after the death of the deceased.

33. On the available facts the deceased was clearly aware that her condition was terminal. What is not clear is when she believed that her death would ensue and whether her decline would be rapid or gradual. The content of the letter to the applicant (annexure "D") is inconsistent with her view that it accompanied her "new" will to be given effect to only after her death. It more probably suggests that she envisaged a gradual decline into a state where she would no longer be

able to attend to her own affairs and then wished to rely upon the assistance of the applicant, until her death eventually came about.

34. The actual mechanism of death is also unclear. On the facts the deceased died some five days after leaving the applicant and returning home. We do not know whether she expected her death to occur after such a short period. We also do not know how physically mobile the deceased was at the time of returning home. For all we know she may have believed that she still had weeks, or even months, as opposed to mere days to live. There is no suggestion that, for instance, she no longer at that stage had access or the ability to operate her email facility or telephone.

35. The fact is that she did not advise the applicant of the existence of the two letters (annexures "A" and "D") prior to her death and that these documents and the red plastic envelope were co-incidentally located by the applicant the day following the death of the deceased, when the applicant went to her home to sort out the personal belongings of the deceased.

36. If the deceased wished, in the ordinary course, to change or replace her will, she would presumably have transmitted instructions to her attorney Mr White, whether orally over the telephone or via email, as she had previously done on 5 October 2009 with regard to the codicil to her will. She was known as a woman who throughout her life was particular and precise in managing her affairs. In addition the affidavit of Mr White suggests quite strongly that at least on the two occasions when the deceased executed testamentary writings prepared by him, he would have explained the required formalities to her. She would therefore have been aware of these formalities at the time of writing out the documents in question.

37. The disputed document (annexure "A") itself is also not prepared in the form of a definite decision which the deceased had taken with regard to the devolution of her estate and a direction to give effect to the decision after her death. It is strangely ambivalent and addressed to Mr White at his firm. It commences with the lament that things have changed and the deceased does not know what the future holds. It then sets out directions for the distribution of assets which she owned before concluding that she hoped "*for the time being it's the right thing*" to let him know, but depending upon how long she would (still) be in the world.

38. Stressing that it was clear from the provisions of s2(3) of the Wills Act that the disputed document must have been intended to be the testator's will (Ex parte Maurice 1995 (2) SA 713 (CPD), Selikowitz J at page 716 H-J), the Court remarked further that had the Legislature intended to empower the courts to treat as wills documents merely expressing wishes for the distribution of the author's estate, then it would have said so. In such a case the Legislature would have focussed upon the document having to reflect the testator's distribution intentions, as opposed to it reflecting the intention with regard to the status as a will and the need for testamentary formalities would have become unnecessary.

39. In the present matter the focus of the disputed document (annexure "A") appeared to have been upon the deceased's future intentions with regard to distribution of her named assets, as opposed to executing there and then a will in final and effective form. The document seems to import doubt that it represented, at that time, the correct approach. Instead it was framed along the lines of the deceased's wishes for the time being, but dependant upon how much remained of her lifetime.

40. Counsel for the respondents submitted that, properly construed against the background of events, the disputed letter to Mr White at

best represented an instruction to prepare another codicil, this time appointing the applicant as a beneficiary to receive specially identified assets, or alternatively a fresh will. In either event there was no intention that this document would forthwith serve as the deceased's new will and accordingly the application should fail.

41. In my judgment and against the background of all the factors involved, I am unpersuaded that the applicant has discharged the burden of proof showing that the deceased had intended the disputed document as her will.

42. It follows that the application must fail. Each of the parties sought costs orders adverse to the other. I had given serious consideration to a costs order which followed the result. However, this being a court of first instance it is appropriate in my view to direct that the costs of the application be paid out of the estate of the deceased (De Reszke vs Maras (supra) at page 283D).

43. In the result the application is dismissed. The costs of the application will be paid by the estate of the deceased on the scale as between party and party.

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VAN ZYL, J.

Case information:	
Judgment reserved on:	**12 June 2013**
Judgment handed down:	**19 March 2015**
Counsel for Applicant	**Adv. L E Combrink** **Instructed by Tomlinson Mnguni James**
Counsel for 1st and 2nd Responden:	**Adv. D Van Reenen** **Instructed by Hildebrand Attorneys**