THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 213/08

In the matter between:

ELIZABETH HENRIQUES Appellant

and

MICHAEL JOHN GILES NO 1st Respondent
PFK (CAPE TOWN) INCORPORATED 2nd Respondent

In the appeal in the counter-application between:

ELIZABETH HENRIQUES Appellant

and

MICHAEL JOHN GILES NO 1st Respondent
PFK (CAPE TOWN) INCORPORATED 2nd Respondent
CARLO GUISEPPE CAMMISA 3rd Respondent
MASTER OF THE HIGH COURT 4th Respondent

Neutral Citation:	*Henriques v Giles NO* (213/08) [2009] ZASCA 64 (29 May 2009)
Coram:	NAVSA, VAN HEERDEN et MHLANTLA JJA, KROON et TSHIQI AJJA
Heard:	15 May 2009
Delivered:	29 May 2009
Summary**:**	***Wills – husband and wife each inadvertently signing will drafted for the other – husband first-dying – whether rectification of his will possible***

ORDER

On appeal from: High Court, Cape Town (Goliath J sitting as court of first instance):

1. Save for the setting aside of paragraph 2 of the order of the court below, the appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

2. The appeal against the dismissal by the court below of the counter-application succeeds to the extent set out below, with no order as to costs.

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

   3.1 The counter-application succeeds to the extent set out in 3.2 below, with no order as to costs.

   3.2 The acceptance and registration, on 10 November 2004, by the Master of the High Court, the fourth respondent in the counter-application, of the will annexed as 'RN2' to the founding affidavit of Ronald Nes as the will of the late Francesco Franco Cammisa in terms of s 8 of the Administration of Estates Act 66 of 1965, is set aside.

   3.3 The application succeeds in part and the will annexed as 'RN1' to the founding affidavit of Ronald Nes, signed by the late Francesco Franco Cammisa on 15 September 1999, is rectified by:

(a) The deletion of clause 2 of 'RN1' and the substitution of same with clause 2 of Annexure 'RN2' to the founding affidavit of Ronald Nes;

(b) the deletion of clause 3 of 'RN1' and the substitution of same with clause 3 of 'RN2';

(c) the deletion of the first sub-clause numbered 5.1 and of the second sub-clause numbered 5.1 of 'RN1' and the substitution of same with the two respective sub-clauses both numbered 5.1 of 'RN2';

(d) the deletion of the words above the heading 'Clause 1' on the first page of 'RN1', namely 'I, the undersigned JACKIE CAMMISA, married out of community of property to FRANCO CAMMISA, do hereby make and execute my Last Will and Testament' and the substitution of same with the words 'I, the undersigned FRANCO CAMMISA, married out of community of property to JACKIE CAMMISA, do hereby make and execute my Last Will and Testament.'

3.4 The Master of the High Court, Cape Town, is ordered to accept 'RN1', as rectified in terms of 3.3 above, as the last will of the late Francesco Franco Cammisa for the purposes of the Administration of Estates Act 66 of 1965.

3.5 The issue relating to the testamentary capacity of the late Jessie Agnes Maria Cammisa at the time of her signing Annexure 'RN2' on 15 September 1999 is referred to oral evidence.

3.6 Subject to 3.7 below, the costs of this application are to be paid from the estate of the late Francesco Franco Cammisa.

3.7 The costs occasioned by the opposition of the application are to be paid by the first to the fifth respondents jointly and severally, the one paying, the other to be absolved.

JUDGMENT

VAN HEERDEN JA (Navsa and Mhlantla JJA and Kroon and Tshiqi AJJA concurring):

Introduction

[1]In about August 1999, acting on the instructions of Mr Francesco Franco Cammisa, Mr Ronald Nes ('Nes'), an accountant and a partner of the second respondent, PKF (Cape Town) Incorporated ('PKF'), drafted two wills, one for Mr Cammisa and the other for his wife, Mrs Jessie Agnes Maria Cammisa. (For the sake of convenience, Mr and Mrs Cammisa will be referred to hereafter in this judgment as 'Franco' and 'Jackie', respectively.)

[2]On 15 September 1999, the couple met with Nes and his colleague, Ms Erica Swailes (who had typed up the wills on Nes' instructions), in PKF's boardroom. These four persons were present at all times during the gathering. The Cammisas carefully read through their respective wills and Nes and Swailes explained to them in detail the contents of each of the wills. As Franco and Jackie were satisfied with their wills, they then proceeded to sign them, Nes and Swailes signing each of the wills as witnesses.

[3]Unbeknown to any of the persons concerned, however, the wills must have got mixed up in the process of explaining and reading them. A silly – and most unfortunate – mistake occurred and Franco and Jackie each inadvertently signed the will prepared for the other. All the other formalities prescribed by law for the execution of wills were duly complied with and, on the face of it, each will appeared to be perfectly valid. This error only came to light after the respective deaths of both Franco and Jackie, which occurred on 19 October 2004 and 5 January 2005, respectively. In the meantime, on 10 November 2004, the Master of the High Court accepted and registered the will prepared for Franco, but signed in error by Jackie, as Franco's last will in terms of s 8 of the Administration of Estates Act 66 of 1965 ('the Estates Act'). As a witness to a will is prohibited from being appointed executor of the deceased estate concerned,[1] Nes could not be appointed executor of Franco's deceased estate and the Master thus appointed the first respondent, Mr Michael Giles (a director of PKF), in his stead.

[4]Is it possible for the will signed by Franco to be rectified so that his estate can devolve in the manner in which he undoubtedly intended or has he died intestate? This is the question that confronts us in the present appeal.

The proceedings in the court below

[5]The Respondents applied to the Cape High Court to rectify the two wills – annexed to the Notice of Motion as 'RN1' (the will drafted for Jackie and in her name, but signed by Franco) and 'RN2' (the will drafted for Franco and in his name, but signed by Jackie) – 'so as to reflect the true intention

[1] Section 4A(1), read with s 4A(3), of the Wills Act 7 of 1953, as inserted by s 7 of Act 43 of 1992.

of' Franco and Jackie, respectively, 'in relation to [each's] last will and testament'. They sought an order in the following terms:

'1.That the document (will) annexed as "RN1" to the affidavit of Ronald Nes filed herewith be rectified by deleting the undermentioned words and/or clauses therefrom and substituting them with the words and/or clauses also referred to hereunder from annexure "RN2" to the said affidavit of Ronald Nes . . . . :

(a) Delete clause 2 of "RN1" and substitute the same with clause 2 of "RN2";

(b) Delete clause 3 of "RN1" and substitute the same with clause 3 of "RN2";

(c) Delete the first sub-clause "5.1" and the second sub-clause "5.1" of "RN1" and substitute the same with the (two) respective sub-clauses "5.1" of "RN2";

(d) Delete the words just above the heading "Clause 1" on the first page of "RN1", namely "I, the undersigned JACKIE CAMMISA, married out of community of property to FRANCO CAMMISA, do hereby make and execute my Last Will and Testament";

and substituting the same with the words "I, the undersigned FRANCO CAMMISA, married out of community of property to JACKIE CAMISSA, do hereby make and execute my Last Will and Testament".

2. That the document (will) annexed as "RN2" to the affidavit of Ronald Nes filed herewith be rectified by deleting the undermentioned words and/or clauses therefrom and substituting them with the words and/or clauses also referred to hereunder from annexure "RN1" to the said affidavit of Ronald Nes . . . . :

(a) Delete clause 2 of "RN2" and substitute the same with clause 2 of "RN1";

(b) Delete clause 3 of "RN2" and substitute the same with clause 3 of "RN1";

(c) Delete the first sub-clause "5.1" and the second sub-clause "5.1" of "RN2" and substitute the same with the (two) respective sub-clauses "5.1" of "RN1";

(d) Delete the words just above the heading "Clause 1" on the first page of "RN2", namely "I, the undersigned FRANCO CAMMISA, married out of community of property to JACKIE CAMMISA, do hereby make and execute my Last Will and Testament";

and substituting the same with the words "I, the undersigned JACKIE CAMMISA, married out of community of property to FRANCO CAMISSA, do hereby make and execute my Last Will and Testament".'

[6]In the alternative, the respondents applied, in terms of Section 2(3) of the Wills Act 7 of 1953, for "RN2" and "RN1" to *"be declared the last will and testament"* of Franco and of Jackie, respectively.

[7]The respondents prayed that the costs of the application be paid from Franco's deceased estate. However, in the event of the application being opposed, they applied for an order that 'the costs occasioned by the opposition . . . be paid by such party or parties opposing the same jointly and severally'.

[8]The appellant, Elizabeth Henriques, and her four siblings (the adult children of Douglas Jackson, Jackie's son from a previous marriage) ('Jackie's grandchildren') – the five respondents in the court below – opposed this application on two grounds. The first was that, as the 'wills' drafted by Nes did not comply with ss 2(1)*(a)*(i), (ii), (iii) and (iv) of the Wills Act 7 of 1953,[2] they were invalid and could not be rectified. The second was that, as neither Franco nor Jackie personally drafted or executed these 'wills', s 2(3) of the Wills Act[3] was not applicable.

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[2] The relevant provisions of s 2(1), as amended by the Law of Succession Amendment Act 43 of 1992, read as follows:

'(1) Subject to the provisions of section 3*bis* –

(a) no will executed on or after the first day of January, 1954, shall be valid unless –

(i) the will is signed at the end thereof by the testator . . . ; and

(ii) such signature is made by the testator . . . in the presence of two or more competent witnesses present at the same time; and

(iii) such witnesses attest and sign the will in the presence of the testator and of each other . . . ; and

(iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator . . . anywhere on the page . . . . '.

[9]As regards the second ground, both before the court a quo and in this court, counsel for the respondents conceded that it could not be said that either of the Cammisas *personally* 'drafted' either of the wills in question (see *Bekker v Naude & andere*).[4] It is thus not necessary to say anything more in this regard.

[10]Jackie's grandchildren also made a counter-application for an order:

1. setting aside 'Franco's will' ('RN2'), which on 10 November 2004 had been accepted and registered by the Master of the High Court (the fourth respondent in the counter-application); and

2. that the costs of the counter-application be paid by PFK (the second respondent in the counter-application).

[11]The Master of the High Court indicated in his Report to the court a quo that, should the main application for rectification of 'RN1' fail, then he supported the counter-application. Apart from this, he abided the court's decision.

[12]Carlo Cammisa, the third respondent before us ('Carlo'), is Franco's adult son from a previous marriage. He was cited as the sixth respondent in the main application. In terms of the will prepared for Franco ('RN2'), Carlo is Franco's sole residuary heir.

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[3] Section 2(3), added by s 3*(g)* of Act 43 of 1992, provides that '[i]f a court is satisfied that a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will …, the court shall order the Master to accept that document, … for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will although it does not comply with all the formalities for the execution … of wills referred to in subsection (1).'

[4] 2003 (5) SA 173 (SCA) para. 20. See also *Reszke v Maras & others* 2003 (6) SA 676 (C) paras 10-14 and *Van Wetten & another v Bosch & others* 2004 (1) SA 348 (SCA) para 14.

[13]There were factual disputes on the papers in relation to Jackie's testamentary capacity at the time of her signing 'RN2' on 15 September 1999.[5]

[14]The court below granted the relief sought in prayers 1 and 2 of the main application, but ordered Jackie's grandchildren to pay the costs of the application – and not just the costs occasioned by their opposition to the application, as had been requested by the present respondents – jointly and severally. Goliath J dismissed the counter-application with costs, and also ordered that the issue of Jackie's testamentary capacity be referred to oral evidence. The present appeal against the judgment of the court a quo serves before us with the special leave of this court.

Rectification

[15]South Africa has no legislation on the rectification of wills and the ambit of our courts' powers to rectify mistakes in a will has been the subject of considerable judicial disagreement. While there has never been any dispute in regard to the court's power to correct clerical errors[6] or an erroneous description of a beneficiary or a benefit in a will,[7] or to delete from a will words or provisions included in it by mistake,[8] there were conflicting decisions concerning the court's power to rectify a will by inserting words or provisions which have been omitted in error or by substituting the correct words or provisions for incorrect ones which have

[5] Jackie's grandchildren maintained that she had suffered from Alzheimer's disease since 1995 and that, at the time of the meeting in PKF's boardroom on 15 September 1999, she lacked the mental capacity to execute a will. This was vigourously disputed by the respondents.

[6] Such as, eg, where owing to a typing mistake, the sum of 'R10 000' has been reflected as 'R1 000' or 'R100 000', where erf number '3489' has become erf number '3498', or where 'my immovable property' has been rendered as 'my movable property': see MM Corbett, HR Hahlo & Ellison Kahn *The Law of Succession in South Africa* 2ed (2001) 498.

[7] Corbett et al op cit 499.

[8] Corbett et al op cit 498-500 and the other authorities cited by these writers.

been mistakenly included in a will.[9] It is now generally accepted that the South African courts do have this latter power:[10]

[16]Rectification is an equitable remedy, the purpose being to give effect to the true intention of the relevant parties or of the testator or testatrix concerned. A court will rectify a will where, due to a mistake, be it on the part of the testator or testatrix or on the part of the drafter, the will does not correctly reflect their testamentary intention. The applicant for rectification must establish that (a) the alleged discrepancy between expression and intention was due to a mistake; and (b) what the testator or testatrix really meant to provide. The onus, which must be satisfied on a balance of probabilities, is on the party seeking rectification.[11]

[17]The appellant contended that it is not competent to rectify a contract or a will that is invalid for non-compliance with prescribed statutory formalities and that the present wills, having each been signed by the 'wrong' testator and testatrix, respectively (a so-called 'crossed wills' situation), are invalid in that they do not comply with the provisions of ss 2(1)*(a)*(i) and (iv) of the Wills Act.[12]

[18]In respect of contracts, it is indeed so that South African courts will not order rectification of a document which purports to constitute a contract for the validity of which statutory formalities are required if, on the face of the

[9] The various different decisions in this regard are discussed in some detail by Corbett et al op cit 500-504. See also *Van Zyl v Esterhuyse NO & andere* 1985 (4) SA 726 (C) at 730B-733F; *Will NO v The Master* above (note 6) at 213G-215F and *Hotz NO v Goodman NO* 1994 (2) SA 186 (C) at 187I-189I, where the relevant authorities are reviewed.

[10] Op cit 504. See also DT Zeffertt, AP Paizes & A St Q Skeen *The South African Law of Evidence* (formally Hoffmann and Zeffertt) (2003) 343and 347-348.

[11] See, eg, *Will NO v The Master & others* 1991 (1) SA 206 (C) at 213H-I and, generally, Corbett et al op cit (note 6) 498-505 and the other authorities cited by these writers.

[12] The wording of which sections is set out in note 2 above.

document, it does not comply with the prescribed formalities – a nullity cannot be rectified.[13]

[19]Statutory formalities for the execution of wills are intended to ensure the authenticity of the relevant document and provide evidence of the testator's or testatrix's intention. [14] In deciding whether to rectify a will, courts must be equally astute to ensure that these objects are not jeopardised.

[20]On the facts of the present case, it is clear that Franco and Jackie each signed a will as testator and testatrix, respectively, and that all the other statutory formalities for the execution of wills were complied with. On the face of it, both wills are formally valid. In each case, the surname of the testator and the signature is the same.

[21]The mistake lies therein that, as a result of the erroneous 'cross-signing' of the wills, the incorrect party is described as the testator in the heading of each of the wills, and clauses 2 and 3, as well as the two sub-clauses numbered 5.1, of each will have been incorrectly included/omitted. The remaining clauses of the two wills are identical. These mistakes are, however, not matters relating or fatal to the formal validity of the will. It is, for instance, well accepted that the incorrect description of the testator or of an heir, is a matter which is capable of rectification. If, therefore, Franco's name had been incorrectly spelt or the wrong initials erroneously reflected in his will, such mistakes could undoubtedly be rectified, even if the

[13] See, eg, *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) paras 10-18 and *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 (3) SA 107 (SCA) paras 4-11. For critical discussion of this approach and of the manner in which it has been applied by the courts, see Schalk van der Merwe, LF Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 3ed (2007) 182-185.

[14] On the functions of formalities for the execution of wills, see John H Langbein 'Substantial Compliance with the Wills Act' (1975) 88 *Harvard LR* 489 at 492-497 and also the South African Law Commission (now called the South African Law Reform Commission) *Report* on Project 22 *Review of the Law of Succession* (June 1991) paras 2.1-2.6.

evidence disclosed that there was another person (even a potential heir) with the 'misspelt' name or with the 'wrong' initials in existence.

[22]It is true that Franco signed the will prepared for Jackie and vice versa. Allowing rectification in the particular circumstances of the present case, where there is no doubt whatsoever about Franco's testamentary intentions, achieves a just result. To insist that this would amount to an impermissible 'rectification of signatures', as was argued by counsel for the appellant, would in my view be to sacrifice testamentary intention to excessive and needless formalism. Indeed, one cannot imagine clearer evidence of a mistake regarding the true intention of a testator than what happened in this case, where everything was recorded in writing and 'attested' to.

[23]In my view, allowing rectification of 'RN1' to reflect Franco's true testamentary intention in the manner sought in prayer 1 of the application would not in any way do violence to the established principles governing rectification of documents, nor would it defeat any of the functions of testamentary formalities. It follows that I am of the view that the appeal against the order of Cape High Court for the rectification of 'RN1' should fail.

[24]This conclusion also accords with international jurisprudence. Although s 20 of the United Kingdom Administration of Justice Act 1982 permits rectification of a will only if the court is satisfied that a will is so expressed that it fails to carry out the testator's or testatrix's intention in two specified instances, namely a clerical error or a failure to understand the testator's instructions,[15] this has been criticised as being unduly restrictive. The trend in other jurisdictions, such as New Zealand, Australia,

[15] Ellison Kahn *1994 Supplement to the Law of Succession in South Africa* by MM Corbett, HR Hahlo, Gys Hofmeyr & Ellison Kahn (1980) 128-129.

Canada and the United States of America, more specifically in 'crossed wills' cases analogous to the present matter, has been to allow rectification of a will whenever the court is satisfied that the will is expressed in a manner which fails to give effect to the true testamentary intentions of the testator or testatrix.[16] Thus, for example, in the judgment of the Court of Queen's Bench for Saskatchewan in *Re McDermid Estate*[17] where a husband and wife had each inadvertently signed the will prepared for the other, the court, in effectively ordering the rectification of the will signed by the husband (the first-dying), stated the following:[18]

'Here, the will intended to be signed by the deceased was prepared by him for his signature and execution in the presence of two witnesses. Here, as is evident from the materials before me, a will in substantially the same form, except for the designated beneficiary and personal representative, was prepared for the signature and execution of the deceased's wife in the presence of the same two witnesses. The requirements of s 7 of said The Wills Act were fully complied with with the exception that each of the deceased and his wife inadvertently executed the will intended for the signature of the other. The deceased's intention to leave all of his real and personal estate to his wife, and for her to act as the executrix of his estate, if she should survive him, as she did, is clear and unequivocal.

. . .

The last will and testament actually prepared for the signature of the deceased, but inadvertently signed by his wife, clearly embodies the testamentary intentions of the deceased. Except for the fact that the deceased signed the wrong document, the last will and testament actually prepared by him for his signature in all other respects fully complies with the requirements of said The Wills Act.

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[16] The relevant cases are discussed in some detail by the Royal Court of Jersey in *In the Estate of Vautier (née McBoyle)* 2000 JLR 351 at 356-361, a case where a husband and wife by mistake each signed the will drafted for the other and where rectification of the will signed by the first-dying (the wife), by the substitution and alteration of words 'so as to accord with her clear intentions', was ordered by the court.

[17] 1994 CanLII 4950 (SK Q.B.).

[18] At 4-5.

In particular circumstances, it is in my view appropriate to direct, as I do, that the said last will and testament inadvertently signed by the deceased be attached to the last will and testament prepared for his signature so that his signature thereto will become and for purposes of this application will be part of his intended will for probate purposes.'

The counter-application

Counsel for the appellant contended that the counter-application (for an order setting aside 'RN2' which had, on 10 November 2004, been registered and accepted by the Master of the Cape High Court as Franco's will for the purposes of the Estates Act), should have been heard and granted by the court below before the main application was even argued. According to counsel, this was the sequence that had to be followed because, even if the court were ultimately to order the rectification of 'RN1' in terms of prayer 1 of the application, the Master would not be able to accept and register Franco's rectified will for the purposes of the Estates Act while 'RN2' remained registered and recorded in the Master's Office as Franco's will.

[25]Appellant's counsel pointed out that, as Goliath J correctly stated in her judgment, acceptance by the Master of a will in terms of s 8 of the Estates Act does not *per se* mean that the will has been determined to be valid. The Master merely performs an administrative act in registering and accepting the will and this must not be equated with the recognition of the will's validity. Notwithstanding registration and acceptance, all questions of the validity or legal effect of the will fall to be determined by the court.[19] Interested parties can apply to court to set aside a will or to have it declared invalid notwithstanding the Master's endorsement of the will to the effect

[19] See in this regard *Meyerowitz on Administration of Estates and Estate Duty* (2007 edition) para 3.7 and Corbett et al op cit (note 6) 117-118.

that it has been registered and accepted.[20] Thus, according to counsel, even if the appeal on the issue of rectification were to fail, the appeal on the dismissal of the counter-application should succeed with costs, and the order of the court a quo in this regard should be amended accordingly.

I agree with counsel for the appellant that, from a procedural point of view, the registration and acceptance of 'RN2' by the Master will have to be set aside before the Master is ordered to accept 'RN1', as rectified, as Franco's will for the purposes of the Estates Act. Nonetheless, it is abundantly clear from the affidavit, deposed to by the appellant in support of the counter-application, that the sole purpose of the counter-application was to have 'RN2' (described in the counter-application as 'the Will of FRANCESCO FRANCO CAMMISA dated 15 September 1999') – and *not* simply the registration and acceptance of such will by the Master – set aside so that Franco's estate could devolve on intestacy to the benefit of Jackie's grandchildren.

[26]Counsel's contentions concerning the correct sequence to be followed, while in my view correct, were (on the papers before us) certainly not wholly or even in part the purpose for which the counter-application was launched. Despite counsel's arguments to the contrary, the thrust of the appellant's affidavit in support of the counter-application was indeed to the effect that 'if Franco's will was set aside, it would mean that Jackie's estate would be an intestate beneficiary of half the proceeds of Franco's estate', to the ultimate benefit of Jackie's grandchildren as Jackie's intestate heirs. The procedural aspect was only raised in argument before the court a quo and was then expanded upon before us, to the extent of counsel filing supplementary heads of argument in this court dealing with that aspect.

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[20] Ibid.

[27]To correct the procedural problem in the Master's Office was thus *not* why Jackie's grandchildren brought the counter-application and I am not persuaded by counsel's attempts to persuade us otherwise. This being so, it is in my view not appropriate, either to order PKF to pay the costs of the counter-application, or to order the respondents in the appeal in the counter-application to pay the costs of such appeal. To my mind there should be no order as to costs in either of these instances.

Jackie's testamentary capacity

[28]As indicated above, the Cape High Court granted the relief sought in prayer 2 of the application by ordering the rectification of 'RN2' (the will prepared for Franco, but signed by Jackie). The court also referred the issue of Jackie's mental capacity at the time of signature of 'RN2" for oral evidence, holding that there was a clear dispute of fact on the papers concerning this issue. It is obvious that these two orders cannot co-exist. One of the requirements for rectification is that the applicant must show what the testatrix really *intended* to provide (once it has been established that the alleged discrepancy between what the will provides and what the testatrix actually intended was due to a mistake).[21] As Jackie's mental capacity at the time of her signing 'RN2' was in dispute and was referred by the court a quo for the hearing of oral evidence, the appellant clearly could not be said to have proven what Jackie's real testamentary intention at that time was. Failing such proof, the appellant did not discharge the onus of proving the requirements for rectification of 'Jackie's will'. The order for rectification of 'RN2' made by Goliath J thus cannot stand and must be set aside.

Costs

[21] See para 15 above.

[29]I have already given my reasons for the conclusion that there should be no order as to costs in respect of either the counter-application in the court below, or the appeal in respect of the dismissal of the counter-application before this court. As regards the costs order made by Goliath J in respect of the application, counsel for the respondents conceded that this order against Jackie's grandchildren went too far and should be limited to the costs occasioned by their opposition to the application.

Order

[30]For the reasons set out above, the following order is made:

1. Save for the setting aside of paragraph 2 of the order of the court below, the appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

2. The appeal against the dismissal by the court below of the counter-application succeeds to the extent set out below, with no order as to costs.

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

   3.1 The counter-application succeeds to the extent set out in 3.2 below, with no order as to costs.

   3.2 The acceptance and registration, on 10 November 2004, by the Master of the High Court, the fourth respondent in the counter-application, of the will annexed as 'RN2' to the founding affidavit of Ronald Nes as the will of the late Francesco Franco Cammisa in

terms of s 8 of the Administration of Estates Act 66 of 1965, is set aside.

3.3 The application succeeds in part and the will annexed as 'RN1' to the founding affidavit of Ronald Nes, signed by the late Francesco Franco Cammisa on 15 September 1999, is rectified by:

> *(a) The deletion of clause 2 of 'RN1' and the substitution of same with clause 2 of Annexure 'RN2' to the founding affidavit of Ronald Nes;*
>
> *(b) the deletion of clause 3 of 'RN1' and the substitution of same with clause 3 of 'RN2';*
>
> *(c) the deletion of the first sub-clause numbered 5.1 and of the second sub-clause numbered 5.1 of 'RN1' and the substitution of same with the two respective sub-clauses both numbered 5.1 of 'RN2';*
>
> *(d) the deletion of the words above the heading 'Clause 1' on the first page of 'RN1', namely 'I, the undersigned JACKIE CAMMISA, married out of community of property to FRANCO CAMMISA, do hereby make and execute my Last Will and Testament' and the substitution of same with the words 'I, the undersigned FRANCO CAMMISA, married out of community of property to JACKIE CAMMISA, do hereby make and execute my Last Will and Testament.'*

3.4 The Master of the High Court, Cape Town, is ordered to accept 'RN1', as rectified in terms of 3.3 above, as the last will of the late Francesco Franco Cammisa for the purposes of the Administration of Estates Act 66 of 1965.

3.5 The issue relating to the testamentary capacity of the late Jessie Agnes Maria Cammisa at the time of her signing Annexure 'RN2' on 15 September 1999 is referred to oral evidence.

3.6 Subject to 3.7 below, the costs of this application are to be paid from the estate of the late Francesco Franco Cammisa.

3.7 The costs occasioned by the opposition of the application are to be paid by the first to the fifth respondents jointly and severally, the one paying, the other to be absolved.

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B J VAN HEERDEN
JUDGE OF APPEAL

Appearances:

For Appellant:	J Whitehead SC
	Walkers Attorneys
	Cape Town
Instructed by:	Claude Reid
	Bloemfontein
For Respondent:	R S Van Riet SC
On behalf of 1st	CHJ Maree
2nd Respondents:	
	Mac Gregor Stanford Kruger Inc
	Cape Town

Instructed by: E G Cooper
Bloemfontein

On behalf of 3rd Respondent:
Heuer & Associates
Cape Town

Instructed by: Lovius Block
Bloemfontein