IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable
Case No. 21732/2009

In the matter between:

CARMEL NAIDOO N.O.	First Applicant
CARMEL NAIDOO	Second Applicant

and

JOHN KENNELLY WOLFE CROWHURST N.O.	First Respondent
SORAYA SOLOMON N.O.	Second Respondent
SORAYA SOLOMON	Third Respondent
MOHAMED RIYADH SOLOMON	Fourth Respondent
BERNARD LAWRENCE ENGEL	Fifth Respondent
FAITH ENGEL	Sixth Respondent
SHAHEEZA ABDUL-HAMID	Seventh Respondent
FARADIBA EFFENDI	Eighth Respondent
BISSET BOEHMKE MCBLAIN ATTORNEYS	Ninth Respondent
THE MASTER OF THE HIGH COURT	Tenth Respondent
THE REGISTRAR OF DEEDS	Eleventh Respondent

JUDGMENT : 1 DECEMBER 2009

BREITENBACH, AJ:

Introduction

1. The applicant in this urgent application is Ms Carmel Naidoo, a professional nurse and the mother and guardian of two minor children, namely K.D.S. (12 years of age) ("K.") and K.T.S. (9 years of age) ("K2."), born to her and the late Uranin Vladimir Dzerzhinsky Joseph Solomon ("the deceased").

2. The deceased died of cancer in Cape Town on Monday 8 September 2008, leaving a will dated 13 August 2008, the making of which is the subject of the dispute in this matter. As explained later, the applicant is a beneficiary under the disputed will.

3. The respondents are the following persons: Mr John Kennelly Wolfe Crowhurst ("Mr Crowhurst"), who is a practising attorney, the executor of the deceased's estate and one of two trustees of the trusts created by the disputed will; the deceased's sister Ms Soraya Solomon ("Ms Solomon"), who is a beneficiary under the disputed will and the other trustee of the trusts created by the disputed will; the other beneficiaries under the disputed will, namely the deceased nephew Mr Mohamed Riyad Solomon ("Mr Solomon"), the deceased's friends Mr Bernard Lawrence Engel and Ms Faith Engel, the deceased's sister Ms Shaheeza Abdul-Hamid ("Ms Abdul-Hamid") and the deceased's sister Ms Faradiba Effendi ("Ms Effendi"); Bisset Boehmke McBlain Attorneys ("Bissets"), Mr Crowhurst's firm which, under a clause in

the disputed will empowering Bissets to do so, nominated him to be the executor of the deceased's estate and to be one of the trustees of the trusts; the Master of this Court; and the Registrar of Deeds.

4. The application is opposed by Mr Crowhurst, Ms Solomon, Mr Solomon, Ms Abdul-Hamid and Ms Effendi. In what follows, for the sake of convenience I shall refer to them as "the respondents".

5. When these proceedings commenced on 15 October 2009, the applicant set the matter down on 30 October 2009 for the issuing of a rule *nisi* operating as an interim interdict. On 21 and 28 October 2009 the respondents delivered notices of opposition, and on 28 and 29 October 2009 Mr Crowhurst delivered comprehensive answering papers. On 30 October 2009, by agreement between the parties, Bozalek J ordered that the matter be postponed for hearing on 24 November 2009, subject to directions about the delivery of further affidavits and heads of argument. Thereafter, on 4 November 2009 Ms Solomon, Mr Solomon, Ms Abdul-Hamid and Ms Effendi delivered comprehensive answering papers, on 9 November 2009 Mr Crowhurst delivered an affidavit by Ms Sharon Bain, a secretary at Bissets who was one of the two witnesses who signed the disputed will, and on 12 November 2009 the applicant delivered her replying affidavits. Finally as to the affidavits, on 17 November 2009 Ms Solomon *et al* delivered a supplementary answering affidavit by Dr Reon van Dyk (to which no objection was made) confirming a report by him dated 3 November 2009 annexed to an earlier affidavit by their attorney Mr J F Louw, and during the hearing on 24 November 2009, by agreement between the parties, a supplementary answering affidavit by Mr Crowhurst dealing with two issues raised in the applicant's replying affidavit, was handed up.

6. At the hearing on 24 November 2009 the applicant was represented by Adv T Carter, who was instructed by Ms L Swartz of De Klerk & Van Gend Attorneys; Mr Crowhurst was represented by Adv R Acton, who was instructed by Mr A A Brink of Bissets; and Ms Solomon, Mr Solomon, Ms Abdul-Hamid and Ms Effendi were represented by Adv D van Reenen, who was instructed by Mr Louw of Lionel Murray, Schwormstedt & Louw Attorneys.

7. The concluding paragraph of Ms Carter's heads of argument states that the applicant is no longer seeking the issuing of a rule *nisi* or any interim relief, save for interim relief in the event of the court deciding to accede to the applicant's request, made in the alternative, that the matter be referred for the hearing of oral evidence. Instead, the applicant is seeking the following final relief, namely an order declaring "*invalid for want of testamentary capacity*" the will of the deceased attached to the notice of motion as annexure "A" (paragraph 2.3 of the notice of motion) and costs of suit against Mr Crowhurst, Ms Solomon, Mr Solomon, Ms Abdul-Hamid and Ms Effendi (paragraph 4 of the notice of motion).

8. In response to enquiries from the court at the start of the proceedings on 24 November 2009, Ms Carter confirmed that the applicant is indeed now seeking such final relief, not the issuing of a rule *nisi* or any interim relief (other than interim relief *pendente lite* in the event of the court ordering the referral to oral evidence); the will in question is the original of annexure "J" to Mr Crowhurst's answering affidavit, there being no annexure "A" to the notice of motion; and the applicant is seeking costs against Mr Crowhurst, Ms Solomon, Mr Solomon, Ms Abdul-Hamid and Ms Effendi jointly and severally, the one paying the others to be absolved.

9. The applicant's case is that at the time when the deceased made the disputed will, which is regular on the face of it, he was mentally incapable of appreciating the nature and effect of his act. In her heads of argument Ms Carter said the following in this regard:

> "*The basis of the application is that the deceased executed the will in question a mere three weeks prior to his death and because of the effects of the disease and the medication he was on he lacked the necessary capacity to execute a legal document*".

10. The respondents dispute the correctness of this contention.

11. The resulting dispute between the parties is governed by s 4 of the Wills Act 7 of 1953 ("the Wills Act"), which reads as follows:

"*Every person of the age of 16 years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same.*"

12. As the deceased was 46 years old when he made the disputed will and it is the applicant who avers that he was mentally incapable when he made the will on 13 August 2008, the burden of proving that allegation rests on the applicant.

13. As indicated earlier, Ms Carter asks that I decide the matter in the applicant's favour on the papers, but adds that if I cannot do so I should refer the matter for the hearing of oral evidence. The question to be decided by oral evidence is whether at the time of making the disputed will the deceased was mentally incapable of appreciating the nature and effect of his act. Ms Carter further asks that in the event of a referral I should grant the applicant an interim order prohibiting Mr Crowhurst from taking any further steps in the administration of the deceased's estate pending the final determination of the matter.

14. Subject to the possibility of a referral to oral evidence or trial under Uniform Rule 6(5)(g), an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by the respondent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers (*Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at paragraph 12 citing *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E to 635C and *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A to 153C). In the present case there is undoubtedly a material dispute of fact between the parties. It follows that unless I find that the respondents' allegations are so far-fetched or clearly untenable that I am justified in rejecting them merely on the papers, or unless I accede to the applicant's request to refer the matter for the hearing of oral evidence, the application must fail.

15. In the remainder of this judgment, therefore, I shall proceed as follows. First, I shall deal with the test to be applied in deciding the question of testamentary capacity. Next I shall outline the course of the applicant's relationship with the deceased (a matter which, for the most part, is common cause). Thereafter I shall briefly describe the contents of the disputed will and the contents of an earlier will made by the deceased on 12 July 2007 (the relevance of which will become apparent in due course). Next I shall describe the deceased's cancer and its treatment. Thereafter I shall set out the respondents' evidence substantiating their denial of the applicant's allegation that the deceased lacked testamentary capacity when he made the will on 13 August 2008. Having done so, I shall assess the applicant's reasons for contending that the respondents' allegations are so clearly untenable that I should reject them on the papers. Lastly, if I conclude that the respondents' version cannot be rejected out of hand, I shall deal with the question whether the matter should be referred for

the hearing of oral evidence with the interim relief requested by the applicant and, if necessary, the form of the order to be made in that eventuality.

The test to be applied in deciding the question of testamentary capacity

16. In *Kirsten and Others v Bailey and Others* 1976 (4) SA 108 (C) at 109 *in fin* to 110 *in fin*, the most recent authority in this Court on the test to be applied in deciding the question of testamentary capacity I have been able to find, Vivier AJ (as he then was) said the following:

> "*The test to be applied in deciding the question of testamentary capacity is whether the testatrix was at the time of sufficient intelligence, possessing a sufficiently sound mind and memory, for her to understand and appreciate the nature of the testamentary act in all its different bearings.*
>
> *In Tregea and Another v Godart and Another, 1939 AD 16 at p. 49, TINDALL, J.A., adopted the following test for testamentary capacity referred to by COCKBURN, C.J., in Banks v Goodfellow, 1870 L.R. 5 Q.B. 549 at p. 568:*
>
> > *"The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator? as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the*

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

Two further cases are in my view instructive in applying the above test of testamentary capacity to the facts of the present case. In Harwood v Baker, 3 Moo. P.C. 282, the testator made a will in favour of his wife to the exclusion of the other members of his family, while suffering from a disease which affected his brain and impaired his mental ability. At p. 290 of the report ERSKINE, J., said the following:

"But their Lordships are of opinion that, in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration; and, therefore, the question which their Lordships propose to decide in this case is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property."

This case was followed in the case of Battan Singh and Others v Amirchand and Others, 1948 A.C. 161, where the testator, whose mental state was weakened through illness, left all his property to the respondents to the exclusion of his four nephews. At p. 170 of the report Lord NORMAND said:

"A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of it, and yet if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of his relations, and if that forgetfulness was an inducing cause of his choosing strangers to be his legatees, the will is invalid.""

17. When this passage is read with a passage later in the judgment of Vivier AJ applying the test to the earliest of the three wills by the testatrix impugned in *Kirsten's* case (at 111C to D), the main elements of the test for deciding the question of testamentary capacity that emerge are the following: at the time of making the will the testator must have been capable of comprehending the nature and extent of his property, of recollecting and understanding the claims of relations and others upon his favour and upon his property and of forming the intention of granting each of them the share in the property set out in the will or excluding them from any share of his property, as the case may be.

The applicant's relationship with the deceased

18. The sequence of events relevant to the present matter commences in 1995 when the applicant and the deceased met and began living together as man and wife. Although they never married, in 1996 their son K. was born and in 1999 their daughter K2. was born. It is common cause that the applicant and the deceased had a turbulent relationship. In 2001 the applicant and the deceased separated. During 2002 there was litigation between them about their children, which was settled in 2003. In 2004 they were reconciled and began living together again with their children. In 2007 they separated again for a period of three months from 11 May 2007 until 9 August 2007 when the applicant and their children moved back to the deceased's home. The applicant says they stayed together from then until the deceased died on 8 September 2008, except for a period of about one month from March or April 2008 when he stayed with his sister in Observatory, Cape Town, a period of about three weeks from about 12 July 2008 when, at the request of the deceased, the applicant and their children lived with the applicant's mother, and again for the last three weeks of his life when, again at the request of the deceased, the applicant and their children moved out.

19. There is a dispute between the applicant and the respondents about when exactly the applicant and her children lived with the deceased during the last five months of the deceased's life and where they and the deceased stayed during the last few weeks of his life. Ms Solomon says that the deceased stayed with her between April and June 2008; and, as regards the final separation, it was the deceased who moved out not the applicant and the children, and he did so in early August (i.e. before the making of the disputed will on 13 August 2008) not for the last three weeks of his life (i.e. from mid August 2008). In relation to the last separation, Mr Crowhurst says that on 5 August 2008 he saw the deceased at his "*new residence*" at 3 San Juan Avenue, Constantia Hills, adding that the deceased "*had (for the last time) fallen out with the Applicant and had left the home he shared with her*".

20. In my view, nothing turns on this dispute because it is common cause that between mid July 2008 and his death in early September 2008 the deceased kept secret from the applicant the fact that he was preparing a new will and, from 13 August 2008 onwards, the fact that he had made a new will (i.e. the disputed will). The parties are *ad idem* that the applicant first learned of the disputed will on 15 September 2008 when it was read out to her and others by Mr Crowhurst at his offices.

The contents of the disputed will

21. In the disputed will the deceased revoked all previous wills. He made bequests to seven persons, namely to the applicant (two motor cars, and the bequest referred to in paragraph 21 below), to Ms Solomon (a motor car and the deceased's interest in a close corporation named Congress Communications and Information Technology Consultants CC ("Congress Communictions")), to Mr Solomon (a motor car, and the right of *habitatio* in the deceased's property at 4 Dennebosch Close (Erf 9913), Constantia until K2. reaches the age of 25

years), to Ms Abdul-Hamid (a motor car), to Ms Effendi (the furniture and effects in his house at 46 Trill Road, Observatory) and to two of the other respondents, Mr Bernard Lawrence Engel and his wife Ms Faith Engel (a fixed property described as "*Erf 2307 Capricorn*" held by another close corporation, United African Mineral Energy and Marketing Consultants CC, subject their discharging any mortgage bond over the property). He further directed that his remaining assets be held in trust for K. and K2. until they reach the age of 25 years, whereupon such assets and the income thereon are to be distributed equally between them, but leaving behind sufficient to provide for the trusts' ongoing obligations to the applicant under a further bequest to the applicant expressed in the following terms:

> "*CARMEL NAIDOO the mother of my children but from whom I am now estranged shall have the right of habitatio over my fixed property 20, Welgelee Road, Constantia Hills (ERF 3197 CONSTANTIA) during her lifetime together with so much of the income of the trust as my trustees in their sole discretion deem sufficient for her maintenance. She shall not be required to provide security for the preservation of the property subject to the right of habitatio. The bare dominium of such property I bequeath to my son K.D.S., and which bequest to him shall take effect upon his attainment of his age of twenty five (25) years. These bequests to Carmel shall lapse and be null and void should she lodge any claim in her personal capacity against my estate or the trust created herein*" (paragraph 4(a) of the disputed will).
>
> "[U]*pon the death or remarriage of the said CARMEL NAIDOO the benefits bequeathed to her shall lapse and terminate and the underlying assets held in trust to provide such benefits shall become distributable to my said children K. and K2. provided they have attained the age of 25 years respectively*" (paragraph 4(c) of the disputed will).

The contents of the deceased's earlier will

22. As indicated above, the deceased had made an earlier will on 12 July 2007 ("the earlier will"). In it he, amongst other things, bequeathed his furniture, household effects and personal effects (excluding his motor cars) in equal

shares to K. and K2. and, subject to the fixed properties placed in the further trust described below, bequeathed the residue of his estate to a trust for the benefit of K. and K2., to terminate and the capital to be distributed to them when K2. reaches the age of 40 years. The trust for K. and K2. was created subject to the proviso that trustees "*honour*" the deceased's "*maintenance obligations under the Divorce Order which terminated my marriage to my former wife*" (clause 2.1.2 of the earlier will). It was common cause at the hearing that this was a reference to the maintenance obligation the deceased had assumed in relation to the applicant (to whom, as stated, he was never married). The earlier will further provided that Mr Solomon (his nephew), Ms Effendi (his sister) and Ms Fatima Solomon (another of the deceased's sisters) could continue to occupy the fixed properties they were then occupying, to be held in a trust for that purpose, on condition that they pay the rates, taxes, insurance premiums and other expenses connected with them, and provided further that upon the death of the last dying of Mr Solomon, Ms Effendi and Ms Fatima Solomon the trust would terminate and the capital would be distributed equally between any of their children who were then alive. In the earlier will the deceased nominated as the executor of his estate whichever of two named financial institutions first accepted the appointment, he nominated his sister Ms Soraya Solomon and a financial institution as the trustees of the trust created for K. and K2. and he nominated Ms Soraya Solomon as the sole trustee of the trust created for Mr Solomon, Ms Effendi and Ms Fatima Solomon.

The deceased's cancer and its treatment

23. Turning to the deceased's cancer and its treatment, as stated earlier the papers include a report by Dr Reon Van Dyk, the deceased's physician. Dr Van Dyk says the deceased was his patient from April 2005 onwards. He says the

deceased was a diabetic and that his main involvement with the deceased related to the management of the deceased's diabetes.

24. In March 2008 Dr Van Dyk diagnosed the deceased with cancer. (The papers suggest that the same diagnosis may have been made about a month earlier, presumably by another doctor.) The deceased was suffering from a malignant renal tumour causing renal failure, and because the malignancy had metastasised (spread) to parts of the deceased's skeleton he was experiencing severe backache and hypercalcaemia (an elevated calcium level in the blood) due to excessive skeletal calcium release.

25. Dr Van Dyk says he referred the deceased to an oncologist, Dr David Eedes, who, in addition to using chemotherapy in an attempt to control the cancer, concentrated on pain relief, the management of the deceased's hypercalcaemia and relief from the severe nausea associated with the chemotherapy. According to Dr Van Dyk, Dr Eedes prescribed for the deceased a combination of well-known analgesics often used in cancer patients, including opiate skin patches (Durogesic patches) and Benzodiasepines and, as anti-emetics (i.e. drugs that are effective against vomiting and nausea), a combination of Zofran and Valoid suppositories.

26. Dr Van Dyk says that on 30 July 2008 the deceased consulted him in his rooms. The deceased's main complaints were nausea and sleepiness. The deceased was admitted to the Christiaan Barnard Memorial Hospital, where investigations were performed. It transpired that at that stage the deceased was not using any Durogesic patches (his opiate level was undetectable), but his Benzodiasepine levels were elevated because the deceased had been taking Alprazolam frequently in order to ease his discomfort. Importantly for present purposes, Dr Van Dyk says in his report the following about the deceased's mental faculties at that stage:

"*Although the patient appeared to be suffering from sedation side effects of these drugs it is important to note that he did not present with any delirium or memory impairment. He was able to hold a normal conversation and responded in a normal fashion to my questions. It was evident that his memory was also not impaired since I still recall him enquiring about my recent holiday in France. I had informed him about my plans some 6 weeks before leaving for France.*"

and

"*During his initial consultation and the following few days spent in hospital Mr. Solomon's ability to reason never seemed to be affected despite the fact that he presented with an elevated calcium level at that time.*"

27. Dr Van Dyk says that while the deceased was in hospital he changed the deceased's palliative regimen to non-sedative analgesia in the form of intravenous Paracetamol (Perfalgan) and a non-steriodal anti-inflammatory agent (Arcoxia). He adds that when the deceased was discharged from hospital "*he was advised to use Benzodiasepines with discretion and to limit the amount of Opiate patches used as much as his pain allowed*".

The respondents' evidence on the deceased's testamentary capacity

28. Against this background, I turn now to the respondents' evidence, besides that of Dr Van Dyk referred to above and discussed further below, substantiating their denial of the applicant's allegation that the deceased lacked testamentary capacity when he made the disputed will on 13 August 2009.

29. The first respondent's papers include affidavits from two estate agents who had dealings with the deceased in the final months of his life. The significance of the evidence of these deponents is that neither of them has any interest in the

disputed will – they are not beneficiaries, executors or the trustees of the testamentary trust.

30. The first estate agent is Ms Roleen Antoinette Beelders, who says that between 2003 and 2008 she facilitated the sales to the deceased of four properties in Constantia. In 2003 she facilitated the sale of the property at 20 Welgelee Road, in 2005 she facilitated the sale of the property at 4 Dennebosch Close (which is apparently adjacent to 20 Welgelee Road) and between March and June 2008 she facilitated the sales to the deceased of the property at 3 San Juan Road which the deceased purchased on 7 June 2008 and the property at 30 Doordrift Road which the deceased purchased on 22 June 2008. According to Ms Beelders the deceased asked her to meet with him at the Primi Piatti restaurant in Constantia on 16 July 2008 and to bring with her a list of the properties he had purchased through her, which she did. The other people at the meeting were Mr Crowhurst, his partner at Bissets Ms Michelle van Wyk and Mr Bernard Engel, who she describes as a friend of the deceased. Ms Beelders confirms Mr Crowhurst's account of this meeting (discussed below) and further confirms that the deceased "*was completely lucid*". Ms Beelders adds that thereafter, in July and August 2008, she saw the deceased regularly and that "[o]*n each occasion he was lucid*". She also says that on 12 August 2008, in her presence in the Primi Piatti restaurant the deceased signed a new will prepared by Mr Crowhurst; and that on 13 August 2008, in her presence at the property at 3 San Juan Road, the deceased signed the disputed will (which replaced the one signed the previous day). (I deal below with the evidence of the respondents' witnesses leading up to and surrounding making of the two wills on 12 and 13 August 2008.) Ms Beelders says finally that she saw the deceased regularly between 13 August 2008 and his death on Monday 8 September 2008. In this regard she says that on the Friday preceding his death (5 September 2008) she saw the deceased "*late in*

the day and he was tired, and would fall asleep. While awake, though, he was lucid".

31. The second estate agent is Mr Reynold Cronin Henkel, who had earlier deposed to an affidavit which formed part of the applicant's founding papers. In his first affidavit Mr Henkel says that on 23 August 2008, when he was in the company of the deceased, together with the applicant's sister Ms Celeste Naidoo, Mr Engel and a Mr Paul Battle, the deceased told them that it was his intention that K. should inherit the property at 20 Welgelee Road and that K2. should inherit the property at 3 San Juan Road. In his affidavit in the first respondent's papers Mr Henkel says that he stands by what he had said in his earlier affidavit, but adds that although when the applicant asked him to make that affidavit she told him that she was contesting the deceased's will because she had evidence that he was not lucid when he made it, the applicant did not ask him whether he thought the deceased was lucid at the time when he signed the will. Mr Henkel then says that in his view the deceased was indeed lucid. He goes on to confirm Ms Beelders' account of the deceased's signing of the will at Primi Piatti on 12 August 2008, and to give his own account of the deceased's signing of the disputed will at 3 San Juan Road on 13 August 2008 (matters to be dealt with below). Finally, Mr Henkel says the following:

> "*I saw the deceased more often than Mrs Beelders because I stayed with him from March 2008 until his death, moving from house to house until his death. As such I saw him closely right up until the end. Early in 2008 the deceased became so ill that he needed to make use of a wheelchair. His medical condition slowly deteriorated until he died.*
>
> *The only occasion on which I saw the deceased be anything other than lucid was on the Thursday immediately prior to his death. I was looking after him in the company of his niece Shaheeza. He asked me to take him out of the chair. He proceeded to walk towards the television and then asked me to open the gates. It seemed to me that he believed that the television was a pair of gates. I realized that his final moments were not far. I told him 'King* [the deceased's nickname]*, I can't open the gates for you. This is where I have to leave you. You have to go on your*

> *own from here'. He was angry and said 'don't be stupid, just open the gates'. A very similar thing happened the next day, on the Friday, when he again walked toward the television. Both incidents happened late in the day, when he was very tired. Other than that he had been lucid through the day.*
>
> *On the Sunday afternoon he was placed on supplemental oxygen. The following morning, in the early hours, he died*" (paragraphs 3.6 to 3.8 of Mr Henkel's affidavit).

32. The applicant's response to this part of Mr Henkel's affidavit reads as follows:

> "*I note* [this part] *of this affidavit but question the value of the opinion expressed by the deponent and others who have failed to substantiate their opinions regarding the state of mind of the deceased by reference to facts*" (paragraph 36 of the applicant's replying affidavit).

33. At this juncture it is convenient to deal briefly with a point raised by in argument by Ms Carter in relation to Mr Henkel's evidence and that of the respondents' other non-medical witnesses about the deceased's mental capacity, namely that it was not admissible because they were not medical experts. In my view, their evidence is akin to the evidence of lay witnesses on the state of sobriety of a person, which is admissible if accompanied by a description of the facts on which it is based or the reasons for their belief (*S v Adams* 1983 (2) SA 577 (A); see generally Zeffertt & Paizes *The South African Law of Evidence* (2ed, 2009) at 338 to 339). As appears from the passages from Mr Henkel's affidavit quoted above, and from the passages from the affidavits of the respondents' other witnesses quoted and discussed below, most of them have substantiated, with descriptions of the facts or surrounding circumstances, their assertions that the deceased was mentally capable of appreciating the nature and effect of making a will when he made the disputed will on 13 August 2008.

34. Unlike *Essop v Mustapha and Essop NNO and Others* 1988 (4) SA 213 (D), which was referred to by counsel for all the parties, the present is not a case where the making of the disputed will is shrouded in mystery. On the contrary, although at the time the applicant was not aware that the deceased was preparing a new will and she was not present when the will was made on 13 August 2008, the respondents have put up affidavits by five people who were either involved in the preparation of the will or were present when it was made, or both.

35. The first of these deponents is Mr Crowhurst, who confirms that on 16 July 2008 at Primi Piatti in Constantia he met with the deceased, Mr Solomon, Ms Beelders, Mr Engel and his (Mr Crowhurst's) partner at Bissets, Ms Van Wyk. Mr Crowhurst explains, and Ms Van Wyk confirms in an affidavit of her own, that she is a conveyancer who had attended to several matters for the deceased in the past, and that after the deceased had contacted her and told her he needed a will to be prepared, she had asked Mr Crowhurst to assist her as he was the most senior partner in the firm handling wills and estates. In her affidavit Ms Van Wyk adds that after the meeting on 16 July 2008 she left the matter of the deceased's will in Mr Crowhurst's hands.

36. Mr Crowhurst says that during the meeting on 16 July 2008 Ms Beelders set out the various fixed properties owned by the deceased, who then instructed Mr Crowhurst how he wished each of them to be handled in his will. Mr Crowhurst then recounts a discussion with the deceased about who should be appointed as the executors to his deceased estate and as the trustees of the testamentary trust he wished be established in his will. This included a discussion of the suitability of the appointment of the applicant, to which the deceased was strongly opposed. The deceased added he was concerned that the applicant would seek to challenge his will and insisted that a clause be inserted

in the will to the effect that should she attempt to do so she would lose any claim she may have to the residue of his estate.

37. Mr Crowhurst says that after the meeting he prepared a draft will in accordance with the deceased's instructions, and he goes on to explain the process by which the draft was amended several times until, eventually, the deceased signed the disputed will on 13 August 2008. It is not necessary to recount all the details of the process of drafting and redrafting. Suffice it to say that between 16 July and 5 August 2008 Mr Crowhurst produced second, third and fourth drafts of the will and he met with the deceased on three further occasions, namely on an unspecified date in late July, on 2 August 2008 and on 5 August 2008. (I should mention that all of the dates in this portion of Mr Crowhurst's affidavit are wrongly stated as being dates in 2009.) Mr Crowhurst says that at the meeting in late July 2008, at which Mr Solomon, Ms Beelders, Mr Engel and Mr Henkel were present, the deceased actively participated in a debate about the relative merits of *habitatio* and usufruct. Mr Crowhurst says that when he arrived at the Christiaan Barnard Memorial Hospital for the meeting on 2 August 2008, the deceased was agitated and explained that as he was expecting a visit from the applicant and he did not want her to know he was changing his will, Mr Crowhurst should leave immediately to avoid an encounter with the applicant. As appears from paragraph 21 above, Mr Crowhurst says that the meeting on 5 August 2008 was held at 3 San Juan Avenue. (Unlike Ms Beelders and Mr Henkel, Mr Crowhurst consistently refers to 3 San Juan Avenue, not 3 San Juan Road.)

38. Mr Crowhurst says that on 12 August 2008 there was a further meeting between him and the deceased. Mr Crowhurst does not say where this meeting was held. He says he attended the meeting with the intention that the will be executed. He adds that at the meeting the deceased asked for further changes to the will, which Mr Crowhurst wrote in because the deceased was anxious to

resolve the matter and did not wish to wait for the will to be re-typed. Mr Crowhurst says that once he had effected the changes the deceased made the amended will, which was witnessed by Ms Beelders and Mr Henkel. Mr Crowhurst adds that, after making the will, the deceased again expressed the concern that the applicant would attempt to interfere with his final wishes. The deceased predicted that she would try to assail his capacity to execute the will and asked how this could most effectively be prevented. Mr Crowhurst says that he told the deceased that "*we could have it signed in the presence of a medical doctor*" (paragraph 7.12 of his affidavit).

39. As a result, Mr Crowhurst says, on 13 August 2009 he met with the deceased again at St Juan Avenue. Mr Crowhurst describes this meeting as follows:

> "*I had prepared a re-typed will and had asked a medical doctor of my acquaintance, Dr Roy Leaver, who is a general practitioner of more than forty years experience, to be in attendance and to satisfy himself that the Deceased was compos mentis. I had wanted Dr Francois Daubenton, a well-known psychiatrist practising in the area, to assist me, but he was unable to attend with me. Again the Deceased wished to make certain changes, this time with respect to the various motor vehicles in his possession. Again the changes were written in, this time by my secretary, Mrs Sharon Bain, who I had asked to attend in order to witness the will. It is her affidavit that was filed with the will when it was lodged with the Master. Doctor Leaver was present during the entire visit and had, before signing the will, asked the Deceased a number of questions the purpose of which was to understand what he was doing. Having satisfied himself, he witnessed the will ...*" (paragraph 7.14 of Mr Crowhurst's affidavit).

40. Mr Crowhurst says the following regarding the deceased's mental capacity when he made the wills on 12 and 13 August 2008:

> "*I have been a legal practitioner specialising in wills and estates for over forty years. Through my experience I have come to know the difference between a testator who does not have capacity, and one who does not. I can assure this court that when the Deceased signed both his*

wills – that of 13 August 2008 and the one that antedated it – he was in full possession of his mental faculties. I know this because of the nature of the conversations that I had with the Deceased. Despite his illness he knew what he owned, and applied his mind to how he wished his assets to be disposed of when he died. He engaged in a constant process of refinement of his will over a period of three weeks. I have no doubt whatsoever that the will of 13 August 2008 accurately reflects the Deceased's wishes" (paragraph 8 of Mr Crowhurst's affidavit).

41. The respondents' answering papers include an affidavit from Ms Bain in which she describes the making of the disputed will on 13 August 2008 and her role in the process in some detail. She says the following:

> "*On 13 August 2008 I was requested by Mr Crowhurst to attend the signing of the will of Mr UVDJ Solomon. Mr Crowhurst drove me to the house at which Mr Solomon was residing. Before we entered Mr Crowhurst had to ensure that the Applicant was not present.*
>
> *Dr Leaver was also present, as was Roleen Beelders, and various other people who were in and out, including Riyadh Solomon. We all – save Mr Riyadh Solomon, sat in the dining room at the dining room table. The Deceased explained to us about the building work that he was attending to. He did not appear to be stressed, or medicated, and his conversation was natural. He was in a wheelchair, and he smoked a number of cigarettes at the table. We rapidly got down to the signing of the will. He read through it and wanted certain changes made, to do with motor vehicles. I was asked to effect the changes in longhand in the presence of everyone else, which I did. No-one prompted him, he spoke to me direct and told me what he wanted changed.*
>
> *At a certain point Mr Solomon asked Riyadh to tell him the time, as he was anxious not to forget to take his medication. Riyadh told him not to worry as there was, he said, plenty of time.*
>
> *I watched Dr Leaver with care. I nursed my husband when he had cancer and I was comparing what I recall of my husband's condition and was struck by how alive Mr Solomon was compared to how my husband had been. Dr Leaver engaged Mr Solomon in conversation and appeared satisfied with his responses.*
>
> *Mr Solomon signed and then I signed, in his presence and in Dr Leaver's presence. Dr Leaver then signed, also in both our presences, and added his degrees behind his name. We then got up to*

leave and Mrs Beelders gave us a quick tour of the house" (paragraphs 2 to 6 of Ms Bain's affidavit).

42. For completeness sake I should record that, as indicated by Mr Crowhurst in his affidavit, shortly after the disputed will was made Ms Bain made an affidavit. It is dated 19 August 2008. A copy is annexed to the copy of the will in the papers. In it Ms Bain confirms that before the will was made, at the request of the deceased she made handwritten amendments to the will.

43. As indicated earlier, the estate agents Ms Beelders and Mr Henkel were also present when the disputed will was made on 13 August 2008, as they also were when the deceased made a will the previous day. In her affidavit Ms Beelders describes the making of the will on 12 August 2008 as follows:

> "*I saw the Deceased* [sign] *his will at Primi Piatti. The Deceased had phoned me that morning and had asked me to come to Primi Piatti that afternoon. The following people were there: the Deceased, Mr Reynold Henkel, and Mr Crowhurst. Riyadh Solomon and Bernard Engel were present, though at a different table. When I arrived he was going through the will with Mr Crowhurst. I signed the will as a witness, and Mr Henkel as the other witness... I confirm that the Deceased was lucid when he signed his will*" (paragraph 3.13 of Ms Beelders' affidavit).

44. Ms Beelders describes the making of the will on 13 August 2008 as follows:

> "*I was also present when the currently-accepted will was signed at 3 San Juan Road. The following people were present in the dining room: Mr Crowhurst; Mrs Sharon Bain; Dr Leaver; Mrs Beelders. At one stage he asked to be wheeled out, which he was. I saw the doctor making the Deceased read the will from beginning to end. He then asked the Deceased a number of questions. The Deceased answered them lucidly. Dr Leaver asked Mr Henkel whether the Deceased had had any pain medication and Mr Henkel confirmed that he had not. Dr Leaver also asked to look at, and was shown, the medication that the Deceased was on. At one point the Deceased asked Mr Crowhurst whether the 'usufruct' had been changed to 'habitatio', and*

Mr Crowhurst confirmed that it had" (paragraph 3.14 of Ms Beelders' affidavit). (The reference to "*Mrs Beelders*" in the second sentence of this paragraph is clearly a mistake. The references to Mr Henkel in subsequent sentences, suggest that he was the person who should have been listed as being present instead.)

45. Mr Henkel described the making of the wills on 12 and 13 August 2008 in terms similar to those used by Ms Beelders:

> "*I witnessed the will of the Deceased at Primi Piatti and confirm what is said in the affidavit of Mrs Roleen Beelders.*
>
> *I was also present when the currently-accepted will was signed at 3 San Juan Road. The following people were present in the room: Mr Crowhurst; Mrs Sharon Bain; Dr Leaver; Mrs Beelders. At one stage he asked to be wheeled out, which he was, and called Carmel. He asked her which cars she wanted and then came back and left her one extra car. I saw the doctor making the Deceased read the will from beginning to end. He then asked the deceased a number of questions. The Deceased answered them lucidly.*
>
> *Dr Leaver asked me whether the Deceased had had any pain medication and I confirmed that he had not. This was early morning, and he tended to take his medication later in the day. Dr Leaver also asked to look at, and was shown, the medication that the deceased was on*" (paragraphs 3.3 to 3.5 of Mr Henkel's affidavit).

46. The last affidavit put up by the respondents about the making of the disputed will, is that of Dr Leaver, the doctor. Dr Leaver says he has practised as a medical doctor since 1968 and he is a Member of the Faculty of General Practitioners and a Fellow of the College of Physicians of South Africa (specialising in paediatrics). The paragraphs of Dr Leaver's affidavit dealing with the making of the disputed will on 13 August 2008 read as follows:

> "*On 13 August 2008 I was requested by Mr John Crowhurst, a longstanding patient of mine, to attend the signing of the will of Mr UVDJ Solomon at Mr Solomon's home. There were a number of people present who I took to be friends and family. I was asked to ensure that the patient was compos mentis. The patient was in a*

wheelchair and physically weak. I watched his actions and listened to what he said. He spoke clearly, and with a strong voice. The content of what he was saying was also clear. Mr Solomon discussed sections of the will with Mr Crowhurst. There appeared to be some controversy with respect to whether or not a certain person was being fairly treated and I gained the impression that the person was Mr Solomon's common-law wife. There was discussion of children, and there was a discussion of vehicles. In all of this Mr Solomon knew exactly what he was referring to, the discussion flowed sensibly, and his responses were appropriate.

There was no doubt that the patient was completely lucid at the time that he executed his will.

I confirm that I witnessed the will. My signature is the second signature ..." (paragraphs 2 to 4 of Dr Leaver's affidavit).

Is the respondents' version clearly untenable?

47. In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) Cameron JA described the modern approach to motion proceedings where there are contradictory affidavits by applicants and respondents, as follows:

> "*That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.*

> *Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence*" (paragraphs 55 and 56, footnotes omitted).

48. The applicant contends that the contents of the respondents' affidavits are clearly untenable, for four main reasons.

49. First, the applicant contends that despite what the respondents' witnesses say, the deceased's hypercalcaemia would have affected his mental functioning and, together with the effects of his cancer, would probably have significantly impaired his mental capacity when he made the disputed will on 13 August 2008.

50. In this regard the applicant relies on "*her medical knowledge*" – it will be recalled that she is a professional nurse – and on "*her knowledge of the deceased*" in the period between his being diagnosed with cancer in early 2008 and his death in early September 2008 (paragraph 10 of the applicant's founding affidavit). More specifically, the applicants relies on the effects of the medication the deceased was taking and his elevated blood calcium levels.

51. The following passages in the applicant's founding affidavit encapsulate her allegations regarding the effects of the deceased's medication and blood calcium levels on his mental capacity:

> "*The medication which the deceased was on included schedule 5 and 6 pain killers which cause opiate and sedative type reactions. The deceased was prescribed 72 hour patches which were the form in which he received the pain medication. This medication alone causes me to*

doubt the competence of the deceased to execute a legal document" (paragraph 23 of the applicant's founding affidavit, my emphasis).

and

"*One of the effects of the cancer having metastasised and spread to the bones was that calcium from the bone was entering the blood stream of the deceased. This causes a condition known as hypercalcaemia and hypercalcaemia in turn can cause delusions and hallucinations*" (paragraph 28 of the applicant's founding affidavit, my emphasis).

and

"*Even in the times when the deceased appeared lucid he was always on strong pain killers, opiate type drugs which would have impaired his capacity. I believed that even though the deceased was able to appear normal that he nevertheless could not have been given his raised calcium levels and the type and quantity of the medications he was on*" (paragraph 38 of the applicant's founding affidavit, my emphasis).

52. The allegations in the first two quoted passages do not go nearly far enough to discharge the burden of proof imposed by s 4 of the Wills Act: they are expressed in terms which fall short of the standard of proof required by that provision, namely proof on a preponderance of probabilities (see *Kirsten and Others*, *supra*, at 109G-H). Although the allegations in the third quoted passage are framed in stronger (more definite) terms, their cogency is diminished by the similar, but more muted allegations earlier in the applicant's affidavit, and they certainly do not show that the respondents' contrary version, namely that the deceased not only appeared "*normal*" but in fact was *compos mentis* when he made the disputed will on 13 August 2008, is clearly untenable.

53. Moreover, the applicant does not have the special study, training or expertise to give reliable expert opinion evidence on the effects of the deceased's medication and blood calcium levels on his mental capacity (see *Ruto Flour Mills Ltd v Adelson (1)* 1958 (4) SA 235 (T) at 237C-D). Perhaps mindful of

this difficulty the applicant has put up an affidavit and a report dated 5 October 2009 by Dr Melvin Letier, a specialist physician and gastroenterologist (who I accept is an expert on the matter on which he was called upon to express an opinion). Dr Letier says that for purposes of his report he was provided by the applicant with the results of tests performed on blood drawn from the deceased on dates ranging from 3 March to 27 August 2008, including on 26 June, 21 July, 1 August and 19 August 2008, which are dates he considers relevant to the execution of the disputed will, although there were no test results for blood taken on 13 August 2008. In his report Dr Letier says that results of the tests on the four dates from 26 June to 19 August 2008 show that the serum corrected calcium levels in the deceased blood "*are all elevated from moderate to high*". He then concludes his report as follows:

> "*Based on the abovementioned test results demonstrating abnormal kidney function and serum Calcium, and their potential for causing encephalopathy of varying degrees, it would be reasonable to consider that the probability existed that the deceased may not have been entirely of sound mind around the period when he signed the new will on 13 August 2008. I reiterate, that I have only reviewed blood and other test results and have never had any personal contact with or knowledge of the deceased prior to 25 September 2009*" (my emphasis).

54. With respect to Dr Letier, I do not understand the emphasized portion of his report. In particular, it is not clear to me what the degree of probability is that he intended to convey with the words and phrases "*it would be reasonable to consider*", "*that the probability existed*" and "*may not have been*", or how the phrase "*entirely of sound mind*" relates to the *factum probandum* established by s 4 of the Wills Act, namely "*mentally incapable of appreciating the nature and effect of his act*". I realise that Dr Letier had to be cautious because he did not examine the deceased while he was still alive and he did not have any results of tests on blood taken from the deceased on 13 August 2009, but the phrasing of the conclusion of Dr Letier's report leaves me in the dark on the

crucial issue of the likely effect of the deceased's cancer and medication on his mental capacity.

55. In his report, Dr Van Dyk, who as explained was the deceased's physician, responded to Dr Letier's report as follows:

> "*It is indeed a fact that the combination of pathologies associated with Mr Solomon's malignancy (especially referring to the hypercalcaemia and* [elevated urea] *levels) can potentially affect a patient's ability to reason. I fully agree with this statement of Dr Letier. However it is not a given that patients suffering from these complications will necessarily experience impaired cognitive functions. Mr* [Solomon] *attended* [on] *me on a regular basis during the last few months* [of his] *suffering from his malignancy and in my opinion his ability to reason was never impaired. I ... also consulted with Mr Solomon for the last time 6 days prior to his death during which he still showed his normal sense of humour. Although suffering from pain he was still able to hold a normal conversation.*" (I have corrected several typographical and grammatical errors in this passage.)

56. As further evidence of the effects on the deceased's mental capacity of the medication the deceased was taking and his elevated blood calcium levels, the applicant refers to several periods or incidents when, she says, the deceased was *non compos mentis*. In this regard the applicant says the following in her founding affidavit:

> "[A]*s his illness progressed the deceased had increasingly frequent episodes where he was unable to walk or take care of his most basic needs. He would just sit in his massage chair and grunt if he needed to move or wanted the bathroom. Sometimes he would attempt to do things for himself and would be frozen in a position for minutes and sometimes hours at a time.*
>
> *He would then recover and be his old self again. The periods where the deceased was unable to do anything lasted for a day at first but as his illness progressed the periods lengthened and he would be incapable of even speech for days at a time*" (paragraphs 32 and 32 of the applicant's founding affidavit).
>
> and

> "*As an illustration of the effects of raised calcium levels I recall an incident the date of which I cannot recall, our domestic worker reported to me that the deceased was saying that they were coming to get him. He kept pointing to the television which is connected to a state of the art security system which includes cameras which enable surveillance of the entire property and that the deceased was afraid. The domestic reported to me that when she looked at the television there was no-one visible from any of the cameras but that the deceased stared at the television and cringed*" (paragraph 44 of the applicant's founding affidavit, confirmed by an affidavit, albeit dated a few days before the applicant's affidavit, by the domestic worker in question, Ms Zoleka Peacock).

57. The applicant gives a further such example in her replying affidavit:

> "*I do not deny that* [the] *deceased enjoyed lucid intervals during his dementia but in the week preceding 13 August 2008 the deceased 'woke up' after having a period where he was unable to walk, talk, eat or go to the bathroom by himself for 5 days. He was so sick during this time that we felt that he would die shortly but he recovered somewhat*" (paragraph 5 of the applicant's replying affidavit).

58. Even assuming that the applicant's raising of the latter example in her replying papers for the first time should be permitted (which, for the reasons given in paragraph 75 below, it should not be), what it has in common with the other two examples is her concession that the periods or incidents she recounts were interspersed with periods when the deceased was "*his old self again*" and was "*lucid*". Consequently, none of these examples assist the applicant in showing that the respondents' deponents' evidence that the deceased was *compos mentis* when he made the disputed will on 13 August 2008, was clearly untenable.

59. The applicant's second main reason for contending that the contents of the affidavits by the respondents' deponents described and quoted in the preceding section of this judgment are clearly untenable, is that they contain what the applicant alleges are contradictions about the steps taken by Dr Leaver on

13 August 2008 to ascertain whether the deceased was capable of making a will.

60. As appears from paragraph 46 above, Dr Leaver's account of his role in the events that day at the deceased's home may be taken to suggest that up to the moment he formally witnessed the deceased's signing of the will, he was solely a passive observer. Dr Leaver says that he "*watched* [the deceased's] *actions and listened to what* [the deceased] *said*", and then goes on to describe what he saw and heard and, having done so, to state his conclusion, namely that there was no doubt that the deceased was lucid.

61. In her argument, Ms Carter pointed out that unlike Dr Leaver himself, Mr Crowhurst, Ms Bain, Ms Beelders and Mr Henkel all say that Dr Leaver played an active role in the proceedings: as appears from paragraph 39 above, Mr Crowhurst says that before the will was signed Dr Leaver "*asked the Deceased a number of questions the purpose of which was to ascertain what he was doing*"; as appears from paragraph 41 above, Ms Bain says that she watched Dr Leaver carefully and that "*Dr Leaver engaged Mr Solomon in conversation and appeared satisfied with his responses*"; and as appears from paragraphs 44 and 45 above, Ms Beelders and Mr Henkel say they saw Dr Leaver "*making the Deceased read the will from beginning to end. He then asked the Deceased a number of questions. The Deceased answered them lucidly. Dr Leaver asked Mr Henkel whether the Deceased had had any pain medication and Mr Henkel confirmed that he had not. Dr Leaver also asked to look at, and was shown, the medication that the Deceased was on*" – the quote is from Ms Beelders' affidavit, but Mr Henkel's account is the same in all material respects.

62. In her argument, Ms Carter also pointed out that there are differences between Mr Crowhurst, Ms Bain, Ms Beelders and Mr Henkel as to what Dr Leaver did

and said: whereas all of them say that Dr Leaver asked the deceased questions or engaged him in conversation, Ms Beelders and Mr Henkel go further and say that Dr Leaver also made the deceased read the will from beginning to end, asked Mr Henkel whether the deceased had taken any pain medication and asked to see and was shown the deceased's medication.

63. Having regard to the test laid down in ***Fakie NO***, *supra* for rejecting out of hand a respondent's version in motion proceedings (quoted in paragraph 47 above), the question raised by these submissions is whether because of these contradictions it can confidently be said, on the papers alone, that the respondents' version that the deceased was *compos mentis* when he made the disputed will, is "*demonstrably and clearly unworthy of credence*". In my view, for two reasons the answer to that question is clearly no.

64. First, none of the respondents' deponents in question purports to give a complete account of everything that was said and done at the meeting at the deceased's house on 13 August 2008 in the run-up to the signing of the will. My strong impression on reading the relevant parts of their affidavits, which were made more than a year after the event, is each of the deponents has recorded the details they can remember and think are relevant to their conclusion that the deceased was mentally capable at the time.

65. Seen in this way, the fact that in his affidavit Dr Leaver focussed on his observations of the deceased's speech and actions, does not mean that Dr Leaver intended to convey that he himself had no interactions of his own with the deceased or any of the others present. Dr Leaver's brief was to ensure that the deceased was *compos mentis*. In his affidavit Dr Leaver states his conclusion and his reasons for his conclusion, namely that the deceased's actions, speech and conversation with Mr Crowhurst about aspects of the will, which Dr Leaver describes briefly as relating to, amongst other things vehicles

and whether the applicant ("*Mr Solomon's common-law wife*") was being fairly treated in the will, were normal despite the facts that the deceased was wheelchair bound and physically weak.

66. In their affidavits in these proceedings Mr Crowhurst and Ms Bain confirm that at the instance of the deceased handwritten changes were made by Ms Bain to the bequests relating to the deceased's motor vehicles. The changes in question, which are to paragraphs 2(d), (e) and (g) of the disputed will, corroborate what Dr Leaver says was discussed. They entailed swopping between the applicant and Ms Solomon the bequests of the deceased's Jeep Cherokee (registration number CA11655) and his Crossfire SRT6 (registration number CA424316), and replacing Ms Effendi with the applicant as the legatee of the deceased's Jeep Grand Cherokee 5.7 VA (registration number CA732972). As adverted to in paragraph 42 above, on 19 August 2008, shortly after the deceased made the disputed will, Ms Bain made an affidavit in which she confirms that before the will was made she made certain handwritten amendments to the will at the request of the deceased.

67. Mr Henkel's affidavit also provides some corroboration for Dr Leaver's statement that Mr Crowhurst and the deceased discussed vehicles and whether the applicant was being fairly treated in the will, as well as for Mr Crowhurst's and Ms Bain's evidence about the changes made to the will. As appears from paragraph 45 above, Mr Henkel says that "*At one stage he* [the deceased] *asked to be wheeled out, which he was, and called Carmel. He asked her which cars she wanted and then came back and left her one extra car*" (paragraph 3.4 of his affidavit). Although the applicant's replying affidavit refers to the relevant paragraph of Mr Henkel's affidavit, she does not dispute having received this call from the deceased – she says nothing about it at all (see paragraph 34 of the applicant's reply).

68. Secondly, even if the matter were to be approached on the basis that Dr Leaver, Mr Crowhurst, Ms Bain, Ms Beelders and Mr Henkel purported to give a comprehensive account of what Dr Leaver did and said, and consequently that their versions of that are contradictory, it would not follow that everything all of them say about the events on 13 August 2008 should be rejected out of hand. That would be illogical. As Brand AJA said in *S v Teek* [2009] NASC 5, an as yet unreported judgment of the Namibian Supreme Court dated 28 April 2009, criticising the trial judge's rejection of the whole of the evidence of each of two witnesses because of contradictions between them:

> "*The thesis the learned judge then seems to have subscribed to, although he did not say so in terms, is that in a case of conflict both versions should be rejected as untruthful. This, I believe, amounts to a non sequitur. As was pointed out by Nicholas J in S v Oosthuizen 1982 (3) SA 571 (T) at 576B-D:*
>
> > *'Where the statements are made by different persons, the contradiction in itself proves only that one of them is erroneous: it does not prove which one. It follows that the mere fact of the contradiction does not support any conclusion as to the credibility of either person. It acquires probative value only if the contradicting witness is believed in preference to the first witness, that is, if the error of the first witness is established.*
> >
> > > *"It is not the contradiction, but the truth of contradicting assertion as opposed to the first one, that constitutes the probative end." (Wigmore [On Evidence Vol III] at 653.)"'*
>
> ...
>
> *It follows that a list of contradictions between witnesses in itself leads nowhere as far as dishonesty is concerned. It is only when it has been established on other grounds that the one witness is reliable and the other one not that the evidence of the latter can be rejected...*" (paragraphs 19 and 20).

69. Moreover, to reject as demonstrably and clearly unworthy of credence everything Dr Leaver, Mr Crowhurst and Ms Bain have said about the sequence of events on 13 August 2008, because of the contradictions about Dr Leaver's role in the proceedings (which I have assumed for purposes of this

part of the judgment) between them *inter se* and between them, on the one hand, and Ms Beelders and Mr Henkel, on the other hand, would also be wrong. That would be to lose sight of the corroboration provided by Ms Bain's handwritten changes to the will and of her contemporaneous affidavit for the essentially complementary evidence of Dr Leaver, Mr Crowhurst, Ms Bain and Mr Henkel in their affidavits in these proceedings about the making of the handwritten changes to the will. The "contradictions" do not detract from the common thread of the relevant deponents' versions of the events that day, namely that they were all present when the deceased made the disputed will and it was witnessed by Dr Leaver and Ms Bain, that before doing so the deceased discussed aspects of the will and requested that certain changes be made to the certain of the bequests, that the changes he requested were made in handwriting by Ms Bain and that all of them believe that the deceased understood what he was doing when he discussed the will, made those requests and ultimately made the will.

70. The applicant's third main reason for contending that the deceased was clearly *non compos mentis* when he made the disputed will, is that it does not reflect what the deceased said about dispositions of his property right until the time of his death. In her founding affidavit the applicant refers to the following statements by the deceased which, she implies, were not carried through to his disputed will:

> "*... the deceased spoke to the children in my presence and told them of his intention to leave them specific properties. He told K. that the property at 20 Welgelee Constantia would be his and that the property at 4 Dennebosch would be K2.'s. On the death of his mother the property at 3 San Juan would also become K2.'s. He also said the same thing to my sister, the deceased's sister Fatima Dodd, Reynold Henkel and Bernard 'Bernie' Engel [and] to various other people... He also told me I would have a usufruct in respect of 20 Welgelee until my death and a year earlier had said to me that he (the deceased) would never see Bernie's wife and children on the streets and that I should give the keys of 20 Oyster Bay, Muizenberg to Faith. I understood this to mean that*

he had bought the house for Bernie and his family" (paragraph 36 of the applicant's founding affidavit).

71. There are two difficulties with this line of argument. First, as pointed out by Mr Crowhurst in his answering affidavit, it is not uncommon for people to make promises to leave things to others in their wills and then not to do so. There are a range of possible reasons entirely unrelated to the testator's mental capacity why a will may differ from the testator's promises. One of these is that the testator may have been mischievous or perhaps even devious. Another is that in the course of giving instructions for the preparation of his will and discussing drafts of the will with the drafter (as happened in the present case), the testator may have refined his thinking on certain issues or even changed his mind entirely about them or about the contents of his will as a whole. I also agree with Mr Crowhurst that the disputed will is not radically different from the statements ascribed to the deceased by the applicant. For example, as appears from paragraph 21 above, the 20 Welgelee Road property will be held in trust for K. and K2. (instead of bequeathed to K. alone), subject to a right of *habitatio* for the applicant (instead of a usufruct); K2. will inherit the property at 4 Dennebosch Close, subject to a right of *habitatio* for Mr Solomon; and the Capricorn property (to which the applicant refers as "*Oyster Bay*") will go to Mr and Mrs Engel, subject to their discharging any mortgage bond over the property. (I deal below with a further point made by the applicant in relation to the bequest of the Capricorn property.)

72. The applicant's fourth main reason for contending that the deceased was clearly *non compos mentis* when he made the disputed will, is that it is irrational in two respects. It is important to note that the applicant's rationality attack is not that the general scheme of devolution in the will is irrational or illogical, but that the two elements in question lead to the conclusion that the deceased was not able to comprehend its nature and effect.

73. The applicant's first point in this regard is that because of the bequests to Mr Solomon, Ms Abdul-Hamid and Ms Effendi and, particularly, the bequest to Ms Solomon (which the applicant alleges comprises a major portion of the deceased's estate), the disputed will does not make proper provision for K. and K2., which is at odds with the deceased's very considerable generosity to them while he was alive and his often-stated intention that they be properly provided for after his death. Mr Crowhurst's answer to this is that despite "*the effect the collapse of the property market had on the sale of the properties*" in the deceased's estate, the disputed will, together with insurance policies taken out by the deceased, do make adequate provision for K. and K2. and, incidentally, the applicant as well. The insurance policies in question provide medical aid coverage for K., K2. and the applicant for ten years after the death of the deceased, provide for the children's education (including tertiary education) and will pay a total of about R940 000 into their testamentary trusts. Mr Crowhurst adds that the furniture and audio-visual equipment at the 20 Welgelee Road property have been sold to the purchaser of that property for R1 million and the proceeds will also be used for the maintenance of the applicant and the children.

74. In her replying affidavit the applicant alleges further that whereas in the earlier will the deceased had left "*the Capricorn property*", i.e. Erf 2307 Capricorn, to Mr and Mrs Engel "*outright*", in the disputed will he left them the property "*subject to them discharging the mortgage bond*". In this regard she then says:

> "*The deceased left the property to Bernie and his wife because he knew they were blacklisted and would not qualify for finance. He also knew that Bernie was not working and his words to me in this regard were that he would never see Faith (Engel) and the children on the streets.*
>
> *That the deceased then leaves them the Capricorn property subject to them discharging a huge bond knowing that they would not even qualify for consideration for one makes no sense. This again confirms my view that the deceased did not know what he was doing ....*" (paragraphs 18.2 and 18.3 of the applicant's replying affidavit).

75. There are two difficulties with this line of attack. The first is that it was made for the first time in the applicant's replying papers, which means that it will be left out of account unless the court, in the exercise of its discretion, allows the applicant to amplify her case in reply, giving the respondent the opportunity to deal with it in a second set of answering affidavits (as to which, see *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)* 1978 (1) SA 173 (W) 177G to 178A, affirmed by this court in *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others* 2003 (5) SA 1 (C) 6E to F). In the present case there is no good reason to do so. Besides the urgency of the matter, it is not as though the attack is based on facts previously unknown to the applicant that came to light after delivery of the respondents' answering papers, or that the existence of the attack appeared for the first time from the answering affidavits. It is based on a comparison of the earlier will and the disputed will and on the financial position of Mr and Mrs Engel, all of which were matters known to the applicant when she launched this application. In her founding affidavit, all the applicant said about Mr and Mrs Engel and their family and the Capricorn property (referring to it as "*Oyster Bay*"), was the following two sentences (which form part of the quote in paragraph 70 above): *"*[A] *year earlier* [the deceased] *... said to me that he (the deceased) would never see Bernie's wife and children on the streets and that I should give the keys of 20 Oyster Bay, Muizenberg, to Faith. I understood this to mean that he had bought the house for Bernie and his family*" (paragraph 36 of the applicant's founding affidavit). Mr Engel made an affidavit, which was annexed to the applicant's founding affidavit, in which he also mentioned the Capricorn property, but like the applicant herself he made no point of the fact that bequest of that property to him and his wife in the disputed will was subject to the condition that they discharge the mortgage bond over the property. All he said was the following: "*The deceased had told me during this period that he was leaving me the property at Oyster Bay or that he would leave me a usufruct of Oyster Bay*" (paragraph 4 of Mr Engel's affidavit).

76. The second difficulty with the applicant's line of attack concerning the terms of the bequest of the Capricorn property to Mr and Mrs Engel, is that, in any event, one of its main premises is incorrect. It will be recalled that the applicant alleges that in his earlier will the deceased had left the Capricorn property to Mr and Mrs Engel without any obligation to discharge the mortgage bond over the property. In fact, there is no bequest of that sort in the earlier will. It does not contain any reference to Mr and Mrs Engel at all.

77. For all of these reasons, I am of the view that, to say the least, I cannot confidently find, on the papers alone, that the respondents' version is demonstrably and clearly unworthy of credence.

A referral to oral evidence?

78. This brings me to the applicant's contingent application for the referral to oral evidence of the dispute about the deceased's testamentary capacity.

79. The referral, though not formally sought by means of a prayer in the notice of motion or a separate notice, is mentioned and justified in the concluding paragraph of the applicant's founding affidavit as follows:

> "*I expect that that the application herein will be disputed and that inter alia certain facts may be placed in dispute. I am advised that in view thereof that a factual dispute is foreseeable in this matter an application is not an appropriate procedure and that the validity of the will should have been disputed in an action. I am advised that should it necessary that the matter may be referred for the hearing of oral evidence. All of the persons who have provided confirmatory affidavits have indicated their willingness to be called as witnesses at the request of the court. I respectfully request that the Honourable Court condone the liberties taken with the procedure herein but respectfully submit that given the urgency of the matter that an application was the only means of securing the relief needed here*" (paragraph 53 of the applicant's founding affidavit).

80. It will be recalled that, faced with the respondents' substantiated denials in their answering papers of the applicant's allegation that the deceased was *non compos mentis* when he made the disputed will, the applicant did not immediately seek a referral to oral evidence. Instead, the applicant has argued for final relief on the papers, and has asked that if the court cannot decide the matter in her favour on the papers, instead of dismissing the application the court should refer the matter for the hearing of oral evidence on the disputed question of the deceased's testamentary capacity.

81. The decision of the full bench of this court in *De Reszke v Maras and Others* 2006 (1) SA 401 (C), dismissing an appeal against the decision of a single judge in this court (see *De Reszke v Maras and Others* 2003 (6) SA 676 (C)), is relevant to the applicant's contingent application for a referral to oral evidence. It was confirmed by the Supreme Court of Appeal in a further appeal (see *De Reszke v Maras* 2006 (2) SA 277 (SCA)). *De Reszke* was a will case in which the issues in dispute included the testator's testamentary capacity and his intention in relation to the document which the applicant alleged was his last will. The applicant in the court of first instance, who was the appellant in both appeals, was the son and only child of the testator and a beneficiary under the document in question. The son applied on notice of motion in terms of s 2(3) of the Wills Act for, amongst other things, an order directing the Master to accept the document as the testator's will. The application was opposed by the executor appointed under an earlier will by the testator (which made no provision for the son), which the Master had accepted as the testator's last will. One of the executor's grounds of opposition was that at the time when the testator gave the instructions embodied in the document, which were instructions for the drafting and contents of a new will, he lacked testamentary capacity because he was not mentally sound. The executor presented a substantial case to that effect. The general thrust of the son's replying affidavits on this issue was that the testator, while admittedly weakened by age

and ill-health, had both "*down*" and "*up*" times, during this "*up*" times he was lucid and that was when the more important events in relation to the disputed document occurred.

82. In his judgment for the full bench Comrie J (with whom Meer J and Hiemstra AJ concurred) said the following about the basis on which the matter was presented for decision in the court of first instance:

> "[T]*he Court a quo was asked to decide the matter on the affidavits when, in my opinion, it cried out for oral evidence on both issues. No such application was made at first instance, not even, it would seem, in the alternative. On appeal Mr Potgieter* [for the son], *prompted by the Court, made a conditional application to that effect which Mr Smit, for the executor, strenuously opposed. The onus of proof was on the appellant in respect of the first issue (whether the deceased intended annexure A* [the disputed document] *to be his will) and on the respondents in respect of the second issue (testamentary capacity). Even though the onus was on the respondents in respect of this second issue, the 'general rule' relating to disputes of fact in motion proceedings is applicable. Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere 1988 (4) SA 224 (A) at 258H-263D. We are bound by that decision notwithstanding a hint that it may have to be revisited. Absa Bank Ltd t/a Bankfin v Jordashe Auto CC 2003 (1) SA 401 (SCA) at para [23]*" (paragraph 29).

83. Comrie J then went on to explain (at paragraph 30) that had the various deponents on both sides been called to testify, and their evidence been tested under cross-examination, it may be that the executor's allegation that the testator lack of testamentary capacity would not have been proved. However, there being no such application in the court of first instance despite the *bona fide* dispute of fact on that issue, that court, and the full bench, were obliged to accept the executor's version and hold that the testator could not have formed the requisite intention. Those then were the circumstances in which, at the hearing of the appeal, the son's counsel made the conditional application for a

referral to oral evidence, the condition being the full bench holding that it could not decide the matter in the son's favour on the papers. Comrie J dealt with this application as follows:

> "*Time was when in practice an application to refer for oral evidence had invariably to be made at the commencement of argument. Counsel in effect had to elect at that stage and could not save a reference for oral evidence as an alternative. In Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 981F-G Corbett JA said:*
>
> > *'This is no doubt a salutary general rule, but I do not regard it as an inflexible one. I am inclined to agree with the following remarks of Didcott J in the Hymie Tucker case supra* [*Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd* 1981 (4) SA 175 (N)] *at 179D*
> >
> > > *"One can conceive of cases on the other hand, exceptional perhaps, ... when to ask the Court to decide the issues without oral evidence if it can, and to permit such if it cannot, may be more convenient to it as well as the litigants. Much depends on the particular enquiry and its scope."'*
>
> *These observations seem to have ushered in a new era. It was welcomed by Botha JA in Administrator, Transvaal, and Others v Theletsane and Others 1991 (2) SA 192 (A) at 200C in these words*
>
> > *'The recent tendency of the Courts seems to be to allow counsel for an applicant, as a general rule, to present his case on the footing that the applicant is entitled to relief on the papers, but to apply in the alternative for the matter to be referred to evidence if the main argument should fail: see Marques v Trust Bank of Africa Ltd and Another 1988 (2) SA 526 (W) at 530E-531I and Fax Directories (Pty) Ltd v SA Fax Listings CC 1990 (2) SA 164 (D) at 167B-J. It seems to me that such an approach has much to commend itself, for the reasons stated in the last-mentioned two cases, but for the purposes of the present case there is no need to pursue the point.'*
>
> *See too Bocimar NV v Kotor Overseas Shipping Ltd 1994 (2) SA 563 (A) at 587B-G. It is my impression in this division, however, that the pendulum has swung too far the other way. Some younger counsel, in particular, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing success on such argument, will refer such disputes, or some of them, for oral evidence. That is not the procedure sanctioned by the Supreme Court of Appeal.*

On the contrary, the general rule of practice remains that an application to refer for oral evidence should be made prior to argument on the merits. The Supreme Court of Appeal has widened the exceptions to this general rule, but they remain exceptions.

In the present case an application to refer for oral evidence should, in my opinion, have been brought ab initio. The evidence of testamentary incapacity was on record; the reply was that the deceased's intellectual capacity fluctuated; given that the deceased was waning at the time, and nigh unto death, the evidence relating to testamentary incapacity was also relevant to the deceased's intentions on 18 and 22 October 2001. I do not consider this to be a case where oral evidence should have been reserved as an alternative to argument on the affidavits..." (paragraphs 32 to 34).

84. Although the specifics of the evidence concerning the deceased's testamentary capacity in the present case differ from those in *De Reszke's* case, and although in *De Reszke's* case the request for the referral to oral evidence was made for the first time during the hearing of the appeal to the full bench, the two are on all fours when it comes to the following matters material to the conditional application for a referral to oral evidence made in the present case: (a) the issue in dispute, namely the testators' capacity to make the disputed wills; (b) the disputes about that issue having been ventilated in the affidavits filed by both sides; (c) the applicants bearing the risk if the matters are not referred to oral evidence in the sense that, generally speaking, the court will then decide the cases on the respondents' versions of events to the extent that they differ from the applicants' versions; and (d) the applicants presenting their cases on the footing that they are entitled to relief on the papers, and in the alternative that they are entitled to orders that the matters be referred to evidence if their main arguments should fail.

85. I am bound by the decision of the full bench in *De Reszke* that a case of this kind is not one where oral evidence could have been reserved as an alternative to argument on the affidavits, i.e. where an application for a referral to oral

evidence cannot be made, unconditionally, at the commencement of argument. Accordingly, the application for a referral to oral evidence must be refused.

86. Even if I could consider and determine the applicant's contingent application for a referral to oral evidence on its merits, I would refuse it for two reasons. The decision of the full bench in *De Reszke* is, at the very least, a strong indicator that I should not exercise my discretion in favour of a contingent application in a case such as the present. Secondly, and in any event, there is the principle that if the probabilities that can be ascertained from the affidavits are evenly balanced a court will be inclined to allow the hearing of oral evidence, whereas the more the scales are depressed against the applicant the less likely it will be that the court will exercise its discretion in favour of referring the disputed factual issues for oral evidence (*Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 979G to I). That is because the court cannot order a referral unless it is satisfied that there is a reasonable prospect that the examination and cross-examination of the relevant deponents will disturb the probabilities as they appear from the papers, and the stronger the respondents' case on the papers the less likely it is that will happen. As appears from my analysis earlier of the contents of the parts of the respondents' affidavits relevant to the disputed question of the deceased's testamentary capacity, and of the applicant's attacks on them, in the present matter the preponderance of the probabilities on that question strongly favours the respondents, so much so that in my judgment there is not a reasonable prospect that oral evidence will tilt the probabilities in favour of the applicant.

Conclusion and costs

87. It follows that the application must be dismissed.

88. The respondents seek an order that the applicant pay their costs, whereas the applicant contends that if the application fails her costs and the respondents' costs should be paid out of the deceased's estate.

89. The court has a discretion as to costs and it is well established that in will cases there are exceptions to the general principle that the losing party is ordered to pay the costs, the order instead being that the costs be paid from the deceased estate. As explained in Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2ed, 2001) at 643, one of these exceptions is where the testator caused the litigation and another is where the circumstances have led reasonably to an investigation of the matter. In my view, both of these exceptions are applicable in the present case. Although the catalyst for this litigation was the executor's decision to sell the 20 Welgelee Road property in order to raise funds to discharge the estate's debts, which appear to be very substantial, the underlying causes of the litigation are that the deceased deliberately hid from the applicant the fact that he was making a new will, despite the fact that she is the mother of his two children, and the fact that the deceased made the will less than a month before he died from cancer of a kind which, alone and together with the palliative medication he was using, it is common cause can significantly impair the sufferer's mental faculties.

90. Another relevant factor is that the applicant instituted the proceedings for the benefit of her and the deceased's children. The disputed will contains a bequest to his sister Ms Solomon of his interest in a property holding close corporation (Congress Communications) which may well turn out to be very valuable and consequently significantly reduce the value of the residue of his estate to be held in trust for his children. In this regard the applicant makes the further, valid point in her papers that whereas the children will be better off if the disputed will is set aside (along with the will made by the deceased the previous day) at her instance, in that eventuality the applicant herself will be

worse off because the disputed will makes better provision for her than the earlier (12 July 2007) will. In addition to providing for her maintenance (a factor common to both wills), the disputed will gives her a right of *habitatio* in the 20 Welgelee Road property and it contains the bequests to her of two motor cars. By instituting these proceedings the applicant did not make a further claim to the deceased's property. To use the wording of paragraph 4(c) of the disputed will (quoted in paragraph 21 above), she did not "*lodge* [a] *claim in her personal capacity against my estate or the trust created* [by the will]".

91. During the course of his address on behalf of Ms Solomon, Mr Solomon, Ms Abdul-Hamid and Ms Effendi, Mr Van Reenen contended that even if I should find that it was reasonable for the applicant to have instituted these proceedings, it was not reasonable for her to have persisted with the substantive relief sought after delivery of the respondents' answering affidavits. He said it was clear from the answering affidavits that her concerns about the deceased's testamentary capacity were unfounded. He accordingly contended that at the very least I should order the applicant to pay the respondents' costs from the date of delivery of the last of the answering affidavits, i.e. from 4 November 2009 onwards. I understand the intended practical effect of this to be that the applicant will bear the costs of perusing the replying affidavit, the costs of preparation of the heads of argument and the costs of the hearing.

92. While I am in agreement with Mr Van Reenen that a distinction should be drawn between the periods before and after the delivery of the respondents' answering affidavits, I believe that the applicant should be afforded the equivalent of a *spatium deliberandi* of three court days from 4 November 2009 (this being an urgent application) during which she should have re-considered and reversed her decision to institute this matter in the light of the answers in the respondents' papers. I also believe that the appropriate order would be to rule that the applicant must carry her own costs from 9 November 2009 (the

court day following the expiry of that period), and not that in addition she should pay the respondents' costs. In my view Mr Van Reenen puts the matter too strongly when he says that it was clear from the answering papers that the applicant's concerns about the deceased's testamentary capacity were unfounded. Although I have found that the probabilities on the affidavits strongly favour the respondents and that the applicant should have called it a day upon receiving the respondents' affidavits, the position that emerges is not so clearly in their favour as to render the result a foregone conclusion and the applicant's continuation of the litigation unreasonable. An order depriving the applicant of a claim for costs against the estate from 9 November 2009 onwards will, I believe, do justice between the applicant and the respondents, and it will hopefully also discourage the continuation of litigation in similar circumstances in future cases.

93. Accordingly the costs of this litigation shall be paid out of the estate, save that in the applicant's case she shall carry her own costs from 9 November 2009 onwards.

94. As regards the scale of costs, save for those of the executor, Mr Crowhurst, whose costs shall be paid on the attorney and client scale, the parties' costs shall be taxed on a party and party basis. This includes Ms Solomon because, although she is a trustee of the testamentary trusts created by the disputed will, she also has a significant personal interest in the litigation and instead of making an affidavit for her co-trustee Mr Crowhurst she aligned herself with Mr Solomon, Ms Abdul-Hamid and Ms Effendi, who are also beneficiaries, and engaged separate attorneys and counsel.

Order

95. In the result, and for the reasons set out above, the following order is made:

(a) The application is dismissed.

(b) The costs of the application, which in the case of the first respondent shall be on the attorney and client scale, shall be paid from the estate of the late Uranin Vladimir Dzerzhinsky Joseph Solomon, save that in respect of the period starting on 9 November 2009 the applicant shall pay her own costs.

_____

BREITENBACH, AJ