REPORTABLE

CASE NO.: I 3284/2007

SUMMARY

VERMEULEN: FA AND ANOTHER v VERMEULEN: GJ AND OTHERS

MULLER J

10/02/2012

- The plaintiffs claimed that a will (the disputed will) made by their mother, the deceased, on 18 August 2000, be set aside. The deceased had a previous will in terms of which all her children would inherit, but in the disputed will only the first defendant would inherit everything, except for a few rifles. Because the deceased had been diagnosed with Alzheimer's disease in November 2003, the plaintiffs claim that she was testamentary unable to execute the disputed will. The plaintiffs rely on incidents which occurred before the disputed will was made to indicate that she could not legally and validly do so, because of the Alzheimer's disease, while the defendants alleged that these incidents only occurred long after the disputed will was made.

- Two experts, Drs Burger and Sieberhagen, testified. Dr Sieberhagen, a psychiatrist described the Alzheimer's disease in detail. The progress of this illness is difficult to pinpoint at a specific period in time and

one is dependent on observations by others, e.g. family members in that regard. He examined the deceased on 20 November 2003, received information from the wife of the second defendant in respect of undated incidents, made his own observations and had MRI scans taken of the deceased's brain.

- All the plaintiffs and most the defendants testified in detail about the incidents on which they differed in respect of the time, namely when they happened or whether they happened at all.

- A legal practitioner, Mr Cornelius de Koning, the third defendant, who drafted the disputed will, testified for the defendants. He found the deceased lucid, neat and clear at the time. After she had given him instructions the will was typed. He explained it to her and she understood it.

- The applicable law was discussed and considered in respect of the *onus* which rested on the plaintiffs, as well as the applicable legal test of testamentary capability as set out in *Tregea v Godart* 1939 AD 16 and followed in Namibia in the case of *Lerf v Nieft NO and Others* 2004 NR 183.

- Approximately during July 2000 an incident occurred where the deceased got very angry and chased the plaintiffs and the second defendant out of her house, because of a proposal that was made, which would negatively affect the first defendant, who was the beneficiary under the disputed will made approximately a month later.

- Held: that the diagnosis of the deceased suffering from Alzheimer's disease is accepted, but that Dr Sieberhagen's opinion that she could

not make a valid will 3 years earlier cannot be accepted on the information he had when he made the diagnosis.

- Held: that on probabilities the evidence of the defendants are more convincing in respect of the incidents that the plaintiffs rely on to show that the deceased could not make a valid will on 18 August 2000 because of her illness.

- Held: that the evidence of the legal practitioner, who drafted the disputed will, is accepted and the argument that he should have had the deceased medically examined before she executed the disputed will, is rejected.

- Held: that in all probability the reason for the deceased for effectively disinheriting her other children was because of the incident in July 2000.

- Held: that the plaintiff's failed to discharge their *onus* to have the disputed will set aside.

- Held: that the plaintiffs' claims are dismissed with costs.

CASE NO.: I 3284/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FREDERICK ANTONIE VERMEULEN **ENGELA MARIA MAGDALENA ELIZABETH**	**FIRST PLAINTIFF**
RABALT	**SECOND PLAINTIFF**
and	
GABRIEL JACOBUS VERMEULEN	**FIRST DEFENDANT**
PETRUS JOHANNES VERMEULEN	**SECOND DEFENDANT**
CORNELIUS JOHANNES DE KONING	**THIRD DEFENDANT**
THE MASTER OF THE HIGH COURT NO	**FOURTH DEFENDANT**
THE REGISTRAR OF DEEDS NO	**FIFTH DEFENDANT**
GABRIEL JACOBUS VERMEULEN	
(birth date) **GABRIEL JACOBUS VERMEULEN**	**SIXTH DEFENDANT**
(birth date) **GABRIEL JACOBUS VERMEULEN**	**SEVENTH DEFENDANT**
(birth date)	**EIGHTH DEFENDANT**

CORAM: **MULLER J**

Heard on: 31/05 – 16/06/2011

Delivered on: 10/02/2012

JUDGMENT:

MULLER J:

[1] With the common adage that blood is thicker than water in mind, one would expect family members to stand together. This case proves the opposite. Here a sister and brothers were engaged in a legal battle over the assets of their own deceased mother. These siblings could not dissolve their squabbles peacefully and turned to the Court to settle their internal feud. After three weeks in Court, during which they testified against each other, accused each other of being liars and where mention was even made of death threats by some of them, the Court had to decide what they were unable to dissolve. However reprehensible the behaviour of the children of the deceased may be to the Court, it has the duty to make an impartial judgment based on the evidence delivered before it, as well as the applicable law, which judgment will have the inevitable consequence that some of the siblings will win and some will lose and their relationship will inevitably worsen.

[2] Mr Dicks was the counsel for the plaintiffs during the trial and Mr Schickerling represented the defendants. During the trial the Court on more than one occasion called upon counsel to discuss the effect and consequences of continuing with the trial, but although counsel made use of the time granted by the Court to discuss this with their clients, all efforts to reach an amicable settlement proved to be of no avail. The reason for this indulgence afforded by the Court was because it is essentially a family

matter, as well as the costs involved in such a long trial. It was also clear that the only real asset in the deceased estate was the farm Chaudamas. As mentioned before, the trial ensued and continued for nearly three weeks. At the end of the trial both counsel preferred to have the typed record of the trial available before presenting arguments to the Court in writing. This option was acceptable to the Court, who indicated to counsel that it must be understood that due to other commitments, judgment may not be delivered soon after the written arguments had been received. Both counsel agreed. However, apparently due to the change of the official Court recorders, the result was that counsel did not receive the record and could therefore not submit written arguments before the end of November 2011. When that time had come, the Court was informed that the record was still not typed and the time for submitting written arguments was again extended to 31 January 2012. Eventually, the only record that was made available to the Court was that of the evidence of the two expert witnesses. Both counsel submitted comprehensive written submissions. Those comprised 86 pages for the plaintiffs and 389 pages for the defendants.

[3] The crux of the dispute between the brothers and sister, children of their deceased mother, Fransina Katharina Elizabeth Vermeulen (the deceased) is which of the two wills that she made before her death (to be referred to in more detail herein after) is the valid will. During the course of this long trial oral evidence were given by several witnesses, which included that of two expert witnesses, namely Dr R Sieberhagen and Dr F G Burger.

It is impossible to discuss all the evidence presented during the course of three weeks in detail, but some evidence regarding the relevant issues will be referred to in this judgment.

[4] In order to understand the historical nature of the dispute between the parties, it will be helpful to refer to the background which is mainly undisputed.

(a) The father, Gabriel Jacobus Vermeulen (deceased in 1992) and the deceased (the parents) were married in community of property from which marriage five children were born;

(b) These children are:

(i) the second plaintiff, Engela Maria Magdalena Elizabeth Rabalt, hereinafter called Engela, who is the oldest child and only daughter;

(ii) the first plaintiff, Frederick Antonie Vermeulen, hereinafter called Frikkie, who is the oldest son;

(iii) the second defendant, Petrus Johannes Vermeulen, hereinafter called Wollie, the second oldest son;

(iv) the first defendant Gabriel Jacobus Vermeulen, hereinafter called Gavie, the third oldest son; and

(v) the youngest son, Johannes Marthinus Vermeulen, hereinafter referred to as Hannes, who died on 17 March 2004.

(c) There are a number of grandchildren of which some testified.

Among them are three named Gabriel, of which two testified, namely the seventh and eighth defendants. The daughter of the first defendant and granddaughter of the deceased, Juanita Vermeulen also testified.

(d) From the evidence it appears that all the brothers and the sister are divorced. The previous wife of Wollie (second defendant), Louisa Vermeulen, also testified for the defence.

(e) Before the death of the father the abovementioned parents were apparently rather wealthy and owned several farms in the Outjo area in Namibia;

(f) The parents had a joint will, executed on 21 October 1970 and when the father (Gabriel Johannes Vermeulen) died in 1992, the mother (deceased) inherited all the assets in the joint estate.

(g) During his life the father (Gabriel Johannes Vermeulen) assisted the first plaintiff to purchase a farm, Onduri, which farm was registered in the name of her ex-husband, Mr Jan Oelofse. The father also gave her 150 cows and 150 calves to start farming with. When she later divorced Mr Oelofse, the father assisted the second defendant (Gawie) to take over the loan on the farm, as well as the cattle. Gawie later sold Onduri and went to stay with the deceased at Chaudamas with his children.

(h) At the time the second plaintiff (Frikkie) was living in South Africa where he started a conveyancing business with trucks. Second defendant also got involved in that business and the

father provided certain funds to get this trucking business off the ground, but which proved to be a failure. The father was apparently not reimbursed.

(i) In 1992 Frikkie returned to Namibia, the trucks were sold and there is a dispute regarding the price obtained for the trucks Gawie claims that he suffered a financial loss.

(j) Frikkie commenced his business as a garage owner and was also assisted by the deceased to purchase a house in Outjo, which was originally earmarked to go to Hannes.

(k) The youngest brother Hannes was given a house in Henties Bay by the mother. He died in 2004.

(l) The second defendant farmed at Dawaros.

(m) After the death of the father, the mother (the deceased) continued farming on Chaudamas. She inherited everything in the joint estate. She was apparently a formidable woman, who was not only a good farmer, but also an excellent hunter, mechanic, baker, cook and botanist. She was a Bisley shot, could repair anything on the farm herself, and was very neat on everything in her house and on her person. Her garden at the farm was admired by everyone who saw it, even tourists. She regularly drove her grandchildren to school on Monday mornings, starting very early, and fetched them again on Fridays. She also did her own shopping.

(n) On 1 October 1994 she executed a will in which all her children

were beneficiaries.

(o) After Gawie sold his farm, Onduri, he moved to the farm Chaudamas, where he stayed with his mother and still lives there. His children (the deceased's grandchildren) stayed on the farm and were also conveyed to and from school by the deceased.

(p) On 18 August 2000 another will was executed by the deceased, hereinafter called "the disputed will" In this will Gawie is the sole beneficiary of the only immovable asset, namely the farm Chaudamas, which his son, with the same name, but called Gawie, would inherit if he should die before the deceased. The effect of this disputed will was that except for certain movables, e.g. rifles, all the other children of the deceased were effectively disinherited. The wording of the disputed will was severely criticised during cross-examination of the defendants and their witnesses, but more will be said in respect thereof later herein. The disputed will was drafted by and executed before a legal practitioner, the fourth defendant, Mr Cornelius de Koning, who also testified. On the same day the first defendant's own will was executed and an agreement regarding the first defendant's purchase of Chaudamas from the deceased, under certain conditions, were also drafted and signed.

(q) The deceased suffered from a form of dementia, namely Alzheimer's disease, hereinafter simply called "Alzheimer's

disease". She apparently lived for a period with the first plaintiff, whereafter she spent her last days in an old age home in Windhoek, where she died on 31 March 2007.

[5] I have already mentioned what the crux of this case is, namely the validity or not of the deceased's last will. The plaintiffs allege that because the deceased already had Alzheimer's disease when she executed this will, she was not mentally fit to do it and therefore that will has to be set aside. The plaintiffs' amended particulars of claim contain the following prayers:

> *"1. An order declaring the will of the testatrix dated 18 August 2000 to be null and void.*
>
> *2. An order declaring the will of 1 October 1994 is the valid will of the testatrix.*
>
> *3. Costs of suit against such defendants who oppose action.*
>
> *4. Further and/or alternative relief."*

On the other hand, the first, second, seventh and eighth defendants deny that the deceased already suffered from Alzheimer's disease at the time when she executed the will and pray that the plaintiffs' case be dismissed. The fourth and fifth defendants did not defend the action. Prior to this trial the plaintiffs' particulars had been amended on more than one occasion and the sixth to eighth defendants were also later joined. There is no dispute in this regard.

[6] The issue that has to be decided is clear, namely whether the deceased was so mentally incapacitated at the time when she executed the disputed will, that she could not legally do it, i.e. that she did not possess testamentary ability at the time.

[7] On behalf of the plaintiffs strong reliance is placed on the expert evidence of Dr Sieberhagen and Dr Burger, as well as on specific incidents that happened before the will was executed and on which they rely to prove that the deceased already suffered from Alzheimer's disease at that time to the extent that she did not have testamentary ability. The defendants attacked the evidence of Dr Sieberhagen, in particular because he based his opinion on specific incidents related to him, as well as the timing of such incidents. No expert witness was called by the defendants. They also relied strongly on the evidence of the legal practitioner, Mr Cornelius de Koning, who was adamant that the deceased was fully *compos mentis* when the disputed will was executed. Furthermore, the defendants aver that the incidents that the plaintiffs rely on occurred subsequent to the execution of the will. In addition to Dr Sieberhagen and Dr Burger, both plaintiffs testified, while the two defendants, as well as three of their children also gave evidence. There was evidence from Louisa Vermeulen, Frikkie's former wife, as well as of a few other witnesses, who were called to confirm specific incidents. Strangely enough, no evidence was presented of any neighbour or any independent witness who knew the deceased and who could assist the

Court in respect of her physical and mental condition prior to and subsequent to the execution of the disputed will. The evidence in this regard was an "inter-family" affair, with severe differences.

[8] I intend to deal with some of the evidence in respect of the various incidents on which the plaintiffs rely as proof that the deceased already suffered from Alzheimer's disease to the extent that she could not execute a valid will in 2000. Where necessary, I shall deal with the evidence of the other witnesses. I shall also consider the expert medical evidence to determine time-issue of the effect of the deceased's Alzheimer's disease at the time when the disputed will was executed. It is common cause that the deceased suffered from Alzheimer's disease; the only issue is **when** did she become unable to execute a valid will. During the trial several disputes between the plaintiffs and defendants were mooted, some which were very time consuming and led to severe cross-examination, but with little value to assist the Court in dissolving the real issue, except for the purpose to cast doubt on the credibility of some of the witnesses. I shall only deal with such issues if, and when, I regard it necessary to do so.

The burden of proof – *onus*

[9] The competency to make a will and the onus in that regard has been clearly defined in section 4 of the Wills Act, No. 7 of 1953 which is applicable in Namibia. That section provides:

> ***"4. Competency to make a will***
> *Every person of the age of sixteen years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same."*

That burden of proof or *onus,* which has to be discharged on a preponderance of probabilities, as in all civil matters, rests on the plaintiffs in this case. (See also: *Lerf v Nieft NO and Others* 2004 NR 183 at 189F-I.) Prior to 1954 when the Will Act came into force the *onus* of proof shifted as a result of a common law rebuttable presumption, namely when it was proved that the testator was of unsound mind. In an article in 1990 (TSAR 754) JC Sonnekus submitted that this prescription should not be part of our law since the new Wills Act came into operation Corbett, Hofmeyr, Khan in *The Law of Succession in South Africa* agreed with this submission at 77-8.

I shall later herein deal with the case law in respect of the mental capability of the testator at the time of making a will.

The medical evidence in respect of Alzheimer's disease

[10] Dr Reinhardt Sieberhagen, a registered local medical doctor and qualified psychiatrist since 1998, with extensive practical experience and knowledge of the so-called Alzheimer's disease gave expert evidence with regard to this disease. At this stage I do not intend to deal with his findings with regard to the deceased, but shall only apply myself to the nature of the disease as described in his evidence, which is undisputed.

[11] This disease was described in 1906 by a French physician by the name of Alois Alzheimer, who recorded the process of this illness of a 51 year old female patient. Over the time his description of the symptoms suffered by his patient and the progress of her illness eventually became known as Alzheimer's disease. It is now known as a heterogenic group of illnesses, because in the development thereof the pathology sits in the brain cell of the patient and regulates the proteins and lypo-proteins that are produced in the cell in the whole process of maintaining the function ability of the brain cell. The amyloid protein is a protein manufactured inside the cell and from which the various proteins that drive the functions in the cell derives. This process is controlled by various enzyme processes which, with Alzheimer's disease, becomes disorganised to the extent that such a patient produces an excess of amyloid protein, which eventually destroys the brain cell. The second part of the pathology is that brain cells also consist of a cell membrane which in turn consists of lypo-protein. In Alzheimer's disease this

process of maintaining the brain cells also becomes disrupted.

[12] Dr Sieberhagen also described how the above situation can be detected by the use of microscope. That is, however, problematic with a living patient, where it is not possible to examine a brain specimen under a microscope. It is sometimes done when a patient suffers from brain cancer, but normally the diagnosis of Alzheimer's disease is dependent upon the behaviour of the patient, which is often only detected when the illness has already progressed to the point where treatment would have very little effect. Available treatment can only provide some relief of some of the symptoms. Alzheimer's disease causes a lack of two types of transmitter systems, namely acetyl colane and noradrenalin. The first allows one to focus one's attention or to concentrate and is situated in the frontal lobe of the brain. The medication available in this regard blocks the enzyme that would break down the acetyl colane. The latter transmitter system, noradrenalin, governs the ability to deal with stress. Therefore anxiety is often one of the first symptoms of Alzheimer's disease.

[13] Dr Sieberhagen also testified what the stages of Alzheimer's disease are in order to determine where in the progress of the illness the patient may be. He said the rate of deterioration of Alzheimer's disease is fairly stable, but it differs from patient to patient, which makes it very difficult to predict how quickly a patient will deteriorate until the time of his death. It is equally difficult to determine for exactly how long a patient had been sick before the diagnosis is made. Various measuring instruments had been

developed by researchers to standardise the measurement of the loss of the patient's functions. One such an instrument is called the Mini-mental state test. There are also other instruments used, but it is necessary to employ a measuring instrument to plot the progress of the illness.

[14] It is known that in the first instance the course of Alzheimer's disease stretches over 5 to 10 years. Secondly, female patients with a family history of Alzheimer's disease tend to deteriorate more quickly. Thirdly, the deterioration in the brain occurs from the outside inwards, i.e. the cortical dysfunction develops first, i.e. the outside rim of the brain (cortical part), which is the more developed part. The mid-part of the brain controls blood pressure, breathing and the functions of the vital organs while the inner part of the brain governs the physical function of the body. When one looks at the clinical progress of the illness, where the process is from outwards inwards, the first symptoms represent the higher functioning, e.g. social interaction, the ability to think abstract, the ability to appreciate subtle nuances of social interaction and the ability to plan and execute certain tasks. As the illness progresses, more basic symptoms would become apparent, such as the ability to orient oneself in space, time or person. Later in the progress of the illness, physical symptoms will become apparent, e.g. the loss of continence, the loss of ability to realise one is hungry or thirsty. Ultimately the patient dies because of multi-organ dysfunction due to the inner parts of the brain becoming dysfunctional.

[15] The three stages of decline of Alzheimer's are: firstly, the amnesia stage when the patient becomes unable to remember things; secondly, disorientation in terms of time and place and the suffering of episodes of mental confusion, abnormal behaviour and mood changes; and thirdly, the dementia stage when the patient becomes incontinent and is severely impaired in terms of his or her cognitive functioning. This is the stage when the patient is not expected to live longer than a year or two. According to Dr Sieberhagen individual persons may differ, although the abovementioned pattern is fairly stable. Such differences may occur in the first stage where it is difficult to detect and reliance has to be placed on adequate information of the patient's behaviour. To determine the stage of the illness one is dependent on observation of the activities of the patient and often on his or her daily activities. As mentioned, certain measuring instruments have been developed to plot these activities on a scale to enable one to make a comparison of a patient's functioning from time to time.

[16] Taking into consideration that Alzheimer's patients are usually ill between 5 and 10 years of a degenerative disease, the illness becomes more exponential as it progresses. Coupled with this the fact that the skull is a very confined space and the production of ameloid protein causes the available space to become lesser. Consequently, once a patient reaches the second stage and experience episodes of confusion and start losing her ability to orient himself or herself, things start to go backwards very quickly.

[17] Dr Sieberhagen also dealt with the phenomenon that a patient suffering from Alzheimer's disease may have lucid moments or a *lucidum intervallum.* According to Dr Sieberhagen there may be moments when one will observe episodes where the patient's symptoms may seem different from what they are from day to day, or even from hour to hour. Such a patient may seem much more clear and livid one momement and the next much less so. This often confuses family members and is the reason why the patient is not sent for further investigation. Dr Sieberhagen testified that such episodes do not detract from the fact that the patient remains ill and remain suffering from a degenerative illness.

[18] Although a patient suffering from Alzheimer's disease in the second stage when the cognitive ability has deteriorated and he or she has lost the ability to plan and execute complex tasks, certain deeply ingrained skills that have been acquired over a long time, before the illness, can be retained for very long. An example is that a person living in a house for long time, will not get lost going to the bathroom, but that does not mean that the ability to orient him or herself is normal. Once the patient is in a place where he or she has to use his or her cognitive ability, he or she will not be able to do that. This is more noticeable after the sun goes down and is known as the "sundowner effect," which confuses such persons in the evenings, causing them to become anxious and paranoid.

[19] Dr Sieberhagen also described the issue of dissimilation in

Alzheimer's patients, namely the attempt to conceal their conditions. Dissimilation is a process where the patient attempts to project himself or herself as being better than he or she actually is in terms of symptoms, which he or she attempts to hide or to play down. Lay people will often be deceived by dissimilation and may miss symptoms of Alzheimer's disease.

[20] When asked during his evidence-in-chief about the stage when an Alzheimer's patient would lose the capacity to make a will, Dr Sieberhagen testified that this will be in stage 1, the amnestic phase. According to him, such a patient will already in phase 1 not be able to make decisions that are necessary to execute a will.

The medical evidence in respect of the deceased

Dr Burger

[21] Dr Burger testified that he knew the deceased and her deceased's husband since 1985 and was their house doctor. He also visited them on the farm. He testified that he saw the deceased professionally on several occasions for various reasons until he made a preliminary diagnosis of Alzheimer's disease on 7 October 2003 and referred her to Dr Sieberhagen. According to Dr Burger the deceased was a very neat and intelligent person. She suffered from hypertension and had slight depression, anxiety and sleep disturbances. During 1993 he noted in his clinical notes that she had severe anxiety with loss of concentration. In 1994 he notices that the anxiety started to affect her general appearance and she started to neglect her usual

spotless makeup. On 15 October 1998 Dr Burger noticed the deceased wore four panties when he treated the bleeding in a muscle of her left upper thigh, a phenomenon that she could not explain. On 26 February 2001 he again treated her for a rib injury and he disputed the truth of the deceased explanation that she attended hospital for this injury prior to this consultation. When she visited him again on 7 October 2003 he made his diagnosis of Alzheimer's disease.

[22] Dr Burger was severely cross-examined in respect of the visits of the deceased and the notes that he made on his clinical cards, as well as the type of medicine that he prescribed to her. He mentioned an occasion when she allegedly wore four panties, which was in particular the subject of cross-examination by Mr Schickerling. It was put to Dr Burger that this incident did not occur on 15 October 1998, but in fact on 26 September 2003 and that Ms Louise Vermeulen was present on that occasion. Dr Burger's response was that he cannot recall whether Ms Louise Vermeulen was present and that he cannot dispute that it happened on the 26 September 2003.

Dr Sieberhagen

[23] Dr Sieberhagen testfified with regard to the deceased that he was presented with the referral letter of Dr Burger and the information given to him by Ms Louise Vermeulen, who accompanied the deceased on the first consultation on 20 November 2003. He made his own observations of the

deceased and also had MRI scans taken from the deceased brain.

[24] When the evidence of Dr Sieberhagen is considered, one has to be cautious to put the specific evidence in the right time context. Dr Sieberhagen's first consultation was on 20 November 2003 with the deceased and her daughter-in-law, Ms Louise Vermeulen. He also had Dr Burger's referral dated 14 November 2003 at that time. He requested MRI scans and had a further consultation with Ms Louise Vermeulen, without the deceased present on 25 November 2003 after he had received the MRI scans. He then reported his opinion to Dr Burger on 16 December 2003, namely that the deceased has Alzheimer's disease in the second stage. That opinion was based on the abovementioned three considerations and his own observations. Only thereafter was an application for the appointment of a *curator ad litem* made by the plaintiffs and Dr Sieberhagen contributed to the application by way of a short affidavit to the effect that the deceased was examined by him and referred to a letter to Dr Burger setting out his diagnosis and the recommendation that she cannot manage her own affairs, dated 16 December 2003. After that application a *curator ad litem* was appointed, who delivered a report. During Sieberhagen's evidence in Court he was not only questioned and cross-examined in respect of his original consultation and the report of Dr Burger, but also in respect of his affidavit to the application and his consultation with the *curator ad litem's* report. To evaluate his evidence one has to steer through all these various occurrences and when they happened in order to understand what considerations are

significant in deciding whether the deceased could legally execute a will in August 2000.

[25] The factors mentioned above in [21] on which Dr Siberhagen based his diagnosis will be discussed and analysed *in seratium.*

(a) Dr Burger's referral of 14 November 2003

[26] With regard to the referral of the deceased by Dr Burger, the 1998 incident of the deceased wearing four panties was regarded by Dr Sieberhagen as a significant indicator of her mental state. Dr Sieberhagen also considered other information supplied by Dr Burger, namely that the deceased received treatment for anxiety in 1993 and that he noticed in 1994 that she was not so well groomed as before. When Dr Sieberhagen was asked during his evidence-in-chief what the significance of this information by Dr Burger was, he replied as follows:

> *"In terms of the pathology if that was the case at that time, it would depict that a person is unaware that he had already put on a piece of clothing and that unawareness is a formal memory loss."* (My emphasis.)

Dr Sieberhagen also regarded the 2002 incident reported by Dr Burger where she allegedly told him she had been admitted in hospital when she had a rib injury, which Dr Burger said was not true, as significant. Dr Sieberhagen regarded these two incidents (the four panties and the latter) as "very important." Dr Sieberhagen was submitted to severe cross-

examination in respect of these two incidents, in particular with regard to the effect thereof in determining the stage of Alzheimer's disease that the deceased was in during 2000. At the end of his re-examination Dr Sieberhagen responded as follows to a question by Mr Dicks:

> *"Now, with all that you have heard or that you have testified, all that has been put to you, can you say that in your opinion, expert opinion she could not on 18 August 2000 execute that will? --- My Lord, if the information that I have been given in terms of the symptoms that were notable before, if we can accept that that was indeed the case, I would be fairly confident in saying that she in all probability had significant dysfunction at that time. <u>But should the situation be that the symptoms mentioned during the latter parts of 1998 and 2000 be not true, then I would not be able to make that statement,</u> and that was the reason why in the curator's report it was that at the time I was not prepared to make any statement like that."* (My underlining.)

(b) Information provided on 20 November 2003 by Ms Louise Vermeulen

[27] Ms Louise Vermeulen, who accompanied the deceased at the consultation with Dr Sieberhagen on 20 November 2003, provided the following information to him in regard to the deceased's behaviour:

(a) she became confused during the evenings;

(b) she did not lock the doors of the house at night;

(c) she frequently did not switch off the lights in the house;

d) at times she seemed confused, clouded in terms of her

consciousness;

e) sometimes she looked like somebody who was a bit drugged;

f) she had become increasingly suspicious towards people and also family members;

g) her condition was notably worse after sunset in the evenings; and

h) her hygiene and self-care deteriorated to the extent that it was noticeably, in particular her grooming and dress had changed.

[28] All these observations are symptoms of a person suffering from Alzheimer's disease. However, what is significant is that Ms Louise Vermeulen did not attach any dates to any of the abovementioned observations. The information was provided at the end of 2003. Dr Sieberagen also testified that he was at the time informed that the deceased had a family history of Alzheimer's disease – both her bothers suffered from this illness.

(c) Dr Sieberhagen's own observations during the consultation on 20 November 2003

[29] There was nothing of note in respect of the deceased's physical health. She never used alcohol or any addictive substance. She had to be guided by Ms Louise Vermeulen and was unable to orient herself. She could not move down the passage and turn left into his office, which was a clear indication to Dr Sieberhagen that if she had come to his offices on her own, she would

not be able to find it. Dr Sieberhagen found no indication of any clouding of consciousness or that she did not have a clear sensorium, but that she seemed a bit slow. It was noticeable to him that her self-care was not good and she was a bit dislevelled in her appearance. During his interaction with her and making small talk, Dr Sieberhagen formed the impression that she had a loss of social sensitivity and was somewhat defensive concerning the examination. She denied having problems with her memory, but conceded that she was sometimes forgetful. She could for instance not remember whether she had breakfast that morning. She attempted to downplay her symptoms in order to create a better clinical impression. All of these convinced Dr Sieberhagen that she had a loss of brain function. Dr Sieberhagen advised Ms Louise Vermeulen that it was necessary to do MRI brain scan to confirm a degenerative brain process.

(d) The MRI brain scan

[30] A MRI brain scan of the deceased was done, which, according to Dr Sieberhagen, confirmed that the deceased was suffering from dementia, possibly the Alzheimer's type. This diagnosis was reported to Dr Burger.

[31] The MRI scans were handed up. At the hand thereof Dr Sieberhagen indicated that they clearly show that the volume of the brain ventricles are noticeably larger than they ought to be and that there is a noticeable enlargement of the separate neutral spaces, in particular of the frontal lobe areas. The temporal lobe areas are notably atrophied, or smaller than they

should be. This confirmed a diagnosis of Alzheimer's disease. Because it is situated in the frontal lobe area it would indicate the inability to reason, to think abstractly, to do executive planning and the loss of the ability to inhibit behaviour. Dr Sieberhagen said that the frontal lobe areas present the areas of the brain which contains memory and the ability to store new material. Such a patient is unable to retain and store material that was recently learned.

Dr Sieberhagen's diagnosis in November 2003

[32] Dr Sieberhagen's diagnosis was that the deceased suffered from Alzheimer's disease in phase 2. As indicated above, it is important to recognise that the abovementioned factors led Dr Sieberhagen to make this diagnosis in November 2003. At that stage Dr Sieberhagen had not yet seen the first and second plaintiffs in respect of the deceased. That occurred only later when the application for the appointment of *curator ad litem* was prepared. Apart from Dr Sieberhagen's own observation and the MRI scans, he only had Dr Burger's referral in respect of the time when the two incidents which he regarded as significant occurred (the four panties and the untrue version of the deceased's hospital visit) when he made his diagnosis. In the light of the evidence of Dr Burger and Dr Sieberhagen in respect of the time when these incidents occurred, the Court did not receive any reliable assistance from these expert witnesses.

The application to appoint a curator *ad litem*

[33] This application is dated 20 January 2004 and contained a supporting affidavit by Dr Burger in which the deponent only mentioned that the deceased was his patient for 20 years and he attached thereto a one page letter by Dr Sieberhagen dated 16 December 2003, as well as his letter of referral to Dr Sieberhagen, dated 14 November 2003. As mentioned Dr Sieberhagen's short affidavit likewise referred to his report to Dr Burger.

[34] This application was brought by way of notice of motion supported by affidavits of the first plaintiff and confirmatory affidavits by Dr Sieberhagen, Dr Burger and a sister of the deceased, who has apparently also passed away in the meantime. The relief sought in the notice of motion are that Adv. Susan Vivier be appointed as *curator ad litem* to represent the deceased (who was still alive at the time) in order to report to the Court in respect of an order that the deceased be declared **incapable of managing her own affairs** and that a curator *bonis* with certain specific powers be appointed in respect of her property and affairs. Significantly, no order was sought to declare her of unsound mind. The disputed will was no consideration in this application. This application was not served on any of the deceased's other children (the first and second defendants).

[35] In his affidavit to the abovementioned application the first plaintiff (confirmed by the second plaintiff) said the following in paragraph 6 thereof:

> *"6. With the benefit of hindsight I now realise that soon after the death of*

> *my father my mother's mental well-being began to deteriorate. I do not think any of us children observed the aforegoing, probably due to our inexperience in this regard.* ***It has only been over past three years that particularly my sister, Engela, have noticed a marked deterioration in the patient's mental capability and capability of managing her own affairs."*** *(*My emphasis.)

The first plaintiff then referred to the examination by Dr Sieberhagen and the latter's opinion that the deceased suffered from "Alzheimer's type dementia" and annexed the letter of Dr Sieberhagen dated 16 December 2003, as well as the referral note of Dr Burger to Dr Sieberhagen dated 14 November 2003, to his affidavit. In the remainder of his affidavit the plaintiff made serious allegations against the first defendant (who was not joined as a party in the application), based on conduct and transactions which purportedly showed how the first defendant abused the deceased's condition to his own benefit and other allegations that would indicate to the Court that the deceased was not capable to manage her own affairs and that she is vulnerable to exploitation by specifically the first defendant. He concluded by stating in paragraph 29:

> *"29. I wish to state clearly that the purpose of this application is solely to safeguard the patient's right and not for any personal gain. I have long since realised that the patient is now virtually destitute and that I stand to inherit very little if anything at upon her death. My main concern is the fact that the patient is in need of medical treatment but that her estate has been diminished to such an extent that there soon may be nothing left for her medical expenses."*

This affidavit has been deposed to on 21 January 2001.

[36] On 19 April 2004, and apparently after considering the *curator ad litem's* report, the Court granted an order declaring the deceased incapable of managing her own affairs and appointed a certain Mr PH van der Merwe as *curator bonis* for the deceased.

Report of the *curator ad litem*

[37] Adv. Susan Vivier, the appointed *curator ad litem* clearly stated in the beginning of her report that her sole duty was to report to the Court on the deceased's capability to manage her own affairs. She had a consultation with the second plaintiff who gave her information of the particular capabilities of the deceased which had apparently changed. These changes were:

a) the farmhouse is no longer cleaned;
b) the garden was left to overgrow;
c) the deceased no longer cooks or bakes;
d) her personal hygiene deteriorated to the extent that she no longer bathed herself;
e) on occasion the second plaintiff found that the deceased wore layers of underwear;
f) the deceased developed a tendency to hide food stock in cupboards in the house, while accusing the people around her of stealing it;
g) the deceased no longer did the own books; and

h) the deceased turned into a spendthrift with no understanding of her own deteriorating financial position in general, or money in particular.

No dates were provided for the abovementioned changes by the second plaintiff to Ms Vivier.

[38] The *curator ad litem* also had consultation with the deceased, whom she found to be attractive, intelligent and in good health. After being informed of her position by Ms Vivier the deceased advised her she was aware of the application and the role of the *curator ad litem.* Although Ms Vivier was apparently impressed by the deceased's memory and relation to detailed events at first, she later gained the impression that the deceased was hiding her inability in respect of her financial affairs. Regarding the consultation in respect of the deceased's financial and property affairs it is apparent from the *curator ad litem's* report that the deceased had a special relationship with the first defendant.

[39] Ms Vivier also had a consultation with Dr Sieberhagen in order for him to amplify and explain his report which accompanied the founding affidavit – the letter of 16 December 2003. Dr Sieberhagen, *inter alia*, described to her the symptoms and the signs he detected, the stages of Alzheimer's disease and that the deceased was in the second stage according to him. Ms Vivier concluded her report with the following:

> *"13.9 Finally, Dr Sieberhagen emphasised that it will be impossible to attempt to investigate historical facts, for instance the sale of the farm and events subsequent to that. According to him it will be impossible to establish whether, at any given time prior to her being diagnosed with the disease, she was able to take informed and independent decisions. According to him such patients furthermore experienced lucidum intervallums from time to time, which may allow them to function properly for short periods of time. Due to this phenomenon her past conduct cannot be questioned. Dr Sieberhagen confirms that that Ms Vermeulen is no longer able to take care of her own affairs and strongly recommends the appointment of curator bonis."* (My underlining.)

The *curator ad litem* thereafter indicated her satisfaction that the deceased is unable to manage her own affairs and recommended the appointment of a *curator bonis*.

[40] Subsequent to this consultation with the *curator ad litem,* Dr Sieberhagen had a consultation with the first and second plaintiffs on 27 May 2011, with Dr Bruger on 23 April 2010, but not with any other family member. Dr Sieberhagen testified in Court what the second plaintiff had related to him regarding – the neglect of the deceased's garden; that she did not prepare food anymore; did not repair her geyser; that her chamber pot was dirty; that she hid food in closets; dressed herself in dirty clothes; could not bake a cake; that her self-care was deteriorating in January 2000. This information was only given to him just before the trial and his original diagnosis was not based thereon. This also applies to what the first plaintiff told him, namely that the deceased's vehicle was destroyed because there

was no water in the engine in January 2000, despite her being a good mechanic.

[41] Observations in respect of the expert medical evidence

(a) In his evidence in Court Dr Sieberhagen based his diagnosis on the factors described above in November 2003 and the consultation with the *curator ad litem*, as well as with first and second plaintiffs.

(b) Throughout his evidence Dr Sieberhagen emphasised how difficult it is to pinpoint the stage of such patient's behaviour in the progress of the illness, based on observations by others, including family members. The *curator ad litem* he emphasised this difficulty as is apparent from the quoted passage above [13.9] of her report.

(c) Although certain instruments had been developed to test the progress of such a patient's illness like the Mini-mental state test, Dr Sieberhagen, did not carry out such a test or referred the deceased to someone e.g. a clinical psychologist to do so.

(d) In direct contrast to his evidence that one of the consistent factors is that a person suffering from Alzheimer's disease lives between 5 and 10 years, Dr Sieberhagen expressed the opinion that that the deceased had Alzheimer's disease from 1993. Not only did Dr Sieberhagen have no dated evidence in this regard when he diagnosed the deceased, but if that is so, she would have been dead before he even saw her. She died in 2007.

(e) The MRI scans indicated the deceased's condition in November 2003.

There is no medical evidence what her condition was in August 2001 in respect of the specific stage, which she was in at that time.

(f) Dr Sieberhagen's expertise lies in the medical field and not in the legal field.

(g) Dr Sieberhagen conceded in re-examination that if the information regarding the symptoms of the deceased on which he based his opinion regarding her illness in 1998 and 2000 are not true or correct, then he could not make statement that she was unable to execute a will in August 2000.

(h) The deceased was brought to Dr Sieberhagen on 20 November 2003 by Ms Louise Vermeulen, who testified on behalf of the defendants and on whose (undated) information he relied in making diagnosis, while she testified that all the incidents mentioned occurred after 2002.

(i) Despite the evidence of the first and, in particular, the second defendant to the effect that the deceased's behaviour revealed strong indications that she was not *compos mentis* before August 2000, neither of them discussed it with other family members, or the family doctor, Dr Burger, or did anything about it in terms of having the deceased medically examined.

(j) The second plaintiff testified that the deceased denied that she had changed her will when she confronted her about rumours in that regard. However, she did not mention this to the *curator ad litem* who could at that time still moot this issue to the deceased. Only the first

plaintiff mentioned in this affidavit that he told the *curator ad litem* that there was a such a rumour, but did not mention that this issue was taken up with the deceased and that she denied the truth thereof.

(k) Only after the deceased was diagnosed in November 2003 as suffering from Alzheimer's disease, did the plaintiffs apply for the appointment of a *curator bonis* because the deceased could not manage her own financial affairs anymore. No allegation is made in that application that the deceased exhibited symptoms of the Alzheimer's disease since 1993 or anytime before August 2003. The second plaintiff stated under oath that he and first plaintiff (with the benefit of hindsight) realised a marked deterioration in the deceased's mental capacity **over the past three years.**

(l) There was no application to appoint a *curator bonis* for the deceased because she was of unsound mind.

[42] These observations confirms my decision that, although I accept Dr Sieberhagen's evidence in respect of Alzheimer's disease in general and his diagnosis based on the factors that I have set out above, the expert evidence given by him and Dr Burger do not assist me to determine whether the deceased had the testamentary ability to execute a will on 18 August 2000. For such a determination I am reliant on the acceptable evidence of the witnesses who testified what the deceased's mental condition was at the time.

Evidence by family members of changes in the behaviour of the

deceased

[43] Lengthy evidence was given by family members of the deceased, mainly by the first and second plaintiffs, as well as by first, second, seventh and eighth defendants, Ms Louise Vermeulen and Juanita Vermeulen concerning the changes in the general behaviour and person of the deceased. These changes and incidents were either totally disputed or were disputed in respect of time or were explained as not relevant to the condition of the deceased. Counsel dealt with all these incidents or changes during cross-examination and also extensively in their written submissions. Mr Schickerling on behalf of the defendants submitted written arguments that comprised of 389 pages which contained arguments in respect of all these incidents and changes in the evidence. Although not so extensively, Mr Dicks did the same. Both counsel pointed out discrepancies and untruthfulness of the evidence submitted by the witnesses of the other party.

[44] Most of the incidents have been referred to earlier herein and I do not intend to analyse all these incidents and changes. The following observations will suffice:

a) the disputed will was executed on 18 August 2000;
b) the deceased was diagnosed by Dr Sieberhagen as suffering from Alzheimer's disease in November 2004;
c) the deceased died on 31 March 2007;

d) the first and second plaintiffs testified that several incidents which convinced them the deceased's normal behaviour had deteriorated before August 2000;

e) the first, second, seventh and eighth defendants, as well as Ms Louise Vermeulen and Juanita Vermeulen, either denied that these incidents occurred before 2004 or explained them;

f) several of the incidents replied upon the plaintiff's were not mentioned to Dr Sieberhagen and were not contained in his expert summary as shown by Mr Schickerling in his argument;

g) two incidents regarded as significant by Dr Sieberhagen from Dr Burger's referral to him, namely the four panties and the untruth about the deceased's hospitalisation, lose their significance in respect of timing if it did not happen at the time Dr Burger put on it;

h) no time was mentioned for any incident related to Dr Sieberhagen by Ms Louise Vermeulen;

i) there were also certain specific incidents:

   (i) the incident regarding the collision with the donkey;

   (ii) the collision with Mr Garoeb's car;

   (iii) the incident regarding diesel instead of petrol in the deceased's car; and

   (iv) the incident regarding the deceased's car's engine ceasing because it was driven without water.

[45] The specific incidents are now briefly dealt with.

(i) The donkey incident. The plaintiffs referred to the collision with the donkey as if that is an indication of the deceased's deteriorated mental condition, although neither of them was present at the time. Only the seventh and eighth defendants were present in the car when the collision occurred. I have no reason not to accept their evidence. The deceased collided with at night with a donkey standing in the road and after applying brakes she collided with the donkey. The windscreen of the car was broken. First plaintiff corroborated the damage – he fixed the windscreen. This incident bears no indication of a deterioration of the mental condition of the deceased. The Court has to frown on the reliance on this incident by the plaintiffs.

(ii) The collision with Mr Garoeb's car. I do entertain serious doubts that the seventh defendant was present. It has to be accepted on that evidence that the deceased caused the accident. According to Mckenzie Garoeb it occurred on 6 November 2000. The deduction that the reason for the accident was the deceased's deteriorating mental condition does not seem to me to be the only possible inference. Anyone can cause an accident and such a driver may be in shock. Without medical evidence at the time, I am not in a position to make a finding that this is an indication of the deceased's fading mental condition.

(iii) The wrong fuel incident. I accept that this incident occurred. Pieter Prinsloo confirmed it, but although he testified that it happened between 16h00 and 17h00, no specific date was provided. The seventh defendant is also aware of the incident and testified that while he offloaded warthogs that morning, which he sold at a service station called "Hoekie" (Corner) his grandmother put fuel in the car. The car broke down the afternoon. He did not provide a date. The first plaintiff also testified about this incident and said "one time" he called Piet Prinsloo who told him that his mother was standing with the red Toyota along the road with diesel instead of petrol in it. The only time that he could provide is that it was the year after Gawie (first defendant) wrote the red Toyota off, namely in 2002. This incident may be an indication of memory loss or some of deterioration because of the illness diagnosed the next year by Dr Sieberhagen. This incident did not occur before August 2000.

(iv) The incident with the vehicle driven without water. The first plaintiff testified that "one time" the deceased drove the vehicle without water and the engine overheated. He did not expect that his mother, who was a good mechanic, would do such a thing. He fixed the car. He referred to his invoice on which he wrote a date -28 June 2000- in support of his evidence. The first defendant confirmed that the fist plaintiff did the repair work, but denied that it was caused by the vehicle being driven without water. He testified that the reason was a

defective water pump and that he was personally involved in the repeated repair work. On the evidence before me in this regard I cannot come to the conclusion that this incident supports a finding that the deceased's metal condition was in state of deterioration.

[46] I find that the evidence of the defendants and witnesses named, who corroborated each other in most instances are on a balance of probabilities more acceptable than that of the plaintiffs in regard to the changes and incidents. I am supported in my abovementioned finding, *inter alia,* by the following:

a) The plaintiffs allege that they (in particular the second plaintiff) noticed a deterioration in the behaviour of the deceased, the upkeep of her garden and house, her personal hygiene and grooming since 1993 and more pronounced since 1998 and during 2000, yet they did nothing in that regard;
b) The first plaintiff (supported by the second plaintiff) unequivocally states in his founding affidavit to the application to appoint a *curator ad litem* that **for the past 3 years** these changes in the behaviour and person of the deceased had been observed;
c) The application for the appointment of a *curator ad litem* was based on the fact that the deceased did not have the ability to manage her own affairs and not that she was of unsound mind. The Court only declared her to be unable to manage her own affairs;

d) Ms Louise Vermeulen took the deceased to Dr Burger and when he referred her to Dr Sieberhagen, she accompanied her to Dr Sieberhagen;

e) The undisputed evidence of the seventh defendant is that the deceased drove them (grandchildren) regularly to school on Monday and fetched them on Fridays and the first indication of any deterioration in her mental condition was when they became concerned of her driving skills during 2003;

f) Only after the deceased's death in 2007, more than 6½ years after the disputed will was executed and when the plaintiffs discovered that that there was such a will, did they commence legal proceedings in 2008 on the basis that the deceased was not mentally capable to execute the 2000 will.

The applicable law

[47] *"A will which is regular on the face of it is presumed valid unless it is declared invalid and the onus of proving its invalidity is on the person who challenges it."* (Meyerovitz, *The Law and Practice of Administration of Estates*, 5th ed, pa 4.25, p33.) I have earlier referred to and quoted section 4 of the Wills Act, No 7 of 1953, which is also applicable in Namibia in respect of the *onus* that rests on the plaintiffs in this case. That particular section requires that the testator of a will should be mentally capable to appreciate the nature of his or her act **at the time** of the making of a will. The authors of the applicable authority in this regard, Corbett, Hofmeyr and Kahn, *The*

Law of Succession in South Africa, 2nd ed, states at p74 that the abovementioned Wills Act confirms the common law with regard to the test for testamentary capacity.

In *Smith and Others v Strydom and Others* 1953(2) 799 (T) Steyn J referred in 804B-D to the position of a person who was placed under curatorship in respect of his person and assets and stated that such an order does not mean *per se* that that person cannot peform any legal transaction. Such an order does not exonerate the plaintiffs from their *onus*. They still have to prove that the testator was not capable to make the will.

[48] It is generally recognised that the test for testamentary capacity has authoratively been set out in the South African Appeal Court case of *Tregea and Another v Godart and Another* 1939 AD 16 at 49 where Tindall JA stated:

> *"…in cases of impaired intelligence caused by physical infirmity, though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. Voet 28.1.36 states that not only the healthy but also those situated in the struggle of death, uttering their wish with half-dead and stammering tongue, can rightly make a will provided they are still sound in mind."*

In his formulation of the abovementioned test, Tindall JA considered and adopted the English Queens Bench decision in *Banks v Goodfellows* 1870

LR 5 QB 549, where Cockburn CJ said the following:

> *"The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have insufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty?"*

This test has been followed by the South African courts in several cases, e.g. *Kirsten and Others v Bailey* 1976(4) SA 108 (CPD) at 110; *Essop v Mustapha and Others* 1988(4) SA 213 (D) at 221C-D and *Harlow v Becker NO and Others* 1998(4) SA 639 (D) at 644A-B. In Namibia the test in the *Tregea* cases has been adopted in *Lerf v Nieft NO and Others*, *supra,* at 190C-191C.

[49] In respect of the required testamentary capacity, the authors Corbett, Hofmeyr and Kahn has the following to say at 76 in the second edition of

their authorative work – *The Law of Succession in South Africa*:

> *"A will is valid if executed by a person suffering from an insane delusion connected with the dispositions in it. Not every delusion is, however, an insane delusion. It is not sufficient if the delusion is merely an unfounded though colourable suspicion nor even a belief which no rational person could have entertained. It must consist of a persistent and incorrigible belief of things as real which exist only in the imagination of the patient and which no rational person can conceive that the patient when sane would have believed. A delusion in the mind of a testator only deprives the testator of testamentary capacity if the delusion influences, or is capable of influencing, the provisions of the will."*

[50] LAWSA states the requirements of testamentary capacity in vol 31, par 245 (footnote 4), p164-5 as follows after referring to the authorities dealing with the testamentary capacity of a person of unsound mind:

> *"From these authorities it is clear that, in order to show that the testator did not have the necessary mental capacity, it must be shown that he failed to appreciate the nature and effects of his testamentary act, or that he was unaware of the nature and the extent of his possessions, or that he was unable to discriminate between the persons whom he wished to benefit and those whom he wished to exclude from his bounty. The fact that a will is in officiosum may be evidence of want of understanding: Cloete v Marais supra 250; Kethel v Estate Kethel 1948 3 SA 797 (EDL) 804. A will is invalid if executed by a person suffering from an insane delusion in connection with the dispositions in it: Woods v The Master 1942 SR 159. Not every delusion, however, is insane. It must not be merely an unfounded though colourable suspicion; nor even a belief which no rational man could have entertained. It is a persistent and incorrigible belief of things as real which exist only in the imagination of the patient and which no rational person can conceive that the patient when sane would have believed: Rapson v Putterill 1913 AD 417 420;*

> *Kethel v Estate Kethel supra 804-805. A person declared unfit to manage his own affairs does not, without more, qualify as a person of unsound mind: Geldenhuys v Borman 1990 1 SA 161 (E).”*

[51] In *Harlow v Becker NO and Others* 1998(4) SA 639 (D+CLD), Thirion J approved of what was stated in *Harwood v Barker* (1980) 3 MOO PCC 282 at 290, namely:

> *“…in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have the capacity to comprehend the extent of his property, and the nature of the claims of others whom, by his will, he is excluding from all participation in that property. …”*

Thirion J also emphasised that the intention to make a will should be distinguished from the testator’s testamentary capability to do so. (See also *Lerf v Nieft NO, supra*, at 190J and 191B-C.)

Evaluation of the evidence against the test for testamentary capacity

[52] I have set out, rather comprehensively, the medical evidence of the deceased’s condition and in particular that of Dr Sieberhagen. I accept that he diagnosed the deceased as suffering from Alzheimer’s disease in November 2003. That was, however, more than 3 years after she executed the disputed will in August 2000. I have also earlier herein pointed out that Dr Sieberhagen relied for his diagnosis in November 2003 on what he was informed by Dr Burger, the information that Ms Louise Vermeulen provided,

his own observations and the MRI scans.

[53] In an unreported judgment by Murray AJ in the case of *Elsie Meyer v Meester, Vrystaat Hoë Hof, Bloemfontein and Andere*, Case No 452/2010 the testatrix was examined by a clinical psychologist, Dr Smit, who also provided a report in respect of her cognitive functioning and capability 10 days before her death. That testatrix also suffered from Alzheimer's disease. The following is significant in respect of a comparison of that testatrix the deceased in the present case:

a) The testatrix in the *Elsie Meyer* case made a will on 18 March 2009 in which she bequeathed 50% of her assets to a non-family member, despite having bequeathed all of it in 2010 to her stepdaughters and a friend in equal shares;

b) Less than a month after she made the disputed will of 18 March 2009 the testatrix died on 14 April 2010;

c) From the evidence which the learned Acting Judge considered in the *Elsie Meyer* case, it appeared that the testatrix's mental capacity drastically deteriorated in the months since 2008 until 18 March 2009 and it is evident that the accepted behaviour of that testatrix could not only be related in time to the making of the will, but that her established mental condition is far worse than any observation in respect of the deceased in the present matter;

d) The testatrix in the *Elsie Meyer* case was placed in an Alzheimer's unit in a care institution;

e) With her examination of the testatrix Dr Smit must have subjected her to tests, because Dr Smit found that on 3 April 2009 she had a substantial cognitive impairment of a count of 9 out of 30 where 25 already shows an impairment. Dr Smit's test results also indicated a serious compromise of the testatrix's memory, social judgment, mind and her ability to think rationally. The testatrix was disoriented in respect of time and place. No clinical tests were performed by Dr Sieberhagen, or on his instructions by a clinical psychologist dispite his own evidence that test instruments had been developed specifically for his purpose; and

f) Despite the tests taken by Dr Smit and the results obtained, she was not prepared to say that the testatrix, who died only about 11 days after she was tested, was not testamentary capable. Significantly, Dr Smit testified that she was only prepared to venture that opinion if the testatrix made the will on the day when was tested. Dr Sieberhagen was prepared to testify that the deceased could not make the disputed will more than 3 years prior to his examination of her.

[54] I have already pointed out that as far as the information provided by Dr Burger, as well as Ms Louise Vermeulen are concerned, Dr Sieberhagen

could not provide this Court with any authority that the deceased did not possess the required testamentary capability at the time to execute the disputed will. Dr Sieberhagen's evidence is that a firm determination of the deceased's mental capacity is clearly dependent on observations by others of her behaviour or conduct. In his own evidence, he often mentioned that any determination of the mental capacity of a living person is very difficult. In respect of observations by others that, according to Dr Sieberhagen, is often made retrospectively, the first plaintiff declares under oath that "in hindsight" such deterioration had only been observed the past 3 years. I am still satisfied that no fixed determination can be made from what Dr Sieberhagen had been informed of at the stage of his diagnosis in respect of the testamentary capability of the deceased and even more so 3 years earlier. Dr Sieberhagen is not an expert on the legal aspects of determining a person's testamentary capability and any opinion expressed by him in this regard must be seen in that light.

[55] The submissions in respect of the MRI scan, the interpretation thereof and Dr Sieberhagen's evidence in that regard have also been considered. The plaintiffs rely on these MRI scans and Dr Sieberhagen's evidence to the extent that they indicate the deceased's was in the second phase of Alzheimer's disease. In that regard the plaintiffs submit that the deceased had lost the mental functions that are affected by second stage and consequently also the ability to make a will. The defendants, on the other hand, submitted that these MRI scans constitute inadmissible evidence and

should be disallowed. In my judgment the fact that the deceased might have been in the second stage in November 2003 and that the MRI scans might support that, is irrelevant when the deceased's testamentary capability on 18 August 2000 has to be determined. In the light thereof, I regard those scans as well as Dr Sieberhagen's opinion based thereon as irrelevant to determine the deceased's testamentary capability **at the time,** i.e. 18 August 2000.

[56] In his written arguments, Mr Schickerling referred the Court to an interesting decision regarding the testamentary capability of an Alzheimer's disease patient in the Supreme Court of Victoria, Australia by Vickery J in the case of *Nicholson and Others v Kraggs and Others* [2009] VSC 64 (27 February 2009.) The testatrix in that case was in a far worse mental condition than what the deceased was in, even if the Dr Sieberhagen's opinion in November 2003 is considered, but she was considered to be capable of making a valid will. Several expert witnesses testified in respect of that testatrix's mental condition, but in conclusion Vickery H held in respect of her 1999 will:

> *"I am satisfied that at the time of the making of the 1999 Will and the March 2000 Codicil, Betty Dyke had sufficient mental capacity, to comprehend the nature of what she was doing, and its effects, that she was able to realise the extent and character of the property she was dealing with, and to weigh the claims on her estate, such as they were, which she ought to have been aware of. To the extent that she may have suffered mental impairment at the time this was not sufficiently advanced to have precluded testamentary capacity*

which I have described.…"

This corresponds with the statement of Southwood AJ in *Thomas and Another v Clover NO and Others* 2002(3) SA 85 (N) at 89A-B:

> *"The applicants…had to establish prima facie, that Thelma did not have testamentary capacity when she signed her will, even if this conclusion was open to some doubt. … It would not be sufficient to establish prima facie through open to some doubt, that she might have had testamentary capacity when she signed the will." (My underling.)*

[57] I have already found that there is no reliable evidence regarding the alleged incidents and changes of the behaviour of the deceased to be satisfied that she did not have the testamentary capacity to make the disputed will on 18 August 2000.

[58] The plaintiffs complained about the fact that they were effectively disinherited by the disputed will. As I understand Mr Dick's submission in this regard, the disputed will should be regarded as one *in officiosum.* This effect seems to be the result, and in my opinion is the motivation, why the current case had been instituted. An incident which occurred in approximately July 2000 would in my opinion provide the reason why the deceased made the disputed will of 18 August 2000. It is common cause that a meeting was held at Chaudamas during approximately July 2000, which meeting was attended by the first and second plaintiffs, second defendant and the deceased as a result of the latter's dire financial position.

The first defendant was absent. Although the parties differ about the proposal discussed at the meeting, it is not necessary to decide which party is right or which party is wrong. What is important, however, is that the outcome of this meeting was that nothing came of it and the deceased became very angry. She chased the plaintiffs out of her house. She was very angry because she considered it an attempt to disallow the first defendant from continuing farming on Chaudamas. In my opinion, this anger caused her to change her will a month later and she effectively disinherit her other children in favour of the first defendant, who lived with her and for whom she obviously had a soft spot. Her testamentary ability had nothing to do with it.

[59] The plaintiffs also attempted to make an argument of alleged secrecy of the disputed will. They have heard rumours to that extent, but when confronted by the second plaintiff, the deceased apparently denied that she had made a new will. I find this argument unconvincing. If this was the case, I seriously doubt it that the defendants would have been satisfied by the deceased's denial to the second plaintiff. One would expect that the first plaintiff would also have acted. They clearly did not trust the first defendant who lived with his mother. Furthermore also the second defendant would be disinherited. It was not so difficult to find out whether there was a new will if they wanted to. They definitely did not approach the first defendant, or Mr de Koning, or his firm. Instead the plaintiffs did nothing until the deceased was diagnosed by Dr Sieberhagen. Then they applied for the appointment of

curator bonis for the deceased, because she allegedly could not manage her financial affairs. Nothing was mentioned in any affidavit to that application or the *curator bonis* that they suspected the deceased might have made another will and when confronted she denied it. The only reference in this regard was by the first plaintiff in his affidavit supporting the application to the effect that there was such a rumour, but nothing was said about any denial by the deceased thereof. Also nothing was mentioned of the plaintiffs' new argument that the reason why she denied the existence of the new will to the second plaintiff, was because she was not testamentary capable when she made the will. I reject this argument.

[60] The most important evidence regarding the deceased's testamentary capacity at the time is that of the third defendant, Mr Cornelius de Koning, the legal practitioner who drafted the will. He testified that although he did not know the deceased before and she was not his client, she was visited the Outjo office of his firm which he manned on 18 August 2000. She was accompanied by first defendant. The deceased was neatly dressed, her hair done and she was lucid without any sign or indication of self-neglect. Mr de Koning is experienced in drafting wills. According to him the deceased herself gave instructions of what she wanted to be contained in her will, while her son, the first defendant also wanted a will drawn for which he gave instructions to Mr de Koning. There was also a contract for the sale of the farm Chaudamas to the first defendant by the deceased that he was simultaneously instructed to draft. In respect of the disputed will of the

deceased, Mr de Koning testified that it was a fairly simple will and that he had it typed. When the deceased and first defendant returned later that day, he went through her will with her. She understood it and was satisfied. According to him she fully comprehended it, whereafter it was signed. Both witnesses to the will testified that they worked for Mr de Koning's firm and witnessed the disputed will on that day. None of them were cross-examined. In cross-examination of Mr de Koning he was specifically asked whether the deceased was mentally capable to execute the disputed will on 18 August 2000 and Mr de Koning confirmed that she was. He was then asked on what does he base this evidence, to which he replied:

> *"I didn't detect anything wrong with her and her instructions were clear."*

When specifically asked about her testamentary capacity to make the disputed will, he replied:

> *"Yes. I was satisfied that she understood what she was doing. I understood that she was lucid and that it was her wishes. As far as the testamentary capacity is concerned she was able."*

He also confirmed that she appreciated what she wanted to be included in the will and who would inherit what in terms thereof. If he had any doubt about her "sanity," Mr de Koning said he would have referred her to someone who could evaluate her. Although Mr de Koning was severely cross-examined, I have no hesitation in accepting his evidence.

[61] Mr Dicks attacked the evidence of Mr de Koning mainly on the basis that he ought to have satisfied himself of the deceased's mental capability to execute a valid will at the time. In this regard he relied on English cases like *Key v Key* [2010] EWHC 408 (Ch), where Briggs J referred to the "Golden Rule" expressed by Templeton J in *Kenward v Adams* to the effect that a solicitor who drafts a will for an aged testator or one who has been seriously ill, should have the testator examined by a medical practitioner. On this basis Mr Dicks submitted that that "Golden Rule" ought to be followed by our Courts and in the current matter Mr de Koning should have had the deceased examined first by a medical practitioner before he could be satisfied that she had the mental capacity to execute the will on 18 August 2000. Mr Dicks also found support for this argument in *Spies NO v Smith* 1957(1) SA 539 (A) at 543E-F where the attorney had a medical practitioner, as well as a magistrate present to ascertain for themselves that the testator in that case had the necessary testamentary capacity to make the will.

The circumstances under which the attorney made use of a medical doctor and a magistrate in the *Spies* case are quite different from the present one. Spies was retarded and suffered from epilepsy since his childhood. After being placed under curatorship he made the disputed will. Dr Tromp, a medical doctor, as well as a magistrate, Mr Lombard, were called to question the testator by the attorney, but both certified at the end of the will that the testator was aware of the contents of the will and that the will is according to his wishes.

[62] I have not come across the "Golden Rule" on which Mr Dicks relies in South African law. However, in certain circumstances it may be advisable to have the opinion of a medical practitioner as to the mental capability of a testator when making a will. Even in the English cases such circumstances seem to be when the testator is old (in the *Key v Key* case the testator was 90), or has been seriously ill, or suffered from a recent and serious trauma, like in the *Key v Key* case where the testator had lost his wife with whom he was married for 65 years shortly before he executed the will. The fact that the attorney in the *Spies* case made the effort to be satisfied, as mentioned before, does not mean that this is a general requirement in all cases.

[63] I am satisfied that on Mr de Koning's observations of the deceased on 18 August 2000 he cannot be faulted in the way he conducted the procedure. He had no reason to be suspicious that the deceased is not testamentary capable and none of the circumstances existed to make him cautious or to place any burden on him to have her medically examined first.

[64] Mr Dicks also relied on the *Lerf v Nieft NO and Others* case. In that matter the circumstances of the testator of the will that van Niekerk J set aside are not comparable to that of the deceased. Dr Goagoseb, a specialist in the field of internal medicine saw the testator in the intensive care unit of the Roman Catholic Hospital at 10h00 on 2 April 2003. The testator was

unable to understand or say anything, made only groaning noises and could not respond to any questions. According to him, the testator was at the time unable to make clear decisions like drawing a will. He saw the testator later that day again at 17h00 and his condition was unchanged. The testator died the next morning, yet the will was signed on his behalf around 12h00 on 2 April 2003. Both witnesses (nurses) had serious doubts about the testator's mental capacity. One nurse even refused to sign as a witness. Considering the applicable law, van Niekerk J declared the will invalid on these facts.

Conclusion

[65] During my evaluation of all the evidence presented during this rather lengthy trial, I kept the *onus* that rested on the plaintiffs in mind and tested against the relevant legal requirements, the conclusion is inescapable that the plaintiffs failed to discharge that *onus*. I am satisfied that on the requirements for testamentary capacity as stated by van Niekerk J in the case of *Lerf v Nieft NO and Others, supra,* at 191B-C, or any of them, the plaintiffs failed to discharge the *onus* which they had and which they accepted. Consequently, the first claim of the amended particulars of claim does not succeed and, as a logical consequence, neither does the second claim succeed. In respect of costs, there is no reason why costs should not follow the result and the plaintiffs are liable to pay the defendants costs. All the defendants who have pleaded only claimed cost and not payment thereof jointly and severally, neither was that argued.

[66] In the result, the plaintiffs' claims are dismissed with costs, which costs include the costs of one instructing and one instructed counsel.

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MULLLER J

Counsel on behalf of Plaintiffs:	Mr G Dicks
Instructed By:	Kirsten & Co Inc.
Counsel on behalf of the 1st, 2nd, 6th,	Mr J Schickerling
7th and 8th Defendants:	
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