Malan and another v Strauss and Francesca NNO and others
[2014] JOL 31641 (FB)

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Country:	South Africa
Jurisdiction:	High Court
Division:	Free State, Bloemfontein
Judge:	Ebrahim J
Bench:	S Ebrahim J
Parties:	Mandy Malan (1P), Maria Jozephina Malan NO (2P); Johanna Christina Strauss and Johanna Christina Francesca NNO (1D), Johannes Stephanus Hugo (2D), Master of the High Court, Bloemfontein (3D)
Appearance:	Adv N de V Duvenhage SC, Eugene Attorneys (P); Adv PCF van Rooyen SC, Phatshoane Henney Attorneys (1–2D), None Indicated (3D)
Categories:	Action – Civil – Substantive – Private
Function:	Confirms Legal Principle
Relevant Legislation:	Administration of Estates Act 66 of 1995

Key Words

Trusts and Estates – Succession – Will – Validity of – Testamentary capacity – Mental capacity of testatrix

Mini Summary

The present matter concerned the validity of a will executed in 2001. The testatrix died in 2011. During her lifetime, she had adopted two boys, both of whom had predeceased her. The first plaintiff was the daughter of one of the sons of the testatrix, and the second plaintiff acted in a representative capacity as the mother of the other daughter of the deceased son – that daughter being a minor at the time of institution of the action.

In her will, the testatrix bequeathed R20 000 to her grandchildren in equal shares. The remainder of her estate was bequeathed to the first defendant in her capacity as trustee of a trust formed to benefit the first defendant's family. The first defendant was married to a doctor who had treated the testatrix. The plaintiffs challenged the validity of the will on the ground that the testatrix did not have the required testamentary capacity to execute a will at the time she signed it. They claimed an order for it to be set aside as invalid and for her estate to devolved as on intestacy.

Held that the onus is on the person who asserts invalidity of a will to prove mental incapacity at the time of its execution. The specific question in this case was whether the testatrix was at the material time of sufficient intelligence, possessing sufficiently sound mind and memory for her to understand and appreciate the nature of the testamentary act in all its different bearings. Having regard to the evidence, the Court found that the probabilities were overwhelming that the testatrix was mentally incapable of executing a will in August 2001. The will was thus set aside. It was declared that the testatrix died intestate.

EBRAHIM J:

[1] This trial is concerned with the validity of a will executed on 20 August 2001 by the late Charlotte Mary Salome Malan (born Oertel), ("the testatrix") who died on 18 July 2011 at an Old Age Home in Petrusburg, Free State, aged 96 years. She was married to André Francoise Malan who predeceased her in 1991. They had had no children of their own, but chose to foster the three sons of her brother, who

lived in Bloemfontein. The eldest was Winston, followed by Mervin and the youngest Alvin.

[2] Both Mervin and Alvin were officially adopted by the testatrix and her husband and changed their surname from Oertel to Malan. Both are at present deceased. Mervin is the biological father of the first and second plaintiffs and was, during his lifetime, married to Maria Jozephina Malan, who sues herein in her representative capacity as mother and sole guardian of the second plaintiff, Claire Malan, who at the time of the institution of this action, was a minor but who has since attained majority.

[3] In terms of clause 3 of her will, the testatrix bequeathed R20 000 of her Estate to her grandchildren, the children of her son Mervin Oertel Malan, in equal shares. In terms of clause 4 of her will, she bequeathed the remainder of her Estate to the first defendant, Johanna Christina Strauss, in her capacity as trustee of the Dennelaan Trust IT3474/01. The first defendant is married to a general medical practitioner, who treated the testatrix prior to her admission to the Old Age Home and who was responsible for her admission to the home. No

evidence was placed before the Court concerning the Trust save that a copy of the Trust Deed executed on 13 July 2001at Petrusburg was tendered as exhibit "D" in the proceedings by consent of the parties. From the Trust Deed it is clear that the trust was formed in order to benefit the members of the Strauss Family, *viz* Dr Strauss, first defendant and their four children. All the children are listed as income beneficiaries together with their

parents, whilst the capital beneficiaries of the Trust are limited to the children themselves and/or their direct descendants.

[4] The plaintiffs have challenged the validity of the will on the ground that the testatrix did not have the required testamentary capacity to execute a will at the time she signed it. They claim an order for it to be set aside as invalid and for her estate to devolve as on intestacy. In an action of this nature, the history of family dynamics and interaction assumes some relevance and, I have no doubt, influences the disposition of family assets. However, such evidence has no place in deciding the present issue and I shall accordingly limit my summary of the evidence to the material and relevant evidence placed before me.

[5] Winston Oertel, the elder brother of Mervin and Alvin, testified on behalf of the plaintiffs, that their biological mother passed away in December 1966 and that they then went to live with the testatrix on her farm "Doringplaats" in the Petrusburg district. He said as a result of repeated physical and verbal abuse upon him by the testatrix, he ran away from the farm in 1972 and had had no contact with her until Alvin's funeral when she failed to recognise him even after he was introduced to her.

[6] Maria Jozephina Malan, the biological mother of the first and second plaintiffs, married Mervin Malan in Holland on 21 May 1990. She told the Court that they lived in Holland throughout the duration of their marriage and denied, under cross-examination,

that when he died, they had already been divorced. She readily conceded that it was Alvin who had throughout the years remained on the farm with the testatrix and her husband and had managed the farm and that this continued until his death in April 2001.

[7] Maria Malan testified to the strong physical and mental health of the testatrix which she said was apparent to her when she visited her mother-in-law in South Africa in 1991. She said that at the time her father-in-law was very ill. She stayed with her for two weeks and then returned to Holland. Her two daughters, the first and second plaintiffs, accompanied her during that visit. It appears that they thereafter returned to South Africa on two further occasions, on holiday, once in 1993/1994 after Mr Malan had died and then again in June 2001 after Alvin's passing when she was again accompanied by Mervin and the children.

[8] According to her on each of her visits, except the last one, she observed the testatrix to be strong and healthy, but when she visited her after Alvin's death, she found that she was not well and spent most of her time in bed, confused and unable to recognise her or Mervin. According to her observations, the testatrix was refusing to eat or drink, wash and dress herself and had hysterical outbursts when she would shout out the names of certain persons. She could not walk without assistance and her condition was such that she had to be cared for 24 hours of the day. She was unable to think for herself at all and it was impossible to conduct a proper conversation with her. The witness said she was

under the medical treatment of Dr Strauss, the husband of the first defendant and on his recommendation, the testatrix was moved into an Old Age Home providing frail care during July 2001.

[9] Elena Kokororopo, the domestic helper of the testatrix, corroborated the testimony of the testatrix's daughter in law as to the testatrix's physical condition. She told the Court she arrived on the testatrix's farm in 1974/1975 and began working for the testatrix; doing household cleaning, washing, ironing and cooking. She told the Court that the testatrix was a strong and hardworking woman. She was in the peak of good health but after the death of Alvin Malan, her health deteriorated and she began to get very ill. She said she slept in the room next door to that occupied by the testatrix at night and that the testatrix was not sleeping well during the day or night. She spent almost all her time in bed. She did not eat or drink properly and she was mentally not fit, because she screamed all the time and only stopped once she went to sleep. She could not conduct a proper conversation with anyone or engage meaningfully with people. As a result Dr Strauss decided to admit her to the Old Age Home.

[10] This witness specified an incident during which she said it was clear to everyone that the testatrix's mind was not working properly (as she put it). This happened in May 2001 when she was paying salaries. The practice was to record payments and receipts in a cash book and Elena said the testatrix was struggling with this task. She was holding the book upside down and she did not even realise it. Eventually

she was unable to cope with this task and someone else had to do the salary payments. Elena told the Court that the testatrix was not capable of doing anything for herself and had to be washed, fed and clothed. After her admission to the Old Age Home, Elena said she visited her daily for approximately two weeks and could see that

she was slowly getting better and stronger and that she had started eating again. Elena went on to add that after two weeks she stopped visiting the testatrix and only returned after a significant period. She did not say how long, merely that it was after some time and she discovered that the testatrix was in a worse condition than she had been before her admission to the Old Age Home. She elaborated by saying that whilst in the past, the testatrix could recognise her and would shake her hand, at the home she failed to recognise her and could not speak to her. The witness said that the testatrix just lay in bed, staring blankly at her without talking. Because of this lack of any communication between them, Elena said she stopped visiting the testatrix at the Home as there was no point. On the basis of the testimony of Elena and Maria Malan, the plaintiffs claim the relief mentioned.

[11] The defendants' case is simply based on the following testimony of a single witness, Johannes Stephanus Hugo. He is the Malan family attorney. He drafted three wills in all for and on behalf of the testatrix:

(a) A joint will of her and her husband dated 9 February 1988 in terms of which Alvin Malan was nominated the sole beneficiary of their estate;n

(b) A will dated 2 May 2001, in terms of which Mervin Malan or his issue *per stirpes* was nominated the sole beneficiary of the testatrix's estate;

(c) The will dated 20 August 2001.

On 20 August 2001 in response to her request he conducted on interview with the testatrix at the Old Age Home. She requested him to revoke the will dated 2 May 2001 and draft a new will in terms of which the Strauss family would be made major beneficiary of her Estate save for a sum of R20 000 which should be for her grandchildren.

[12] Hugo advised her that South African law did not permit farm property to be apportioned between different persons and that he could accommodate her wish by placing the major asset (the farm "Doringplaats") in a Trust which the Strauss family had set up for their children as capital beneficiaries. She agreed and so after agreeing ancillary matters, he returned to his office and compiled the will. He returned to the testatrix, who signed it in the presence of two nursing sisters who signed as witnesses in his and her presence after he had gone through the contents of each clause with her and after she had told him she was satisfied. All this happened on the same day – 20 August 2001. It was not disputed that the will was regular on the face of it.

[13] He told the Court that he had a "full" discussion with her about what she wanted to happen to her estate and property and she came across to him as someone who was in her sound and sober senses, who fully understood what he was

saying; she gave him specific instructions to seal and keep the will in safe custody and only be opened on her death. He conceded that the Strauss family were also his clients; that he had drafted the Trust Deed on their behalf and that he was during that period also involved closely with legal matters on their behalf. Despite stringent cross-examination he did not change his evidence that the testatrix understood the contents of the discussion he had had with her and that she knew what she was doing when she gave him instructions to draft a new will. He testified that according to his observations there appeared to be nothing mentally wrong with her at the time of the execution of the will. He explained that he would have known if she was mentally incapable due to his close professional relationship with her over the years. He had come to know her well and would have known if she had behaved contrary to the manner in which she normally conducted herself and/or exhibited conduct indicating she was not in a conscious state and/or not in her sound and sober senses when she made the will.

[14] He told the Court that he had no knowledge at all of the circumstances and events which had necessitated the testatrix's admission to the Old Age Home. He also testified that he did not enquire from the testatrix what those reasons were and more importantly why she had decided to change her will by disinheriting her blood relative, Mervin, her adopted son. Evidence of two affidavits, attested to by the two witnesses who signed the will, were tendered by counsel for the plaintiffs, as proof of the making of allegations relating to the mental capacity of the testatrix, but not as proof of the

truth of those allegations. They are received in that vein by this Court and will be dealt with and considered on that basis in deciding the dispute (see *African Organic Fertilizers and Associated Industries Ltd v Premier Fertilizers Ltd* 1948 (3) SA 233 (N) at 238; *Gonsalves and another v Gonsalves and another* 1985 (3) SA 507 (T) at 512G).

It was common cause that Hugo had drafted these two affidavits at the time he drafted the new will and that he commissioned the signatures thereof himself.

[15] The *onus* of proving the validity of a will, which is regular on the face of it, rests on the person attacking it and the standard of proof is that required in all civil cases, *viz* proof on a preponderance of probability (see *Kunz v Swart* 1924 AD 681 at 651; *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (AD) at 778H).

This common law *onus* has been codified by statute in the form of the Wills Act 7 of 1953. Section 4 of this Act 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

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of proof that he was mentally incapable at that time shall rest on the person alleging the same."

Thus both at common law and under the Wills Act 7 of 1953 the *onus* is on he or she who asserts invalidity to prove mental incapacity *at the time of its execution*.

[16] The question that arises is what test is to be employed in deciding whether this *onus* has been discharged. The answer lies simply in deciding the further enquiry of whether the testatrix was at the material time of sufficient intelligence, possessing sufficiently sound mind and memory for her to understand and appreciate the nature of the testamentary act in all its different bearings (see *Kirsten and others v Bailey and others* 1976 (4) SA 108 (C) at 109H–110).

In *Tregea and another v Godart and another* 1939 AD 16 at 19 Tindall JA held:

". . . 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."

At 50, relying on the test espoused by Cockburn CJ in *Banks v Goodfellow* 1870 LR 5 QB at 568, he went on to describe what he considered to be a sound and disposing mind:

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"'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 sufficient 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? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?'"

In his classic judgment in *Banks v Goodfellow*, *supra*, Cockburn CJ discussed the testamentary power:

"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his

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sense of right or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

He added:

"By the term 'a sound and disposing mind and memory' it has not been understood, that a testator must possess those qualities of the mind in the ugliest degree; otherwise very few could make testaments at all; neither has it been understood that he must possess them in so great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree enfeebled and yet there may be enough left clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

In *Battan Singh and others v Amichand and others* 1948 AC 161, 1948 (1) AER 152 the testator, whose mental state had been weakened through illness, excluded his blood relatives from inheriting his property in terms of his old will and testament. In an action for a declaration of invalidity, Lord Normond at 170 said the following of the test to be applied in such matters:

"A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of it and yet, if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of the relations and if

that forgetfulness was an inducing cause of his choosing strangers to be his legatees, the will is invalid . . ."

[17] In *Harwood v Baker* 3 MOO P.C. 282 the testator made a will in favour of his wife to the exclusion of other members of his family. At 290 of the report Erskine J held as follows:

". . . in order to constitute a sound disposing mind a testator must not only 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 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; and the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so fixed in the attention of the invalid as to shut out all others that might require consideration and therefore the question . . . is not whether Mr Baker knew when he was giving all his property to his wife and excluding all his other relatives from any share in it but whether he was at that time capable of recollecting who those relatives were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share in his property."

[18] I turn now to the application of the test for testamentary capacity to the facts of the present case. No medical evidence was placed before me of the testatrix's condition at any time immediately before, during or after her admission to the Old Age Home. But one crucial aspect of her physical and mental state is not in dispute and that is that it was the consensus of all concerned, namely, Maria Malan, Elena

Kokororopo and Dr Strauss that the testatrix's physical and mental condition was such that she was one in need of constant care as she was incapable of performing any act in order to take care of herself and/or the farm and her staff. She was unable to deal with financial matters and had to rely on Elena to tell her what wages needed to be paid. She was unable to perform any of the duties on the farm, nor wash, clothe or feed herself. She was unable to walk, could not sleep and behaved inappropriately by continuously shouting and screaming. She had suffered a complete lapse of memory as was indicated by her calling for Alvin despite her having buried him. She was unable to understand anything that was going on around her at the house or on the farm. This was in direct contrast to her character and personality as one who always took charge in the house and on the farm and issued the necessary instructions to have things working and in place. As a result of her complete lack of interest, a neighbour, one Grobbelaar, came in to assist her for a while. From this uncontested evidence it is clear that prior to her admission to the Old Age Home the testatrix lacked the disposing mind and memory required for testamentary capacity. Her memory was subnormal; this is evident from the evidence of the plaintiffs' two witnesses, which I accept without hesitation.

[19] The question is whether, despite Hugo's uncontested evidence, that she was in her "sound and sober" senses when he responded to her request to see him and that she "fully understood" his advice and gave specific instructions, the risk of mental enfeeblement due to sickness and old age

was not an inducing cause of her having preferred strangers (the Strauss family) rather than blood relatives (her grandchildren) to be the major beneficiaries of her estate. Was she capable of recollecting who her blood relations were at the time of the execution of the will, of understanding that they would have claims to her estate and of deliberately forming the intention to exclude them in favour of the Strauss family? That is the moot question. Elena Kokororopo is a completely independent witness who had no claim at all to any of the testatrix's possessions. She was just a caregiver with no motive to fabricate or embellish upon evidence. Her evidence which I accept unreservedly is that when she visited the testatrix in hospital after a period of some time had lapsed after her admission, she found the testatrix's condition to have worsened. She could no longer recognise Elena and she was unable to talk. Whilst it is not clear on the evidence precisely when with reference to the execution of the will in question, she made these observations, to my mind one thing is clear and that is whatever the reasons were for the testatrix's sudden improvement immediately after admission, her condition had not stabilised completely. Whilst she may well have been in her sound and sober senses and fully understood what Hugo conveyed to her, that is not the test of testamentary capacity. Elena's evidence was that Dr Strauss was the testatrix's doctor. He undoubtedly carried on treating her at the Old Age Home. This is borne out by Hugo's evidence that she had told him she wanted the Strauss family to inherit her property, because "they" had been looking after her. Under these circumstances with the attention of Dr and Mrs Strauss

(first defendant) thrust upon her, and her only surviving family (her grandchildren) out of the country being overseas in Holland, and given her history of mental and physical enfeeblement and infirmity, the testatrix was, in

my view, no longer capable on 20 August 2001, of fully and properly comprehending the extent of her estate; of recollecting and understanding the claims of her relatives thereon; and of deliberately excluding them from any share in her property. There is ample evidence that in addition to difficulties of speech and mobility (as testified to by Elena) there were other signs and indications of deterioration, which must, undoubtedly, have had a bearing on the testatrix's memory and powers of comprehension. Such facts as were elicited in the witness box do not show the probability of a lack of mental deterioration, but rather the opposite is true. I am satisfied that forgetfulness and a dullness of memory was an inducing cause of the testatrix appointing the Dennelaan Trust as the major beneficiary of her estate.

[20] I accordingly conclude that the motives, which led the testatrix to disinherit the two plaintiffs, were such as would probably not have had that result, were it not for the mental impairment she suffered as a result of physical infirmity due to old age and emotional disturbance associated with the passing of her son Alvin, who took care of her and the farm prior to his death. The probabilities were overwhelming, in my view, that in these circumstances, the testatrix was mentally incapable of executing a will on 20 August 2001. This will is accordingly set aside.

[21] One further aspect needs mentioning and this is the point taken by Mr *Van Rooyen* that the plaintiffs ought to be unsuited because no notice to substitute the second plaintiff, who is now a major, was given by the plaintiffs prior to judgment. During oral argument, Mr *Duvenhage* asked for such a substitution. As no prejudice would be occasioned to the defendants, the request for such a substitution is granted. There will accordingly be judgment for the plaintiffs as follows:

1. The will of the testatrix Charlotte Mary Salome Malan (born Oertel) is hereby declared null and void and is set aside;

2. It is declared that the said Charlotte Mary Salome Malan (born Oertel) died intestate;

3. First and second defendants are ordered to pay the costs of this action jointly and severally, the one paying the other to be absolved.