In the High Court of South Africa
(Western Cape Division, Cape Town)

CASE: 19339/2014

In the matter between:

DIANA RUTH HARDIE	APPLICANT
And	
WINIFRED MAUD JANSEN	FIRST RESPONDENT
THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	SECOND RESPONDENT
FRANCES ELIZABETH HARDIE N.O. *[In her capacity as executor of the estate of the late Mr Keith Allanson Hardie]*	THIRD RESPONDENT
THE MASTER OF THE HIGH COURT	FOURTH RESPONDENT

JUDGMENT DELIVERED ON 30 JULY 2015

GOLIATH, J:

[1] On 10 December 2013 the late Professor Keith Allanson Hardie ("the deceased") married Winifred Maud Jansen ("first respondent"), his caregiver of four years, without the knowledge of his family. The applicant seeks an order declaring the marriage of her late father to first respondent null and void, as well as ancillary relief. The first respondent opposed the relief sought.

[2] Applicant and her siblings became aware of the marriage when they were contacted by Mr Eugene Pienaar of First National Bank regarding the management of the deceased's banking account. The bank had, due to unusual activity in the account which had commenced subsequent to him signing a power of attorney in favour of first respondent in October 2013, considered it necessary to investigate the transactions. From October 2013 until late January 2014 an amount in excess of R200 000,00 had been withdrawn from the deceased's account. First respondent also transferred an amount of R120 000,00 to her personal account. First respondent also sought to obtain the release of certain investments of the deceased. The predominant concern was the deceased's lack of involvement in respect of any discussion pertaining to his financial affairs. First respondent also arranged a meeting with the bank's financial advisors for the purposes of altering the deceased's will. The advisor declined to alter the will due to the lack of participation of the deceased.

[3] In 2008 the deceased was diagnosed with Parkinson's disease. The first respondent and her sister were appointed as carers to him. First respondent cared for him during the week from Monday to Friday. Her sister cared for him over weekends. The deceased was frail and in 2009 underwent major bowel surgery. During 2013 his health condition deteriorated to the extent that he had to have permanent full time care. The deceased was well cared for by first respondent, who could drive and attended to various duties such as shopping for the home and taking the deceased to the bank. The family had no knowledge of the existence of a romantic relationship between them.

[4] Due to his frail medical condition and the covert manner in which the marriage was concluded the family engaged the services of various medical experts to assess the deceased. It became apparent that the deceased was not capable of managing his affairs and making informed decisions. Consequently an application was made for the appointment of a *Curator ad litem* to the deceased. A *Curator ad litem* was duly appointed and conducted her investigations. However, the deceased passed away on 19 May 2014 before finalization of her report. The Curator ad litem completed the report on 29 May 2014 subsequent to his passing.

The Marriage Ceremony

[5] Ms Nozuko Antoni was the Marriage Officer. She stated that marriage officers receive training and are aware of certain specific requirements that must be met failing which a marriage could be void or voidable. On the day of the ceremony she noticed that the deceased was elderly, frail and shaking. None of his family members were present and only a family member of first respondent was present. He seemed unaware that he was at the Offices of Home Affairs and appeared disorientated. She confirms that first respondent conveyed to her that the deceased has dementia. She was concerned that it would not be proper to conduct the marriage ceremony and the first respondent's reassurances in respect of the state of health of the deceased did not provide her with any assurance. She approached her supervisor, Amelia Arendse, and conveyed her concerns to her. Ms Arendse insisted that she should proceed and despite her concerns conducted the ceremony. The electronic system provides for contemporaneous notes to be made about ceremonies and she recorded her concerns. She recorded in the marriage register that the husband has dementia.

[6] She requested her colleague Ms Urias not to register the marriage immediately as she wished to follow up the matter with the Manager of the office and seek further advice from the Home Affairs Head Office. However, first respondent returned to the Home Affairs Offices a few days later and went to Mrs Meyer who provided her with the marriage certificate. Ms Antoni stated that she remains of the view that the advice given to her by Ms Arendse was incorrect and that the marriage ceremony should not have been performed as Professor Hardie did not understand what he was doing. Notes were also made on the system by her colleague Ms Lesley-Ann Urias. The notes read as follows:

> ***"Client got married, suffering from dimentia*** *(sic),* ***wife indicated her husband has dimentia, marr officer asked the wife what was wrong with husband when he was shaking and she mentioned the sickness he has, marr officer went to supervisor as well, Ms Arendse to discuss the matter and informed her, marr officer was told us as officials cannot interfere because they made the booking for marr appointment, and appointment was made by the office manager".***

[7] Applicant contends that her father made no mention of any marriage to any of his family members or friends subsequent to the ceremony. This is contrary to his nature and illustrates in the family's view that he was not aware that it had taken place. Applicant further contends that the secretive nature of the ceremony, Ms Jansen's attempts to liquidate certain assets of the deceased, and her attempt to procure a new will demonstrate a lack of bona fides on her part and underscore the belief that Professor Hardie was induced into such marriage by the first respondent for ulterior motives.

First Respondent's contention

[8] First respondent confirms that she met the deceased in 2008 when she was employed by applicant as her father's carer. She cared for the deceased during the week and her sister cared for him during weekends. She was aware that the deceased was diagnosed with Parkinson's disease. They spent time together on a daily basis and in 2009 a loving relationship developed between them. She began sharing a room with the deceased and attended to the running of his household. The children of the deceased were aware of the relationship prior to 2013. She had lived together with the deceased for approximately four years. The deceased insisted that they get married without informing his family as he knew they would not approve.

[9] In opposing the Curatorship application instituted after the marriage, she initially disputed the fact that her husband was suffering from dementia and contended that there was no need to appoint Curators. She contends that he understands when she communicates with him. However, she admits that it takes time for him to comprehend and respond but attributes this to old age. She observed that he did not communicate with his family freely and openly. She expressed the view that she was not opposed to the appointment of a Curator to administer her husband's affairs. However, she should be able to obtain a second opinion. According to her the deceased voluntarily entered into the marriage.

[10] At the marriage office the deceased shook uncontrollably as a result of Parkinson's disease which was witnessed by Ms Antoni. Ms Antoni erroneously perceived such shaking as him being disorientated. The fact that the marriage officer

performed the marriage ceremony is conclusive proof that the deceased had the capacity to enter into the marriage and no expert evidence is required. The deceased was in his full senses on 10 December 2013 when they got married and if not for his Parkinson's, he was fully aware of what had transpired. Furthermore, the applicant and her siblings were estranged from the deceased and would accordingly not be in a position to comment on his state of mind.

[11] First respondent admits that Ms Antoni requested Ms Urias to stall registration of the marriage until such time as Ms Antoni gave further instructions to proceed. However, the fact that Ms Antoni performed the marriage meant that she was satisfied that both of them understood the proceedings and consequences of their actions and this is definitive and indicative of the fact that the deceased had the necessary legal capacity to enter into and consent to a valid marriage. Given such direct evidence there is no need to resort to medical or psychiatric evidence.

[12] She was informed that the deceased had dementia which worsened, but was never advised of the nature of his condition. She also contends that it was very difficult to determine the exact date the dementia started. First respondent vehemently denied that she had squandered or dissipated the deceased's assets. According to her she was never requested to account for withdrawals from his banking account which were all legitimate expenses. She admits that she facilitated the transfer of funds from his account to her personal account but same was used for the benefit of the deceased.

Medical evidence

[13] **Dr Gardiner** is the Neurologist who had been treating the deceased since 2010 in regard to his symptoms of Parkinson's disease. First respondent obtained a report from Dr Garner in respect of the Curatorship application. A subsequent report was obtained from Dr Gardiner at the request of the applicant's attorneys to clarify specifically the deceased's ability to appreciate the consequences of entering into a marriage in December 2013.

[14] **Dr Dion O'Cuinneagain**, general practitioner to Professor Hardie, consulted with him on 1 February 2014. In his report he indicates that on the MMSE he scored 9/30 which is, he states, *"very low and puts him in the advanced dementia category".* He comments that since his last consultation with Professor Hardie a year previously, he gained the impression of *"significant advancement in his dementia".*

[15] **Dr Irvine Eidelman** assessed Professor Hardie on 5 February 2014 (two months after the purported marriage) and stated in his report *"I assessed him and he was accompanied by his son and daughter and his wife, who supplied me with collateral".* Dr Eidelman states *"he displayed evidence of severe Parkinson's disease as well as a dementing illness having scored 15/30 on a mini mental examination. This is indicative of a severe dementing illness and in my opinion is irreversible"* and that in his opinion *"this patient has evidence of an irreversible dementing illness of the brain together with severe Parkinson's disease"* and that *"this patient is extremely vulnerable and gullible and therefore the application is urgent".*

[16] **Dr John Gardiner**, a neurologist, treated Professor Hardie from 2010 and indicated in his report dated 6 February 2014 that he saw him regularly at 6 month intervals and followed his progress being one of *"progressive deterioration in neurological function".* He states that a precise diagnosis was not clear because he had features of both Parkinsonism and a progressive dementia. Professor Hardie's most recent mini-mental state on 6 February 2014 revealed a score of 13/30 and that *"he has lacked adequate insight into financial and legal matters for at least the last year to 18 months".* Dr Gardiner further states: *"I have no hesitation in holding the view that this man was not capable of understanding his actions in December 2013",* actions meaning: *"his ability to appreciate that he was entering a marriage in December 2013".*

[17] **Dr Michelle Jackson**, neuro-psychologist, assessed Professor Hardie on 13 February 2014. In her report Dr Jackson states:

(a) *"he does not have the ability to hold things in mind long enough to think through things, problem solve, or complete even straightforward tasks";*

(b) *"His clinical picture in its entirety is dysexecutive – he presents with a highly typical, and severe, sub-cortical dementia. ... He lacks insight, and has a poor grasp of his circumstances and situation";*

(c) *"the patient has a classical and advanced sub-cortical dementia; a degenerative process of insidious, chronic and gradually progressive cognitive decline that has deprived him of insight into both his condition and situation, and would have done so for at least the last year, and likely longer. As a result, he does not have the capacity to manage his own financial or personal affairs".*

[18] In the report to this Court by the Curator ad litem appointed to Professor Hardie she reports in respect of Dr Gardiner's treatment of Professor Hardie, as conveyed to her by Dr Gardiner when she attended on him at his rooms:

(a) *"Dr John Gardiner, a neurologist, took over the management of this condition in 2010. At the first consultation on 12 October 2010 Professor Hardie complained that his memory was poor. Due to the fact that it was undecided whether there was a good response to the medication, Dr Gardiner diagnosed Parkinsonism, with an overriding picture of cognitive decline, rather than idiopathic Parkinson's disease",*

(b) *"Dr Gardiner reported that at his consultation on 14 February 2011, Professor Hardie was worried that he was no longer able to concentrate on his research",*

(c) *"[At the consultation] On 13 August 2011 he could no longer do calculations. He scored 25/30 on the mini-mental state examination and his thought processes were slow".*

(d) "*By [the consultation on] 10 January 2012 his score on the mini-mental state examination had dropped to 20/30, although when he came to the consultation in July 2012 he was still driving";*

(e) *"[At the consultation] In January 2013, Dr Gardiner did not conduct a mini-mental state examination, but noted that Professor Hardie was slow and required assistance to walk",*

(f) *"On 17 July 2013, he was admitted to Constantiaberg Hospital as he was more confused than usual"* [Dr Gardiner saw him in hospital];

(g) *"At his routine appointment on 6 February 2014, his mini-mental state examination score was 13/30 and his executive function was severely impaired. During this consultation* [Ms Jansen] *third respondent asked Dr Gardiner for a report on Professor Hardie's condition*";

(h) *"Dr Gardiner agreed with the opinion expressed by Dr Irvine Eidelman in his report that Professor Hardie was extremely vulnerable and gullible. He stated that "his condition predisposed him to be suggestible and open to coercion"* and

(i) *"Dr Gardiner agreed with Dr Jackson's diagnosis and conclusions regarding Professor Hardie's lack of insight and poor grasp of his circumstances and situation".*

Application to file confirmatory affidavit

[19] After the conclusion of argument in this matter the applicant brought an application in terms of Rule 6(5) requesting leave to file the confirmatory affidavit of Dr John Gardiner dated 24 March 2015. Apparently it was due to an oversight on the part of the instructing attorney that a confirmatory affidavit from Dr Gardiner was not obtained. The application was opposed by first respondent.

[20] In the confirmatory affidavit Dr Gardiner confirmed that the *Curator ad litem*, Adv de la Hunt, consulted with him and that the information contained in her report and memorandum correctly reflects information conveyed to her by him in respect of Professor Hardie. Furthermore, he confirms the contents of two medical reports compiled by him which forms part of the record. First respondent did not challenge the correctness or validity of any information in Dr Gardiner's medical reports.

[21] The First Respondent conceded that no new information is contained in the confirmatory affidavit. However, first respondent contends that the affidavit merely seeks to confirm the condition of the deceased through various extracts from the record, and questioned why oral medical evidence was not led by the applicant. It

was submitted on behalf of first respondent that the report of the Curator is irrelevant since her report was compiled after the death of the deceased. It is common cause that all the information contained in the confirmatory affidavit already formed part of the court record, no new material is introduced, and it does not impact on the arguments and submissions made. First respondent also conceded that no further response will be required should the court allow the affidavit. In my view the first respondent failed to indicate any prejudice should the affidavit be allowed. Having regard to the nature of the information contained in the confirmatory affidavit, I was satisfied that there was no prejudice to first respondent if the confirmatory affidavit was allowed to be filed at that stage of the proceedings. In any event I had no difficulty in allowing the confirmatory affidavit since the interests of justice requires it. (See: **Pangbourne Properties Ltd v Pulse Moving CC and Another** 2013 (3) SA 140 (GSJ) at para 16).

The Law

[22] The legal position in South Africa in respect of capacity to enter into a marriage is summarized in **South African Law of Husband and Wife** 5 (Ed) **HR Hahlo** p66 as follows:

> *"A person who, owing to mental disease or defect, is incapable of understanding the nature of the marriage contract, or the duties and responsibilities which it creates, free from the influence of morbid delusions, cannot contract a valid marriage, nor can his incapacity be cured by the consent of his Curator. The reason is not the mental disease or defect as such, but the absence of a mind capable of understanding".*

(See: **Pheasant v Warne** 1922 (AD) 481; **Pienaar v Pienaar's Curator** 1930 OPD 171).

[23] As stated in **Pheasant v Warne** 1922 (AD) 481 at 487 *"a consenting mind"* is essential to contractual validity. In **Pienaar v Pienaar's Curator** 1930 OPD 171 it was found that a person who because of some mental defect has been declared incapable of managing his or her own affairs may marry if capable of understanding the nature of the marriage contract and the responsibilities it creates. In **Prinsloo's Curators Bonis v Crafford & Prinsloo** 1905 TS 669 at 672 - 673 it has been stated that a lunatic, whether certified or not, can validly marry during a lucid interval.

[24] In **Vermaak v Vermaak** 1929 (OPD) 13 at p 16 the court referred to **Hunter v Edney** (1881) 10 P.D. 93 where it was stated at 95 that the question is not merely whether the respondent was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract entered into, free from the influence of morbid delusions. In **Durham v Durham** (1885) 10 P.D. 80 at 82 it was stated that the capacity to enter into a valid contract of marriage is *"a capacity to understand the nature of the contract, and the duties and responsibilities which it creates".* The Court further stated the following about the contract of marriage at page 81:

> *"I may say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others. ... I agree with the Solicitor General, that a mere comprehension of the words of the promises exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into".*

[25] In **Lange v Lange** 1945 A.D. 332 at p. 342, Tindall, JA stated that *"It is clear, of course, that if, owing to mental disease, a contracting party does not understand or appreciate the nature of the matter, the contract will be void; for he could not be held to have consented to obligations the nature of which he could not understand"*. The court also referred to **Hunter v Edney** (supra) and **Forster v Forster** (1923, 39 T.L.R. 658) in respect of delusions rendering a party mentally incapable of entering into the contract of marriage and stated at p 343 - 344 that:

> *"the defendant must have understood the nature of the contract and have appreciated the nature of the obligations he was undertaking. But the question is whether his volition was not influenced by his mental disease and more particularly by the auditory hallucinations from which he suffered. Of course it cannot be demonstrated that his volition was so influenced. Whether it was or was not is a matter of inference; but it is legitimate to draw an inference on a balance of probabilities. The evidence above mentioned, and especially that as to his behaviour before entering the Magistrate's office to be married, seems to me to render it highly probable that his volition was so influenced".* (See also **Uys v Uys** 1953 (2) SA 1 (E) at 2 F-H).

[26] In the **Estate of Park, Park v Park** [1953] 2 All ER 1411 it was held that, in considering whether or not a marriage is invalid on the ground that one of the parties was of unsound mind at the time it was celebrated, the test to be applied is whether he or she was capable of understanding the nature of the contract which he or she was entering free from the influence of morbid delusions on the subject.

[27] The Court of Appeal in the **Estate of Park, Park v Park** [1953] (supra) restated the principle with regard to capacity to marry as follows at p 1430:

> *"Was the deceased ... capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? In order to ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract".*

[28] The consent to enter into a marriage must be voluntary, and such consent must be to enter into a marriage with the other party. In **Ex parte Marais and Another** 1942 CPD 242 it is stated that the nullity of a void marriage is absolute. Consequently, an annulment is not required, but merely a declaratory order stating that the marriage is void. The effect of such declaratory order is that none of the legal consequences follow, including any proprietary consequences.

[29] The authorities therefore establish that the contract of marriage is a simple one which can be readily be understood by anyone of normal intelligence. It is not sufficient that someone appreciates that he is taking part in a marriage ceremony or understands its words, but he must understand the nature of the contract. The enquiry is therefore, "Did the deceased understand the duties and responsibilities that normally attach to marriage?"

[30] From the outset it is necessary to deal with first respondent's contentions that the Curator's report is not relevant to the proceedings. The Curator was appointed on 8 April 2014 and was specifically empowered to report to court on not only whether the deceased was capable of managing his affairs, but also the deceased's capacity to enter into a contract of marriage and to assess whether it would be appropriate to institute proceedings for the annulment of the marriage. The deceased

died on 19 May 2014. At the time of Professor Hardie's death the *Curator ad litem* had conducted certain interviews with relevant parties. She was requested by the applicant to complete her report in respect of these interviews since the report may be relevant to the status of the marriage between the parties as well as the administration of the deceased's estate. She completed the report on 29 May 2014 and was discharged on 30 May 2014. The Curator remains an officer of the court until discharged. The Curator was fully empowered to investigate the circumstances of the purported marriage of the deceased and I am satisfied that the Curator's report is relevant to the proceedings in this matter. In fact, the Curator, as an officer of the Court is obliged to assist the court in the determination of this matter. (See **Ex Parte Glendale Sugar Millers (Pty) Ltd** 1973 (2) SA 653 (N) at 659 H; **Du Plessis N.O. v Strauss** 1988 (2) SA105(A) at 120 A-D).

[31] It is not disputed that the deceased was diagnosed with Parkinson's disease in 2008 resulting in the appointment of the first respondent and her sister as his carers. He subsequently underwent major surgery and needed additional care. During 2013 his condition deteriorated and he was no longer able to manage alone. First respondent continued to care for him on practically a full time basis except weekends.

[32] Dr Gardiner took over the management of Professor Hardie's medical condition in 2010 and confirmed the diagnosis of Parkinson's disease with an overriding picture of cognitive decline. Dr Gardiner saw Professor Hardie at regular intervals and his condition subsequently deteriorated. In 2011 he could no longer do calculations; in 2012 his score on the mini-mental state examination dropped and in

2013 Dr Gardiner observed that the he was slow and required assistance to walk. Dr Gardiner confirmed that in July 2013 Professor Hardie was admitted to hospital as he was more confused than usual. On 6 February 2014 his mini-mental state score had deteriorated rapidly and his executive function was severely impaired. It can therefore be concluded that at the time of the marriage in December 2013 the deceased's condition had deteriorated significantly since the first respondent started to care for him in 2008.

[33] Against this background the circumstances surrounding the marriage needs to be assessed. There is clear and unambiguous evidence that the marriage officer was concerned about his capacity to understand the marriage proceedings. The conduct of Ms Antoni prior and subsequent to the marriage is indicative that she had grave concerns. First respondent's contention that the fact that Ms Antoni conducted the marriage ceremony reflected her satisfaction that the deceased had capacity to enter into the marriage is not borne out by what is stated by Ms Antoni herself. In any case, a marriage officer's belief that the deceased had the capacity to enter into the marriage is irrelevant to the question before court as to whether the deceased in fact entered into the marriage of his own volition. A marriage officer cannot impute capacity to a party.

[34] The concerns expressed by Ms Antoni must also be assessed in conjunction with the medical evidence. All of the medical experts assessed the deceased in February 2014, although Dr Gardiner saw him at regular intervals since 2010. Dr O'Cuinneagain concluded that his condition was indicative of advanced dementia. Dr Eidelman concluded that the deceased had an irreversible severe dementing

illness of the brain together with severe Parkinson's disease. Dr Michelle Jackson stated that as a result of his condition he lacks insight and has a poor grasp of his circumstances and situation. Dr Eidelman expressed the view that the deceased was extremely vulnerable and gullible. Dr Gardiner stated that he had no hesitation in holding the view that the deceased was not capable of understanding his actions in December 2013, and lacked the ability to appreciate that he was entering into a marriage in December 2013. He also indicated that his condition predisposed him to be suggestible and open to coercion.

[35] On the papers there appears to be a dispute of fact with regard to the mental capacity of the deceased and his ability to consent to a marriage contract. Despite obtaining the report of Dr Gardiner dated 6 February 2014 first respondent disputes his expert conclusion but failed to obtain a "second opinion". It is well established under the Plascon Evans Rule that where in motion proceedings disputes of fact arise in the affidavits, a final order can be granted only if the facts averred in the applicant's affidavit which have been admitted by respondent, together with the facts alleged by the respondent justify such order. (**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** [1984] (2) All SA 366 (A)). Cameron, JA stated the position as follows in **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) at para 55 and 56.

> *"[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing*

of the matter or to deny the applicant its order. There had to be a 'bona fide' dispute of fact on a material matter. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,*** *this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.*

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence".

[36] In **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at para 26 Harmse, JA stated that if a *"version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable the court is justified in rejecting them merely on the papers".* In **Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another** 2011 (1) SA 8 (SCA) at 14, 15 para 21**,** Shongwe, JA said this could be done where *"the version propounded by the respondents was fanciful and wholly untenable".* In **Wightman t/a JW Construction v Headfour (PTY) Ltd and Another** 2008 (3) SA 371 (SCA) at para 13 the court noted that:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed".

[37] First respondent did not present any medical evidence to refute the conclusions of the medical experts nor did she seriously address the issue of the mental condition of the deceased at the time of the marriage. In the absence of tangible evidence justifying first respondent's version with regard to the mental condition of the deceased it would serve no purpose for the court to refer the matter to oral evidence when it is apparent that *viva voce* evidence is unlikely to disturb what appeared from the papers. It would only result in unnecessary costs and unnecessary delays. (**Wallach v Lew Geffen Estates CC** 1993 (3) SA 258 (AD) at 263 G- I). I am satisfied that the facts and circumstances of this matter called for the adoption of a common sense and robust approach. (**Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another** (supra) at 14 A-D).

[38] First respondent alluded to a cohabitation arrangement with the deceased, claiming they had lived together for a period of four years. She was initially appointed as a carer, who was remunerated for her services. The pattern of the carer arrangement remained unchanged from its inception until the death of the deceased. It is not disputed by first respondent that after the marriage she continued to return to her flat in Kenilworth each weekend while her sister cared for the deceased. This is not consistent with first respondent's averment that she had moved into the residence and shared a room with the deceased. If a cohabitation arrangement existed there would have been no need for her sister to care for him during weekends since the nature of the relationship would have been redefined. As a cohabitant she would have assumed new responsibilities and obligations in respect of the relationship. This would have continued after the marriage.

[39] It is highly unlikely that any form of cohabitation existed without the knowledge of the family. There is no reason why it should have been regarded as a secret. On first respondent's own version the family witnessed them acting in a loving manner towards each other and were aware that they shared a room on occasion, yet no one objected. According to the applicant there were suggestions that they, in past years, had been intimate on occasion. However, the applicant had no personal knowledge of an intimate relationship. Applicant contends that first respondent had never been presented as anything other than a carer and employee, and was never regarded as her father's partner. It is evident that the deceased and first respondent had not established or maintained a joint household and the first respondent never contributed towards any expenses. On the contrary, the evidence incontrovertibly points in one direction, namely, that the first respondent benefited unduly by controlling the financial affairs of the deceased to her own benefit. She failed to provide an account for large sums of money withdrawn from the account of the deceased. I am satisfied that neither evidence of a cohabitation arrangement prior to the marriage nor any evidence of the existence of a normal marital relationship after the marriage was presented. In fact, it can safely be concluded that the relationship remained that of patient and carer.

[40] The first respondent must have been aware that the deceased had health challenges and limited capabilities. She personally informed the marriage officer that the deceased had dementia and Parkinson's but alluded to uncertainty surrounding his condition in her replying papers. The deceased could not take care of his own person and first respondent attended to his personal affairs. She attended to his financial affairs and daily withdrawals. The deceased effectively relinquished control

of his affairs to first respondent by granting her power of attorney over his affairs in October 2013. Bank officials also stated that first respondent took control of his financial affairs whilst the deceased appeared blank, disinterested and lacked participation in his affairs. First respondent failed to explain why the need arose for her to control all the affairs of the deceased.

[41] The first respondent attempted to persuade the court of her *bona fides* in entering into a marriage with the deceased. At the time of the marriage the deceased was a frail 84 year old male with significant cognitive deficiencies. It can reasonably be concluded that first respondent, who had spent time with him on a daily basis, must have observed the deterioration in his condition. It is questionable whether the deceased would have granted her power of attorney over his affairs at his own volition. He assumed the role of a bystander while first respondent dealt with banking officials and managed his affairs. Having regard to the mental capacity of the deceased at the time of the conclusion of the marriage as concluded by the medical experts, it is highly improbable that the deceased would have initiated and conspired with first respondent to marry in a covert manner. It is also questionable whether he meaningfully appreciated the reciprocal duties and legal obligations attached to a cohabitation arrangement or marriage. These conclusions are congruent with the medical findings that he was mentally predisposed to gullibility, suggestibility and coercion.

[42] First respondent avoided to respond to pertinent issues, failed to engage with disputed facts, and created a fictitious dispute regarding the mental capacity of the deceased in the face of overwhelming expert medical evidence. The averments

made by the applicant that a normal romantic relationship had developed between them leading to the marriage are palpably implausible, so far-fetched, and clearly untenable and stand to be rejected.

[43] It is clear that at the time of the marriage the deceased had a number of pre-existing diagnoses that were affecting his cognition and capacity to live independently. From the medical evidence it is clear that his abilities were seriously impaired at the time of assessment. His cognitive impairments were in an advanced stage and affected his ability to make decisions. The deceased had significant cognitive deficiencies which clearly prevented him from being able to understand the consequences of his marriage. All of the experts and the *Curator ad litem* are satisfied that the deceased was not capable of providing valid consent to the marriage. With mini-mental state examination scores of 9/30 and 13/30 two months before the marriage, Professor Hardie could clearly not have had the capacity to appreciate the duties and responsibilities which the marriage agreement created. I therefore conclude that Professor Hardie did not, as a matter of fact and law, have legal capacity, including contractual capacity, to conclude a marriage with Winifred Maud Jansen on 10 December 2013.

[44] With regard to costs, the general rule is that costs are to follow the event. The applicant, as a successful party, would ordinarily be entitled to costs in her favour. This general rule should only be departed from in exceptional circumstances. The first respondent is in her senior years and her conduct in taking advantage of the deceased who trusted her cannot be condoned. This is a regrettable set of circumstances which undoubtedly has caused much distress to the family of the

deceased. Understandably, there is tension between the parties and I deem it undesirable to make matters worse by granting a costs order against the first respondent. I am therefore satisfied that justice and fairness would be best served if no costs order is made against first respondent.

[45] In the circumstances the following order is made and it is declared that:

45.1. Keith Allanson Hardie, due to his mental condition, was not capable of consenting to a valid marriage;

45.2. The marriage concluded between Keith Allanson Hardie and Winifred Maud Jansen on 10 December 2013 is null and void;

45.3. The void marriage did not vest ownership or any other rights in any portion of Keith Allanson Hardie's estate in Winifred Maud Jansen.

[46] It is ordered that the Applicant's costs be paid out of the estate of the late Keith Allanson Hardie.

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GOLIATH, J

Judge of the High Court