REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 61782/2012

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

20 JUNE 2016 **EHD VAN OOSTEN**

In the matter between

RICHARD DOUGLAS PENWILL NO	**FIRST PLAINTIFF**
CHRISTOPHER ANTHONY FRASER MACDONALD NO	**SECOND PLAINTIFF**
and	
ANDREW DONALD JONATHAN PENWILL	**FIRST DEFENDANT**
WILLEM FRANCOIS BOUWER NO	**SECOND DEFENDANT**
MASTER OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG	**THIRD DEFENDANT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] 'Prophetically, I see this ugly difference of opinion, and the waste of assets, continuing after I have departed this earth. This continuing disagreement without reason is a struggle without victors, only victims.'

Peter D'Arcy Herrman, Chartered Accountant (SA), Tzaneen, 26 January 2007.

And, indeed so it has come to pass: almost 10 years hence - Peter D'Arcy-Herrman in the afterlife and the Penwill brothers head locked in a titanic legal battle.

[2] The core issue in this matter concerns the validity of a will executed by the late Ms Pat Penwill. On 30 August 2006, at the age of 83, widowed and while living in the family homestead on the farm Grey Mists, in the district of Haenertsburg, in the province of Limpopo, she executed the contested will (the August 2006 will). The parties to these proceedings, in essence, are Richard Penwill and his elder brother, Andrew Penwill, who are the only sons of the testatrix and her late husband, Douglas Penwill. For the sake of convenience I will henceforth refer to the members of the Penwill family by their first names. Richard is the first plaintiff in this action, acting in his capacity as one of the trustees of the Beverly Trust (the trust), a family trust established by his late father, in 1997. Andrew is the first defendant and the second defendant is the executor of the deceased estate appointed by the third defendant. I shall henceforth interchangeably refer to the plaintiffs in the singular as 'the plaintiff' and to the first defendant as 'the defendant'.

[3] The dispute between the Penwill brothers is embedded in rivalry, jealousy, greed and hatred. Richard, although admitting their present strained relationship, pins the commencement of their animosity to approximately 2003 and maintains that, before that, they were on 'kissing terms'. This kind of rivalry is not uncommon to human nature in the context of heritable expectations and disputes, as so appositely described in an Afrikaans song:

'Belangrik, verseker.
Kyk hoe baie mense by die graf
kameras flits aanhoudend
selfs die predikant moet wag

Halleluja, sing almal saam
Prys die Here se naam
En daarna
gaan almal huistoe
en die manne skink 'n dop

die maan sal
sy gang gaan
die son kom weer in die more op

Hoe later, hoe kwater
die testament, die groot baklei
broedertwis, dis gewis
want elkeen voel
hy moes meer kry

Die stof gaan lê maar
weer op die klip tot dit reën
en sy laaste woorde:
waar gaan dit alles tog heen'

It is moreover true to what the American writer, Whitney Otto, has remarked 'No one fights dirtier and more brutally than blood; only family knows its own weakness, the exact placement of the heart'. Their rivalry has led to the distress, frustration and condemnation of not only the testatrix but, seemingly, also one of the attorneys who, at some stage in the raging battle, was involved in their infighting, which caused him to vividly express himself as follows in an email to Andrew:

> 'Your dishonesty and obsequiousness are the pillars upon which you and...your brother have built your wretched lives. You are like two vultures feeding off the corpses of your dead parents. So ugly and distasteful. Conduct becoming of the pond people. Repulsive. There is a special hell for you guys who are mirror images and that is to spend eternity with only one another as company.'

[4] Douglas and his wife moved to South Africa from Kenya in 1963 and founded the well-known Sapekoe Tea Estates, in Tzaneen. They were married for 54 years. Douglas, if the letters written by him that are before this court and the descriptions of him by family members are anything to go by, was a *pater familias* in the true sense: vexed in traditions, rigid in his beliefs and strong willed. Richard is married and three children were born from the marriage. He qualified in law and after a stint in the diplomatic service and thereafter farming for his father on his Bredasdorp farms, he joined the Cape Bar where he practiced as an advocate until 1998. Richard and his family lived in England from end 1997 until 2012. During that time he frequently visited his parents at Grey Mists. After the death of his mother he went to live on the farm. In October 2006, he for the first time learned from D'Arcy-Herrman that the August 2006 will was in existence and he was placed in possession thereof as well as the trust directive on 19 December 2006. Andrew never married and has no

children. He is a retired businessman and stock broker, living in Morningside Johannesburg.

[5] Central to the dispute between the parties is the trust in respect of which Douglas and his wife were the appointed founding trustees. In 2012 the trustees of the trust were Pat, her two sons and Peter D'Arcy-Herrman, at the time practicing in Tzaneen, and who had become an esteemed, long standing friend of the Penwill family, until August 2008, when he resigned as trustee of the trust as well as executor in the deceased estate of Douglas. The trust is the sole shareholder in a company known as DJ Penwill Properties (Pty) Ltd (the company). The company was owned and controlled by Douglas and is the registered owner of seven valuable farms in the Bredasdorp district, in the Western Cape Province (the Cape farms). Their present value, although disputed by Andrew, amounts to some R14m. The family farm Grey Mists, where the August 2006 will was executed, was purchased by Douglas and his wife, who were married out of community of property, jointly, some 20 years prior to his demise on 4 October 2000. In his will, dated 7 August 2000, Douglas bequeathed one half of his deceased estate to the trust and the other half to his wife. The administration of his estate has still not been finalised. The trust however, is the vested beneficiary of Douglas's one half of Grey Mists and the trust will also, in terms of the wills executed by Pat prior to the August 2006 will, inherit her half share of Grey Mists and thus become the owner of the entire farm.

[6] The beneficiaries of the trust according to the trust deed, dated 26 June 1994, are Douglas, his wife and 'any children or other relatives of Douglas and Pat as decided by the trustees from time to time' and further 'any institutions, or persons nominated by the settlor (Douglas) either by written direction to the trustees or by way of testament'. According to the minutes of a trust meeting, held on 6 March 1998, at which were present Douglas, his wife and D'Arcy-Herrman, Richard's three children were added as beneficiaries of the trust. The meeting and the authenticity of the minutes, counsel for the defendant has informed me, are in dispute to which I shall revert. In his evidence before this court Richard revealed that his wife, Ute, had recently been added as a further beneficiary of the trust. Assuming this to be the true status of the trust, Richard and his family are $\frac{5}{6}^{th's}$ beneficiaries of the trust as opposed to Andrew's $\frac{1}{6}^{th}$ share.

[7] Three wills executed by Pat are relevant for present purposes. On 21 February 2003 she signed a will in which the trust is the beneficiary (the February 2003 will). On 17 May 2006 she executed a will in terms of which the trust was likewise the beneficiary of her undivided half-share in the farm Grey Mists but added thereto, that her movable assets be divided in equal shares between her sons (the May 2006 will). On 30 August 2006 she signed two documents: firstly, the disputed August 2006 will, in which her entire estate is divided equally amongst her sons without any mention of the trust and secondly, a directive, in effect dissolving the trust (the trust directive). It is common cause that Ms Pat Penwill was mentally incapacitated by February 2007. She died on 7 June 2012.

The litigation between the parties

[8] On 25 October 2012 the present action was instituted. The initial relief sought was for a declarator that the August 2006 will 'is void and of no force and effect' and for upholding the February 2003 will for the purpose of administering the deceased estate. Prior to trial and after discovery of documents by the defendant the plaintiff for the first time became aware of the May 2006 will. This prompted the plaintiff to amend the particulars of claim to include a challenge to the validity of the May 2006 will on the same grounds. The amendment was brought during the opening address at the commencement of the trial and was not opposed. I propose to formally grant the amendment at the end of this judgment. It is not in dispute that, if the plaintiff is successful in its claim, the May 2006 will follow the fate of the August 2006 will and I therefore propose to deal with both wills on the same footing. I will refer to the two wills as the contested wills.

[9] The plaintiff's challenge to the validity of the contested wills is based on two grounds. First, that the testatrix, at the time of execution of the August 2006 will, was no longer 'of a sound and disposing mind' and incapable of understanding what she was doing as she was suffering from old age and dementia. Second, and in the alternative, reliance is placed on an alleged undue influence exerted on her, in regard to the May 2006 will, by Andrew, and, in regard to the August 2006 will, by Andrew, assisted by Ms Jennifer Emily Hutchinson Wild, a semi-retired advocate from Cathcart in the Eastern Cape, once an associate member of the Durban Bar

and later a member of the Bishu Bar, who came on the scene on 29 August 2006, the day before the will was signed.

[10] At the commencement of the trial the defendant applied for a separation of the issue concerning the testatrix's capacity to make a will, from the remainder of the issues. The application was opposed by the plaintiff. The defendant simultaneously sought leave to file a counterclaim out of time which was likewise opposed. At the conclusion of argument counsel for the defendant withdrew the counterclaim which was noted and I consequently ordered the defendant to pay the costs relating thereto which is reflected in the order made at the end of this judgment. The trial thereafter proceeded on all issues.

[11] The trial of the matter extended into 13 court days over a period of 30 months. Altogether ten witnesses, three of whom were experts, testified. Counsel for the plaintiff in argument disavowed any reliance on the evidence of one of the plaintiffs' expert witnesses, Lt-Col Landman, a handwriting expert. The court proceedings were on 2 February 2015 adjourned to resume in Tzaneen for the hearing of the evidence of 3 witnesses for the defendant in order to meet the needs of one of those witnesses, Ms Keller, who was 92 years old and declared medically unfit to travel to and attend court in Pretoria. Numerous wide ranging, often irrelevant facts and disputes were raised and debated ad nauseam. I do not consider it necessary to traverse all those disputes. The credibility of the *dramatis personae* in this saga was vigorously attacked and has become pivotal to the determination of the issues.

The plaintiff's main claim

[12] In order to prove the mental state of the testatrix, at the time of executing the August 2006 will, the plaintiff mainly relies on the expert evidence of Prof Grobler, a psychiatrist, in the employ of Elizabeth Donkins Psychiatric Hospital, in Port Elizabeth. He testified that he, at the behest of Richard, examined the testatrix on 10 January 2007, which was some four months after the execution of the August 2006 will. He concluded that she was suffering from dementia. It is however, common cause that she was at that time no longer mentally capable of executing a will. Prof Grobler, however, unavoidably and understandably so, was constrained to concede that, notwithstanding his own observations, the testing performed by him and the

information furnished to him by Richard, he was not in a position to express any firm views on her mental condition at the time of signing the August 2006 will. In view of the concession and having regard to the totality of the evidence presented in this court on this score, I do not consider it necessary to traverse his evidence any further.

[13] The lay evidence adduced on behalf of the plaintiff in regard to the testatrix's mental capacity, include the following:

- Richard, who testified that his mother's mental condition started deteriorating in 2003. Although she always remained in good physical condition, by 2005 he said she 'had truly lost her bearings' and, in February 2006, during his visit From the United Kingdom for her 83rd birthday celebration, she had not improved at all. In fact she was living, as he put it, 'on auto pilot'. As for her mental capacity in August 2006, he expressed the firm view that his mother was most definitely not mentally capable of executing a will;
- Ms Matlebjane, a domestic servant in the employ of the testatrix at Grey Mists, from 2002 onwards and in particular in August 2006, who testified concerning her daily interactions with her employer; and
- Ms McMahon, who lived on a neighbouring farm and had known the Penwill family, and in particular, Ms Pat Penwill, after the death of her husband, quite well.

[14] The defendant called the following countering witnesses on this issue:

- Ms Keller, a life-long friend and confidant of Pat;
- Trevor Phillips, a manager at Lumber Mills in Haenertsburg, who had often visited Grey Mists and was well acquainted with the Penwills and who, moreover, was present at the signing of the August 2006 will and the trust directive and indeed signed as a witness thereto;
- Ms Spaumer, an account analyst in the business banking section at the Tzaneen branch of Standard Bank, who had not only dealt with Ms Pat Penwill personally from 2005 onwards, but also facilitated a written loan agreement Ms Pat Penwill had concluded with Andrew on 22 August 2006;

- Dr Craig Golding, a specialist physician, in private practice, practicing at the time in Bryanston, who had examined Pat for the first time on 10 May 2006 and thereafter on 31 August 2006, which was the day after the signing of the August 2006 will. Dr Golding was requested by Ms Wild to examine Ms Pat Penwill and to sign a written certification, prepared by Wild, in regard to both documents that she was 'of sound mind and legally competent to execute' the two documents; and lastly
- Ms Wild, who had met Ms Pat Penwill for the first time on 29 August 2006 and who was the scribe and facilitated the signing of the August 2006 will as well as the trust directive and on the next day facilitated the certification on the will and the trust directive by Dr Golding. Wild thereafter remained in contact with the testatrix and indeed was involved in the aftermath events to which I shall revert.

[15] I do not consider it necessary to traverse the evidence of the witnesses I have referred to in any detail. Suffice to say that this court is faced with mutually destructive versions advancing two extremes concerning the testatrix's mental capacity at the relevant time. It would moreover not serve any useful purpose to tabulate and decide the various reasons proffered by the witnesses for holding their views, nor the discrepancies, inconsistencies and improbabilities counsel were admirably able to extract from the evidence and relied on in support of the opposing contentions raised in the heads of argument. Having considered the totality of the evidence, I am unable to make any firm findings on this issue, either way (see *Tregea and Another v Godart and Another* 1939 AD 16). Counsel for the plaintiff readily and, in my view, fairly and correctly, in argument, did not seriously pursue the main claim.

[16] Counsel for the defendant referred me to and heavily relied on the judgment in *Harlow v Becker NO and Others* 1998 (4) SA 639 (D) 644-655, in which the requirements of both s 4 of the Wills Act 7 of 1953 and the common law in regard to the required mental capacity to make a will, as well as the considerations in regard thereto, were extensively dealt with. The plaintiff bears the onus of proving mental incapacity 'in the clearest manner' (*Kunz v Swart and Others* 1924 AD 618 at 692). Applying those principles to the facts before me I conclude that that onus has not

been discharged and it follows that the main claim based on the testatrix's alleged mental incapacity cannot succeed.

The plaintiff's alternative claim: Undue influence

Introduction

[17] The crucial events before, at and after the signing of the August 2006 will and trust directive occurred over a period of three days, from 29 to 31 August 2006. Those events are decisive to a proper consideration of this case. This requires me to carefully consider and assess the evidence of Ms Wild who played a pivotal role in these events. She operated under and in terms of the instructions of Andrew, who was clearly the main driving force and master mind in these events. Andrew, I should mention at this stage already, was not called to testify and I shall revert to the question whether a negative inference against the defendant is warranted. Dr Golding's evidence concerning his examination of Ms Pat Penwill and the certification appended to the August 2006 will and the trust direction is of vital importance and likewise requires careful analysis. Wild's involvement, as I have indicated, extended well beyond the crucial three day period. Andrew kept her on a paid retainer at rate of R6 000 per month, from 2007 to 2012, and she further, after her return home on 1 September 2006, commencing on 3 September 2006, and regularly thereafter, sent no less than 50 letters to a number of persons between September 2006 and January 2007. Wild energetically and intimately became personally involved in the action instituted by Andrew against the trust. Counsel for the defendant, somewhat euphemistically I would think, described her involvement as 'unorthodox', juxtaposed to the more damning depiction by counsel for the plaintiff, that her conduct was 'plainly and indisputably fraudulent'. Counsel for the defendant surprisingly submitted that the aftermath of events and Wild's evidence in regard thereto were not relevant to the adjudication of the issues in this matter, and that he considered it not necessary to address either those events or Wild's credibility in regard thereto. In my view counsel's approach is plainly wrong. As to my approach, I propose to consider the totality of all the evidence, facts and circumstances in this case as well as the probabilities arising, in the adjudication of the issues I am required to determine (*S v M* 2006 (1) SACR 135 (SCA) para 189). For the reasons I will presently revert to, Wild's subsequent involvement in the

matter and her credibility in regard thereto, as well as her credibility in general are critical aspects in the adjudication of this case, in particular in regard to the question whether she unduly and improperly influenced the testatrix in the execution of the August 2006 will and the trust directive. With this brief introduction I now turn to a résumé of the relevant facts.

The facts prior to and concerning the execution of the will and the trust directive

[18] I shall first deal with the evidence of Wild from the inception of her involvement with Ms Pat Penwill until the signing of the will and the trust directive. As for the certification of those documents by Dr Golding the very next day, I propose to mainly examine the evidence of Dr Golding.

The evidence of Ms Wild concerning the execution of the will and trust directive

[19] Wild was first informed of the problems with the finalisation of the Douglas Penwill deceased estate at a social dinner conversation. The name of Andrew came up after she had expressed a view concerning the impossibility of sub-division of agricultural land without approval of the Minister of Agriculture. On 22 August 2006 she was formally 'briefed' by an attorney, one Sipho Mkhize, whom she had known very well. She was 'briefed' in the following manner:

> 'It was on 22 August and basically Sipho's brief to me was: 'Here is a problem.' He did not even really explain what the problem was. He said there is a problem that he got from Baden (her first ex-husband) with a trust and estate that is being outstanding. It involves this family. Okay? And he said: 'I will get the fellow to phone you' and then Andrew (Penwill) phoned and I just said to him when he was speaking, he is not a man of a few words, My Lord and it is not always crisp and to the point. I said to him: 'Listen, this involves an estate. I want to speak to the executor. I want to come and speak to the executor and the trust this and [indistinct].' I said: 'No, no, no, no. No, no. I will come and speak to the executor and then I will see what the problems are.'

In cross-examination she said that she was briefed to 'sort out the Penwill estate' but that no name of a client was furnished to her.

[20] The 'briefing' of Wild by Sipho Mkhize was hotly contested. At best for Wild this happened in the most unusual and odd manner and circumstances. Although I am not inclined to accept that the Bar rules concerning briefing of an advocate by an attorney were either observed or complied with, I do not consider this an issue that requires determination in this matter and it is accordingly not further dealt with.

[21] On the first available day she could fit in, which was on 29 August 2006, Wild flew from East London to Johannesburg. By prior arrangement Andrew collected her at the airport where they met for the first time. They travelled to Haenertsburg. The conversation *en route* was of a general nature without any reference to the Penwill estate. They first stopped at the Grey Mists home where she met Pat for the first time. She told Pat that she was a lawyer and that she had an appointment to see D'Arcy-Herrman that afternoon. It was already late in the day and she and Andrew proceeded to D'Arcy-Herrman's office in Tzaneen. Their ensuing conversation concerned *inter alia* the sub-division of the Cape farms in respect of which D'Arcy-Herrman informed her that the Minister of Agriculture had refused consent for the sub-division. He handed to her the Douglas will, as well as the first liquidation and distribution account in the deceased estate of Douglas, in which he was the appointed executor. Among the documents was a loan agreement in terms of which the trust assumed liability for the payment of a loan to Andrew, to which I shall revert. D'Arcy-Herrman assured her that the will was not 'the problem' as there was 'nothing controversial, ambiguous or vague there'. He then said: 'The problem is actually the trust' and gave her a copy of the trust deed. Interestingly, she made no mention of enquiring from D'Arcy-Herrman *what* the problem with the trust was. D'Arcy-Herrman enlightened her with details concerning the brotherly enmity between the Penwill brothers, to which he added that he and his wife were 'just caught in the middle'. They agreed on a follow-up meeting the next afternoon and she and Andrew returned to Grey Mists.

[22] At Grey Mists they had dinner with Pat. A normal dinner table discussion ensued. It was already late at night and they all retired to their bedrooms. While Wild was in her downstairs bedroom perusing the documents she had been given by D'Arcy-Herrman, there was a knock on the door and Pat walked in. A conversation started. Pat seemed starved for company. She started telling her about her late husband, who appeared to have had 'a hugely strong appearance' in the family and

that she was worried about the way things were going as her sons, or as she referred to them as 'the boys', were constantly bickering and fighting. She mentioned Richard, who was in England, that Andrew had neglected her and that they were both 'more interested in her things'. Wild explained to Pat that she had read the Douglas's will, showing that she was entitled to half of Grey Mists and that she could stay there as she had that right for all her life although Douglas had given it to the trust. The conversation then proceeded as follows:

> 'And she said: 'I do not care for the trust.' And then she basically told me that it was her husband's idea and that... I cannot remember her exact words, My Lord, but what she imparted to me was that, she and Peter D'Arcy-Herrman were left in the middle with these two boys fighting on either side and that had been exactly what Peter D'Arcy-Herrman had communicated to me as well and basically she said to me: 'Why can we not stop with this trust? Why can we not stop this trust?' And I said to her: 'Ms Penwill, I have not looked at the thing yet. I will have to look at what you are saying.' She said: 'Because if Andrew takes his, Richard takes his and I take mine, then there is nothing to fight about,' which... You know, I have not looked at those trust issues yet because I have not read the trust deed yet, but I said to her: 'Ms Penwill, I will look into it. I will see what the position is,' because normally when you have a deadlocked trust it is possible to dissolve that trust. So that, that was what was in my mind at that time was, whether this thing... Because she and Peter are caught in the middle neutral so to speak and then the two boys on either side. Well, I gave her that promise. I said to her: 'Have you got any papers?' And she said to me: 'My papers are upstairs.' So, I said to her: 'Well, do not worry about it now. It was actually getting quite late. We will look at the thing tomorrow morning' and she said to me: 'Please help me.' And I said: 'Of course I am going to do that. Of course.'

[23] The next morning Wild 'carefully read' the trust deed. That is when she stumbled on clause 21.4 of the trust deed. I interpose to refer to this clause in the trust deed which provides as follows:

> 'The total of the balance of the trust fund shall vest in the beneficiaries and shall be distributed to them as directed by the survivor of Douglas and Pat, by way of last will and testament or by direction in writing given to the trustees, failing which direction, within the absolute and unanimous discretion of the trustees.'

'The Trust Funds' in terms of clause 1.6 of the trust deed mean:

'the aggregate of all the assets from time to time administered by the trustees in terms of the provisions of the trust deed including (but not limited to) the donation in terms of clause 5 (five) and all income from time to time earned by the Trustees on the assets forming part of this Trust Fund, and not distributed by them in terms of the provisions of the Trust Deed.'

I shall revert to a detailed discussion of the clause read in context of the provisions of the trust deed, later in the judgment. The clause provided, it then dawned on her, in the context of the whole deed, 'what would happen to the capital of the trust' and that in her view, it was 'absolutely intended' that 'either Douglas Penwill or Pat Penwill could determine the application of capital...and that the total balance of the trust would vest in the beneficiaries and [be] distributed [to] them as directed by the survivor of Douglas and Pat by way of last will and testament, or by direction in writing given to the trustees'.

[24] Wild and Pat had breakfast together. They then proceeded on a tour of the house and the rose garden, and, so she continued to testify:

'Then I said to her: 'The stuff that we spoke about last night, I would like to sit down and speak to you about it fully' and she said to me: 'Yes.' And I said: 'Did you... Have you got your papers?' She said: 'They are upstairs.' She went upstairs and she fetched them. We came downstairs and she and I sat together and I said to her: 'Ms Penwill, I have read that trust deed and it seems to me that you have the power to direct that the capital fund of the trust be split as you asked, to you, to Andrew and to Richard.' She said: 'Well, do it.' I said to her: 'Yes, no, I am going to... I will do it.' She said: 'Do it.' She said: 'Then this fighting will stop' and she said she had asked Peter, but he would not do it because he had been with Douglas and so there was this thing of a loyalty to Douglas had wanted, as opposed to sorting things out and in fact, I must say, that perception was well founded as well, My Lord, because truly Peter was torn in that way. He had fought in the war with Douglas Penwill. He had apparently played a role in saving his life. I'm not sure exactly under what circumstances. So therefore, what Douglas had wanted, was very much on Peter's mind. You will see from what I tell you from what happened later, that Peter confirmed that Ms Penwill had actually asked to try and separate this thing out and for the boys and her to go their own ways. So, I said to her: 'Yes, I will do the trust [indistinct]. I will do it for you.' She was actually... It was as if I could bring the fighting to an end then. You know what I mean? She... 'Do it.' But then as I looked through her papers because she brought me some, I saw that there were two wills in the

papers and I looked at that because one was a 2003 and the other one was also... Was a 2006 and I took them out and I looked at them and the very first thing I saw on those wills was that she was leaving Greymist to the Beverley Trust. I said to her: 'Ms Penwill, these wills of yours, there are two of them? Oh yes. Yes, yes, I know about them.' I said: 'But you have asked me to divide up this trust for you, but I think there is a problem because you have left your half of Greymist to the trust. Oh,' she said: 'I did not do those wills. No,' she said. 'Andrew looked at them [indistinct].' So I said to her: 'No, no. No, no, hold on. Let us just be clear.' She told me that literally those boys... Sorry, her sons... I should not refer to them as those boys, but... Had write her wills and told her to sign them. Each his own one.' I said to her: 'No, let me explain this to you because this is really important.' I said to her: 'There has been a problem with your husband's estate. Trust me, if you leave it like this there is going to be a huge problem.' She said: 'Do the trust.' I said: 'Yes, but you cannot leave it with these wills because you have left stuff to the trust.' I said to her: 'Ms Penwill, the way you do wills is not what someone tells you to do. It is what you want that matters. Now, forget about what everybody else wants. You tell me what is it that you want. It is your property. You' and she said: 'These boys share and share alike. Equally to the boys. Share and share alike.' So, I said to her: 'That is fine by me.' So, I said: 'Are you sure that is what you want?' She said: 'That is what I want.'

They then discussed and agreed who the executor for the will would be. Having discussed a few other matters she borrowed Pat's Pajero vehicle, and on roads she was not familiar with, on her own travelled in the direction of Tzaneen, in search of a computer. She happened to find one at the Protea Hotel and proceeded to type the two documents on one of their computers. On her return to Grey Mists she went through the two documents she had typed with Pat, who wanted to sign them there and then, but Wild explained to her that the signing would have to wait as there were no witnesses available to attest to the documents. Andrew was around. Trevor Phillips was called by Andrew on his cell phone and he arrived later. They first had tea and whilst having tea, Pat conversed with Phillips. Wild then read through the documents in the presence of Phillips and Pat confirmed that she was happy with them and she then signed. Wild and Phillips signed as witnesses. The provisions of the will read as follows:

'1.

I hereby revoke, cancel and annul all previous wills, codicils and testamentary dispositions previously made by me.

2.

I hereby nominate, constitute and appoint GORDON KEITH HAY, Director of MACROBERTS INC., Pretoria to be my Executor and I direct that he shall be exempt from being required to furnish security for the performance of his duties hereunder.

3.

I bequeath my entire Estate to my sons ANDREW DONALD JONATHAN PENWILL and RICHARD DOUGLAS PENWILL in equal shares, share and share alike.

4.

If either of my sons predecease me:
4.1 leaving lawful issue, then that son's share shall devolve upon his children per stirpes;
4.2 without leaving lawful issue, then that son's share shall devolve upon my other son.

5.

I direct that no benefit devolving hereunder shall form party of any joint, community or accrual regime of any estate of any beneficiary.'

[25] At the scheduled meeting that afternoon with D'Arcy-Herrman, she handed the original documents to him and he in turn made copies and gave them to her. That evening she reflected on Richard's possible opposition to the latest developments and decided to have Pat medically certified. She discussed this with Pat who was only too willing to oblige. Andrew happened to be around and she told him that his mom needed 'to see her doctor with some documents' without mentioning the will and trust directive because she reasoned it was 'not right' to 'discuss the will of a parent with the children at all' and, as for the trust, she was confident that D'Arcy-Herrman, as the managing trustee, would formally deal with the unveiling of the trust directive to the Penwill brothers.

[26] Andrew managed to arrange an appointment with Dr Golding the very next day, and Dr Golding in turn was able to 'squeeze in' the appointment in-between other appointments. Pat was 'absolutely delighted' to leave Grey Mists being assisted and accompanied by Matlebjane, after some four hours of travelling later they, including Andrew, arrived at Dr Golding's consulting rooms in Rosebank, Johannesburg.

Dr Craig Golding

[27] Dr Golding confirmed that his diary was full that day and that he was asked to squeeze Ms Penwill in. He conducted a shortened consultation with her. She had told him before that she wanted to leave her estate to her two sons, that she was 'fed

up' with their fighting and that she wanted this to end. Wild gave him the documents that were signed the previous day and she requested him 'to spend some time with her to ensure that she understands the contents of the will and the change in the trust' being 'to the three of them, the survivors, the two kids and her and the will if anything happens to her that her estate be left to her two sons'. He considered that he was tasked to 'briefly understand what Ms Penwill wanted ' and 'she stated again that she wanted to leave her estate to her two children, that the trust needed to be reduced to the three of them and that that was her desire'.

[28] Dr Golding further testified that, having read the documents to her, she was asked whether she understood the contents thereof. He further requested her to explain what she had read, and continued:

> 'And simplistically she said what I have verbalised, that she was tired of the fighting, it is time that it comes to an end and that she wanted to leave her estate to her two sons.
>
> On the trust document what was the answer there? --- The trust document, I said to her, do you understand the content of this? So she said it has been reduced to the three of us and if I die, I want my estate left. So she used very simplistic communication, but I was satisfied that she understood the content.'

Wild typed the wording of the certification on one of the computers and it was photo copied onto the documents which he then signed. The wording thereof reads as follows:

> 'I, Dr C Golding, MBCHB (PTA), MMed (PTA), FCP (SA), Specialist Physician, hereby certify that I have evaluated and assessed Patricia Margaret Jean Penwill as being of sound mind and legally competent to execute this document, the nature of and effect of which she fully understands.'

Dr Golding readily conceded that he was not furnished with the relevant background information in regard to the trust and that he had not been placed in possession of the trust deed.

Evaluation

[29] The onus of proof in regard to the alleged invalidity of the will based on undue influence, rests on the plaintiff (see *Spies NO v Smith en Andere* 1957 (1) SA 539

(A) 545F-548A; *Diehl v The Master* [2008] 4 ALL SA 430 (T); LAWSA vol 31 para 285). The headnote in *Spies* correctly translates and paraphrases the *ratio decidendi* in the judgment as follows:

> 'A last will can be declared invalid where the testator is moved by artifices of a nature such as to justify their being equated, by reason of their effect to the exercise of coercion or fraud, to make a bequest which he would otherwise not have made and which, therefore, would express another person's will rather than his own. In such a case we are dealing, not with the genuine wishes of the testator, but with the substitution of the wishes of another person, and the will is not maintainable.
> The amount of pressure or urging ach leads to invalidity may vary from case to case. The mental state of the testator, his ability to resist instigation and prompting must be taken into consideration. The relationship between the persons concerned can also be important. It might be such as to give rise to a *metus reverentialis.* This alone, however relevant, is not sufficient but might be present to such an extent that the request of one person to another might be taken as a command which must be obeyed. The mere existence of a relationship which might involve *metus reverentialis* does not, however, of itself give rise to the presumption of a substitution of the will of another where a person subject to the authority of another makes a bequest to the latter. As with coercion and fraud, a fraudulent substitution of wishers by *artes captatoriae* is not presumed. It must be proved even where a relationship of power is involved *cum sola potentia metum non arguat.* And if after the drawing up of a will a certain period has elapsed during which the testator could have altered his will, had he wished to do so, then this is a circumstance which should be taken into consideration together with the other. It could indicate that the will was not really made against his own wishes or that he had subsequently voluntarily and tacitly confirmed it.'

[30] Against this background and applying the above principles to the facts of this matter, the first question for determination is whether Wild's understanding of the effect the termination of the trust would have had on the strained relationship of the Penwill brothers, was correct. It will be remembered that this was the sole concern of the testatrix which she repeatedly had communicated to Wild. Wild, having read the trust deed overnight, then informed her that the trust capital could be evenly distributed which, without more ado, met with the approval of the testatrix, to which she added, in line with what she was told by Wild, 'then this fighting will stop'.

[31] How the dissolution of the trust was to stop the fighting Wild did not explain to the testatrix. Nor did she offer any explanation how she perceived this could be achieved in dissolving the trust. It was merely presented to the testatrix as a fait accompli. The testatrix slavishly accepted and relied on what Wild had represented to her. After that it was eating out of her hand. It accordingly becomes necessary to determine whether the dissolution of the trust, objectively considered, would have brought an end to the fighting which was what the testatrix had wished to achieve.

[32] It is necessary to postulate two scenarios concerning the trust. The first is that the beneficiaries of the trust included the children and, perhaps, the wife of Richard. Assuming that to be so, the unilateral dissolution of the trust would have been invalid as the rights of the beneficiaries had by then already vested. Further, assuming it could be done, it would not have solved any relationship problems but indeed would have compounded matters, as the beneficiaries on Richard's side would have outnumbered Andrew, as a single beneficiary. I am alive to the fact that the number of beneficiaries of the trust as well as the dissolution thereof, are the subject matters of litigation between the parties, which I am presently not concerned with and I accordingly refrain from making any findings in this regard. The other scenario is that the Penwill brothers, in terms of the trust deed and their rights prior to the August 2006 will, would have been the beneficiaries in equal shares in the trust and Ms Pat Penwill's will. In the event of discord between trustees, remedies would have been available for dissolving the trust or removal of one of the trustees. The termination of the trust does not in reality secure any change as for the relationship between the brothers. In terms of the August 2006 will they were to inherit in 'equal shares, share and share alike', albeit not through the trust instrument. The disappearance of the trust would still have necessitated the brothers working together in the implementation of each receiving his equal share in the estate. The estate would have consisted mainly of immovable properties, which could not simply be divided between them as it became apparent regarding the Cape properties. The sub-division impasse in regard to the Cape farms resulted in the administration of the deceased estate, 16 years after the death of Douglas, still not having been finalised. The utopia foreseen by the testatrix 'because if Andrew takes his, Richard takes his and I take mine, then there is nothing to fight about' accordingly remained illusionary.

[33] The possibility of dissolving the trust was 'discovered' by Wild on reading the trust deed and she unabatedly persisted with it. The testatrix, considering her responses, understood that an immediate simple division of the trust (the trust funds, as she was informed by Wild) would have solved the difficulties. But, Wild then realised the difficulty emerging concerning sub-division of the farms. She then mentioned 'there has been a problem with your husband's estate' which 'if you leave it like this is going to be a huge problem'. The nature of the problem regarding the deceased estate was neither explained to Pat nor in any manner further dealt with. In her response the testatrix once again simply reverted to her wish that they should inherit in equal shares.

[34] I am not satisfied that, on her own version, Wild properly advised the testatrix in regard to her wish that her sons be treated equally. Wild's interaction with the testatrix was superficial and anything but a model of clarity as to proper advice and assistance concerning the consequences of dissolving the trust. Wild was in a position of authority and the testatrix not only confided in her but blindly accepted what was put to her. Wild in addition, was acutely aware that the testatrix was susceptible, if not vulnerable (the term used by Dr Golding) to influence, in particular as Wild had been made aware that both her sons had forced her to sign the previous wills. The exposure to and the real possibility of manipulation of Ms Pat Penwill therefore cannot be excluded. I am accordingly not satisfied that the August 2006 will and trust directive properly reflect the testatrix's 'vry en uiterste wilsbeskikking' (*Spies* 545H).

[35] The evidence of Dr Golding is instructive as to Ms Pat Penwill's understanding of the trust directive. Except for once again expressing the desire to leave her estate to her two sons and when specifically asked concerning the trust directive, she said that 'it has been reduced to the three of us'. Her response must be viewed against the evidence of Wild that, on the previous day, Ms Pat Penwill, in no uncertain terms, desired to 'stop' the trust. Had it been her desire one would have expected to say exactly that once the trust directive had been read to her.

[36] The wording of the trust directive, on its own, without the assistance or knowledge of the content of the trust deed, does not expressly state that the trust is dissolved. It reads as follows:

> 'I, [Name and address of Ms Pat Penwill], one of the first and presently one of four trustees of the Beverley Trust invoke the power accorded to me in clause 21.4 of the trust deed and direct the trustees, after receipt of the inheritance from the estate of my late husband Douglas John Penwill, to vest the total balance of the trust fund in the beneficiaries of the trust, namely myself, Patricia Margaret Jean Penwill and my sons Andrew Donald Jonathan Penwill and Richard Douglas Penwill in equal shares of one-third each and to effect such distribution accordingly.'

Dr Golding interestingly, when testifying about the August 2006 will and the trust directive, not once specifically referred to a dissolution or termination of the trust. It is my impression of his evidence that not even he understood the trust directive to provide for the dissolution of the trust. His understanding, admittedly not having read clause 24.1 of the trust deed, and as is apparent from his evidence, is that the trust would be 'divided' between the three of them. He testified that he was requested by Wild to ensure that Ms Pat Penwill understood 'the change in trust' and that Ms Pat Penwill stated that 'the trust needed to be reduced to the three of them' and 'because of the fighting and she wanted an end to it' which he in cross-examination conceded was 'compatible' with the continued existence of the trust.

[37] Even if I were to be wrong in the findings I have thus far made, the question whether undue influence was exerted on the testatrix must be considered on the totality of the evidence, in particular having regard to the conduct of the defendant and Wild subsequent to the execution of the August 2006 will and the trust directive and in regard thereto, their credibility and the probabilities arising from the facts of this matter.

[38] The starting point is to consider the peculiar circumstances surrounding the execution of the documents. The events are characterised by unexplained bewildering haste in getting the documents typed and signed by the testatrix. The consultation with Dr Golding the very next day followed in the same vein. The true reason for the rushed consultation in Johannesburg remains a mystery. The rapid certification of the documents, Wild explained, was in anticipation of the possibility of Richard challenging the validity of the will. No attempt was made either to involve Richard in, or, inform him of the events, which undoubtedly significantly affected him. Axiomatically, if Wild's proposal of terminating the trust would have produced the miraculous evaporation of the brotherly enmity, there would not have been any need

for surreptitiously obtaining an amended will and in addition, to close every possible challenge to its validity. The inference is inescapable that Richard was deliberately excluded and ignored for an ulterior purpose, in particular viewed against the backdrop of the subsequent events, which I now turn to deal with.

The action instituted by Andrew against the trust

[39] In November 2006 Andrew instituted an action against the trust in which he claimed payment of the amount of R1,740,099-74, in terms of an agreement, dated 11 August 2003, which provided for the trust assuming liability for the claim in that amount he had against the deceased estate of Douglas. The defendant in the action was cited as 'The Trustees for the time being of the Beverly Trust' who, at the time were Andrew, Richard (who was then living in the United Kingdom) D'Arcy-Herrman (he was 87 years old at the time) and Ms Pat Penwill, who lived at Grey Mist. On 23 November 2006, a simple summons was issued by George Traub Attorneys of Pretoria. It was served only on Ms Pat Penwill, who not unbeknown to both Andrew and Wild was in an advanced stage of dementia. No notice of intention to defend was filed and, on 4 April 2008, a request for default judgment was issued by Bekker Attorneys of Pretoria, once again addressed to Ms Pat Penwill, as a trustee of the trust. The notice was affixed to the principal door of the Grey Mists homestead, in the absence of Ms Pat Penwill, who since January 2007 had been living in Johannesburg with Andrew. Wild conceded in cross-examination that this amounted to dishonesty. On 12 September 2008 default judgment for the amount claimed was entered against the trust. Through Bekker Attorneys an attachment was effected of a cash deposit of R72 422-22, held by the trust in a Stanlib account. Andrew further caused the attachment of the shares held by the trust in the company. The mandate of Bekker Attorneys was then terminated and John Ford of John Ford & Associates, in Johannesburg, was instructed to arrange a sale in execution of those shares by the sheriff of Durban North. Those shares (750 ordinary shares and 1000 preferrent shares) were then sold at a sale in execution held on 29 July 2009 at the offices of the sheriff in Durban North.

[40] The sale in execution was attended by Wild and her long standing friend and colleague at the Bar, Natalie Lange, who practiced as an advocate at the Durban Bar. Lange purchased the shares for the meagre sum R27 300. She, in turn,

immediately 'offered' the shares for sale to Wild, who 'acted' as Andrew's representative, for the sum of R34 300 and, on 31 August 2009, signed a written agreement confirming the 'sale'. Andrew, through Wild, telephonically accepted the offer and thus became the owner of the shares and the company.

[41] The sale price of the shares, on every possible construction, was way below their true value. The company was debt-free and its principal assets consisted of valuable farms worth millions of Rand. The net result was that Andrew became the sole owner of the shares in a company with assets with a municipal value of some R15m, for a mere R34 300, in respect of a claim against the trust in the sum of R1,74m. And there it does not end: theoretically Andrew's entitlement to payment of the balance of the judgment debt, in the sum of R1,64m, remained alive.

[42] On 11 May 2010, following the sale in execution and the subsequent sale of the shares, attorney John Ford convened a shareholders meeting for the company at which both Ms Pat Penwill and Richard were removed as directors of the company and new auditors appointed. The meeting was attended by Andrew, in his capacity as the sole shareholder of the company, and Wild 'on behalf of Mr ADJ Penwill'. Andrew voted himself in as the sole director of the company.

[43] Richard only became aware of the events described above following upon a receipt of registered letter from the secretary of the company, in April 2010, while in the United Kingdom. This unsurprisingly prompted him to conduct a protracted investigation in order to obtain all the facts relating the default judgment and its aftermath. Needless to say, to his shock and dismay, he discovered that he was the victim of an elaborate well-orchestrated scam. He contacted an attorney friend in Johannesburg and arranged to come to South Africa to deal with the matter. An extensive consultation with his legal advisors was held in October 2010 and an application for rescission of the default judgement was launched (the rescission application) soon thereafter.

[44] The relief sought in the rescission application, in summary, was for rescission of the default judgment, the setting aside of the warrant for execution and the sale in execution in respect of the shares held by the trust in the company, the return of those shares to the trust and the setting aside of the attachment of monies held in

the bank account of the trust. A punitive costs order was sought. Voluminous papers of some 800 pages were filed. Andrew launched a separate application for security for costs against Richard, which mounted another 250 pages to the paper mass. By direction of the Deputy Judge President the two applications were heard together in a special motion and it came up for hearing before Ranchod J. At the heart of the main application were the allegations made by Richard imputing improper and indeed fraudulent conduct to Andrew, Wild and Lange. A number of technical points were raised on behalf of the respondents but none found favour with the learned judge. In the course of his judgment Ranchod J made a number of adverse findings and comments concerning the conduct of Andrew, Wild and Lange. The learned judge having considered the entire chain of events, from when summons was issued until the eventual transfer of the shares, came to the conclusion that it showed 'an elaborate scam' and, with regard to the sale in execution, that 'the inference is inescapable that this was part of the well-orchestrated plan to eventually have the shares in the possession of Andrew'. The learned judge moreover expressed 'grave misgivings' about the conduct of the two advocates, Wild and Lange. The relief sought by Richard was granted with a punitive order as to costs and Andrew's application for security for costs was dismissed likewise with a punitive costs order.

[45] Leave to appeal was sought but refused by Ranchod J. A subsequent petition to the Supreme Court of Appeal was dismissed with costs save that leave to appeal was granted to this court in respect of paragraph 9 of the order in terms of which Andrew was removed as a trustee of the trust. The appeal on that limited ground was however, not pursued and has accordingly lapsed. Andrew accordingly, at this stage, is no longer a trustee of the trust.

Bekker Attorneys

[46] I have already referred to Bekker Attorneys who, almost two years after the issue of summons, took over from Traub Attorneys and filed a request for default judgment in the action. During the present trial the plaintiff's legal representatives together with Richard, out of their own accord, consulted with attorney Hennie Bekker of that firm and they were allowed to retain a copy of the notes he had made on the case file cover. The notes undoubtedly, show that the details recorded were obtained from Wild. The notes reflect that Wild had 'instructed' him on the

continuation of the action, which of course implicates her in being instrumental in procuring the default judgment against the trust and further, warrants the inference of impropriety arising concerning the service of the application for default judgment at the Penwill homestead on the farm Grey Mists, well knowing that Ms Pat Penwill was suffering from dementia. Wild baldly and disingenuously denied ever having had any contact with Bekker.

[47] Richard was re-called to testify concerning the meeting held with attorney Bekker. He testified that Bekker, in the consultation that followed, light-heartedly referred to Wild as 'the instructing advocate'. A copy of the file notes was handed in. In cross-examination of Richard by counsel for the defendant, some vague reference was made to 'the client/attorney privilege' which counsel put to Richard, remained of full force and effect notwithstanding whether the attorney still appeared for the client or not. In cross-examination Wild defiantly accused Richard of having 'deliberately reconstructed' the notes in order to support the allegations he had made against her. She unscrupulously denied that Bekker could have made the notes or that she ever had any link with Bekker attorneys. These wide ranging, unfounded allegations were notably not put to Richard in cross-examination. Wild's evidence in this regard is indisputably false and her denial is rejected. According to the notes made by Bekker the file was sent to him by attorneys in Durban, by the name of Preston White & Associates. Wild conceded in cross-examination that she knew these attorneys, that she had interaction with them and admitted that some payments reflected in her bank statements, had been made by them. The notes moreover specifically refer to Bekkers' interactions with Wild, either telephonically or in person. Personal particulars appearing in the notes concerning, for example, her son, evidently have Wild as their source and are dispositive of anyone else having furnished them.

[48] Counsel for the plaintiff submitted, with which I agree, that the irresistible inference to be drawn from Wild's denial is that a confirmation by Bekker of the genuineness of the notes would have 'landed her upon the horns of a prickly dilemma', which would have exposed Wild as the driving force behind an application for default judgment which in all respects was a well-orchestrated falsity.

[49] But there it does not end: the plaintiff's intention to call Bekker as a witness was thwarted when an objection was raised by the defendant raising an 'attorney/client

privilege'. Counsel for the defendant intimated that the objection was raised on the instruction of Andrew. Bekker was accordingly not called to testify by either party.

[50] The defendant's reliance on an alleged attorney/client privilege is legally untenable, misconceived and nothing but a transparent attempt to subvert the true facts relating to the file notes. The notion of such privilege, in the face of Wild's denial that she ever had any contact with Bekker, constitutes a deplorable attempt to mislead the court. I am accordingly constrained to comment on the raising of the objection by the defendant's legal representatives. As officers of this court, even in the face of an instruction to do so, they ought not to have raised the objection. The raising thereof, accordingly, deserves the strict censure of this court.

[51] Lastly, it is necessary to refer to Wild's unusual, energetic involvement in the trial of this matter, underscoring the inference that she is the driving force in the litigation. She sat in court for the entire duration of the plaintiffs' case and did not dispute that she regularly passed notes to counsel for the attention of Andrew. At the hearing in Tzaneen she was present when the defendant's witnesses testified. Her interest in the evidence that was tendered was so keen that counsel for the plaintiff objected to her presence in the venue and recorded that she nodded her head in such a way that it suggested answers to the witnesses. Counsel for the defendant in response requested her to leave the room. Wild conceded in cross-examination that her conduct in this regard was inappropriate.

[52] In conclusion Wild, in my view, was an unsatisfactory witness who clouded issues in proffering long winded, vague and irrelevant responses. Wild dishonestly and relentlessly, right from the outset, pursued her own agenda. In regard to the finding by Ranchod J that the sale in execution was an elaborate scam, Wild disingenuously maintained that 'it was a *bona fide* attempt to recover shares that were going up on a public sale in execution', but reluctantly, later, conceded that it was a scam 'only to the extent of the sale'. The evidence reveals a carefully pre-planned scam to strip Richard of his interest in the company. Both Wild and Lange faced, or, are facing charges of unprofessional conduct brought against them by the Bisho Bar. Counsel for the defendant unconvincingly sought to defend the bona fides of the sale in execution, but was constrained in the debate that followed in argument, to concede, and correctly so, that a fraud had indeed been perpetrated.

[53] The integrity and professionalism of Wild and Lange acting in their professional capacities as advocates, in my view, have been shown, on the facts of this matter, to fall dismally short of the norms and standards applicable to the profession of an advocate and I accordingly, as I intimated to Wild at the conclusion of her evidence, propose to order that a copy of this judgment be forwarded to the General Council of the Bar of South Africa.

The failure to call the defendant as a witness

[54] In the circumstances of this case the defendant's explanation, if any, on the numerous adverse allegations made and inferences arising against him was called for. The adverse findings in the judgment of Ranchod were based on affidavits only, but have now indeed been shown as entirely justified on the evidence before this court. The defendant, on a conspectus of all the evidence, was the driving force and master mind together with Wild, as his dutiful lackey, in orchestrating an elaborate and fraudulent scam with the sole purpose of prejudicing his brother and enriching himself. The facts relating thereto were peculiarly within Andrew's knowledge and he was best able to testify thereto. An adverse inference against the defendant for failing to testify, accordingly, is justified (see *Durban City Council v SA Board Mills Ltd* 1961 (3) SA 397 (A) 405A-G).

[55] One last comment is called for. On 7 April 2016, after the conclusion of argument in this matter on 23 March 2016, I was placed in possession of an affidavit deposed to by the defendant, sent by him to my secretary, by email. The defendant obviously bypassed all protocol as the affidavit was also sent without the knowledge or consent of his attorneys of record. I only cursory scanned through the affidavit which revealed an attempt to bring certain facts pertaining to this matter, to my attention. I immediately informed counsel on both sides of the events and indicated that I would not in any way have regard to the contents of the affidavit in the adjudication of this matter. I do however take into account the untoward attempt by the defendant to inappropriately bring further information to my attention.

[56] In view of the findings I have made, the punitive costs order asked for by counsel for the plaintiff, is justified and, in my view, the appropriate sanction to be imposed as a mark of this court's disapproval of the defendant's conduct (*Nel v*

Waterberg Landbouwers Ko-Operatieve Vereeniging 1946 AD 597 at 607; *Rautenbach v Symington* [1995] 1 ALL SA 184 (O)). I do however consider it fair and appropriate to disallow the costs relating to the hearing in Tzaneen on 2 February 2015, as the testimony of those witnesses was confined to the plaintiff's main claim in respect of which he has not been successful.

[57] In the result the following order is made:

1. The plaintiffs' amendment in terms of rule 28(10), dated 4 September 2013, is allowed.
2. The wills executed by Patricia Margaret Jean Penwill, dated 17 May 2006 and 30 August 2006, are declared null and void.
3. The third defendant is authorised and directed to accept the will of Patricia Margaret Jean Penwill (the deceased), dated 21 February 2003, as the deceased's last will and testament for the purpose of administering the deceased's estate in terms of the Administration of Estates Act, 66 of 1965.
4. The second defendant is ordered to administer the deceased estate of Patricia Margaret Jean Penwill in accordance with the provisions of the last will and testament of Patricia Margaret Jean Penwill, dated 21 February 2003.
5. The first defendant is ordered to pay the costs of the action, excluding the costs relating the hearing in Tzaneen on 2 February 2015, but including:
   5.1 the costs of the hearing on 9 September 2013; and
   5.2 the costs consequent upon the employment of senior counsel,
   such costs to be taxed on the scale as between attorney and client.
6. It is ordered that a copy of this judgment forthwith be forwarded to the General Council of the Bar of South Africa.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFFS	***ADV MP VAN DER MERWE SC***
PLAINTIFFS' ATTORNEYS	***T DU PRE LE ROUX ATTORNEYS***

COUNSEL FOR FIRST DEFENDANT	***ADV H HAVENGA SC***
FIRST DEFENDANTS' ATTORNEYS	***OJ BOTHA ATTORNEYS***
DATES OF HEARING	***4, 5, 6 & 9 SEPTEMBER 2013; 27, 28, 29 & 30 JANUARY 2015; 2, 3, 4 & 5 FEBRUARY 2015 & 23 MARCH 2016.***
DATE OF JUDGMENT	***20 JUNE 2016***