

SOUTH AFRICA / JUDGMENT

Gruhn and Others v Singh NO and Others (8884/16) [2021] ZAWCHC 267 (30 November 2021) [2021] ZAWCHC 267

COURT

Western Cape High Court, Cape Town

BEFORE

Fortuin

CASE / FILE NUMBER

8884/16

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OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 8884/16

UTE GRUHN

1st Plaintiff

PETER HORSTMANN

2nd Plaintiff

ULRICH HORSTMANN

3rd Plaintiff

SONIA HSU-MICHEL

4th Plaintiff

v

YANITA SINGH NO

1st Defendant

YANITA SINGH

2nd Defendant

THE MASTER OF THE HIGH COURT

3rd Defendant

JUDGMENT

DELIVERED ON THIS 30TH DAY OF NOVEMBER 2021

FORTUIN, J:

A.

INTRODUCTION

[1] This is an application to declare the wills of the late Professor Gisela Ingeborg Prasad, nee Horsemann (hereinafter “Gisela”), invalid on the following three bases:

1.1 Gisela lacked testamentary capacity at the time of making the will.

1.2 She was unduly influenced by the late Mr Ramesh Vassen (hereinafter “Mr Vassen”) to make the South African will.

1.3 On a proper interpretation of the will, the last-signed one revokes all the previous ones as it is signed one day after the first two.

[2] The plaintiffs placed the following aspects at issue:

2.1 Gisela’s mental state at the time she signed the wills and the period leading up to it.

2.2 The relationship between Gisela and Ms Yanita Singh (hereinafter “Yanita”).

2.3 The bona fides of Mr Vassen and Yanita.

[3] Gisela (hereinafter referred to as “Gisela”) was born in Germany on 26 August 1941. She was the youngest of four children. She was married to Prof Jamuna Prasad (“Jamuna”) who was born in India, for many years. She was a professor in Geology at UCT. At the time of her death, she was a widow with no biological children. Her parents had predeceased her and her intestate heirs are thus her siblings, i.e., the first to third plaintiffs (the third plaintiff died on 16 January 2021, and has been substituted by his son).

[4] Jamuna died on 18 October 2015 at the age of 98 (108). He was a professor in mathematics and statistics at UCT.

[5] During March 2015, Gisela was diagnosed with lung cancer. She fell ill in December 2015 and was hospitalized at the Vincent Pallotti hospital with pneumonia on 18 December 2015. On 20 December 2015, she signed two wills, as well as one dated 21 December 2015, prepared by Mr. Vassen, an attorney who died during 2017.

Mr. Vassen and his wife Veena Vassen also witnessed these wills. Gisela passed away on 30 December 2015.

- [6] The plaintiffs in essence only disputes the contents of the South African will and is asking for relief that would result in the deceased's estate being dealt with as intestate. This would be the result should the South African will be declared invalid on the basis that the testator did not have the necessary capacity. Such a finding will result in all three wills being invalid, as they were all signed at the time when the plaintiffs allege that Gisela

did not have testamentary capacity. Moreover, it is alleged that Mr Vassen and/or Ms Singh unduly influenced the deceased to leave her South African assets to his wife's niece.

B. PARTIES TO THIS DISPUTE

- [7] The first and second plaintiffs, Ute Grün and Peter Horstmann, are the brother and sister of the late Gisela. The third plaintiff, Christoph Horstmann NO, is the executor of the estate of a late brother of hers, who recently passed away. These three plaintiffs are the heirs of her assets in Germany in terms of one of two wills dated 20 December 2015, (hereinafter the "German will"). The first plaintiff is also the nominated executor of this will. In the absence of a valid will for Gisela, these plaintiffs would be her intestate heirs.
- [8] The fourth plaintiff, Sonia Hsu-Michel (hereinafter referred to as "Sonia") is the heir of Gisela's funds held in a HSBC bank account in Bristol, England, in terms of a will dated 21 December 2015 ("the London will"). This will also have nominated Sonia, a Chinese national who lived with her family in Lesotho at the same time as the Prasads, as executor. Sonia moved in with the Prasads as a little girl, for them to help her with the English language. She and her siblings, who also lived with them, but not at the same time, became known as the Prasads' Chinese children. Sonia now lives in London.
- [9] The first and second defendants, Yanita Singh (hereinafter referred to as "Yanita") is the nominated executor and heir in terms of the third will, dated 20 December 2015 (the "South African will"). She has been cited as the first defendant in her capacity as executor, and cited as the second defendant in her capacity as heir of the South African will.

C. COMMON CAUSE FACTUAL BACKGROUND

a. Visits by family members during 2015

- [10] Upon receiving the news of Gisela's illness during March 2015, Sonia in the UK and her two sisters, Min-Hua (Amy), in Johannesburg and Hsin-Yu in Taiwan, all members of the Chinese family, decided to take turns to come to Cape Town to look after and assist Gisela in her time of need. Min-Hua came for two weeks during April, two long weekends in May, and in August 2015.
- [11] On 14 September, Jamuna fell and had a hip operation on 15 September. Hsin-Yu came to Cape Town during May, and Sonia came from the middle to the end of June.

- [12] During Sonia's visit, she stayed with "her parents" at their home in F[...] Road. On 17 October 2015, Amy and Pai-I (their brother) arrived in Cape Town. On 18 October, Jamuna died and Sonya arrived from London. On 21 December Pai-I visited Gisela at Vincent Palotti hospital and left again on 24 December. Sonia arrived on 26 December and visited Gisela in hospital. On 31 December after Gisela died, Amy arrived in Cape Town.
- [13] The European family members who travelled to South Africa were:
- 13.1 Henriette (Ms. Schlupmann's sister) visited from 30 September to 10 October 2015;
- 13.2 Mr. Jakob Schlupmann (hereinafter referred to as "Jakob") visited from 14 to 26 October 2015;
- 13.3 Ms. Jenny Schlupmann (hereinafter referred to as "Jenny") visited from 6 to 23 November 2015. This was also when Yanita met her for the first time;
- 13.4 Ute Grün visited from 22 November to 3 December 2015; and
- 13.5 On 2 January 2016, Jenny and Jakob arrived in Cape Town. The wills were read.
- [14] Gisela fell ill during December and was hospitalised. While in hospital, she signed three wills: one wherein her Chinese daughter Sonia inherited the assets in the UK, one wherein her siblings inherited all her assets in Europe and one wherein Yanita (First Defendant) inherited all her assets in South Africa.
- b. The Prasads' interactions with the rest of the family, Yanita and the Vassens, during 2015.
- [15] During September and October 2015, Yanita visited Jamuna with her parents at the Science Institute at UCT/Kingsbury Hospital. She also visited on her own after he suffered a cardiac arrest. During this time, Gisela also called Yanita to discuss Jamuna's health.
- [16] Jamuna died on 18 October 2015 and his funeral was on 20 October
2015. Gisela and Yanita had lunch on the day before the funeral to discuss the cultural and/or religious aspects of the funeral.
- [17] Yanita was in KwaZulu Natal between 7 and 15 November, and she and Jenny communicates via WhatsApp during this time. On 17 November, Yanita visits Gisela while Jenny was there. During this visit, Gisela was ready to sort out Jamuna's affairs and Mr. Vassen is called to advise.
- [18] On 21 November, Gisela, Jenny, Ramesh and Veena meets at Gisela's house.
- [19] On 24 November, Yanita visits Gisela and Ute, who was visiting at the time. Yanita takes Ute on a sightseeing trip to Signal Hill.

- [20] On 2 December Ramesh consulted with Gisela. Yanita visited Ute and Gisela after this consultation.
- [21] On 6 December, Yanita and Gisela had lunch in Constantia. The next day Gisela went to the bank and made payment for her own treatment.

D. PLAINTIFFS' CASE

- [22] It is the plaintiffs' case that Mr Vassen and/or Yanita unduly influenced Gisela to leave her South African assets to his wife's niece. Moreover, that she did not have the mental capacity at the time to make a valid will. In casu, the Plaintiff alleges inter alia, that the will itself is illogical, unusual and unfair. Moreover, that Gisela overlooked material assets entirely that may point to a conclusion that she was not "capable of comprehending the nature and extent of [her] property".
- [23] Jenny and Jakob Schlupmann (hereinafter referred to as "Jenny" and "Jakob") knew Gisela as their "aunt in Africa". They visited her in Tanzania in 1974 and 1978 and in Lesotho in 1982.
- [24] Jenny has a doctor's degree and works as a physicist at the Free University of Berlin. The family would see the Prasads in Europe "very often", and she met up with them in the United States of America in 1987. She said that she spoke to Gisela on the telephone "maybe every two or three weeks". She was, however, in much more contact with her after she left Cape Town in November 2015.
- [25] Jakob testified that his wife stayed with the Prasads in 1988 to complete her Master's degree. He also explained that the Prasads visited him in Paris in the 1990's and 2000's.
- [26] In 1983, when Sonia was ten years old, her parents moved to Lesotho and she went to live with the Prasads, who taught her English. Although never formally adopted, Sonia testified that the Prasads were her de facto family for approximately 30 years.
- [27] She remembered meeting Meena Vassen at the Prasad house in Lesotho when she was 13 years old. She was instructed not to tell anyone about Meena's visit, as she was a South African political refugee at the time. According to her Meena kept in touch with the Prasads throughout the years.
- [28] Sonia also testified that since moving to London in 2000 she visited the Prasads for two weeks "around once a year or once every two years", within the constraints of her work, and that she and Gisela spoke on the telephone two or three times a week. She testified that her two younger siblings, Pai-I and Hsin-Yu, had also gone to live with the Prasads at a later stage. During the trial, they were referred to as the "adoptive children" or the "Chinese children". Yanita testified that Gisela mentioned them at their first meeting, or shortly thereafter. Sonia testified that she met Yanita in 2013. According to her, she did not consider Yanita to be close to Gisela, this despite the family relying on Yanita for information on Gisela's health during the last month or more of her life.

- [29] Sonia described Gisela as her mother throughout her evidence. This accords with the way she described herself when she reported Gisela's death. Mr. Vassen's notes record that Gisela described Sonia as such during a consultation on 21 November 2015 when she was admitted to Vincent Pallotti hospital. Her conduct as described during the evidence in court leaves it in no doubt that the relationship between Sonia and Gisela was effectively one of parent and child. It was obvious that Sonia was shocked and saddened by Gisela's death on 30 December 2015.
- [30] Gisela's family had a similar reaction to the news of her diagnosis. Jenni testified that a "whole caravan of family members traveled to Cape Town" after hearing this news. She calculated that, together they "traveled 230 000km, which is almost six times around the world".
- [31] Jenni went on to testify that she was concerned when Gisela contacted the first plaintiff during September 2015, around the time Jamuna fell and broke his hip:
- "... and at a point in September my aunt talked to my mother and she asked her for her help. That was already very frightening, because my aunt asking for help is an alarm signal, and then my sister flew down within a 48 hours' notice and there was a very short gap. My brother came, another short gap; and I came."*
- [32] When Gisela told Sonia that Jamuna did not have long to live during a telephone call on 16 October 2015, Sonia immediately arranged to travel to South Africa to see her. Min-Hua also came from Johannesburg. This, too, illustrates the nature of the relationship between Sonia and the Prasads.
- [33] The plaintiffs called Dr Parker, a neurosurgeon, as an expert. He was of the opinion that Gisela was not compos mentis when she signed the three wills, i.e. that she was not orientated for time, place and person. In short, he testified that the lung cancer with which she was diagnosed earlier that year, spread to her brain and affected her testamentary capacity. He testified that he was not an oncologist and certainly not an expert in lung cancer.
- [34] He was convinced that she was going downhill after being hospitalised and this would have affected her cognitive functioning. He drew these conclusions from the notes of Dr Van der Plas, Dr Hall and the extensive hospital notes provided by Vincent Pallotti hospital.
- [35] The factors he considered were, inter alia, that the cancer that was noted in the brain on 27 October 2015 would have spread by 20 December 2015. Moreover, he considered her weight loss of 20kg as extensive for a person of her age and a sign of her going downhill. As she had a possible fit on 27 October 2015, she was put on Epilim, which further reflected the spread of the cancer to the brain. A further fit on 14 November also indicated a further spread to the brain.

- [36] In addition, the fact that the nurses changed her nappies unsolicited was, in his view, an indication that she was not alert and orientated. He interpreted the fact that the cot sides of her bed were up that the nurses did not trust her mental state anymore. Moreover, the fact that she, on 20 December, could not recognise that she was wet, was in his opinion an indication that she was very weak at this stage and debilitated. In addition, she had redness on her buttocks, which meant that she hardly moved.
- [37] He also noted that she was constantly on strong painkillers, a strong schedule 7 Opiate, and a sleeping tablet. She was also suffering from so-called “happy-hypoxia” with a low oxygen blood saturation level of 90%.
- [38] When Gisela refused analgesia on 21 December, notwithstanding that the Glasgow Coma Scale (GCS) was 14/15, Dr Parker speculated that the deceased “was towards the end” and that the patient “has just given up”.
- [39] Dr Parker gave a detailed explanation of the Glasgow Coma Scale (GCS) and how it is used globally. It is common cause that this is the tool used to determine whether a patient is orientated for place, person and time. In the end though, he concluded that little weight could be attached to Gisela achieving a “good GCS score”.
- [40] When referred to Dr Van der Plas’s notes on 19 December 2015 of *nuero: nil focal*, and to Dr Ameen’s, (one of the defendant’s experts) reliance on this note, he distinguished between a neuro physical and neurocognitive examination. He was of the view that Dr Ameen assumed that Dr Van der Plas did both a neuro physical and neurocognitive test. Dr Parker, in the absence of any certainty, speculated that Dr Van der Plas did not do much and only conducted a neuro physical examination, which would have included assessing whether Prof Prasad could lift her arms.
- [41] He further speculated that, because of Gisela’s advanced age, the fact that she had lung cancer, which had spread to her brain, and that she was emaciated and incontinent, it would have made little sense for Dr Van der Plas to perform a full neurocognitive examination. He remained unconvinced that the words *nil focal* gave any indication of what examination was done by Dr Van der Plas.
- [42] Dr Parker admitted that he initially missed/did not comment on this note by Dr Van der Plas. He however stood by his interpretation of her notes in court, after being alerted thereto.
- [43] Apart from questioning the notes by Dr Van der Plas, Dr Parker also strongly criticised the notes made by the nurses in the ward at Vincent Pallotti Hospital. It was his evidence that the court should not place much reliance on these notes as these notes are made “... by nurses who are just not worth their salt.”

[44] Dr Jacqueline Hall was the plaintiffs' fifth witness. She was the treating physician of Gisela from 26 March 2015 when she was first diagnosed with lung cancer. Dr Hall is an oncologist who only gave factual evidence and not evidence of an expert nature. Dr Hall concluded that the patient was "definitely confused at times". She was not cross-examined.

E. DEFENDANT'S CASE

[45] It is the defendants' case that the testator had testamentary capacity at the time of making her will and that she was not unduly influenced by anyone at the time. The defendants called four witnesses; Ms Meena Vassen, Dr Ozayer Ameen and Prof Daniel Niehaus as experts and Yanita.

[46] Ms Veena Vassen (hereinafter "Ms Vassen") testified that she was the 72-year-old widow of the late Mr Vassen. Yanita is her cousin, but she considered her a niece. She studied law, and met her late husband while they were both studying in Durban. She married her husband in 1972 and moved to Cape Town in 1975 where her husband joined the law firm of the late Dullah Omar.

[47] She explained that then her husband did mostly political matters. When the ANC was disbanded in the early nineties, a discrepancy of approximately R120 000 was found being money paid to him by the International Defence Aid Fund (IDAF). He used this money from his trust account. The money was repaid but Mr Vassen was removed from the roll of attorneys in 1995, charged criminally, convicted and was handed a suspended sentence.

[48] In 1995 Mr Vassen joined the legal department of the Department of Foreign Affairs and also worked as a parliamentary officer in Cape Town.

[49] Mrs Vassen testified that her cousin, Meena Vassen who is the sister of Yanita's father, spent time with the Prasads in Lesotho while she was doing her PhD.

[50] The witness recalled accompanying her husband to the home of the deceased on 21 November 2015 in connection with the estate of Jamuna.

[51] She remembered that her husband consulted with the deceased again at her home on 18 December 2015 and that he was "shaken" when he returned home. When she asked him about it, he informed her that Gisela has decided that she wanted to leave all her South African property to Yanita. According to her, he explained that he asked Gisela whether she did not want to consider her other family members, and she said that "she did give to her family and that they are okay". Her husband further informed the witness that Gisela also turned down a suggestion that the money could go to charity.

[52] The witness testified that she did not discuss the will with anyone after this because of professional confidentiality.

- [53] She recalled the signing of the wills at the Vincent Pallotti Hospital on 20 December as follows: She accompanied her husband into the ward. Gisela was awake and said that Mr Vassen did not have to read the wills back to her again. A nurse was asked to assist. She brought a table closer. The nurse asked Mr Vassen whether the patient knew what she was signing, and before he could answer, Gisela said yes.
- [54] According to this witness, the three wills were explained to Gisela. She signed each one of them and Mr Vassen and his wife witnessed them respectively. Hereafter, Gisela asked the nurse to take her to the bathroom. The witness and her husband left at this point.
- [55] The two of them visited the deceased again on the next day and found her neighbours living opposite her in F[...] Road, talking to her. They also visited the deceased in hospital on 24 and 29 December 2015.
- [56] Dr Ozayr Ameen, a neurologist, was called by the respondents as their first expert. Referring to the patient's hospital records, it was his opinion that the primary tumour in Gisela's lungs had shrunk and not increased as suggested by Dr Parker.
- [57] The witness did a detailed analysis of Dr Van der Plas' notes between 27 October 2015 and 21 December 2015 as well as a report by Dr Van der Plas to Dr Hall on 2 November 2015. This witness focussed on the note "neuro non focal" by Dr Van der Plas. It was Dr Ameen's opinion that, because of Dr Van der Plas' history with the patient, she was primed to note down whether the patient had an abnormal mental state or not, which she did not do. Instead, she noted down "neuro non focal". It was further his view that, because Dr Van der Plas knew that the patient had a brain lesion, she would therefore have been checking the neurological system.
- [58] The court was urged to look at her notes, e.g. "frail, but alert and orientated" and "neuro non focal". He stressed that this doctor was primed as she detected neurological decease on 27 October 2015. He pointed out that there was only one single gyrus that was abnormal at the time. On re-examination Dr Ameen asked the court to accept that Dr Van der Plas would have checked the neurological system and thereafter made the note "neuro non focal". Prof Niehaus agreed with Dr Ameen in this regard.
- [59] Dr Ameen was adamant that there was no clinical evidence that there was an increase in the cancer in the brain. Moreover, in his view, there were no physical signs of an increase in the tumour. The court was pointed to the fact that the brain tumour was a small single gyrus in the right parietal lobe and if there were a large or increasing tumour in that area, "then you would expect it to manifest in the way that these things usually manifest."
- [60] Commenting on Dr Parker's evidence, the witness was of the opinion that the patient's (Gisela) blood results showed a marker of infection, which he viewed as expected, as the patient was admitted to hospital with pneumonia.

- [61] In respect of the patient's testamentary capacity and cognitive function on 20 December 2021, Dr Ameen differed from Dr Parker when looking at the same nursing notes. In his opinion, the hospital notes indicate that, at 2am after signing the wills, the patient was alert and orientated. Moreover, an hour after the wills were signed, the patient had the capacity to make a decision about whether she wanted to be washed or not.
- [62] Dr Ameen pointed out that the first note of her being weak and disorientated was a note by Dr Van der Plas on 21 December 2015. The court was pointed to the notes by the nursing staff at 2am indicating the opposite, as well as her score on the GCS of 15/15 four hours later. That same morning the patient also refused analgesia.
- [63] In respect of the size and location of the brain tumour, it was Dr Ameen's opinion that the lesion was not in the substance of the brain but only on the surface of the brain. Whether the brain tumour could have an impact on the cognitive abilities of the deceased, Dr Ameen differed from Dr Parker pointing out that there were no localising signs, e.g. disprosity of speech, weakness of the left arm and leg, sensory loss, ongoing seizures and an inability to recognise faces, since the last scan, and that it can therefore not be said that the lesion had grown and was impairing her cognition.
- [64] The witness also differed from Dr Parker on the meaning of the patient wearing nappies. Dr Parker interpreted the fact that she was wearing nappies towards the end as she was in a very frail state. Dr Ameen, on the contrary suggested that incontinence pointed to a spinal cord dysfunction and not a neurological dysfunction. Moreover, that the fact that the patient was still able to go to the toilet intermittently, should also be taken into account.
- [65] It was therefore Dr Ameen's expert opinion that the cognitive abilities of the deceased were intact at the time of making the wills, and that she therefore had the necessary testamentary capacity.
- [66] Prof Daniel Niehaus, a psychiatrist, was the second expert called by the respondents. He is the head of the Psychogeriatric Unit at Stikland Hospital. He currently specializes in geriatric psychiatry, focusing on patients 60 years and older. He testified that at Stikland Hospital, one of the first questions they ask their patients is whether they have a will and that they use the test laid down in *Banks v Goodfellow*[1]. The professor concluded after submitting two reports that, despite the possibility of delirium and /or dementia, insufficient

evidence exists to show a lack of testamentary capacity on 20 December 2015.

- [67] The witness took issue with Dr Parker's stigmatised view that psychiatrists put a patient "on a couch and listen to your stories."
- [68] He reached his conclusions after consulting the wills, all the medical records, statement from Mr Vassen, WhatsApp messages between the parties and all other relevant documents, including the testimony of Dr Hall, Sonia, Mrs Vassen, Jakob and Jenny and Dr Parker.

[69] He noted that Gisela did show signs of delirium but also had clear moments.

[70] Some of the assessments done by their unit are very instructive. It was his evidence that they are on the lookout for red flags when making these assessments.

- The fairness of the will is considered e.g., why a testator is giving certain heirs certain assets. He gave an example of someone who disinherited her two children and gave all her assets to an animal shelter because she built stronger emotional relationships with people at the shelter. This meant that it was subjectively fair;

- The value of the assets. Only large discrepancies are considered to be of concern. It was his view that it is not expected of patients to know exactly what is kept in every bank account. Where patients have a financial adviser, this is particularly relevant.

- Whether the patient owns a car, is still driving, had accidents recently gives an indication of mental ability, or impaired mental ability.

[71] The following are considered red flags pointing to possible undue influence.

- The presence of undue influence is also assessed. A red flag would be if access to the patient is blocked resulting in a form of alienation.

- Another red flag would be who is present at the discussion of a will.

- Should there be a want of approval by the patient of one of the heirs, it would also be considered a red flag.

- Inconsistency of the wishes over time is also a red flag.

[72] It was his evidence, that when the beneficiaries are considered, it is also important to look at the life history of the patient.

[73] The witness looked at the five most important people in the deceased's life over the last few years i.e. who spent the most time, app 40% of their time with her. The court was asked to look at the duration of contact between the deceased and the heirs. The witness agreed with Dr Ameen and Dr Hall that the reason for Gisela's admission on 18 December 2015 was pneumonia and not her mental state.

[74] The witness agreed with Dr Ameen on the interpretation of the note that she was "alert and orientated". His evidence was that these words refer to a neurological symptom.

[75] Yanita testified in her capacity as executor of the South African will as well as in her capacity as heir. She referred to Jamuna and Gisela Prasad as "uncle and aunty". Yanita is a 44-year-old Clinical Technologist of Indian heritage. She first worked at the Red Cross Children's Hospital in the Paediatric Cardiology division and currently as a clinical technologist in Cardiology. According to her, the Prasads were fascinated by her work, in particular the fact that she was "putting

pacemakers in babies”.

- [76] She testified about how the Prasads met and told the court their life story as related to her by the two of them. The Prasad's both attended the La Sorbonne University in Paris where they met. They both were undertaking their PhDs. Uncle was working in Scotland before this. He told her that Auntie was very beautiful and that her family was not very happy that she wanted to marry this “poor Indian man” as there were many more suitable European men. Auntie on the other hand was not interested in any European men. According to her, Uncle was very different to all the European men she has met. She loved him. She went against her family's wishes and married the love of her life.
- [77] The witness testified that she had a long relationship with the Prasads, starting in 2005. It is her version that for a very long period, from about 2009, she was not just a family friend, but also the person who was closest to the Prasads.
- [78] Her evidence was in effect a chronological narrative of the intimate nature of her relationship with the Prasads.
- [79] The Prasads knew Yanita's family since the late eighties, when her aunt, Meena Vassi, did her PhD in geology at Cambridge University, and chose to do her fieldwork in Lesotho. Gisela was her supervisor. In 2005, her aunt Meena's husband, who was an economics professor, came to UCT and the witness accompanied him to the Prasads' house at 2[...] F[...] Road. This was her first physical meeting with the Prasads. She remembered this as it was her very first time to interact with a cat.
- [80] Many of the witness' family members stayed over at the Prasads house when visiting Cape Town, as she was staying at the nursing home at the time and did not have available accommodation for them. When her grandmother visited in 2006, uncle reminded her of a letter she wrote to him in the eighties thanking them for allowing Meena her daughter to stay with them.
- [81] According to the witness, the Prasads were very interested in her education and her work. They told everyone who they met how proud they were of her “fixing pacemakers in babies”.
- [82] She started visiting them regularly, every two weeks, as she did not know many people in Cape Town at the time. She also took many of her friends to meet the Prasads, and the Prasads also invited her when they had visitors over, especially young people. She remembers meeting the cousin of Pres Thabo Mbeki who lived in Lesotho, at their house.
- [83] She remembered taking one of Gisela's visiting students, Anil, from India to spend time with the Prasads. Uncle, in particular, enjoyed spending time with him because he could speak 32 Indian dialects.
- [84] The witness started house sitting for the Prasads during 2005/2006 when they went to India for a month. She took care of their cat, Yogi.

- [85] During 2006 when they were back from India, uncle got sick and was admitted to Kingsbury Hospital. She and Gisela took turns to visit him. The witness came to know about the Chinese children shortly after she met the Prasads in 2005.
- [86] She remembered that the Vassens met the Prasads for the first time in 2007 when her cousin and her aunt stayed with the Prasads.
- [87] She testified that she met Dr Ulrich Horsemann (the second Plaintiff) on three separate occasions in 2007 while he visited the Prasads in Cape Town. She remembers taking him to see luminous plankton at Fish Hoek on his request. She also remembered that Dr Horseman and uncle argued a lot. Even though it was about silly stuff most of the time, she did sense some animosity between them.
- [88] During 2008, while she was writing exams, the Prasads invited her to stay with them, as she did not have a place to stay at the time. They insisted that she focussed on her exams, and not spend time to find a new place.
- [89] Jamuna was a vegetarian while Gisela was not fully vegetarian and occasionally enjoyed some chicken and fish.
- [90] The witness paid the Prasads R5000.00 for return tickets to Durban as a thank you gift for staying with them during that month. They did not want to accept it but she insisted. She suggested a trip to Durban as uncle has never been to Durban before. The Prasads did not take up her offer, as uncle was too old to travel at the time. His official age was 98-years old, but he was always of the view that he was unofficially 10 years older, that means 108 years old.
- [91] The witness met Sonia and her daughter Kaia for the first time in February 2009.
- [92] During 2009, her grandfather died, and the family wanted to spread his ashes in Ganges River. Jamuna advised on the logistics of doing this. During 2010, she attended a musical show with them. It was just the three of them. She remembered this as the artist performed a very spiritual blessing of the crowd. The three of them attended every year after this. During 2011, they attended the concert again. The artist played the Indian classical flute. They were exited to hear this, as Gisela also played this flute and played regularly for the witness.
- [93] When the witness completed her degree, her parents came to Cape Town for her graduation. She invited the Prasads to her aunt Veena's house for the celebration. She invited them because they were a big part of her life.
- [94] They attended another concert during 2012 when Sonia and her daughter accompanied them. Towards the end of the year, she accepted the position to move back to Red-Cross Hospital, and was then looking to buy her own place. She asked Gisela to help her, as she was very able and willing to help. Gisela accompanied her to many viewings, including the place she is currently living in.

- [95] She moved into her place in March 2013. Her place is in walking distance to their house, only 5 minutes by car. On 8 June 2013, the witness spent uncle's birthday with him as Gisela was travelling for her work. When aunty travelled, the witness checked in on uncle more regularly. She would stay over for a weekend and go grocery shopping for them.
- [96] The Prasads made their own yogurt at home. Every few months they went to Ryland's to have Jamuna's hair and beard cut. Aunty was grateful for this, because it made him feel good. During this time, Gisela asked her to take her to a wine farm where they got Indian running ducks to get rid of the snails in her garden. As the witness was now staying much closer, she started visiting more often. Almost every weekend. They spent a lot of time together in the garden. During this time, the Prasads had a new cat also named Yogi.

YANITA'S EVIDENCE REGARDING ILLNESS DURING 2015

- [97] During October 2015, Gisela called Yanita to help with Jamuna's funeral preparations. On 27 October 2015, Gisela was admitted to hospital and was discharged on 30 October 2015. On 4 November 2015, Gisela went to see Dr Hall and was accompanied by Dawn, a carer.
- [98] On 10 December 2015, Gisela told Yanita that she wanted to physically go into the bank on the Saturday after she accidentally blocked her on-line banking pin. The two of them went to the First National Bank and thereafter went to lunch where Gisela ordered steak. Hereafter, on the same day, Mr Vassen consulted with Gisela.
- [99] The witness recalled that over the next few days Gisela met with a student of hers, had a dentist appointment and arranged a discussion with her financial adviser. On 17 December Yanita spoke to Dr Hall about a will for the first time. She also called Gisela's financial adviser.
- [100] On 18 December 2015, Gisela consulted with Mr Vassen once again, visited the dentist and was admitted to the hospital. Yanita wanted to take Gisela to the carols by candle light on Sunday 20 December but her doctors advised against it. That same evening Mr and Mrs Vassen went to the hospital and had the wills signed. On 21 December, Mr and Mrs Vassen visited Gisela once again. On 23 December, the doctors informed Yanita that Gisela would probably not recover from her illness, and that she should inform the family. On 24 December, Yanita took Elubi, the helper, to visit Gisela in hospital, and Mr and Mrs Vassen visited again.
- [101] On 27 December, Gisela asked Sonia and Yanita to speak to the doctors, as she was ready to go. On 28 December, Gisela was administered morphine and was moved to a side room. The Vassens visited again on this day.
- [102] Yanita took Yogi to the hospital window when Gisela was very weak so that she could see her beloved cat one last time. Sonia and Yanita spent time with Gisela on 30 December, the day she died. The cremation and funeral ceremony was held on Monday 4 January 2016.

APPLICABLE LEGAL PRINCIPLES

a. Interpretation of Wills

[103] It is trite that the object of a court in interpreting a will is to establish the intention of the testator from the language used as far as can be gathered from the will itself.[2]

[104] It is further trite that a will that is complete and regular on its face is presumed to be valid until the contrary is proved. Moreover, that the burden of proving that it is invalid rests on the party who

challenges the will.

b. Testamentary capacity

[105]

Section 2(3) Of the Wills Act 7 of 1953 (hereinafter “the Act”) provides that:

“(3) If a court is satisfied that a document or the amendment of a document drafted or

executed by a person who has died since the drafting or execution thereof,

was intended to be his will or an amendment of his will, the court shall order the master to accept that

document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).”

[106] In South Africa, the capacity to make a will is governed by Section 4 of the Wills Act 7 of 1953. Section 4 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.”

[107] Whether someone has testamentary capacity is a factual question. The dictum in Naidoo NO & Another v Crowhurst NO & Others[3] illustrates which factors should be taken into account as follows:

“... 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.”

[108] In the oft-quoted case of Tregea v Godart and Another[4] the court relied on the test laid down in Banks v Goodfellow[5]:

"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?"

c. Undue influence

[109] A testator should be free to make his or her will. This principle was emphasized in the matter of *Thirion v Die Meester en Andere*[6] as follows:

"'n Gebied waar spanning so dikwels voorkom, dat dit die verhaalkuns stimuleer en tot populêre spreekwoorde aanleiding gee is die erfreg. Aan die een kant het sekere reëls uitgekristaliseer oor wat objektief moreel en logies korrek is. Derhalwe bepaal die intestate erfreg 'n sekere rangorde van persone aan wie 'n oorledene se boedel nagelaat word, soos die oorlewende eggenoot, kinders, ouers, broers en susters en so meer. Tog respekteer ons die wense van 'n persoon wat nie meer met ons is nie soveel, dat die reg 'n mens in beginsel toelaat om al jou eiendom te bemaak aan jou spreekwoordelike gunsteling kroegman, of die dierebeskermingsvereniging, selfs ten koste van jou eggenoot en kinders, mits ons maar seker is dat dit wel die bedoeling van die erflater is. Die reg eer die begeerte van 'n dooie, selfs tot die punt waar dit haat en nyd onder oorlewende naasbestaandes veroorsaak, of so onbillik voorkom dat dit ten hemele skree. Slegs waar bewys kan word dat 'n testatêre aanwysing deur 'n gestorwe persoon die gevolg is van dwang of onbehoorlike beïnvloeding word dit nie deur die reg erken nie. Die oënskynlike onbillikheid of immoraliteit van 'n persoon wat sy lewenslange getroue eggenoot behoefte agterlaat ten einde sy gunsteling prostituut luuks te laat lewe, weeg nie op teen die reg se respek vir die wens van die dooie nie. Die rede hiervoor godsdienstig of andersins geestelik gegronde agting wees vir die dood, of dalk vir die hiernamaals, of dit mag 'n kapitalisties gedrewe respek vir eiendomsreg wees: Wat aan jou behoort, mag in beginsel slegs jy oor beskik, volgens jou goëddunke, ongeag die wyse waarop jy moontlik daaraan gekom het en wie dit die meeste verdien."

[110] This means that the law honours the wishes of the deceased even if it results in envy among the next of kin. This is the position unless it is proven that a provision(s) is the result of fraud or duress or undue influence. The principle applies even where a testator included absurd provisions in a will.

[111] The plaintiff, in the alternative claimed that the testator was unduly influenced by Mr Vassen. It is their case that the conduct of Mr Vassen and Yanita points to their undue influence over her at a time when she did not have the necessary testamentary capacity.

d. Expert Evidence

[112] Both sides called expert witnesses to give an opinion on the issues that this court are to decide. Plaintiffs referred the court to the trite principles, principles which this court applied when considering all the evidence in this matter. The court was referred to the basic principles of evidence in Schwickkard and Van Der Merwe and the oft-quoted decisions in Naidoo NO & Another v Crowhurst NO & Others[7].

e. Inferential reasoning

[113] It is well-established that, as this is a civil matter to be determined on the balance of probabilities, when considering whether to draw a particular inference the Court need not be satisfied that it is the only possible inference available, but rather that it is the most readily apparent and acceptable one. This approach (and its application) was recently confirmed by the Supreme Court of Appeal in Meyers v MEC, Department of Health, EC (emphasis added)[8]:

“In my view, at the close of Ms. Meyers' case, after both she and Dr Pienaar had testified, there was sufficient evidence which gave rise to an inference of negligence on the part of Dr Vogel. In that regard it is important to bear in mind that in a civil case it is not necessary for a plaintiff to prove that the inference that she asks the court to draw is the only reasonable inference; it suffices for her to convince the court that the inference that she advocates is the most readily apparent and acceptable inference from a number of possible inferences.”

f. Revocation

[114]

Section 2A of the Wills Act 7 of 1953 provides:

“2A Power of court to declare a will to be revoked

If a court is satisfied that a testator has-

- (a) made a written indication on his will or before his death caused such indication to be made;
- (b) performed any other act with regard to his will or before his death caused such act to be performed which is apparent from the face

of the will; or

(c) drafted another document or before his death caused such document to be drafted,

by which he intended to revoke his will or a part of his will, the court shall declare the will or the part concerned, as the case may be, to be revoked.”

[115] It is trite that a will may be revoked by a subsequent valid will which indicates an intention to revoke.

g. Costs

[116] The law in respect of costs in cases where a will is challenged is trite. In the absence of fraud, mala fides, etc., the costs of all parties where the testamentary capacity of a testator is challenged are usually ordered to be paid out of the estate.

[117] The issue of costs in a matter where a will is challenged, was at the centre of many decisions. It is trite that it is the duty of an executor to defend a will until such time as it is set aside by a court. In this regard, see *Lewin v Lewin*[9]:

“Questions of testamentary capacity are notoriously difficult, and the defendant was able to put before the Court a number of medical, as well as lay, witnesses who seem to me to have formed an honest, if mistaken, view as to the rationality of the deceased. Opinions might well have differed upon the point, and I have found it by no means easy to arrive at the conclusion which I have reached. In Dunn v Estate Dunn (14 C.T.R. 132) DE VILLIERS, C.J., expressed the opinion that it was the duty of an appointed executor to defend the will until it is set aside by the Court, and in Boughton v Knight (L.R. 3 P.D. 64) the view was taken that the executor, though he had failed to prove the testamentary capacity of the deceased, was entitled in the circumstances of the case to take the opinion of the Court upon the state of the testator's mind. In questions of testamentary capacity as well as of interpretation the Courts often act upon the principle that where the litigation has been brought about by the conduct of the testator, the costs of the parties should come out of the estate ...”

[118]

The opposite view was held in the matter of *Spies NO v Smith en Andere*[10]. It was held that where the litigation is not as a result of the vagueness of the testator's words, the estate should not be responsible for the costs.

G. DISCUSSION

[119] Considering the trite principles in respect of expert witnesses, in particular those principles referred to by the plaintiffs' counsel, I would like to make the following remarks about the expert witnesses in this matter. Drs Parker and Ameen's, and Prof Nieuhaus' evidence was extremely helpful to the court. Their vast experience and expertise was very informative and enlightening.

- [120] All three of these witnesses, however, had the tendency to draw conclusions applicable to this matter. In line with the trite principles in respect of expert witnesses, this court considered their theoretical expert opinions, but disregarded the conclusions drawn by them in respect of this matter.
- [121] The court is concerned about Dr Parker's tendency to speculate about the diligence with which other professionals were performing their functions. I found it very disturbing that Dr Parker explained to the court e.g. what the universally used test for determining the level of consciousness in a person was, i.e. the Glasgow Coma Scale (GCS) and immediately thereafter asked the court to disregard the results of this test in this matter. It was also his evidence that the court should disregard the nurses' notes at Vincent Pallotti Hospital, because these notes are made "... by nurses who are just not worth their salt."
- [122] In both instances, i.e. the GCS test and the nurses' general notes, the effect of accepting it as is, would be a conclusion that the patient was not cognitively impaired. This court finds it concerning that Dr Parker was willing to disregard these notes, which are the only source that courts traditionally use to establish the state of health of patients. Moreover, this court finds Dr Parker's comments on the general competence of nurses or the lack thereof, as insulting to members of a humble, selfless and hardworking profession.
- [123] Dr Parker also speculated that Dr Van der Plas probably only asked the patient to lift her arms when examining her and made her notes based thereon. Once again, the witness assumed the worst of the medical professional because the notes did not square up with his opinion. This court evaluated the evidence objectively and was not persuaded by the conclusions drawn by all the expert witnesses. Refer to Naidoo NO and Another v Crowhurst NO and Others.[11]
- [124] Dr Parker also did not give much credit to psychiatrists' ability to give evidence of a medical nature, and was quite condescending to that profession as well.
- [125] Considering the evidence relevant to Gisela's mental state, I also took into account that it is undisputed that she was admitted to hospital because she was suffering from pneumonia and not because there was any concern about her mental state. Moreover, she was able to provide Sonia's London telephone number on her admission to hospital without any assistance.
- [126] On behalf of the plaintiffs, the court was asked to consider many of the actions by parties to this dispute as "red flags". One of these was the fact that Gisela delayed her decision on what to do with her assets. In my view, her delay in deciding what to do with her assets in discussions with her family points to her continuously applying her mind to the issue, and not to her being unduly influenced.
- [127] Moreover, I find that her wishes were consistent all through her discussions with her family. As an example of this consistency, the WhatsApp messages identified two beneficiaries, i.e. Yanita and Sonia. This was in a discussion between the biological family,

the non-biological child and Yanita. The biological family probably expected that they would inherit as her biological heirs, Sonia as the non-biological Chinese child, and Yanita in some other capacity. At that point, following from the above, it is clear that the plaintiffs expected Yanita to inherit. It seems though as if the size of the inheritance is currently at issue. It is, however, trite that the decision as to how assets are distributed amongst heirs is the decision of the testator only. In this regard see *Thirion v Die Meester & andere*.^[12]

- [128] I also do not consider the short period between the discussion of the will and the signing of the will a red flag, as submitted on behalf of the plaintiffs.
- [129] In considering whether Gisela understood what it meant to make a will or what a will was, I could not ignore the fact that when she was discussing her and Jamuna's joint will, she indicated that his stepfamily should not benefit. This discussion took place during the relevant period shortly before she fell ill. I find this to be an indication that she knew what a will was and what it meant to make a will.
- [130] In interrogating what Gisela's motivation was in how her estate should be divided, the court had Mr Vassen's notes, which the plaintiffs want the court to disregard, the WhatsApp messages and Ms Vassen's evidence. I mention the following notes of Mr Vassen briefly, i.e. that Sonia should inherit because she studied, became qualified, bought her own apartment, worked hard and has always been there for them. Even if the court disregards these notes, I am faced with the WhatsApp messages pointing to Sonia, and not any other member of the Chinese family, inheriting. The exclusion of the Chinese children is also evident from the Prasads' joint will.
- [131] Moreover, I am faced with the overwhelming evidence from both the plaintiffs and the defendants that Gisela valued hard work, education and those expressing a caring nature. Therefore, even in the absence of Mr Vassen's notes, on the plaintiffs' own version, Sonia's inheritance was expected. This is also to be deducted from Gisela listing Sonia as her daughter on admission to Vincent Pallotti on 18 December 2015.
- [132] In considering Yanita's inheritance, the plaintiffs in effect asked the court to ignore Gisela's character and values. Once again, on the plaintiffs' own version, they expected Yanita to inherit. This is evidenced by Jenny's WhatsApp messages shortly before Gisela died. Moreover, Dr Hall called Yanita the "predominant person here". In addition, the inclusion of Yanita in the will was not strange as it is common cause that the Prasads always supported non-biological children in the past.
- [133] I also took account of the plaintiffs' version of Yanita's closeness with the biological family, e.g. Jakob asking about an internship for his daughter, Jenny telling Yanita that "so you are family too", and Sonia testifying that "Yanita even got along with my daughter who was probably about 7 at the time". Yet another indication that Yanita was not just a girl who lived around the corner from Gisela and only became close when Gisela became ill during 2015, as alleged by the plaintiffs.

- [134] The court was also referred to Jenny's comment in the WhatsApp group that Yanita and Sonia would "do what she wants". In my view, this means that the two of them knew what the deceased wanted, i.e. a reading of her mind. This meant that they were the closest people to Gisela. I find that this also pointed to a motivation for the selection of these heirs.
- [135] The court was asked to decide whether the deceased's lack of knowledge of the exact amount of money in her UK bank accounts pointed to cognitive impairment or, to a particular financial management style. In my view, this did not point to cognitive impairment. Here we are faced with an obviously eccentric individual whose serious financial decisions were left to a financial adviser.
- [136] I find Gisela's ability to remember where her accounts were held and the fact that she knew that Sonia would be able to give more details on those accounts, as a clear indication that she was not cognitively impaired. To the contrary, I find this to be an indication of someone who knew exactly where her assets were. She did not, for the purpose of the inheritance, need to know how much is held where, as she planned to leave everything she owned in the UK to Sonia. The value of that inheritance was not important. What was important was the fact that she wanted Sonia to inherit everything held in the UK bank accounts. It is common cause that Sonia is a chartered accountant and would surely be in a better position to grasp the extent of Gisela's financial accounts there.
- [137] Another possible red flag raised by the plaintiffs was that she failed to pay an account. I am satisfied that her failure to pay this account was not an indication of her deteriorating mental state, but that there was in fact a logical explanation for this failure, i.e. that the account was sent to the wrong e-mail address.
- [138] The plaintiffs also pointed to her forgetting her online banking pin a red flag. I do not consider this as her being cognitively impaired, as she decided thereafter to not use her online banking services, but rather go into the bank physically, i.e. she was able to decide on the most obvious alternative.
- [139] From the evidence led in this court, I am satisfied that the deceased was eccentric, non-materialistic, frugal and valued the deeper things in life like education, music, gardening and the South African liberation struggle when she lived in Lesotho, etc. In addition, I find that her driving such an old vehicle when she clearly could afford a more expensive car, illustrates her humble life style.
- [140] On behalf of the plaintiffs, it was submitted that the fact that Gisela ate steak during December 2015, should be considered a red flag, i.e. that she was cognitively impaired at the time. I do not agree with this conclusion. The evidence in this court was that Jamuna was a true vegetarian, but that Gisela was not a true vegetarian as she enjoyed chicken and fish. I do not find it strange that a person who was experiencing so many traumatic events, such as being diagnosed with cancer, and burying the love of her life, chose to eat something that she would not normally eat. I find the submission that this points to cognitive impairment extremely farfetched and I do not consider this a red flag. In fact,

from the evidence it is clear that this was a once off occasion and that she, when admitted to hospital, resumed her normal diet.

- [141] The fact that the deceased decided on her own immune suppression treatment and personally arranged for the payment thereof, is, in my view, also an indication of her will to fight her illness and her cognitive ability to make these decisions.
- [142] On Jenny's version, her own contact with Gisela increased after she left Cape Town in November 2015, i.e. after Gisela fell ill. Before this, she contacted Gisela telephonically only once every two or three weeks. She, however, frowned on Yanita's increased contact with Gisela over the same period. Once again, the court is asked to assume mala fides on Yanita's part without any proof.
- [143] I was also, indirectly asked to assume that a young person, Yanita, who spent many valuable hours with the Prasads over many years, would want to influence Gisela unduly to benefit from her estate. The evidence on these interactions between Yanita and the Prasads were never disputed. A submission was, however, made that the interactions increased during 2015, in particular between 10 and 15 December 2015 and that many significant events occurred during this time. I am in agreement with this submission. The evidence in this regard is clear. It is, however, the innuendo that the interactions that intensified towards the end of Gisela's life was aimed at influencing her to bequeath a big portion of her estate to Yanita that I find difficult to associate with the evidence.
- [144] From the evidence, it is clear that the interactions between the German family and Gisela also increased during
2015. It follows therefore that they would have more contact with Yanita during this time. Their increased time with Gisela during 2015, does not automatically mean that Yanita's contact with the Prasads increased only during 2015, as alleged by them. From the evidence it is also clear that members of the biological family contacted Gisela at most once or twice every two or three weeks before she fell ill.
- [145] The Prasads and Yanita had a relationship since 2005. Yanita met the second plaintiff in 2007. This was not placed before the court by the plaintiffs. On their version, Sonia met Yanita in 2013. The length of the relationship was not disputed, nor the role played by Yanita in the Prasads' lives. This is therefore not a relationship that intensified in the months immediately preceding December 2015. The plaintiffs questioned certain actions taken just before Gisela died i.e. the power of attorney and the wills.
- [146] In my view, it is understandable that no power of attorney was given to anyone during 2005 or thereafter, nor was any instruction to draft a will provided, as Gisela was perfectly healthy at the time. There was therefore no need to do this. From the evidence before me, the appropriate time to give a power of attorney and to draft and sign a will, was after Jamuna died and Gisela became ill. As there were no family members around, Yanita was accordingly the closest person to Gisela at the time. I, therefore, do not consider this a red

flag.

[147] In essence it is submitted on behalf of the plaintiffs that Gisela's physical state at the time affected her cognitive abilities, making her susceptible to undue influence. I cannot disagree more. The fact that someone *inter alia* wears a nappy does not imply that her cognitive abilities were impaired. Gisela's cognitive abilities were measured at the

relevant time against internationally accepted standards and were found to be intact. The experts may differ on this point, but I am satisfied that the evidence, on the probabilities, point to this conclusion, as it is the "most readily apparent and acceptable inference from a number of possible inferences". Refer to *Meyers v MEC, Department of Health*[13] in this regard.

[148] I am satisfied that Gisela had the necessary testamentary capacity when giving instructions to Mr Vassen on 18 December 2015 and the period leading up thereto, as well as on the 20 December 2015 when she signed the wills.

[149] I am further satisfied that Gisela was not unduly influenced by her relationship with Yanita, nor was she influenced unduly by Mr Vassen, who in fact did not receive any benefit from the challenged will. The court was requested to assume *mala fides* on the part of Mr Vassen because he was removed from the roll of attorneys during the 90's for using money from his trust account. No evidence was led as to why Mr Vassen would want to deprive Gisela of her assets after assisting her with the estate of her late husband, ostensibly to her satisfaction, and after they clearly had a long-standing relationship. No proof was provided of fraud committed by Mr Vassen.

[150] Finally, I would like to comment on Gisela's personality. As stated before, it is clear from the evidence that she was an eccentric person. As a young woman she got married against the wishes of her family to an older Indian man who clearly was as eccentric as she was; She travelled throughout the African Continent when it was not common or even acceptable to do so; She lived in Lesotho at a time when it was not common to do so; She assisted political refugees when it was not common to do so; She took Chinese children into her house to live with them and taught them English when it was not common to do so; She swam in a two-piece bathing costume when it was not common or acceptable to do so. In her later life, she supported and encouraged a stranger in Cape Town while she was studying when it was not common to do so; She drove an old car when she could afford to buy a better one when it was not common to do so; She made her own yogurt at home instead of buying it when it was not common to do so; She used new medical technology for her cancer when it was not common to do so; She worked as a lecturer and her contract with UCT was renewed until shortly before her death at the age of 74, when it was not common to do so. This, in my view, points to her being an eccentric person doing uncommon things even when she made the wills. Moreover, in my view, this points to her not being cognitively impaired at the time.

[151] This court is asked to interpret these “illogical, unusual and unfair” wills of this eccentric person, and to question why her assets were divided in the way that they were. I am satisfied that, considering the person who Gisela was, an estate divided in the usual way, would be “unusual” for her. In my view, the wills of Gisela were not illogical, unusual or unfair. In fact, it was subjectively logical, usual and fair.

H.

CONCLUSION

[152] After considering all the evidence, I find, on a balance of probabilities, that the most readily, apparent and acceptable inference is that Gisela possessed the necessary testamentary capacity when she made and signed the wills. Moreover, the wills reflect her intention and I find that she was not unduly influenced by Mr Vassen, nor by Yanita. In addition, it is my view that the London will, on the face of it, does not show any intension by Gisela to revoke the German and South African wills, as it does not deal with any German or South African assets. Accordingly, I am therefore not satisfied that there was compliance with section 2A of the Wills Act.

I. ORDER

[154] In the circumstances, I make the following order:

154.1 The plaintiffs’ case is dismissed with costs on a party and party scale, such costs to include the qualifying fees and expenses of the two experts, Dr Ameen and Prof Niehaus.

154.2 Costs are not to be recovered from the estate.

FORTUIN, J

Dates of hearing: 25 & 27 & 28 November 2019 2 – 3 December 2019 9, 10, 11 & 12 November 2020

Date of judgment: 30 November 2021 Counsel for plaintiffs: Adv A Morrissey Adv T Steyn

Instructed by: Attorneys Zumpt Ms A Walsh Counsel for Defendants: Adv J de Vries Instructed by: Moosa, Waglay & Petersen Mr E Petersen

[1] [1870] LR 5 QB 549.

[2] See Hofmeyer and Kahn, Succession

(2001) 447 et seq.

[3] [2010] 2 All SA 379 (WCC) at para [17].

[4] 1939 AD 16 50.

[5] Supra.

[6] 2001

(4) SA 1078 (T) at 1083.

[7] [2010] 2 All SA 379 (WCC) at para [33].

[8] EC 2020

(3) SA 337 (SCA) at para [82].

[9] 1949

(4) SA 241 (T).

[10] 1957

(1) SA 539 (A).

[11] Supra.

[12] Supra.

[13] Supra.

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