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

Case No 14436/2009

In the matter between:

DIANE JEAN THEART	Applicant
and	
HANS-PETER WOLFGANG SCHEIBERT N.O.	First Respondent
JAN WILLY SUNDBY	Second Respondent
THE MASTER OF THE HIGH COURT	Third Respondent
THE REGISTRAR OF DEEDS	Fourth Respondent

Court:	Cloete, AJ
Heard:	1 February 2011
Delivered:	10 February 2011

JUDGMENT

CLOETE AJ:

INTRODUCTION

[1] This is an application in which the applicant seeks an order declaring that the will of the late Kristian Jens Korsgaard ("the testator") dated 15 March 2008 ("the new will") is invalid and unenforceable to the extent that it purports to dispose of assets that constituted a part of the erstwhile matrimonial estate of the testator and his late wife Isabel Louisa Wilhelmina Korsgaard ("the testatrix"); and that the will of the testator and testatrix dated 28 March 1983 ("the joint will") is the will in terms of which their erstwhile estate should devolve.

[2] In the alternative, the applicant seeks an order declaring that the new will is invalid and unenforceable insofar as it purports to dispose of one half of the assets which constituted a part of the erstwhile matrimonial estate of the testator and testatrix. Coupled to the alternative relief sought are claims that (a) the joint will be declared to be the will in terms of which the aforementioned one half of such assets must devolve; and (b) the master (as third respondent) be directed to accept the joint will for this purpose.

[3] The applicant also claims costs jointly and severally against those of the respondents who oppose the relief sought together with an order for costs against first respondent in respect of an interlocutory application launched by the applicant during August 2010.

[4] An application by the applicant to strike out certain portions of the first and second respondents' answering affidavit as being scandalous and vexatious was abandoned by the applicant during the course of argument and thus need not be dealt with further.

[5] Just short of a week after the conclusion of argument, and after the matter was adjourned for judgment, the applicant delivered an application for

condonation for late filing of certain confirmatory replying affidavits. To my mind, the applicant has failed to provide any explanation at all for the length of time she has taken to bring this application, particularly in light of the clear indication from the respondents that they objected to the late filing of the affidavits in question. At the very least, I would have expected an indication from applicant's counsel prior to the conclusion of argument that the applicant still intended to formally apply for condonation. No such indication was given and I consider it to be inappropriate for the application to be delivered at such a late stage. However, and in any event, whether condonation would or would not have been granted is to all intents and purposes irrelevant in light of my findings as set out below, and I accordingly do not deem it necessary to deal with the condonation application.

[6] Central to this matter and the relief sought by the applicant is the immovable property situated 19 Dysart Road, Green Point ("the immovable property"). This is the main asset of the testator's estate and was also the only asset of any value in the erstwhile matrimonial estate of the testator and testatrix.

[7] The application is opposed by the first and second respondents (for purposes of convenience, they will be referred to collectively in this judgment as "the respondents"). The third and fourth respondents do not oppose the relief sought in this application.

THE FACTS WHICH ARE COMMON CAUSE

[8] The testator was born on 26 October 1908 in Norway. He evidently arrived in South Africa in the early 1940's, whereupon he took up employment as a whaler, working on whaling vessels based near Cape Town. Sometime in the mid-1940's the testator gave up whaling and took up employment as a rigger in the Cape Town harbour. Towards the end of 1946 the testator purchased the immovable property and it was registered in his name on 26 February 1947.

[9] On 11 March 1947 the testator and testatrix were married. The testatrix was the applicant's maternal grandmother, and the testator thus became the applicant's step grandfather. The immovable property was the matrimonial home of the testator and the testatrix. The testator continued to reside there after the death of the testatrix, until his own death.

[10] On 28 March 1983 the joint will was executed. On 11 February 1990 the testatrix passed away. It was only almost eight years later (on 4 December 1997) that two death notices were signed by the testator and one Maria Brink (a friend of the testatrix), and thereafter filed with the Master. The notice signed by Brink reflects, inter alia, that the testatrix had not left a will and was married by antenuptial contract. The notice signed by the testator also reflects that the testatrix had not left a will and specifically states that the parties were married out of community of property. Apart from any interest which the testatrix might have had in the immovable property, she had no other assets of any value. Her estate was finalised on 2 July 1998 when the Master addressed a letter to the testator advising that as the inventory filed with him reflected no assets at all, the estate was regarded as finalised.

[11] On 5 October 2005 the testator executed a will in which he bequeathed his entire estate to the second respondent, and failing him the applicant's daughter, one Tanya Gordon. The second respondent is the testator's nephew who resides in Norway.

[12] In April 2006 the testator engaged the applicant's attorneys of record to draw up another will, which they duly did. On 6 December 2006 the testator executed this will, in which the second respondent was appointed the sole heir of his estate and all reference to the said Tanya Gordon was removed.

[13] On 15 March 2008 the testator consulted with attorneys Scheibert & Associates and caused the new will to be executed in terms of which he again left his entire estate to the second respondent but, failing him, to the

daughter of the second respondent, one Janne-Gry Sundby. In terms of the new will, the first respondent was appointed as executor. The testator passed away on 6 May 2008.

ISSUES TO BE DETERMINED

[14] The issues to be determined in respect of the main relief are the following:

14.1. Whether the joint will is valid and has not been revoked;

14.2 If the joint will is valid and has not been revoked, whether the joint will is to be interpreted as reflecting a massing of the estate or estates of the testator and testatrix;

14.3 If the will is to be interpreted as reflecting a massing of such estate or estates, whether there was an adiation on the part the of the testator.

[15] If the applicant does not succeed in the main relief, whether the alternative relief sought is competent against the estate of the testator.

[16] Which party or parties should bear the costs, including those relating to the interlocutory application.

BURDEN OF PROOF

[17] The affidavits filed reflect certain material disputes of fact. The applicant nonetheless asks for final relief on the papers alone and without the matter being referred for the hearing of oral evidence. Accordingly the rule set out in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C must be applied. The applicant will thus only be entitled to the relief sought *"if those facts averred in the applicant's affidavits*

which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

[18] What must also be borne in mind is the obvious disadvantage which the testator of a deceased estate will have in enforcing or defending a claim relating to that estate as the testator is clearly not able to furnish instructions. *"The possibility that this situation may have tempted a claimant against an estate to perjure him/herself makes it necessary for the court to scrutinize his or her evidence with care ... The evidence should be sufficiently cogent to satisfy the caution which the court is required to show".* See DT Zeffert and Paizes *The South African Law of Evidence* (2nd Edition) at p974. In the instant matter, the disadvantage faced by the testator's executor is compounded by the fact that the testator's erstwhile attorneys now act for the applicant. These testators hold the file and were party to communications with the testator of a privileged nature and which were clearly not limited to written communications only.

WHETHER THE JOINT WILL IS VALID AND HAS NOT BEEN REVOKED

[19] The general rule is that a will becomes effective on the date of death of a testator and the testator may revoke a will before his or her death. The exception to this rule is that where two testators have massed their estates in terms of a joint or mutual will the survivor cannot revoke the will after he or she has adiated – see *The Law of South Africa*, vol 31 – *Wills and Succession* by De Waal et al ("*LAWSA*") at paragraph 262.

[20] It is trite that no formalities are required in order for revocation to be effective. A will may be revoked if it is destroyed by the testator, provided that he destroys it deliberately and with the intention of revoking it. When a will which was last known to have been in the possession of the testator cannot be found upon his death he is presumed to have destroyed it with the intention to revoke it. See *LAWSA* supra vol 31 at paragraphs 266 and 269 and Le Roux v Le Roux and others 1963 (4) SA 273 CPD at 277D-F.

[21] The applicant relies upon a copy of the joint will which she has in her possession. In correspondence annexed to the applicant's founding papers the applicant (through her attorney) informed the first respondent that the original will *"was handed to the testator and testatrix ... The present whereabouts of the original document are unknown"* and that the applicant *"is unable to confirm (or deny) that the original will was ever lodged with the Master of the High Court"*.

[22] It was only after the respondents filed their answering affidavits in which, *inter alia*, they dealt with the applicant's poor relationship with the testator and strongly suggested a poor relationship with the testatrix at the time of her death that the applicant, in reply, proffered a different version, and for the first time stated that *"I now know that the joint will was never in fact produced to the Master. That failure may initially have been an oversight by the testator. However, for the reasons set out .... below, I believe that the testator ultimately contrived, deliberately and fraudulently, to suppress the joint will."*

[23] The joint will may have been destroyed by the testators before the death of the testatrix or indeed after her death by the testator. If the joint will destroyed after the testatrix's death and after adiation by the testator than that purported revocation would of course be ineffective. The respondents argue that there are a number of facts which point to the conclusion that the joint will was revoked (presumably by destruction) before the death of the testatrix, and in support of this submission they rely upon the following:

23.1. The testatrix's estate was reported to the Master by the testator on the explicit basis that she had died intestate;

23.2. There is no evidence that the testator was appointed as the executor of the testatrix's estate as is provided for in the joint will;

23.3. For the 18 years following the testatrix's death nothing was said or done by anyone (including the applicant) which in any way points to the recognition or existence of the joint will as an ongoing testamentary disposition;

23.4. The testator dealt with the immovable property (and his estate) in a manner which was at variance with the joint will;

23.5. The testator did not disclose the existence of the joint will to his erstwhile attorneys (the applicant's current attorneys), presumably as he knew that it was revoked in the past and that it did not bind him;

23.6. The testator clearly regarded the immovable property as being his and his alone to do with as he wished. In this regard, the respondents refer *inter alia* to a meeting which took place between the testator and his erstwhile attorneys on 5 December 2006. The notes recording the content of that meeting were obtained by the respondents' attorneys from the applicant's attorneys who, as indicated above, previously represented the testator. Although the notes reflect that only the applicant's attorney, the testator, one Muriel, the second respondent and a nurse were present at the meeting, it is clear from the content of the notes that the applicant herself was also present. The relevant portion of the notes reads as follows:

> *"Diane indicated that her mother owned the house and that she wanted to claim it back. Mr Korsgaard explained that his wife (Diane's mother) rented the property when they met. He assisted with the exspenses* (sic), *then they got married, had a little money, worked 3 nights a week, Saturdays + Sundays. Bought the house. Worked for everything he has himself ... All his assests* (sic) *must go to* (the second respondent)*".*

[24] Although the applicant is the granddaughter of the testatrix, the reference to "Diane" is clearly a reference to the applicant, if regard is had to

the fact that the testator in discussing the immovable property made specific reference to the testatrix in the context of the reference to the applicant's "mother". In any event, it is common cause that the applicant's mother passed away when the applicant was very young. Leaving aside the attitude of the applicant's attorneys, namely, that they do not consider themselves to have a conflict of interest in the present proceedings, it is significant that nowhere in the notes of the meeting of 5 December 2006 is any reference whatsoever made to the existence of a joint will. One would have expected the applicant, in the context of the discussion which was taking place, and in the full knowledge of the testator's intention to leave what he regarded as his property to the second respondent, to have made some mention of her understanding that, upon the testator's death, she would receive the immovable property. All that she indicated was that *"her mother"* was the owner of the immovable property and that she wished to *"claim it back"*. Nowhere in the papers is it alleged by the applicant that the immovable property was at any stage owned solely by the testatrix. Further, the content of the discussion of 5 December 2006 does not lend credence to the applicant's assertions (in reply) that (a) she did not believe that she was entitled during the testator's lifetime to assert any claim to the immovable property, on the basis that she had inherited it from the testatrix upon her death; and (b) she believed that new wills executed by the testator (of which she admits she received what she refers to as "anecdotal notice") could not prejudice her.

[25] In any event, any attempt to suppress the will would have had to take place at the time of the testatrix's death, and the applicant herself also had a duty to report the will to the master: see section 8 (1) as read with section 102 (1) (h) and (iv) of the *Administration of Estates Act* No 66 of 1965.

[26] It is clear that the onus rests upon the applicant to rebut the presumption that when a will which was last known to have been in the possession of the testator cannot be found upon his death he is presumed to have destroyed it with the intention to revoke it. However, for the reasons

which follow hereunder, I do not believe it necessary to make a finding as to whether the applicant has discharged this onus, although, to my mind, the indications are that she probably has not.

WHETHER THE JOINT WILL REFLECTS A MASSING OF THE ESTATE(S)

[27] Two or more persons may execute their wills in one document. If such a will contains some element of reciprocity of disposition it is a mutual will. Joint and mutual wills are *prima facie* construed as separate wills and each testator is (with certain exceptions) free to revoke the will insofar as it concerns his or her own dispositions. One such exception occurs when the testators have consolidated their property or a portion of their property into one mass for the purpose of a joint disposition of it and the survivor has accepted some benefit under the will of the first dying. See *LAWSA* supra at paragraph 361-363.

[28] Whether or not there has been a massing is a matter of interpretation in each case. In Corbett *et al The Law of Succession in South Africa* (second edition) at page 438, the learned authors state the following: "*there is a strong presumption against massing...*" In *Perry and Another v Executors Estate Oats and Others* 1941 TPD 91 at 97 the presumption against massing was set out as follows:

"*There is, of course, the initial presumption against massing referred to by van Leeuwen... on the ground that a testating party in case of any doubt is presumed to dispose only of his own property...*" (My emphasis).

[29] Before turning to the provisions of the joint will in the instant matter, it is useful to consider other cases in which the courts have been called upon to interpret whether the provisions of a will constitute a massing.

[30] In *Marais v Estate Rust and Others* 1914 CPD 180 the court held that a will which provided that "*as heirs of all our goods and money wherever they may be found, nothing excepted, we declare each other as heirs, that is, the first-dying, the survivor of us both, together with all our children...*" did not constitute a massing of estates.

[31] In *Scheidel v The Master and Others* 1936 CPD 287 the will in question read as follows: *"We nominate and appoint the survivor of us to be the sole heir or heiress of the estate of the first-dying of us, of whatsoever kind and wheresoever situate, movable or immovable and whether in possession, reversion, remainder or expectancy. And upon the death of the survivor of us we direct that our executor hereinafter named to realise the estate of the survivor of us and after payment of all just debts to distribute the proceeds in manner following:..."* the court held that massing had not been effected by the will and that each spouse was dealing with their own half of the joint estate.

[32] In *Perry and Another v Executor Estate Oats and Others supra* the court interpreted a codicil in order to determine whether it had effected a massing in respect of two estates. The testator and testatrix had executed a mutual will bequeathing to the survivor the whole estate left by the first-dying and appointing the survivor as executor and administrator. Approximately two years later, and purporting to act under a reservatory clause in the will, they jointly executed a codicil which provided that: *"We declare to make provision for the disposal of our estate upon the death of the survivor of us in the following manner... In the event of both of us testators dying at the same time the provisions of this codicil shall take effect immediately."* The court held that massing had not been effected. A number of reasons were given by the court for reaching this finding, including *inter alia* that (a) the reference in the will to "all property which the survivor was possessed at the time of death" was not a reference to the joint estate; and (b) the provisions pertaining to simultaneous death of the testators were superfluous if the estates were in fact massed.

[33] In *Rohm v The Master and Another* 1949 TPD 135 the court held that no massing of estates had occurred as the will in question was described in the document itself with the words *"this the will of the first dying of us and of his or her estate and effects"*. At page 137 the court pointed out that: *"The use of plural possessive pronouns in the operative part of the will is by no means conclusive that massing was intended, and the courts have consistently construed bequests of "our estate", or "the whole of our estate and effects" in mutual wills as dealing with the estate of the first dying only. The testators could not say "we bequeath the whole of my estate". It would not read grammatically."* (My emphasis).

[34] In *D'Oyly-John v Lousada* 1957 (1) SA 368 (NPD) the court held that a massing had been established. At 371 A-B, the court stated that: *"I have come to the conclusion that, upon a proper construction of the joint will, there was a massing of separate estates of the testators and both the testator and the testatrix intended, in terms of clauses 3 to 6 of the will, to dispose not only of his or her own property, but of the whole of the property of the survivor, including property acquired by him or her after the death of the first-dying, as should remain in possession of the survivor at the date at his or her death, that, accordingly, as the testator accepted the benefit under the will he had no power to revoke it...* (My emphasis).

[35] There is no provision in the joint will to this effect in the instant matter.

[36] In *Rhode v Stubbs* 2005 (5) SA 104 (SCA) the Supreme Court of Appeal held that a will which provided that the testators *"... benoem en stel aan die kinders verwek uit ons huwelik as die erfgename van die restant van ons gesamentlike boedel en nalatenskap, losse goedere sowel as vaste eiendom...en begeer dat hulle die restant sal erf in gelyke dele"* as being insufficient to rebut the presumption against the massing of estates.

[37] From the authorities cited it is clear that a court will be reluctant to interpret a will as establishing a massing of estates if, read as a whole, the

will does not express that intention clearly. Thus in the case of doubt, a massing will not be established.

[38] In the instant matter the joint will makes provision for two separate eventualities. These eventualities are contained in clauses 3 and 4 of the joint will.

[39] Clause 3 provides that in the event of the first-dying, the other would become the sole heir (or heiress) of the whole of the estate of the deceased (and would also be the executor of the deceased's estate). This is clearly an out and out bequest and is irreconcilable with a massing .

[40] Clause 4 provides that *"In the event of our dying simultaneously or in circumstances where it is difficult or impossible to determine the first dying of us or on the death of the survivor of us, then in that event we declare our Last Will and Testament to be as follows:-"* (My emphasis).

[41] Clause 5 of the joint will provides that: *"We give and bequeath the whole of our Estate and Effects movable and immovable, of every description and wheresoever situate, whether same be in possession, reversion, remainder, expectancy or contingency to DIANE JEAN CHESTER (born Kells)"*. On the plain language of this clause, this constitutes an out and out disposition to the applicant, and is in direct contradiction to the provisions of clause 3. To my mind, clauses 3 and 5 are utterly irreconcilable unless subject to a qualification, namely that clause 5 will only operate upon the happening of certain of the events in clause 4, namely upon the simultaneous death of the testator and testatrix, or in circumstances in which it is difficult or impossible to determine the first dying (thus implying some sort of virtually simultaneous death). This interpretation would render the words "or on the death of the survivor of us" in clause 5 *pro non scripto* but would certainly give meaningful effect to the content of the joint will. This interpretation also clearly militates against any massing of the estate(s) of the testator and testatrix.

[42] Clause 8 of the joint will provides that *"where necessary, the singular shall include the plural and the masculine shall include the feminine and vice versa."* Thus the reference to "our estate" in the joint will can also include a reference to "our estates".

[43] Clause 9 of the joint will provides that: *"we hereby reserve to ourselves the right from time to time and at all times hereafter, to make all such alterations in and additions to this our Will and Testament as we may think fit, either by separate act or at the foot hereof, desiring all such alterations made under our hands to be held as valid and effective as if inserted herein."* (My emphasis). This is entirely consistent with the interpretation which I believe should be placed on the joint will as outlined above.

[44] Further, it would appear that if the estates were in fact massed then the provisions of clause 4 (dealing with the simultaneous death of the testator and testatrix or in circumstances where it would be difficult or impossible to detect the first dying), would be superfluous: See *Perry and Another v The Executor Estate Oats and Others supra* at page 100. It would not matter who died first and any difficulty in relation to determining that fact would be inconsequential. This factor further militates against a massing of the estate(s).

[45] An additional consideration is that one would have expected the joint will, if the intention was to create a massing of estates, to specify the manner in which the immovable property would be dealt with, or at the very least to specify the rights of the survivor in respect of the immovable property. This was simply not done.

[46] In light of the above, it is my view that the joint will has not established a massing of estates. However, if I am incorrect, then for the reasons which follow I am still not persuaded that the applicant is entitled to the relief claimed.

WHETHER THERE WAS AN ADIATION ON THE PART OF THE TESTATOR

[47] The applicant in her founding affidavit alleges that, upon the death of the testatrix, the testator adiated the benefit allegedly conferred upon him by the joint will. In support of this allegation, she states the following: *"Although I am not aware of an express, written election made by the testator…I say that he must be taken to have adiated the benefit conferred upon him by the joint will because, for more than eighteen years after the testatrix's death…he exercised control of and used the whole of the erstwhile matrimonial estate as his exclusive property, and, more particularly, continued to reside in and use the immovable property as his exclusive property. Compelling evidence of his adiation, as aforesaid, is also to be found in the fact…that the testator believed that he was at liberty to dispose of the immovable property by a new will. That belief could only have been based upon his view that he had previously inherited, and accepted the testatrix's undivided half share in the immovable property, in terms of the joint will."* (My emphasis).

[48] In Meyerowitz: *The Law and Practice of Administration of Estates and Estate Duty supra* the learned author at paragraph 18.11 states as follows: *"The courts have been slow to infer that a surviving spouse has adiated merely because she has taken some steps from which adiation may be inferred. So, for instance, it has been held that adiation was not established where the surviving spouse…remained in possession of the joint estate."* (See also the authorities cited therein at footnote 13).

[49] It accordingly follows that the act of adiation should be an act of will and, in turn, this means that the testator must have had the intention to adiate. In *King NO and Another v Nel and Others* 1922 CPD 520 at 528-529 the court put it thus: *"As to adiation there must be some clear proof of some unequivocal act of adiation under the will, to debar the survivor from dealing with his share of the joint estate…It also appeared from the evidence…* (that

the testator)...*remained in possession of the joint estate after his wife's death. Such mere occupation is not proof of adiation."* (My emphasis).

[50] There was some debate in the affidavits as to whether the testator and testatrix were married to each other in or out of community of property, having regard to the legal issue of domicile and the principles of private international law. To my mind, nothing really turns on this for purposes of the adiation. The important question to be asked is whether the testator himself believed whether he was married in or out of community of property, since he had to have had the intention to adiate, and he could not accept the benefit of something which he already regarded as being his own property.

[51] Counsel for the applicant conceded that the only reference to the testator and testatrix as having been married in community of property is to be found in the heading of the joint will. In my view, all of the other evidence strongly indicates that, in the testator's mind, he was married out of community of property and regarded the immovable property (registered in his name) to be his and his alone. The testator viewed (a) the immovable property as belonging to him only; (b) the testatrix's estate as being devoid of assets; and (c) he himself as being at liberty to dispose of his assets and estate as he saw fit (having executed three wills after the death of the testatrix). I agree with respondents' argument that each of these facts is in itself inconsistent and destructive of the adiation contended for by the applicant.

[52] I accordingly find that there was no adiation and accordingly the main relief sought by the applicant must fail.

WHETHER THE ALTERNATIVE RELIEF SOUGHT IS COMPETENT AGAINST THE ESTATE OF THE TESTATOR

[53] There were thus two separate testamentary dispositions made by the testator and testatrix, namely: (a) the testatrix's possible testamentary

disposition in terms of the joint will, alternatively her estate would have devolved in accordance with the laws of intestate succession; and (b) the testator's testamentary disposition in terms of the new will.

[54] The enquiry into which assets devolved upon the testatrix's estate on her death, and which of these assets in turn devolved upon the testator's estate on his death, is a factual enquiry and one which does not have any bearing on the validity of the testator's new will. Accordingly, the applicant is not entitled to the relief claimed in respect of the new will.

[55] Further, the applicant cannot seek a declaratory order against the estate of the testator (which is being dealt with by the executor in terms of the new will), obliging such executor to deal with those assets which might have devolved upon the testator in accordance with the will of the testatrix. Neither the executor of the testator's estate nor this court have the power to extend the executor's authority beyond the specific powers given to him in terms of the new will. In this regard, section 13(1) of *The Administration of Estates Act* 66 of 1965 provides that *"No person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act..."* Simply put, the executor of one estate cannot set about distributing the assets of another estate unless he is specifically authorised to do so in terms of the letters of executorship of the latter estate.

[56] The claim for alternative relief directed at the Master appears to be nothing other than a variation on the same theme: just as the Master (and this court) cannot grant an executor powers outside of his letters of executorship, so to, neither the Master nor this court can grant the Master any powers outside of such letters of executorship.

[57] The alternative relief sought by the applicant lies, not against the testator's estate, but against the estate of the testatrix which is not a party to

these proceedings. It accordingly follows that the alternative relief sought must also fail.

COSTS OF THE APPLICATION

[58] Matters involving the validity and interpretation of wills are a special category of matter in which the costs may not follow the result: See *A C Cilliers Law of Costs* Lexis Nexis at 10-12 to 10-13. However, in the particular circumstances of this matter, I believe that it would be unreasonable to order the testator's estate to pay the applicant's costs. The applicant has been wholly unsuccessful in her application and the effect of ordering the testator's estate to pay her costs would be that the second respondent would pay such costs.

[59] To my mind, this is a matter in which the costs should follow the result (which would thus include the costs of the interlocutory application). Respondents' counsel submitted that the matter is one of sufficient complexity as to warrant the employment of two counsel. I agree with this submission.

[60] In the result, the applicant's application is dismissed with costs, including the costs of two counsel.

J I CLOETE