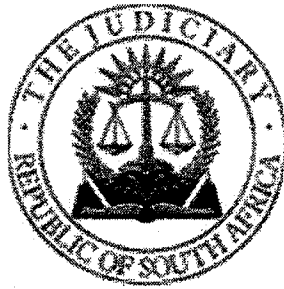
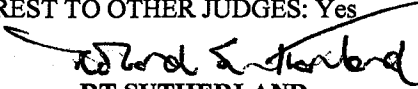


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 44009/2015

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: Yes
30 September 2019	 RT SUTHERLAND

In the matter between:-

JAN HENDRIK VERMAAK N.O.

FIRST PLAINTIFF

(in his capacity as executor in the estate of the late
JOHANNA FRANCINA LINDHOUT)

ELSIE JOHANNA PEARSON N.O.

SECOND PLAINTIFF

(in her capacity as duly appointed executrix in the estate
of the late THOMAS GEORGE PEARSON)

and

GERHARD JACOBS

FIRST DEFENDANT

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

SECOND DEFENDANT

HENDRIK PETRUS STEYN

THIRD DEFENDANT

JUDGMENT

Introduction

[1] The sole substantive question to be decided in this case is whether Johanna Francina Lindhout, known to all as Hanneltjie, was of sound mind and thus cognitively capable of executing a valid will on 24 March 2010 ('The 2010 Will'). There were other disputes which were resolved and are addressed in the order made. In addition certain disputes about costs orders remain alive and are addressed discretely.

[2] On 1 May 2005 Hanneltjie had, jointly with her husband, Gerhardus Lindhout executed a Will ('The 2005 Will'). He died on 1 November 2005. The 2010 Will followed. Hanneltjie then executed a further will on 17 October 2014 shortly before her death, aged 82, on 28 December 2014. It became common cause between the parties in the course of the litigation that she was not of sound mind when she executed the 2014 Will by reason of dementia. The contest that came before the court is whether the 2005 or the 2010 Will should prevail. It is common cause that Hanneltjie was of sound mind when she, with her husband, executed the 2005 will. The soundness of Gerhardus Lindhout's mind has never been questioned.

[3] The litigation was initiated by the initial executor of the 2010 Will, George Pearson. He died on 2 May 2018 and was substituted by his widow, Elsie, and by Vermaak, who had been

initially instructed, *qua* attorney, by George Pearson to attend to the execution of the Will. (I shall refer, henceforth, only to Vermaak as Elsie Pearson's role is purely nominal) The late George Pearson is the person who drew up all the wills and was, in all of them, nominated as executor. He was a financial adviser by occupation.

[4] The first defendant, Gerhard Jacobs, is a first cousin of Hanneltjie. He is a beneficiary, as legatee, in all of the wills, along with several others legatees. The third defendant, Hendrik Steyn and the fourth defendant Eduard Lotz are legatees only in the 2010 and 2014 Wills.

[5] Jacobs, holds the view that Hanneltjie was not of sound mind when she executed the 2010 Will. Steyn and Lotz hold the view that she was of sound mind. This difference of opinion is the origin of the controversy that induced George Pearson to bring an application to obtain the court's sanction on which of the three wills to administer. When the application came before Court it was referred to trial. Whether it ought to have been brought as an application at all is an aspect that is pertinent to the costs controversy. The parties exchanged pleadings. Vermaak, now substituted as executor, sought an order in the alternative declaring the 2014 or 2010 or 2005 Will be to the will he was to administer. Jacobs pleaded that the 2005 Will should prevail.

[6] The material difference between the 2005 Will and the 2010 Will is that in the 2005 Will, the whole of the estate is distributed to a list of legatees. A significant part of the estate was the business built up by Gerhardus Lindhout, Lindt Instruments, a small manufacturing concern producing an industrial component for a single client. In the 2010 Will the business was bequeathed to two new legatees, Steyn (70%) and Lotz (30%) and the diminished capital

balance distributed to a list of legatees which included the 2005 legatees, or, ostensibly, their surviving family members, plus two additional persons.

[7] The body of evidence adduced includes several witnesses to the state of mind of Hanneltjie over the period from 2005 until 2014. These witnesses were all laypersons, save two; Dr Natsis, Hanneltjie's regular General Practitioner and Jacobs, who is a Psychologist. Although not called *qua* medical experts, the fact of their expertise is relevant to the scope of the evidence they could legitimately proffer about their observations of Hanneltjie's conduct and condition in so far as that might be pertinent to her state of mind. Pearson's death has robbed the enquiry of a witness who could have testified about her state of mind as at the time of all three Wills being executed. Vermaak never knew Hanneltjie.

[8] Two medical experts testified. Neither knew or examined Hanneltjie at any time. Their opinions as to her state of mind were solicited on the basis of their examination of such information as was *ex post facto* to hand. They hold opposite opinions about her soundness of mind as at 2010. Their differing opinions are central to the controversy.

[9] The crucial issue in the body of evidence was to determine the presence of and extent of dementia. At the time of her death she was unequivocally demented. The question is how long before that had she been demented. More particularly, can it be concluded that in 2010, Hanneltjie was demented, either, at all, or if indeed she was demented to some extent, was that extent enough to inhibit her from appreciating the implications of the act of disposing of her assets through means of a will.

The Test

[10] To execute a valid will, self-evidently the testatrix must be capable of grasping the task at hand and its implications. The test is well established. Section 4 of the Wills Act 7 of 1953 provides that:

“Every person of the age of sixteen years or more may make a Will unless at the time of making the Will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest upon the person alleging the same.”

[11] Plainly, this requires a fact finding exercise. In this case, the outstanding controversy is whether the 2010 Will satisfies the section. Vermaak claims it does; Jacobs claims it does not; *ergo*, he attracts the special onus provided for.

[12] The determination of the capacity prescribed is often a matter degree. It does not require good health or robustness, more narrowly, appreciation of the nature and effect of the action taken. Whether or not, for example, a testatrix is subjected to undue influence is a wholly different enquiry.

[13] In *The Law of Succession*, 2nd ed, (Juta) (2001) by Corbett, Hofmeyr and Kahn, at page 75; the authors offer this view:

“The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have a memory, a man to 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 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 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 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 understand the business in which he was engaged at the time he executed his will?"

[14] Moreover, in *Katz & Another v Katz & Another* [2004] 4 ALL SA 545 (C) it was held:

"[20]

There was little, if any, dispute between the parties with regard to the applicable legal principles. Instead, the dispute revolved around the application of those principles to the facts of this case.

[21]

Section 4 of the Act entrenches the common law in regard to the test for testamentary capacity. According to the authorities, a person with diminished mental powers will not necessarily lose the capacity to make a will. As was stated by Tindall JA in his minority judgment in *Tregea and another v Godart and another*:

"... (I)n 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."

Or as *Voet* so succinctly put it, more than 300 years ago:

"It is true that not only the healthy, but also those who lie in the throes of death, and who utter their wishes with half dead and stammering tongue make last wills correctly, provided that they are still strong in mind."

[22]

Furthermore, the test of a person's mental capacity is specific to the task or decision to be carried out. In the words of section 4 of the Act, the testator, in making a will, must be capable of understanding 'the nature and effect of his act', ie the act of making the particular will in question. Put differently, a person may be incapable, due to diminished mental powers, to enter into a complicated commercial transaction and yet be capable of performing other juristic acts, eg to conclude a contract of purchase and sale; to marry; or to execute a will. What is required in order to satisfy the test is the ability "to understand and appreciate the testamentary act in its different bearings".¹¹ This entails, first, an appreciation of the nature of the transaction itself, ie the act of disposing of one's property to named beneficiaries after one's death and appointing one or more executors to oversee the process; secondly, the ability to distinguish between potential heirs and to make a rational and reasoned decision as to their respective claims to the testator's assets; and finally, the ability to appreciate in broad terms the nature, extent and value of the testator's estate.

[23]

It needs to be emphasised that it is not required

“that a testator must possess those qualities of the mind in the highest degree; otherwise very few could make testaments at all; neither has it been understood that he must possess them in as 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”.

[24]

Once it is clear that a document is the will of the testator, the person who attacks it on any ground whatever “must prove his case and prove it in the clearest manner”. This onus is not an easy one to discharge, although the measure of proof remains a balance of probabilities. The rationale for this rule, as one common-law writer put it, is

“cum homini mortuo nihil magis debeatur, quam ut servetur ejus ultima voluntas: it being admitted as the will of the deceased there is no greater due to the dead than to uphold his last will.”

The Evidence

The Experts

[15] The two experts approached their tasks from points of departure which could not be more different. Dr HJ Edeling, a neurosurgeon had at his disposal certain medical records, and the information provided by witnesses who knew Hanneltjie during the relevant period. His approach was holistic. His viewpoint was informed by all this data. On the basis of what he had available, he concluded that Hanneltjie was not of unsound mind in 2010. He did, however, not have information from Jacobs or, his sister, Lodia Eagle.

[16] Dr J Reid, a neurologist, says that he eschewed any contact with persons who knew Hanneltjie and addressed only the documented medical records, including reports by medical practitioners who attended Hanneltjie. He says his approach is to exclude consideration of lay observations, premised on his view that such accounts are unreliable because of the self-interest of such observers. Thus, it is preferable to not have such reports contaminate the effort to offer a clean forensic opinion. In the event, Dr Reid was not wholly true to this approach and indeed,

relied upon a report of conduct, presumably from Jacobs and his sister, Lodia Eagle, of certain incidents they believed suggested a cognitive deficit. The only medical records that Dr Reid did not have when formulating his opinion were the patient records of Dr Natsis, which he says were denied to him. He commented in the hearing on these patient notes after he had given an opinion that Hannetjie must have been ‘moderately’ demented in 2010. He was critical of treatment of Hannetjie by Dr Natsis, alleging that she was derelict because she did not perform a mini mental test. Dr Natsis’s notes therefore did not incline him to change his initial opinion.

[17] Despite their differences in methodology, the two doctors were able to reach agreement on several matters of importance, which are captured in a joint minute, dated 17 April 2019, about two months before the trial. They agree that Hannetjie was “probably” of sound mind in May 2005 when the joint Will was executed. They agree that she was not of sound mind on 17 October 2014 when she executed the 2014 Will.

[18] Moreover, they agree that at her death she was suffering from dementia. The cause of the dementia is of paramount importance. The cause was a partial obstruction of the aqueduct of sylvius, resulting in hydrocephalus. In plain English, a tumour or growth was located in the base of the skull which blocked a vessel leading away from the cerebellum. That vessel or aqueduct drains fluid away from the brain. If the vessel is blocked, fluid builds up and is unable to drain away and then indirectly causes pressure on the brain. A build-up of fluid on the brain is called hydrocephalus.

[19] They record in the joint minute the following:

“Neither [of them] has a scientific way of assessing when the dementing illness, due to the partially obstructive hydrocephalus commenced. [They] differ in relation to the probable time at which she lost the mental capacity to execute a valid [will] but agree that this stands to be determined on the basis of factual evidence. [They] note that contradictory facts have been reported [to them] and defer to the court for factual determination.”

(Underling supplied)

[20] Furthermore, they go on to state:

“Dr Reid is of the opinion that the partially obstructive hydrocephalus was a slow process and that the earliest troubles probably started after surgery for the removal of the schwannoma in October 1991.

It is his opinion that further medical records should be sought, with specific reference to symptoms or signs suggestive of increased intracranial pressure during the late nineties or the decade from 2000 until 2010. For example, with any reference to headache, headache on waking, headache associated with nausea or headache induced by exercise or straining at stool, episodic confusion or sudden changes in vision imply that the partial obstructive hydrocephalus was present and symptomatic during the first decade of this century, well before Johanna Francina Lindhout’s execution of the will and testament of 24/03/2010.

Dr Edeling has concluded, on the basis of the documented and reported facts set out in paragraphs 2.1 to 3.3.9 of his report, that Mrs Lindhout was probably of sound mind at the time of executing her last will and testament on 24 March 2010.”

(Underlining Supplied)

[21] From these remarks it is plain that both acknowledge a paucity of data and that a degree of ambivalence attaches to each opinion.

[22] Thus, on Dr Reids view:

- 21.1 In 1991 Hanneltjie had a tumour removed from her head.
- 21.2 The tumour displaced the brain matter albeit marginally.
- 21.3 This permanent change created the opportunity for fluid to build up in the cavity.
- 21.4 This is the origin of the hydrocephalus that eventually killed her in 2014.
- 21.5 The condition progressed incrementally over the intervening 23 years.
- 21.6 The condition is such that a sudden onset of symptomology of dementia is impossible.
- 21.7 In 2014, the condition was lethal.
- 21.8 By inference, dementia must have been evident much earlier.
- 21.9 On the basis of his experience, albeit with a very small sample, the 1991 condition, could be reasonably expected to reveal itself in dementia within 10 – 12 years. Thus, even by 2003, she would have been adversely affected by dementia. By 2010, therefore, she could not be of sound mind.
- 21.10 Thus, on the probabilities, in 2010 she was suffering from moderate dementia.

[22] On Dr Edeling's view:

22.1 Upon a consideration of the contemporary observations of Hanneltjie's condition and conduct as reported through witness comments of Mrs Slabber, a niece of Hanneltjie, of Lotz, of patient notes of Dr Natsis and of Natsis personally, and from a report by a social worker Gisela Hiestermann, who herself gathered reports from others including Steyn, and other medical records, no inference that dementia was apparent in 2010 can be made.

22.2 The data available indicates onset of discernible symptoms at the earliest during late 2013, not earlier, and manifestly so in 2014.

22.2 The data available indicates onset of discernible symptoms at the earliest during late 2013, not earlier, and manifestly so in 2014.

22.3 Having sight of Dr Reid's report, he is critical of the report for want of a factual substratum for the inferences drawn by Dr Reid; in particular no evidence from Dr Wasserman's 1991 report justifies the inferences drawn by Dr Reid and the allusions to inappropriate behaviour of Hanneltjie in 2005 is not sourced and is unsubstantiated.

Evaluation

[23] In my view, Dr Reid's opinion is undermined by several considerations.

23.1 The idea of excluding contemporaneous accounts is not *per se* a flaw in the methodology adopted. (In truth Dr Reid did not strictly stick to this modus).

23.2 However on that premise, two shortcomings are apparent.

23.3 The first shortcoming, is the anterior opinion that dementia would become evident as least in the late 90s or early 2000s. This view is held on the strength of only a few examples, alluded to in passing, and in respect of which no details were shared with the court. A small sample and Dr Reid's personal conviction cannot amount to a persuasive foundation to assume the same pattern must necessarily have applied to the latest patient, Hanneltjie. The theory may be proven correct in time but is not one upon which reliance can be placed at this time in respect of Hanneltjie. A major premise of Dr Reid's reasoning is that in the absence of any other plausible explanation his theory must prevail. This is a fallacious approach. Dr Reid expressly referred in the joint minute to

the absence of medical records from 1991 onwards that would offer corroboration of the presence of dementia. The flurry of medical data in October – November 2014 does not illustrate what happened before. Dr Natsis' records from 2004 – 2014 do not illustrate any indications either. The upshot is that on a true "pathology only" approach, the theory is uncorroborated.

23.4 Second, the evidence adduced from contemporaries offers observations which are inconsistent with dementia during the crucial period of 2009 - 2010. In keeping with Dr Reid's allusion to the Court determining facts pertinent to the timing of the presence of dementia, the facts adduced contradict his theory. This body of evidence is examined hereafter.

[24] Dr Edeling's opinion, by contrast, is based on a holistic approach. In such an approach the observations of contemporaries are relevant. On the basis of the material available to him the anecdotal accounts do not evidence a clear onset of dementia until early 2014 and perhaps late 2013; a conclusion reached, however, without the benefit of the input of Jacobs or Eagle. When testifying, Dr Edeling dealt in cross examination with the anecdotes proffered by these two witnesses and in weighing the anecdotes, his conclusion that in 2010 there is no basis to conclude that dementia was evident remained unchanged. This conclusion, evidence-based as it is, must not be confused with an idea that it is his opinion that dementia suddenly presented itself in late 2013/early 2014. Rather, no rational basis exists to contend that dementia existed earlier.

[25] The fact that the cause of dementia was not congenital, such as would be the case in an Alzheimer's patient, but was the result of the pressure on the brain caused by the fluid

build- up is a significant factor and a critical aspect of the differences between the two experts. Precisely at what pace the hydrocephalus developed is an unknown and unknowable in the absence of frequent monitoring of a patient. The assumption that the pace was consistent and progressive from 1991 is unsubstantiated on the available evidence. A variable pace is no less likely. Accordingly, in that context the observations of contemporaries are critical to add to the mix.

[26] Dr Edeling expresses the opinion that there is no evidence to substantiate that proposition that the trigger for the 2014 detected hydrocephalus was the 1991 surgery. Dr Reid, states that the aftermath of the removal of the tumour or schwannoma is capable of being linked. Part of this rationale is his view that there is scarring evident in the radiological results. Dr Wasserman's report of 1991 does not substantiate a displacement thesis. Dr Edeling states there is no factual basis to infer a displacement of the cerebellum.

The nature of the lay evidence

[27] The seven people who testified about Hanneltjie's condition and conduct provided anecdotes of moments of Hanneltjie's life. Naturally, what is of use in these anecdotes are the hard observable facts, not primarily, the opinion of the witnesses about what the conduct signified. The exceptions are Natsis and Jacobs, who to some extent, might have been thought to have a greater insight into the significance of Hanneltjie's observable conduct. As alluded to above, these nuances are to be addressed hereafter. The cross examination of these witnesses did not proceed from the premise that the accounts given were untruthful. This was not a choice; in the nature of such evidence, there is seldom, if ever, the possibility of a direct rebuttal. The incidents alluded to were seldom witnessed by more than one person. Thus, the

credibility of none of the witnesses is seriously questioned. Each of these witnesses held an opinion about Hannetjie's state of mind, and despite their opinions being legally irrelevant, to expect of witnesses to exclude from their testimony their viewpoint would be to expect the unnatural. Indeed, to a large extent, what, in an enquiry of this nature, a witness recalls as relevant to relate to the court, is triggered by a recollection of events which tends, to substantiate their subjective opinion on the question being posed. An appreciation of this consideration is relevant to the need to caution oneself that the witnesses cannot be regarded as reliable as to providing the full gamut of incidents that actually took place in the life of the deceased person or that what is related is wholly free of a subjective gloss. An honest witness remains the victim of the limits of human memory, which years after the event, is subjected to pressure to recount, accurately, an incident, the memory of which, may have lain dormant for years. Sometimes what is recalled is an incident that was striking, not mundane, but is not for that very reason, a reflection of the typical condition or conduct of the deceased person. The greatest evidential casualty is being able to pinpoint in time when a remembered incident occurred. Vagueness and even contradiction ought not to be grounds for a rebuke of a witness's account. However, ultimately, what can be gleaned is not a full, nor a reliably accurate picture and, accordingly, the integrity of the witnesses cannot excuse the imperfections of the body of evidence which their efforts to recall, ultimately, yield.

Evidence of the observations of Hannetjie by her contemporaries

[28] In order to grasp the context in which the crucial period of 2009 - 2010 must be assessed, a chronological narrative, garnered from the several witnesses, is set out.

The period 2003 to 2009

[29] During 2002 Eagle reports Hanneltjie stopped painting, a pastime she formerly enjoyed and practised. Further, Hanneltjie, in her view, became increasingly anti-social. No details are disclosed why these developments occurred.

[30] In 2004, aged 71 years, whilst at a casino, Hanneltjie fell and broke her femur. She was a small, lean and light-framed woman, as evidenced by photographs over several years. No real detail is available about her exact medical condition at this time. In later years, she had more falls or slips and injured other limbs.

[31] Jacobs reports that there were occasions when he dined at the home of Hanneltjie and Gerhardus, that she took the entire evening to prepare a meal and they sat down to eat only at 11 o'clock. Gerhardus would fall asleep. No more detail is proffered. How often this occurred and exactly when is unclear.

[32] Jacobs reports that when calling on Hanneltjie at her home in a secure complex, he would alert her at the security gate of his presence, and on occasion wait half an hour before she admitted him. How often this occurred is unclear, nor are there any other details supplied to contextualise the event. For example, was this because she wished to change her dress to receive visitors, or was distracted by some other incident and so forth. The inference advanced by Jacobs was that it must inevitably be because she forgot she had visitors waiting thus evidencing memory loss. By contrast, Lotz who called once a month for years, says that when visited, he experienced Hanneltjie sometimes forgetting to open the gate by pressing the button after answering the intercom, and thereby delaying his entry.

[33] In 2005, Hanneltjie lost her husband. He had ostensibly been ill for some time. The 2005 Will drawn by them, jointly, was executed about 8 months before Gerhardus's death. The provisions seem to have foreshadowed his imminent death because it provided for a Trust to care for Hanneltjie. The Trust was never created. No explanation exists, but Gerhardus' estate was never wound up which deed facilitated an avoidance of creating it. A tangential controversy exists about these matter but it is irrelevant to this case.

[34] The funeral of Gerhardus in 2005 was mentioned as a matter of importance by Jacobs who reports that Hanneltjie did not want her biological relatives to attend. She was illegitimate and had been adopted. For a reason that only be speculated about, she, according to Jacobs, was resentful towards them. No further details are supplied. This anecdote was offered by Jacobs as an illustration of her mind being unsound as early as 2005, and was picked up by Dr Reid as a factor in his assessment. In my view the information available proves nothing other than a curiosity of family dynamics. Slabber's evidence reveals that Hanneltjie conducted her family relationships as practically hermetically sealed silos. Hanneltjie's husband's family had no contact with the family of Jacobs, and they met only at the funeral of Gerhardus and of Hanneltjie herself. At a later stage Hanneltjie became hostile to her sister, Jacobs mother. This calls to mind Tolstoy's famous remark, immortalised in his work, Anna Karenina: "Happy families are all alike, unhappy families are unhappy in their own way".

[35] In 2005, according to Jacobs, Steyn took over the running of the business. Lindt Instruments after Gerhardus had died. Lotz was already an employee and became the *de facto* Foreman whilst Steyn dealt with the other aspects. Hanneltjie, as before Gerhardus's death, continued to attend to the accounts for some time. It is unclear when she scaled back her

involvement, to eventually, in the late 2000s, she was involved only in signing off on salaries, determining bonuses, taking personal charge of the annual staff party and being consulted on major decisions.

[36] During 2006/2007 she developed a limp. No detailed explanation exists but on the probabilities, her broken femur of 2004 in which a pin had been inserted, might be relevant, as surmised by Jacobs himself. Her posture and her gait became awkward.

[37] In 2007, as reported by Lodia Eagle, Hanneltjie asked certain friends of her not to visit anymore. No details are disclosed to explain why she did this. It was speculated that depression might be an explanation but no finding can be made. It could be no more than inexplicable eccentricity.

[38] In 2008, Jacobs and his wife and family immigrated to England. Prior thereto, he and his wife saw Hanneltjie every week and took her to the theatre and to dinner, presumably a custom that dated from the time Gerhardus had died in 2005. This custom would have extended over about three years. Jacobs had known Hanneltjie all his life, over 40 years by the time of her death. He says she regarded him as the child she never had. It is upon this degree of long standing intimacy that he grounds his familiarity with her behaviour and habits.

[39] Jacobs reports that in this period up to about 2008 (obviously with an understandable degree of vagueness) the following conduct:

39.1 When out to dinner, she would complain that her meal was cold. Jacobs, who had ordered the identical meal would swap with her and she would be content with a meal of no different temperature.

39.2 Hanneltjie developed a taste for fish dishes which was inconsistent with her former tastes. Moreover, she was keen to eat at Ocean Basket which was a decidedly downmarket option she would once have refused to countenance.

39.3 Hanneltjie adopted a more casual dress habit, and began to wear slacks and even tights which was an innovation from her usual smart image. She even resorted to wearing knee-high stockings.

39.4 Hanneltjie fell asleep in the car or bus, and also at home whilst seated, according to Jacobs, but other than the gate incidents no concrete examples are given. However, she never forgot a telephone number. How a recipient of a call could establish this is unstated.

39.5 Hanneltjie displayed poor memory.

39.6 Hanneltjie refused to have visitors arrive unsolicited. Why so is not explained but seems of itself to be innocuous.

[40] In 2008 Hanneltjie visited Jacobs in England. Whilst on that trip she slipped on stairs causing a wrist fracture.

[41] Jacobs also visited Hanneltjie in South Africa in 2008; it is unclear in which order the respective visits occurred. Jacobs reports that during this visit Hanneltjie made incorrect allegations of theft against her domestic servant

The years 2009 -2010

[42] What do we know about Hanneltjie's life immediately before and after 24 March 2010? This is self-evidently the critical period. Even if it is to be assumed that during this period Hanneltjie was, to some degree suffering from dementia, evidenced by, for example, that generic affliction, a poor memory, the question at the heart of the enquiry is what self-possession did she have at this time.

[43] Dr Edeling sought first to unearth answers from the patient records of Dr Natsis and in an interview with her. Dr Natsis had been Hanneltjie's doctor from 2004 to 2014 throughout the critical period.

43.1 Natsis' relationship with Hanneltjie is worthy of comment. Hanneltjie was taken with Natsis because she is Greek, as is Jacobs wife. Why this should matter is unimportant. This factor founded a bond they forged and Hanneltjie sought out Dr Natsis in that context. When Dr Natsis herself, in the first 6 Months of 2013, was ill and recuperating from breast cancer, they communicated by phone with one another in which Hanneltjie expressed her support. Accordingly, their relationship and the degree of communication extended beyond mere fleeting doctor/patient interactions. Hanneltjie in conversations with Dr Natsis frequently alluded to Jacobs and Olga, his Greek wife with affection.

43.2 The patient records notes five visits between 15 January 2010 and 16 September 2010.

According to Dr Natsis, she was, well turned out as usual, witty and in good spirits despite her ailments. The conditions treated were:

43.2.1 Osteoporosis

43.2.2 Gallstones

43.2.3 Incontinence: In this regard, on 9 September 2010 Hanneltjie visited Dr Natsis for this condition. The condition is apparently common in post-menopausal women. Dr Natsis is under the impression that Hanneltjie came alone unassisted. Tests were conducted. Nothing untoward was noted. Dr Natsis referred Hanneltjie to Dr Bell, a urologist. No report is tendered by Dr Bell. The incontinence is corroborated by Jacobs and Eagle.

43.3 Dr Natsis testified that she noticed nothing about Hanneltjie to suggest cognitive deficits. She had been criticised for not doing a mini mental test which consists of counting numbers back and forth. Dr Natsis riposte was that no need ever manifested itself to do so. (The first observable oddity, to her, was in October 2014, referred to hereafter.)

[44] Jacobs, in the period after 2008, recalls the following events, which supposedly extend over the period 2009 to 2010:

44.1 They spoke on the phone and skyped 3-4 times a week.

44.2 Jacobs attempted to see Dr Natsis in 2010 (also in 2014). Dr Natsis has no knowledge of such attempts. Jacobs never made an appointment nor emailed Dr Natsis.

44.3 During 2010, Hanneltjie decided to pay £4000 (pounds) a year to Jacobs. This payment was indeed effected.

44.4 During a visit in 2010 Hanneltjie wet herself, an event corroborated by Dr Natsis, described above.

[45] Lodia Eagle reports that:

45.1 In 2009, Hanneltjie, having not attended her wedding, told her not to visit with her husband without arranging beforehand. She said she was busy, which Eagle interpreted as a pretext.

45.2 Hanneltjie developed a hoarding habit.

[46] Mrs Slabber, Hanneltjie's niece, (Gerhardus' sister's daughter) who knew her all her life, reported her encounters.

[47] There were visits by Hanneltjie to the Cape to stay with the Slabbers:

47.1 A Fortnight in December 2009,

47.2 In April 2 – 16, 2010 at Easter. This visit was 9 days after executing the Will. This is perhaps the only significant critical contemporaneous evidence of this period.

47.3 A visit in December 13 – 21, 2010. Slabber says during this period Hanneltjie was lucid. She was not repetitive, a condition she first manifested in 2014. She was not forgetful. She had travelled to the Cape alone. She was frail and her gait was noticeably uncertain.

47.4 They had frequent phone chats, but she did not visit again until November 2013.

47.5 Slabber says that, in general, Hanneltjie's physical condition became frail over time, but during these periods when she was with the family at the Cape she exhibited alertness and comprehension. Slabber says she is familiar with dementia conditions owing to her 30 years of voluntary work in Rotary visiting old age homes. She could think of nothing that, to her, might have signalled a cognitive affliction.

[48] Lotz, who had been an employee since about 2003 of Lindt Instruments, reports:

48.1 He had a monthly business/social meeting with her. The custom was for him to visit her at home to sign off on the salaries.

48.2 Hanneltjie attended Lotz's fiancée's 21st birthday party on 21 September 2009.

48.3 Lotz opined that she was seriously "involved" in the business. There is not much to back up that statement. Hanneltjie had the last word on big decisions and she exercised her power to decline proposals owing to her conservative nature about financial matters. Nonetheless, she was involved to some degree even in 2014, to which reference is made again.

48.4 Lotz' grandmother suffered from Alzheimers and he was familiar with the symptoms.

[49] Suku Dibakwana, Hanneltjie's domestic worker, reports on the period 2003 – 2011

49.1 She cleaned one day a week which was the level of exposure she had to Hanneltjie.

49.2 Hanneltjie was forgetful, eg losing spoons and so forth. A scarf was tied over a doorhandle to remind her to activate the alarm.

49.3 Hanneltjie injured herself from time to time; an inference drawn from seeing her wearing bandages. Hanneltjie's posture was bent over.

49.4 Hanneltjie frequently accused her of stealing things that were mislaid; eg paring knife, towels and so forth.

The years thereafter 2011 – 2014

[50] Mrs Hiestermann, a social worker, knew Hanneltjie from 2011. Jacobs was responsible for introducing them. His idea was to keep an eye on her and alleviate the loneliness. Their interaction was lunching and going to the cinema. In November 2014, at Jacobs request, she drew up the rudiments of a report for a curator to be appointed. She commented that she herself observed a deterioration only on 5 November 2014.

[51] Violet Ngunve was a domestic worker from 2012 – 2014. She reports:

51.1 Hanneltjie was very strict about diet and food preparation.

51.2 Hanneltjie habitually lost her keys.

51.3 Hanneltjie stopped driving; when exactly is uncertain but seems to have been in 2013 after a near accident. A certain Diedericks, who was enlisted by Jacobs to drive her, took her car and, according to Jacobs, misappropriated it. The missing car was a cause of upset to Hanneltjie.

51.4 Hanneltjie fell three times in 2014.

51.5 In 2014, Hanneltjie needed help to bath. She was ill tempered about this.

[52] In 2011, Hanneltjie was with the Jacobs family at a Magaliesburg resort. She had to be fetched from her room to join the family.

[53] In 2012, year-end party of Lindt Instruments was arranged as usual by Hanneltjie.

[54] In 2012, the bachelorette of Lotz's fiance was attended by Hanneltjie and on 23 July 2012 she attended the wedding. Lotz says he saw her drive alone to and from the bachelorette.

[55] In 2012, Jacobs graduated in England. Hanneltjie visited for the occasion. During this visit, Hanneltjie decided to grant Jacobs a shareholding in the business. In the result, a share was not effected but a profit share was paid.

[56] In 2013, Jacobs' family with Hanneltjie visited Prague. She was wheeled about owing to her frailty.

[57] With Jacobs they also visited Greece? Whilst there she slipped in the bath and hurt herself. A doctor attended her. There is no suggestion that any indication of dementia was detected.

[58] In 2013, on 18 June, Hanneltjie consulted Dr Natsis. She diagnosed malaise. She was thin. No other abnormalities were noted. Her speech was not repetitive. She was referred to Dr Le Roux, a specialist physician. No report from Dr Le Roux on this question was adduced.

[59] In 2013, in December, Hanneltjie visited the Slabbers at the Cape. No oddities were observed.

[60] The 2013 year end party for Lindt Instruments was arranged by Hanneltjie. She was clearly self-assertive because an error occurred in the booking with the restaurant which she sorted out herself. It was noted by Lotz that she was frail and struggled on stairs

[61] In May 2014, Hanneltjie went on a trip to Sun City with Jacobs. She displayed forgetfulness. She was irascible. She became obsessed with the number 13.

[62] In 2014, Lotz reports that Hanneltjie, uncharacteristically, showed a lack of interest in a financial decision about a new expensive machine, the sort of decision she was always consulted on and which she formerly would have taken deep interest.

[63] On 28 October 2014, Olga Jacobs arrived from England and saw Hanneltjie was in poor state. She took Hanneltjie to Dr Natsis. Dr Natsis diagnosed dementia. Hanneltjie was wearing slippers. Why Olga did not help her address appropriate is unexplained. Dr Natsis referred her to Dr le Roux.

[64] In 2014 during November and December, Dr Le Roux and Dr Van den Heever attended Hanneltjie. They confirm the presence of dementia. A lumbar puncture was administered to drain the fluid which apparently resulted in an improved gait and “intellectual improvement”. Alas, no real details are available.

Overall Evaluation of the evidence

[65] The question is whether in the light of this body of evidence, can it be inferred that on 24 March 2010, Hanneltjie was cognitively impaired so that she could not have grasped the implications of the contents of the will she executed?

[66] The several anecdotes strongly suggest that even before 2010 she was becoming frail. Her gait in particular was a well-established affliction by then. Her memory was becoming poor but the body of evidence lacks detail as to the time when this became a serious affliction. The direct evidence of serious decline is from late 2013, if indeed that early. She had other ailments and indeed in the critical period she sought medical attention and was frequently seen by Dr Natsis.

[67] These considerations, in my view stand out.

67.1 The first is the Easter holiday in 2010 with the Slabbers at the Cape. This was a mere week after the will was signed. Family who knew her well, and had seen her the previous December and indeed the following December give an account of her that offers no corroboration of the idea that she was cognitively declining.

67.2 Second, in the five visits to Dr Natsis, the doctor noticed nothing to suggest she was cognitively declining. The urinary incontinence is a condition in an elderly person which does not signify anything specific beyond the urological condition. Nothing prompted Dr Natsis to enquire more, and this of a patient with who she had better than usual rapport.

67.3 Even if Lotz's observations are discounted for exaggeration about her degree of active involvement in the business, the account of her condition is bland and is not suggestive of cognitive decline in 2010.

[68] As against that impression, what of Jacobs' and Eagle's observations? Their reports are broadly speaking non-specific. Many of the incidents or episodes recounted by Jacobs and Eagle as being, in their subjective, ex post facto, view, as being relevant to the enquiry plainly do not ground an inference of cognitive impairment. Others, albeit generic indicate poor memory, detachment, and occasional irascibility. But, in my view, bearing in mind the intimacy claimed by Jacobs and his skill set as a psychologist crucially, how did he behave towards Hanneltjie given his reported observations? More specifically, if these observations truly, in the context of her general behaviour, indicated cognitive deterioration why did he not raise the issue earlier? It is not his evidence that in 2010, he thought she was suffering in any way from dementia. Indeed she made him a generous donation of four thousand pounds a

year at that time. He says he visited about twice a year, and they spoke often on the phone. Given his stated frequency of contact, had he had indeed any reason to question her intellect he did absolutely nothing about it. Moreover, the position at that time was not that he was unconcerned about her welfare. Indeed, his attempts to see Dr Natsis (which must be taken at face value) albeit clumsily not making an appointment and being surprised he could not get beyond her secretary, and not emailing Dr Natsis were not, on his own evidence, inspired by a belief that she was cognitively impaired. In 2011, when he procured Mrs Hiester mann, a social worker, and Mrs Hiester mann's mother to look in on Hanneltjie, it was not with a brief that Hanneltjie was becoming incapable of rational thought.

[69] The best evidence available of Hanneltjie's conduct at the crucial time therefore does not include a single instance of anyone holding or expressing the belief that Hanneltjie was impaired, including a doctor, a psychologist, and a person familiar with dementia in the aged. Moreover the Accounts of Slabber and Natsis over the crucial period do not support the idea that Hanneltjie was demented.

[70] In my view, it must therefore follow that this body of evidence, weighed with that of the expert witnesses, drives me to conclude that there is no rational basis to contend that when the 2010 Will was executed, Hanneltjie was of unsound mind.

The Costs questions

[71] The point of departure is that the litigation was initiated by the executor. What for? The affidavits in the initial application set forth that the relief wanted was a declaratory order telling the executor which of three Wills to rely upon. The form of the order was, as alluded

to, a declaration that the 2014 Will, alternatively, the 2010 Will alternatively the 2005 Will be declared valid.

[72] In bringing the application, the executor acted sensibly. First, the diagnosis of dementia so soon after signing the 2014 Will, made an enquiry of some sort into Hanneltjie's state of mind appropriate. That enquiry might have occurred even if Jacobs had not contended that the 2014 and the 2010 Wills ought to be invalidated. The critical point is that relief was not being sought *against* Jacobs per se. He was entitled to question the validity of the Wills and demand clarification. Plainly, the executor did not pick a Will and proceed to wind up the estate, leaving it to an unhappy legatee to seek relief against him. Rather, the executor sought relief he needed. The lodging of the 2014 Will and acceptance by the Master is of no importance, as it is plain the executor appreciated he could not rely on it without the comfort of a court order. The abandonment of any reliance on it was sensible.

[73] In my view these circumstances indicate that the costs involved in obtaining the declaratory order should be borne by the estate. The cost of clarification through a declaratory order was appropriate and prudent step.

[74] Jacobs' costs ought also be borne by the estate as he was not unreasonable in having his perspective ventilated. His stance, even though not upheld, was not mala fide.

[75] Steyn's position is different. He chose to be separately represented despite having no distinct viewpoint from Vermaak. He moreover chose not to testify and contribute to the enquiry when he obviously must have had material evidence to offer. In short, his role was

akin to a fifth wheel on a waggon. Having contributing nothing to the enquiry, there is no reason why the estate should bear the costs of his self-indulgence.

[76] Therefore, the appropriate order is that all the costs of all three parties be borne by the estate on the party and party scale.

[77] The reserved costs in the hearing before Wright J are subject to the same fate. Despite allegations of culpability levelled at Jacobs for delay and complexity, it is not, in my view, possible to reach such a conclusion. The matter was never going to be resolved on affidavit and had to go into an oral hearing.

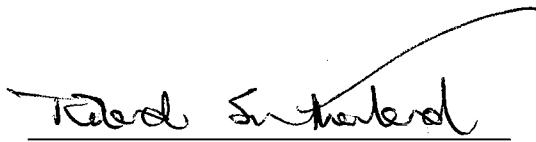
[78] There were grievances raised about inappropriate remarks in the papers made by Jacobs against Vermaak. These were the result of mistaken identity and a confusion with another Vermaak. The issue was resolved at the pre-trial conference, which is an appropriate time to have done so. In my view, no special costs order is warranted to address that matter. If Vermaak is of the view that a defamation claim is viable, it is his right to pursue it.

The Orders

- (1) The 2014 Will is declared invalid by reason of the testatrix being of unsound mind at the time of execution.
- (2) It is declared that the testatrix, Johanna Francina Lindhout, was, when executing the 2010 Will of sound mind and was capable of executing a valid will.

(3) The Plaintiff, *qua* executor is entitled to the prescribed fees for the winding up of the estate.

(4) The Plaintiff, *qua* executor, shall bear the costs of the matter including the costs of the First Defendant on the party and party scale.

A handwritten signature in black ink, reading 'Roland Sutherland', is written over a horizontal line.

ROLAND SUTHERLAND

Judge of the High Court

Gauteng Local Division, Johannesburg

Date of hearing: 27, 28, 29, 30, 31 May 2019 and 13 September 2019

Date of judgment: 30 September 2019

For the Plaintiffs: Adv JW Steyn & Adv J le Roux

Instructed by Bento Incorporated

For the First Defendant: Adv L Zazeraaj

Instructed by Shalene Schreuder Attorneys

For the Third Defendant: Att G Culhane

Instructed by Gerard Culhane Attorneys