REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) Reportable: Yes
(2) Of Interest to other judges: Yes

16/10/17
Date Signature

Case number: **38940/14**

In the matter between:

Paula Anne Twine **First Plaintiff**
Susan Caroline Killerby **Second Plaintiff**

and

Sharon Naidoo **First Defendant**
Master of the High Court, Gauteng Local Division, Johannesburg **Second Defendant**

Coram: VALLY J

Delivered: 17 OCTOBER 2017

Summary: Expert Evidence- expert witness once an infrequent visitor to the court now enjoys a daily presence in the court-principles regarding the admission of expert evidence-role of an expert witness- expert's evidence must be capable of being tested and it must be verifiable-validity of a will according to section 2 of the Wills Act.

Order

1. The will signed by Mr Twine on 7 January 2014 is invalid, null and void.
2. The will signed by Mr Twine on 6 November 2011 is declared valid.
3. There is no order as to costs.

Judgement

Introduction

[1] John Charles Twine (the deceased) passed away on 21 July 2014. His estate is registered with the second defendant with Estate No. 30613/2014. At the time of his death he was eighty-five (85) years old. He left behind two daughters. They are the two plaintiffs in this matter. The deceased resided in Durban. The first plaintiff resided in Johannesburg. The second plaintiff resided in Nelspruit. As a result, the two plaintiffs did not see much of the deceased.

[2] The deceased had a romantic relationship with the first defendant.[1] She was thirty-eight (38) years his junior. The relationship

[1] The second defendant did not participate in this litigation, hence for purposes of this judgment the first defendant will henceforth be referred to as “the defendant”.

commenced in 2006. Prior to his death, for some of the time during their relationship, they lived together in a flat owned by the deceased. At the time of his death the relationship was still in existence. Like many relationships it was not without its problems.

[3] The deceased is alleged to have executed two wills during his lifetime: one on 6 November 2011 (the 2011 will) and one on 7 January 2014 (the 2014 will). This matter concerns the validity of the two wills. The plaintiffs maintain that the 2014 will is invalid and should be declared null and void. At the same time, they ask that this Court declare the 2011 will to be the last will and testament of the deceased and therefore legally valid.

The 2011 will

[4] The relevant portion of the 2011 will provides:

> "I bequeath the sum of **Ten Thousand Rand (R10000)** to Johanna Susanna Kuhl.
>
> I bequeath the sum of **Twenty Thousand Rand (R20000)** to Sharon Naidoo, ID […].
>
> I bequeath the sum of **Twenty Thousand Rand (R20000)** to my niece, Louise Marlene Bennett, ID […]
>
> I bequeath the remainder of my estate in equal shares to my daughters SUSAN CAROLINE KILLERBY, ID […] and PAULA ANNE TWINE, ID […]". (Bold in original)

[5] On the same day that the deceased signed this 2011 will he executed another document styled: "ADDENDUM TO MY LAST WILL & TESTAMENT". It reads:

> "**I, John Charles Twine, ID […]**, due to my present situation with Sharon Naidoo and being well acquainted with her history, I hereby declare that any document not co-signed by my niece **LOUISE MARLENE BENNETT (nee Twine) ID […]** (specimen signature below) is null and void" (Bold in original)

The 2014 will

[6] The 2014 will was executed at the Durban Central Police Station. It reads:

> "I, John Charles Twine (ID No. […]) unmarried, hereby revoke all wills; codicils and other testamentary writings previously made by me jointly or singly and declare the following to be my Last Will and Testament.
>
> 1. Should I, the testator, pass away:
>
> 1.1 I bequeath my flat situated at
> 519 The Gables, Esplanade, Durban to my lifelong partner Sharon Naidoo (ID No. […]).
>
> 1.2 I bequeath cash of R10 000 to each of my two daughters Paula Twine ([…]) and Sue Killerby (ID No […])
>
> 1.3 I bequeath cash of R5 000 to each of my three grand – children Candice, Tanya and Abby
>
> 1.4 I bequeath the residue of my estate to Sharon Naidoo
>
> I nominate **Sharon Naidoo** to be the Executor of my estate." (Bold in original)

[7] Two witnesses, who were friends of the deceased and the defendant, signed this will. It was signed at the Durban Central Police Station and was stamped by one of the police officers on duty at the time.

[8] On the same day, and at the same time and place (Durban Police Station) the deceased deposed to an affidavit. The affidavit is in manuscript form and is written by the police officer that commissioned it. It reads:

> "I, John Charles Twine has a permanent partner Sharon Naidoo and daughter Rochelle Naidoo living at the above address. Sharon takes care of my daily need and lives with me John Twine until my death. As per agreement stated I John Charles Twine bequeaths my property should any dispute arise between John and Sharon in his last Will and Testament. John agrees to allow Sharon to continue living in his flat. Should John sell the property during his life time, John agrees to bequeath the cash from the sale of the property to Sharon. Sharon lives with me as a common law wife for the past eight years. Sharon takes care of me and none of my family members. I am old and need Sharon only to care for me. My health is not good and I don't want pressure from my daughters." (Quote is verbatim)

[9] Accompanying this affidavit is an agreement between the defendant and the deceased. Unlike the affidavit the agreement had been typed. The material terms read:

> "Now therefore the parties agree as follows:
>
> 1. "Cohabitation"
>
> John and Sharon have been living together for the past 7 years as life partners.
>
> 2. Care and support and accommodation
>
> Sharon has been looking after John for the past 7 years and attending to his daily needs and comfort. John therefore bequeaths his property known as The Gables, situated in the City of Durban, to Sharon in his last Will and Testament. Should any dispute arise between John and Sharon, John agrees to allow Sharon to continue to living in his flat. Should no compromise be reached, John agrees to provide alternative accommodation to Sharon at his expense, and to compensate her for the value of the property. Should John

sell the property during his life time, John agrees to bequeath the cash from the sale of the property to Sharon.

3. The whole agreement
   The parties record that this contract embodies the whole agreement between them and that no addition thereto and no amendments thereof shall be of any force and effect unless made in writing and signed by both parties.

4. Jurisdiction of the magistrate's court
   The parties consent to the jurisdiction of the magistrate's court having territorial jurisdiction in respect of any dispute, which may arise from this agreement."

[10] The agreement is co-signed by four witnesses, two of them being the same persons who signed as witnesses to the 2014 will.

<u>The grounds upon which the plaintiffs seek to have the 2014 will declared invalid, null and void</u>

[11] In their Particulars of Claim (POC) the plaintiffs allege that the 2014 will is invalid because:

"16.1 it does not comply with the formality stipulated by the deceased in that it was not co-signed by the deceased's niece, Bennett;

16.2 it was not signed by the deceased;

16.3 to the extent that it might have been signed by the deceased:

16.3.1 the deceased never intended same to be a valid last will and testament by reason of the deceased being aware of the formality he had stipulated and intentionally not followed;

16.3.2 the deceased lacked the mental capacity to execute a valid will by reason of dementia brought about by the onset of old age."

[12] The defendant denied all of these averments which resulted in a number of factual disputes and some legal ones. The entire spectrum of the disputes is captured in the following two basic questions:

a. Did the deceased sign the 2014 will?

b. If so, was it legally executed?

[13] The plaintiffs called two expert witnesses and one witness to testify on the rest of the factual issues. The defendant called one expert witness and two witnesses on the rest of the factual issues.

The evidence of the experts

[14] The plaintiffs called two handwriting experts to testify: one employed by the plaintiffs and the other representing the defendant. Their testimonies focussed on the signatures of the testator on the two wills. The expert employed by the plaintiffs was one Lourika Buckley (Buckley). The other expert witness was employed by the Legal Aid Board which was representing the defendant at that time. He was one Gerhard M Cloete (Cloete). Both experts were tasked to examine the two signatures of the testator on the two wills and to opine as to whether they were the signatures of the deceased. They were both given copies of the two wills as well as an affidavit and an agreement allegedly signed by the deceased in order to complete their respective assignments.

[15] Buckley commenced her evidence by stridently averring that the 2014 will was not signed by the deceased. She then explained that she came to this conclusion after examining the original 2014 will which she had accessed from the Master's office. She had compared the alleged signature of the deceased on that will with the alleged signature of the deceased on the 2011 will. In her view the signatures on the two wills were different in length of lines and in manner of curves. These, she said, led her to the conclusion that the deceased had signed the 2011 will but not the 2014 will. After being questioned by myself she admitted that she had no basis for boldly asserting that the deceased had signed the 2011 will but not the 2014 will. She had no basis to say which will he did sign and which he did not, or even whether he signed any of the two wills.

[16] At the conclusion of her evidence, it became clear that her evidence that the 2014 will was not signed by the deceased was tailored to suit the plaintiffs' case. I will say more of this in a moment.

[17] Cloete was only provided with copies of the two wills. He averred upfront that he had no basis for saying who signed the two wills, and that he could not say with any degree of certainty that the same person had signed the two wills. He could only be certain of this if he were provided with the original versions of the wills so that he could analyse them properly. However, from the two copies provided to him he could conjecture that the same person had not signed them. The reason he was

not willing to extend his opinion beyond conjecture was because he could not be certain that the differences he identified in the two alleged signatures of the deceased were not caused by the machines used to copy them. Understandably, no party placed in issue his honesty and reliability. He was, in my view, undoubtedly candid.

[18] Given the divergent approaches adopted by the two experts it is, I believe, appropriate to comment on the role, duties and functions of an expert witness as well as the role and functions of the court before analysing their respective testimonies. This is especially necessary as an expert witness, once an infrequent visitor to the court now enjoys a daily presence in the court. There are two broad reasons for this: (i) litigation has enjoyed an unprecedented growth over the last seven decades; and, (ii) over the same period the growth and development of scientific and technical knowledge of the natural, physical, social and commercial world has been vast. The latter has often resulted in the law being forced to play catch-up. The prevalence of expert testimonies has, however, produced challenges for the courts, some of which are fundamental to its duties and functions as a justice producing institution. This is particularly so as an entire industry of alleged experts selling their skills, knowledge and/or experience to litigants has developed, especially in personal injury cases where the defendant is the Road Accident Fund. Most of the challenges faced by the court arise from the fact that the basic principles about the role, relevance and value of an expert's testimony are often ignored by the

alleged experts themselves and by the parties calling them. This, unfortunately, has resulted in the unnecessary wastage of court time and the unnecessary incurrence of costs by parties. It is, for this reason, necessary to recall the basic principles involved in the admission of expert evidence. Before doing so it is worth mentioning that as these principles have evolved over time they have themselves raised challenges of their own for the courts, much of which stem from the fact that the courts have not always been consistent in the application of some of the principles underlying the admission of the evidence. Put differently, the landscape of expert evidence has been expansive and its topography uneven. Nevertheless, the learning over the years has established the following principles with regard to expert witnesses:

a. The admission of expert evidence should be guarded, as it is open to abuse.[2]

b. The witness claiming to be an expert has to establish and prove her credentials in order for her opinion to be admitted.[3]

c. The expert testimony should only be introduced if it is relevant and reliable. Otherwise it is inadmissible. It should, therefore, only be introduced if there is a possibility of it assisting the court in (i) understanding a scientific or technical issue, or (ii) in establishing

[2] *Kozak v Funk* 1995 CanLII 5847 (SK QB) at 3
[3] *Menday v Protea Assurance Co. Ltd* 1976 (1) SA 565 (E) at 569B-C; *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 772G-H

a fact either directly or by using inferential as opposed to speculative reasoning. Testimony that falls outside the scope of either of the two is superfluous. In other words, there is no need for an expert's opinion if the court can come to its own conclusions from the proven facts. In such a case the expert's opinion should be disallowed:

> "If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour with the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."[4]

d. The expert witness should bring specialised knowledge to the court.[5] The specialised knowledge could be either experience, training or study-based and the testimony that the expert witness provides must be entirely or substantially based on the specialised knowledge of the expert.

e. While expert witnesses should confine their testimony to the area of their expertise they may, in appropriate circumstances, trespass outside their area of expertise. However, to the extent that they deem it necessary to so do they should at once declare the trespass. They:

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[4] *R v Turner* [1975] 1 All ER 70 at 74d-e
[5] *Holtzhauzen*, n3 at 772C

> "*should make clear when a particular question or issue falls outside (their) expertise*."[6]

f. Expert witnesses must present their testimony with clarity and precision. They must avoid obfuscation and vagueness.

g. The expert witness should provide any evidence outside her report if asked to do so by the court.

h. Expert witnesses should state all facts and the assumptions upon which they base their opinions.[7] The facts relied upon:

> "must be proved by admissible evidence. …:
> Before a court can assess the value of an opinion it must know the facts on which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgment counsel calling an expert should in examination in chief ask his witness to state the facts on which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination."[8]

While they are entitled to make assumptions, they should avoid basing their opinions on conjecture or speculation for once they do so they place their evidence at risk of being disallowed.

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[6] *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd ("The Ikarian Reefer 1")* [1993] 2 Lloyds Rep 68 at 81. This case was taken on appeal however the principles iterated by the court *a quo* were left intact by the Appellate Court. In fact, *The Ikarian Reefer 1* has enjoyed significant influential status in many common law jurisdictions around the world. The judgment of the Appeal Court is reported as *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* [1995] 1 Ll L R 455 (CA) ("*The Ikarian Reefer 2")*. This particular principle was reiterated in *The Ikarian Reefer 2* at 497.

[7] *R v Jacobs* 1940 TPD 142 at 146-7; See also: *R v Barry* 1940 NPD 130 at 132; *R v Theunissen* 1948 (4) SA 43 (C) at 46; *S v Adams* 1983 (2) SA 577 (A) at 586A-C; *S v Van As* 1991 (2) SACR 74 (W) at 86c-e; *Holtzhausen*, n3 at 773A-B; See also *The Ikarian Reefer 1*, n6 at 81

[8] *R v Turner*, n4 at 73d and 73f-g; See also, *Holthausen*, n3 at 772H

i. Expert witnesses must:

> "… not omit to consider material facts which could detract from (their) concluded opinion(s)"[9]

j. Expert witnesses should at all times be candid with the court with regard to shortcomings in their research or analysis. Expressed differently:

> "If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be noted in the report."[10]

k. Expert witnesses are allowed to speak to their opinions, but are not the ones that determine the fact or facts in issue. That determination resides within the exclusive province of the judicial officer.[11] An expert witness is not allowed to usurp this function nor is a judicial officer allowed to abdicate the responsibility.

l. Any material relied upon by the expert witness should be provided to the party that did not engage the particular expert witness to furnish an opinion. This includes any "*photographs, plans, calculations, analyses, (or) measurements*"[12]

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[9] *The Ikarian Reefer 1*, n6 at 81
[10] *Id.*
[11] All the cases cited in n7
[12] *The Ikarian Reefer 1*, n6 at 81

m. Expert witnesses' overriding duty is to the court. In this regard they:

> "… should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within (their) expertise."[13]

n. Expert witnesses are not advocates for any party: their independence should never be relinquished:

> "Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation."[14]

This dictum was complemented with the following comment in the *Whitehouse*:

> "To the extent that it is not, the evidence is likely to be not only incorrect but self-defeating"[15]

o. The expert witness is not tied to any party. There "*is no property in an expert witness*".[16] Thus, any party is entitled to call upon the expert to testify once that expert has furnished an opinion to one of the parties.

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[13] *Id.; Meadow v General Med Counci*l [2007] 1 All ER 1 (CA) at [21]
[14] *The Ikarian Reefer 1,* n6 at 81; *Whitehouse v Jordan* [1981] 1 All ER 267 (HL) at 276b
[15] *Whitehouse v Jordan*, n14, at 276b
[16] *Meadow v General Med Council* n13 at [23]

p. It is the duty of counsel and attorneys to mediate the role of the expert witness by explaining to her the limits of her role in the case and by reminding her of her duty to the court.

q. The expert's evidence must be capable of being tested. It must be verifiable. In *Jacobs* the court pronounced:

> "In cases of this sort (where the issue was whether the accused was drunk while driving) it is of great importance that the value of the opinion should be capable of being tested; and unless the expert witness states the grounds upon which he bases his opinion it is not possible to test its correctness, so as to form a proper judgment upon it." [17]

This principle was expanded upon and extended, though not without controversy, by the U.S. Supreme Court in *Daubert* where the majority of the Court concurred in the *dictum* of Blackburn J, which endorses the approach of one philosopher of the scientific method (Karl Popper) who argued that in order for a theory or an explanation to be accepted as scientific it had to, in the main, be falsifiable. Blackburn J opined:

> "Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology is what distinguishes science from other fields of human enquiry" …. "The criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.""[18]

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[17] *R v Jacobs*, n7; See further all the cases cited in n7, save for *The Ikarian Reefer 1*

[18] *Daubert v Merril Dow Pharmaceuticals Inc.* 509 U.S. 579 (1993) at 593. For an account of the numerous potential problems this approach invites see: Suzanne Orofino, *Daubert v Merril Dow Pharmaceuticals Inc.: The battle over the admissibility standards for scientific evidence in court*, Journal of Undergraduate Sciences 3: 109 – 111 (Summer 1996); David L Faigman, *Mapping the labyrinth of scientific evidence,* Hastings Law Journal, No 46, 555; Gary Edmond, *Judicial*

r. A court is not bound by, nor obliged to accept, the evidence of an expert witness:

> "It is for (the presiding officer) to base his findings upon opinions properly brought forward and based upon foundations which justified the formation of the opinion."[19]

And:

> "(A) court should not blindly accept and act upon the evidence of an expert witness, even of a finger-print expert, but must decide for itself whether it can safely accept the expert's opinion."[20]

s. The court should actively evaluate the evidence.[21] The cogency of the evidence should be weighed "*in the contextual matrix of the case with which (the Court) is seized.*"[22] If there are competing experts it can reject the evidence of both experts and should do so where appropriate. The principle applies even where the court is presented with the evidence of only one expert witness on a disputed fact. There is no need for the court to be presented with the competing opinions of more than one expert witness in order

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Representations of Scientific Evidence, The Modem Law Review, v 63 no 2, March 2000. Needless to say that this list constitutes a tiny fraction of the commentaries that were generated by the majority decision in *Daubert*. For a fuller account see the citations in each of the articles listed here. A key criticism levelled at the approach advanced by the majority in *Daubert* is that it endorsed and encouraged the courts to follow one school of thought engaged in the field of epistemology (the theories of knowledge), that of Karl Popper. This approach, it has been argued, is not the only one that leads to the truth and can, at times, hinder the search for the truth. Thus, it does not always advance the interests of justice. However, a debate on which approach is best suited in a particular case falls outside the scope of our present concern which is to identify the principles concerning expert evidence that have evolved over time.

[19] *R v Theunissen*, n7

[20] *R v Nksatlala* 1960 (3) SA 543 (A) at 546C-D

[21] All the cases cited in n7, and *Daubert* ,n18

[22] *S v M* 1991 (1) SACR 91 (T) at 100a

to reject the evidence of that witness. This principle was eloquently articulated in *Davie* in the following terms:

> "Founding on the fact that no counter evidence on the science of explosives and their effects was adduced for the pursuer, the defenders went so far as to maintain that we were bound to accept the conclusions of Mr Teichman. This view I must firmly reject as contrary to the principles in accordance with which expert opinion evidence is admitted. Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court. Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or the jury. In particular the bare *ipse dixit* of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert."[23]

t. In certain cases of neurological, psychological and psychiatric evidence the expert is dependent on the honesty of the person who is the subject of the assessment for their evidence to be of any probative value to the court. This problem has manifested itself many times and the approach of the courts is succinctly

[23] *Davie v Magistrates of Edinburg* [1953] SC 34 at 40. It bears mentioning that unlike an expert witness, a judicial officer is often tasked to balance the probabilities derived from the admitted factual evidence, something the expert witness must never do or be allowed to do. The focus here is on admitted evidence. It is trite that not all evidence is admissible. However, the decision as to which evidence is admissible and which not is something that is not often appreciated by non-legal persons. Experts who trespass into this area are in danger of finding themselves unable to appreciate the nuances involved, in for example, accepting or rejecting hearsay evidence, and then ignore admissible, or include inadmissible, evidence in the balancing exercise- thus indelibly staining their evidence and rendering their conclusions nugatory.

captured in the following *dictum,* which while dealing with the evidence of an expert in psychiatry is no less applicable to an expert in the sciences of neurology or psychology:

> "The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value."[24]

Should the subject of the assessment not testify, it would render the views of the expert meaningless as it was based on the untested hearsay of the subject of the assessment. In *Shivute* the court, confronted with exactly this situation, held that "*[t]he accused failure to testify stripped the opinion evidence of the expert witness of almost all relevance and weight.*"[25] The principle was re-stated in *Mngomezulu*, where the Court said that unless the psychiatric or psychological evidence is linked to facts before court, it is just "*abstract theory*."[26]

u. Expert witnesses who repeatedly provide expert opinions to parties – and sometimes only for plaintiffs or only for defendants – should be careful not to burden the court with what some justices of the U.S. Supreme Court called "*expertise that is fausse and*

[24] *S v Mthethwa* (CC03/2014) [2017] ZAWCHC 28 at [98], but see all the cases cited at [97] – [99] as well as *R v Turner*, n4 at 73f
[25] *S v Shivute* 1991 (1) SACR 656 (Nm) at 661H
[26] *S v Mngomezulu* 1972 (1) SA 797 (A) at 798F-799 *in fin*

science that is junky."[27] Evidence which is repeated from case to case or an opinion that is mildly altered from case to case is in danger of falling foul of this principle.[28] The court should scrutinise these opinions very carefully and should not hesitate in refusing them admission, nor should it be swayed by the impressive scientific qualifications of the expert for these are irrelevant, as pointed out in *Menday*:

> "However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The dangers of holding otherwise - of being overawed by a recital of degrees and diplomas - are obvious; the Court has then no way of being satisfied that it is not being blinded by pure 'theory' untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on the knowledge or experience of others who themselves are shown to be acceptable experts in that field. In *Van Heerden v. SA Pulp and Paper Industries*, 1945 (2) P.H. J14, BLACKWELL, J., consequently refused to accept the evidence of a scientist with general chemical qualifications on a special matter on which he had made no special study nor acquired any special experience.
> Where, therefore, an expert relies on passages in a text-book, it must be shown, firstly, that he can, by reason of his own training, affirm (at least in principle) the correctness of the statements in that book; and, secondly, that the work to which he refers is reliable in the sense that it has been written by a person of established repute or proved experience in that field. In other words, an expert with purely theoretical knowledge cannot in my view support his opinion in a special field (of which he has no personal experience or knowledge) by referring to passages in a

[27] *Kumho Tire Co. v Carmichael* 526 U.S. 137 (1999) at 159 (per Scalia J, with O'Connor and Thomas JJ concurring)

[28] A good example of this is the opinions of some neurosurgeons in the personal injury cases where the Road Accident Fund is the defendant. In almost all these cases the expert witness opines that the plaintiff suffers from "*mild to moderate brain injury*", based on what the plaintiff said to the expert during a brief consultation. Another example of this would be the opinions of some Industrial Psychologists in the same set of cases.

> work which has itself not been shown to be authoritative. Again the dangers of holding the contrary are obvious."[29]

[19] The above principles were developed in the course of the courts experiencing some significant challenges when faced with the issue of whether to admit expert evidence or not. The law is obviously still in a state of development in this area and the list catalogued in the previous paragraph is not exhaustive. There is no doubt that expert evidence plays a valuable role in assisting the courts and other triers of fact (tribunals and arbitrations) in establishing the true facts and doing justice by the parties. However, courts have expressed their misgivings about admitting expert evidence when such evidence overlooks or contravenes one or more of the above-stated principles, some of which are elementary.[30] In such cases courts have not hesitated in refusing to admit the evidence.

Should Buckley be accepted as an expert witness in this case?

[20] The evidence of Buckley unfortunately did not meet many of the requirements set out in [18] above for it to be accepted and for her to be qualified as an expert. Most importantly, it has to be said, she failed to extricate herself from the case of the plaintiffs to the point where she became an advocate for their case. As a result, she lost the degree of independence required of an expert witness who provides the court with

[29] *Menday*, n3, at 569E-H, citations omitted; See, too, the quote in sub-para c. above
[30] *R v Turner*, n 4 at 73d

an unbiased opinion. She determinedly asserted that the deceased had signed the 2011 will but not that of 2014, which was exactly what the plaintiffs required, and set out to prove. Her assertion, however, was not factually grounded.

[21] In direct contrast to her testimony the other expert, Cloete, deliberately abstained from providing an answer to the questions: did the decease sign only one of the two wills? and if so which one? Unlike Buckley he was conscious of the fact that no reliable information as to how the wills came to be signed by the deceased were placed before them so that he could justifiably join her in the assertion that the deceased had signed the 2011 will but not the 2014 one. He categorically stated that he could not engage with the questions as to whether the deceased had signed either or both of the wills as he was not furnished with sufficient information to allow him to opine, using his expert knowledge, on this issue. He could go no further than say that the likelihood of the same person signing both documents is negligible but not improbable.

[22] It was Buckley's inability or unwillingness to acknowledge this that stained her testimony so badly that it became valueless. In the result, I have come to the conclusion that she has to be disqualified as an expert and her testimony is to be disregarded.

[23] Finally on this issue, it bears mentioning that Cloete's testimony, too, was problematic. His opinion, though candidly expressed, was too uncertain to be of any probative value in determining the central questions before this Court: Did the deceased sign either or both of the two wills?

[24] However, even if he was furnished with all the information that was made available to this Court his opinion would be no more than just that – an opinion. This Court will provide the answers. The expert knowledge of both Buckley and Cloete does no more than empower them to furnish opinions, which are subject to acceptance by this Court.

The rest of the evidence of the plaintiffs

[25] The plaintiffs also relied on the evidence of a Louise Marlene Bennett (Bennett), the niece of the deceased, to explain the circumstances under which the 2011 will was signed by the deceased. She is the person who signed the 2011 will as a witness, and is referred to in the Addendum to that will as the person who should co-sign any document the deceased signs in future in order for that document to be valid. Her evidence was that the deceased came to her house on Sunday 6 November 2011 for lunch and to sign the will that was prepared in advance by an attorney instructed by herself. She acted as a duly authorised agent of the deceased when giving instructions to the attorney. The deceased signed the will in the presence of two witnesses, who co-signed it. Thereafter both

the deceased and herself signed the Addendum, which again, was done in the presence of two witnesses who, too, signed it. The attorney who drafted the will commissioned the Addendum. Thus, this attorney was present when the will and the Addendum were signed.

[26] A crucial aspect of Bennett's evidence concerns the reason the Addendum was drafted and signed by herself and the deceased. She claimed that the deceased was concerned about the defendant manipulating him into signing a will that would not reflect his true wishes. She claimed that the deceased was particularly concerned at the fact that the defendant was previously married twice, in both cases to octogenarians, both of whom died while their respective marriages with the defendant still subsisted. As a result, the defendant benefitted from their respective estates. This evidence was consistent with the following averments in the POC:

> "8.6 The deceased was aware that:
>
> 8.6.1 the first defendant had inherited an immovable property from a deceased octogenarian, to wit George Riddle, whom she had married and who died in 2004 from unnatural causes;
>
> 8.6.2 the first defendant had thereafter formed a relationship with and married another octogenarian who had also died from unnatural causes in 2006, to wit Dennis Vorster; and
>
> 8.6.3 the facts of the first defendant's previous conduct suggested the reasonable inference that she may be a person who formed relationships with men several decades her senior for the purpose of exercising influence over them for pecuniary benefit to herself."

[27] Neither she nor the plaintiffs were able to place any document written under the hand of the deceased or signed by the deceased to indicate that he held these views about the defendant. As a result, the plaintiffs were wont to rely on her hearsay evidence to prove that the deceased drew the "*reasonable inference*" that the defendant "*may be a person who formed relationships with men several decades her senior for the purpose of exercising influence over them for pecuniary benefit to herself.*" Even if the hearsay evidence of Bennett is accepted in this regard it still has to be explained as to why the deceased who had such a low regard for the defendant continued with the romantic relationship with her for almost three years thereafter – this belief was supposed to have been held in 2011 (6 November 2011 is when he is said to have signed the 2011 will) and he passed away on 21 July 2014.

[28] Bennett claimed that the deceased was concerned that the defendant, who was not married to him, but with whom he was happy to have a relationship, would pressurise him into signing documents that would involve the dissipation of his assets to his detriment or contrary to his true intentions. To this extent she presented a view of the deceased as a helpless old man who required protection from himself taking action or doing something that would either harm his interests or be contrary to his true intentions. At the same time, she said of the deceased: "*uncle John was uncle John*"; he was a "*strong headed and stubborn person*", who knew what he wanted and was capable of getting it. "*In fact*", she said,

coyly and without any hint of irony that "*he was so determined in having what he wanted that had two girlfriends at once.*" He was, she said, firm in his views and determined in his ways. With these averments she presented the deceased as being someone who was fully conscious of his affairs and determined in his behaviours. The two presentations do not, in my view, sit harmoniously with each other: either he was a "*strong-headed*" person capable of taking care of his own affairs or he was a helpless individual in need of protection from himself. The rest of Bennett's testimony did not assist in resolving this tension.

[29] Her testimony also focussed on the tumultuous nature of the relationship between the deceased and the defendant. As for her testimony concerning the deaths of the two previous husbands of the defendant she conceded after rather mild cross-examination that she had no factual basis to suspect that the circumstances of their deaths involved foul play on anyone's let alone the defendant's part.

The evidence of the defendant

[30] The defendant testified that: the deceased had of his own accord asked her to arrange for the 2014 will to be drafted; he voluntarily signed it in the presence of two witnesses on 7 January 2014; the signing process took place at the Durban Central Police Station in the presence of the police officers on duty; one of those police officers, in his capacity as

Commissioner of Oaths, had administered the oaths and certified the signatures on the affidavit and agreement that she and the deceased had concluded at the time; both the agreement and the affidavit resulted from the deceased's unhappiness with members of his family, particularly his niece and daughters, for interfering in his life by persistently questioning the continuation of his relationship with her; she took care of him over seven years and in that time lived intermittently with him in his flat; his family, particularly his daughters (the plaintiffs) and his niece (Bennett) were quite content with her looking after him as it suited them by relieving them of any duty to take care of any of his needs; now that he has departed from this planet they are making a concerted effort, through this litigation, to try and deny her what is rightfully hers; the deceased signed the 2014 will because he recognised and valued the mutual love they had for each other and the support they gave each other.

[31] During her cross-examination by Mr Peter, SC, she was asked about the numerous conflicts she had with the deceased, which conflicts were publicly aired and which resulted in, at one point, her laying criminal charges against him, and in both of them obtaining protection orders against each other. Her response was that these were conflicts normal to any relationship but they did not detract from the fact that they loved and cared for each other. She was asked about her previous relationships, in particular her relationship with her husbands who were also much older than herself and who died while the marriage between her and them still

subsisted. She unhesitatingly admitted to these two facts as well as to the fact that she benefitted materially from their estates. The questioning was deliberate and pre-designed. It was anchored in paragraph 8.6 of the POC quoted above in [26]. Mr. Peter signed the POC, and therefore it can safely be inferred that from inception the plaintiffs as well as their counsel had decided that it was important for their case that these facts about the defendant's past and about her relationship with the deceased be highlighted. They believed that these facts supported their claim that the deceased did not sign the 2014 will. The defendant was asked if she had commenced a relationship with the deceased whilst still married to one of her previous husbands. She admitted to this fact too, but supplemented it by saying that at the time she and the deceased commenced their relationship the deceased was the best friend of her husband.

[32] At this point the cross-examination took an unfortunate turn and had to be stopped by myself in order to prevent the proceedings from degenerating into a morass of irrelevant information, not all of which could be said to be factual. However, it is necessary to say a word or two about this aspect of the cross-examination. Bearing in mind that the questions focussed on the previous marriages of the defendant they were, obviously, of a very personal nature. They were also presented in a tone and manner that caused the defendant offence and resulted in her claiming that she was offended by the questioning and that she believed the questions to be

"*racist*"[31]. What was clear from the questioning was that it implied that the defendant was a woman of loose morals who only married older men in order to take advantage of them both during their lifetimes and after their deaths. To this extent the cross-examination bore the hallmarks of the sexist presumption that young women who engaged in relationships with older men do so only for material gain. In response the defendant pointed out that the deceased had no qualms about having another girlfriend when he commenced his affair with her, and about engaging in this relationship when he was fully aware that she was married to his best friend. It, therefore, bears mentioning that to the extent that the cross-examination focussed on impugning the morals of the defendant while ignoring those of the deceased it unduly discriminated against her *vis a vis* the deceased. In my view, there simply was no need to discriminate between the defendant and the deceased when it came to morals. This aspect was attended to by the defendant who during this cross-examination pointed out that while the cross-examination only focussed on her (and her morals) it had to be borne in mind that the relationships between her and her previous husbands, including the relationship between her and the deceased, were only possible because of the bilateral consent and the joint benefits that prevailed in each of those relationships. This claim of hers was not dispelled by the cross-examination. The main reason it could not be dispelled is because the plaintiffs had placed no evidence of their own about those relationships even though they, from inception of their case,

[31] She is of Indian descent while the deceased was of European descent.

believed that the nature of those relationships were central to their case that the deceased did not sign the 2014 will. As a result, they found themselves in a position where they had to try to elicit the necessary facts through robust cross-examination. But the cross-examination failed to do so. At the conclusion of the cross-examination it was clear that the deceased was as culpable in establishing the relationship with the defendant as she was, and that the benefits derived from the relationship over the years were enjoyed by both of them. Hence, the plaintiffs had failed to prove that the origins and nature of the relationship between the defendant and the deceased, and that the past relationships of the defendant, were strong indicators that the deceased did not sign the 2014 will.

[33] The other witness called in support of the defendant's case, was a Sunporunam Govender (Govender). Her testimony focussed on the circumstances surrounding the signing of the 2014 will. She signed this will as a witness. She said that on the 7 January 2014 she and her husband came across the defendant and the deceased in the street. As the two couples were acquainted with each they naturally engaged in social conversation. She and her husband were informed that the defendant and the deceased were on their way to the police station to sign a will and some other documents. She and her husband were asked if they would accompany the defendant and the deceased in order to attest to the signature of the deceased and to co-sign the 2014 will and the agreement

between the defendant and the deceased. She or her husband (she was not sure who it was) informed the defendant and the deceased that they were in a hurry to get somewhere. They were assured that the process would not take long so they agreed to assist. Once they arrived at the police station, she and her husband signed the documents (the agreement and the 2014 will) and immediately left. They were the first to sign the documents. At the time they signed the documents neither the deceased nor the defendant had signed any of the documents. They left before witnessing either the defendant or the deceased signing any documents. Hence, the 2014 will was not signed by the deceased in their presence even though it reflects their respective signatures as witnesses.

The relevant facts established by the *viva voce* evidence

[34] The *viva voce* evidence assessed collectively established the following relevant facts:

a. The deceased signed the 2011 will.

There was no disagreement between the parties in this regard. The defendant did not in any material way challenge the evidence of Bennett that the deceased signed the 2011 will as well as the Addendum to that will.

b. The deceased signed the 2014 will.

In their POC the plaintiffs alleged that the deceased did not sign the 2014 will. At the trial they relied on the evidence of the two experts to establish this as a fact. However, their evidence, as mentioned above, failed to do so. It was too uncertain to exclude the possibility that the deceased had signed it. The plaintiffs were then forced to deal with the *viva voce* evidence of the defendant who was adamant that the deceased signed the 2014 will. The plaintiffs were not able to dispel this evidence. I was not able to find any contradictions, nor were the plaintiffs able to point to anything that undermined the defendant's evidence to the extent that it was unbelievable or improbable. Mr Peter drew attention to the fact that Govender's version of how she and her husband came to be approached by the defendant and the deceased to witness the signing of this will was too sketchy and too accidental to bear any semblance of reality. He urged that on this basis it should be found that the deceased did not sign the 2014 will. Thus, he argued that Govender should not be believed. There is no doubt that Govender's evidence in this regard was not very illuminating. However, it would, in my view, be a stretch to find that merely because Govender and her husband met the defendant and the deceased by chance on that specific day, such meeting did not take place at all and that therefore the deceased did not

sign the 2014 will. There is, it must be remembered, the evidence of the defendant that has to be factored into this equation. Her evidence that the deceased signed this will on that day with Govender and Govender's husband being present was unequivocal and it was not challenged by the plaintiffs during her cross examination in any meaningful way. Thus, it would be incorrect in these circumstances to find that on the basis of the vagueness of the version of Govender as to how she and her husband came to meet the deceased and the defendant on that day that she, Govender, was either reckless about the truth, or that she deliberately fabricated the version. On the contrary, the collective evidence of Govender and the defendant show that the deceased signed the 2014 will on that day at the police station. And, so I find.

c. The 2014 will was signed by the deceased after the two witnesses to the will – Govender and her husband – had already left and therefore was signed in their absence.

This fact is established by the unequivocal and uncontradicted evidence of Govender.

<u>The relevant law and its application to the facts</u>

[35] In terms of s 2(1)(a)(ii) of the *Wills Act, No 7 of 1953* (Wills Act), no will is valid unless the signature made by the testator is made "*in the presence of two or more competent witnesses present at the same time.*" Accordingly, the witnesses who attest to the signature of the testator have to be present when the testator actually signs the will. This requirement is mandatory. If not met the will is invalid for want of compliance with a statutorily required formality.

[36] We know from the established facts referred to in [34(c)] above that both witnesses who were supposed to attest to the signing of the 2014 will by the deceased were not present when he signed it.

[37] Hence, the 2014 will is invalid. In the result the plaintiffs are entitled to an order that declares this will to be invalid, null and void. At the same time it has to be noted that there was no evidence that there was any irregularity in the execution of the 2011 will. As the 2014 will is declared invalid that leaves the 2011 will as the last will and testament of the deceased. Accordingly the plaintiffs are entitled to a declaration that the 2011 will is valid.

Costs

[38] The plaintiffs, rightfully, did not ask for any costs.

Order

[39] The following order is made:

4. The will signed by Mr Twine on 7 January 2014 is invalid, null and void.

5. The will signed by Mr Twine on 6 November 2011 is declared valid.

6. There is no order as to costs.

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VALLY J

Representatives for the plaintiffs	J Peter SC assisted by R J Stevenson
Instructed by	Clark Attorneys
Representative for the first defendant	Self-represented