

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case Number: **38667/19**

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: No
25/08/2026 DATE	_____ SIGNATURE

In the matter between:

L[...] **J[...]** **K[...]** First Plaintiff

S[...]¹ **B[...]** **K[...]** Second Plaintiff

S[...] **L[...]** **K[...]** Third Plaintiff

R[...] **K[...]** Fourth Plaintiff

B[...] **K[...]** Fifth Plaintiff

and

DAVID NATHAN N.O First Defendant
(In his capacity as the executor of the late B[...]
K[...]¹ – Deceased Estates/Masters Ref no
007836/2018)

DAVID NATHAN N.O AND L[...] **K[...]** **N.O** Second Defendant
(In their capacities as executors of the estate of the
late G[...]¹ S[...]¹ K[...]¹ – Deceased
Estates/Masters Ref no. 003808/2021)

L[...] H[...] (born K[...])

Third Defendant

L[...] H[...] (born K[...]) and L[...]1 H[...]

Fourth Defendant

(jointly as father and mother and guardian respectively
of their child T[...] H[...])

MASTER OF THE HIGH COURT OF SOUTH AFRICA

Fifth Defendant

(Gauteng Local Division – Deceased Estates/Master's
Ref no 007836/2018)

J[...] H[...]

Sixth Defendant

JUDGMENT

MANOIM J:

Introduction

1. This case concerns a family dispute over the validity of various wills and codicils executed by the late B[...] K[...] (B[...]) in the last four years of his life. K[...], born in 1923, died at the age of 94. There is no dispute that he signed these wills and codicils. What is in dispute, was whether he had the capacity to do so. All agree that in his twilight years he was suffering from dementia, more specifically Alzheimer's disease.
2. The key question is whether that meant that he lacked testamentary capacity because he was mentally incapable of appreciating the nature of his testamentary acts. In terms of section 4 of the Wills Act, 7 of 1953:

“Every person of the age of 16 years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and

effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same.”

3. With one exception, the litigants are all members of his family.¹ They could usefully be categorised as his first family and his second family. The plaintiffs are his first family. They are his three children he shared with his first wife D D[...] (R Regina); L[...], S[...]1 and S[...] K[...], and two grandchildren, the daughters of his son L[...].² L[...] and S[...]1 are twins, and S[...] is one year younger than them. B[...] divorced D[...] in 1965, and she remarried in 1969.
4. The defendants can loosely be described as B[...]’s second family. In 1969, B[...] got married for the second time to G[...] K[...], who is now deceased. He had one child with her, L[...] K[...], now L[...] H[...]. L[...] was born in 1973 which makes her thirteen years younger than L[...] and S[...]1, and twelve years younger than S[...]. L[...] is married to L[...]1 H[...], and they have two children, T[...] and J[...]. Such has been the length of this litigation that the composition of the defendants has changed from when it was initiated. G[...], the second defendant has since passed away, while J[...] and T[...] have reached majority and have been joined to the litigation.
5. The only non-family litigant and the first defendant is David Nathan. He is cited because he was, at the relevant times, the sole executor of the disputed wills and a trustee of a family trust. Nathan was a witness in case for the defendants, but he did not instruct his own legal team. G[...] passed away on

¹ I have adopted the convention used by the parties throughout the litigation by referring to the members of the Kaminer family by their first names. Thus B[...], G[...], L[...], S[...]1, S[...], L[...] and L[...]1.

² S[...] and S[...] do not have children.

17 December 2020 and was substituted as the second defendant by David Nathan and L[...] in their capacity as executors of her estate.

6. At the outset it is important to appreciate that the plaintiffs have not been disinherited. Rather, the inheritance they anticipated from prior wills had, over the four-year period, steadily diminished in favour of the second family. (I discuss this more fully in the section headed financial evidence.)
7. This case concerns two issues. First, the validity of wills and codicils made by B[...] during the period of 2012 to 2016. I will refer to this period as the contested period. There are five contested testamentary instruments: his 2012 will, 2012 codicil, July 2014 will, August 2014 will, and a 2016 codicil.
8. Secondly, the plaintiffs seek an order declaring G[...] K[...] an indignus. An indignus is someone considered to be unworthy to inherit from the deceased.
³ In this case if G[...] is declared an indignus the effect of such a declaration is that she would not be entitled to inherit under the wills. But G[...] passed away after this litigation had commenced, but before the trial. This means that if she is declared an indignus this has implication for her heirs, because a sizable portion of her estate is what she inherited from B[...]’s estate. Her heirs are L[...], and her two sons from her two prior marriages, J[...] W[...] and A[...] B[...].
9. But the family dispute is even more complicated than the validity of the contested wills and the indignus declaration. Whilst in the present case I am concerned with his South African will, this does not represent the totality of B[...]’s assets. The fortune that B[...] had built up in his lifetime was, for want

³ *Taylor v Pim* (1903) 24 NLR 484 at 491.

of a more elegant expression, divided up into three pots. His South African assets that are the subject matter of the contested wills, an inter vivos family trust, the K[...] Family Trust (the Trust) and an estate in Israel which is the subject of another will.

10. The plaintiffs in this matter are engaged in separate litigation in respect of both Israeli will and the Trust. Those are matters I am not called upon to decide. Nevertheless, they played a significant role in the evidence presented. This is because at the same time as B[...] was changing his South African will, he was also making changes to his Israeli will, and by means of letters of wishes, to how benefits should be distributed from the Trust, during much of the contested period.
11. The issues concerning the Israeli will and the Trust letters of wishes are so closely connected with this case that the parties agreed to suspend that litigation pending its outcome. If B[...] had testamentary capacity in relation to his South African estate—the subject of this case—it may be assumed that he also had testamentary capacity in relation to his Israeli estate and to issue letters of wishes for the Trust. If he lacked that capacity, it may well be that the same conclusion would apply to those instruments.
12. The letter of wishes concept requires further clarification. B[...] was advised to establish a family trust known as the K[...] Family Trust. The beneficiaries of the Trust included his four children, G[...] and, at various times, his siblings. The composition of the trustees changed over the years, but they comprised family members and David Nathan.

13. Even though the Trust's assets had all come from dispositions made overtime by B[...], they were technically no longer part of his estate. To address the problem of this loss of control, B[...] was advised to prepare letters of wishes in which he indicated to the other trustees how he considered the Trust's assets should be distributed from time to time.⁴
14. The letters of wishes are not written in B[...]’s own voice. They are written in the same language as the testamentary instruments he would sign; formal, precise, and devoid of sentiment. They were prepared by his attorney Michael Bloom, who had also drafted the testamentary instruments that are the subject of the plaintiffs’ challenge in this litigation. In the record is a letter from Bloom dated 10 May 2012, in which he acknowledges this fact and says he had drafted them on the instructions of B[...], and that the letter of wishes was signed by B[...] in his presence and that of David Nathan and G[...].
15. It is evident from the record of the case that the trustees honoured his letters of wishes. While this case does not concern the legality of those dispositions made during the contested period, their content is relevant as to his state of mind during the contested period. It is likely that B[...] viewed his assets holistically and not in silos. Thus, if he made changes to his will, it is relevant to consider what he was doing with his Israeli assets and his letters of wishes at the same time.
16. As David Roy, his erstwhile financial advisor, put it, despite being aware of the separate legal nature of the Trust assets:

⁴ In the letters to the trustees is a standard paragraph in which Benjy states that he appreciates “your discretion is absolute and this letter is not intended to bind you in any way.” But in the next paragraph he goes to say during my lifetime: “I should like you to be guided by my wishes and preferences ...”

“However, everyone, including David, Jan, and me, regarded this as part of what could loosely be called the K[...] family investments.”⁵

The opposing narratives

17. It is important to understand the rival narratives of the litigants in this matter in advance because all the facts are viewed through these respective lenses. For the plaintiffs, B[...] as the patriarch of the K[...] family was always generous to all and observed a principle of equality, which meant that he wished to treat all his children equally in his will. G[...], on this narrative, was not to be an heir. She had been well looked after during B[...]’s lifetime and would still be after his death by means of a legacy. This is not speculative - this is what he had done in his last will prior to the contested period. It is also consistent with a letter B[...] wrote in 1989 which he had told L[...] about, but which he requested should only be revealed to his family after his passing. The letter is not a will, but in terms of sentiment shows similar love and affection without distinction for all his children and G[...].
18. His instruction was that the letter should be read together with his will. The assumption could be that this would only make sense if there was equal treatment of all in the family named in the letter. He writes, *“I have left to you my wife and to you my children more than sufficient to lead an affluent life.”* Thus, on this theory, the fact that they were partially disinherited could not be reconciled with his lifelong policy of equal treatment and must be a manifestation of his incapacity, or worse still, an indication that he was susceptible to suggestion to depart from it.

⁵ David is a reference to David Nathan and Jan to Jan Faure, Roy’s colleague from Trillian Asset management.

19. The defendants lay great emphasis, not on fairness, but on the freedom of testation. Thus, absent proof of incapacity, the fact that B[...] chose to prefer G[...] and L[...] during the contested period requires no justification. It is simply a manifestation of how he chose to exercise his right to bequeath as he saw best. Notwithstanding this, the defendants' witnesses put forward two theories to explain the preferential treatment.
20. The first comes from remarks that B[...] had made during his lifetime in which he blamed his first family for deserting him, while his second family (G[...] and L[...]) were there for him in his ailing years. The second does not rely on any feelings of emotional alienation from the first family. Rather, it was out of concern for G[...]’s welfare and that she did not have sufficient means. In the case of L[...], hers was a younger family who needed more support, given that B[...] had offered generous support to the first family over the years and whenever they needed it. He did not, as he once said to one of the witnesses, *“keep a ledger”*; meaning that he gave when needed, and in different amounts, but never sought to balance the books between his children.
21. But what adds to the complexity of the case and the plaintiffs' difficulty is that they were never completely disinherited or removed as beneficiaries of the Trust; nor were they ever, prior to the contested period, beneficiaries in his Israeli will. This means that their case had to be that they were diminished, not disinherited heirs.

B[...] K[...]

22. B[...] K[...] or B[...], the name all who knew him by, was the archetypal self-made man. He was born in Minsk in Russia in 1923. He emigrated with his

family in the 1930's to escape persecution. The family settled in Polokwane, then known as Pietersburg. He obtained a degree in mechanical engineering from the University of Witwatersrand and opened his own business making hub caps in Wynberg in Johannesburg. His earliest entrepreneurial flair was shown when he realised that if he bought a more sophisticated press, one available in the United States, he could press steel faster and at a lower cost than rival firms. This brought early success to him and the business expanded from its humble premises into a larger factory.

23. Later he bought into a firm called Form-Scaff, located down the road from his first factory, which made forms and scaffolding. He was to grow this firm into one that exported its products and listed on the stock exchange. He stayed at Form-Scaff until 1983 when he sold his shares to a fellow shareholder.⁶ A brief less successful venture in a startup bank followed. B[...] then retired. The date is not in the record, but he seems to have retired earlier in his career than a man of his energy and talent might have wished to. He then invested for his own account buying and selling shares.
24. According to L [...], who gives the most detailed history of his father's business life, B[...] doubled his money after five years. What emerges is a picture of B[...] both as an entrepreneur with good analytical financial skills, but also a conservative businessman who disdained those he considered flashy and without substance.
25. B[...]’s personal life was less successful. His marriage to the plaintiff’s mother D[...] ended in 1965. He then married G[...] in 1969 the same year,

⁶ According to S[...]1 he received R 65 million.

coincidentally, that D[...] remarried. G[...] had two sons from two prior marriages. The two sons, J[...] and T[...], have an interest in the outcome of this case as they are both heirs to her estate. If her estate is diminished because of this litigation, then they are prejudiced. That they should benefit indirectly from B[...] is an unexpected outcome. While J[...] and T[...] grew up in B[...] and G[...]’s household, they were never the beneficiaries of his generosity, unlike his biological children. Instead, B[...] viewed their support as the responsibility of their respective fathers. Such was his treatment of them that S[...], at one stage, confronted G[...] about why she had not stood up to B[...] about his attitude to her sons. The plaintiffs however, particularly S[...] and L[...], had a good relationship with T[...] and J[...] during their childhood years. But past sentiment does not displace current self-interest – J[...] testified for the defendants in this case.

26. L[...] is the only child born of the marriage between B[...] and G[...]. L[...] was born in 1973, making her 13 years younger than L[...] and S[...]1. L[...] and, through her, her children and husband L[...]1 are the key beneficiaries of the testamentary changes that happened in the disputed period. This is not only because of a shift in her favour, but also because she is the major heir to G[...]’s estate. Thus, to the extent that G[...] began to benefit during the disputed period, so too, indirectly, has L[...]. L[...] lived together with her parents until her marriage to L[...]1 in 2002. L[...] and L[...]1 have two sons T[...] and J[...], previously represented by their parents, who are now defendants in this matter, having reached their majority during the course of this litigation.

Overview of the evidence

27. The question as to whether B[...] had testamentary capacity is a legal conclusion based on the testimony of both lay witnesses and expert witnesses. Before I consider the medical evidence, which lends itself to being considered chronologically, I will consider the evidence of the major lay witnesses who testified.
28. The first category of witness were the children. L[...] and S[...]1 testified during the trial for the plaintiffs. S[...] submitted a witness statement. Due to illness, he was unable to testify. By agreement, his witness statement was accepted as evidence but not as to the truth of its content. L[...]’s wife, J[...] testified as did M[...], S[...]’s wife who testified on a virtual platform.
29. For the defendants, L[...] testified as well as her stepbrother J[...] W[...].
30. Both counsel conceded that I have to approach the testimony of the family witnesses with caution. This is the approach I have adopted. To be fair to them, none were discredited as witnesses, but I must have in mind that they have a substantial personal interest in the outcome of this litigation and that their personal observations of B[...], which was the thrust of their testimony, must be approached with caution. All the children continue to have a revered memory of their father. They struggled to separate their filial affection of their father from the dispassionate reserve required of reliable observers of his behaviour during his declining years. For this reason, I have placed more reliance on the testimony of the non-family lay witnesses.

31. Since these non-family witnesses testified about B[...]’s capacity over the whole or part of the challenged period, I have considered the weight to be given to their evidence at first holistically, and then when I consider the testamentary instruments in chronological order, I have then commented more specifically about their evidence.

The major lay witnesses

David Nathan

32. David Nathan was the key witness for the defendants. This is because on the defendants’ theory of the case, the test for capacity is the moment when the testamentary instrument is signed. This is why for them Nathan is such a crucial witness, as throughout the challenged period he was present at all the times of signing.
33. Nathan is an accountant by profession, with an expertise in estate planning. There is no doubting his competence or his standing in the profession. His knowledge encompasses the legal and tax issues associated with estate planning, as well as the experience which comes from advising clients, usually high net worth individuals over a number of years.
34. In this matter, Nathan played a number of roles. First, he was the final executor of B[...]’s will, having been first appointed to a joint position in that role prior to the contested period. He also was a joint trustee of the K[...] Family Trust. Although this was a joint role, there is little doubt from the history that given his expertise and knowledge he was the dominant trustee.

35. His firm, Grant Thornton, were the auditors of the K[...] Family Trust and a separate investment vehicle of B[...] known as Nygren, throughout the challenged period.⁷
36. Nathan and his wife Shirley were also personal friends of B[...] and G [...], often seeing them socially. He was also an advisor to G[...] and was the executor of her wills, including her final will. He was also involved in instructing the relevant professionals with regard to the Israeli assets, including the Israeli wills.
37. Nathan was also the intermediary between B[...] and his attorney Michael Bloom. Bloom, now deceased, drafted all the impugned testamentary instruments as well as all the letters of wishes which are drafted in the same formal terms. Bloom, like Nathan, was a highly regarded professional and his drafting is precise and carefully crafted to provide for most contingencies.
38. But Bloom's drafting style is old-fashioned and formal. This means his language is not easy for laypersons to follow. Nathan admits that part of his function was to act as the interpreter between Bloom and B[...]. His recollection of this interaction is not specific to any date. Rather, it was general; he recounted what he normally did and assumed that this is what he did on each occasion, the only variation being a change of venue – sometimes at the K[...] home sometimes at Bloom's offices. Prior to drafting he would go through what was required with B[...], then instruct Bloom, often sending him briefing notes, and then, once the document had been drafted, go through it with B[...] to ensure he understood what he was signing.

⁷ For several years he was listed as the responsible partner for the Nygren account, at least from 2011 to 2013, according to David Roy.

39. The contention of the defendants is that even if the language in the drafts was obtuse, Nathan was an effective interlocutor who could explain what was being done in simple terms.
40. But Nathan was the subject of criticism by the plaintiffs after a spirited cross-examination. Despite his close relationship with the K[...]s, G[...] never told him of B[...]’s heart attack which preceded the April 2012 will, and most significantly of the advice of Dr Tipping, B[...]’s treating doctor, which he had given her in February 2015, that he should have “*no more wills*”. I return to these two issues later.
41. Nathan is specifically mentioned by name in this note of Dr Tipping. Presumably because he was meant to be told of this advice by G[...]. But Nathan testified that he was unaware of this. He could not explain why G[...] had not told him. Nevertheless, Nathan retained his stance that on all occasions, despite his physical infirmity, B[...] understood what he was signing.
42. The plaintiffs argue that Nathan’s evidence that B[...] was lucid and had capacity on all these occasions must be rejected. This is not an attack on his bona fides, but on his judgment in this regard. I agree. I say so for the following reasons: Nathan’s evidence is of a general nature, yet he was being asked to confirm what happened on each specific occasion. His response, which amounts to saying it was always like that, is not persuasive.
43. The plaintiffs’ counter to Nathan during this period was Daniel Roy, who I go on to discuss later. Roy was often Nathan’s antagonist on investment advice. This conflict is not relevant for this case and related to what risk appetite the

Trust or B[...]’s estate should assume with its many investments. What is relevant in this conflict is Roy’s assertion that he detected B[...]’s mental decline, something Nathan continued to deny.

44. But a crucial piece of evidence during the trial was when a sound recording was played of a discussion between B[...] and Roy in 2016. From the recording, it is evident that B[...]’s understanding of what he was being told and his retained memory of what had been discussed with him only moments earlier, was seriously compromised. Yet, within weeks of this, Nathan was present when B[...] signed a codicil which was the final testamentary disposition that he had made. If what is evident from this recording was not evident to Nathan, it calls into question his reliability as an observer.
45. It is more likely that given his historic relationship of trust with Nathan that B[...] agreed with every suggestion made to him. That acquiescence might have seemed to Nathan an indication of capacity. Since Nathan had started his relationship with B[...] during the time he had capacity he may have been less astute than he should in observing the latter’s cognitive decline.
46. Nathan occupied a central position in the K[...] family’s financial affairs. He was the executor of B[...] and G[...]’s wills, and a trustee of the K[...] family trust. He was also a friend of the couple. They had great confidence in his advice. It is not surprising then that he was not pro-active in responding to B[...]’s decline. I do not suggest he acted in bad faith. Indeed, when he believed that L[...] was overreaching in her demands, he showed great concern. Rather, he perceived, albeit misguidedly, that he was the guardian of B[...]’s best interests. Having B[...] tested with a view to the appointment of a

curator was not a step to be taken lightly. He knew even prior to B[...]’s death that the family was split over the future of his estate. The prospect of this conflict arising over the appointment of a curator may have caused him to remain supine.

47. All this means is that I can place little weight on his observations of B[...]’s cognitive capacity. If he could not observe this at a time when his lack of capacity was obvious to Dr Tipping, G[...], and Daniel Roy as evidenced by the sound recording, then Nathan is unlikely to be reliable during the earlier periods either.

Daniel Roy

48. L[...]1 H[...], L[...]’s husband, introduced Daniel Roy and Jan Faure to B[...]. L[...]1 had worked with them at Trillian, an investment company, as a day trader. At the time, Roy and Faure were trying to establish an asset management business at Trillian. Securing B[...] as a client was a major coup for them: he was a well-known, successful, high-net-worth individual whom they could present as their client. Their engagement with B[...] began at the end of 2010, when they entered into an agreement to manage investments for KFI, the investment vehicle of the K[...] Family Trust.
49. They took the unusual step of meeting with B[...] at his home once a week. But these meetings had little to do with the management of his portfolio and were more designed to keep him company. They even discussed religion.
50. Roy also had meetings with others including B[...] to discuss his investments. Trillian started off managing the portfolio of KFI, the investment company

which held the K[...] Family Trust assets. Later, Trillian's role expanded to include Nygren Holding Limited (Nygren) the offshore company of which B[...] was the sole shareholder.⁸

51. Roy testified that he detected B[...]’s mental decline earlier than others, but he was not listened to. For this reason, as mentioned earlier, he took the unusual step of recording one interaction with B[...] in 2016, which was played in court, and here B[...]’s mental decline is obvious.
52. Roy, like Nathan, was subject to vigorous cross examination. The defendants queried why he took no steps to recommend that a curator be appointed if he thought that B[...] was suffering from dementia. Roy maintained that if a power of attorney could be obtained this would suffice. This, it was pointed out, did not cure the problem. If B[...] did not have capacity to bequeath, he would not have capacity to sign a power of attorney.
53. Thus, it was suggested that his observations of B[...] were a post facto reconstruction in which he conveniently moved forward the date of B[...]’s decline. But Roy has no reason to do so. Trillian lost their mandate in 2017, when due to the firm’s association with the Gupta family B[...]’s other advisors felt that a new firm be appointed, which they duly were.
54. The more likely reason for Roy not intervening earlier is that this might have meant losing B[...] as a client if a curator was appointed and wanted new representation.
55. Roy was frank about his failure. In his witness statement he says:

⁸ Nygren was registered in the British Virgin Islands as an international company and its director was another company called Guardian Corporate Services Ltd.

“I will be criticised for not recording my views and for continuing to get B[...] to sign documents and make investments. That criticism is correct. I did express my views to David and Michael Bloom in late 2013 or early 2014 (paragraph 32 of my main witness statement). In retrospect, it would have been wise to have done so earlier and to have insisted on a doctor's report”

56. Where Roy may be less reliable is when the cognitive decline was first observed. It is unlikely that unless a specific incident presented itself (like the recording he did in 2016) that years later he could precisely determine the onset. Thus, where his earlier recollection is not supported by the medical evidence, I have not given this much weight in assessing B[...]’s then capacity.

The care givers

57. Three witnesses who testified were all care givers of B[...] during the contested period. They provided what they termed socialisation services. This meant, in essence, keeping company with B[...] various times a week. It did not include medical or physical caring services. All three worked for the same firm, Reva’s Rehab Services, run by Reva Goldsmith and her husband Lance Goldsmith. The latter both testified for the defendants, whilst Raeline Krom testified for the plaintiffs. All three were credible witnesses but not decisive on any point.
58. Krom testified as to B[...]’s confusion from the time she saw him. She observed this immediately when she started visiting him which she dated as mid-2014, a crucial date since it coincides with the dates of two of the contested wills which were signed in July and August of that year. However, the employment records showed that she started a year later in July 2015. I

will assume these records are correct. She had one decisive recollection which was that B[...] had believed that his sister Luba was still alive at the time she interacted with him. In fact, she had passed away 15 years earlier. Tested on this aspect, it was suggested that she had probably got the name wrong. But Krom replied that the name Luba was familiar to her as her sister had the same name, hence her specific recollection.

59. Reva did not offer much by way of specificity, and her recollection was of B[...] recalling his past. She also recalled going to a restaurant with B[...] and that he was able to pay the bill and include a tip.
60. However, she was also the person who informed a Dr Lipschitz (coincidentally Krom's brother) and G[...]s treating doctor, about G[...]s troubled state of mind. This is more consistent with B[...]s lacking capacity than having it, but it does not take the matter much further.
61. Lance recalled a specific conversation with B[...] about his opinion on Spar shares. The problem is what to make of this. It was shown that B[...] indeed had Spar shares in his portfolio at the time. Did this portend an awareness of his assets? The defendants argued that it did. The plaintiffs argued that it indicated that B[...], who was always discrete about his finances, had lost his normal inhibitions. Why else, they argued, would he discuss this with Lance who was not one of his friends or an advisor. More likely, they argued, this indicated a deterioration in his cognitive functions.
62. Both conclusions of the defendants and plaintiffs justify a possible inference from this remark. But since the inferences equally point in opposite directions, this evidence cannot take the matter further for either party.

L[...]¹ H[...]

63. L[...]¹ is L[...]'s husband and the father of T[...] and J[...] H[...]. He appeared briefly on the first day of the trial in response to a subpoena for documents. The plaintiffs argue that the defendants had deliberately not called him as a witness when he was available. They argued that on L[...]'s evidence, L[...]¹ was B[...]'s sounding board on financial matters, had been integral to the appointment of Trillian as his financial advisors, and attended some of the crucial meetings where estate planning took place. For this reason, he had material information and an adverse inference should have been drawn from the fact that the defendants chose not to call him, because they contend he would have given evidence that was unfavourable to their case. (L[...]¹ had testified that her legal team made the decision not to call him.)
64. The defendants pointed out that since L[...]¹ had presented himself in response to the subpoena the plaintiffs could have called him.
65. I agree with the defendants on this point. While L[...]¹ was often in the room when estate related issues were discussed, there is nothing in the record to suggest that he would have given unfavourable evidence for the defendants and hence for that reason was not being called. I was not, for instance, referred to any documentation of which he was the author which would have been inconsistent with the defendants' case. If, on the other hand, he was being called as a witness to B[...]'s state of mind then this runs contrary to the case the plaintiffs seek to make out; that lay witnesses' observations of capacity should be given little weight because of 'social masking'. I discuss the concept of social masking later in this decision.

66. I cannot draw an adverse inference from the defendants' failure to call L[...]1 as a witness.

The financial evidence

67. The plaintiffs instructed Mr Mohamed Bhamjee, a chartered accountant, to perform an analysis of the financial effect of B[...]s estate planning over the period 2010 to 2019. In his executive summary he described the methodology he adopted. His focus was:

"... on how the changes introduced through successive South African Wills, Israeli Wills, and Letters of Wishes ("LOWs") affected the distribution of assets among beneficiaries over time. The analysis is based on financial information and asset values drawn from annual financial statements covering the period 2010-2019, supplemented by other relevant documentation. Assets were allocated to beneficiaries based on our interpretation of the instructions contained in the Wills and Letters of Wishes that were operative at each point in time. In applying these instruments, I've have set out detailed explanatory notes to record the reasoning behind our approach and the assumptions made. This methodology enabled us to reconstruct what each beneficiary's share would have been under the respective succession plans, and to track how those allocations evolved between 2009 and 2018. The primary objective of this report is to provide the heirs represented by Group L[...], S[...]1, and S[...] with a clear, year-by-year picture of how their prospective inheritance was affected by these estate planning changes."

68. His report is 45 pages long including annexures. The detail is not important because the defendants did not contest his conclusions. They had consulted

with a Mr Hendler, a financial advisor to B[...] at a late stage in his life, and Hendler and Bhamjee had discussed the contents of the document which I was given to understand had become common cause.

69. What matters then is the conclusion. Here, Bhamjee, speaking about the effect of all three (SA, Israeli estates and the K[...] Family Trust) on the respective heirs, said:

“The progression of allocations shows G[...]’s decisive rise after 2009 as the dominant heir, while L[...] consistently remained ahead of her siblings with a materially significant share. S[...], S[...]1, and L[...] saw little movement over time and never approached parity. Across the period, the estate’s growth translated primarily into gains for G[...] and L[...]. As an added indicator, the KF Trust’s income distributions over 2009-2018 likewise reflected trustee discretion that favoured G[...] and L[...], rather than aligning with any principle of equalization.”

70. The import of this evidence is that the plaintiffs’ perception that, over at least the impugned period, there was a shift in benefits away from the first family in favour of the second was according to the financial information correct. That, of course, is not decisive of the issue of capacity. But it is a necessary evidentiary hurdle the plaintiffs must cross to make their case.

The medical experts

71. A considerable part of the six-week trial was devoted to the evidence of the medical experts called by the respective parties.

72. The brief of the medical experts was to opine on whether B[...] had the necessary capacity to make a will or codicil. Here the disciplines of law and medicine necessarily intersect.⁹ The medical experts all accept they need to rely on a legal standard to make their medical conclusions. The case all referred to, and which enjoys wide recognition both locally and internationally in the legal and medical literature, is an English decision that dates back to Victorian times; *Banks v Goodfellow*.¹⁰ That case laid down criteria for determining legal capacity. Despite being decided in 1870, these criteria are still cited with approval today in many jurisdictions, including our own.¹¹ Phrased as one commentator put in Dickensian language, modern forensic psychiatry has summed up its test in clearer language.¹² In a leading journal of forensic psychiatry the authors describe it as follows:¹³

a) The testator/testatrix must be capable of understanding the nature of the act of making a will and its consequences, i.e. what a will is, when it comes into effect, that it can be changed at a later date, the role of the executor, etc.

b) The testator/testatrix must be capable of understanding the extent of his/her estate, i.e., property jointly or solely owned by him/her, other assets, insurance policies, etc.

⁹ In their conjoint report the plaintiffs' experts quote an article in which the authors distinguish between capacity and competence. Capacity is seen as a clinical concept determined by a health care professional and competency as something determined by a legal professional. (See P. Voskou et al *Testamentary Capacity Assessment: Legal, Medical and Neuropsychological Issues*, Journal of Geriatric Psychiatry and Neurology 2018, 31(1):3-12.

¹⁰ *Banks v Goodfellow* (1870) LR 5 QB 549.

¹¹ See for example *Tregea and another v Godart and another* 1939 AD 16, at page 50, *Lewin v Lewin* 1949(4) SA 241 (T) at page 278-9, and *Katz v Katz* 2006 JDR 0049 (C) at paragraph 23.

¹² National Case Law Archive, 'Banks v Goodfellow (1870) LR 5 QB 549' (LawCases.net, April 2026) <<https://www.lawcases.net/cases/banks-v-goodfellow-1870-lr-5-qb-549/>> accessed 30 July 2026.

¹³ *Kennedy et al. 2012 (Journal of Forensic and Legal Medicine*. This extract comes from the expert witness statement of Professor DH Niehaus who was one of the plaintiffs' experts.

c) Whilst the competent testator/testatrix will ultimately decide who the beneficiaries will be, he/she must demonstrate understanding of the logical claims of those who might expect to benefit from his/her will. This applies to both those being included in and those being excluded from the will.

d) The testator/testatrix must be capable of understanding the practical effect of the will, i.e., who receives what, the impact of the will on the beneficiaries and on those who are excluded, the impact on any previous will, the impact of any changes from a previous will, the impact of any conditions attached to the will, that a beneficiary might pre-decease him/her, etc.

e) The testator/testatrix must be free of any disorder of mind or delusions (i.e., mental illness) that will influence his/her will and bring about a disposal of his/her property which, if his/her mind had been sound, would not have been made."

73. Five experts testified at the hearing; three for the plaintiffs and two for the defendants.
74. None of the experts had ever seen B[...]. This meant that they testified relying on the principles of forensic psychiatry. Without the benefit of ever having seen B[...], they had to conduct a retrospective analysis.
75. They had various sources for their opinions. The narratives of the lay witnesses who had interacted with B[...], his medical records, and the academic literature. Key to the medical records were screening tests that had been performed on B[...] by Dr Brent Tipping, who was his treating doctor at the time. I discuss these more fully below.

76. The plaintiffs called three experts. Professors Brink and Niehaus, both of whom are psychiatrists and Anna Potocnick, a psychologist. Each filed individual reports and then, unusually, they filed what they termed a conjoint report which, it emerged, had been drafted by Ms Potocnick.
77. The defendants called two experts, Dr Fuller a psychiatrist and Ms Maganlal, a psychologist. The experts all produced lengthy reports and files of academic literature, very little of which was referred to. I will not spend too much time on what they all said, because by the time the trial had concluded, little reliance was placed on some of the experts and even less on the volumes of literature.
78. From the joint minute, agreement emerged on the following. Forensic psychiatrists, like lawyers, adopt the *Banks v Goodfellow* test as the prevailing framework to inform their analysis.
79. They all agreed that B[...] suffered from a form of dementia, which progressed over time. They also agreed that the multiple serious comorbidities that B[...] suffered from contributed to expediting the dementia. But these are generalised observations. The experts could not agree on the date B[...] lost testamentary capacity.
80. Professor Brink and Ms Potocnik suggested the earliest date. In their opinion, B[...] lost capacity somewhere between 2011 and by 2012. Professor Niehaus was more circumspect and thought he had probably lost capacity by 2012. Dr Fuller, as recorded in the expert minute, considered that B[...] had probably lost capacity between 2014 and 2015, but with the possibility that testamentary capacity still existed beyond this period. But when he gave his testimony, he conceded under cross examination that from February 2014

onward, on a balance of probabilities, he lacked capacity. Nevertheless, he gave a caveat that he could have had good days. Ms Maganlal, who did not testify on this point, is noted in the joint minute as saying his capacity was retained up to December 2016. In this respect, Ms Potocnik and Ms Maganlal, the two psychologists, are the outliers – the former suggesting the earliest onset, the latter the latest.

81. If I can find a common cause view from the reports of these experts, then the probabilities are that 2011 is too early to show that he lacked capacity and 2016 is too late to say he had capacity. The plaintiffs' experts argue that once there is evidence that he lacked capacity on a certain date it can be assumed that he would have lacked capacity thereafter.
82. The defendants contend that even if one could say he lacked capacity at a certain date, this does not mean that on the date he signed the will or codicil he still had capacity. Thus, the difference is between the once-lost, never-retained position, versus the possibility that capacity may be shown to be present on a particular day.
83. Since none of the experts could tell in a retrospective exercise whether any day was a clear day, they had to rely on the observations of lay witnesses on the day the document was signed. For the defendants, this meant relying on David Nathan who was B[...]’s estate planning advisor throughout the period and some of Nathan’s assistants, who were witnesses to the signing of the wills and codicils. While both G[...] and Michael Bloom, the attorney who prepared all the documents, were there on some of the occasions, both had passed away before the trial commenced.

84. The second issue concerns the degree of B[...]’s cognitive decline. All were agreed that B[...] was a person of superior cognitive ability. His talent as an engineer, entrepreneur and then financial investor are all testimony to this. But this is where they draw different conclusions. The plaintiffs’ experts argue that B[...]’s decline in performance as manifested in the testing, that I will discuss later, and that involved him having to copy geometric drawings and make arithmetical calculations, are indications as to how far he had fallen compared to the ordinary individual not gifted in either capacity.
85. The defendants’ experts posit the existence of what is referred to as crystallized intelligence. This is the possession of a stored intelligence developed over a lifetime which an individual can call upon years later. On this theory, B[...] had retained skills in respect of his finances that he could still call upon, notwithstanding the steady deterioration in his test scores.
86. The third area of disagreement concerned the significance of the anecdotal evidence of several of the defendants’ witnesses, that B[...] presented normally in social situations; making conversation and even recalling events from his past. The defendants’ experts regard this evidence as highly significant to the retention of his cognitive capacity. The plaintiffs advance an opposing theory which has support in the literature. This behaviour, they say, is what is called “social masking”. The individual in social situations will still come across as cognitively functioning even when it is not so. Hence the label ‘social masking’.
87. The fourth issue is that of his other co-morbidities. Was his poor performance in the tests attributable, not to cognitive decline, but to these other factors,

inter alia his arthritis (affecting his writing ability), his depression, and side effects from his medication for his other ailments.

88. Two experts however stood out for me. Professor Niehaus for the plaintiffs, who bizarrely was called as an afterthought, and Dr Fuller for the defendants. The reason I found them most helpful is that they deal on a daily basis with patients suffering from dementia and it was this hands-on experience that was most informative. Professor Brink was no longer in the country nor in the direct field of dealing with dementia patients. Ms Potocnik was more of an academic and not a psychiatrist, when this was the field of expertise most directly relevant. Ms Potocnik was also criticised for having lost her independence and becoming overly sympathetic to the case of the plaintiffs.
89. I do not need to take a view on this as on the key issues I found the evidence of Niehaus and Fuller more helpful. Ms Maganlal was called as the final witness for the defendants and by agreement her evidence was confined to confirming some of the academic literature. Her one unique contribution, a statistical exercise related to G[...]’s diary entries, was never led.¹⁴ She too, like Potocnik did not take the case any further.

MMSE test

90. Key evidence in this case concerned tests that Dr Tipping, B[...]’s doctor, performed on him during the period of May 2011 to 6 February 2017. This test is known as the Mini Mental State Examination (MMSE). The test was first developed in 1975, thus 100 years after *Banks v Goodfellow* had been

¹⁴ Gwen’s diary was admitted as evidence. However, without her testimony it was not particularly informative. It was nothing more than a list of appointments and social arrangements and who attended them.

decided. Professor Brink explained that the purpose of the test is to serve as a screening instrument for cognitive capacity. Professor Niehaus explained that whilst other tests for cognitive capacity exist, none have achieved widely accepted status. Since the MMSE test was the one used in this case, I will confine myself to it.

91. The process of the MMSE test is that the doctor asks the patient a series of questions and gets the patient to perform certain tasks. It comprises five sections, all of which allocate a specified number of points. Thus, the sections are; orientation (10 points), registration (3 points), attention and calculation (5 points), recall (3 points), and language (9 points). These total up to 30, and the patient is given a score out of 30.
92. By way of example, I mention some of the questions which occupied more attention during the trial. In the beginning, the patient is asked whether he can recall the date (year, month and day), the country etc. Another question was whether the patient can recall three words (pen, apple, table). After being asked another unrelated question, the patient is then asked to recall what the three words were. Another question requires the patient to look at a drawing of two intersecting pentagons and then copy it.
93. Because the MMSE is scored out of 30, it might suggest there is a threshold score below which it would be considered that a patient lacks testamentary capacity. There is, however, no consensus amongst the experts on such a threshold. The plaintiffs' experts favoured a higher cut-off than the defendants' experts. In his report, Professor Niehaus quoted literature stating that at

“24/30 the sensitivity and specificity are > 80% and > 89% respectively, with slightly higher cut-offs suggested for persons with higher educational levels”.

94. The defendants referred to an article which said capacity had been found when a patient had scored as low as 8/30 on an MMSE. The plaintiffs' experts considered this an outlier.
95. Dr Tipping also made use of another test which is not part of the MMSE. He did not use this test on every occasion he did the MMSE, but he regarded it as instructive when he did. This is known as the clock drawing test. This test requires the patient to draw a clock face with all the numbers on its face in the correct place. Then the patient is asked to draw the hands of the clock to represent a certain time. In Dr Tipping's use of the test, he asked B[...] to show the hands at a certain time.
96. But there is at least consensus that test results themselves should not be regarded as decisive. Professor Niehaus, despite testifying for the plaintiffs, fairly quotes from one of the academic writers, Marson, who says these tests:

“...cannot replace the judgment of a forensic expert, and a single instrument or score can never take into account all the aspects of the variety of medical, legal, ethical, and other factors that inform a competency decision.”, but they can offer “an approximation of legal capacity”.¹⁵

Dr Tipping

¹⁵ Marson D *et al.* *Assessing the competency of patients with Alzheimer's disease under different legal standards.* Arch Neurol 1995 52(10):949-954.

97. The key medical witness was Dr Brent Tipping. Dr Tipping was not qualified as an expert by either side although he was called to testify by the plaintiffs.
98. The reason Tipping was called is that he was B[...]’s doctor during the impugned period. Dr Tipping is not a psychiatrist. Nevertheless, his field of expertise is geriatric medicine. He is regularly consulted by patients suffering from dementia. Both sides accepted his expertise in this area. Since I rely on Dr Tipping for more than merely providing his reports (there were several over the period) but also interpreting them, he gave opinion evidence as well.
99. I do not consider the fact that he was not qualified as an expert in the formal sense the Rules require to be fatal to a reliance on his opinion evidence. Firstly, both sides had his records well in advance and his opinions were confined to what he noted in those reports. Second, he provided a witness statement which was available to the defendants in advance of his testimony. Third, the defendants, despite not calling him, spent much time cross examining him on opinions. Nor at the end of the case did the defendants argue that his opinions should not be considered as those of an expert.
100. Dr Tipping occupied a unique role in the trial because he was the only medical expert who had consulted with B[...]. It was G[...] who was responsible for taking B[...] to see Dr Tipping. He was able to provide his contemporaneous notes of his consultations. These have greater probative value than otherwise, because when he prepared them, he was not being consulted for medico legal purposes.
101. In *Katz v Katz* Griessel J quoted with approval the following passage from English law:

*"The personal medical knowledge of the testator's own doctor or of a psychiatrist who has had the opportunity of examining the testator at the time of making the will, must normally carry great weight."*¹⁶

102. Moreover, Dr Tipping studiously avoided getting involved in the litigation. So much so that it was the plaintiffs, ironically, who reported him to the Health Professions Council of South Africa in order to get him to provide his records. He appeared in this case under subpoena and was represented by his own attorneys. He was at pains to avoid being seen as partisan to any of the litigants in this matter.
103. This does not mean that Dr Tipping did not have important views on B[...]’s cognitive capacity. Yet his answers were always careful and backed by solid reasoning. Thus, Dr Tipping is a unique witness in this matter whose evidence I have accepted as reliable, independent, and informed. Where he has differed from the versions of both the plaintiffs’ and defendants’ experts on any point I have preferred to accept his evidence.
104. The defendants, whilst accepting Dr Tipping’s expertise without reservation, have argued that his evidence as a treating doctor is limited in relation to the key question in this matter, namely B[...]’s testamentary capacity, as this was not an issue he was consulted upon. But these criticisms do not detract from the main import of Dr Tipping’s testimony. Indeed, I regard it as his strength that he was primarily a treating doctor, which has meant that his observations at the time were not influenced by having to reach a conclusion on testamentary capacity to benefit any of the parties to the litigation.

¹⁶ 2004] 4 All SA 545 (C) at paragraph 67 quoting from *Halsbury’s Laws of England*, 4 ed vol 17, paragraph 891.

The early appointments with Dr Tipping

105. Dr Tipping first saw B[...] on 13 January 2011. The first appointment was brief. On L[...]’s narrative, G[...] had taken B[...] to see Dr Tipping following an incident when he had fallen asleep while driving. G[...] had hoped Dr Tipping could persuade B[...] to stop driving. He was 87 at the time of this consultation.
106. Dr Tipping’s notes show that he had been asked to see B[...] as an emergency. He referred him to various other specialists. The diagnosis was that he was suffering from “*sub-acute/chronic hypercalcemia related delirium*”. This is a state of confusion caused by abnormal levels of calcium in the blood. Dr Tipping detected signs of dementia, but during testimony he was careful not to make a conclusive diagnosis of the extent of his dementia. This is how he described it in his notes:
- “I feel he certainly has some underlying dementia and that this will continue to progress rapidly unless his calcium level is normalized. Currently he is moderately impaired with respect to his insight, judgment and functional status.”*
107. B[...] underwent surgery twice in February 2011. Once, to remove the right lower lobe parathyroid adenoma, and a second, at the end of that month, to remove a cancerous lump. Although Dr Tipping visited him in hospital, nothing of significance emerges from these visits. He did not perform an MMSE test at this stage given his medical state, as he was recovering from an acute event and facing the stress of a cancer diagnosis. He consulted with B[...] again on 11 March 2011 for vertigo.

108. On 30 May 2011, B[...] saw Dr Tipping again. This time Dr Tipping performed a Mini Mental State Examination test (MMSE). B[...] scored 28/30 for this test. On 19 August B[...] wrote a codicil deleting certain legacies given in his prior will to G[...] and his siblings. This codicil is not subject to challenge and represents a change in the estate planning from his estate to the family trust.
109. I digress briefly to consider his 1999 will which is his last unchallenged will. This is the will which the plaintiffs seek to have me declare as being his last will, as modified by four later codicils (24 October 2000), 2 August (2005), 11 August (2006) and 19 August 2011 and to have the Master register it in terms of section 8(3) of the Administration of Estates Act, (Act 66 of 1965).
110. The architecture of the 1999 will is that G[...] receives a legacy of R1 million, his four siblings each get a legacy of R500 000, while the four children are appointed as heirs in equal shares for the residue of the estate. The plaintiffs' argument is that the manner of these dispositions represents B[...]’s historic intent whilst he retained his capacity – the siblings and G[...] receive legacies, whilst the four children become heirs and are treated equally.
111. On 19 August 2011, B[...] signed a codicil. This codicil, as noted, has not been challenged by the plaintiffs. Whilst not explained, there are probably two reasons why they have not done so. First, the content of the codicil is not complicated (he removes his siblings as legatees) and at that stage Tipping had conducted an MMSE test where he scored 28/30. Recall that the literature relied on by the plaintiffs suggested that it is only when capacity falls below 24/30 that it starts to become significant.

112. Dr Tipping saw B[...] on 2 September 2011 and again gave him the MMSE test but did not do the clock drawing test. He scored 27/30 on the MMSE.
113. Dr Tipping saw B[...] again on 2 March 2012 and again gave him the MMSE test. This time he scored 24/30. In his witness statement Dr Tipping says this was accordingly clinically significant and raised the possibility of mild dementia developing because this was a drop of four points from the baseline test and three points from the September 2011 test. The plaintiffs do not rely solely on this test in relation to the first challenged document which is B[...]’s will of 20 April 2012. Its evidential value to them is the progressive decline in B[...]’s condition for its later implications.

The first challenged instruments: the 20 April 2012 will and 26 April 2012 codicil

Content of the will

114. The will of 2012 is the first sign of a change in testamentary architecture. First is the change in executors. His 1999 will provided for four executors, amongst them David Nathan. But in the 2012 will, Nathan becomes the sole executor. The first bequest is to G[...]. He says, if during his lifetime he has not succeeded in buying her a flat in Israel, his estate must buy her one similar to the flat he owns together with L[...] in Ramat Aviv in Israel. But then the significant change. He bequeaths his entire estate to G[...] in trust for a period until her death or a period of 10 years after his death, whichever was the later.
115. After that the capital of the trust would be divided between the four children in equal shares. The codicil he signed on 26 April was straightforward. It

reintroduced four organisations as recipients of charitable donations. Since this had been a feature of his previous wills, neither their identity nor the amounts indicated a change in intent unlike the content of the April will.

116. What did lead to the challenge to the April 2012 will, and subsequent codicil, was an unexpected event. B[...] suffered a myocardial infarction on 4 April 2012. Here we depart from Dr Tipping's notes because this event did not involve his care. The key witnesses here are L[...], S[...] and L[...] who were around at this time.

Circumstances surrounding the will and codicil

117. On 27 March 2012 L[...] arrived to visit B[...] who was on his own because G[...] and L[...] had gone to London. On 4 April B[...] complained of suddenly feeling ill. L[...] correctly assumed he was having a heart attack and L[...], who had returned from London two days before, arranged for an ambulance to bring him to hospital where he had a stent inserted.
118. L[...] was not there all the time as he had to return to the United States. Whilst he was still there for a few days after B[...] had returned from hospital he describes him as *'exhausted and barely present'*. S[...] then came from Nelspruit to be with B[...]. S[...] told L[...] that B[...] could not remember having a heart attack. L[...]’s recollection was of B[...] refusing to take his medication despite having had a heart attack.
119. L[...]’s recollection at the same time is quite different. In her rebuttal statement she says that *"B[...] took having a heart attack in his stride."* And that there was no issue about him not taking his medication. L[...] maintains that L[...]

was not around when B[...] had to take his medication, so she was not in a position to comment on this.

120. Sixteen days after suffering the heart attack, B[...] signed the April will on 20 April 2012. L[...] said he was shocked to hear of this. Had he been asked if B[...] was in a fit state to sign a will he (L[...]) would have said '*absolutely not*'.
121. Of the three people present when B[...] signed the April will only one was available to testify; David Nathan testified that he was unaware that B[...] had had a heart attack. Either Nathan has forgotten that he may have been told of this, or G[...] or B[...] may, for reasons that are not known, have chosen not to tell him; this notwithstanding the fact that Nathan and his wife were personal friends.
122. The plaintiffs' case here to challenge the April will does not primarily rely on dementia, but a condition called hypo-active delirium. Professor Niehaus explained the condition as follows:

"Delirium is defined as a transient, usually reversible, cause of mental dysfunction and manifests clinically with a variety of neuropsychiatric abnormalities. It can occur at any age, but it occurs more commonly in patients who are elderly and have a previously compromised mental status. The signs and symptoms include clouding of consciousness, difficulty maintaining or shifting attention (present in more than 90% of cases), disorientation, illusions, hallucinations, fluctuation of levels of consciousness, dysphasia, dysarthria, tremor and motor abnormalities."

123. The experts were all agreed that this condition needs to be distinguished from dementia. The primary reason is that delirium, as the definition makes clear, is transient and usually reversible. It is probable that what L[...] and S[...] described were the symptoms of dementia. I have no reason to disbelieve their testimony on this point. L[...] gave evidence in detail, and it was clear that he was alarmed by B[...]’s behaviour, whilst L[...]’s evidence was a generalised rebuttal. L[...]’s version was corroborated by S[...]’s, although he was not cross-examined. I will assume for the benefit of the plaintiffs that if B[...] was still experiencing delirium on the 20 April, it is probable that he lacked testamentary capacity. But this does not mean that on the day in question B[...] was still experiencing delirium.
124. If delirium is transient and reversible, as the experts all agree, is there evidence that this condition had not reversed 16 days later? There is no firm medical evidence that the condition had not reversed. The plaintiffs’ experts evidence here is speculative, largely based on the impressions given by L[...] and S[...].
125. But neither L[...] nor S[...] were still with B[...] on the day he signed the will. No medical practitioner who he saw at the time noted signs of delirium. This may not be entirely destructive of the plaintiffs’ case as the experts agreed that it is not a condition that is easily detectable, even by medical practitioners.
126. Nevertheless, the burden to prove incapacity is on the plaintiffs. Delirium, unlike dementia, is a transient reversible condition. The plaintiffs’ needed to have evidence that he experienced this condition on that day. But we do not have that evidence.

127. But the plaintiffs also sought to rely on evidence of dementia that both preceded the 20 April signing and post-dated it. Little reliance is placed on Dr Tipping's MMSE's reports for this. Rather, the plaintiffs sought to rely on what they called early red lines. These red lines are the evidence of several interactions with Nathan and certain Israeli based lawyers and accountants over B[...]s Israeli assets. It was apparent from this evidence that B[...] was uncertain if he had an Israeli will, and whether the flat he had bought in Ramat Aviv was owned by him, him and L[...], or by some other entity.
128. The background to this is that many years earlier B[...] had bought a flat in Israel (the Ramat Aviv flat) intended for L[...] and her family, and a warehouse which was rented out for income. These assets were managed by Ilana Krieger, the daughter of his late sister Luba, who lived in Israel.
129. At Nathan's instance, enquiries were made from the Israeli professionals to get clarity on these issues. Does this lack of recall indicate a sign of dementia? I do not consider this is strong enough evidence. The experts were divided and even the plaintiffs were hesitant on this point. B[...] had not forgotten that he had bought the apartment. The fact that years later he could not recall the finer details of the legal arrangement, which others must have undertaken for him, is insufficient evidence of dementia.
130. Nevertheless, it is not hard to see why the plaintiffs are suspicious about why B[...] signed a will 16 days after a heart attack, and the consequent hospitalisation and insertion of a stent. Nathan, his estate planner, testified that he was not aware of the heart attack. Then, six days after he signed the April will, Beny signed a codicil. Was this a sign of his incapacity that a

change had to be made this soon. Nathan explained that an error had been made and there was nothing unusual.

131. Since Nathan always briefed Bloom, we can safely assume that he was not aware either. But what the plaintiffs seem unaware of was that Nathan was already working on estate planning with B[...] in 2011. Prior to the heart attack, he had met with B[...] several times to do this. He had notes taken of what these instructions were; which member of the family should benefit from legacies and how much.
132. On 10 May 2012, B[...] signed a letter of wishes in respect of changes to his Trust. Witnessing this signature were Bloom, Nathan, G[...] and David Roy. Roy testified that he raised B[...]’s capacity with Bloom. This is an important fact given that Roy saw B[...] regularly to discuss his investments. The problem is that this was not in Roy’s witness statement which he had provided prior to the hearing, nor in consultation notes he had with Ms Pocotnick, nor in a consultation with the defendant’s erstwhile attorney Roy Stoler. Nor does he explain how Bloom reacted to such a suggestion if it had been made. More likely, this is a remark that Roy made much later and he has confused the dates.
133. Dr Tipping saw B[...] again on 16 May 2012. This was the first consultation he had with him since the heart attack. Dr Tipping did not perform an MMSE because he said it was too close to the occurrence of the heart attack. Instead, he performed a Visual association test (VAT) which tests visual memory for association between objects. B[...] scored 9 out of 12 for this test.

Dr Tipping says this is consistent with mild dementia. He wrote to B[...]’s cardiologist, Dr Steingo, to say he had “*stable dementia*”.

134. B[...] next saw Dr Tipping on 22 October 2012. The focus of this visit was diagnosing Beny for depression. He also performed an MMSE which Dr Tipping scored at 25 out of 30. He also performed a clock test. This drawing was poorer than before. Not only could he not organise the numbers on the clock, but he also did not insert the hands. But Dr Tipping attributed this poor performance to depression.
135. Dr Tipping indicated that he was not asked at this time to assess capacity and he did not do so. This report, whilst showing progressive dementia over the period since Dr Tipping first saw him, is insufficient to base a conclusion, retrospectively, that B[...] had lost capacity when he had earlier signed the April will and codicil. B[...] then had further surgery for the excision of his left auxiliary mass. Dr Tipping saw him in hospital, but the records show no further comment on his dementia.
136. In November 2012, B[...] signed a new Israeli will, drafted by Bloom on the instructions of Nathan.

Conclusion on the April 2012 will and codicil

137. It is unfortunate that neither Nathan nor Bloom were advised of the heart attack sixteen days earlier. Perhaps they may have postponed the signing till a later date. But that does not constitute sufficient evidence of a lack of capacity. There is insufficient evidence to set aside the 20 April 2012 will, or the later 26 April 2012 codicil.

2013

138. No contested wills or codicils were signed in 2013. B[...] also did not consult Dr Tipping in 2013. Dr Tipping does not know why this was the case. He received periodic reports from Dr Steingo, the cardiologist, and Dr Kassianides, a gastroenterologist.
139. B[...]’s 90th birthday, on 29 September, was the only event of significance to the case in 2013. A party was held to celebrate it. It was a brunch occasion at a country club which B[...] and G[...] had attended in the past. The defendants produced colour photographs of the occasion showing B[...] together with others. The evidential value of this event was not commensurate with the time spent on it. Was this B[...] seen as someone alert who could recall the name of someone’s grandchild or was he faking it, or as the experts refer to it, engaging in social masking, a topic I return to later. Some witnesses for the plaintiffs, S[...]1, S[...] and Daniel Roy, who had attended, testified to B[...] in various states of confusion. Others called by the defendants, L[...], and family friends, testified to B[...] being engaged and aware.
140. Professor Brink testified that he could not comment on which was the more reliable of these recollections, leaving the matter to the court. I do not consider any of the evidence photographic and oral testimony useful in the determination of contractual capacity. Witness testimony was parochial. I can make no conclusions about B[...]’s state of testamentary capacity from the selection of photographs presented to me and the observations of witnesses about his demeanour.

2014

141. On 3 February 2014, B[...] saw Dr Tipping again, who conducted an MMSE test. The last MMSE test had been given some fifteen months earlier. His score was 23/30; two points down from the previous test. Dr Tipping notes that his visio-spatial skills had decreased but speculates that this could also be attributable to severe shoulder arthritis. But what was significant was his response to the three-word test. This requires the patient, after answering another question, to remember three words – apple, table, pen. B[...] could not recall any of them. He referred B[...] to a plastic surgeon to remove a lesion on his nose. The referral note to the plastic surgeon says: *“Dementia moderate”*. When he was cross examined on this observation, he said he sometimes *“overcalls”* a condition to protect himself and the other doctor. Based on this report, Dr Tipping is equivocal on the subject of B[...]’s testamentary capacity. In his witness statement he puts it this way:

“Had I been asked about his capacity to sign wills or powers of attorney, I would have conducted further tests. Certainly, the fact that he was receiving assistance showed that he was more frail. I did not dissociate physical frailty from cognitive frailty.”

142. The parties offered conflicting interpretations of these notes at trial because this was the last MMSE test conducted on B[...] before he signed his next will on 25 July 2014, which substantially reorganised the estate’s assets.
143. Professor Niehaus focused on B[...]’s failure to recall any of the three words on the word test. Asked specifically if that was a concern for testamentary capacity, he explained why it was:

“Yes, so for testamentary capacity, you need to be able to recall your assets. You need to, and assets is both fixed assets and other assets. You would need to be able, if it is a will that you are reading, be able to recall what is happening on page 1 by the time you get to page 3, 4 or 5, depending on how long the document is. So yes, it would be a concern on multiple levels.”

144. Prior to the will being signed on 25 July, there was an important meeting that took place at B[...]’s apartment in Cape Town. The meeting was to discuss his interests in general. In attendance were B[...] and G[...], L[...] and her husband L[...]1, and the two advisors David Nathan and Daniel Roy. The meeting lasted four and a half hours. The minutes are terse but record that the various portfolios were discussed and the loan of money for G[...] to purchase a flat in Houghton.
145. There is no indication from the minutes that B[...] expressed a view on any subject despite the length of the meeting, and the fact that it concerned his estate and investments, save for a remark that he made about saving tax when there was a discussion about re-weighting portfolios by selling shares. None of the plaintiffs were present. Whether there was an attempt to have them represented is not clear.
146. On the day the will was signed on 25 July 2014, L[...] and his new wife J[...] had arrived in South Africa for a visit. Both testified to it being strange that G[...] would be taking B[...] off to see Bloom on the day they arrived. L[...] recalls two remarks made by B[...]. First, by way of explanation, he told him we *“... are going to make sure you blokes are fixed up”*. But then curiously he also asked G[...] *“... what am I signing today”*

147. The remarks fit into L[...]’s narrative that G[...] was in a hurry to reconstitute B[...]’s affairs and that she had agency over him. However, whether this is sufficient to suggest he lacked capacity is a leap too far. G[...] signed her will on the same day and the two were clearly aligned in terms of the estate planning done by Nathan. L[...] and J[...] left South Africa on 7 August, and in the days that followed B[...] met with Nathan to do more estate planning resulting in a further letter of wishes and a new will which he signed on 15 August 2014.
148. Why a new will should have to be signed a month later is again a matter that the plaintiffs were suspicious about. Nathan however took responsibility for this.
149. I must first explain what the 25 July 2014 will did and how it changed in August. In the July will, B[...] left the Nygren assets to G[...] as a legacy, and if she predeceased him, to Lauren.
150. The Nygren asset was an investment held through a British Virgin Island company with investments in several entities. It is distinct from the K[...] Family Trust and not part of the South African estate because it was held offshore. This was one of the assets he had held for some years prior to the Trillian asset managers (Roy and Faure) becoming his advisors. It represented a significant part of B[...]’s wealth. Leaving this to G[...] and failing her to L[...] was a significant change.
151. The residue of the estate (which meant any asset other than Nygren, those subject to the Israeli will and those in the K[...] Family Trust) would go into a testamentary trust run by his administrator (Nathan). (Note that this

testamentary trust was a new trust, not to be confused with the inter vivos K[...] Family Trust). G[...] would receive the income from this trust, but if that was insufficient, the administrator could realise some of the capital of the trust. On her death, the income of the trust was to be distributed to his children. But not in equal shares. Instead, the administrator is given the power to distribute them “... *in such proportions and at such times and in such manner as the Administrators’ in their discretion deem fit.*”

152. The trust was to terminate either on G[...]’s death or five years after B[...]’s death, whichever was the later. In that event, the assets would be distributed in equal shares to the children.
153. Nathan testified that the reason the will had to be changed a month later in August was because he (Nathan) realised that establishing a testamentary trust for the residue of B[...]’s estate would be pointless as he had few assets in the estate other than Nygren. The revised will eliminated the testamentary trust but also dealt with other issues.
154. The will was a product of a two-hour meeting held on 11 August which was attended by B[...], G[...], Nathan, and Bloom. It involved a complex set of interrelated transactions. B[...]’s Israeli will, provision for a domestic worker Anna Sibeko (which required G[...] to write a letter to L[...] to provide for Sibeko’s maintenance), and a reworking of Trust benefits (an increase for his brother Joe).
155. B[...] signed his Israeli will on 4 September, the same day as G[...] signed her Israeli will, and B[...] signed the letter of wishes. The simultaneous signing

suggests the three were presumably viewed holistically - the product of the 11 August planning meeting.

156. Of all the estate planning that B[...] was going through at this time in his life this was the most complicated. Whatever he did with the estate had knock on effects on the K[...] Family Trust, its beneficiaries, and then there was the Israeli estate. G[...] and L[...]’s arrangements become more advantageous to them at the expense of the plaintiffs. B[...] of course, it is common cause, was free to re-organise his affairs and prefer some ahead of others in his family. The question is whether he did so fully appreciating what he was doing. It was not merely an appreciation of who was becoming better off, but who was worse off as a result. This is what the *Banks* test for capacity requires. Did a man who could not remember three simple words a few minutes later appreciate this complexity albeit that it was being explained to him by Nathan?
157. Although Nathan takes responsibility for the need to change the July will a month later, it does not answer the *Banks* issue. If Nathan did not appreciate that in the July will he had created a trust for B[...]’s children with very little in it, whilst the bulk was in Nygren going to G[...] and then L [...], did B[...] understand this. It seems he did not, or he might have corrected it then. Nor is there any evidence that when this changed in August, he had any point of view. The fact that it was preceded by a meeting in August at which he is present does not alter this position.
158. The collateral evidence at the time is mixed. Roy testified that he did not believe that B[...] had capacity at this time, but at the same time he got B[...] to

sign three authorisations in favour of Trillian. This may well have been self-interest trumping concern as I discussed earlier.

159. J[...] K[...] was an important witness here. She testified to B[...]’s mental state coming in as an outsider and meeting him for the first time. Her observations of B[...] are insightful and detailed. This is because she had met him for the first time and was anxious as the new daughter in law to make a good impression, so her recollection is reliable. She can also date the experience accurately. Other collateral witnesses who saw him more regularly over a period of years were understandably less reliable in dating their observations.
160. One witness who was not a regular visitor and who saw B[...] later that year in December was Ilana Krieger, B[...]’s niece, who had visited from Israel. Ilana had become the unexpected beneficiary of B[...]’s Israeli will, in that she was to inherit the warehouse. She testified that she never expected any benefit to come from her uncle despite her many years of service attending to his investments. Ilana testified that she could reminisce with B[...] about old times and recalled B[...] having a conversation with an acquaintance and then when the acquaintance left, recounting a story about her family.
161. Ilana’s rosy picture of B[...]’s mental health needs to be approached with caution given that she is a beneficiary of the Israeli will, subject to challenge by the plaintiffs. Of course, the same caution must apply to J[...], given that she would indirectly benefit from L[...]. I have no reason to prefer the recollection of the one ahead of the other and accept that these impressions cannot take the case much further.

162. But since dementia is a progressive disease, it is relevant to consider medical evidence that came after the signing as it might be relevant to his state of mind in July and August.
163. In February 2015, B[...] saw Dr Tipping again. This record was the subject of the most attention during the trial as it is the first time that Dr Tipping addressed himself to the issue of B[...]’s testamentary capacity. He conducted an MMSE test again; this time B[...]’s score was down to 20/30, a decline of three points from what it had been the previous year. Of significance in this test is that again he cannot recall the three words (apple, pen, and table). The pentagon’s have no resemblance to the example, and his clock drawing was deficient, as Dr Tipping put it in his witness statement:

“He did not include all the numbers, did not get the spatial planning correct, got the number order wrong and did not even draw the hands.”

164. But the most significant entry was one Dr Tipping wrote, he said probably at the end of the consultation, when he was writing out the prescription. He surmises that this was probably in answer to a question from G[...]. This is how he explained it in his witness statement:

“At the bottom of the page I wrote: “Patient wants to have power of attorney David Nathan” (the word could be attorney or advocate - my handwriting is unclear), At the time, I understood that David Nathan was an attorney or advocate. Just above that I wrote: “No will changes advised.” This was in response to a specific question from G[...]. I told her that Mr K[...] did not have the capacity to make will changes or give a power of attorney. I advised that

this was a matter that needed to be discussed with David Nathan, since a power of attorney was not valid. My note is shorthand to record this advice.”

165. After this consultation Dr Tipping’s opinion was no longer ambivalent. He says in his witness statement:

“At this point, my firm opinion was that Mr. K[...] did not have the capacity to make will changes.”

166. Shortly after this consultation, Dr Tipping wrote a letter to one of B[...]’s other treating doctors in which he stated: *“I had last seen him in February 2014. He has shown significant cognitive decline in the past year.”*

167. Dr Tipping says in his witness statement that he cannot say when the significant decline took place. The most he could do, he surmises, is to say that B[...] must have lost capacity sometime between the visit of February 2014 and February 2015.

168. It is significant as well that the enquiry is made by G [...], the person closest to B [...]. Why would she be asking that a power of attorney be given to David Nathan, unless she was conscious of the fact that B [...] was no longer capable of making the kind of decisions he had been called upon the year before – will changes, and statements of wishes. The most benign interpretation of her question is that she wished to spare him physically. But there is no evidence that signing documents was physically burdensome, and documents were brought to the home for him to sign.

169. By this stage, the treating doctor best placed to assess B [...]’s capacity had expressed a clear view on the issue. The plaintiffs’ experts agreed with that

conclusion, as might be expected. More significantly, so did the defendants' expert, Dr Fuller. By February 2015, there was therefore unanimous expert consensus.

170. This has two implications. The plaintiffs argue that it is probable that this level of incapacitating dementia must have already emerged before February 2015, given the devastating assessment made by Dr Tipping. On this argument, it is likely that when B[...] made his will and codicil in 2014 his condition was just as compromised. I will refer to this as the 'retrospective' implication of the Dr Tipping notes.
171. But there was also a prospective implication given the February 2015 assessment. The plaintiffs put their prospective argument more strongly. Although only one further codicil was made after February 2015, and although it was less far-reaching than the earlier instruments, the challenge to it must still be decided. Their confidence rests on the fact that by this stage, all the experts, including Dr Fuller, the defendants' expert, agreed that B[...] no longer had testamentary capacity.
172. But this is not the only evidence of that year which has both prospective and retrospective implications. In November 2015, G[...] wrote a letter to Dr Tipping. It was a cry for help. Her letter needs to be placed in context before I discuss its contents.
173. For a long period, B[...] had become increasingly afraid of G[...] leaving home even for short periods. He had also become more demanding. Dr Lipschitz, one of the plaintiffs' witnesses, testified that G[...] had consulted him on 26 January 2015. Like Dr Tipping, Lipschitz specialises in the treatment of

geriatric patients. In his notes of the consultation with G[...], he wrote she had “*severe carer burnout*” and that her husband was totally disabled and dependent on her. He noted it is “... *essential that a care plan be developed for hubby*”.

174. The following month Lipschitz made notes of a consultation he had with Reva Goldsmith, a social worker who was caring for B[...] at the time. Reva, he testified, often reported to him on his patients because she would give him feedback on psychosocial issues his patients were experiencing that they would not tell him. His notes record that Reva told him information presumably from discussions that she had with G[...] which went as follows: “*She said that the child from the second marriage was taking huge financial advantage, that his son was also taking advantage, that the brother-in-law (Joe K[...]) was taking advantage and that G[...] was also supporting her other two sons.*”
175. Lipschitz did not know B[...] and had never met him, so his notes do not take the question of B[...]’s capacity at the time any further. But they are evidence of G[...]’s anxiety at the time (beginning of 2015) which provides the context for a letter that G[...] wrote to Dr Tipping on 24 November 2015. G[...] wrote to Dr Tipping to explain that she apologised for not taking B[...] herself to the consultation with him. She then details a number of issues that she has noticed with B[...]’s condition, both physical and mental. It is the mental observations that are relevant. She lists them in telegram form. “*He has mood swings*”, “*Is forgetful*”, “*Angry -stamps feet bang stick*”, “*Frustrated*”, “*talks to-self*”, “*Cannot spell names anymore*” “*Phone scares him*”. “*Puts the wrong shoe on each foot*”, “*emotional tears up a lot*”, “*repeats himself gets fixated on*

one subject” She goes on to write: “I feel there is a huge deterioration in his memory” And then she adds the observation that: “In company he manages very well, except for his hearing, and no-one would believe there is a problem.”

176. The reason why this letter does not only have prospective implications for the period beyond November 2015 is the remark that G[...] makes at the beginning of the letter prior to listing B[...]’s ailments. *“I’d just like to mention a few points I’ve noticed in the last year or so”*
177. The plaintiffs argue that this description of B[...]’s mental deterioration is an observation made by the person closest to him about what he had been like for the last year or so. Without being overly mechanical about the use of language, given that the letter was written in November 2015, this letter suggests that this was his condition at least in late 2014. But “last year or so,” whilst a retrospective observation, is not specific about the timing of its onset. Could this mean that what G[...] observed as his parlous mental state was also in existence in July 2014 and then again in August 2014, when he signed his South African wills.
178. Thus, both Dr Tipping and G[...] provide strong retrospective evidence of B[...]’s parlous medical decline at some time, at least in 2014. G[...] also supports the plaintiffs’ experts’ theory of social masking. Given that she is a layperson not schooled in forensic psychiatry, her contemporaneous observation that in company he manages very well and no one would notice that there is a problem is strong evidence that those who interacted with B[...] at the time and testified to conversations that they had with him, (the

Goldsmiths, Ilana Krieger and friends of G[...] at the 90th) were making superficial observations of his surface behaviour, unaware, as G[...] was, of an underlying cognitive problem.

179. The experts agree that testamentary capacity is relative to the cognitive task being sought of the testator. B[...] might well have understood that if he was bequeathing an object like a car to one of his children that he knew what this meant. But the July and August wills were far from simple. Nor can their implications be viewed in isolation from the two other tasks that impacted upon his South African wills – the Trust for which he signed off on letters of wishes and his Israeli assets which were disposed of in terms of a separate will.
180. Then there is what to make of the fact that at the age of 90, B[...] signed two wills in close proximity to one another – the first in July 2014, which was then revoked in August 2014. Nathan explains this as an error on his behalf because he realised that the impact of the moving of assets had hollowed out the asset base of the testamentary estate and hence creating another trust was futile. But if Nathan, a skilled and experienced estate planner as well as a trustee of the family trust, had not appreciated this at the time, it is less likely that B[...] was able to appreciate what was being done. There is no suggestion that he had alerted Nathan or Bloom to this.
181. B[...] was faced at the time with a tripartite re-organisation of his assets (the SA will, the Israeli will and the K[...] Family Trust) which required an appreciation of not only who was now benefiting but who was also being further disadvantaged. Did he know for instance what G[...] and L[...] and her

children had previously, and what greater benefit they now gained cumulatively over the three assets. Did he know the impact on L[...], S[...]¹ and S[...]?

182. The defendants here have to rely heavily on the testimony of Nathan with “walk on parts” given to two of his erstwhile secretaries at the time (Visser and Wing) and an erstwhile notary colleague of Bloom’s (Tonini). The latter three all testified as to B[...]'s demeanour at the time of his various signatures. He was variously described as having good manners, (he stood up when Cynthia Wing came into the room) was conversational and sociable. But insofar as they are relied upon for any period beyond 2013, their testimony is belied by the more reliable testimony of Dr Tipping and G[...]'s retrospective conclusion in her 2015 letter to Dr Tipping. Even amongst themselves their observations are inconsistent. Tonini, the notary who saw B[...] only once as late as in January 2017, observed nothing unusual, whilst Marcus in her witness statement said, *“I do remember that the last time I watched Mr K[...] signing a document, I thought to myself that he was visibly getting older.”*
183. None of these witnesses can testify as to whether despite witnessing the signing of documents B[...] understood their contents. Evidence of superficial external behaviour as normal does not constitute probative evidence of capacity that negates the other more probative observations of Dr Tipping and G[...].
184. By this stage the weight of the medical evidence – the plaintiffs’ experts, the surmise of Dr Tipping, and the testimony of Dr Fuller, is that he probably lost capacity in 2014. The plaintiffs, whilst conceding that they assume the overall

burden, argued that this medical evidence creates a *weerleggingslas* for the defendants which they failed to discharge. I agree with this submission. Given Dr Fuller's vital concession, the only medical evidence the defendants had left to argue was the possibility that B[...] may have had a clear day when he signed in July and then again in August. This clear day argument is too tenuous for me to accept to shift the burden of the other evidence.

Conclusion on 2014 July and August wills

185. The probabilities are that the combination of the increased estate planning complexity, coupled with the deteriorating state of B[...]’s cognitive abilities as observed with strong retrospective medical evidence, and the not insignificant prior evidence of the presence of dementia, meant that it is probable that he did not have testamentary capacity in July and August 2014 when he signed these two wills. My conclusion is that these two wills fall to be set aside.

2016

186. The final instrument to be considered is the codicil B[...] signed on 1 December 2016. On the medical evidence, the plaintiffs’ case for incapacity had by now become overwhelming. On 24 November 2015, Dr Tipping again tested B[...] with an MMSE test. This time he scored 13 out of 30. This was a drop of seven points from the one in February 2015 when he had scored 20 out of 30. As Dr Tipping observed, this drop is commensurate with the progression of his dementia.

187. B[...] again saw Dr Tipping on 28 June 2016. Again, he administered the MMSE test and B[...] again scored 13 out of 30. Dr Tipping saw him again on 6 February 2017 and this time his MMSE score was down to 8 out of 30.
188. Yet, between these two visits to Dr Tipping (November 2016 and February 2017) B[...] signed a codicil on 1 December 2016, the final contested testamentary document. For context, he also signed some other resolutions. For the K[...] Family Trust, appointing G[...], B[...] and David Nathan as signatories on all bank accounts and stock broking accounts, and on 19 January 2017, a power of attorney in favour of Ilana for the Israeli banks.
189. It is difficult in the face of the uncontradicted medical evidence and G[...]’s letter to Dr Tipping in November 2015 to understand why the defendants still cling on to their case that B[...] still had testamentary capacity when he signed the December 2016 codicil.
190. In fairness, they concede the medical evidence is against them. Instead, they rely on lay anecdotal evidence that he attended meetings, participated in them, and the theory that dementia sufferers have clear days. But this is weak evidence and is met by Dr Tipping’s riposte during re-examination in the trial when he was asked if anyone had told him at this time that B[...] could attend financial meetings for hours and have discussions, what would he think. His answer was brief and to the point. *“I would think he had seen the wrong patient.”*
191. The evidence of the lay witnesses who considered he still had capacity needs to be approached with caution. These witnesses ought to have been aware of B[...]’s frailty. A sound recording we have of a meeting held between Daniel

Roy and B[...] on 27 October 2016 is the only evidence we have of B[...] speaking in the record.

192. Roy testified that by this stage B[...]’s condition was so bad that he decided to record what he said. Roy was attempting to obtain an instruction from B[...] about repaying a reduction in the loan account of another investment, a VW Property to the Nygren account. Admittedly, Roy’s explanation of what he is doing is obtuse. Nevertheless, it is evident that B[...] has no idea what is being said, forgets what he has been told just moments before, yet seems agreeable to what is being suggested. The audio was played during the hearing and B[...]’s confusion is evident from it.
193. Yet only a month later B[...] signed the codicil of December 2016. The defendants suggest that given the simplicity of the codicil this would have been cognitively undemanding. In the codicil, B[...] bequeaths to G[...] all amounts that L[...] owes to him, and that failing G [...], this amount is bequeathed to L [...]. Then in relation to S [...], he bequeaths all amounts which S [...] owed B [...] at the date of B [...]’s death. This might on the face of it seem simple, but it is not. B [...] would need to have appreciated why L [...] and S [...] owed him money, how much it was and the significance of the impact on the other heirs of the forgiveness of the loans. That required a degree of comprehension which all the evidence suggests he no longer had.
194. I find that it is probable that B [...] did not have capacity at this time and this 2016 codicil must be set aside.

Indignus

195. The final relief the plaintiffs seek is to have G[...] declared an indignus or unworthy. The plaintiffs' case relying on the indignus doctrine has changed since first pleaded. In their original plea, the plaintiffs sought to have both G[...] and L[...] declared as indignus. In consequence of this declaration, they sought an order that they (G[...] and L[...]) be declared unworthy to inherit from B[...]. Given that G[...] and L[...] were still beneficiaries under the last unchallenged will, an additional order was sought to declare that they forfeited their benefits from B[...]’s estate whether testate or intestate.
196. The main basis for the claim was that G[...] and L[...] both had a special relationship with B[...]. In G[...]’s case this arose from the fact that she was his wife and confidant, and responsible for his care in his final years. In L[...]’s that she was his youngest child and his only child with G[...], on whom he relied for advice and hence was also his confidant.
197. Both, it is alleged, took advantage of this special relationship to influence B[...] whilst his own volition weakened, to unlawfully influence him to disinherit the plaintiffs without any cause or reason and to bequeath the whole of his estate to G[...] and failing her to L[...]. It was alleged that the two were aware of B[...]’s mental state and that he was susceptible to influence, which they duly exercised. But for this influence, it was alleged, B[...] would not have departed from his long-stated intention to treat all his four children equally as his heirs and in the case of G[...], leave her a legacy but not appoint her as an heir.¹⁷

¹⁷ Paragraph 17 of the particulars of claim.

198. In July 2025, the plaintiffs gave notice to amend their particulars of claim to provide an alternative cause of action for the indignus claim.¹⁸ This is the now cause of action relied on for the indignus claim.
199. Then at the beginning of the trial, the plaintiffs informed the court that this order would no longer be sought against L[...] but only G[...]. But this proposed relief still has implications for L[...] given that she and her children are heirs of G[...]’s estate along with J[...] and T[...], G[...]’s sons from her two prior marriages. The bulk of G[...]’s estate is to come from what she was to inherit from B[...].
200. But the change in the identity of the indignus also had implications for the evidential basis on which the claim is based. On the original pleaded case, G[...] and L[...] are portrayed as self-interested schemers, who manipulated B[...] emotionally, so he became, in his ailing state, more susceptible to feelings of resentment about his first family having left the country, whilst appreciating the support and loyalty of his second family.
201. But the case now turns from the psychological wearing down of his independent volition to one of bona fides of G[...]. The case is premised on the Dr Tipping note of February 2015, and G[...]’s letter to Dr Tipping in November 2015. It is alleged that subsequent to the Dr Tipping February consultation, G[...] knew that B[...] lacked capacity, yet despite this she *“procured or facilitated”* his signing of powers of attorney; one in her favour and one in favour of David Nathan, and to sign a codicil to his Israeli will which benefited L[...]’s sons T[...] and Jason.

¹⁸ Paragraph 18 of the amended particulars of claim. This was not the only amendment to the particulars of claim, but an omnibus amendment which was not objected to.

202. Then, it is alleged, that from the letter to Dr Tipping in November 2025 it is clear that G[...] was aware that B[...] lacked capacity, yet despite this she procured and or facilitated that he sign the December codicil which bequeathed to G[...] any loan owed by L[...] to B[...], and failing G[...] to L[...], and secondly to procure a power of attorney in favour of Ilana Krieger.
203. This then is the pleaded case. Based on the evidence, the question posed in law is this; If G[...] had been told in early 2015 that B[...] must make no more wills, why did she tell no one else? Why did she not inform Nathan, who was both his trustee and the executor of his will and a close friend of the family. Nor did she inform any of the children – not even L[...] who phoned her regularly. Yet despite this she remained silent on the issue until February 2017 when she informed the family by WhatsApp of B[...]’s diagnosis.
204. The first in the record is an exchange of messages with S[...]1 in which she says: *“Everything is the same as yesterday and the day before ... except it now has a name”* S[...]1 explained that the reference to ‘it now has a name’ was a reference to Alzheimer’s.
205. In the same exchange of messages, G[...] writing in early 2017 says:
- “I know this is a new person Not the old B[...] we all knew. But it has been happening over the last 3 years or so. Very hard to accept. But we have to.”*
206. Then in a WhatsApp to L[...] on February 2017 G[...] writes:
- “We do finally know that Dad has late onset Alzheimer’s”*

207. Since G[...] had passed away on 17 December 2020, before this trial began, we do not have her testimony. No other witness besides Tipping was aware of his “*no more wills*” advice to her in February 2015. Dr Tipping was not aware that B[...] had signed subsequent wills, codicils and letters of wishes.
208. I will assume for the benefit of the plaintiffs that G[...] was aware of the advice Dr Tipping records in his notes “*no more wills*” and that she understood that its implications were that he must not make any further testamentary instruments, power of attorney, or statement of wishes, until he had been tested for testamentary capacity. Yet despite being aware of this information she took no steps to act on it. Further, that her reason for not doing so was because there was, in these instruments, a progressive alteration of his estate away from the plaintiffs towards L[...]’s family and herself. Thus, it was a silence predicated on self-interest.
209. The question then is whether in these circumstances G[...] should be considered an indignus.

Case law on indignus

210. The power of the court to disinherit someone on the basis of unworthiness is based on the common law. It is an extreme power. As one writer has put it, it is to treat the unworthy heir as someone who has predeceased the testator. The writers and the case law have applied the doctrine in various circumstances over the years. Most well-known is the notion that someone who causes the death of the testator is unworthy to inherit from their foul deed. The doctrine is “*Die bloedige hand erf nie*”

211. Cases where an heir is deemed an indignus have been expanded from the murderer to those where the indignus has had a less instrumental but nevertheless causative effect on the death of the testator. But courts have also applied the principal to cases of fraud and forgery or a person who hides a will to prevent an heir of their inheritance.¹⁹
212. Writers such as Domat, a seventeenth-century French jurist who was a proponent of not limiting the class of persons who could be declared an indignus, advocated expanding the class where ‘*good manners and equity*’ would require a person to be declared an indignus.
213. What in today’s language is meant by good manners and equity, assuming it’s been correctly translated, is a matter for academic writers to ponder upon. It suffices to say that if taken literally this test is too elastic to serve as a useful filter. At least this is the conclusion the court came to in *Yassen* which I would agree with.²⁰
214. But where Domat is still useful is the notion that this category is not static and a product, not so much of the manners, but of the mores of a particular time.²¹ As far back as the beginning of the last century, the court in *Taylor v Pim* noted “*Some of the prohibitions would probably be now regarded as obsolete and inconsistent with the more enlightened spirit of modern times ...*”²² We know this is so, given that certain conduct once considered unworthy (adultery and whether the heir was a concubine or a sex worker) are no longer categories, that judged by contemporary mores, would attract the indignus

¹⁹ *Pillay v Nagan* 2001(1) SA 410 at 424

²⁰ *Yasen v Yassen* 1965(1) SA 438 (N)

²¹ See the views of Traverso AJP in *Danielz v De Wet* 2009(6) SA 42(C)

²² *Supra*, at 492.

label. Academic writers come to the same conclusion. The authors of the *Law of Succession in South Africa* write that if the common law is silent on a point, then:

*“In that case the courts nevertheless have a discretion to regard someone as an indignus if prevailing values of public policy so require.”*²³

215. On the other hand, the values of the constitution and its remit to expand the common law where appropriate have led to an expansion of the category. A case in point is *Jacobs* where an heir's neglect of children led to his being declared an indignus.
216. The question then is not whether the category can be expanded by contemporary notions - the consistent view seems to be that it can. Rather, the question is what should constitute a new category and why. Unlike in *Jacobs*, the plaintiffs here do not invoke a constitutional value. Rather, they rely more broadly on public policy.
217. I can see an argument being made out for expanding the law to allow a new category in this way. Modern psychiatry has now devised tests for testamentary capacity for persons effected by dementia that were not previously available.²⁴ If forging a will or fraudulently inducing a testator to include a term in it have traditionally been regarded as unworthy, why should an heir's silence about a lack of capacity be treated any differently. Notionally, from a public policy perspective they are similar. An heir who permits a testator to execute a fraudulent will knows the will does not reflect the

²³ Jamneck et al, *Law of Succession in South Africa*, Oxford Fourth edition, page 134.

²⁴ The MMSE test is relatively recent having been devised first in 1975.

testator's true intention. Similarly, an heir who knows a testator lacks capacity to make a will and yet permits the will to be made knows the person cannot bequeath and hence acts dishonestly.

218. Of course, the distinction here is that one does not know what the testator would have bequeathed because it is the capacity not the content which is at issue. But the solution is to derive an inference from the content where this person benefits under these conditions to the disadvantage of others previously favoured by the testator. In such situations, public policy should declare that person to be an indignus. Thus, the elements would be as follows:

- a. The testator lacked testamentary capacity;
- b. The beneficiary was aware of this lack of capacity;
- c. The beneficiary facilitated or induced the testator to sign a testamentary instrument whilst so incapacitated; and
- d. The beneficiary benefited from the impugned instrument if there were no prior wills, or if there were, he/she was advantaged and others were disadvantaged in comparison to any prior instrument made by the testator at time when the testator had capacity.

219. I now apply this test to the present case. I have found that on a balance of probabilities that B[...] lacked testamentary capacity from sometime in 2014. Does this meet the requirement of (a) for applying the indignus doctrine. I do not think it suffices. The reason I say so is that disinheriting someone is an extreme measure. It is a deprivation of property. Dr Tipping did not test for capacity in terms of a recognised test, although he was firmly of the opinion

that B[...] lacked capacity. To conclude that he lacked capacity for the purpose of the indignus doctrine the evidence would require that a formal test was done or the evidence was otherwise conclusive, not merely probable.

220. As Dr Tipping himself said during his testimony:

“I would imagine that all of the experts that give opinions here, would share my view that this is not something you need an opinion, you need to do further testing.”

221. Whilst this may weaken the application of the doctrine, to hold otherwise would widen the doctrine to abuse by dissatisfied heirs.

222. For this reason, I do not consider that the doctrine can be successfully invoked on the facts of this case. Moreover, because G[...] did not live to testify in the trial, her reasons for not telling Nathan and Bloom about Dr Tipping’s diagnosis or her own observations of B[...]’s mental state, remain unknown. Her conduct in not intervening to prevent him from further dispositions without being tested, certainly is to be frowned upon, but the evidence is insufficient for it to be legally consequential. The prayers for her to be declared an indignus therefore must be dismissed.

Conclusion

223. Neither side has been wholly successful in this litigation. The practice in some prior cases where a will is challenged with partial success is to order that the costs are paid by the estate. This is appropriate in the present matter. The same applies to the indignus application. Although it was unsuccessful it was not without foundation. As regards the experts I have included the qualifying

fees of those experts whose testimony has helped me decide the matter; they are Professors Brink and Niehaus, and Dr Fuller.

Order

1. It is declared that the late B[...] K[...] lost testamentary capacity at some time, by mid-2014.
2. All wills and codicils signed by the late B[...] K[...] from July 2014 and thereafter are set aside and declared void.
3. It is declared that the last will and testament of the late B[...] K[...] dated 20 April 2012, as modified by the codicil dated 26 April 2012, shall govern the winding up of the estate of the late B[...] K[...].
4. The First Respondent is directed to transmit or deliver the last will and testament of the late B[...] K[...] dated 20 April 2012, as modified by the codicil dated 26 April 2012, to the Master in terms of Section 8(1) of the Administration of Estates Act (Act 66 of 1965).
5. The Fifth Respondent is directed to register the last will and testament of the late B[...] K[...] dated 20 April 2012, as modified by the codicil dated 26 April 2012, in terms of Section 8(3) of the Administration of Estates Act (Act 66 of 1965).
6. The application to have G[...] K[...] declared an indignus and disqualified to inherit from the estate of the late B[...] K[...] is dismissed.
7. The costs of this action are to be paid from the Estate of the Late B[...] K[...], including the qualifying fees of Professors Brink and Niehaus, and Dr Fuller.

MANOIM J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances

For the Plaintiffs: S Vivian SC and A Myers

Instructed by: Myers Incorporated

For the Defendants: D Watson

Instructed by: Werksmans Attorneys

Date of hearing: 27 October 2025 to 4 December 2025

Date of final arguments: 23 and 24 February 2026

Date of Judgment: 25 August 2026