REPORTABLE

CASE NO.: SA 05/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FREDERICK ANTONIE VERMEULEN	**First Appellant**
ENGELA MARIA MAGDALENA ELIZABETH RABALT	**Second Appellant**
and	
GABRIEL JACOBUS VERMEULEN	**First Respondent**
PETRUS JOHANNES VERMEULEN	**Second Respondent**
CORNELIUS JOHANNES DE KONING	**Third Respondent**
MASTER OF THE HIGH COURT NO	**Fourth Respondent**
REGISTRAR OF DEEDS NO	**Fifth Respondent**
GABRIEL JACOBUS VERMEULEN	
(birth date 13/09/1984)	**Sixth Respondent**
GABRIEL JACOBUS VERMEULEN	
(birth date 31/08/1984)	**Seventh Respondent**
GABRIEL JACOBUS VERMEULEN	
(birth date 30/04/1987)	**Eighth Respondent**

Coram:	SHIVUTE CJ, MAINGA JA and MTAMBANENGWE AJA
Heard:	**5 June 2013**
Delivered:	**31 March 2014**

APPEAL JUDGMENT

MTAMBANENGWE AJA (SHIVUTE CJ and MAINGA JA concurring):

[1] This matter comes before us on appeal against the judgment of the High Court.

[2] In a defended action in the High Court the two appellants, as first and second plaintiffs, sued the respondents, as first to eighth defendants. The two appellants, the first and second respondents are siblings, all offspring of the marriage of one Gabriel Jacobus Vermeulen to one Fransina Catharina Elizabeth Vermeulen (néé van der Merwe) (the parents) and the sixth to eighth defendants are their grandsons.

[3] The family tree produced in the trial as exhibit 'L' (the family), shows that the second appellant is the eldest child and only daughter while the first appellant, second and first respondents respectively are the first, second and third sons of the family; the grandsons bearing the same names are sons of first appellant, second and first respondents.

[4] Both parents are deceased, the husband predeceasing the wife. Before she died, Fransina Catharina Elizabeth Vermeulen (testatrix/deceased) executed two wills, the first on 1 October 1994 and the second, replacing the first, on 18 August 2000. The appellants claimed in their action:

‘1. An order declaring the will of the testatrix dated 18 August 2000 to be null and void.

2. An order declaring that the will of 1 October 1994 is the valid will of the testatrix.

3. Cost of suit against such defendants who oppose the action.

4. Further and/or alternative relief.’

The claim was based on the allegation that:

> ‘At the time of the execution of the will – the 18 August 2000 will – the testatrix was not in a mental state fit to execute a valid will, in that at the time she was suffering from Alzheimer’s disease / dementia to such a degree that she was unable to appreciate the nature or contents of her acts.’

[5] Needless to say that respondents denied that allegation, and referred to a number of incidents or reasons, on which they relied to refute it. The court *a quo* correctly identified the issue to be decided as whether the deceased was so mentally incapacitated at the time when she executed the disputed will, that she could not legally do it, i.e. that she did not possess testamentary ability at the time, and referred to s 4 of the Wills Act 7 of 1953 which is applicable in Namibia regarding the competency to make a will and the burden of proof.

[6] At the outset it is necessary to briefly outline the background to this unfortunate family feud and the circumstances surrounding the making of the 18 August 2000 will (the disputed will). I call it a family feud because the family, apparently formerly closely knit has, as result, been divided into two camps beset

with mutual suspicion, recrimination and distrust and, as the court *a quo* remarked, because of the legal battle over the assets of the deceased mother, the case has proved opposite of the common adage blood is thicker than water.

[7] Before the death of their father the parents were apparently rather wealthy and owned several farms in the Outjo area in Namibia. The parents made a joint will on 21 October 1970 and when the father (Gabriel Johannes Vermeulen) died in 1992, the mother inherited all the assets in the joint estate.

[8] In dealing with the evidence in this matter, I shall refer to the Vermeulen siblings by their first names or nicknames. The first appellant is known as Frikkie while the first and second respondents are known as Gawie and Wollie respectively. During his life the father assisted the second appellant to purchase a farm Onduri, which farm was registered in the name of her ex-husband, Mr Jan Oelofse. He also gave her 150 cows and 150 calves to start farming with. Later he assisted Gawie to take over the loan on the farm Onduri as well as the cattle. Gawie later sold that farm and he and his children went to stay with the deceased at the farm Chaudamas.

[9] At the time, Frikkie was living and working in South Africa where he started a trucking business. Gawie also got involved in that business and the father provided certain funds to get the trucking business off the ground. The business, however, proved to be a failure. The father was, apparently, not reimbursed.

[10] Frikkie returned to Namibia in 1992 with the trucks which were then sold. There is a dispute regarding the price obtained for the trucks and Gawie claims that he suffered some financial losses in connection with that trucking business.

[11] Frikkie commenced business as a garage owner and was also assisted by the father to purchase a house in Outjo. That house was originally earmarked to go to Hannes, the youngest child who was subsequently given a house in Henties Bay by the mother. He died in 2004.

[12] Wollie was also assisted by the father to acquire farm Dawarob, where he had farmed. The parents lived and farmed at farm Chaudamas.

The deceased

[13] The deceased, as described by all the children, was a very strong and capable character who was the right-hand of the husband in their farming operations. She was not only a good farmer herself but also an excellent hunter, mechanic, cook, baker and botanist. She was a bisley shot, could repair anything on the farm herself and was a very neat person who kept everything in her house neat. Her garden at the farm was admired by everyone who saw it and even tourists would stop to admire it. She regularly on Monday mornings drove her grandchildren to school in Otjiwarongo starting early in the mornings and would pick them up on Fridays. In brief she did everything for herself. Above all she was a woman who expressed herself forcefully, fearlessly and honestly. She was commonly known in the vicinity as the ‘Iron Lady of Outjo’. She did not allow herself to be dictated to and spoke her mind if anything bothered her. It is clear

from the testimony of Frikkie and Engela and Wollie that the deceased and her husband always treated their children in a fair and equal manner and would not allow one child to benefit to the detriment of another. That this was the conduct of the parents is borne out by their joint will of 1970 (the 1970 will) and the deceased's will of 1994 (the 1994 will).

[14] The 1970 will, executed by the parents on 21 October 1970, shows what the parents' wishes were. It provided, *inter alia*:

> 'In the event of our simultaneous death or if we die under such circumstances that in terms of the Law it is considered that we died simultaneously, then we bequeath our entire estate in equal shares to our children or their offspring by representation per stripes.'

The 1994 will of the deceased was executed on 1 October 1994 (this is not in dispute). In this will the deceased made a disposition of her assets as follows:

> '(a) My farm property, Chaudamas, to my son FREDERIK ANTONIE VERMEULEN.
>
> (b) To my daughter ENGELA MARIA MAGDALENA ELISABETH ROUX:
>
> i) my fixed property, erf 1222, Hentiesbaai.
> ii) all my personal belongings.
> iii) all furniture and household goods of the dwelling house on farm Chaudamas.
> iv) the red 1993 Toyota vehicle
>
> c) The fixed property, erf 12, Outjo, to my son JOHANNES MARTINUS VERMEULEN.

d) All implements, tractors and tools in equal shares to my sons FREDERIK ANTONIE VERMEULEN and PETRUS JOHANNES VERMEULEN.

e) All livestock in equal shares to my children ENGELA MARIA MAGDALENA ELISABETH ROUX, FREDERIK ANTONIE VERMEULEN, PETRUS JOHANNES VERMEULEN, GABRIEL JACOBUS VERMEULEN and JOHANNES MARTINUS VERMEULEN.

f) The entire residue in equal shares to my children ENGELA MARIA MAGDALENA ELISABETH ROUX, FREDERIK ANTONIE VERMEULEN, PETRUS JOHANNES VERMEULEN, GABRIEL JACOBUS VERMEULEN and JOHANNES MARTINUS VERMEULEN. Failing them, then to their descendants by representation per stirpes.'

[15] There is undisputed evidence by Wollie, that he accompanied the deceased to the bank manager after he urged her it was time to draft a new will, that 'before my father's death he discussed with me who will inherit what' and that when they went to the bank manager 'my mother told me that I should inform the bank manager how the will should be drafted as your late father explained to you how the will should look. You are at least honest' and that she trusted him. It is also common ground that while every child was assisted to acquire a farm only Frikkie was not so assisted; it was the whole family's understanding that he would inherit farm Chaudamas.

The Law

[16] Before turning to discuss the evidence adduced in this matter, it is necessary to refer to some authorities regarding the approach to the evidence in

cases of wills generally. In the Australian case *Nicholson and Others v Knaggs and Others* [2009] VSC 64 Vickery J stated at para 41:

> 'In the end it is for the Court, assessing the evidence as a whole, to make its determination as to testamentary capacity. . . . The Court must judge the issue from the facts disclosed by the entire body of evidence. . . . The manner in which she gave her instructions, the content of those instructions, the setting in which the instructions were given and the outcome of enquiries made by the solicitor acting in the matter, all assume importance.' (My emphasis.)

In *Lewin v Lewin* 1949 (4) SA 241 (TPD) Roper J said at p 253:

> 'The Courts are . . . almost daily called upon to decide disputed issues of fact without the aid of scientific proof. When that is the case they must take such evidence as is put before them and decide the issue upon the probabilities.'
> (Again my emphasis.)

[17] In para 12 of the respondents' heads of argument reference is made to the principles that should apply on appeal, including the assessment of the evidence of witnesses, their demeanour. Of particular relevance is what respondents' counsel said with reference to *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A). In that case at pp 705-6 Davis AJA summarised the principles which should guide an appellate court in an appeal purely upon facts as follows:

> '1. An appellant is entitled as of right to a rehearing, but with the limitations imposed by these principles; this right is a matter of law and must not be made illusory.

2. Those principles are in the main matters of common sense, flexible and such as not to hamper the appellate court in doing justice in the particular case before it.

3. The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.

5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.

6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.

7. Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by him.

8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons

as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and to come to its own conclusion on the matter.

12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.

13. Where the appellate court is constrained to decide the case purely on the record, the question of *onus* becomes all-important, whether in a civil or criminal case.

14. Subject to the difference as to *onus*, the same general principles will guide an appellate court both in civil and criminal cases.

15. In order to succeed, the appellant has to satisfy an appellate court that there has been "some miscarriage of justice or violation of some principle of law or procedure" '. (My underlining for emphasis.)

Departure from intentions in disputed will

[18] The disputed will shows a radical departure from deceased's intentions as reflected in the 1994 will. Whereas in the 1994 will she bequeathed farm Chaudamas to Frikkie, all her personal belongings, all her furniture and households goods of the dwelling house on farm Chaudamas and her red Toyota motor vehicle to Engela Roux (now Engela Rabalt) her eldest child and only daughter, the second appellant, the fixed property Erf 12, Outjo to her son Johannes Martinus Vermeulen (now late), all implements, tractors and tools in

equal shares to Gawie and Wollie, all livestock in equal shares to all her five children and the entire residue of her estate in equal shares to all her five children, in terms of the disputed will Gawie alone inherits her entire estate including all her movables, apart from a few rifles.

[19] The court *a quo* sought to explain the remarkable change of intention on deceased's part when the learned judge stated at para 58 of his judgment:

> 'An incident which occurred in approximately July 2000 would in my opinion provide the reason why the deceased made the disputed will of 18 August 2000. It is common cause that a meeting was held at Chaudamas during approximately July 2000, which meeting was attended by the first and second plaintiffs, second defendant and the deceased as a result of the latter's dire financial position.' (Underling is mine.)

Engela was not at that meeting at all. The learned judge *a quo* thus misdirected himself as to the facts in this matter.

[20] I find this misdirection very important, in that it apparently led to the court *a quo* glossing over the consideration of -

(a) the circumstances surrounding the making of the disputed will;

(b) the conduct of the deceased during the giving of her instructions to the lawyer who drafted the will, Mr de Koning;

(c) the evidence-in-chief of Mr de Koning as to what transpired during the taking of his instructions, as compared with his evidence under cross-examination; and

(d) the conduct of first respondent during the giving of instructions for drafting the disputed will and the contemporaneous drafting of an agreement of sale of the farm Chaudamas by the deceased to the first respondent.

The conduct, both of the deceased and Gawie during the giving of the said instructions to Mr de Koning and Mr de Koning's evidence on that issue needed, in my opinion, to be more closely scrutinised in light of many factors relevant to that issue. I shall, later in this judgment, endeavour to show why. In the absence of the testatrix 'circumstantial evidence usually assumes great importance' (see *Nicholson*'s case, *supra*, at para 43).

[21] In my opinion a less obvious misdirection by the court *a quo* is the fact that in dealing with the evidence, the learned judge made no definite finding as to the credibility of witnesses. This is shown for instance, in the way the learned judge gave a blanket acceptance of the evidence of respondents' witnesses without properly analysing their evidence. This to me seems to be a very significant omission. For the moment suffice it for me to repeat what the Full Court of the Supreme Court of Queensland said in *Bool v Bool* [1941] St R Qd 26 at 39 (as referred to by Vickery J in *Nicholson's* case, *supra*, at para 573) namely:

> 'A great change of testamentary disposition evidenced by a departure from other testamentary intentions long adhered to always requires explanation.'

[22] Before I proceed to analyse the evidence adduced in this matter, it is necessary to refer to three more cases. In *Nicholson's* case, *supra*, Vickery J also referred to what was said in *Kantor v Vosahlo* [2004] VSCA 235 at para 22. Discussing the burden of proof in cases of disputed wills, the learned judge in that case (Ormison JA) expressed himself as follows:

> 'For purposes such as the present, where the Court has to be satisfied affirmatively of the capacity of the testatrix to make a valid will, the burden of proof or, more precisely, the standard of proof therefore remains the same, that is, upon the balance of probabilities, but the Court is not to reach such a conclusion unless it has exercised the caution appropriate to the issue in the particular circumstances by a vigilant examination of the whole of the relevant evidence. If that process results in the Court being affirmatively satisfied that the testatrix had the necessary testamentary capacity at the appropriate time to make the propounded will, then a grant of probate should be made.' (My emphasis.)

The learned judge in that case, after referring to another case of the High Court *Boreham v Prince Henry Hospital* [1995] 29 ALJ 179 where at 180 the three judges dealt with the burden of proof, went on to say:

> 'As is made clear, in approaching such cases by applying a closer scrutiny of the evidence than is usual in the course of reaching a decision on the balance of probabilities, the Court is not imposing a higher standard of proof. The standard remains that of affirmative satisfaction on the balance of probabilities. What is required, however, is a consideration of the evidence as a whole coupled with the application of a degree of caution which is appropriate to each factual issue which is placed under scrutiny, before applying the standard.' (Underling for emphasis.)

In *Louwrense v Oldwage* 2006 (2) SA 161 (SCA) Mthiyane JA stated at 167I-168C (paras 14 and 15 (regarding different versions of the evidence in a case):

> 'On a proper approach, the choice or preference of one version over the other ought to be preceded by an evaluation and assessment of the credibility of the relevant witnesses, their reliability and the probabilities. (*See Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*.)[1] Unfortunately it is not apparent from the record that this approach was adopted by the Judge *a quo.* I do not think this is a case where, sitting as a Court of appeal, we should defer to the trial Court's findings of credibility because of the peculiar advantages it had of seeing and hearing the witnesses. Even if such findings were in fact made by the trial Court, I do not think that we are precluded from dealing with findings of fact which do *not* in essence depend on personal impressions made by a witness in giving evidence, but are rather based predominantly upon inferences from the facts and upon the probabilities. In *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another*[2] this Court, *per Zulman JA,* said:
>
> > "Although Courts of appeal are slow to disturb findings of credibility they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour but predominantly upon inferences from other facts and upon probabilities. In such a case a Court of appeal with the benefit of an overall conspectus of the full record may often be in a better position to daw inferences, particularly in regard to secondary facts." ' (Emphasis emphasis.)

It follows therefore that the factual evidence presented to the court *a quo* merits reconsideration and re-evaluation.

[23] I consider that the approach enunciated in these cases should be adopted in dealing with the evidence in this case, notwithstanding the fact that it is the

appellants who bear the burden of proving lack of testamentary capacity. The circumstances of this case call for such an approach.

The evidence adduced for the appellants

The evidence of Engela Maria Magdalena Elizabeth Rabalt (formerly Roux)

[24] On 19 April 2004, on the application of Engela and Frikkie, the High Court declared the deceased incapable of managing her own affairs. This came as a result of a recommendation by Ms Susan Vivier appointed as curator *ad litem* on the same application. Before she made the recommendation, Ms Vivier consulted with among others the deceased and Engela. Frikkie deposed to the founding affidavit in the said application and Engela the confirmatory affidavit. In para 6 of the founding affidavit Frikkie stated:

> 'With the benefit of hindsight I now realise that soon after the death of my father my mother's mental well-being began to deteriorate. I do not think any of us children observed the aforegoing, probably due to our inexperience in this regard. It has only been over the past three years or so that particularly I and my sister, Engela have noticed a marked deterioration in the patient's mental capacity and capability of managing her own affairs.'

Engela's evidence as well as Frikkie's thus concerns the hindsight observations they made of the deceased's action (conduct) 'over the past three years or so'. Engela related her observations to Dr Reinhardt Sieberhagen, a psychiatrist who examined the deceased during November 2003 on the request of Dr F Burger, the deceased's general practitioner. Engela related the same observations to the curator *ad litem.*

[25] Engela gave a description of the deceased's capabilities and competencies that are echoed in the testimony of nearly all her other children. She testified that the deceased and herself had a very good and close relationship; they never quarrelled and there never was any problem between them; they bathed together; and talked a lot ('we could not talk enough') as she put it. They had this relationship until the end. Louisa Jacoba Vermeulen, Wollie's ex-wife, who later testified on respondents' behalf, confirmed this.

[26] Engela continued to testify that her parents 'did not allow themselves much, because they always said they worked hard and that they were doing it especially for their children, they always believed that they wanted to treat all their children the same way'. The she testified about how their father assisted each child to acquire a farm, giving each livestock to farm with, except Frikkie who (which is common cause), the father said 'must inherit Chaudamas one day'.

[27] She further testified that all the children took out a life insurance policy on the deceased's life and made arrangements as to how much they would pay per month; the payments were to be made into the deceased's bank account; and 'Frikkie and Wollie decided that they would pay hundred-and-fifty Rand (R150), me and brother Hannes we decided that we will pay two hundred-and-fifty Rand (R250) a month and Gawie decided that he will have a policy and pay six hundred Rand (R600) a month'. She said that all the children made their monthly payments except for Gawie whose instalments were deducted from the deceased's account. Gawie was not working and was staying with the deceased at Chaudamas farm at that stage. She said that whenever first respondent was asked about this 'he just

got angry'. In substance Frikkie corroborated this evidence and first respondent did not deny it.

[28] Engela testified that in November 1999 when the deceased came to visit her in Swakopmund she observed that her suitcase was not packed properly, the clothes in the suitcase were not the type of clothes 'she wears to town and she did not talk much'. Asked why that was important to her, she said:

> 'My mother was very neat, her suitcase was so precisely packed and that was very strange to me and also me and she bathed together and talked a lot and I poured the water in the bath and when she took off her clothes I saw that she had a lot of panties on and she climbed into the water and without washing, she just climbed out and that was strange to me and the whole time she ate a lot and she was not a person who ate a lot.' (sic)

Asked why it was strange that the deceased did not talk much, she replied:

> 'It was strange because me and she (sic) we could not stop talking, we were always laughing and I thought, "oh, maybe my mother is old now, I do not know what is wrong." '

[29] She further testified that in January 2000 '. . . it was after the Millennium, I went to the farm. As usual she will go to the car and will be very happy to see us and she did not talk much . . .'. She said that previously:

> 'She was very happy to see us, but then she was not the same as always.'

Asked to 'differentiate' between how she was before and how she was that night when she arrived there, she replied:

> 'She did not talk much, just looking at us, "hallo", not as always. She was always so happy to see us but not that night and always she had cooked food for us when we came from Swakop and then there was no food and that was also strange to me and she always did the cooking by herself, nobody else cooked in her kitchen and then I could cook in her kitchen. That was also strange to me and I realised that my mother did not bath because the geyser was broken and she always could fix the geyser in Henties Bay and she could not fix the gas geyser in her house. Her house was not as always neat and precise. Her cupboards were not as neat as always. She was painfully precise in her home and that was not my mother, she was not like that.'

Asked about her observation about the garden on that occasion i.e. 2000, she said:

> 'My mother's garden, the grass was long, the flowers were dry and I could not believe what I was seeing because my mother always loved her garden, so she did not water the garden and no more cut the grass and she did not worry about that. That was strange to me.'

[30] Engela also testified about a second visit to the deceased in 2000. She said on that occasion Gawie asked whether Engela wanted to buy a camp on the farm because they had financial problems. She was not interested in doing so but realising they had financial problems, she offered to assist and asked him how much they needed and he said three thousand five hundred (N$3500) would be enough. She then made the first monthly payment 'into their bank account' in June

2000. She said when she had asked to see their financial statements Gawie had said that he had cancelled the deceased's short-term insurance.

[31] In July 2000 she went back to the farm and 'the grass was still long and the geyser was still not working, and I was very angry and I phoned my brother Frikkie and my brother Petrus and told them to come and repair my mother's geyser'. She continued:

> 'On that stage Gawie lived with her on the farm. So, she did not bath and so it does not bother her because she did not bath, the water was cold and I could smell that my mother was not as always, I could smell her and I looked and when I was in her room, I smelled something not very nice and I looked and there was, in Afrikaans you call it a pot that you put underneath a bed. . . . "Chamber pot" yes and which was not emptied for very, very long and that was in need for emptying. I found in her cupboards open tins of condensed milk and jam and I asked her why did she put the tins there. She said to me that somebody will steal it.'

Asked if she enquired 'about their finances and the bank statements and so on', she replied:

> 'I asked my mother are they okay now, is (sic) things better now because I did pay my first payment and she did not worry about that and I asked them the bank statements but no one gave any statements to me. So, I left it there but it was strange to me that my mother does not worry about the finances.'

She said she had continued to pay the N$3500 further until December 2001. Documentary proof of payments she made was produced as exhibits 'Q[1]' to 'Q[13]' showing, *inter alia*, deposits by her into the deceased's account.

[32] Engela testified further that in May 2001 the deceased was with her in Swakopmund. The next day was her husband's birthday. Because she had a lot of computer work to do, she asked her mother, who she knew could bake very well, to bake a cake after she gave her a recipe book and all the things needed and the mother could not bake a cake and kept on asking what she should do which was strange to her. 'It was a whole flop.' That time she went with the deceased to Walvis Bay and when she asked her to look for a number 'in her telephone book' she could not find it. It was also strange to her. She also gave the deceased money to go one block straight down the street and the deceased got lost and she had to send all the people from her shop to look for her. Back home, the deceased tried to hit her parrots with a remote control. She was not like that before. Before she liked birds, dogs, cats and any animal. The court asked how the deceased got to Swakopmund and Engela said:

> 'I could not remember at the moment how did she get there.'

She later, in cross-examination, said she could not remember how she got there 'because sometimes I go and get her, sometimes Gawie brings her to us or Wollie brings her'.

[33] It was Engela's further evidence that the deceased stayed with her most of the period 2002 to 2004 except during the period her husband was in hospital and she asked Frikkie to take her and look after her. Frikkie then took her to the farm. During this period, she said:

> 'It was not easy to look after her because she was very aggressive. I had to bath her, she could not do anything for herself and she ate the whole day and she could not sit still and she could not talk to me. She could not relax and sit and look at the TV, she just goes up and down, up and down.' (sic)

Louisa Vermeulen told Dr Sieberhagen more or less the same thing.

Engela continued to say that in 2004, the deceased stayed with her and in October 2005 '. . . I could not manage to look after my mother anymore, so first I tried to put her in an old-aged home in Walvis Bay but they did not want people with Alzheimer's and then I put her in the J G Potgieter Alzheimer Home'.

She paid for that as well as for everything else her mother needed. It cost her approximately one thousand Namibian dollars (N$1000) a month extra. In December 2001 there were rumours that the deceased had sold the farm to Gawie and Gawie had ceded the policy which all the children except him had been paying for his bank overdraft. Then she immediately stopped paying the N$3500. She confronted the deceased and Gawie about the rumours and both denied the rumours.

[34] The court *a quo* allowed evidence as to what Engela was told by her mother she would inherit. This the court did, subject to argument, it said. Mr Schickerling, who appeared for the respondents in the court below, had objected to the evidence as hearsay. Finally in her evidence-in-chief, Engela was taken through the provisions of the two wills. These two wills were both produced as exhibits and it is not necessary to repeat her evidence in that regard. However, I should

mention that Engela was asked if she knew any reason why the deceased disinherited her in terms of the disputed will and she replied:

> 'No because we had a very, very good relationship, we never quarrelled and that was very strange to me. She loved me a lot, why would she do that? That was impossible for me.'

She also said from 2000 when the deceased executed the disputed will till she passed away in 2007 the deceased never mentioned anything to her, nor did Gawie, about the 2000 will.

[35] In the end she was asked to comment on what Louisa Vermeulen would say, namely:

(a) that deceased never went to a doctor for a personal examination without a family member being present;

(b) that the reason why deceased wore four sets of underclothes is because she did not want to wear step-ins; and

(c) that she, Louisa and deceased had a very close relationship.

She denied all these claims and gave reasons why she denied them. As mentioned before, Louisa Vermeulen was formerly the deceased's daughter-in-law.

[36] Engela was subjected to a long cross-examination by respondents' counsel. This cross-examination focused mainly on the various incidents she testified to as showing deceased's diminishing mental capacity before she executed the disputed will. In the main, counsel did not seem to deny that the incidents happened, but attempted to show that they happened on different dates or to explain them away. In my opinion Engela demonstrably refuted the said dates or explanations by, for example, relating the incidents she described to such historical events as her husband's birthday and the millennium. The sweeping suggestion was made by respondents' counsel that all that Engela related about deceased's strange behaviour since 1999 was a concoction or an afterthought. She denied the suggestion. She and Frikkie denied the claim that Gawie worked for the deceased, that 'sometimes he attended to selling her meat products when she could not do it'. When he came to testify, Gawie repeated these claims and seemed to suggest that the deceased was remunerating her for the work he did for her by paying the school fees for his children, by regularly taking them to school in Otjiwarongo and by paying his insurance premiums. Engela said the deceased had 'no choice but to do that'. In fact when Gawie came to testify this claim developed into an assertion that he was in fact running the farm for the deceased and that deceased was the one who depended on him financially. If this evidence is to be believed, this claim would amount to saying the deceased was no longer capable of managing her own affairs at least to the degree that she was known to do before. Admittedly, Gawie was experiencing financial problems of his own which problems had compelled him to sell farm Onduri. That he had become heavily dependent on the deceased in several respects is quite clear and his siblings resented this situation.

[37] Engela was cross-examined on the incident when she said she discovered an unemptied chamber pot under the deceased's bed in July 2000. Without denying the incident, the questioning ended with counsel saying 'that particular person who was present during the incident was the first defendant'. She denied that he was present. She denied that the particular incident happened in December 2003 'after your late mother was diagnosed with Alzheimer's and you came to the farm to fetch her'.

[38] She denied being present at the meeting 'in July 2000' between the deceased, Frikkie and Wollie where Wollie and Frikkie tried to persuade the deceased to sell Chaudamas to Frikkie'. She said the meeting where she was present was 'at Frikkie's house after my mother was diagnosed with Alzheimer's'. This, she said, would be in 2004. The deceased did not tell her about the July 2000 meeting with Frikkie and Wollie; she did not have a discussion with the deceased 'about possibly buying a camp on the farm'.

[39] Referring to an earlier visit to the deceased in January. Engela categorically denied the suggestion that it was in January 2001.

She also denied that the incident when the deceased failed to bake a cake for her husband's birthday was in 2004 instead of 31 May 2001 as she had testified. At that time she did not know that the deceased had Alzheimer's disease, she said.

[40] In an attempt to explain the cause of his financial problems at the time Gawie moved to stay at Chaudamas farm, the respondents' counsel put various

reasons, why Gawie sold Onduri farm and moved to Chaudamas. Many of the reasons were such as Engela could not be expected to have intimate acquaintancy with. Engela, however, eventually said:

> 'I cannot tell you what was the reason for his financial problems, but it is strange to me that since my mother was already on her feet and since he moved in with her, there was also financial problems, that is my problem with that.'

It is significant that all the other children of the deceased, including, admittedly, Wollie, were concerned about the Gawie's dependence on the deceased and felt he should find work instead of depending on the old lady. They did not mince their words, and as I will try to show later in this judgment, this attitude of dependency on his part had a significant bearing as to the setting under which deceased purported to execute the disputed will.

[41] Engela was asked about the incidents in November 1999 when she said:

> '(a) deceased did not talk as much as before;
>
> (b) deceased ate a lot unlike before;
>
> (c) deceased got in and out of the bath without washing herself; and
>
> (d) deceased wore many panties.'

She was asked why she did not talk to Louisa about these since Louisa would say she, Louisa, and the deceased had a very close relationship. In her reply she said she told Frikkie about it, denied that her 'mother and Louisa Vermeulen had an extremely close relationship . . . Because as I told you, in 1995 she phoned me

and she asked me to ask my mother to take her cattle off the camp and that was me and my husband's wedding . . . .'

She went on:

> 'And also Louisa talked to me about that and that is why I told her that "please Louisa, talk to my mother about it, you know Louisa, that my mother and father they helped you and Wollie a lot, you must help them because they helped you. If you and your husband still stayed in Windhoek you would still have nothing if it was not for my parents who helped you." '

Counsel's comment after this answer was not that Louisa would deny this but to minimise it as a single incident. Counsel then said:

> 'I put it to you that what you are telling this Court of the events in 1999, 2000 and 2001 is just an afterthought. These are facts which you had concocted afterwards to stretch the timeline to before the date on which your later mother executed her Last Will and Testament. That is why there is no mention of any of this.'

The people Engela is said not to have mentioned in the incidents in 1999 to 2001 are Louisa, the respondents in the application for curatorship and Dr Sieberhagen. Engela's simple and telling answer to what counsel put to her was:

> 'Sir, but before that none of us did know about that testament. I did not know about any testament.'

She later said that when she went back to the farm after the millennium 'then things looked to me very, very strange and that is when, after I talked to Frikkie about that, that I said to him 'jislaaik Frikkie, that is happening and that is when

Frikkie said ‘jong, there is something big strange’. She also queried why respondents who were staying with the deceased never mentioned anything knowing she was the only daughter.

She was referred to para 6 of the first appellant’s founding affidavit sworn to on 21 January 2004, which I have already quoted above, and questioned and answered as follows:

> ‘Q: During the last three years or so and from 2004 that would bring us to 2001 or so.
> A: Yes.
>
> Q: So, how do we get from there now to 1999? That is what you said under oath?
> A: You see, all the things were strange of my mother, but I thought my mother is just getting older.’

This, in my opinion, was a matter for argument and therefore, need no comment at all.

[42] Against what Engela said of the deceased’s illness, the respondents’ case was then put to her (that they would testify) as follows:

1. that the first incident they (particularly Louisa Vermeulen) recalled which could be linked to the deceased’s illness was in December 2002 ‘when you had sent her to the bank and she had gotten lost’;

2. that the seventh and eighth respondents would testify that as late as 2003 the deceased did their washing and ironing, she packed their suitcases neatly and impeccably;
3. that as late as 2003, the deceased did her own income tax returns; these were done by first respondent and the deceased jointly;
4. that as regards errors made in her tax returns various cheques since 1987 will be produced to show the deceased made spelling errors;
5. that Juanita will testify that in 2001 the deceased's garden was still so beautiful that some tourists who gave her a lift even stopped to take photographs of it;
6. that the seventh and eighth respondents would testify that up towards the middle of 2003 the deceased still drove them to school every second Friday and every second Monday approximately a hundred kilometres from the farm to Outjo;
7. that the incident of the chamber pot happened in December 2003 after Dr Sieberhagen had diagnosed the deceased with Alzheimer's; and
8. that the deceased's instructions were very clear as to what she wanted as far as the terms of the agreement were concerned and as far as the terms of the last will and testament were concerned.

[43] Significantly Engela retorted immediately and emphatically to the last suggestion (No. 8 above):

> 'That definitely my mother did not, that is impossible that my mother forgot me because I am her only daughter and she will never ever if things were normal, she will never ever forget me.'

As for the rest, Engela refuted or denied all of them, that is to say:

(a) all that respondents would say as to whether the incidents she related happened or did not happen and when she said they happened; or
(b) the explanation that respondents would make of the various incidents; or
(c) respondents' version as to, for example, when and why on some occasions she visited her mother at the farm Chaudamas.

[44] The only aspect of respondents' case that Engela seemed to agree with was when counsel put it to her that 'by 2000 your mother was in severe financial dire straits . . . she had severe financial problems?' She answered:

> 'Yes, that was for me also a problem, that is why I decided that I will help them and Gawie said to me that three thousand five hundred Rand (R3 500-00) will help them and that he has already stopped my mother's short-term policy and also her policy for the Rand overdraft and her medical that he stopped and he said to me yes, then it will be better with him. That is why I went back to the farm from time to time to see is things better, can they cope and that is why I also took groceries with me when I went to the farm and when I asked my mother, "are you okay, is things better", then it did not bother her.' (sic)

This evidence elicited in cross-examination was never denied.

[45] Engela disputed all the assertions contradicting her own evidence, or said at some particular dates she was not with the deceased. It is my view that the dispute can only be resolved after the analysis of the evidence as a whole.

However, I think Dr Sieberhagen's evidence about the stages of development of and effect at various stages of the Alzheimer's disease is very relevant in this regard, and in the end, the determination of where the truth lies will largely depend on assessing the probabilities.

The evidence of Frederik Antonie Vermeulen (Frikkie)

[46] Frikkie gave evidence similar to Engela's in a number of respects. When asked if he had noticed anything about the deceased's behaviour, he said:

> 'First I noticed nothing, but after we sent her to Dr Burger and Dr Sieberhagen, everything fell into place what happened over the past years.'

Asked what he meant by that, he said:

> 'First my mother had an SMBA account; it is a *koopkrag rekening*, in Outjo. The lady phoned me and told me that there was not enough funds into my mother's account, so I paid that account at that time and the next month there was also a problem with her payment, so I did that payment too and it was not like my mother to buy something which she cannot afford. It was very very strange. My mother never paid something which she cannot afford. . . . That was in June and July 2000. . . . The one payment I did was on 2000.07.03, (he said referring to some exhibits . . .) and the other document, number 7, it is on the year 2000.06.12.'

This, he said, never happened before '. . . my mother was always perfect on that'.

[47] Frikkie mentioned a number of other incidents which he said were strange to him and why:

1. On 20 June 2000 she drove her vehicle without water till the engine seized – the mother was a good mechanic.
2. The incident when she hit a donkey. Before the mother never made accidents, she was a very good driver, it was in October 2000.
3. The deceased's behaviour on the road, when a Mr Prinsloo phoned him, the deceased had put petrol in a diesel engine and did not remember where she did this. The behaviour of the deceased was witnessed by Mr Prinsloo who testified to the effect that the deceased was disoriented, she looked strange. This was approximately in November 2000. Documentary evidence was produced to show the Toyota vehicle which was written of on 9 February 2001.
4. Then there was an incident where she hit into the back of Mr Mackenzie Garoeb's vehicle and just drove off as if nothing had happened, even wondering, why Garoeb was following her. Frikkie said he got to the house after his wife phoned him, he asked the deceased what had happened 'she knew nothing about it. I could not explain what is wrong with her; I found it strange because my mother was not like that'. This happened on 6 November 2000. Mr Garoeb confirmed this evidence. He had to pay Mr Garoeb N$450 for the damage.
5. Then he testified about a meeting he had with the deceased and Wollie in June or July 2000 where Wollie made a proposal to the deceased that he and Engela should buy the farm Chaudamas from the deceased (Engela was not at that meeting) because the deceased was at that time under financial pressure to such an extent that she did not pay her income tax assessments and her cheques started to bounce.

With reference to the disputed will, he could find no reason why Engela was disinherited.

[48] In cross-examination he denied seventh respondent's story that he (seventh respondent) was present when Garoeb was at the house, where his wife was also present, when he met Garoeb.

[49] I will later refer back to and discuss in greater detail the meeting between Frikkie, Wollie and the deceased. I shall do so when I come to analyse Engela's evidence, as I need to point out certain implications arising from Gawie's answers on the matter during cross-examination.

[50] The important and relevant points that emerged from Frikkie's evidence, when he was cross-examined, were the following:

1. He denied that seventh respondent was present when he met Garoeb at his house, i.e. after his motor vehicle was bumped from behind by the deceased; he denied the claim by seventh respondent in his evidence-in-chief, his evidence under cross-examination and in his evidence in re-examination. On this, his evidence is supported by Garoeb.
2. He denied that seventh respondent was present at the scene where the deceased was found by Mr Prinsloo, which scene he attended after a phone call from Mr Prinsloo. Mr Prinsloo supports him in denying that seventh respondent was present at that scene.

[51] In regard to the disputed will, Frikkie was taken through its provisions, the aim, apparently, being to show that the deceased remembered all her sons. There was an erroneous suggestion that clause 3 says 'N$3 100 000 apart from a 8mm Mauser rifle was bequeathed to Frikkie'.

I do not know what submissions respondents' counsel made regarding this point as written submissions were made after trial and they do not of course, form part of the record. The important point to note is, however, that Engela, the eldest child and only daughter is completely not provided for in this will, nullifying, it would appear, the point respondents' counsel was trying to make, namely, that deceased was *compos mentis* at the stage she executed the disputed will, because she remembered all her children. That in itself is a puzzle lacking any plausible explanation in the evidence tendered on behalf of the respondents.

Mackenzie Garoeb's evidence

[52] Mr Garoeb related how his car was bumped from behind by the deceased and said he was surprised that the deceased 'drove off'. He followed her until she stopped and went into a house. When he came to the doorway of the house, Gawie's wife approached him asking if she could help. He explained to her what happened adding: 'and to my disbelief the old lady was just sitting there as if nothing has happened'.

Then Frikkie was called and after Garoeb 'also explained to him about the incident' they went to Frikkie's workshop where they made an agreement. He said the

deceased had nobody else in her car. He denied seventh respondent's claim that he and the deceased had protested against him being paid. He denied all that seventh respondent would say about the accident. That incident happened on 6 November 2000.

[53] At the end of Garoeb's testimony, Mr Schickerling was for some reason allowed to put further questions to Frikkie who had already been re-examined. The questions concerned the issue whether Frikkie had in fact paid into Gawie's account certain sums of money (cheques) in connection with the trucking business that the two had been involved in when Frikkie was still in South Africa. This went on and on until the judge *a quo* stopped it, remarking in the process in apparent frustration at all this:

> '. . . I am not going to allow any further documents that were not discovered. . . . The case before me is a will, whether a will was properly executed or not. Now we have gone off the rails often and I know that a further discovery was made during the course of, of the, this trial, apparently in respect of cheques which is apparently this that is now before the witness. We cannot continue in this way. I will not allow it in the future.'

Referring to the documents (the cheques) on which the questions revolved, the honourable judge *a quo* queried:

> '. . . whether it has anything really to do with, with the case before me is doubtful.'

Needless to say that when Mr Schickerling pressed on with such questions the judge *a quo* cut him short and excused the witness without further a do, except indicating that appellants' counsel could cross-examine 'this evidence'.

Peter Johannes Prinsloo's evidence

[54] Mr Prinsloo testified that he had known the Vermeulen family for many years having been born in Outjo and been to school with the Vermeulen children; he knew the deceased. One afternoon approximately 17h00 on his way from Otjiwarongo to Outjo he saw a vehicle standing alongside the road and the deceased in this vehicle. He stopped at the vehicle and asked if she had a problem. She said yes 'the vehicle does not want to move'. He went on to say:

> 'I could observe that Ms Vermeulen was confused and she was in tension. She was moving up and down from the road to the field and up and down to the road.'

He told her not to move onto the road, he examined the vehicle and observed that the car was wrongly fuelled. He observed that it was a diesel vehicle filled with petrol. When he asked her where she filled up in Otjiwarongo, she said she did not know where she filled it. When he asked her again where she refuelled, she said 'she only knew that she filled up the vehicle but did not know where'. When he advised that it was dangerous standing alongside the road, seeing that she was very confused, the deceased responded by saying:

> 'I have my revolver here. I will shoot them to death. I am not afraid. I am not afraid of them.'

He then contacted her son Frikkie, and told him what the problem was and his observation of the state of confusion the deceased was in. He stayed with the deceased until Frikkie arrived.

[55] In cross-examination he said he did not know how long the deceased had been next to the road or if she recognised him. What he meant by ‘she was anxious and confused’ was that:

> ‘She was confused. She was like someone who is in shock and confused.’

Prinsloo in his evidence-in-chief had said that Frikkie had initially said:

> ‘Call my brother so he can come get her. He sent her to Otjiwarongo.’

But he had insisted that Frikkie should come as he could not leave the deceased alone along the road in those circumstances.

He said where he found the deceased alongside the road ‘can be three to five kilometres’ from Otjiwarongo on the road to Outjo and Outjo is seventy kilometres and where she was ±sixty five kilometres. He could not recall how the deceased was dressed when he got to her. He said the incident had taken place a long time ago and he could not recall the date.

He could not tell if the incident was in May 1991 as counsel was instructed to say. He insisted, however, that it could not be 1991, whereupon cross-examining counsel said he confused the date and said it was in May 2001, the witness said it must be closer to 2000. The date of the incident remained unestablished even after the witness was re-examined. But Frikkie, in cross-examination, said it was

more or less in November 2000 not in May 2001. I accept that this incident occurred at least soon after the deceased executed the disputed will.

Kathleen Vera Vermeulen's evidence

[56] Kathleen Vera Vermeulen is Frikkie's ex-wife. Her evidence concerned the incident on 6 November 2000 when the deceased bumped into the back of Garoeb's car. She said the deceased came to their house and went inside and there was a man following her and she did not know why. She looked up and saw Garoeb in the doorway and asked him what the problem was. Garoeb told her what had happened. She went inside and phoned Frikkie. Asked what the deceased had said about it, she said deceased said nothing:

> '. . . There was no reaction because when Mackenzie said she bumped into his car I looked at her, because I want to see her reaction, but there was no reaction at all, she did not say a word.'

She said: 'there was definitely nobody with her' in response to what seventh respondent claimed, namely that he was with the deceased that day 'at your house' the same time. She also denied seventh respondent's claim that the deceased protested against the fact that 'your husband Frikkie wanted to pay Mr Garoeb'. She said:

> 'My mother, mother-in-law's reaction was, there was no reaction. She did not say a word.'

There was not any discussion about payment. Asked if she heard 'anything at the time from Gawie protesting' she said:

'No, he was not there.'

This witness was not shaken under cross-examination but stuck to her evidence denying -

1. that the seventh respondent was with the deceased at her house when the deceased came followed by Garoeb; and
2. that there was any discussion about Frikkie wanting to pay Garoeb or any protest against that from the deceased and/or the seventh respondent.

All counsel for the respondents could do was to insinuate 'and you have much to gain from this case'? Which insinuation was not persisted in when the court *a quo* asked 'what does that mean?'

[57] I now turn to look at the evidence given by the two doctors called in support of the case for the appellants. They are Dr Burger and Dr Sieberhagen. Dr Burger was for many years the deceased's general medical practitioner. He on his own initiative based on his observations of the deceased's behaviour, referred the deceased to Dr Sieberhagen on 14 November 2003. The referral note reads:

'Dear Dr Sieberhagen

Re: Ms F C E Vermeulen – 65 years

> This lady is known to my practice for the last 20 years. Since ±4 years ago she started with symptoms which can implicate senile dementia or Alzheimer's disease.
> Would you please be so kind as to help us with an opinion and further management please.
>
> Regards'

On 20 November 2003, Dr Sieberhagen had a consultation with the deceased who was accompanied by Ms Louisa Vermeulen. To assist him to make a diagnosis, he had before him the referral letter of Dr Burger and the information supplied by Louisa Vermeulen. He made his own observation of the deceased and had the MRI scan taken of the deceased's brain. Following a further consultation with Louisa Vermeulen without the deceased being present, on 25 November 2003, he then made a report to Dr Burger that the deceased had Alzheimer's disease in the second stage.

[58] Dr Sieberhagen is a duly qualified and registered psychiatrist with more than 14 years' experience in the diagnosis and treatment of mental illness including Alzheimer's disease. Dr Burger is a duly qualified and registered general medical practitioner with more than 30 years' experience. In respect of both doctors notice was given on 30 May 2011 and a summary of the expert evidence they would give, in terms of rule 36(9)(*b*) of the High Court rules. No such summary was given in respect of anyone in support of the case for the respondents. At a very late stage in the proceedings, an application for a postponement was made by counsel for the respondents with a view to remedy the omission. The Court rejected that application.

Dr Floris Gerhardus Burger's evidence

[59] He testified that the deceased was his patient since 1984. He knew her personally, had visited the deceased and her late husband on the farm a few occasions. She was quite a 'regular patient suffering from hypertension and a thyroid problem and then anxiety problems also'. As to the 'type of person' she was he said:

> '. . . she was a very neat person and very clean in appearance. She was of slender built, she was very intelligent, she was a very hardworking woman. Her general appearance was very, very neat and she liked to wear red clothes. . . . A nice woman to talk to and it was nice to have her as a patient.'

As to her 'medical history', he said:

> 'She was known to suffer from hypertension which she had treatment for and a thyroid problem which she also took treatment for. And she had problems with slight depression and anxiety and sleep disturbances. That was the three main diseases that she was treated for.'

Asked whether at any stage he noticed any difference in her appearance, he said:

> 'During June 1993 I noted in my clinical notes that she had a severe anxiety with loss of concentration, the reason why I noted it, it was more than we were used to. Since then in 1994 during a consultation I noted that the anxiety had started in April 1994. I noted that that the (anxiety) had started to affect her general appearance and she had started to neglect her usual spotless makeup. And I noted that her clothes were not as crisp and clean as before. (My emphasis.)

He said that the next visit he noted was 15 October 1998 when:

> ‘I treated her for a bleeding in the muscle of her left upper thigh and during examination I noted that she was wearing four panties, which was something that stood out because it did not happen before.’

He said he noted it in his clinical notes and had asked her about it and she could not explain the phenomenon. He continued:

> ‘Due to the fact that it is something strange for a person to wear four panties, I would have definitely have noticed it. And I cannot recall at any time during examining her that she wore more than one panty.’

He specifically asked her why she was doing that but she could not explain this situation. Besides knowing her at a doctor-patient level, he had visited the deceased on the farm on three to four occasions while her husband was still alive. The very first visit at the farm was in 1985, both of them were financially strong and he noted their hobby and love for the Brahman cattle. They had showed him the registration cards of the Brahman cattle, he had heard later that she had sold all the cattle and that sheep had been bought instead. This was the talk of Outjo, a very small town. He saw her again on 26 February 2001 for a rib injury on the right side of her chest and a bruise on the right side of her face. He said:

> ‘I did make a note that she told me that as if I should have known about the injury because she had visited the hospital two weeks prior to my consultation. And this is definitely not true.’

On 7 October 2003 he saw the deceased again, made a preliminary diagnosis of Alzheimer's disease and started her on treatment for that. He then referred her to Dr Sieberhagen for a consultation. His reference letter was produced and quoted above as exhibit 'A'.

[60] In cross-examination he was referred to his medical report and his cards, and questioned as follows: '. . . there is nothing in your patient's cards that refers to severe anxiety, what is solitron?' He replied: 'Solitron is an insulatic treatment, medication for anxiety and also for mild depression'.

When it was said 50 mg was a mild dosage, suggesting he did not treat her for severe anxiety, he replied:

> 'May I just make a note that she was at that time already on tryptinol, 25mg 3 x day. This was in addition to the previous treatment.'

Asked if he discussed the problem with the deceased, the doctor replied:

> 'If you go through the notes she was treated with this trepiline or tryptanol for a very long time and this is why she was, in my notes I told the Court that she was treated for anxiety. The reason why the solitron was added is the fact that she was more anxious and had more sleep problems and more a concentration loss than before. That is the reason why I stated that in my opinion that she was more anxious than before.'

When counsel suggested that because it did not appear in his card 'that he, as testified, treated her for severe anxiety', the doctor begged to differ and said:

> '. . . In my opinion the person took two kinds of medication for severe anxiety. So in my opinion it was severe anxiety.'

[61] The evidence shows that counsel did not succeed in denting the doctor's evidence, but again resorted to insinuations, suggesting, it would appear, that the doctor was testifying as he did because he knew Frikkie, that it would be alleged that he regularly serviced his vehicles. The doctor readily admitted that Frikkie was his patient, that he knew the whole family, but denied that Frikkie regularly serviced his vehicles. Wollie, who was said would testify to the above effect, gave no such evidence.

[62] In the course of further cross-examination, it was put to Dr Burger that the incident where the deceased wore four panties was on 26 September 2003 'when Louisa brought the deceased to his surgery, because the family by that time had become concerned about her mental state'.

After a series of questions on whether the doctor had said he could not recall the date 26 September, Dr Burger had eventually said he could not dispute this, meaning the date he observed that the deceased wore four panties, counsel tried to interpret this as a concession, but Mr Dicks, counsel who represented the appellants and the judge *a quo* corrected him. In re-examination the doctor still disputed that the incident took place on 26 September 2003.

[63] The doctor was referred to his affidavit deposed to on 21 January 2004 in support of the application for the appointment of a curator *ad litem,* where he

confirmed that ‘since ± four years ago the patient started with symptoms which can implicate senile dementia’ and counsel said this was contrary to his evidence relating to stress as early as 1993 and 1994 and that he said these were symptoms of Alzheimer’s. That the statement was out of context was pointed out by the doctor, by Mr Dicks as well as by the Court; the doctor clarified as follows:

> ‘In the first place My Lord, this affidavit was signed by me on 21 January 2004 but the referral letter was written by me on 14 November 2003.’

Then Mr Schickerling changed the subject and turned to ask about the accident that the witness had referred to earlier. The questions were on whether the doctor knew when that accident occurred and whether he knew what happened during the accident. In the end, counsel asked questions on matters the doctor could not be expected to know. When counsel eventually put to the doctor that ‘what we have on your evidence is two isolated incidents where she exhibited some anxiety’ the doctor significantly commented:

> ‘. . . you must remember that a doctor has a patient and a relation with the patient and if he knew the patient for about 20 years then it is very easy in retrospect to see things that whilst he was examining the patient at that stage it did not make any sense. But we do have a collection *(sic)* of our patients and we do know the first impression of our patients and the later impressions. So although it may seem like two incidents nobody can take away my recollection of the patient and my knowledge of the patient since I saw her first and until she died.’

[64] The following two questions by counsel appear to confirm that in June 1993 and in the middle of 1994 the deceased had cause to be stressed, giving the

alleged causes of the stresses. The doctor said as to the alleged causes of the anxiety:

> 'Of course it might have caused anxiety, but she was an anxious woman since I have seen her from the start. It could contribute but there were periods before that that there were not external factors that were mentioned here that would make me prescribe her some medication for anxiety and depression. So I cannot dispute but there is also the opposite of this coin.

Remember Engela testified, that when she visited the farm 2000 she talked to the deceased and the deceased did not bother about her financial problems. This was to deny that 'your mother's financial dire straits dictated her mood at the time' (that is deceased changed her welcoming mood.) This is what counsel representing respondents had to put to the witness when he cross-examined her.

[65] When re-examined, the doctor clarified the incident on 15 October 1998 of the deceased wearing four panties, the date of which was apparently to be contradicted by Louisa Vermeulen who would say that the incident was on 26 September 2003 by saying:

> 'If this is true I did not note it at that stage because I did not make as that she had been wearing four panties to contain her diarrhoea.'

Note that on 26 September 2003 the deceased was treated for intra enteritis and the doctor had then first said in effect what he said above. He specifically said he did not recall the incident alleged by Louisa to have been on 26 September 2003 and that was why he could not dispute that date. Also note Dr Burger had informed

Dr Sieberhagen that on 26 February 2001 the deceased had been involved in an accident and he had treated her for the injuries sustained as a result; that car accident had generated concern that she was not fit to drive anymore. When challenged that his evidence was hearsay he said:

> 'This is of course not noted in my clinical notes, but this, because Outjo is a very small town.'

Dr Reinhardt Sieberhagen's evidence

[66] Before delving into Dr Sieberhagen's evidence let me advert to the application for the appointment of a curator *ad litem* which issue was introduced by the respondents in the proceedings before the High Court. Firstly, it will be noted that the judge *a quo* dealt with this application in *extenso* and sounds very critical of the appellants, pointing out, in particular, that the application was not served on the other members of the Vermeulen family, more specifically on Gawie, and that no specific dates were mentioned in relation to the allegation made therein against him or the events that gave rise to the application.

[67] A few points must, however, be noted in this connection. Firstly, the application was brought by the eldest children of the deceased. Secondly, the main concern in the application is the conduct of Gawie vis-à-vis the deceased. Thirdly, Ms Vivier made her report as curator *ad litem* after which on 19 April 2003 a court order declared the deceased 'incapable of managing her own affairs'. Before making her recommendation that a *curator bonis* be appointed because 'Ms Fransina Catherine Elizabeth is incapable of managing her own affairs,' Ms

Vivier had consultations with, among others, the deceased and Gawie. She said in para 11 of her report:

> 'During the first half hour of our consultation I did not detect any problem with the patient's memory and the manner in which she related events to me. We had a relaxed consultation. She was forthcoming with information about her background and could give me detailed information about her children and grandchildren. As our consultation progressed, I gained the distinct impression that the patient is hiding her inability to give detailed information to me about her assets and financial position. She frequently told me that she cannot give me the requested information and will have to look at her tax records, animal registers, bank statements and accounts, etc., when such answers were not appropriate or when I expected no more than approximate numbers/figures. As our consultation progressed she frequently told me **"I cannot say right now** . . . **it is difficult to say"**, even to the general questions. It was evident to me that her memory deteriorated as we consulted but that she wished to hide this from me. (This suspicion was subsequently confirmed by Dr Sieberhagen).' (My emphasis.)

In para 12 of her report Ms Vivier enumerated a number of matters regarding deceased's estate and financial affairs that the deceased could not remember or had definite misconceptions about.

What I have underlined in the above quotation and other passages hereunder is very much in line with Dr Sieberhagen's evidence and opinions. In para 12.1 Ms Vivier reports the deceased as saying:

> 'Her other children are jealous of Gawie, whom she has favoured over the years. She first came to Gawie's assistance when he lost his farm and divorced his wife. Gawie has the custody and control of four minor children. She invited him to live

> on the farm Chaudamas. He lives in a second house on the farm situated approximately a kilometre away.'

[68] The report makes it quite clear that on a number of crucial questions in the consultation the deceased said 'she would have to ask Gawie about it' or 'she would take it up with Gawie'. Lastly, in para 12.11 of her report Ms Vivier says:

> 'The patient was not aware that she still owed money to Agribank and indicated that she would speak to Gawie to pay one half of the Agribank debt. According to her the farm was fully paid and she owed nothing to Agribank but she added that it was possible that she again borrowed money from Agribank for the farming operations. She again appeared only very mildly surprised when I told her that the debts amounts to N$204,000.00. My impression was that Ms Vermeulen did not understand these amounts were sizeable amounts. She appears to be under the impression that the debts can be paid selling a few sheep. She does not seem to understand that her 50 sheep at N$400,00 will only fetch N$20,000.00.'

The deceased, according to Ms Vivier, was aware of the application, so was Gawie who claimed that when he tried to intervene Engela stopped him. In para 2 of her report Ms Vivier said that she was in telephone contact with Gawie on two occasions during her consultations, and that Gawie told her that 'these assets belong to him and that his mother own nothing anymore and that he could not understand what the current proceedings are about'. Engela's evidence, which was not denied by Gawie was that both the deceased and Gawie had denied rumours about the existence of the disputed will.

[69] Dr Sieberhagen testified that he examined the deceased on 20 November 2003. He had before him the referral letter (already quoted) from her family physician Dr Burger. The other information he had was supplied by the deceased's

daughter-in-law, Ms Louisa Vermeulen, who accompanied her to the consultation namely:

(a) that the family had become concerned about her mental health because of changes in her behaviour;
(b) that some of these concerns were indicative of behaviour changes which one would not find with a person simply becoming forgetful because of the normal aging process;
(c) that some of the concerns were that she had become at times confused during the evenings, she would fail to lock the doors of her house in the night and that she would often not switch off the lights;
(d) that they had noted that at times she would appear to be not clear in terms of consciousness and that she seemed confused;
(e) that she seemed to be clouded in terms of her consciousness or her sensorium;
(f) the way in which it was put was that she sometimes looked like somebody who was a little bit drugged;
(g) her daughter-in-law also mentioned that Ms Vermeulen had become increasingly suspicious towards people and also towards family members;
(h) that her symptoms tended to be notably worse after sunset;
(i) that Ms Vermeulen’s hygiene and self-care had deteriorated to the extent that is was noticeable;
(j) that she was known to be a person who was very particular in terms of her grooming and dress and that this had changed.

Louisa Vermeulen gave no dates when these observations were made, but it can safely be assumed that these observations were not made only in 2003 but even before that year. In cross-examination Wollie said:

> 'I should say that just a few months before she was diagnosed by Doctor Sieberhagen it is when these problems started when I also had a problem with the prices.'

[70] Following this information Dr Sieberhagen examined the deceased that day; he established that there was a family history of Alzheimer's disease; deceased's two brothers had suffered the same illness. He did an orientation test which she failed, but he found that her sensorium or consciousness was clear, 'in terms of her psychomotor activity, a little slow.' He continued:

> 'What was immediately noticeable was that her self-care was not good. She was a bit dishevelled in her appearance. And in her interaction with myself, with introducing myself and making small talk my impression was that she had loss of her social sensitivity. There was an element of dis-inhibition in her conduct towards me. Also she was a little petulant and defensive concerning the examination.'

[71] He explained that dis-inhibition means 'one's ability to contain behaviour that one would otherwise in a social setting not display'. 'It usually comes across in a situation like this as a person being familiar towards the examiner which, to the extent that it can be perceived as inappropriate'. He added:

> 'Ms Vermeulen acted towards me as if she had known me for a long time. She was fairly familiar. In that setting it would have been inappropriate.'

He said the deceased ‘conceded forgetting small things like losing her keys. But upon my questioning of her having problem with her memory, she denied that, although she could not recall whether she had breakfast that morning’. He said his ‘impression during the consultation was that Ms Vermeulen, and this is fairly normal, attempted to downplay her symptoms to a certain extent to make a better clinical impression’. He concluded:

> ‘. . . It was clear to me that her speech and her manner of interaction with myself, disorientation in my office, forgetfulness in terms of whether she had breakfast that morning or not, that she had loss of brain function.’

[72] He further testified that he discussed the above with Louisa Vermeulen and to confirm a degenerative brain process a brain scan was done which confirmed the diagnosis. He reported back to Dr Burger ‘that Ms Vermeulen was suffering from dementia; most probably from the Alzheimer type . . . her clinical features met the criteria for making this diagnosis’. Asked what he could see from the MRI scan, he said:

> ‘The most apparent feature on the scan in terms of Alzheimer’s per se is that the volume of the brain ventricles are notably larger than they should be. Also the cortex is atrophied which is indicated by the enlargement of the separate neural spaces, in particular the frontal lobe areas and the temporal lobe areas they are notably atrophied.’

Asked what ‘atrophied’ meant, he continued:

> 'Smaller than they should be, My Lord. The atrophy of the cortex in the frontal lobe areas and the temporal lobe areas specifically meet the requirements of making a diagnosis of Alzheimer's disease. This also correlates with the clinical picture because they are present with frontal lobe symptoms, which would include their ability to reason, to think abstractly, to do executive planning and they also, like I said before, tend to lose their ability to inhibit their behaviour. The temporal lobe areas present the area of the brain which contains memory and the ability to learn and store new material. That explains these patients inability to retain material that they have recently learnt or experienced. This is the reason why one would find that a patient would for instance not be able to remember a recent incident or recent action.' (My underlining.)

His diagnosis was that at that stage Ms Vermeulen suffered from Alzheimer's disease.

[73] In explaining the Alzheimer's disease and its diagnosis Dr Sieberhagen made the following important points:

1. The only way in which one would be able 'to without any question make the diagnosis of Alzheimer's is if a specimen of the brain be examined; the problem is, with a living patient taking a brain specimen is not really possible.'

2. 'So the diagnosis of Alzheimer's in the clinical setting is always dependent upon the behaviour of the patient. That puts one in a position where often when people start realising that a person's behaviour is consistently become abnormal or reduced one finds that the illness has already progressed to the point where treatment would have little effect.' (My underlining.)

The doctor also dealt with the difficulty of treating the deceased and further remarked that 'anxiety or mood symptoms can often be in the early stages of the illness the only symptom'. He pointed out what he saw on the MRI scan thus:

> '. . . There are two things that are immediately noticeable and that is the loss of cortical matter, in other words the cortical atrophy. On the image marked in pink one can clearly see that the cortex of the frontal lobe is much, much smaller and thinner than it would normally be. Also on that same image one can see that the brain ventricles are enlarged. On the image in the middle right here, the atrophy that one can see is in the temporal lobe area and the temporal lobes are notably smaller than they would normally be.'

Diagrams of the brain depicting the above descriptions were produced as exhibits 'C' – 'F'. The doctor said that the scan confirmed his earlier diagnosis.

[74] Dr Sieberhagen was asked to say how Alzheimer's disease progressed, i.e. the stages of its development in a patient. He prefaced his analysis of these stages as follows:

> 'The staging of Alzheimer disease is something that is of clinical importance in terms of it giving one the ability to a certain extent. Get an idea of where in the process of this illness a patient may be. In order to determine the progress of a particular patient's illness one would want to make repeated examinations on a patient's ability that would enable one to at least to an extent determine the rate of deterioration. The rate of deterioration in Alzheimer disease is fairly stable but it differs from patient to patient which makes it very difficult to predict how quickly a patient will deteriorate until the time of his death. It can make it equally difficult to determine for exactly how long a patient had been sick before the diagnosis is made.'

He said a number of researchers had developed instruments to standardise the measurements of the loss of different functions if one accurately wants to plot the illness one would need to employ a measuring instrument of some sorts. 'In clinical practice we do not really do that because mostly it is not necessary . . . We do know however that the cause of Alzheimer stretches over anything between 5 and 10 years. We also know that female patients who have a family history of Alzheimer's tend to deteriorate more quickly'. (My emphasis.)

[75] Further elaborating, he said:

> 'The process of Alzheimer disease then is from the outside inwards. So, that when one looks at the clinically the progress of the illness, the first symptoms would be symptoms that represent our higher functioning. In other words, our social interaction, our ability to abstract thinking, our ability to appreciate the subtle nuances of social interaction, our ability to plan and execute certain tasks. Those are the first symptoms that one would notice changes in those functions. As the illness progresses the symptoms that become apparent would be more basic, for instance our ability to orient ourselves in space or to orient ourselves in terms of time, or a person. Little bit later in the progress of this illness, physical symptoms will become apparent, namely the loss of continence for instance, the loss or the ability to realise that we are hungry, or thirsty.'

By the words underlined it is clear the doctor meant to say either when one looks clinically at the progress of the illness or when one looks at the physical progress of the illness.

He illustrated the three stages of the progress of the disease with a diagram (produced as exhibit 'F1') which shows (in note form): 'I Amnesia stage:

dyscalculia; apraxia, II Confusion stage: aphasia disorientation; time place, mental confusion abnormal behaviour psychotic episode and III Dementia stage: Severe cognitive deficit incontinentia, and explained':

'(a) If one looks at that diagram the first, or amnesic stage is the stage where one notices patients starting to forget things. The second stage is known as the confusion stage where people tend to become disoriented in terms of time and place, where they can suffer from episodes of mental confusion and abnormal behaviour. During this stage of the illness patients can also suffer from psychotic episodes, mood episodes and behaviour patterns which may constitute psychiatric problems of its own. The third stage, the dementia stage is when patients become incontinent, where they are severely impaired in terms of their cognitive functioning. This is usually the stage where one expects the patient to not live much longer than a year or maybe two at the most.

(b) It is important to note that although this pattern is fairly stable and consistent, individual patients can differ in terms of how long they can be in especially the first stage, or the amnesic stage. This is something that can be very difficult or virtually impossible to predict, except if one had adequate information on a patient's behaviour and general functioning. Because of what the illness is, one's ability to make an observation in terms of the stage of the illness is very dependent upon the activity of the patient and often on the daily activities of the patient. The term that we use in clinical practise is that term "activities of daily living" because these are the activities that often are the only indication that there has been a change, or that a patient is in a process of change, or that a patient's level of functioning is not the same as it was before. It is on these grounds that we often make some form of judgment in terms of a patient's functional ability.' (My emphasis.)

He cautioned that in research just observing symptoms or actions like this is not accurate enough but said, however, that:

> 'We know generally patients who suffer from Alzheimer's disease will be ill anything between five and ten years. The fact is that this is a degenerative illness that develops over time.' (My emphasis.)

[76] The doctor explained in particular what happens to the brain in the second stage of the illness where he said the damage can produce symptoms that can be reversible, where a patient suffering from confusion 'can at times seem to be much more lucid' and said:

> 'This situation can carry on throughout the process of the illness where one will observe episodes where a patient's symptoms may seem different from what they are from day to day or even from hour to hour, where one would find a patient much more clear and lucid one moment and the next moment much less so. This often results in a situation where family members would notice a symptom, which will be followed by a lucid interval and then tell themselves, "maybe she did not feel well" or "maybe she is just getting old because yesterday she was confused but today she is fine". That is one of the reasons why it often takes very long before people are sent for further investigation when they display symptoms like that. . . . It does not detract from the fact that the patient is ill and suffers from a degenerative illness. And it does not make a difference to the patient's functional ability, although it may seem so. Now, the symptoms that one sees in phase 2 of the illness would include deterioration of cognitive ability, the patient's ability to plan and execute the tasks, language ability, insight and all factors that determine the patient's ability to plan fairly complex tasks. Remembering again that with a situation of a patient suffering from this illness, very deeply ingrained skills or skills that have been acquired over a very long period of time can be retained for very, very long . . . .Eventually those skills will also disappear.' (Emphasis supplied.)

He gave several examples of retained skills that have been developed before the illness that a patient can repeat although '. . . that patient may already be quite ill at that time'. (My underlining.)

[77] Dr Sieberhagen said from the information provided by Louisa Vermeulen and from his examination his impression was that the deceased at the time was suffering from phase 2 of Alzheimer's disease. He remarked:

> 'Often when one looks in retrospect family members would say but it now makes sense to them that even five or six or ten years ago they became aware that the person's character traits had become more pronounced.'

This finding was not disputed in any way. It is obvious that the respondents had no way of casting doubt on it. It is also evident that what Louisa Vermeulen described of the deceased's conduct (activities), and what Engela and Frikkie described in their affidavits in support of the application for the appointment of the curator *ad litem* and even what Dr Burger noted in his clinical notes fit into this scenario. In other words emphasis cannot be put only on what respondents' observed and reported. Questions put, even by the judge *a quo,* as to the basis of the doctor's conclusion regarding his diagnosis, would seem to suggest the opposite approach.

[78] It was Dr Sieberhagen's further evidence that a patient's affections or emotions can be affected very early on in the illness. 'One might early on in the illness lose your ability to judge whether this is a good business transaction or not', he said. He was asked at what stage the person's capacity to appreciate the

nature and consequences of an action would be affected, for instance the making of a will, he answered:

> 'That will be in phase 1, because as we have said phase 1 is the amnesic phase. That is also the phase where a person's social interaction, inhibition and short term memory comes into play, and a person will not be able to safely makes such decisions if he does not have the ability to for instance remember certain things in sequence, which in phase 1 already will not be there anymore.' (My emphasis.)

[79] The doctor also testified on what he described as dissimilation on the part of a patient suffering from Alzheimer's disease; and he said the following:

> 'Dissimilation is a process where one attempts to project yourself as being better than you actually are in terms of symptoms. But with Alzheimer's illness these patients do not do this as a process of factitiousness. In other words, it is not something that is planned in order to make them seem different from what they are. But because of their experience of interaction with for instance the examiner, a patient like Mrs Vermeulen for instance, she was an upstanding member of the community. And she was very used to be approached in a certain manner because of her standing in the community. And all of a sudden she finds herself in a situation where she is approached fairly critically in terms of her functioning and she is being asked questions about "can you remember that you had breakfast" for instance. That is a very different approach from what she has been used to over the last sixty years. And it is a, I do not want to call it a reflex but it is an automatic response that these people attempt to hide some of the symptoms and to down play their symptoms.'

[80] Next the doctor was asked 'in this context, these symptoms that you have just explained to the court in all these phases, how easily do lay people pick on that?' and he answered:

> 'Not very easily because of, like I said it is now because of the patient's ability to go about his routine activities in the same way that he did before. So, casual observation would probably miss a lot of the obvious symptoms coupled with the tendency to dissimilate these patients may seem to be much more normal than they actually are. So, if a person does not pertinently look for symptoms the chances are that you are going to miss them.' (My underlining.)

In answer to a question by the court, the doctor however said that the problem is often brought to the attention of the psychiatrist by family members and not by the family physician, because of the fact that people who intimately know the patient or the person concerned would be the first to notice changes in the activities.

[81] The doctor testified about an occasion when he was consulted again by the curator *ad litem* and said that the question that time 'was whether I would be able to declare if transactions done by Ms Vermeulen prior to my making the diagnosis, could have happened while she was already too sick to act on her own in terms of business transactions'. This of course is the critical issue in this matter, the issue that the court *a quo* was called upon to determine and this court must look at in the light of the evidence as a whole.

In answer to the above question and to a further question as to what collateral or historical facts he had been provided with and which he had taken into account to help him answer the question, he said the information included:

1. What Dr Burger had reported to him;
2. What the patient's daughter Engela and son Frikkie reported; and
3. The report by the curator *ad litem*.

He took the report by the curator *ad litem* which he had gone through because of the observation made during the curator's consultation with the deceased. The deceased seemed to be completely *compos mentis* during the first half of the consultation because there was nothing that indicated to the curator that there was anything wrong with her. The curator's report was handed in as exhibit 'G'. The doctor analysed and interpreted the report as follows:

> 'The curator describes the first half of her consultation with the patient being fairly normal. After which she realised that the patient started answering her questions with approximate answers. And she also realised that at the time the patient was completely unaware of her true financial status. She had the number of sheep for instance that she had wrong. She overemphasised for instance her fuel expenses. The notable symptom of that consultation is the repetitive nature of a certain fixed response, which one can clearly see. If I may refer to page 5 of that report, paragraph 12.7. The response was, "It is difficult to say" and she repeatedly said that. Also on the previous page, page 4 she says to the curator "I cannot say right now it is difficult to say" and that is again repeated on page 8, paragraph 12.23. That sort of response also depicts a patient's progressive poverty of speech where the interaction becomes more and more concrete and where the response to certain questions became shorter and shorter and more and more poor in terms of content.'

He was interrupted and referred to para 12.22 thereof where she recorded: 'she was not aware that portions of the farm had been sold to a neighbour Mr Van Zyl.' (The evidence going to be that that contract was already signed in 2002.) 'What would that indicate to you?' he was asked. He replied:

> 'That would indicate a loss of memory. . . . and also this illness often goes with confabulation. In other words, if I have a gap in my, (memory) I will fill that with a confabulation. Her answer, that she heard the rumour and that she does not know anything, is a typical confabulation.'

He said that kind of behaviour indicated stage 2. He clarified that what the deceased said to the curator depicts a stage 2 dysfunction and went on to say:

> 'Information from Dr Burger was that, as early as 1993 he had noted Ms Vermeulen to be anxious and for which he had apparently treated her. The next notable bit of information was in 1994 where he described her to be not as well groomed as he was used to seeing her, that she seemed to not be able to groom herself on the usual standard. Then there was mention in 1998 of Ms Vermeulen in terms of her dress where she apparently had worn under garments in excess where it was noted that she wore more than one under garment. . . . In terms of the pathology if that was the case at that time, it would depict that a person is unaware that he had already put on a piece of clothing and that unawareness is a formal memory loss.'

[82] It would make this judgment unbearably too long to detail all the references Dr Sieberhagen made in illustration of the progress of Alzheimer's disease. Suffice it to say he mentioned other observations by Dr Burger of the changed or changing behaviour of the deceased as well as other and similar changes observed by Engela and Frikkie. In the course of all that he commented on two things he described as 'very important', which I also think are very important to always bear in mind. He said:

> 'Firstly that it can be very difficult to predict a patient's progress along this deteriorating course of illness. In the same vein, it can be very difficult to associate a particular symptom to the illness. <u>What in the end happens in the clinical terms is that because of the knowledge that we have of the illness, we can state that in all probability a patient would have had this illness during that time</u>.' (Emphasis added.)

From what the doctor had said earlier for instances 'if that was the case at that time' and repeated elsewhere, I think all that the doctor was saying was that despite the advances in medical science, the caution *omnibus paribus* (all things being equal) still applied to this branch of science as well. At the end of his summary of information made available to him the doctor concluded:

> 'If one considers that information, it paints a picture of a person who is in the process of deteriorating ability to function on the same level as she did before.'

The Court asked if this (information) helped him 'in forming an opinion on her illness', and he answered:

> 'Yes My Lord, if I look at the symptoms described during the course of 2000 it is fairly clear that Ms Vermeulen must have suffered from significant symptoms of an illness already at the time. She seems to have lost herself, to maintain her home and to maintain her vehicle. Those would all place her in stage 2 of the illness as we have seen.'

He said all that he had testified about now occurred in the dates mentioned with end of 1999 to 2001. He also said in answer to a question by Mr Dicks counsel for the appellants in the court below:

> 'The ability to conduct business depends on the cognitive ability to consider different facts and to be able to make a decision based on one's knowledge and consideration of different facts. I really do not believe that Ms Vermeulen would have been able to do that if she was at that time already unable to maintain self-care and to maintain her person.' (My emphasis.)

[83] Dr Sieberhagen doubted that in August 2000 the deceased would have had the testamentary capacity to execute the 18 August 2000 will and further said:

> '. . . if her illness was such that at that time she already displayed her abnormalities in her activities of daily living what were indicative of her ability to look after herself, being deteriorated to a level that was notably poorer than before. I would be much surprised if she would have been able to conduct business towards the second half of 2000.'

The doctor confirmed para 12 of the summary of his evidence, namely that, based on the information he had received, the deceased had already suffered from phase 2 for 5 years. He clarified to the trial judge:

> 'If we work on the assumption that these illnesses are known to last for between eight to 10 years then we can assume that her having passed away in 2007 that she most probably should have significant symptoms already in 1998, or even earlier than that.' (My emphasis.)

On the basis of further information, other than the information he had when he had a consultation with the curator *ad litem* he was able to say:

> '. . . in probability this patient has been ill since I guess in early 90's or the mid 90's. And that from that time until her death there should have been a time when she became unable to conduct business, where her testamentary capability disappeared . . . it is diminished in phase 1 of the deceased already.' (My underlining.)

He repeated that by the time he diagnosed the deceased she was in phase 2 for 'approximately' five years already. In regard to the lucid intervals he talked about earlier he expanded:

> 'What I meant was that, a patient may have lucid intervals during which they can appear to be completely normal or very close to normal. And where people dealing with these patients has this lack of ability. This does not mean that during lucid interval there is disappearance of the illness or the effects of the illness. The illness is a constant.' (My emphasis.)

Referred to the observation (to be made) in evidence by Mr de Koning that at the time she gave her instructions to him, the deceased 'looked fine to him', the doctor said he did not know what Mr de Koning meant, and went on to say:

> 'If a person is in regular contact with the patient, one has fairly constant knowledge . . ., constant awareness and constant knowledge of this person's way of doing things. And as soon as things change it becomes noticeable. When people who are not dealing with the patient on a regular basis have a once off meeting it is not impossible for them to not realise that the patient is ill. In the same way that the curator mentions in her report that in the first half an hour or so of her consultation with Ms Vermeulen she became convinced that there is nothing wrong with this patient.' (My emphasis.)

Short of wanting the doctor to answer 'yes' or 'no' to the questions whether he could make a declaration that the transactions done by the deceased prior to his diagnosis of her could have happened while she was already too sick to act on her own in terms of business transactions, what the doctor said above puts the Court in a good position to decide that issue on the probabilities.

Interestingly the respondents' pleadings were brought to his attention, that in 2003 the deceased still drove a motor vehicle, and in answer to this he said:

> '. . . the US had a President who had Alzheimer's and he could govern the country. Alzheimer's disease does not disable one to the extent that you cannot drive a motorcar because it is a routine action that this person has done for many, many years. So, she does not need much of an IQ to do that. So she could have been very ill and still drive a car.'

The evidence of Dr Sieberhagen under cross-examination

[84] The cross-examination of Dr Sieberhagen was made somewhat complicated and confusing by a number of factors – the tendency of counsel to pose argumentative or speculative questions; the tendency of counsel to put questions based on inaccurate facts, particularly dates; and the tendency of counsel to put questions not based on a correct understanding/appreciation of the witness' evidence-in-chief and the tendency of counsel to ask long and composite questions. I will illustrate. By and large Dr Sieberhagen confirmed his evidence-in-chief as to the progress and stages of Alzheimer's disease and its effects, and the information he received from Louisa Vermeulen and Dr Burger before he made his diagnosis that the deceased was in phase 2 of the illness (at the time she executed the disputed will.)

[85] Counsel for the respondents asked Dr Sieberhagen a series of questions which, by and large, sought a clarification of the doctor's evidence-in-chief. Such questions concerned, for instance, the various stages of the development of Alzheimer's disease, how it affected individual patients, the rate of development of the disease and what happens in the various phases of the illness. He was referred to his summary of evidence, where at para 4 thereof it says:

> ‘During his examination of Mrs Vermeulen Dr Sieberhagen found that she presented with *inter alia* the following complaints, namely she experienced episodes of disorientation, forgetting to close the doors of her home at night, not switching off lights and intermittent inability to recognize known surroundings. She became increasingly paranoid and suspicious towards people and also family members. Her symptoms tended to be worse after sunset in the evenings. Her personal hygiene and self-care deteriorated significantly – she only bathed once a week whereas she was always known to be very particular about her appearance and used to dress meticulously.’

and asked:

> ‘. . . would it be correct to recognise say that forgetfulness would be one of the first signs that would present itself during the first phase?’

The doctor answered:

> ‘Yes, yes Sir.’

The doctor was further referred to exhibit ‘D’ and ‘E’; (the former being a comparison of an atrophied and normal brain and the latter being photographic images of that brain.) He was asked to explain the terms used in exhibit ‘F[1]’ that is ‘figure 2, three stages in the clinical course of Alzheimer’s dementia’. He then explained the term apraxia as follows:

> ‘It is an inability to do or complete certain tasks that one would normally expect a person to do. If one should consider the sequence of dressing oneself, I think one would be able to consider that term as descriptive, yes.’

Counsel's questions on this aspect of Dr Sieberhagen's evidence appears to be based on a misunderstanding of his evidence. It should also be noted that earlier the doctor had testified that the first stage may continue for quite a number of years before people start to pick up on subtle symptoms and that there is no definite rate of decline for the disease within the first period.

[86] As regards the incident during which the deceased was wearing four panties, firstly, counsel put it to the doctor that Louisa Vermeulen would testify that it was not uncommon for the deceased to wear two panties; secondly, it was argued that accepting that she had put on four panties would that be consistent with apraxia. The doctor answered:

> 'I would rather consider it to be a dysfunction of memory than apraxia. . . . With regards to the panties, I would rather say it is a memory dysfunction, in other words an inability to remember something that she has already done.'

In a roundabout manner the suggestion was made that since Gawie lived 15 km from the deceased and since Ms Louisa Vermeulen would claim to have had close relationship with the deceased, those were the family members who were concerned and who would have picked up those signs which Louisa said caused concern. In response the doctor said, *inter alia*:

> 'But it is a bit of a double-edged sword in the sense because when one is in constant contact with a person and changes happen slowly and insidiously, the observer, so to speak, would also make that adjustment to the change in behaviour and one could argue that one can for the same reason miss certain signs because of the joint routine of the family. If I may use a very simple example.

> If you live with yourself day by day and find yourself having become much more grey over the last five years, it is not an observation that one makes day by day. It is an observation that is made after a period of time. So, certainly people having intimate knowledge of a person changing in terms of those signs and symptoms would be the first people to notice. But the observation need not be, the observation itself, need not be gradual but will become apparent over time also.'

He was asked what he meant by his own finding (in para 6 of the report or summary of evidence) and his evidence that the deceased's sensorium was clear i.e. there was no sign of clouding. He answered:

> 'Clouding of one's consciousness is a very important clinical sign in my job, because it is an indication of organisity, in other words, an indication of organic pathology. If I may put it like this, if one should combine disorientation which can happen with a clear sensorium, if you combine that with clouding of one's consciousness then you get a situation called delirium which constitutes confusion and that is why one tends to particularly look for that sign.'

Yes, he agreed, that at that time there was no sign of any clouding. He, however, testified that she did appear a bit dishevelled and had notably lost her social sensitivity at the time.

Counsel then said that Louisa, Gawie, Wollie, seventh and eighth respondents had noticed for the first time in 2003 signs of change in the deceased's behaviour when her grandchildren reported to Wollie that their grandmother's driving was no longer good. Then came argumentative and speculative questions about the deceased's cause of death, followed by really inconsequential questions about Dr Sieberhagen's report on the deceased including one on 19 January 2004 where

he concluded that the deceased was currently in phase 2 of Alzheimer's illness and unable to grasp the implications of financial decisions, followed by repetitive questions, still, apparently, trying to prove that the deceased, as late as mid-2003, could do certain routine things *ergo*, she was *compos mentis* in August 2000.

[87] Again referring to the incident when the deceased was found to have worn four panties, counsel tried to say that Dr Burger conceded that it happened on 26 September 2003 instead of 1998. The court *a quo* interjected and said 'definitely not' counsel was not deterred by this correction by the judge *a quo* and went on in the same line of argumentative comments till the doctor finally responded:

> 'My Lord, I would not be able to make such a statement because of the fact that the illness can have symptoms for a long period of time. I do not think that I would be able to answer that question properly. Certainly if the first time that her driving had become noticeably affected only in 2003, one would not expect to have had symptoms as early as 1998 but that may still fit into the pattern of a person suffering from Alzheimer's illness. I would not be able to say it would not be possible that she had symptoms some years earlier.'

The court *a quo* rightly remarked that this was something that can be argued on the evidence.

[88] Lastly the entire respondents' case was put to the doctor, including what the lawyer De Koning would say, and he was asked:

> 'With that in mind, and we can accept that the court will upheld that version, can you say that on 18 August 2000 the late Mrs Vermeulen was not in a position to

> understand the execution, the terms of the last will and testament and the agreement entered into by her?'

The doctor answered:

> 'My position as a clinician is such that I can only work with the information that I was given. If that is the case, if Mrs Vermeulen was still capable of conducting business in that way, then certainly one would not be able to argue that she was too sick, but I have to, I have to remind the Court that a description of what you have given me now does not . . . It implied that the patient was able to conduct her business but it does not give any information about her ability, her ability to remember facts. What I think you said to me was that she was able to make a decision that she would not, she would not accept the business proposition. And that she was adamant that there be certain conditions to this transaction. That does not constitute, necessarily constitute normal brain function. So, my answer is I would need more information in terms of what transpired during that interaction of the parties before I would be able to give an opinion.' (My emphasis.)

What transpired during that interaction include what Mr de Koning revealed under cross-examination (see his evidence hereunder). The questions under cross-examination thereafter in substance sought to show that the deceased was still *compos mentis* in 2003. I do not think they add anything significantly different to the questions before. So I need not repeat them.

The court *a quo* then asked:

> 'Just to ask this question in a different way. If you had the information that was just put to you, would you have come to the same conclusion as you did, as you have testified yesterday?'

He answered:

> 'If that information was given to me previously, I would still have to deal with the other information that I have that contradicts her ability at that stage and once again, I would not be able to give a clear answer. To my mind the information and I, it certainly is not my place to question the information. The fact is that if she was dysfunctional to the extent that somewhere in 2000 like we saw yesterday, she was unable to bake a cake that she had done for so many years, to my mind that is a fairly serious sign of dysfunction. And I would not be able to explain that away in any other manner than to, you know, want to know whether she was dysfunctional because of the fact that she suffered from Alzheimer's which we know was a fact or whether it was some other problem at that time.' (Emphasis supplied.)

He added that he would not be able to ignore that information and

> 'If it can be proven that that information is wrong, if we have to discard that information then any deduction that I make would only start obviously from a later date and that would then exclude the date on which you said this transaction had taken place.'

Asked if the court accepts that as the correct version i.e. the information that had been given to him he could not say that on 18 August 2000 she was not in a position to have entered into the agreement or have executed the will, Dr Sieberhagen answered in the affirmative.

[89] As a final fling respondents' counsel referred to the curator's report and put it to the doctor that during the first half of her consultation with the deceased, the deceased, was relaxed and could give detailed information about her children and grandchildren. He then asked:

> 'Now, given the fact that this is in April, or this is after the application on 26 April and between the time when Advocate Vivier filed her report on 8 April 2004. So, it is obvious and you cannot dispute that she is clearly capable of recalling all her children, her grandchildren. That cannot be disputed.'

The doctor answered:

> 'No Sir. But one has to remember that patients suffering from Alzheimer they prefer to dwell on old information. In other words, long term memory is what they have left and they tend to revert back to old knowledge when they find it difficult to accommodate new knowledge. So it would still fit in with that fact that she had this illness at that time, that she would be able to describe her earlier in life in very fine detail.'

The court *a quo* finally asked if with all that he heard and what had been put to him 'can you say in your opinion, expert opinion, she could not, on 18 August 2000 execute that will?' His answer was:

> 'My Lord, if the information that I had been given in terms of the symptoms that were notable before, if we can accept that that was indeed the case, I would be fairly confident in saying that she in all probability had significant dysfunction at that time. But should the situation be that the symptoms mentioned during the later parts of 1998 and 2000 be not true, then I would not be able to make that statement, and that was the reason why in that curator's report it was reported that at that time I was not prepared to make any statement like that.'

That information, as respondents' counsel immediately recalled was about events in 1998, 1999 and 2000 as related by Dr Burger as well as by the plaintiffs.

[90] Dr Sieberhagen was refreshingly honest in his opinions. He gave his evidence completely honestly in my opinion, and made concessions, in particular when he was not in a position to give a definite answer or opinion. In the light of this assessment I feel quite confident to accept his opinions; he clearly explained the bases thereof. Later in this judgment this court will have to determine the main and only issue on probabilities and in my opinion, Dr Sieberhagen's evidence and opinions will be of great assistance in that regard. For example, the missing facts he alluded to vis-à-vis the transaction between De Koning and the deceased would, in my view include the omission by the deceased to specify which grandson she had in mind when she executed the disputed will seeing that she had three grandsons with the same name, and the complete disinheritance and no mention of her only daughter and eldest child, Engela, in that will, whom she had generously provided for in the 1994 will and what Mr de Koning mentioned under cross-examination. Dr Burger was equally an honest witness who was not shaken in cross-examination.

Retrospective diagnosis necessarily involved an examination of action by the testator in immediate periods post facto, i.e. actions showing changes in testator's behaviour that confirm that the testator's testamentary capacity had gone. The evidence shows that Dr Sieberhagen conducted such an exercise. In this regard see the English case *In the Estate of George Douglas Key* [2010] EWHC 408 (Ch) at paras 84 – 92.

The evidence on behalf of respondents

The evidence of Kornelius Johannes de Koning

[91] He was the first witness called to testify on behalf of the respondents. He testified that his client was Gawie; the deceased was a client of the late Mr Dawids who, at the time of the drafting of the 18 August will, was practising in partnership with him and was mainly in charge of the firm's office at Outjo where he worked on Wednesdays and Fridays; he was also in the Otjiwarongo office for three days a week. He did not know the deceased on a personal level, but through Gawie who probably visited his firm (at Otjiwarongo) once or twice a year. At the time of the drafting of the 18 August 2000 will, Mr Dawids was still part of the practice. He drafted deceased's will the same day she came to see him. He continued:

> 'She and Mr Vermeulen, Mr Gabriel Vermeulen, the first defendant, we took the instructions and I drafted and completed the will and had it signed on the same date. Just in illustration, the client drove from the farm so obviously to save her the bother of driving back we tried to accommodate the client by finishing the will on the date.'

He said that Gawie was present during the consultation. The deceased gave the instructions. Asked what happened then, he said:

> 'Basically what we did is I took the instructions from her, then I told the client that we will draft the will. I took the notes that I made during the consultation, I took it next door to my deeds, my typist. We basically sat down, I quickly dictated the will to her. When the will was finished, I returned and had the will explained to her and she then signed the will'. (My underlining.)

He was asked if deceased waited for the will after he had taken instructions and he answered:

> 'I am not quite sure. I believe it, I believe that they may have come back at a later stage, because we had, we needed time to complete the will, or the two documents but I cannot recall'.

Asked 'if we accept she later came back . . . what happened?'. He answered:

> 'What I did was basically, I went through each and every clause of the will with her, I explained the clauses, she was happy with the will and she then indicated that she wanted to sign the will.'

[92] I note the uncertainty of his answers. First he gives the impression that preparing the will was a simple matter and the deceased waited in his office while he went next door and dictated the will to his typist. Then he doubts whether or not deceased waited or came back to sign the will later. Next he talks of 'the two documents', yet we know he had to prepare three. He came to mention the agreement of sale that he also drafted that day much later when appellants' allegation was put to him – that on 18 August 2000 deceased was suffering from Alzheimer's or dementia to the extent that she was unable to understand the consequences of her action in executing the will. He indeed, under cross-examination, stated that 'the will was fairly simple . . . it is a short will with not a lot of bequests and as far as I am concerned a fairly simple will'.

The uncertainty in his evidence also cropped up in regard to when he came to know the deceased whom he initially said was unknown to him on a personal

level. He described the deceased in the familiar terms that the children described her – as neat and well groomed. He testified that the deceased was lucid when he took instructions from her and that she was specific as to what she wanted in the will, she understood the will and he could not see any of the signs of dementia or any other disease, conceding of course that he was not an expert on medical matters. He stated that both the deceased and Gawie were present when they gave instructions about their respective wills. He, however, could not give definite answers on why deceased came to him at Otjiwarongo whereas she and her husband had been Mr Dawid's clients for a very long time. He could only speculate which instructions were given first, i.e. whether for the deceased's will or for Gawie's will or for the agreement of sale of Chaudamus by the deceased to Gawie.

[93] In cross-examination Mr de Koning was asked if the deceased had given any other explanation regarding this will, her property and why she was leaving it in this manner? He answered:

> 'During the course of the consultation it appeared, and I cannot say who stated this or if it was Ms Vermeulen who stated it or Mr Vermeulen who stated it, it appeared or I understood that Mr Frederik Antonie Vermeulen had apparently either loaned an amount from her or received an amount from her and he had not kept to a payment arrangement or whatever the case may be and as a result thereof she had decided to complete the will in this fashion, but I cannot recall who made the statement, but that was the gist of the matter. And that was the reason why she had drafted the will as such nominating Mr Gabriel Jacobus Vermeulen Senior as the heir of the estate. I might just add to this whenever I saw her Mr Vermeulen, Mr Gabriel Vermeulen was always with her. So he was always present with her. As far as I am concerned they had a very good relationship. I never saw Ms, well I

> cannot say that I ever saw Mr Vermeulen alone, I think she always accompanied him and he was always present with her.' (sic)

The question and answers continued as follows:

> 'Mr Dicks: Yes and he was also present this day when this will . . . was consulted on.
> Mr de Koning: Yes
> Mr Dicks: And you cannot remember whether it was him or her that said it. It could also have been Mr Gawie Vermeulen?
> Mr de Koning: It is possible
> Mr Dicks: Yes
> Mr de Koning: I cannot say
> Mr Dicks: But about the statement that you just told us Mr De Koning, you have no file notes.
> Mr de Koning: None whatsoever. This is a recollection from memory.'

[94] In the course of further cross-examination, Mr de Koning made the following startling statements about the deceased and Gawie:

> 'She was very specific that the other son, Mr Frikkie Vermeulen, should not inherit in terms of the will. So as far as that is concerned she was very specific. If I can explain that a little further the reason for the deed of sale was also <u>they wanted to make sure that if the deed of sale was completed that Frikkie would not inherit the property and that was the reason why the deed of sale was drawn up</u>'. (My emphasis.)

And, later, in answering a question about the deed of sale and the 2000 will, he insisted that the deceased had a right to bequeath her assets in terms of the will and stated further:

> '. . . at the stage when this was executed I believe that she might have had financial difficulty. I recall that at some stage a client had handed over an account to our office and a payment was made in respect thereof. So I assumed when this agreement was made that the reason why the agreement was made was to either to refinance the farm or to obtain funds in a different matter, in a different manner. That is the assumption that I made in respect thereof. The other thing which I clearly recall is that Mr Gawie Vermeulen asked me when I executed this deed of sale, he questioned me, he asked whether I was certain that Frikkie would not get the farm in respect of the will and the deed of sale and I advised him that in terms of the will the farm is left to Mr Gawie Vermeulen and the deed of sale obviously also gives him certain rights as purchaser in respect of the farm.' (Emphasis is mine.)

He thereafter could not confirm or deny that the 'sole purpose of the visit' to his office on 18 August 2000 was to ensure that Frikkie does not inherit the farm firstly and secondly that Gawie inherits and obtains the farm. Further questions were put to Mr de Koning on this issue by Mr Dicks, seeking concessions from him about the motive of the visit on 18 August 2000. These questions, amounted, in my opinion, to flogging a dead horse. The passages which I have just quoted above clearly show -

(a) That the consultations between Mr de Koning and the deceased, and Gawie were more detailed (in the sense that apparently more was discussed) than Mr de Koning was prepared to say; they were definitely not a matter of taking simple instructions about a simple will as Mr de Koning wanted the Court to believe.

(b) That Gawie played such a role during the giving of the instructions for deceased's will as might have amounted to dictating what the will

> should look like, otherwise why would he ask for assurances from Mr de Koning that Frikkie was disinherited. As is shown by his inability to say the order (sequence) in which the instructions for the three documents he drafted that day were given. Mr de Koning was not prepared to reveal more of what transpired during those consultations.

His efforts to explain the rationale of the will is full of assumptions and mere guessing.

[95] Earlier in the cross-examination Mr de Koning had in fact conceded that Gawie might have commented when the deceased gave her instructions. This was in answer to the question whether Gawie gave instructions in regard to the deceased's will? In light of De Koning's answers that I have quoted above this answer was obviously an understatement, apparently designed to hide the full details of what transpired during the relevant consultations. When the disputed will was compared with the 1994 will and he was asked which grandson of the deceased was meant and why Engela for instance was disinherited in the disputed will, Mr de Koning had to admit that he had not been given information about the three grandsons with the same names, nor any information about the existence of Engela. He purported to explain, for instance, that he had been given instructions that the grandson meant was Gawie's son. This is not reflected in the will.

[96] I, therefore come to the conclusion that Mr de Koning's evidence that the deceased was lucid and specific about her instructions cannot be accepted on

face value. It raises a lot of doubt about its veracity, I say so for the following reasons -

(a) he confessed that he was not given instructions as to which of the three grandsons of the deceased referred to in the disputed will; both he and Gawie could only at best speculate that Gawie's son was what she meant. The will does not say so;

(b) his evidence as to who gave the instructions regarding deceased's will can be interpreted at best to mean both deceased and Gawie gave such instructions, that is, it appears more likely, if Gawie did not play a dominant role in that regard;

(c) he did not remember who made the important statement about the financial problems deceased had and the solutions thereof by the agreement of sale;

d) of the curious questions he says Gawie addressed to him on that occasion; and

e) his inability to say in what order the instructions to draw up the three documents were given.

The mention of Frikkie during the instruction of the deceased's will, and Gawie's insistence that Frikkie should not inherit Chaudamas should have alerted Mr de Koning to make some enquiring regarding the deceased's family. If he had done so, obviously he would have been told of the deceased's other children. As a lawyer Mr de Koning knew the requirement that a testator had to consider the equitable claim of those other family members, as the authorities say.

The second respondent, Wollie's evidence

[97] Wollie testified that deceased's 1994 will was drafted in accordance with deceased's late husbands will. He accompanied the deceased to the bank where the will was drafted and there deceased who said she trusted him and that he was honest asked him to inform the bank manager 'how the will should be drafted as your late father explained to you how the will should look like'. The deceased had then said 'you are at least honest' and that she trusted him. He was taken through that will clause by clause to confirm the bequests made therein. He said after his father's death the livestock he left was sold.

[98] Wollie was next asked to comment on the evidence given by Dr Burger, Dr Sieberhagen, and by Frikkie and Engela. On Dr Burger's testimony that he had noted in his clinical notes in 1993 that deceased had severe anxiety with loss of concentration, he said 'she concentrated good enough on anything' and later said 'it could have been that she had severe stress, because of financial difficulties'. On Dr Burger's evidence that in 1994 he noted that the anxiety had started to affect deceased's general appearance; that she had started to neglect her usual spotless make up; that her clothes were neglected, he said 'that does not exist'. He went on to say he recalled that deceased had started neglecting her clothes 'when she lived with my brother Gawie' not before that (Gawie started living with deceased in 1994). He added 'she was not herself'. Then there were some questions about Dr Burger's evidence that he knew deceased and her late husband, he had visited them in 1995, that they had been very good to their cattle, but deceased 'had sold the stud'. Wollie agreed that they had sold some cattle in 1995. Asked why they

had sold the cattle, he answered: ‘in all probability because of the drought’ and also recalled the accident on 26 February 2001 that led to her being treated by Dr Burger for a rib injury and bruising on the right side of her face. He confirmed the further evidence by Dr Burger regarding the consultation with deceased on 7 October 2003 when the doctor made a preliminary diagnosis and referred deceased to Dr Sieberhagen, and said that the consultation was initiated because the children whom deceased used to take to school had informed him that the deceased did not drive properly anymore. He mentioned a quarrel he and the deceased had at that stage when deceased had falsely claimed that she had won a good price for sheep but later said that she made a mistake: He said:

> ‘It was at that stage we decided that there is a big problem and we need to make a decision.’

Prior to that he had not observed ‘anything that was out of character’ for his late mother, up to November 2003 there was nothing that stood out in his observation of the deceased. He said they could argue about anything, ‘but there was definitely something wrong with her driving’. She had good communication with people. As to the lack of inhibition noted by Dr Sieberhagen his comment was:

> ‘It is very possible – because she was a very outgoing person – an extrovert’.

[99] In cross-examination second respondent reaffirmed his evidence in chief and confirmed what appellants said more or less. In brief he described his parents as law abiding, fair, straight forward and God fearing people. He described the deceased as a person who spoke her mind and a person who would never lie, that

she was a good farmer in her own right and his late father's right hand helper on the farm. In short he repeated all her qualities and capabilities much in the same way all the other children related ungrudgingly except for Gawie. He testified to the fairness of the parents in respect of assisting each of their children to acquire farms and said Frikkie was the only child who had not been assisted in that regard, it being the father's wish and the understanding of the whole family including the deceased that Frikkie would inherit Chaudamas. Indeed this wish and understanding was subsequently fulfilled in deceased's 1994 will as well as in the joint will of the deceased and her husband.

[100] Wollie admitted that deceased and Engela 'were always extremely close'. He admitted that deceased had inherited 'close to six hundred head of cattle and two hundred and seventy small stock' and had continued farming after the father's death in 1992. He also admitted that by the year 2000 she had virtually nothing left, and said Gawie had moved on to the farm Chaudamas in September 1994 (together with his 4 children) and did not have a job where he earned a salary. He did not admit, however, that deceased's financial position had deteriorated because of Gawie's presence, nor did he admit that Gawie's presence had caused him unhappiness, until the stage when he wanted Engela and Frikkie to buy the farm.

[101] Wollie agreed that Frikkie had made the following suggestions to the deceased:

(a) that he and Engela could pay off her debt;

(b) that her account must be closed because Gawie must not have signing powers on it ;

(c) that they (Frikkie and Engela) must take all responsibilities of her over on them;

(d) that the farm stays in her name;

(e) that she stays on the farm; and

(f) that Gawie must go and find himself a job for a change.

He said deceased became very angry over the proposals. Explaining why deceased would be angry with Frikkie, he said Frikkie had called Gawie a crook and said he did not want him on the farm. Later he said he himself was still satisfied that Gawie lived on the farm 'because he hunted day and night to pay all the debts and they went through hell . . . he and my mother together sold the cattle.' It was possible that 'most of that money went into his account', 'because they worked together and there was at some stage Gawie's son's sheep was sold and they paid the money into my mother's account to cover her debts'. He said at the time Gawie had the business at Khorixas. He confirmed that the 2000 will was executed a month or so after the meeting on the farm where the deceased got angry.

[102] Wollie gave some speculative explanation why deceased would prefer her grandchild in the disputed will to her own children and agreed that the will basically disinherits the other four children of the deceased and that it was strange that Engela 'is not even mentioned', that the disputed will was a radical departure from what he understood his parent's wishes were.

[103] He confessed his inability to remember dates. In this regard I find that where he purports to dispute dates of events related by Engela for instance, Engela's evidence is more reliable than his. This finding is fortified by the ability of Engela to link the events she related to specific events like her wedding anniversary or the millennium. I make the same finding with regard to events related by Dr Burger, such as when he noted that deceased had started to neglect grooming herself as previously. This finding is important because in my assessment of the credibility of the witnesses for the respondents, Wollie gives the impression of being the most credible of all of them. But the problem with his evidence is that he tended to tell long stories 'which have nothing to do with what the question was', as the learned judge *a quo* pointed out at a certain stage in the cross-examination of him by Mr Dicks. He was also somewhat evasive and defensive in his answers when counsel questioned him about deceased's deteriorating driving ability, about accidents deceased started having in 2000 whereas before she was an excellent driver, whom he himself described as 'better than a man'.

The evidence of Louisa Jacoba Vermeulen

[104] Respondents' witness Louisa Jacoba Vermeulen as mentioned already is the ex-wife of Wollie. On 26 September 2003 she accompanied deceased to the consultation with Dr Burger. Her description of what kind of person deceased was before her illness is almost in every respect similar to that of all of the deceased's children, in particular, to that given by Engela. I therefore need not repeat it here.

[105] Louisa testified that she used to see deceased on Mondays and Fridays 'and in the week between'. When she attended deceased's consultations with the doctor the deceased had intestine infection. She asked the doctor to investigate deceased 'because she is not normal, there are things that she is not doing in a normal way or she is not herself'. In July that year the children had told her that deceased was not driving well, something was not correct with her personality or her character. She had told the doctor then and he asked her to bring the deceased. It was then that the doctor noticed that deceased wore four panties. She was asked about a visit by deceased to Engela in November 1999, when according to Engela, her suitcase was chaotic, and she said she would not know, she was not present. She said deceased's eating habits changed in July/August 2003. 'That', she said, 'was one of the reasons why I told Burger that something is not okay with her, because she started moving from one place to the other from point A to point B without knowing she was doing that'. (My underlining.)

It was in late 2003, 'starting from 2004' that she experienced that deceased 'started to present problems communicating with people'. In January 2000 deceased's garden was still in good condition. It was also at the end of 2003 that one could observe that deceased was not herself, she was not as neat as she was before. They observed that deceased's garden was neglected in 2002; during that time the deceased and Gawie had financial and other constraints. (Underlining for emphasis.)

[106] Louisa said with hindsight the first time, deceased showed signs of Alzheimer was in 2002 when she got lost while she and her were visiting Engela,

and Engela had to send people to look for her. She confirmed that deceased's financial position was a struggle in January 2000. In brief counsel put to her all that Engela said. While she in respect of these events gave different dates or said she was not there, she, by and large, seemed to say the problems with deceased started in 2003. I think if one had to accept the dates she mentioned one has to do so bearing in mind Dr Sieberhagen's description of the stages of Alzheimer's disease and its effects at the various stages, and also his comment about why people in close contact with the patient only realise late when they then refer patients for further medical enquiry. Her comment on Engela's evidence that in 2001 deceased could not look after herself is quite interesting and somewhat evasive. Asked if she agreed with that evidence she said:

> 'No, that was, it was not like that. I know, I know that when she went to visit Engela, Engela took good care of her, she Engela took good care of her mother, she could provide her food and shoe(s), clothes and shoes. Ja and she also used to bath with Engela with a very nice warm water and she washed her back and her feet as well. That was to show her love to her mum.'

Asked when was the first time that deceased required assistance in bathing, she answered:

> 'During late 2003 that was the last time that she was with her sister Engela Maritz, she stayed for a week with her sister so she could help her with her income tax returns and auntie Engela observed it and she realized that and she discussed it with me.'

She was not with deceased in October 1998 when Dr Burger observed that deceased wore four panties.

[107] Under cross-examination Louisa agreed that the fact that they only noticed symptoms in 2002 and 2003 did not mean that is when deceased fell ill. She admitted she could not deny that in 1998 deceased wore four panties when she was examined by Dr Burger since she was not there, although she said she did not believe it. She also admitted that 'that would be totally out of character for her'. The time they went to Dr Sieberhagen what bothered her (a) was the children complaining about deceased's driving; (b) the fact that deceased regularly forgot that she had eaten and asking for food again; and (c) the fact that she did not do her tax returns anymore, 'small things like that,' she said. She admitted that she was not there in July 2000 when Engela found jam and condensed milk in deceased's cupboard and that she too in 2003/2004 experienced that deceased was hiding food. She knew about the accident in November 2000 when deceased did not stop and said it was 'not at all' like her. I underlined (a) to (c) to emphasise the several causes of the concern expressed and the near similarity of this evidence to that of Engela.

Juanita Amanda Vermeulen's evidence

[108] Respondents' witness Juanita Amanda Vermeulen is Gawie's daughter. She denied that on a visit to Dr Burger on 15 October 1998 deceased wore four panties. She also denied that in January 2001 deceased's garden was very neglected and told a long story about hiking a lift with some tourists that day who stopped to admire the garden and were seen taking photographs of it.

In cross-examination she said in 1998 she was eleven years old and in 2001 fourteen years. Initially she said she could not recall the number of times she had been to Dr Burger. Asked what happened on the visit to Dr Burger in 1995, at first she said:

> '. . . I feel that that is personal and I wish not to relate that'.

Later she said:

> 'I was there. Perhaps I was ill'.

Later still she gave a reason why she was at Dr Burger, she also said:

> '. . . but the reason why I can recall the date when my grandmother was examined is because my grandmother was a pretty shy person and I was not comfortable to witness my grandmother as a shy person being examined.'

[109] To be brief this witness was asked several questions to test her veracity, and I would say her answers were not convincing. She could not remember when it was that she visited Dr Burger again after the 15 October 1998 visit. She said that she was with the doctor again on 22 December 1999 'according to his patient's sheets', and what she was treated for then.

She, however, purported to remember how the deceased was dressed on that occasion in 1998 when she was only seven years old and also how the doctor

proceeded with the examination including the setting in the examination room. Yet in her evidence in answer to a question as to what happened that day she said:

> 'If I cannot recall precisely what happened that day how can I remember how the consulting rooms looked (like) at that stage.'

I accept Dr Burger's evidence in preference to hers.

Gabriel Jacobus Vermeulen's evidence (6th respondent)

[110] Gabriel Jacobus Vermeulen was in 1999 fifteen years old. He is the son of Gawie. In a long-winded fashion he stated that the deceased taught him many things and did many things for him. The deceased carried on with ironing clothes for him and other children up to the end of 2003. He recalled the accident with Mr Garoeb on 6 November 2000. His description how the accident happened was unnecessarily long. In brief he claimed to have been with the deceased up to Frikkie's house where Garoeb caught up with them and when Frikkie came to the house. He said when Frikkie came he told him what happened. That he was at Frikkie's house is denied by Frikkie, Garoeb and Louisa. As to the day the deceased was found on the road by Mr Prinsloo he claims to have been with the deceased at a garage in Otjiwarongo where petrol was put in the diesel tank, but did not know the name of the garage although he said it was near the school he used to attend. Gabriel Jacobus Vermeulen commented on Engela's evidence about the deceased being restless but mentioned dates completely different. Like the other respondents' witnesses his evidence was that the problems of deceased's changed behaviour were first observed in 2003.

[111] In cross-examination he said he could not agree that by the middle of 2003 deceased's illness had already advanced. He admitted he was not at Engela's house in 2001, 2000 or in 1999, i.e. he was not in a position to deny the incidents mentioned by her. He showed himself at his worst as a witness, prevaricating about the petrol into the diesel tank incident and about the incident when deceased hit a donkey. As to the incident where deceased hit into the back of Garoeb's car he contradicted what was put to appellants' witnesses. He said the witnesses Garoeb, Frikkie and Vera Vermeulen (Frikkie's former wife) were all lying when they testified that he was not present at Frikkie's house where Garoeb followed the deceased after the accident on 6 November 2000. The credibility of this witness is seriously dented first by his long winded and sometimes irrelevant answers to questions, secondly by being contradicted on some crucial points by other witnesses including Wollie and his ex-wife and thirdly by his prevarications on a number of points.

Gabriel Jacobus Vermeulen's (Jnr) evidence

[112] Gabriel Jacobus Vermeulen, the seventh respondent was 13 years in November 2000. He testified about the incident when deceased hit a donkey. He also said the first time he realized that something was wrong with deceased was in 2003, when deceased would be driving slower than usual when she took them to school. He is Wollie's son.

The first respondent's (Gawie's) evidence

[113] He testified that before he moved to the farm Chaudamas he lived at Onduri Farm. He related how he got Onduri from his brother-in-law, Jan Oelofse, Engela's

first husband. He was referred to deceased's 1994 will and said in terms of clause 1(a) thereof Frikkie would have inherited the farm Chaudamas. He also stated what Engela would have inherited in terms of that will and who would have inherited the rest of deceased's property. He described the position in terms of possessions of all his siblings and how he fell into a financial crisis after he sold his cattle apparently to help Frikkie in the trucking business that they jointly ran in Johannesburg before the death of their father in 1992. He sold Onduri and moved to Chaudamas farm in 1994. At Chaudamas he did various things in connection with the running and maintaining of the farm including hunting for the deceased to get some income. He lived in the old house at Chaudamas together with his four children for whom deceased did everything including cooking, attending to their clothing and taking them to and from school till late 2003.

[114] Gawie talked about the deceased's upkeep etc. and said it was in 2004 when she returned from Engela that deceased's 'dressing and things were not proper anymore'. As to Engela's evidence that in 1999 deceased got into a bath and got out without bathing herself, he commented:

> ' . . . that is the biggest nonsense'.

He said he realised for the first time in the middle of 2003 that something was wrong with the deceased, 'when she had forgotten to pour water into the batteries' and the children complained about her driving. In 2004 he noticed that there was 'a slight descent in her communication'. In 2001 deceased's garden was still beautiful and deceased 'did not have a problem at that time'. Asked about

Engela's evidence about deceased's dirty chamber pot under the bed, he answered:

> 'That is the biggest lie'.

Asked why he said so he went on:

> 'That incident occurred in 2003 December. That was after I telephoned Engela and informed her that she may come and fetch my late mother to go and live with her while she was still okay.'

Asked if it was after Dr Sieberhagen's diagnosis of deceased he replied:

> 'That was after the diagnosis, and when Engela came to fetch her I was together to assist packing her things. And then we then saw that the maid had not taken out or removed the pot in the morning.'

This evidence was never put to Engela to comment on when she was cross-examined by counsel for the respondents who was at every turn very astute to indicate what respondents' witnesses would say against what appellants' witnesses said they had observed about deceased's changed or changing behaviour.

He was asked what happened in July 2000, he answered:

> 'In July 2000 a purchase cheque of my mother bounced, and then next I heard Frikkie and Engela will then buy the farm and that they would take over the debt, however the land would still be in my mother's name'.

[115] Gawie confirmed the arrangements regarding his siblings and him taking out insurance policies on deceased's life and said the purpose was to enable them to 'buy cattle and animals'. He said 'I took my share and offered, I gave it up as security to the bank. Engela and Frikkie then stopped paying. They stopped paying in 2001'. In July 2001 the financial position of deceased was 'in detriment,' he said, 'her cheques bounced'.

[116] Gawie gave a completely different version of events preceding the stage where deceased got angry and chased Frikkie and Wollie out of her house. His version was that after the meeting between the deceased and his two brothers he went to the deceased who was then very upset:

> 'And I did not want further problems between herself and Engela. And I suggested to Engela that she can buy a piece of land. She did not have cash to pay the entire camp and so she asked my mother whether she could pay it off and they agreed that the amount she can then pay off would be three thousand five hundred (N$3500) per month.'

No further questions were put to him to clarify, for example when or where Engela and deceased agreed the price to be paid or what problems existed between Engela and the deceased.

[117] Gawie was asked 'how it came about that your late mother at the time executed this last will and testament.' He answered:

> 'She and Frikkie experienced problems. She also had financial problems. She informed me that she must go and have a testament drawn and also advised me to have one drawn for myself, because at that stage mine was still on my ex-wife.'

He said he was present at the consultations when deceased gave her instructions and he also gave instructions for his own will. After the draft they were asked to come back in the afternoon to sign the wills. He was asked which Gabriel Jacobus Vermeulen was to inherit the 30.06 rifle and he said 'my son Gawie Vermeulen' and that the deceased had said 'Klein Gawie' and that the other grandsons are called Gabes and Abri. He went on to say that deceased 'was as always neat and tidy, full of jokes and in full consciousness . . . full state of mind and very specific'. He said that when he and the deceased returned to sign the will, Mr de Koning:

> '. . . browsed the documents and read it and asked whether we are all satisfied with it, both hers and mine'.

Gawie was asked if he had had a discussion with Frikkie about the meeting whereafter deceased 'had chased Frikkie and Wollie out of the house', he answered:

> 'Frikkie came to the old house and he said to me, you must just make your calculations, because you must sell the farm. Just count on your calculator. That is what he said to me.'

[118] He was referred to the agreement of sale drawn on 8 August 2000 and asked who had given the instructions for it to be drafted. He said deceased had given the instructions and that he also had 'an input in it'. Still with reference to the

agreement (clause 1.1) he said the purchase price of N$380 000 ‘is the debt of Agribank’ and that where the agreement says ‘payable by purchaser to the seller by taking over the existing liabilities on the property at Agribank and First National Bank’, what was meant was that he could only take possession of the farm once the debt was paid off. He amplified:

> ‘It remains my mother’s possession up until I have then paid the debt, she will remain the owner of everything.’

In answer to a question by counsel he said if deceased had passed away before he paid, ‘I would have taken over ownership of the farm’, i.e. inherited the farm. I pause to highlight some factors that should be noted at this stage:

(a) It is common cause that deceased was in financial difficulties in 2000, even earlier; the evidence on this by both parties is very clear (see also De Koning’s evidence);
(b) Gawie claimed, according to his own evidence, that he was trying to help deceased out of this chaotic financial situation;
(c) Both Engela and Frikkie as well as Wollie were trying to extricate deceased from this situation;
(d) To the extent that one might say deceased was really involved in the agreement of sale, the whole arrangement smacks of a conspiracy between her and Gawie to disinherit Frikkie who, by all accounts, was to inherit the farm;
(e) Deceased also inherited the farm from her husband whose wishes were well known to her that Frikkie should inherit the farm;

(f) The deceased in acting the way she did was either being dishonest or had lost her memory;

(g) She completely forgets her only daughter and eldest child, Engela, whose only blame was to want to help her out of her chaotic financial situation; what deceased did was contrary to her reputation as a straight forward and God fearing person; and

(h) She angrily rejected the proposal by Wollie that would have solved her financial problems, and instead tried to solve those problems by selling the farm to Gawie, knowing very well, or completely unaware, that Gawie was not in a position to perform the agreement of sale of the farm. Yet at the stage he was consulted by the curator *ad litem* he claimed that deceased no longer owned the farm.

All these factors speak of deceased not acting according to character or as she had acted in 1994. In acting the way deceased did, as outlined above, to repeat, she was either dishonest or it was because she had lost her memory or cognitive function. The fact that she denied the rumours that she had made a new will makes her loss of memory or cognitive function the more plausible inference.

[119] Gawie was referred to amounts paid by Engela, which Engela had testified were meant to help the deceased and which she said she stopped paying when they discovered what Gawie had done. His explanation of those payments was that they were ‘for the farm that she purchased’. There is no evidence that Engela purchased the farm either as proposed by Wollie or as claimed by Gawie. He did not pay the purchase price in terms of the sale agreement. Gawie was also taken

through documents including cheques signed by deceased from 1996 or so, to refute the import of Engela's evidence that deceased made spelling mistakes and also to refute Engela's evidence that deceased was unable at some relevant stage to do her own tax returns and that this was done by deceased's sister, Engela Maritz. In answer to the last mentioned, Gawie denied that evidence and said:

> 'However once she (deceased) has completed it then Engela would then you know transfer that onto her computer, I do not know whether it is for security reasons to be kept saved or whatever.'

He was asked about the agreement signed on 9 December 2000 between deceased and Mr Kornelius Van Wyk, how it came about deceased entered into that agreement, and he said:

> 'The financial difficulties were tremendous at that stage; she had no other option but to sell.'

[120] Some further cheques were presented to refute the appellants' evidence that at some stage deceased could not do anything for herself. The cheques were dated 7 May 2001, 17 May 2003 etc. He said deceased wrote the cheques. The questions on these were more correctly to refute what was stated by the appellants in the affidavit in support of the application for the appointment of the curator *ad litem*. He was finally taken through appellants' evidence and his stock response was either 'highly improbable', 'it is impossible', 'it is all nonsense', or 'that is non-existent', 'a bundle of nonsense', and on evidence of self-neglect by the deceased he insisted that deceased was very neat at the relevant stages.

[121] Gawie was the only family witness who would not admit that deceased and her husband were fair to all their children. Even on the issue whether the parents were consistently fair as far as giving their children animals; he said 'I cannot remember'. His admission in this regard was to the statement that deceased was referred to as the Iron Lady of Outjo. According to him she 'was a straight forward strong woman'. He, however, admitted to the statement in the joint will of deceased and her husband which in clause 3 provides that in the event that the parents should die simultaneously 'all the children would inherit equally'. His admission as to the fairness of his parents wherever made was grudgingly made even in regard to his, being assisted by his father to buy Onduri farm 'in the mid 80's or 1986'. But he admitted that it was his father's wishes 'that Frikkie should one day inherit Chaudamas after he, Wollie and Engela had been assisted. He also admitted that clause 1(a) of deceased's 1994 will (whereby Frikkie was to inherit Chaudamas), was according to his father's wishes.

[122] Significantly Gawie admitted that by the time the 1994 will was drafted he 'had already sold Onduri,' he 'had already moved back to Chaudamas and the trucking business in which he and Frikkie were involved had already been disposed of'. Onduri was sold in August 1994. He admitted he sold Onduri because he was 'in financial dire straits'. He said when he settled at Chaudamas he had livestock at the farm. He was also grudging about the deceased being an experienced farmer, his father's right hand, referring to her ungratefully as follows:

> '. . . there is a difference between farming yourself and being there and watching how others farm. One can compare it to a truck driver, the one seated next to him

> only goes along with the driver, however he is acquainted with changing of flat tyres.'

When reminded of all his siblings' views about the deceased, he insisted he knew better. He said deceased's financial position went downhill long before he moved on to the farm Chaudamas. His disparaging remarks about deceased continued when he related how she supported him and his children:

> 'Yes my Lord, yes, we both supported each other. I worked for my mother and she, loved her grandchildren a lot. She took care of them, paid their school fees, took care of the meals and all of that, and she took very good care of them. She loved her grandchildren. And so I hunted for her and I made income for her through that. With the farming and the cattle, my mother was allergic to the sun and she could not stand in the sun for long or in the kraals.'

Later he claimed:

> 'I brought more in for her than what she gave out to me'.

All these claims despite admitting that after he had been at Chaudamas for six years deceased had no livestock left, whereas when her husband's estate had been finalised in 1993 the deceased 'started with five hundred and ninety two (592) cattle and two hundred and seventy (270) small stock' and also despite admitting, grudgingly, that deceased had paid his 'part of this policy that we have been hearing about in this matter.' He said he was aware that on a number of occasions Wollie asked Frikkie and Engela whether they would not buy Chaudamas as he was afraid deceased 'would lose the farm'. He deviously

admitted that he was not asked to buy the farm because he was not in the financial position to do so. He said:

> 'Wollie did not approach me first my Lord that is correct'.

He admitted he was not at the meeting with the deceased nor was Engela present in June/July 2000. What he said in his evidence-in-chief was not put to Frikkie to deny, namely that Frikkie had come to his house after that meeting and told him to make his calculations. He said:

> 'They were there with Wollie or his car, I cannot remember whose vehicle; but they passed by my house and as they drove by he said that, he yelled that out from the car's window'.

Asked if he was saying Wollie was there too, and he would have heard that, he answered, contradicting what he had just said:

> 'I cannot remember if Wollie was there also'.

The questions and answers continued as follows:

'Mr Dicks:	Because Wollie did not mention anything about this either. Can you explain that? - - -
First respondent:	I do not know whether he was asked, whether it was put to him.
Mr Dicks:	It was not, because we heard about it for the first time when you testified. You see Mr Vermeulen there was no reason

for your mother to be angry with Frikkie and I will put it to you why I say so. - - -

First respondent: I am listening.

Mr Dicks: He did not suggest that your mother sells her farm. That was Wollie's suggestion.

First respondent: But he wanted to buy the farm.

Mr Dicks: Those were not my instructions. My instructions are that he and Engela offered to settle your mother's debt with the banks but that the farm will stay on her name.

First respondent: My Lord before Frikkie went to my mother he came to me at the old house by the scrap yard, and he took from the scrap there and loaded that. . . . Then he said to me that if he obtains a market for meat then he would also hunt. And he said to me that the trucks and the implements he would then sell so that he could then pay the debt. I asked him whether mother knows about it. He said there is no choice. He wanted to buy the farm and he said to me all that they have is a piece of paper. The land or the farm will still be in my mother's name.'

Mr Dicks: Did you tell this to your legal representatives during consultation?

First respondent: I cannot remember my Lord.'

[123] As Mr Dicks rightly pointed out, it was not put to Frikkie that Gawie met him before and after the meeting with the deceased. It will serve no purpose to go on exposing more contradictions in Gawie's evidence. Suffice it to say if you compare his evidence-in-chief to his evidence under cross-examination (with the additions thereto) you can easily see that he was lying. Even his evidence under cross-examination is full of contradictions that show that he was lying. I have earlier in this judgment referred to what I called stock answers given by Gawie when

incidents related by appellants' witnesses regarding change in the behaviour of the deceased were put to him for comment, such as for instance 'improbable', 'nonsense'. These answers were given without further comment. Apart from all this, Gawie resorted to giving new evidence when cornered, evidence which was never indicated he would give when those witnesses were cross-examined. Also in many instances he gave vague answers, clearly suggesting he was evading questions. For instance, he was asked if he had signing powers on deceased's account as alleged by appellants and his answer was:

> 'I am not sure. At that stage I do not think I had' or 'I can go back and check whether I had signing powers then but I do not think that I had.' '

The allegation that he had signing powers on deceased's account was first made in the affidavit supporting the application for the appointment of the curator *ad litem* which application he was aware of and, according to him, about which he tried to do something.

[124] Although Gawie's evidence was that deceased gave her own instructions for the disputed will, he purported to give explanations for the provisions in the will–

(a) Why Frikkie and Wollie were bequeathed the mouser rifle and the .22 rifle respectively;

(b) Why Engela was not even mentioned and did not get anything;

(c) Why Frikkie was no longer getting the farm Chaudamas; and

(d) Why Wollie was no longer getting the farm implements.

This implies that the deceased discussed these provisions with him beforehand although when and where such discussion took place was not canvassed. He said that he was aware of the existence of the 1994 will but had not seen its contents before. He agreed though that the disputed will was a radical departure from the 1994 will. The disputed will did not specify which of the three grandchildren called Gabriel Jacobus Vermeulen was referred to in clause 3.5 thereof and Gawie's evidence that it was his son is based on deductions. It appears that De Koning was not made aware that there were three such grandsons either. Gawie said that he was not concentrating when deceased gave her instructions on this aspect of her will. This is surprising and appears as an effort to evade the questions. He denied what De Koning said namely that when he was giving instructions for the sale agreement he wanted an assurance that 'Frikkie would definitely then no longer inherit Chaudamas'. Of the two witnesses I prefer De Koning's evidence to that of his on that score.

[125] It was Gawie's evidence that Louisa Vermeulen took deceased to Dr Sieberhagen because he had noticed that she forgot to fill her batteries and, because of the report by the children that deceased was driving poorly in 2003. He did not notice the many changes Louisa Vermeulen related to the doctor though he said he saw deceased 'everyday basically'. He ended up admitting that he was not present when in July 2000 Engela found a dirty chamber pot under deceased's bed or when Engela found tins of condensed milk in deceased cupboards in June 2000. He gave the following nonsensical answer in this regard:

> ‘I was not present, because there was no such incident’.

He admitted that he did not witness the deceased getting into the bath tub and out without bathing herself as testified to by Engela. His explanation why Engela did not buy a camp as he suggested was also quite illogical. In connection with the dirty chamber pot incident, the following was specifically put to Engela in cross-examination:

> ‘My instructions are that somebody was in fact present during that particular incident and that particular person who was present during that incident was the first defendant.’

The questioning about the chamber pot incident was repeated several times. At last it was said Gawie was present and;

> ‘. . . will testify that this particular incident happened in December 2003 after your late mother was diagnosed with Alzheimer’s and you came to fetch her.’

Engela clearly denied that and repeated that the incident was in July 2000. When Gawie came to testify, he was asked why he was saying the incident occurred in December 2003. As previously mentioned, he answered that he had telephoned Engela to come and fetch the deceased after the diagnosis by Dr Sieberhagen. He went on:

> ‘When Engela came to fetch her I was together to assist her, packing her things, and then she saw that the maid had not taken out or removed the pot in the morning.’

This last statement was not put to Engela to admit or deny when she was cross-examined.

[126] It should be noted that although Louisa Vermeulen gave no dates of the observations she told Dr Sieberhagen she made about deceased's changed behaviour, the majority of her observations correspond or are similar to what Engela said she observed at various stages of deceased's life. I have already listed the observations Louisa Vermeulen relayed to Dr Sieberhagen in para [69] above.

[127] My consideration of the evidence as a whole convinces me on a balance of probabilities that Gawie's heavy financial dependence on the deceased was a cause of great concern on the part of the other children, including Wollie. The other children tried to do something to alleviate deceased's debt-ridden situation, of which, for whatever reason, Gawie was part of the cause. In para 58 of his judgment the learned trial judge said that deceased's reaction to the proposals of Frikkie and Wollie to lessen the deceased's dire financial situation had nothing to do with her testamentary capacity. I disagree. My disagreement is fortified by how Roper J treated a similar situation in *Lewin v Lewin, supra*. In that case the learned Judge first analysed the evidence regarding the testator's grievances against his wife, whom the testator had disinherited, and came to the conclusion

> '. . . that the motives which led the deceased to disinherit the plaintiff were such as would probably not have had that result had it not been for the mental impairment

> and emotional disturbance associated with the aphasia which followed upon his stroke.'

Evidence had been given by a doctor (expert) in that case that 'the action of an aphasic to a grievance might be more extreme, and that it might result in an unreasonable reaction'. In the present matter the so-called motive for the deceased to change her mind and disinherit Engela, in particular, can only be described as extreme and unreasonable and would not have produced that result if one considers further that the deceased was diagnosed to be suffering from stage 2 of Alzheimer's disease already in 2003.

[128] In the *Lewin v Lewin* matter, the passage, I have already quoted therefrom in full context states at 253:

> 'According to the experts the degree of impairment of the intellect can only be determined in any individual case by an exhaustive and lengthy neurological examination, such as was never carried out in the case of the deceased. It was accordingly contended on behalf of the defendant that the plaintiff had not discharged the *onus* of proving that the deceased had no testamentary capacity when the disputed will was made. The Courts are, however, almost daily called upon to decide disputed issues of fact without the aid of scientific proof. When that is the case they must take such evidence as is put before them and decide the issue upon the probabilities.'

The Law on testamentary capacity

[129] Section 4 of the Wills Act 7 of 1953 (the Act) provides:

> '**4. Competency to make a will**

> Every person of the age of sixteen 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.'

[130] Over the years a number of tests for testamentary capacity has been formulated. It is apparent that all these tests are an elaboration of the principles spelt out in s 4 of the Act. Because the parties in this matter accept these tests it may not be necessary to refer to all of them. It is the application of these tests to the facts of this matter as revealed by the evidence that is of cardinal importance. A classic statement of testamentary capacity was provided by Cockburn CJ in the English case of *Banks v Goodfellow* [1987] LR 5 QB 549 at 564. His Lordship explained the law as follows:

> '[A] testator shall understand the nature of the act and its effect; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder to the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which if the mind had been sound, would not have been made.'

[131] A further account of the concept was provided by Dixon J in *Timbury v Coffee* [1941] HCA 22 [1941] LR 66 277 where his Lordship said at 283:

> 'Before a will can be upheld it must be shown that at the time of making it the testator had sufficient mental capacity to comprehend the nature of what he was doing, and its effects, that he was able to realize the extent and character of the property he was dealing with, <u>and to weigh the claims which naturally ought to press upon him</u>. In order that a man should rightly understand these various

> matters it is essential that his mind should be free to act in a natural, regular and ordinary manner . . . "If a will rational on the face of it is shown to have been executed and attested in the matter prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances in evidence which counterbalance that presumption, the decree of the court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it." . . . In the end the tribunal – the court or jury – must be able, affirmatively, on a review of the whole evidence, to declare itself satisfied of the testator's competence at the time of the execution of the will . . .'

[132] In the present matter the onus of proving that the testator was not capable of making a will remains on the appellants despite the court's order that deceased was incapable of managing her own affairs. See *Smith and Others v Strydom and Others* 1953 (2) SA 799 (T).

[133] I, with respect, accept, as the court *a quo* did, that the test for testamentary capacity is as stated in the South African Appeal Court case of *Tregea and Another v Godart and Another 1939* AD 16 at 49. There Tindall JA said:

> '. . . in cases of impaired intelligence caused by physical infirmity, though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. Voet (28.1.36) states that not only the healthy but also those situated in the struggle of death, uttering their wish with a half-dead and stammering tongue, can rightly make a will provided they are still sound in mind.'

[134] The judge *a quo* in this matter quoted the passage in *Bank v Goodfellow* where Cockburn CJ also stated the following at 568:

> 'The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have insufficient 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?'

[135] The passage as quoted, with approval, by Tindall JA in *Tregea and Another v Godart and Another* at 49 ends up with the following sentence:

> '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?'

[136] In *Kirsten and Another v Bailey and Others* 1976 (4) SA 108 (CPD) at 110 Vivier AJ, referred to two cases i.e. *Harwood v Baker*, 3 Moo. P.C. 282 and *Battan Singh and Others v Amirchand and Others*, 1948 A.C. 161. In *Harwood v Baker* the testator made a will in favour of his wife to the exclusion of other members of his family, while suffering from a disease which affected his brain and impaired his

mental ability, the learned judge quoted what Erskine J said at 290 of the report, namely:

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

In *Battan Singh and Others v Amirchand and Others* the testator, whose mental state was weakened through illness, left all his property to the respondents to the exclusion of his four nephews. At 170 of the report Lord Norman said:

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

[137] Vivier AJ also drew attention to *Lewin v Lewin* 1949 (4) SA 241 (T) where at 280 Roper J said:

> '. . . It is abundantly clear from the authorities that it is not sufficient that the testator understood and intended the dispositions which he was making in his will (see on this point in our own Courts *Estate Rehne and Others v Rehne* (1930 OPD 80 at p. 91*); Lange v Lange* (1945 AD 332, at p. 342)); it is necessary further that he shall have been able to comprehend and appreciate the claims of his various relations upon his bounty, without any poisoning of his affections, or perversion of his sense of right, due to mental disorder; and generally, to use the language of the American case referred to by COCKBURN, C.J., that he shall have had the ability
>
> > "clearly to discern and discreetly to judge of all these things, and all those circumstances, which enter into the nature of a rational, fair and just testament".' (My emphasis.)

[138] It is also quite clear that *Banks v Goodfellow* and all the other cases referred to above propound several tests of capacity, each of which, separately, has to be satisfied for a will to be regarded as valid. In the present case sight must not be lost of the fact that the disputed will in many respects presents a remarkable departure from deceased's earlier will, the 1994 will. Nor must the diagnosis of Dr Sieberhagen be forgotten, that in 2003 the deceased was already suffering from Phase II of Alzheimer's disease, or his description of the various stages of the disease or his evidence that the capacity of a testator suffering from Alzheimer's disease is affected in Phase I. The doctor's diagnosis was not challenged.

[139] Lastly, in *Lerf v Nieft NO and Others* 2004 NR 184 (HC) at 190J van Niekerk J referred to a dictum in *Harlow v Becker NO and Others* 1998 (4) SA 639 (D) at 644A-B where it was stated as follows:

> 'Obviously, it is a prerequisite to the execution of a valid will that the person who executes the will has to intend it to be his will. But the mental capacity or competency to execute a valid will embraces more than a mere intention on the part of the testator that the draft will to which he puts his signature should be his will. He may appreciate the meaning of the document and approve of its contents and yet may lack the understanding or mental capability necessary for the execution of a valid will.' (Emphasis added.)

After an examination of the case law on the point Van Niekerk J then proceeded to express the Court's view on the matter as follows at 191B-C of her judgment:

> 'In order to show that the deceased in this matter did not have the necessary mental capacity it must be shown that he failed to appreciate the nature and effect generally of the testamentary act; or that he was at the time unaware of the nature and extent of his possessions; or that he did not appreciate and discriminate between the persons, whom he wished to benefit and those whom he wished to exclude from his bounty; or that his will was inofficious in the sense that it benefited persons to the exclusion of others having higher equitable claims to the estate. (See *Cloete v Marais* 1934 EDL 239 at 250.)'

The court *a quo*'s judgment

[140] Considering the evidence which I have analysed above, it is surprising that in para 46 of his judgment the learned judge *a quo* came to the conclusion that 'the evidence of the defendants and witnesses named who corroborated each other in most instances are on a balance of probabilities more acceptable than that of the plaintiffs in regard to the changes and incidents', whatever that means. If that is meant to give a blanket cover of credibility to the evidence of the witnesses called on behalf of the respondents, I beg to differ. To begin with the evidence analysed above in this judgment shows that the only area where respondents'

witnesses seem to corroborate one another is the claim that deceased's problems (the changes in her conduct etc.) only started in 2003 or after Dr Sieberhagen's diagnosis of deceased as in Phase II of Alzheimer's disease. With respect, I find the conclusion that respondents' witnesses corroborated each other in this respect is not supported by the evidence at all. The evidence shows that respondents' witnesses either admitted that the incidents related by appellants in regard to deceased's changed or changing behaviour occurred, but, unconvincingly, sought to explain away such changes, or allege that the incidents happened on different dates or in some unspecified manner, or deny that the incidents happened at all; respondents' witnesses do not corroborate each other in such explanations. Secondly, with respect, I find the points mentioned by the judge *a quo* as support for his conclusion to be mere makeweights. I comment on them seriatim -

(a) 'The plaintiffs allege that they (in particular the second plaintiff) notices a deterioration in the behaviour of the deceased, the upkeep of her garden and house, her personal hygiene and grooming since 1993 and more pronounced since 1998 and during 2000, yet they did nothing in that regard.'

The affidavit was sworn to on 21 January 2001. In para 6 thereof, to repeat, first appellant stated:

> 'With the benefit of hindsight I now realise that soon after the death of my father my mother's mental well-being began to deteriorate. I do not think any of us children observed the aforegoing, probably due to our inexperience in this regard. It has only been over the past three years that

particularly my sister, Engela, has noticed a marked deterioration in the patient's mental capability and capability of managing her own affairs.'

That was after Dr Sieberhagen's diagnosis of the deceased on 23 November 2003. What first appellant said is in line with Dr Sieberhagen opinion, *inter alia*, that '. . . the diagnosis of Alzheimer's disease is dependent upon the behaviour of the patient, which is often only detected when the illness has already progressed to the point where treatment would have very little effect'. In the light of all this with respect, the remark by the judge *a quo* that appellants did nothing is simply gratuitous.

(b) 'The first plaintiff (supported by the second plaintiff) unequivocally states in his founding affidavit to the application to appoint a *curator ad litem* that for the past 3 years these changes in the behaviour and person of the deceased had been observed.'

The evidence shows that this was also the case with other members of the deceased's family. Obviously the words stressed by the court *a quo* are quoted wrongly and out of context. In any case how this supports the court's decision is beyond my comprehension. Dr Sieberhagen's unchallenged opinion on how lay persons close to an Alzheimer's patient come to realise what is happening is apposite in this regard.

(c) 'The application for the appointment of a curator *ad litem* was based on the fact that the deceased did not have the ability to manage her

own affairs and not that she was of unsound mind. The court only declared her to be unable to manage her own affairs.'

That application is neither here nor there. What appellants were required to prove is what they allege in the particulars of claim in this matter.

(d) 'Ms Louisa Vermeulen took the deceased to Dr Burger and when he referred her to Dr Sieberhagen, she accompanied her to Dr Sieberhagen.'

I fail to see how the fact that Louisa Vermeulen took the deceased to Dr Burger or accompanied her to Dr Sieberhagen supports the blanket conclusion reached by the court *a quo* on the credibility of respondents' witnesses.

(e) 'The undisputed evidence of the seventh defendant is that the deceased drove them (grandchildren) regularly to school on Monday and fetched them on Fridays and the first indication of any deterioration in her mental condition was when they became concerned of her driving skills during 2003.'

That may be so, but Dr Sieberhagen was specifically asked a question in connection with that, namely:

> '. . . the evidence will be that in 2003, that she still drove a motor vehicle. . . Would that be an indication that (she) does not have Alzheimer's disease? Can you comment on that?'

He replied as already noted and I repeat: 'My comment will be that the US had a President who had Alzheimer's and he could govern the country. Alzheimer's disease does not disable one to the extent that you cannot drive a motorcar because it is a routine action that this person has done for many, many years. So, she does not need much of an IQ to do that'.

So that evidence albeit undisputed does not prove that the deceased did not have Alzheimer's disease before 2003 or that the disease did not affect her mental capacity before 2003.

(e) 'Only after the deceased's death in 2007, more than 6½ years after the disputed will was executed and when the appellants discovered that there was such a will, did they commence legal proceedings in 2008 on the basis that the deceased was not mentally capable to execute the 2000 will.'

How this supports the court ***a quo***'s finding, to say the least, also passes my understanding.

With respect, I conclude that the criticism of the appellants by the learned trial judge, bolstered by the points (a) – (f) above, was based on specious reasoning.

[141] The learned judge *a quo*, with respect, did not analyse the evidence of all the witnesses in detail or individually or as I have done in this judgment. He merely summarised the evidence, including that of Dr Sieberhagen. I find this approach fraught with danger in that thereby one may put oneself in a situation where one is unable to focus on particular aspects of the evidence that may have a very significant bearing on the issues; I think this happened in this case. This is particularly so in a case like the present where one, in the absence of direct medical proof, has to rely on probabilities. The judgment *a quo* reflects this lack of focus in a number of respects. For instance –

(a) In para 41 (i) the court *a quo* states:

> 'Despite the evidence of the first and, in particular, the second defendant to the effect that the deceased's behaviour revealed strong indications that she was not *compos mentis* before August 2000, neither of them discussed it with other family members, or the family doctor, Dr Burger, or did anything about it in terms of having the deceased medically examined.'

Apart from incorrectly referring to second respondent, the time when the appellants should have had the deceased medically examined is not indicated. According to Louisa Vermeulen none of the family members (including the respondents, it would seem) were able to do anything of that nature until only in 2003.

(b) There is no mention or consideration of the two important statements by Mr de Koning (quoted above) under cross-examination, which statements cry out for interpretation as to what deceased and Gawie were up to when giving their instructions to him or why the deceased would have her will drafted in that manner, and why the first respondent took the deceased to Otjiwarongo, to his own lawyer, instead of to Outjo to Mr Dawids, the lawyer who had dealt with her and her husband before.

(c) Then there is the misdirection on facts regarding the meeting in June or July 2000 between Frikkie and Gawie and the deceased which in para 58 of the judgment *a quo* the court relied on to explain the deceased's radical change of intentions. The radical departure of the disputed will from the deceased's 1994 will also cry out for interpretation. (See *Nicholson's* case, at 51.)

[142] The court *a quo,* as already mentioned, also merely summarised the evidence of Dr Sieberhagen. While I have no problem with the summary per se, the difficulty is that the summary does not mention important statements of opinion by Dr Sieberhagen as to the testamentary capacity of the deceased. These opinions are quoted above in this judgment. The one quotation of what Dr Sieberhagen said that the court *a quo* refers to appears in para 39 of the judgment *a quo* referring to para 13.9 of Ms Vivier's report.

[143] In para 41 the trial judge summarised observations in respect of the expert medical evidence after which he stated in para 42:

> 'These observations confirm my decision that, although I accept Dr Sieberhagen's evidence in respect of Alzheimer's disease in general and his diagnosis based on the factors that I have set out above, the expert evidence given by him and Dr Burger do not assist me to determine whether the deceased had the testamentary ability to execute a will on 18 August 2000. For such a determination I am reliant on the acceptable evidence of the witnesses who testified what the deceased's mental condition was at the time.' (My own emphasis.)

Almost the whole of that para 41 of the judgment is devoted to observations by Dr Sieberhagen, yet the learned trial judge concluded as quoted above, without distinguishing what Dr Sieberhagen said from what Dr Burger testified about. In my opinion, the summary of the evidence that followed the above statement did not do justice to the evidence as analysed the way I have done in this judgment. It looks at pieces of the appellants' evidence in isolation instead of looking at the evidence as a whole, including that given by the respondents. It ignores the evidence of Dr Burger who, by the way, was not a family member of the deceased. It says absolutely nothing about the probabilities. It ignores or pays lip service to what was stated in para 28 of the respondents' heads of argument viz:

> 'It is submitted the Court a quo realised that the opinion of Dr Sieberhagen was dependent on certain facts and failing such facts or based on the acceptance of contrary facts, a different opinion would have followed. It was thus important to establish the true facts in an attempt to establish if Alzheimer's affected the testatrix at all or to such an extent that she lacked testamentary capacity in August 2000 when she executed the contested will.' (My emphasis.)

[144] If one accepts, as the court *a quo* did, the correctness of Dr Sieberhagen's diagnosis that confirmed that in 2003 the deceased was suffering from Phase II of Alzheimer's illness, his evidence that each phase of the illness can last many years and that a patient's capacity or ability to make a will will be affected in Phase I, it seems completely illogical to determine whether the deceased had the testamentary capacity to execute a will on 18 August 2000 solely on the evidence of respondents' witnesses (such as it was) without looking at the probabilities. In regard to the testimony and opinion of Dr Sieberhagen, for instance, in re-examination, when he was specifically asked as already noted:

> 'Now, with all that you have heard or that you have testified, all that has been put to you, can you say that in your opinion, expert opinion she could not, on 18 August 2000 execute that will?

and he answered:

> 'My Lord, if the information that I had been given in terms of the symptoms that were notable before, <u>if we can accept that that was indeed the case,</u> I would be fairly confident in saying that she in all probability had significant dysfunction in saying that time. But should the situation be that the symptoms mentioned during the later parts of 1998 and 2000 <u>be not true</u>, then I would not be able to make that statement, and that was the reason why in that curator's report it was reported that at that time I was not prepared to make any statement like that.' (My underlining.)

That answer necessarily required the court *a quo* to ask itself the question, what was the truth? The answer would, in my opinion, require an assessment of the evidence by Dr Burger and the evidence by the appellants particularly that of Engela. The incidents mentioned by Engela as I have shown above, were either

not directly denied, by the respondents, and the cross-examination by counsel thereon merely sought to explain the incidents or to allege different dates as to their occurrence; the four panties and the dirty chamber pot incidents, for instance.

[145] A proper assessment of the evidence would require that sight is not lost of the fact that in making his diagnosis that in 2003 the deceased was already in Phase II of Alzheimer's disease, Dr Sieberhagen relied also on his own observation of the deceased's actions and the result of the MRI scan of the deceased's brain. In other words, all factors must be put in the scale before deciding as to the balance of probabilities. These factors would include para 12 of the curator *ad litem's* report, what Louisa Vermeulen told Dr Sieberhagen on 20 November 2003 (listed above and in the judgment *a quo* at para 27) which observations, albeit no dates were mentioned, it would be ridiculous to claim were all made in one day, one week or one month period. Also sight should not be lost of the seeming emphasis by witnesses for the respondents that deceased's mental problems only started at the end of 2003. The evidence of Mr de Koning under cross-examination (quoted above) should also be taken into consideration. Lastly, Dr Sieberhagen's remarks on probabilities should also be kept in mind in this regard, viz:

> 'At the time I had the consultation with the curator, the information that was available to me was only that I had after having diagnosed her. And I did not have any information concerning the development of her symptoms previously. And that put me in a position where it would have been not possible to make any retrospective statement in terms of the patient's ability on a specific date and also with regard to a specific transaction. I would like to emphasize that the best that I can do today is again to say that in probability this patient has been ill since I

> guess early 90's or the mid 90's. And that from that time until her death there should have been a time when she became unable to conduct business, where her testamentary capability disappeared. My guess is that it was end of 1999 or during 2000. But I do not think that I will be able to get any closer than that.' (My emphasis.)

[146] It is trite that the court is not bound by the opinion of medical experts but itself not being an expert in the psychiatric field, it will not lightly reject the opinions of expert witnesses. See *S v McBride* 1979 (4) SA 313 (W) where at 317H it was stated:

> '. . . On the other hand the Court, which is not an expert in the psychiatric field, will not lightly reject the opinions of the specialist witnesses. It will do so only if in its view the specialists based their opinion upon an inadequate knowledge of the relevant facts or ignored such facts. (See *S v Kavin* 1978 (2) SA 731 (W) at 736F-737A.)'

In my view the rejection of Dr Sieberhagen and Dr Burger's opinions (and evidence) in this matter was completely unwarranted.

[147] The standard of proof in civil cases was succinctly spelt out by Lord Denning in *Miller v Minister of Pension* [1947] 2 ALL ER 372 at 373:

> 'If the evidence is such that the tribunal can say that it is more probable than not the burden is discharged.'

In *Govan v Skidmore* 1952 (1) SA 732 (N), Selke J said p 734C:

> '. . . for, in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence (3rd ed, para 32), by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

[148] On the evidence in this matter, I am satisfied that the probabilities are overwhelming in favour of a finding that on 18 August 2000 the deceased was suffering from Alzheimer's illness to the extent that she lacked testamentary capacity. The deceased, in all seriousness did not pass the test spelt out in the various cases I have quoted above. To repeat, I find the judge a *quo's* remark in para 58 of his judgment that the incident which occurred approximately July 2000 had nothing to do with the deceased's testamentary ability, untenable when one properly has regard to how the disputed will came to be made, particularly when one accepts Mr de Koning's revelations in his evidence under cross-examination. Therefore, the appeal must succeed.

Costs

[149] The court *a quo* dismissed the appellants' claim with costs which costs were to include the costs of one instructing and one instructed counsel. On appeal the appellants asked for costs against the first, second, seventh and eighth respondents; they asked in the alternative that costs be paid out of the estate. I do not think that the estate be mulcted in costs in the circumstances of this case. The only asset of note in the estate is the farm. Moreover, other than giving evidence on behalf of the respondents, the executor (Mr de Koning) did not take an active

part in the proceedings. I think, therefore, that the respondents concerned should bear the costs of the appeal as well as the costs of the action in the High Court.

[150] In the result I make the following order:

1. The appeal succeeds.
2. The order of the High Court in Case No [P] I 3284/2007 dismissing the appellants' claim is set aside and is substituted for the following order:

   '(a) The will of Fransina Katharina Elizabeth Vermeulen dated 18 August 2000 is hereby declared *null* and *void*.

   (b) The will of Fransina Katharina Elizabeth Vermeulen (the testatrix) dated 1 October 1994 is declared the valid will of the testatrix.

   (c) The first, second, seventh and eighth respondents are ordered to pay the costs of the action, such costs to include the costs of one instructing and one instructed counsel.'

3. The first, second, seventh and eighth respondents are ordered to pay the costs of the appeal jointly and severally, the one paying the other to be absolved. Such costs are to include the costs of one instructing and two instructed counsel.

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MTAMBANENGWE AJA

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SHIVUTE CJ

_____

MAINGA JA

APPEARANCES

APPELLANTS:	R Tötemeyer (with him G Dicks) Instructed by Kirsten & Co Inc
1ST, 2ND, 6TH, 7TH, 8TH RESPONDENTS:	T J Frank SC (with him J Schickerling) Instructed by Etzold-Duvenhage