IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 74302/2013

In the matter between: DATE: 29/8/2014

THOMAS JOHAN VAN DEEMTER	First Applicant
JOHANNA MARIA OHLHOFF (born VAN DEEMTER)	Second Applicant

and

THE MASTER OF THE HIGH COURT PRETORIA	First Respondent
MARYKE SWANEPOEL N.O.	Second Respondent
HERMAN OHLHOFF	Third Respondent
JAN THEUNIS CHRISTIAAN OHLHOFF	Fourth Respondent
FRITZ ULRICH OTTO OHLHOFF	Fifth Respondent
MARILEE OHLHOFF	Sixth Respondent
CHRISTINE VAN DEEMTER	Seventh Respondent
ANIKA VAN DEEMTER	Eighth Respondent
TARIEN HELBERG	Ninth Respondent
MARYNA SWANEPOEL	Tenth Respondent
KARIN SWANEPOEL	Eleventh Respondent
GERRIT LE ROUX SWANEPOEL	Twelfth Respondent
HERMIEN BOSCH	Thirteenth Respondent
ABSA TRUST N.O. / UNA POSTHIMUS N.O.	Fourteenth Respondent
ALMERO BOSCH	Fifteenth Respondent
CORNELIUS LODEWICKUS DE JAGER N.O.	Sixteenth Respondent

JUDGMENT

DAVIS, AJ

INTRODUCTION:

[1] The application concerns the estate of the late Jan Van Deemter who passed away on 10 September 2010 (hereafter referred to as "*the deceased*").

[2] The Applicants claim an order declaring a will of the deceased dated 12 November 2004 to be invalid, **alternatively** that the deceased's surviving spouse, the late Magdalena Wilhelmina Van Deemter be declared unfit to inherit from the deceased. There is also a claim for costs on a certain formulation.

[3] The Second, Tenth and Thirteenth Respondents as a counterclaim, seeks to have the First Applicant removed from his office as executor of the deceased's estate. Costs are also sought against him on the scale as between attorney and client.

PRESUMPTIONS AND ONUS:

[4] A will which is *prima facie* regular is presumed to be valid. The will in question, being that of the deceased 12 November 2004, annexed to the First Applicant's Founding Affidavit as Annexure "VD3" thereto, is on the face of it regular and in compliance with the statutory provisions. It has also been accepted as such by the Master in terms of a belatedly delivered report dated 13 August 2014.

[5] A party alleging that such a will is not valid or that the testator lacked the necessary mental capacity at the time of making the will carries the burden of proof.

See: **Katz v Katz** [2004] 4 All SA 545 (C) and

Kotze N.O. v Santam Insurance Ltd 1994(1) SA 237 (C) at 242E-G.

[6] A person who has influenced the drafting of a will to include himself as heir may not be competent to inherit from the deceased estate. For purpose of this submission the Applicants relied in their belated Heads of Argument on **Pillay v Nagan** 2001(1) SA 410 (D). Having regard to the principles set out in **Spies NO v Smith e.a.** 1957(1) SA 539 (A) and **Katz v Katz**, *supra*, the Applicants also bear the onus in this regard.

[7] In respect of the counter-application the relevant Respondents bear the onus to satisfy the court that it is "*undesirable*" that the First Applicant should act as executor of the deceased estate.

See: Section 54(1)(a)(v) of the Administration of Estates Act, No. 66 of 1965.

COMMON CAUSE FACTS:

[8] The deceased passed away on 10 September 2010 without making a further will than the one in question.

[9] At the time of his passing away, the deceased was married to the late Magdalena Wilhelmina Van Deemter out of community of property and had been so married to her since 1982. She was accordingly, at the time of the deceased's passing away, his surviving spouse.

[10] The aforesaid surviving spouse herself passed away on 6 June 2013 and the Second Respondent is the executrix of her estate.

[11] No children were born of the marriage between the deceased and his surviving spouse but the deceased had two children born of a previous marriage, who are the Applicants in this application.

[12] The Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Thirteenth and Fifteenth Respondents are all heirs of the deceased in terms of the will in question and the Fourteenth and Sixteenth Respondents are executors of the deceased estates of two other heirs.

THE WILL:

[13] In order to place all the parties in context and to deal with the issues raised by the Applicants and having regard to the fact that their principal claim relates to the validity of the will in question, I deem it apposite to quote it here in full:

"***TESTAMENT***

Hierdie is die laaste wilsbeskikking en testament van

JAN VAN DEEMTER
Identiteitsnommer […]

getroud buite gemeenskap van goed met MAGDALENA WILHELMINA VAN DEEMTER Identiteitsnommer […] tans gedomisilieerd en woonagtig te Woonstel Nr. 4, B[…] House, Nazareth House Old Age & Frail Care Centre, Koningin Wilhelminalaan 290, Waterkloof, Pretoria.

1. ***Herroeping van vorige testamente***

Ek herroep hiermee alle vorige testamente, kodisille en testamentêre geskrifte en beskikkings deur my gemaak.

2. ***Benoeming van eksekuteur en afstanddoening van sekerheidstelling***

2.1 Ek benoem my voornoemde eggenote MAGDALENA WILHELMINA VAN DEEMTER as

eksekuteur van my testament en as administrateur van my boedel met mag van assumpsie en bepaal dat sy daarvan vrygestel word om sekuriteit aan die Meester van die Hooggeregshof te verskaf vir die behoorlike uitvoering van haar pligte as sodanig.

2.2 Indien my genoemde eggenote nie in staat is om as eksekuteur en administrateur op te tree nie, dan benoem ek in die alternatief my seun, THOMAS JOHAN VAN DEEMTER as eksekuteur van my testament en as administrateur van my boedel met mag van assumpsie en bepaal dat hy daarvan vrygestel word om sekuriteit aan die Meester van die Hooggeregshof te verskaf vir die behoorlike uitvoering van sy pligte as sodanig.

2.3 My eksekuteur wat hierkragtens optree het volle en onbeperkte bevoegdheid om vir doeleindes van die bereddering van my boedel en as dit nodig sou wees, na goeddunke:

2.3.1 enige bate van die boedel te verkoop hetsy uit die hand of deur openbare veiling of andersins;

2.3.2 in die algemeen enige kontrak aan te gaan en alle sodanige sake te verrig as wat die eksekuteur in belang van die boedel ag;

2.4 Ek magtig my eksekuteur om 'n prokureur aan te stel om haar/hom by te staan met die bereddering en administrasie van my boedel en ek magtig voorts die betaling van prokureursfooie uit bates van my boedel.

3. ***Bemakings en erfgename***

Ek bemaak my boedel soos volg:

3.1 Aan my genoemde eggenote MAGDALENA WILHELMINA VAN DEEMTER die volgende roerende eiendom –

3.1.1 Die Renault Clio motorvoertuig met registrasienommer N[…];

3.1.2 Die twee polshorlosies wat sy aan my geskenk het;

3.1.3 Die Sony televisiestel met trollie en die video-opnemer.

3.2 Aan my genoemde seun, THOMAS JOHAN VAN DEEMTER die volgende roerende eiendom –

3.2.1 Die 9 mm Browning pistool en messe-versameling. Ek versoek egter uitdruklik

dat my genoemde seun enige mes of messe van sy keuse aan elkeen van HERMAN OHLHOFF, CHRISJAN OHLOFF, ULRICH OHLHOFF, MARELEE OHLHOFF en CHRISTINE VAN DEEMTER sal gee;

3.3 Aan my dogter, JOHANNA MARIA OHLHOFF die volgende roerende eiendom –

3.3.1 Die kiaat dames hangkas;

3.4 Aan my kleindogter CHRISTINE VAN DEEMTER die volgende roerende eiendom –

3.4.1 Die volle stel van Langenhoven se boeke;

3.4.2 'n Kontantbedrag van R10 000,00 (Tien Duisend Rand).

3.5 Aan my kleinseun, JAN THEUNIS CHRISTIAAN OHLHOFF die volgende roerende eiendom –

3.5.1 Die kaliber .308 Win Musgrave geweer;

3.5.2 Die kaliber .22 BSA geweer;

3.5.3 'n Kontantbedrag van R10 000,00 (Tien Duisend Rand).

3.6 Aan my kleinseun, FRITZ ULRICH OTTO OHLHOFF die volgende roerende eiendom –

3.6.1 Die kaliber 6.5 Mauser geweer;

3.6.2 Die kaliber .22 Air geweer;

3.6.3 'n Kontantbedrag van R10 000,00 (Tien Duisend Rand).

3.7 Aan my kleindogter, MARILEE OHLHOFF die volgende roerende eiendom –

3.7.1 Die Nikon FM2 kamera;

3.7.2 'n Kontantbedrag van R10 000,00 (Tien Duisend Rand).

3.8 Aan my skoondogter, ANIKA VAN DEEMTER en haar dogter, TARIEN HELBERG die volgende roerende eiendom –

3.8.1 'n Kontantbedrag van R10 000,00 (Tien Duisend Rand) aan elkeen.

3.9 Aan my genoemde eggenote se kinders en kleinkinders naamlik MARYNA SWANEPOEL, GERRIT LE ROUX SWANEPOEL, KARIN SWANEPOEL, MARYKE SWANEPOEL, HERMIEN BOSCH, GARY BOSCH en ALMERO BOSCH die volgende roerende eiendom –

3.9.1 'n Kontantbedrag van R10 000,00 (Tien Duisend Rand) aan elkeen.

3.10 Aan my suster, HERMANA GROBLER die volgende roerende eiendom –

3.10.1 'n Kontantbedrag van R10 000,00 (Tien Duisend Rand).

3.11 Indien enige van bogenoemde erfgename by my afsterwe nog nie die ouderdom van 21 jaar bereik het nie, moet die bemaking aan sodanige erfgenaam in trust aan sy of haar ouer of voog oorgedra en/of betaal word.

4. ***Bemaking van restant***

4.1 Ek bemaak, behoudens die bepalings van paragraaf 5 hieronder, die restant van my boedel aan my genoemde eggenote, MAGDALENA WILHELMINA VAN DEEMTER.

4.2 Ek wens voorts uitdruklik te bepaal dat die eiendomsreg van die volgende roerende eiendom van die gemeenskaplike huishouding by my genoemde eggenote MAGDALENA WILHELMINA VAN DEEMTER berus:

4.2.1 Alle meubels en huishoudelike toebehore wat nie elders in hierdie testament deur my bemaak is nie;

4.2.2 Die matte, gordyne, olie- en waterverf-skilderye, die handgemaakte artikels insluitende die houtperd en ovaal tafel met gekerfde blad en ander items wat deur my genoemde eggenote uitgewys sal word asook die twee silwer Parlement gedenkmunte.

5. ***Spesiale bemaking***

Ek bemaak die volle kapitaalbedrag van R325 000,00 (Drie Honderd Vyf-en-Twintig Duisend Rand) wat gedurende 2004 deur my as 'n rentevrye lening aan die "Sisters of Nazareth" voorgeskiet en oorbetaal is ten einde die lewenslange gebruik en okkupasiereg van 'n eenheid bekend as Woonstel Nr. 4 B[…] House, Nazareth House Old Age & Frail Care Centre, Koningin Wilhelmina-laan 290, Waterkloof, Pretoria vir beide myself en my genoemde eggenote te bekom en welke leningskapitaal

ingevolge die bepalings van 'n skriftelike ooreenkoms aangegaan nie later as 180 dae na die beëindiging daarvan sonder rente terugbetaalbaar is in gelyke dele aan my twee kinders naamlik THOMAS JOHAN VAN DEEMTER en JOHANNA MARIA OHLHOFF of hulle afstammelinge staaksgewys.

6. ***Uitsluiting van die gemeenskaplike boedel***

Alle voordele wat enige van my erfgename uit hoofde van hierdie testament toeval sal buite enige gemeenskaplike boedel van sodanige erfgenaam val en sal vry van die inmenging, kontrole, maritale magte of skulde van enige eggenoot wees.

7. ***Inbringing***

Dit is 'n uitdruklike voorwaarde dat geen bates wat 'n erfgenaam gedurende my leeftyd van my ontvang het in berekening gebring moet word by die verdeling van my boedel nie.

8. ***Voorsiening vir begrafniskoste en grafsteen***

Ek bepaal hiermee dat die opbrengs van die begrafnis- en lewenspolisse deur my uitgeneem en gehou by Koopkrag Beperk aangewend moet word vir die hou van 'n begrafnisdiens en bepaal verder hiermee dat my eksekuteur in sy/haar eie diskresie enige balans bestee of

tekort aanvul by wyse van 'n kontantbedrag uit my boedel vir die uitgawe verbonde aan die aankoop en oprigting van 'n grafsteen op my graf.

GETEKEN DEUR MY OP HIERDIE 12DE DAG VAN NOVEMBER 2004 TE PRETORIA IN DIE TEENWOORDIGHEID VAN DIE ONDERGETEKENDE GETUIES ALMAL TEGELYKERTYD TEENWOORDIG."

[14] The will spans 11 typed pages and each of the pages were signed by the deceased and by two witnesses, being Jac De Villiers and J M Michael. Their identity numbers were also inserted on the last page of the will. It appears that none of these witnesses are available any longer, both having also passed away.

APPLICANTS' CASE:

[15] In paragraph 8 of the First Applicant's Founding Affidavit under the heading "***REASONS FOR DECLARING THE WILL INVALID***", the First Applicant states two reasons, namely:

15.1 A "*steady history of disposal of assets… belonging to the late Jan van Deemter …*" by the surviving spouse; and

15.2 The allegation that, at the time of the making and signing of the will the deceased was mentally unable to understand the contents of the will as well as his actions in signing the will.

[16] The first ground, insofar as it may have been a ground for attacking the will (presumably the allegations in respect thereof had more been inserted in support of an insinuation that the surviving spouse had coerced or influenced the deceased in formulating the will in the manner he did) was not persisted with at the hearing and in fact Mr Schoeman who acted on behalf of the Applicants expressly disavowed any claim in respect of prayer 1.2 of the Notice of Motion whereby a declarator was initially sought that the late surviving spouse be declared unfit to inherit from the deceased's estate.

[17] In respect of the second ground the First Applicant alleged that during November 2004 the deceased had fallen and bumped his head. With reference to certain medical reports, it is alleged that the deceased was disorientated, could not see clearly and his speech was affected. It was further alleged that his condition had deteriorated to such an extent that he was not able to conduct any administrative or financial transactions which had to be attended to by his surviving spouse.

[18] In an affidavit far more extensive than that of the First Applicant, the Thirteenth Respondent in her capacity as stepdaughter and testamentary heir of the deceased, in my view, dispelled all the allegations regarding mental incapacity. She had instructed her attorney of record to conduct a full investigation into the physical and mental condition of the deceased at the time of the signing of the will and, contrary to the approach of the Applicants, to obtain affidavits from the relevant persons concerned. In summary her affidavit, confirmed by the necessary confirmatory affidavits, indicated the following:

18.1 That, with reliance on a report of Dr Franklin, the deceased was not as "*confused*" as the First Applicant alleged pursuant to a heart attack.

18.2 The loss of vision relied on by the First Applicant was only partial in respect of the deceased's right eye.

18.3 With reliance on a Dr Jean-Marie Malan who confirmed that the deceased had been a patient of hers since 1996 indicated that the deceased was mentally lucid and fully aware on 4 November 2004, being the date on which a Dr Guldenpfennig

(who had also already passed away) examined the deceased and on whose report the Applicants sought to rely.

18.4 After extensive references by Dr Malan to the deceased's condition and with comment on various of the other reports, she states the following with regard to the deceased's mental condition in paragraph 7 of her affidavit:

> "*As far as the patient's mental condition was concerned I made the following relevant notes on the patient's file:*
>
> *7.1 19 April 2006: Geen spesifieke klagtes. Baie maer … verstand nog helder.*
>
> *7.2 13 Oktober 2006: Pasiënt lyk goed en tans goed georiënteerd.*
>
> *7.3 2 November 2006: Soms deurmekaar.*"

18.5 These comments all postdate the date of signing of the will on 12 November 2004.

18.6 The Respondents also rely on statements made by Sister D M Burton who at the time indicated that the deceased was still of

sound mind when signing the will. Similar comments are made by other physicians who knew or treated the deceased.

[19] Lastly, the Thirteenth Respondent stated that she and her late husband used to visit the deceased almost every Sunday in Nazareth House until his death. She had numerous conversations with the deceased during each of these visits and he was lucid on each of these occasions up and until the last year prior to his death when he was already very frail and not very responsive. She states that she has no doubt that the deceased was mentally and physically able to make his will on 12 November 2004 and that he intended the contents thereof to be his last will and testament.

[20] Not surprisingly, and, in my view correctly so, Mr Schoeman did not press the point of alleged mental incapacity more than by referring to the affidavits.

[21] Having considered the affidavits again and applying the process for evaluation of different versions presented on behalf or the parties set out in **SFW Group and Another v Martel et Cie and Others** 2003(1) SA 11 (SCA) and based on the evidence as a whole, I come to the inescapable conclusion that at the time of the execution of the will, the deceased was of sufficiently clear mind as to be able to

dispose of his estate in a meaningful and coherent way. I am fortified in this view if regard is had to the detailed content contained in the will as quoted above.

[22] In a change of tack, which was severely criticised by attorney Cornel Botha who acted for the Second, Tenth and Thirteenth Respondents, Mr Schoeman on behalf or the Applicants sought to rely on the following proposition:

22.1 Annexed to the Answering Affidavits was a prior will of the deceased, produced by his then attorney, one Gerhard Bester.

22.2 The prior will (annexed as “GB3” to the papers) was executed by the deceased on 15 September 2004 and apparently compiled by Absa Trust Ltd.

22.3 It is not necessary to repeat the whole of the will for reliance was principally placed on behalf of the Applicants on the wording of clause 1.9 thereof which read as follows:

> “*Die restant aan my gade MAGDALENA WILHELMINA VAN DEEMTER en my kinders THOMAS JOHAN VAN DEEMTER en JOHANNA MARIA OHLHOFF of indien*

een van hulle my nie oorleef nie dan aan sy of haar afstammelinge by wyse van plaasvervulling en by gebrek aan afstammelinge dan aan die oorblywende erfgename of by vooroorlye aan sy of haar afstammelinge by wyse van plaasvervulling."

22.4 In manuscript the words "*in gelyke dele*" has been inserted to the top right hand of this paragraph with a diagonal line apparently connecting the insertion to the names of the Applicants.

22.5 To the left of the paragraph the following inscription was also made in manuscript:

"*R325000 lening ½/½.*

22.6 When this paragraph (1.9) is compared with clause 4.1 of the will in question, it is immediately apparent that the Applicants do not feature therein.

22.7 The difference between the wording of the two paragraphs, so the argument goes, amounts to a "*discrepancy*" and this discrepancy is relied on by the Applicants to indicate that the

deceased could never have intended to exclude the Applicants from inheriting the remainder of his estate.

22.8 Although Mr Schoeman's instructions were to insist that the whole of the will be declared invalid and void, he made an alternate submission to the effect that the court only excise clause 4 from the will.

22.9 Mr Schoeman could however not explain to my mind satisfactorily why clause 4.2 should also be excluded.

[23] Of all the people involved in the executing of the will, the draughtsman thereof, being attorney Gerhard Bester, is apparently the only one available and/or alive. The relevant portions of his affidavit read as follows:

"*2.*

The late Mr Jan van Deemter (the deceased) and I were very well acquainted and I often visited him and the late Mrs Van Deemter at their home, both in my official and unofficial capacity as their attorney and neighbour…

4.1 I confirm that I am in possession of the original of the deceased's will dated 15 September 2004 …

4.2 I came into possession of the above document when the late Mrs Van Deemter during the week of 5 November 2004 left a message at my office that I should phone her …

4.3 The next day I travelled to Nazareth House in Waterkloof, Pretoria where the deceased and the late Mrs Van Deemter had recently moved to. Upon my arrival the deceased told me that he wanted to amend his will and that he would appreciate it if I could assist him in doing so. He handed me a copy of the abovesaid will on which he had made some amendments in writing and we proceeded to discuss same. In the process I also made notes on the document according to his instructions. After we had finished our instructions the deceased placed the document in a folder and handed it to me to take when I leave …

4.5 I proceeded to draft a new will according to the deceased's instructions and returned a day later. While perusing the draft I have prepared, the deceased and I realised that he had neglected to deal with the amount he had loaned to the Sisters of Nazareth and which formed the basis of their right to occupy the unit they were at the stage residing in at Nazareth House… The deceased forthwith advised me that he wished to bequeath the abovesaid amount to his two children, the First and Second Applicants herein in equal shares and that I should amend the draft accordingly.

4.6 I consequently amended the draft and returned to Nazareth House during the afternoon of 11 November 2004. I discussed the amendments with the deceased and he confirmed that he was satisfied with the content of the draft document as amended. I explained the formalities that had to be complied with when signing the will to the deceased and arranged to collect same after it had been signed.

4.7 I collected the original signed will the next day 12 November 2004 after having been notified by the late Mrs Van Deemter that the will had been signed by the deceased and that he requested that I collect same for safekeeping…

4.11 I furthermore confirm that the deceased was of sound mind at each of the abovesaid occasions when I consulted with him to discuss the amendment of his previous will and that he encountered no difficulty in reading the documentation I prepared. I may also add that the deceased was legally qualified himself and that he clearly understood the terms of the will and that I have no doubt that the deceased intended the said Annexure "VD3" to be his last will and testament…" (My emphasis).

[24] Mr Schoeman criticised the affidavit of attorney Gerhard Bester and argued that the attorney had not fully explained the "*discrepancy*"

referred to above. One must bear in mind however that at the time when the attorney deposed to the affidavit, he was dealing with the Applicants' attack on the mental capacity of the deceased at the time when the will was executed. He was not called upon to explain the notes on the draft will to be amended. It is however clear that clause 9.1 in the draft will was not merely repeated with the excision of the Applicants in the will in question. Clause 4.2 was also added thereafter in the will. I also interpose to state that clause 4.1 is the last paragraph on page 8 of the will and appears above the signature of the deceased and two witnesses. Clause 4.2 and the first portion of clause 5 appears on page 9 of the will which is similarly signed at the bottom thereof by the deceased and two witnesses. The remainder of the will thereafter continued over pages 10 and 11 with each page similarly undersigned. I find it so difficult to comprehend that the deceased with the mental capacity as described by attorney Bester and the Thirteenth Respondent and himself being legally trained would, on having read the first draft prepared by Gerhard Bester and having furnished further instructions in regard thereto, not again peruse the final draft and ensure that it accords with his instructions prior to having it signed. The will is extensive and detailed and was left with the deceased and he was in no rush to sign it and the attorney only collected it the next day.

[25] Considering all the evidence I am unable to find on a balance of probabilities that the will in question in the terms as reflected therein did not represent the will and intention of the deceased. According I find that the Applicants' application cannot succeed.

AD COUNTER-APPLICATION:

[26] In their amended notice of counter- application, the Second, Tenth and Thirteenth Respondent claim the following relief:

26.1 That the First Applicant, Mr Thomas Johan van Deemter, be removed from his office as executor of the estate of the late Mr Jan Van Deemter (Masters ref: 4677/2011). As already aforestated, costs are also sought on the scale as between attorney and client.

26.2 The amended notice of a counter-application was accompanied by a Supplementary Answering Affidavit which the Applicants objected to unless given an opportunity to reply thereto. Upon hearing this stance, the said Respondents withdrew the affidavit. I interpose to state at this stage that the Answering Affidavits of the relevant Respondents had been delivered together with their initial counter-application

(wherein the same relief has been claimed) as long ago as February 2014. The Applicants' Replying Affidavit had only been deposed to on 21 August 2014 and handed to me in court at the hearing of the matter. The Replying Affidavit also constituted the Applicants' Answering Affidavit to the counter-application. After the said Respondents have indicated that they do not wish to reply to the said Answering Affidavit to their counter-application and had withdrawn their Supplementary Answering Affidavit, I, in the exercise of my discretion and in the interests of the administration of justice and the considerations of finality, accepted the Applicants' aforementioned belated affidavit. It was not accompanied by any application for condonation and counsel conceded that he had no answer or instructions regarding the issue of condonation. I shall revisit this aspect hereinlater when dealing with the issue of costs .

[27] Returning to the issue of the counter-application, various complaints had been levelled against the First Applicant regarding the non-finalisation of the estate. Apart from the fact that the will had been lodged and the estate advertised (by attorney Gerhard Bester) and that SARS had apparently responded as being the only creditor of the deceased estate and that estate accounts had been opened,

very little had taken place in respect of the administration of the estate.

[28] The Applicant in the belated Opposing Affidavit to the counter-application blamed the attorney Gerhard Bester whom he had appointed as agent and who he had replaced in June 2013 with one P P Van der Westhuizen without furnishing any particularity as to what instructions he had furnished or what steps he had taken himself. An extension for the submission of a liquidation and distribution account was requested and consented to by the Master up to 30 September 2014. This was presumably due to the fact that the present application was pending. The present application was only launched in December 2013.

[29] Apart from the lack of activity and the lack of any detail regarding the current state of the estate and what it comprises of, there is one further aspect referred to in the papers. In paragraph 27.5 of her Answering Affidavit, the Thirteenth Respondent in support of the counter-application makes the following statement:

> "*The Honourable Court will appreciate the fact that the First Applicant's failure to furnish copies of the said bank statements is of great concern as we suspect that the First Applicant has already in terms of the will (the validity which he*

disputes) distributed funds to heirs without having even lodged a liquidation and distribution account for the Master's approval."

[30] The First Applicant's reply hereto is somewhat disturbing. Faced with an accusation of impropriety he simply deals with this accusation as follows:

"*I deny that I failed to furnish the Master with copies of the bank statements of this account. The bank statements have been furnished to the Master. I submit that interim advances to heirs and legatees are allowed if the executor is convinced that the estate is solvent and if the liquidity of the estate permits. This issue will be addressed in legal argument.*"

[31] Of course Mr Schoeman, having not been furnished with any further instructions, could not advance the matter further during argument. If the aforementioned statement by the First Applicant does not amount to an implied admission of the accusation, then his failure to pertinently deal therewith, certainly gives rise to a negative inference, namely that he had indeed made such payments. I am of the view that the accusation is one of those instances where, if it is placed in dispute, a party was required to "*seriously and unambiguously*" address the fact said to be disputed.

See: **Whightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008(3) SA 371 (SCA) at par. [13]

[32] I am also concerned about the manner in which the First Applicant, when acting in his personal capacity, attacked, not only the validity of the will but the alleged conduct of the deceased's surviving spouse (an aspect which was not pursued with once the Answering Affidavit had been delivered). I am of the view that I need not make a finding that the First Applicant is not a fit and proper person to act as an executor of the deceased's estate but it is sufficient if I am satisfied that it is undesirable that he continues to so act. Having regard to the emotive content of issues regarding the deceased's estate and even more so as exemplified by the present application, I am of the view that it would be undesirable for the various parties and heirs to have the estate administered by the First Applicant.

[33] As a last defence, Mr Schoeman argued that the counter-application should not be entertained due to the fact that it had not been served on the other Respondents. It is clear that none of the other Respondents in any event opposed the principal relief and presumably then abided by whatever might happen regarding the deceased's estate. I am furthermore of the view that the other Respondents' concerns would simply be to the effect that the estate

should be properly administered. The lack of notice to them of the counter-application I do not find to constitute a fatal non-joinder.

[34] Having regard to the manner in which the Applicants' attack on the will and on the conduct of the surviving spouse has been set out in the Founding Affidavit and having regard to the absolute tardiness with which the Applicants have approached the opposed application with little regard to obtaining finality thereof (to the extent that the relevant Respondents had to enrol the matter), I am of the view that I am entitled to exercise my discretion in favour of a punitive costs order against them.

[35] In the premises I make the following order:

1. The application is dismissed with costs including the costs of the counter-application, both on the scale as between attorney and client.

2. The First Applicant, Mr Thomas Johan Van Deemter, is removed from his office as executor of the estate of the late Mr Jan Van Deemter (Masters ref: 4677/2011).

3. The Master of this Court is requested to urgently see to the appointment of a replacement executor for the abovementioned deceased estate.

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N DAVIS
ACTING JUDGE OF THE
HIGH COURT