IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A 276/2017

In the matter between:

FREDERICK WESTERHUIS	First Appellant
CATHERINE WESTERHUIS	Second Appellant
and	
JAN LAMBERTUS WESTERHUIS	First Respondent
JAN LAMBERTUS WESTERHUIS N.O.	
(In his capacity as the Executor in the	
Estate of the late John Westerhuis)	Second Respondent
DERICK ALEXANDER WESTERHUIS N.O.	
(In his capacity as the Executor in the	
Estate of the late John Westerhuis)	Third Respondent
JAN LAMBERTUS WESTERHUIS N.O.	
(In his capacity as the Executor in the	

Estate of the late Hendrikus Westerhuis)	Fourth Respondent
PATRICIA WESTERHUIS	Fifth Respondent
MARELIZE VAN DER MESCHT	Sixth Respondent

Coram: Erasmus, Gamble and Parker JJ.

Date of Hearing: 20 April 2018.

Date of Judgment: 27 June 2018.

JUDGMENT DELIVERED ON WEDNESDAY 27 JUNE 2018

GAMBLE, J:

INTRODUCTION

[1] In the aftermath of the Second World War there was a large migration of European refugees to various parts of the world, including South Africa. Amongst that number were Mr. Hendrikus Westerhuis and his wife, Trish, her sister Ms. Jannetje Haasnoot and her husband who was known as “Hug” Haasnoot. The Westerhuis and Haasnoot families first shared a communal home in the Cape Town suburb of Claremont and later moved to Vredehoek on the slopes of Devil’s Peak where they lived in adjacent houses. The Haasnoots stayed at […]3 V. Avenue and the Westerhuis’ at number […]5. Access was gained from the one dwelling to the other via an inter-leading gate in the backyard.

[2] Ms. Westerhuis was the first of the elders in the family to pass away – she succumbed to cancer in 1984 - while “Oom Hug” (as he was fondly known) died in 1997. The two surviving spouses (Oom Henk and Tannie Jannie, as they were

referred to in the trial court, and to whom I shall therefore similarly refer) lived alongside each other for many years in a harmonious relationship akin to that of brother and sister. Tannie Jannie was childless while Oom Henk fathered six children - four sons (Jan, John, Derick and Frederick a.k.a Freddie) and two daughters (Hendrika and Carla).

[3] The Westerhuis children grew up with their aunt as an important figure in their lives. There were regular daily visits to her house during the week for coffee and sweet delicacies, and a ritual every Sunday where tea and cake was enjoyed after the entire clan had attended church in the City Bowl. Religious holidays such as Christmas and Easter were also cause for great celebration, mostly at number 13. As the children grew up and moved away they maintained a close relationship with their aunt. They would contact her telephonically on a regular basis and often drop in for a social visit if they were in the area. Evidently her supply of coffee and cake was endless.

[4] Mrs. Haasnoot struggled financially. Her late husband had lost his life savings with the collapse of the Masterbond investment scheme and she was left with a small Dutch social pension. Mr. Westerhuis and the older sons all helped out financially when they could. Mrs. Haasnoot was a passionate animal lover, enjoying daily walks with her dogs in the nearby De Waal Park and she supplemented her meagre income by providing day-care services to other dog owners. She also kept cats and caged birds at her house.

[5] By all accounts, Mrs. Haasnoot was a feisty and fiercely independent woman until about September 2013 when she was hospitalised at the Somerset

Hospital in Green Point after suffering a fall at home. She seems never to have fully recovered from that incident and after her discharge from hospital spent long periods of time at home convalescing in bed, the circumstances whereof will be dealt with more fully hereunder. On 4 November 2013, Mrs. Haasnoot was admitted, in an emaciated condition, to Groote Schuur Hospital where she died on 7 November 2013 at the age of 86. For the sake of convenience I shall hereafter refer to Mrs. Haasnoot as *"the deceased"* or "*Tannie* Jannie", and to the Westerhuis children and their spouses/partners by their first names so as to avoid confusion.

THE DECEASED'S WILLS

[6] On 16 January 2013 the deceased duly attested a last will and testament which for the sake of convenience will hereafter be referred to as *"the first will".*[1] In terms of this will Jan and John were appointed executors to the estate of the deceased, while the beneficiaries were to be Hendrikus, John, Patricia and Marelize. The proceeds of the deceased's home after the sale thereof were expressly incuded as an asset in the will.

[7] On 10 February 2014 the Master duly issued letters of executorship to Jan and John pursuant to their appointment under the first will but just three days later Freddie lodged a will dated 17 October 2013 with the Master pursuant whereto he had been appointed the sole executor in the deceased's estate. For the sake of convenience this will be referred to as *"the second will".* Save for a bequest of

[1] This was, however, not the deceased's first will: the evidence before the trial court suggests that she made no less than eight wills between 1997 and her death.

R50 000 to Hendrikus, the second will left the deceased's estate to Catherine. In terms of clause 1.2 of that will her assets were described as –

> "*Alle orige kontant, huisinhoud, troeteldiere, voertuig en roerende bates in my huis, motorhuis en buitekamer te Virginia laan (sic) 13, Vredehoek, Kaapstad…"*

In clause 3.1 the deceased directed that, *inter alia,* "die *volmag van enigiemand op my Deed of Transfer van my huis, behalwe myself, verval hiermee…*"

[8] In the result, the Master informed Jan and John on 25 February 2014 that the first will had been revoked by the second will and gave them notice that they would be removed as executors in the deceased's estate unless they obtained an order to the contrary in terms of s54(1)(b)(i) of the Administration of Estates Act, 66 of 1965.

[9] Thus spurred into action, Jan and John approached this court on notice of motion on 26 March 2014 seeking various orders aimed at declaring the first will to be the deceased's last will and testament, declaring the second will to be invalid and directing the Master to accept the first will and confirm their appointment as co-executors in the deceased estate. Jan's wife Patricia (a.k.a. Patsy) and Freddie's first ex-wife Marelize van der Mescht were joined as co-applicants in the matter by virtue of their respective interests in the benefits conferred on them in the first will, while Freddie and his third ex-wife, Catherine Westerhuis (who was co-habiting with Freddie notwithstanding their prior divorce) were cited as co-respondents, the latter by virtue of the fact that the second will effectively left the deceased's entire estate to

her. Freddie and Catherine opposed the application and contended for the validity of the second will.

PROCEEDINGS IN THE TRIAL COURT

[10] Initially the intention of the parties was to request the trial court to determine the matter on the papers but when it became apparent that there were significant disputes of fact on both sides, a joint decision was taken for the hearing of oral evidence. The matter ultimately came before Sher AJ (as he then was) and in a thorough and detailed judgment dated 17 March 2017 the court found that the second will had been duly attested to by the deceased, save for a manuscript amendment thereto which was found to have been irregular and which was rejected by the trial court. As will be seen hereunder, that amendment related to the incorporation into the second will of the deceased's property at […]3 V Avenue.[2] In the result the trial court directed that such immovable property fell outside of the provisions of the second will and was to be subject to intestate succession.

[11] Freddie and Catherine were dissatisfied with the order of the court below and sought leave to appeal the judgment. Jan, John and the other beneficiaries under the first will were similarly dissatisfied and sought leave to challenge the ruling by way of a cross appeal. Both applications were granted and the parties are now before this court with the leave of Sher AJ. I should point out that there were two further fatalities along the way. The *paterfamilias*, Mr. Hendrikus Westerhuis, died

[2] The amendment purported to vary the word *"huisinhoud"* by the deletion of the suffix *"inhoud" and* the substitution of the phrase *"erf […]"* therefor so that the amended clause referred to *"huis erf […]"*

during 2015 and was unable to testify at the hearing, while John Westerhuis (who did testify before Sher AJ) died in December 2017.

[12] In the result when the matter came before this court at the end of January 2018 it was necessary for the matter to be postponed to enable the executors in John's estate to be joined in the proceedings. Hence, the citation of Jan in two representative capacities in this matter - firstly as the executor in the estate of his late father (who had an interest in the first will) and secondly as the co-executor with Derick (who is also now before this court), as the nominated executors in John's will. Jan continues to litigate in this matter in his personal capacity together with Patsy and Marelize, who seek to benefit under the first will.

ORAL EVIDENCE IN THE TRIAL COURT

[13] It is necessary, in my view, to comment briefly on the nature of the proceedings before Sher AJ in light of the decision of the parties not to call certain witnesses in those proceedings. When the matter originally came before this court for hearing it was allocated to Salie-Hlophe J as an opposed motion on the semi-urgent roll. Her Ladyship evidently came to the conclusion that there were significant disputes of fact which were incapable of determination on the papers and in such circumstances the parties were obliged to resort to the provisions of Uniform Rule 6(5)(g) which is to the following effect.

> *"6(5)(g) Where an application cannot be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the*

generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any opponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definitions of issues, or otherwise."

[14] The agreed procedure chosen by the parties was –

"1. …..(F)or the hearing of oral evidence with regard to:

(a) the validity of the execution of the second will of the Deceased, dated 17 October 2013…;

(b) the validity of the Deceased's alleged signature on the said second will;

(c) the validity of the amendment to paragraph 1.2 of the said second will;

(d) the First and Second's (sic) Respondent's (sic) proposed counter-application for an Order in terms of Section 2(3) of the Law of Succession Amendment Act, Act 43 of 1992, declaring that the amendment referred to in paragraph 1(c) of this Order was intended to be the Deceased's will/amendment and ordering the Master to accept the second will, inclusive of such amendment, notwithstanding that the amendment does

not comply with the prescribed formalities in that it was not witnessed.

2. *That the notice of motion shall stand as a simple summons.*

3. *That the answering affidavits of the First and Second Respondents shall stand as a notice of intention to defend.*

4. *That the First and Second Respondents are granted leave to counter-apply, or to conditionally counter-apply, as the case may be, for an Order in terms of Section 2(3) of the Law of Succession Amendment Act, Act 43 and 1992 declaring that the amendment referred to in paragraph 1(c) of this Order was intended to be the deceased's will/amendment and ordering the Master to accept the second will, inclusive of such amendment, notwithstanding that the amendment does not comply with the prescribed formalities in that it was not witnessed and that such counter-application shall be in the form of a Counter-Claim as provided for in paragraph 6 below.*

5. *That the Applicants' Declaration shall be served and filed by Friday, 31 July 2015.*

6. *That the First and Second Respondents' Plea and Counterclaim (if any) shall be served and filed by Friday, 21 August 2015.*

7. *That the Applicants' plea to the Respondents' counterclaim (if any) shall be served and filed by Monday, 31 August 2015.*

8. *That the Applicants and the First and Second Respondents shall deliver their discovery affidavits by Friday, 11 September 2015.*

9. *That the Applicants shall deliver their expert notices (if any) by Friday, 25 September 2015.*

10. *That the First and Second Respondents shall deliver their expert notices (if any) by Friday 9 October 2015.*

11. *That the further conduct of trials, as set out in the Uniform Rules of the High Court, shall thereafter apply.*

12. *That only the persons who have deposed to affidavits in this matter and the experts, for which expert notices are filed as stated hereinabove, may be called as witnesses.*

13. *That, in addition to the persons mentioned in paragraph 12 above, the following persons may be called as witnesses:*

    13.1 Sergeant Jean-Pierre Toua (the investigating officer in the inquest into the cause of death of the Deceased) with regard to such investigation and the deposing of certain affidavits already filed of record;

13.2 Constable Auxley Moleleni (sic) of the South African Police Service with regard to and connected with the matters canvassed by him in the affidavit signed by him on 19 September 2014 at Cape Town.

14. That no witness, other than those mentioned above, may be called to give evidence in this matter without the leave of this Court or a Judge in Chambers, which leave may be sought only after the opposite party has been given reasonable notice of the date and time when such leave will be sought and such notification is accompanied by a summary of the proposed evidence of the witness sufficiently to allow an assessment of the justification for allowing the said witness to be called….."

[15] As can be seen, the procedure which the parties agreed upon is really an amalgam of two of the options available under Rule 6(5)(g). On the one hand, a party may adopt the approach in ***Metallurgical*** [3] by precisely defining the issues to be traversed in oral evidence while limiting the witnesses who will testify to those who have already deposed to affidavits, unless the court (upon application) directs otherwise. In such event the cause of action and legal issues will be determined from the affidavits already filed.

[16] On the other hand, a party can simply refer the application to trial and make provision for the filing of pleadings, as if the founding papers are no more than a

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[3] Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co. (Pty) Ltd 1971(2) SA 388 (W) at 396G- 397B

simple summons setting out the cause of action in brief terms.[4] In such circumstances, one would then usually continue with the matter as if it were an ordinary trial with the pleadings determining the issues and such witnesses as may be required to provide the evidence to be called in due course. The usual rules relating to pre-trial procedures would then also apply and it would not be necessary to legislate for discovery, expert notices and the like.

[17] It seems to me that what the parties here had in mind was to specifically limit the number of witnesses to testify at a trial in which the issues were yet to be determined through the filing of pleadings. That approach begs the question as to what would happen if the issues traversed in the pleadings then lead to the necessity for the calling of other witnesses. Why, in such circumstances, should a party's right to call witnesses in support of its case be limited by the disclosure in advance of the witness' testimony and the express authorization of a judge?

[18] But, to the extent that Rule 6(5)(g) gives the court a wide discretion to "*make such order as it deems fit with a view ensuring a just and expeditious decision",* it is arguable that that is just what the parties sought to do. In any event, what is clear from the agreed procedure is that the only evidence which would be admissible for adjudication by the trial court was that which had been delivered *viva voce* and subjected to cross-examination. While an affidavit already filed of record could undoubtedly be used for purposes of attacking the credibility or reliability of a witness under cross-examination, it is clear that the parties contemplated that a litigant was not entitled to rely on such affidavit evidence in the absence of the deponent being

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[4] Haupt t/a Soft Copy v Brewers Market Intelligence (Pty) Ltd and others 2006 (4) SA 458 (SCA) at [19]

called to testify. In argument before us, Mr. Walter for the appellants, accepted that no reliance could be placed on evidence contained in any of the affidavits before the trial court, unless the deponents to such affidavits had given *viva voce* evidence.

THE ISSUES BEFORE THE TRIAL COURT

[19] Sher AJ delivered a detailed judgment and dealt comprehensively with all of the material facts and circumstances. It is therefore not necessary for purposes of this judgment to recite the facts in their minutiae. Aside from the issues defined by the parties in para 1 of the order of referral to oral evidence, the declaration, the plea and counterclaim fall to be considered as regards defining the substance of the *lis.* As I understand it the issues were as follows:

- The parties were *ad idem* that the first will complies in all respects with the material provisions of the Wills Act, 7 of 1953 (*"the Act"*).

- Consequently, if the second will is found to be invalid and of no force and effect, the deceased's estate falls to be administered in accordance with the provisions of the first will by Jan (and a further executor in the place of John, who has since died).

- The second will contains various signatures which are alleged to be those of the deceased, as well as two witnesses, evidently police officers who were on duty at Cape Town Central Police Station on 17 October 2013, the day that the will was allegedly executed by the deceased.

- The respondents contend that the signature on the second will, which is alleged to be that of the deceased, is in fact not hers and rely on the evidence of a handwriting expert in that regard.

- There is a manuscript alteration to clause 1.2 of the second will which is accompanied by only one signature – allegedly that of the deceased – which was not countersigned by any of the police witnesses.

- It is common cause that the absence of the signatures of the 2 police witnesses verifying the alteration of clause 1.2 renders the alteration ineffective pursuant to the provisions of s2(1) of the Act.

- Unless the court exercises its discretion under s2(3) of the Act and orders the Master to accept the alteration to clause 1.2, the alteration is of no force and effect.

- The respondents' case before the trial court was not that the second will was executed while the deceased was of unsound mind or subjected to duress or undue influence.

[20] In his judgment Sher AJ found that the alteration to clause 1.2 was of no force and effect because it had not been properly witnessed. The trial court was not convinced that the intention of the deceased in relation to the property at […]3 V Avenue had conclusively been established and in the circumstances, the court refused to exercise its discretion under s2(3) to condone the non-compliance with the provisions of the Act. The court was, nevertheless, satisfied that the second will was

otherwise properly executed and valid *sans* the amendment. In the result, Sher AJ held that the deceased's property at […]3 V Avenue had not been disposed of in the second will and that it fell to be disposed of in accordance with laws relating to intestate succession. The focus of the case in the trial court was really what transpired at the Cape Town Police Station when the second will was signed. But before dealing with that event it is necessary to contextualize it.

BACKGROUND FACTS

[21] Much evidence was led before the court *a quo* about the facts and circumstances which preceded the signing of the second will and as much was said about the relationship between the Westerhuis siblings, their spouses and the older generation in the extended family. As these matters go there was much bile spilled between the parties, both in the witness box and beyond, and it is clear that there were essentially two camps in this case. I shall attempt to summarise just the salient points.

[22] As I have said, there was an "*open door*" arrangement between no's […]3 and […]5 V Avenue. Accordingly, when Jan or John or one of the sisters visited their father they might pop in to their aunt's house for coffee and a chat. Use was made of the back garden gate and they all knew where the key to the security gate for access through the kitchen door was hidden. Those siblings evidently also made regular contact with their aunt telephonically who seems to have been fond of them all. Jan and John and their spouses lived in the northern suburbs of the Peninsula but it was no inconvenience for any of them to travel to the City Bowl to see Tannie Jannie.

[23] Freddie, however, was shunned by his older siblings. He had a dubious past involving some dodgy deals (he was said, for example, to have misled even his father in relation to procuring his signature on a suretyship) and had done time for sexually molesting a daughter of a previous marriage. And so, while Jan and John were regular visitors at their father's home they had no contact with Freddie, either at the family home or at the farm which he occupied near Montague. This notwithstanding, it seems Hendrikus Westerhuis still retained a soft spot for his youngest child and was accommodating and trusting of Freddie, much to the chagrin of Jan, John and the others. Freddie has had three marriages, the most recent of them to Catherine, the second applicant herein. As their respective dates of birth reflect, in October 2013 Freddie would have been 45 years of age, while Catherine was then just 21.

[24] During 2013, Freddie had had no contact with Jan or John – they were to all intents estranged from each other. Jan testified that on Saturday 7 September 2013 after he heard that Tannie Jannie had a bad fall at her home and was taken to Somerset Hospital for treatment, he and Patsy immediately went to visit her. He further testified that when he and Patsy went back to visit Tannie Jannie the following day, he saw Freddie walking into the hospital and refused to accompany Patsy to the patient's bedside. Jan went in later and noted that his aunt was in a serious condition. Upon enquiry, Jan said, one of the nursing staff told him that Tannie Jannie was in a bad way and would be in hospital for a while as she needed physiotherapy and the like before she could be discharged.

[25] Jan stated that he was most surprised to hear from his father late on Sunday 8 September 2013 that his aunt had been discharged from hospital prematurely and shortly after their visit that day. He was even more surprised when he found out that Freddie had managed her discharge, seemingly in the face of medical advice to the contrary. When Jan and Patsy then went to visit Tannie Jannie at home thereafter they were dumb-founded to find that Freddie and Catherine had moved in with her. Jan said that upon enquiry the deceased told him Freddie had sold up his business in the Boland and that he and Catherine (whom she erroneously referred to as "*sy vroutjie"*, believing they were still married) needed a place to stay for a few days. Jan was highly suspicious of this turn of events given his innate mistrust of Freddie.

[26] On 9 September 2013, Patsy (a primary school teacher) went to visit Tannie Jannie alone in the afternoon after school had closed. She testified that the deceased was mobile and in pain but seemed to be her feisty old self and went on to say that the deceased retrieved, from underneath a mattress in one of the bedrooms, a bag containing the original title deeds to the property and the original of the first will. Patsy said that the deceased told her to take the documents, make copies thereof and to return a copy to her. The deceased further instructed Patsy to give a copy of the will to each person named therein and to keep the originals because Freddie "*had moved in with the child"* - obviously a reference to Catherine. Patsy said that when she took the documents to the Parow police station to be certified, the police official inadvertently stamped the original will as if it were a copy and so she wrote the word *"OORSPRONKLIKE* " on it.

[27] Two days later Freddie's former wife Marelize van der Mescht visited the deceased who told her that she had given the original will and title deeds to Patsy for safekeeping and had instructed her to make copies thereof since "*she did not trust any Westerhuis".* Marelize testified that she also came to the conclusion that the deceased's condition was improving.

[28] Patsy produced her diary which confirmed her evidence that she had visited Tannie Jannie on several occasions between 9 September and Saturday, 19 October 2013. She also testified that she returned copies of the title deeds and will to the deceased on 12 September 2013. She went on to say that during the course of a telephone conversation on Sunday, 20 October 2013 the deceased suddenly accused her of taking her property and of stealing from her. Patsy assumed that this was a reference to the title deeds and will. She said that she was most taken aback by these accusations and arranged to visit her aunt later that evening. However, during that visit the deceased made no mention of earlier accusations and carried on as if nothing had happened at all.

[29] John testified that he also visited his aunt that Sunday morning, 20th October 2013, together with his girlfriend and her four-year-old child. The parties sat outside the back door drinking coffee in the shade of a lean-to when he looked up and noticed what appeared to be a video camera mounted directly above the door. He was curious and pointed it out to his aunt who initially appeared oblivious thereto but later told him that Freddie had installed an alarm system which was connected to a red light which went on in his bedroom. The deceased also told John that Freddie had

said that he was trying to catch an unknown person who was using the outside toilet on the property.

[30] There was much testimony on this issue but it is not necessary to go into detail thereon. Suffice it to say that Freddie had effectively bugged the house using video and audio equipment in order to monitor what was being said, by the deceased in particular. Reams of transcripts were produced at the trial relating to what was allegedly said inside no. […]3 over the following number of weeks. These were not proved in evidence by Freddie or Catherine and are accordingly inadmissible hearsay, save for a concise portion thereof which was put to Jan in cross examination (and to which he was therefore able to respond) as regards his own utterances in the house. The transcript of any remarks on the part of Tannie Jannie, Freddie and/or Catherine remain inadmissible hearsay

[31] John testified that after the discovery of the bugging device there was an argument with Freddie, during which he raised concerns about Freddie's paedophilia and the possibility that the hidden camera's might be used to spy on his young daughter when they visited their aunt. These accusations were very upsetting for Tannie Jannie who responded hysterically. She complained that John did not know what was really happening with her and intimated her concerns that Freddie and Catherine were going to sell her house and either put her in an old age home, or worse still, on the street.

[32] John testified that he asked his aunt whether she had signed any documents recently to which she replied in the negative, saying that she couldn't sign anything because her hand was too stiff. This statement raises a red flag given that

the second will had allegedly been executed just a few days before, together with a pair of deeds of sale in respect of no. […]3. The evidence suggests that the deceased had no recollection of these events.

[33] John was concerned about his aunt's welfare while seemingly under the control of Freddie and Catherine and took it upon himself to draw up a series of documents intended to protect her and her estate against what he considered to be undue influence and maltreatment of her by Freddie. These documents were to be signed by his aunt and were intended to be public declarations by her to the effect that -

- No one was to prevent her having contact with her family;
- She was not to be declared senile by any person without the intervention of a doctor and the intercession of her chosen executors (Jan and John);
- She was not to sign any legal documents in the absence of her chosen executors, who were required to counter-sign same;
- Any power of attorney signed by her would not be of any force and effect unless witnessed and counter-signed by the chosen executors;
- She wanted to stay at no.[…]3 until her death and did not want to be transferred to an old age home;

- She authorized her executors to have free access to her house to look after her and her pets;

- Any persons residing in no. […]3 at the time of her death would be required to vacate the premises; and

- John would be allowed to rent the garage at no. […]3 in exchange for a 150kg bag of bird seed (or the cash value thereof) per month.

[34] John further testified that on Monday 21 October 2013, when he took the documents to the deceased's house to be signed, he was unable to gain access through the rear security gate because a removable lock had been inserted therein. He left and when he came back a little while later he surprisingly found the house open and unattended. He went in and gave the documents to his aunt, asking her to read them and sign if she was happy with the contents. He then left.

[35] In the result, the documents were never signed by Tannie Jannie but they somewhat predictably landed up in the possession of Freddie who subsequently took active steps to preclude John and Jan from gaining access to their aunt's house by taking out a domestic violence interdict at the local magistrates' court. This was precipitated by an event on 23 October 2013 when John, Jan and their father were unable to gain access via their customary route through the back security gate. An acrimonious altercation ensued between John and Freddie during which mutual filial recriminations were exchanged and threats of physical violence made by Jan. Freddie was accused, *inter alia*, of keeping Tannie Jannie hostage in her own home, as if she

was in a prison. During this time the deceased emerged on crutches, was described as ghostly white and had to support herself on a cupboard. Her physical condition was the cause of great concern for John and the others but they were unable to come to their aunt's assistance having been locked out of the premises.

[36] Patsy testified that she saw Tannie Jannie sometime towards the end of October 2013 when Freddie eventually gave her access to the house after she had threatened to call the police if he did not open up. Patsy visited the house again on Sunday, 3 November 2013 and reported that the deceased's condition was poorly. She had evidently complained of stomach pain and nausea and said that she had been dosed with a large quantity of pills. Freddie rejected a suggestion that the deceased should be examined by Patsy's general practitioner, saying that he would call a doctor of his choice if the need arose.

[37] Patsy's visit on Sunday, 3 November 2013 was the last face-to-face contact that anyone from the Westerhuis family (other than Freddie) had with Tannie Jannie. On Monday 4 November 2013, Patsy spoke telephonically with her and said that the deceased told her that she was all right but very tired. As appears from the hospital notes, Tannie Jannie was anything but well at that time. Attempts to reach her telephonically on 5 and 7 November 2013 were unsuccessful because the phone remained unanswered

[38] On 8 November 2013 Jan was informed by his sister Carla that Freddie had phoned her and reported that Tannie Jannie had died the previous day. The family members were distraught about this turn of events and the various siblings hastened to the house at no. […]3. On the way the assistance of a local police colonel

was enlisted as the parties anticipated difficulty in obtaining access to the house. On arrival they were met with a scene which can only be described as ghoulish and bizarre.

[39] The front gate was locked, Freddie was on the patio with others but refused to open the gates and provide access to his siblings and their spouses. Two recently laminated notices had been put up at the front gate. One of them showed a photograph of the deceased with her dogs in the park and contained a short obituary to Tannie Jannie. It recorded that she had died on 7 November 2013 and that any persons wishing to attend her funeral were to RSVP before 11 November 2013 in light of the fact that the funeral date was yet to be finalised. The document was given under the hand of the "*Executor of Tante Jannetjie Haasnoot Estate: Frederick Westerhuis*", and a telephone number and banking details were conveniently furnished for those wishing to contribute towards the cost of the funeral.

[40] The second notice was more ominous, and read as follows –

"WARNING

Private Property.

Do not enter.

No fighting allowed.

Respect Tante Jannie's last wishes.

All the property now belongs to C.R.E.Westerhuis.[i.e.Catherine]. *Old will was officially cancelled. New will applies and protection orders have been issued. SAPS Cape Town knows all about this and will patrol regularly as well ready (sic) and on speed dial. Please adhere to this notice so that Tante Jannie can be respectfully laid to rest. Executor of Estate: F.Westerhuis."*

[41] After a while the police colonel was permitted to enter the property and he later emerged with a copy of the second will which he handed to the family. From this the other siblings were able to see that their worst nightmare had become a reality: that the deceased had made a will on 17 October 2013 in which Freddie was appointed the executor of her estate, all of which had been left to Catherine. Emotions ran high in Virginia Avenue with threats of violence being uttered. But what really seems to have peeved the other siblings most was that they had not been told of Tannie Jannie's hospitalization: they all had been led to believe that she had died at home.

[42] The parties (*sans* Freddie and Catherine) then rushed through to Groote Schuur Hospital expecting to find the body of their recently departed relative still in the hospital mortuary. To their amazement they discovered that the body had been spirited away by a local undertaker the night before. And so the parties hastened to the funeral parlour where there was yet another twist in the tale: the family were informed that preparations were being made for an imminent cremation of their beloved aunt. An attorney was contacted and the cremation was put on hold while an autopsy was conducted. Later, Patsy and her daughter laid a charge of

murder but nothing became of that. The deceased was eventually buried alongside her late husband, in accordance with her stipulated wishes, some months later after a court order for the release of her body was granted.

[43] The Groote Schuur hospital notes show that the deceased was admitted at around midnight on 4-5 November 2013. According to the history furnished to the medical staff by Freddie his aunt had been vomiting for some four days before her admission and on examination she presented as "*unwell*", dehydrated and with extremely low blood pressure. There was tenderness over the abdomen, which was distended, and the following day staff noted the presence of a pressure sore in the area of her lower back and buttocks. The clinical notes made on 5 November 2013 record that the patient had been bed-bound for two months and that there was excessive weight loss and dehydration. The records reflect that she was certified dead at 17h30 on 7 November 2013.

[44] A post-mortem examination was conducted on the body on 14 November 2013 during which the pathologist recorded findings of atrophy of the large bowel and liver, features which he said could be consistent with starvation. However, the pathologist declared that he was unable to determine the cause of death on the basis of the post-mortem examination alone.

[45] So much for the history of a grisly tale which has all the hallmarks of a Hitchcock thriller, but which is sadly all true. I turn then to examine the validity of the second will in the context of the law usefully set out by Sher AJ in his judgment.

THE APPLICABLE LEGAL PRINCIPLES

[46] The point of departure is the Act which prescribes the formalities for a valid will. In terms of s2(1)(a) thereof the will of Tannie Jannie was to have been signed by her (or by some other person in her presence and under her direction) at the end of the document. That signature must have been witnessed by 2 or more competent persons who must have witnessed the testator placing her signature on the document in their presence with each such witness being present at that time. Thereafter, the witnesses were required to attest and sign the will in the presence of the testator and each other, and since the will consists of more than one page, the testator and the witnesses were each required to sign at the foot of each page, once again in the presence of each other and the testator.

[47] In terms of s2(1)(b) of the Act, no amendment to a will is valid unless such amendment has been identified by the testator through her signature and similarly witnessed by the witnesses thereto, all of whom must once again be in one another's presence when the alteration is made and attested. In terms of s2(2) of the Act, any amendment made in a will shall be presumed to have been made after the execution of the will, unless the contrary is proved.

[48] Under s2(3) of the Act the High Court is given the power to condone any non-compliance with the formalities of s2(1).

> "*S2(3) If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall*

order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act No 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).”

[49] The subsection has been the subject of much litigation from which the following guiding principles emerge. The statutory formalities relating to the execution of a will generally are aimed, on the one hand, at achieving certainty in relation to the testator’s final instruction as to the disposal of her estate [5], and on the other hand to preclude fraud.[6] Where that “*final instruction*” does not meet the requisite statutory precepts the court is given a discretion to condone non-compliance therewith. In doing so, the court will interpret s2(3) strictly, in particular, because if the court is persuaded to make a positive finding to condone, the subsection has peremptory consequences[7]. Accordingly, once the court is satisfied that there is a condonable formal defect in attestation it has no option but to refer the matter to the Master for acceptance of the document as a valid will.[8]

[50] The Supreme Court of Appeal has stated repeatedly that, when applying s2(3), the real question is whether the deceased intended the document (or any amendment) thereto to be her will. And so, the court is required primarily to ascertain whether at the time of drafting or executing the document, or any amendment thereto,

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[5] Letsekga v The Master and Others 1995 (4) SA 731 (W) at 735F-G.

[6] Henwick v The Master and Another 1997 (2) SA 326 (C) at 334J.

[7] “ *shall order the Master* “

[8] Ex parte Maurice 1995 (2) SA 713 (C) at 716E – 717B; Anderson and Wagner NNO and Another v The Master and Others 1996 (3) SA 779 (C) at 785G.

as the case may be, the necessary intention on the part of the testator has been established. Such an enquiry entails an examination of the document in the context of the surrounding facts and circumstances[9] and the party so alleging must show unequivocally that the intention existed concurrently with the execution or drafting of the document. However, before a court can be persuaded to exercise its discretion under s2(3) it must be satisfied that the document has been duly signed by the testator (or someone acting on her express directions).

THE EVIDENCE PRESENTED RELEVANT TO THE ATTESTATION OF THE SECOND WILL

[51] Neither of the appellants testified before the trial court and, as I have already said, on appeal before us Mr. Walther for the appellants accepted, correctly in my view, that the affidavits deposed to by Freddie and Catherine in the application proceedings could not be considered as part of the factual matrix in the matter. The failure of the appellants to testify in the trial court in circumstances where they were available to be called and where their evidence was highly material entitles an adverse inference to be drawn against them that they were concerned that such evidence might lead to facts prejudicial to their case being exposed.[10]

[52] The appellants' case relied heavily on the evidence of a police officer attached to the uniform branch of the Cape Town Central Police Station, Const.

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[9] Van Wetten and Another v Bosch and Others 2004 (1) SA 348 (SCA) at [16]; De Reszke v Marais and Others 2006 (2) SA 227 (SCA) at [12].

[10] Elgin Fireclays Ltd v Webb 1947 (4) SA 744 (A) at 749- 750; Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A) at 624E.

Michael Nohako, who was on duty at the Community Service Centre (the charge office of old) on the day that the deceased allegedly arrived to sign the second will, 17 October 2013, and who allegedly oversaw the signing of the second will in the presence of the appellants and the deceased, and a Const. Ndlokweni who was later called over by Nohako to sign as the second witness. Ndlokweni was not called to testify.

[53] Subsequent to the alleged attestation of the second will, it is claimed by the appellants that the deceased executed a codicil to that will on 4 November 2013 at her house. It will be recalled that later in that day Tannie Jannie was admitted to Groote Schuur Hospital and the evidence of Const. Oxley Mdleleni was presented in an attempt to persuade the trial court regarding the validity of the codicil and two powers of attorney allegedly signed in his presence by a very ill Tannie Jannie who was confined to bed at the time.[11] In addition to the police evidence, the appellants called a certain Ms. Cheryl Hilse whose dogs the deceased had looked after for a number of years. Her evidence related to the mental condition of Tannie Jannie in the months preceding her death.

[54] Finally, there is the evidence of Mr. Basie Potgieter, a Cape Town attorney specializing in conveyancing, who was actually the first witness called by the appellants. He testified regarding 2 deeds of sale presented to him by Freddie and Catherine in mid-October 2013 in terms whereof the deceased purported to sell her house to Catherine, firstly for R500 000 and just two days later for R1,5m, in circumstances where no money would effectively have changed hands. I shall go into

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[11] The validity of the codicil, of course, only to be considered if the second will is found to be valid.

these transactions in a little more detail later. Suffice it to say at this stage that Potgieter testified that he smelt a rat at the time and took it upon himself to visit Tannie Jannie on his way home from work one day so as to satisfy himself as to the integrity of the second deed of sale. During that visit, said Potgieter, the deceased signed the second deed of sale in respect of her property in his presence, and he went on to testify regarding her mental state and her apparent intentions regarding the disposal of her immovable property.

[55] The evidence presented on behalf of the respondents can be classified in three broad categories. Firstly, there was the opinion evidence of a handwriting expert, Dr Cecilia Rosa, which cast serious doubt over the integrity of the signatures attributed to Tannie Jannie in the second will. Then there was the evidence of a detective stationed at the Cape Town Central Police Station, Sgt. Jean-Pierre Toua, who was tasked with investigating the death of the deceased with a view to either a potential prosecution or an inquest, who interviewed Nohako in the process and took a statement from him in July 2014 regarding the events which transpired in the Community Service Centre on 17 October 2013. Finally, the respondents presented the evidence of the various siblings and spouses who had brought the application attacking the validity of the second will (Jan, John, Patsy and Marelize), to whom I shall refer collectively as *"the siblings*". Freddie, of course, does not fall under this rubric.

THE EVIDENCE OF DR ROSA

[56] By far the bulk of the record of proceedings before the trial court is taken up with the evidence of Dr Rosa. In his judgment, Sher AJ commented favourably on

Dr Rosa's level of expertise and on the persuasiveness of her opinion. I can do no better than to quote directly from para 18 of the judgment.

> "*[18]…[Dr Rosa] impressed me as a careful witness and a professional who had attempted, to the best of her ability, to analyse various handwriting specimens and the documents on which they appeared, and she was both consistent in her testimony at the same time, fair in her concessions. There is no reason for me to believe, on the evidence before me, that Dr Rosa deliberately attempted in any way to put up a false case on behalf of the plaintiffs and I was unable to discern any irrationality or illogicality between her findings and the scientific methods she adopted to arrive at them. She set out a number of reasons why, based on accepted principles of handwriting analysis, she had concluded that the signature of the late Mrs. Haasnoot on the two (original) second wills and on the powers of attorney were inconsistent and why she believed they had not been made by Mrs. Haasnoot. In this regard she compared the questioned signatures with those of the signatures and documents previously signed by Mrs. Haasnoot and illustrated the variances therein by means of an impressive photographic presentation…. It was not suggested to Dr Rosa during cross-examination that what she described and what she saw was not so."*

[57] Why then was Dr Rosa's evidence not conclusive in relation to the invalidity of the second will? Sher AJ explained his reluctance in implicitly relying on the expert testimony as follows.

"*[18]…[T]he principal difficulty which arises from her evidence, as was foreshadowed by defendant's counsel during her cross-examination, is that her findings stand in stark and direct contradiction to the evidence which was tendered on behalf of the defendants. In this regard the defendants called a number of witnesses…who testified that the signatures on a number of the questioned documents, including the two duplicate second wills as well as the codicil and the powers of attorney, had in fact been made by Mrs. Haasnoot in their presence. As such, Dr Rosa quite properly and fairly conceded that her findings would inevitably have to yield to such evidence, if it was accepted by the court as being credible and reliable. But, although this means that it is not necessary for me to traverse the evidence of Dr Rosa in any great measure, it does not mean that it necessarily has no value at all in the context of the evidence as a whole and the issues that I am called upon to decide. I will revert to this aspect later."*

THE ALLEGED SIGNING OF THE SECOND WILL

[58] In having regard to the background and surrounding circumstances relating to the execution of the second will, Sher AJ relied extensively on an affidavit made by Freddie in the motion proceedings. This the trial judge was not permitted to do given that the matter ultimately proceeded by way of action. At the trial stage the affidavits constituted inadmissible hearsay and the only reference that could notionally be made to such affidavit evidence was, either if there was an agreement in that regard (which there was not), or if a deponent to an affidavit took the witness stand

and gave *viva voce* evidence. In those circumstances, a witness could be confronted with an inconsistency between the evidence given in the witness box and the evidence contained in the affidavit but the affidavit evidence remains hearsay.

[59] In the circumstances, I am of the view that reliance upon Freddie's affidavit filed in the motion proceedings constituted a misdirection on the part of the trial court. Similarly, the trial court erred and misdirected itself in relying on the contents of an affidavit made by Freddie in the application for the domestic violence interdict in the Cape Town Magistrates' Court. Both such affidavits contained inadmissible hearsay. In the result there was no evidence before the trial court as to who drafted the second will, on whose instructions it was drafted and under what circumstances this occurred. The absence of such evidence has serious implications for the appellants' purported version of events and, in particular, their duty to persuade the court of the foundation for acceptance of the second will.[12]

[60] As to what transpired at the Cape Town Central Police Station on 17 October 2013, the trial court heard only the *viva voce* evidence of Nohako. He described how an elderly woman was brought into the charge office by a young woman and an older man whom he identified in court as Freddie. Nohako said he identified the old woman as Mrs. Haasnoot through her identity document which was shown to him. He said he was told that Mrs. Haasnoot was there to sign her will which had been drafted for her in Afrikaans. This was a language with which he was not familiar and so Freddie proceeded to translate the document for him. The constable

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[12] Oliphant v Shield Insurance Co Ltd 1980 (1) SA 903 (C) at 907F-H; Humphrys v Lazer Transport Holdings Ltd 1994 (4) SA 333 (C) at 400F.

testified about a "*sort of a mistake"* which was noted in the document which Freddie corrected in manuscript and which he asked the old woman to "*paraphrase*" (sic). After Freddie had read the rest of the document, he said the old woman signed as did he (Nohako) and his colleague Ndlokweni.

[61] Nohako's evidence-in-chief was fairly superficial and sketchy and it was only during cross-examination that a clearer picture emerged as to what had happened that day. It transpired that this was the first time that Nohako had been called upon to witness a will in the course of his employment and it was obvious that his knowledge of what was required of him was very limited. He said, for example, that he understood that all persons identified as beneficiaries in the will were also required to sign it. It would appear that he also considered that it was permissible for the other witness (Ndlokweni) to sign the will without witnessing the testator or his colleague signing in each other's presence.

[62] Under cross-examination Nohako described how after Freddie and the younger woman entered the charge office with the old woman, Freddie produced a type-written document (in Afrikaans) and told the constable that the old woman was there to sign her will. Because Nohako did not understand Afrikaans he asked Freddie to translate it for him in the presence of the old woman, which he duly did. Nohako of course could not vouch for the accuracy of the translation. In the process of so translating, said Nohako, Freddie picked up a mistake in the document which he altered by making a deletion with a solid line through a word and by inserting the phrase "*erf 978"* in manuscript at that point in the document. He heard Freddie instruct the deceased to sign the alteration but it is apparent from the evidence that Nohako

did not actually see the deceased do so. In relation to the signature of the will at the foot of the page, Nohako was adamant that he saw the deceased append this in his presence. Thereafter, said Nohako, he signed at the foot of the page but not adjacent to the manuscript alteration, believing that his signature at the foot of the page would suffice. Thereafter, he said, he called Ndlokweni over and saw to it that he too witnessed the document at the foot of each page. Given that the latter did not testify, we do not know whether (or how) he identified the purported signature of the testator.

[63] At the conclusion of his evidence, Sher AJ questioned Nohako extensively for purposes of clarification. In the process Mr. Walther objected to the court's questions suggesting that it was a repetition of earlier questions. The court was cautioned by counsel that it may be descending into the arena. The objections raised by Mr. Walther bordered on contempt of court but in any event, I do not see anything improper or unreasonable about the way in which the trial judge grappled with the issues. Indeed Mr. Walther's utterances remind one of the adage that an objection is akin to the strangled cry of a lawyer as the truth is about to enter the court room.

[64] In his judgment, Sher AJ noted the more obvious problems with Nohako's evidence. Principle among these was the fact that ultimately it was established that he may well not have been able to see the deceased actually signing the document because of the layout of the charge office. It was pointed out that the old woman was seated at a lower level to the counter at which Nohako was otherwise serving the public and that his vision of the surface upon which the will might have been signed was obscured. Further, while the constable had testified earlier that that

he saw the deceased counter-signing the manuscript alteration to the will it then transpired that Freddie had taken the document over to her and that he was standing between the deceased and Nohako. Nohako also said that he could not recall noting whether the deceased had actually read what she was signing at the time; most certainly, said Nohako, Tannie Jannie did not read the alteration before allegedly appending her signature to it.

[65] The effect of the manuscript alteration was to provide in the second will for the testamentary disposal of no. […]3 V Avenue. I shall refer later to the manner in which the property was dealt with in the deeds of sale shown to Potgieter by Freddie which seemingly rendered it unnecessary for the deceased to include an reference to the house in her will. In his judgment Sher AJ came to certain conclusions regarding the intention of Tannie Jannie when she allegedly accompanied Freddie to the police station on 17 October 2013.

> "*[76] In my view, the evidence shows unequivocally that at the time when Mrs. Haasnoot walked into the police station with Frederick and Catherine, it was not her intention to execute a will in terms of which the immovable property was to be left to either one of them. To construe such an intention would be inconsistent with the fact that she entered into two sale agreements, one before and one after she made the will as well as an acknowledgement of debt in respect of such sale agreements, and this is why the immovable property was not included in the typed document which was prepared by Frederick and which was presented to the police for signature.*"

[66] That conclusion, however, is fundamentally flawed to the extent that it seeks to rely on the affidavit evidence deposed to by Freddie. Similarly, the trial judge relied on the affidavit of Catherine in drawing conclusions about the deceased's intentions regarding the property and her instructions to Frederick and Catherine. Simply put, the trial court was not entitled to have regard to those affidavits.

THE EVIDENCE OF D/SGT TOUA

[67] But there is a far more fundamental problem arising from the the trial court's failure to deal with all of the evidence before it. D/Sgt. Toua, an experienced policeman with more than 10 years' service at the time, testified that in 2013 he was the officer at Cape Town Central responsible for the investigative work relating to judicial inquests. Toua testified that late on the night of 8 November 2013 (and it will be recalled that this was the time when the siblings had discovered that the deceased was about to be cremated), he was approached by two of the siblings and asked to urgently open a docket to investigate the demise of their aunt. He did so and thereafter conducted the necessary investigations and interviewed the relevant witnesses.

[68] In the process of interviewing Nohako, Toua asked the young constable what had transpired in the charge office on 17 October 2013. He testified that Nohako looked at him in embarrassment and simply said "*Sorry Sarge, I can't remember."* Toua said that he also interviewed Ndlokweni at that time and that he too had no recollection of the execution of the deceased's will. Toua went on to say that the two constables were away on a course for about a fortnight and that he prepared their affidavits for the inquest docket in the interim.

[69] After their return, and on 24 July 2014, Toua commissioned an affidavit deposed to by Nohako in his presence in which the latter stated unequivocally that he could not remember -

> "*(H)elping a Mrs. Haasnoot or any of the details in full about the signing of the will documents. All that I can confirm (sic) that the signature that the lady showed me was mine and that is all I can remember about the signature."*

The reference to the signature shown to him by *"the lady"* related to an event at 21h16 on 5 April 2014 when Nohako had appended his signature to an affidavit which had been prepared in advance and which was presented to him at Cape Town Central by a woman (quite possibly Catherine) for attestation. In that affidavit Nohako had purported to confirm the signature of the second will in his presence by the deceased and his signature thereon as a witness.

[70] In his affidavit before Toua 3 months later, Nohako stated, with reference to the 5 April 2014 affidavit, that –

> "*I only signed the affidavit because I did (sic) saw my signature on the documents that the lady had showed me. She had put in all the dates and names in the affidavit and I cannot remember any of them."*

[71] Nohako was cross-examined in regard to the affidavit made before Toua and in particular his ability to remember the events with such clarity in the witness box in 2016. He said that he had only deposed to the affidavit before Toua

because the latter had threatened him and implied that he (Nohako) may be complicit in the fraudulent execution of the second will. This version was never put to Toua in cross-examination by counsel for the appellants, notwithstanding the fact that Nohako was a witness called by them.

[72] Just who was telling the truth in relation to this issue was not resolved by the trial court, probably because it was regarded as a collateral issue. Nevertheless, it is difficult to disregard the testimony of Toua who was a truly independent witness with no obvious interest in the matter. But, in my view, whatever version prevails, the dispute raised an important issue before the trial court – the reliability and credibility of Nohako as a witness. Unfortunately, Sher AJ failed to address Toua's evidence at all in his judgment and did not offer any impressions of the demeanour of either witness in the witness box. Importantly, the question as to Nohako's reliability and credibility in the light of Toua's contradictory testimony was not dealt with.

[73] Either way, the point arising out of Toua's evidence was highly material. If Nohako had no recollection (in July 2014) of the events relating to the signing of the will some 9 months earlier, how was it that his memory improved so dramatically 2 years later in the witness box? And if Nohako's version is to be believed, what faith can be placed in the testimony of a young police officer who was prepared to be brow-beaten by his superior into deposing to an affidavit that was manifestly false?

[74] The trial judge did not expressly prefer Nohako's evidence over that of Dr. Rosa. Rather, it seems he did so impliedly. To the extent that there was such an implicit finding, I am unable to agree with the trial judge that there was credible and

reliable evidence adduced by the appellants which rendered Dr. Rosa's evidence redundant. On the contrary, in my respectful view, there was compelling evidence from an acknowledged expert in her field which fell to be considered in the context, firstly, of a dearth of evidence from Freddie and Catherine (who were manifestly able to explain the material aspects of the preparation of the second will and its execution) and, secondly, as against questionable and unsatisfactory evidence from Nohako. In my considered view there was compelling evidence to suggest that the signature of the testatrix on the second will (both the original and the second original or "copy" thereof) was suspect and the trial court erred in finding that the appellants had established, on a balance of probabilities, that the second will had in fact been signed by Mrs. Haasnoot and that it was therefore a valid testamentary instrument.

[75] I should add that even without the evidence of Dr Rosa, simply by looking at the signature on the second will and comparing it with the signature on the second deed of sale allegedly signed by Tannie Jannie in the presence of Potgieter, it is obvious even to the uniformed eye that there is a striking dissimilarity between the signatures. Furthermore, the signatures at the end of the original and the copy of the second will are notably dissimilar and, finally, the alleged signatures of the deceased witnessing the addition of "*erf […]*" to clause 1.2 on both copies of the second will appear dissimilar to the signatures at the end of each such copy. In remarking on the apparent lack of similarity, I am mindful of the evidence of Dr Rosa that she was alive to the fact that she was examining signatures of an elderly person whose health was failing and that differences in signatures might be expected.

THE EVIDENCE REGARDING THE DEEDS OF SALE

[76] I referred earlier to the involvement of Attorney Basie Potgieter in this matter and shall deal shortly therewith. His evidence was adduced by the appellants in an endeavor to demonstrate (as is required by s2(3) of the Act) what the intention of the deceased was regarding the disposal of her immovable property. In particular, Freddie and Catherine attempted to persuade the trial court that it was always Tannie Jannie's intention to leave no. […]3 to Catherine, thus purporting to give content to the "*erf […]*" alteration in clause 1.2. In view of my finding that the appellants failed to discharge the onus of proving the authenticity of the second will, the testatrix's intention is, strictly speaking, no longer relevant. Nevertheless, I shall deal briefly therewith because of its more general relevance.

[77] Potgieter testified that he practiced as a conveyancer in offices in the city centre of Cape Town. He said that on 16 October 2013 Freddie and Catherine arrived at his offices unannounced and sought advice from him. Freddie produced a deed of sale in respect of number […]3 which recorded that at on that day the property had been sold to Catherine for an amount of R500 000. The document contained signatures by both the purchaser (who had signed at 08h45) and the seller (who had signed at 09h00) The sale was subject to a suspensive condition that Catherine was to procure a bank loan (secured by a first mortgage over the property) in the amount of R 700 000.

[78] Potgieter said that the document contained a number of curious provisions. Not only was it unusual for a purchaser to apply for a mortgage loan in excess of the purchase price of the property but the deed of sale also made provision

for the sale of the entire contents of the house (including pets) and the seller's Opel Kadett motor vehicle. Furthermore, the purchaser undertook not to dispose of the property (both movable and immovable) without the prior written consent of Freddie and guaranteed the seller a lifelong right of occupation of the property (together with her pets) until her demise.

[79] Potgieter said that he enquired from Freddie why the purchase price was so low and wanted to know what the municipal valuation of the property was. When told that it was the of the order of R3,8m, Potgieter said he informed Freddie that he did not think that it was an arms' length transaction and that he was concerned that the deed of sale would not pass muster with the Receiver of Revenue. He went on to testify that the whole episode appeared to him to be "*a cliché* "– an apparent case of an aged person being manipulated and abused by younger members of her family.

[80] Potgieter said that a couple of days later Freddie returned with a revised deed of sale, this time in an amount of R1, 5m. The witness said that his suspicions had not been allayed and he took it upon himself to drop by no. […]3 on his way home one afternoon. He said that he resided in the Southern Suburbs and that the deceased's house was en route to his home. He said that he prepared a revised deed of sale, on the instructions of Freddie, and took the document to the deceased for signature. That document made provision for a purchase price of R1,5m, with a suspensive condition relating to the procurement of a mortgage loan in the amount of R700 000. The purchase price was payable through the sum of R500 000 being paid

on demand by the transferring attorneys and the balance of R1m being secured by an acknowledgement of debt by the purchase in favour of the seller.

[81] Potgieter described how he stopped by Tannie Jannie's house on his way home one evening to satisfy himself that the terms of the deed of sale accorded with her wishes. He described how the deceased signed the deed of sale in his presence and he told the court that he then left. It was clear that he was embarrassed by the whole matter and was reluctant to add any semblance of professional sanction to what he perceived to be an out and out scam. The situation was compounded when 2 days after signature of the second deed of sale Tannie Jannie signed a document entitled "*SKULDOOREENKOMS*" in which she purported to lend Catherine R1m to enable her to buy the property and that "*terugbetaling onderling gereel sal word".*[13]

[82] The problem with Potgieter's evidence is that the copy of the second deed of sale which was placed before the court was dated 19 October 2013, which, it is common cause, was a Saturday. This did not accord with his evidence that he definitely stopped by on a weekday on his way home. Nevertheless, it will be noted from the aforegoing that within the space of 6 days Tannie Jannie is alleged to have signed four separate documents each of which dealt with the disposal to Catherine of no. 13 – the first deed of sale on 16 October 2013, the second will and the purported amendment thereto on the 17th, the second deed of sale on the 19th and the acknowledgement of debt on the 21st.

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[13] "Repayment will be arranged by the parties in due course"

[83] Potgieter said that he found it strange that when he met the deceased to procure her signature on the second deed of sale, and we know now it could not have been the 19th October 2013, she did not make mention of any of the other documents she had signed relating to the disposal of her property; this notwithstanding the fact that at that stage she was alleged to be in full possession of her mental faculties.

[84] But I have digressed somewhat. The importance of Potgieter's evidence for the purposes of this appeal is that the signature allegedly appended in his presence to the second deed of sale bears no resemblance to -

- the signature on the first deed of sale;
- the signature on the original of the second will;
- the signature on the original copy of the second will; or
- the signature on the acknowledgment of debt.

If it was, as Potgieter says, that Tannie Jannie signed the second deed of sale in his presence it is apparent that the signature that he identified on that document stands in stark contrast to the others relied upon by Freddie and Catherine in advancing the integrity of the second will. This, too, was a factor which the trial court was duty bound to interrogate before concluding that the signature on the second will was that of the deceased.

CONCLUSIONS

[85] In light of the aforegoing I am of the view that the trial court erred in upholding the validity of the second will save for the manuscript alteration thereto. In the circumstances, it erred further in holding that the deceased's immovable property located at […]3 V Avenue, Vredehoek, Cape Town should devolve upon her heirs by way of intestate succession.

[86] In light of the fact that it was common cause that the first will was valid the correct order would have been for the court to grant the principal relief sought in the plaintiff's declaration, to have dismissed the first and second defendants' counterclaim and to have made an appropriate costs order.

[87] In addition to the principal relief sought by the plaintiffs there were prayers in the declaration requiring Freddie and Catherine to vacate no. 13 within 30 days of the court's order and directing them to deliver to Jan and John, in their respective capacities as the executors of the deceased's estate, the keys to the property and all of the deceased's movable property in their possession. We were informed during argument by Mr. Zazeraj for the respondents that Freddie and Catherine were still in occupation of the property and in possession of the deceased's movables. Counsel accepted that once the executors of the estate have been duly appointed by the Master they will be in a position to take the necessary steps to obtain possession of the all of the deceased's property. In the circumstances, counsel accepted that it was not necessary for this court to make any order in regard thereto.

[88] While the first will provides for the appointment of Jan and John Westerhuis as the executors of the estate of the deceased, no provision is made therein for the appointment of any substitute executor in the event of either of the nominated executors not being able to act. In light of the fact that John has since died it may be that Derick (as the executor in John's estate) might, for instance, be considered to be substituted as Jan's co-executor. But the appointment of such a substitute executor is not the function of this court which does not have the power to appoint an executor. [14]

[89] In the circumstances, I consider that it would not be prudent to grant the relief sought in prayer (c) of the declaration which directs The Master to confirm the appointment of Jan and John Westerhuis. The appointment of Jan as executor will follow as a consequence of the order of validity in respect of the first will and I will leave the appointment of any further executor to the discretion of The Master, should she consider it necessary.

[90] As far as costs are concerned, there is no reason why the costs on appeal should not follow the result. Given that the order of the trial court is to be set aside and replaced with an order squarely in favour of the plaintiffs, this court is at liberty to consider the question of an appropriate costs order in that forum afresh. In contested will matters courts often direct that the litigation costs are to be borne by the

[14] Bankorp Trust Bpk v Pienaar en 'n ander 1993 (4) SA 98 (A) at 107D-108H

estate.[15] However, neither side in this matter sought such an order, each asking for the opponent to carry the costs.

[91] In my view, the conduct of Freddie and Catherine in this saga is to be deprecated. Not only did they seize the moment and opportunistically take control of the deceased's person and her estate when she was at her most vulnerable, they have attempted to ensconce themselves into a seemingly impregnable position at the expense of the other siblings and the intended beneficiaries under the first will. Freddie, it is said, is an unrehabilitated insolvent and as such appears to have sought to shield his financial exposure and interests behind his young ex-wife. This is manifestly not a situation where the estate should carry the costs. As an indication of the court's displeasure with the way in which the defendants (the appellants before us) have conducted themselves throughout it is appropriate that they should, jointly and severally, be ordered to bear the costs in the trial court.

ORDER OF COURT:

A. The appeal is dismissed with costs, such costs to be paid jointly and severally by the First and Second Appellants.

B. The order of the court *a quo* is set aside and replaced with the following:

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[15] Katz and Another v Katz and Others [2004] 4 All SA 545 (C) at [145]

"1. *It is declared that the document which is attached to the plaintiffs' declaration as Annexure JLW 1 and duly signed and executed by Jannetje Haasnoot (ID No […]) (hereinafter "the deceased") on 16 January 2013, is the deceased's valid last will.*

2. The third defendant is directed to accept the document marked as Annexure JLW 1 as the deceased's valid last will.

3. The documents attached to the plaintiffs' declaration as Annexures JLW 4, JLW 5, JLW 6 and JLW 8, purporting to be the deceased's last will are invalid and null and void.

4. The first and second defendants' counterclaim is dismissed.

5. The first and second defendants are directed to pay the costs herein jointly and severally, the one paying the other to be absolved, such costs to include all costs relating to the motion proceedings which preceded the filing of the plaintiffs' declaration."

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GAMBLE J

I AGREE.

IT IS SO ORDERED.

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ERASMUS J

I AGREE.

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PARKER J