In the KwaZulu-Natal High Court, Pietermaritzburg

Republic of South Africa

Case No : AR227/11

In the matter between :

Shanil Haribans NO — First Appellant

Shanil Haribans — Second Appellant

and

Norosh Haribans — Respondent

Judgment

Lopes J

[1] The deceased, Widthit Haribans, died leaving a will dated the 21st October 2004. All parties to the application in the court a quo accepted that that will had been validly executed. The Master of the High Court in Durban was on the point of winding-up the estate of the deceased pursuant to this will, when a copy of a later will ('the disputed will') surfaced. It was dated the 24th June 2005. The validity of the disputed will was in issue in the court a quo.

[2] The main protagonists are the two sons of the deceased. Norosh, the respondent, who was the applicant in the court a quo, sought an order validating the disputed will. Shanil, the second appellant, was a respondent in the court a quo and is also the first appellant in his representative capacity as

executor of the deceased's estate, sought the dismissal of the application.

[3] The deceased also had two daughters, Nirmala Devi Moodley and Anusha Ramroop. They were respondents in the court a quo. Nirmala was also cited in her representative capacity as an executor in the estate of the deceased.

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[4] A judgment was handed down on the 10th December 2010, in terms of which;-

a) an interdict was granted, preventing the winding-up of the estate of the deceased in terms of the will of the deceased dated 21st October 2004 (annexure "C" to Applicant's Founding Affidavit);
b) the copy of the disputed will (annexure "D" to the Applicant's Founding Affidavit) was declared to be valid;
c) the Master of the High Court Pietermaritzburg was directed to accept the disputed will for the purposes of administering the estate of the deceased; and
d) the costs of the application were to be borne by the estate of the deceased jointly and severally with the parties who had unsuccessfully opposed the grant of the order, the one paying the other to be absolved.

[5] The matter comes before us by way of leave to appeal granted by the court a quo on the 10th February 2011.

[6] The matter may be summarised as follows :-

a) the deceased passed away in Zanzibar on the 20th November 2005;

b) during his lifetime the deceased was married to Taramathee Haribans who died on the 3rd February, 1998. She left a will which was accepted by the Master of the High Court, Pietermaritzburg on the 6th March 1998, under the Master's reference number 1704/98;

c) after the death of the deceased and pursuant to letters of executorship issued by the Master, on the 1st December 2005 Shanil and his sister Nirmala were appointed as co-executors to the estate of the deceased; Shanil was later appointed as the sole executor by the Master in terms of letters of executorship dated the 28th January 2009;

d) the Master accepted as the last will and testament of the deceased, the will dated 21st October 2004;

e) at a stage when the estate of the deceased was all but wound-up, the wife of Norosh (Louana Haribans) was allegedly asked by their attorney to obtain a copy of the will of the deceased's late wife;

f) Louana then proceeded to the Master's office in Pietermaritzburg and requisitioned a copy of the last will and testament of Taramathee Haribans;

g) Louana and Norosh were attended to by a representative of the Master's office, Mr Mlaba. When he handed to Louana the copy of the deceased's late wife's will, a copy of the disputed will was attached to it;

h) the respondent then brought an application in the High Court in Durban to have the disputed will declared to be the last will and testament of the deceased. That application was opposed and referred to the hearing of oral evidence before Gyanda J;

i) Gyanda J found in favour of the respondent resulting in the issue of the order set out above.

[7] Shanil appeals that decision both in his capacity as executor of the estate of the deceased and in his personal capacity. His contention is that the judgment of Gyanda J falls to be set aside because the respondent did not prove on a balance of probabilities that the copy of the disputed will represented the last will and testament of the deceased.

[8] S 2(3) of the Wills Act, 1953 provides :-

'If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act No 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).'

[9] Although there is no suggestion that the copy of the disputed will (the document relied upon) does not comply with all the formalities of the Wills Act, 1953, the respondent nonetheless bore the onus to establish on a balance of probabilities that the document was a copy of a valid will executed by the

deceased. (*Van Wetten and Another v Bosch and Others* 2004(1) SA 348 (SCA) at 354 D – F.) Once the court is satisfied in that regard it has no discretion but to order the Master to accept the document as a will for the purposes of the Administration of Estates Act, 1965. (*Harlow v Becker NO and Others* 1998(4) SA 639 (D) at 642 I – 643 B; *Smith v Parsons NO and Others* 2010(4) SA 378 (SCA) at 379 I – 380 B.)

[10] What is not in dispute in this matter is that the document upon which the respondent relied was a copy, and not an original document. A number of witnesses gave evidence for the respondent and it is relevant to the reasoning of the court a quo to summarise their evidence.

[11] Peter Rex Clover testified that he had worked in the office of the Master of the High Court in Pietermaritzburg, for twelve and a half years as Assistant Master. He testified to the procedure followed when a will is submitted to the Master's office. That procedure is :-

(a) a registry clerk opens a file and places an acceptance stamp on a submitted will;

(b) if the Assistant Master is satisfied that the will complies with the necessary formalities he or she will register and accept the will, which he or she does by date stamping it and by signing on the stamp;

(c) if a will bears the stamp 'registered and accepted', and it is signed by an Assistant Master and dated, that should indicate that an original of that will was lodged in the

Master's office;

(d) once the Assistant Master has dealt with the will, it is sent back to the registry clerk who makes a copy of the will and the original is kept in a box file in a strongroom in the wills' registry. If the will is not accepted, a will slip is put into the file noting that the will was not accepted and the reasons for not doing so;

(e) any file which had been opened in 1998 (in this case containing the will of the deceased's late wife) would have been kept by Docufile, a company which specialised in the storage of records;

(f) Mr Clover referred to a requisition made on the 12th November 2009 by Louana who wished to view a copy of the will of the deceased's late wife. That requisition for the file was given to Mr Mlaba, and Mr Clover said that he had worked with him for a number of years at the Master's office;

(g) the file duly arrived at the Master's office in Pietermaritzburg and it bore reference number 1704/98; and

(h) Mr Clover was referred to a stamp on the disputed will which states 'REGISTERED AND ACCEPTED/GEREGISTREER EN AANVAAR' with a line thereunder providing for the signature below it of the Master of the High Court. He said that the initials on the stamp which was dated the 24th November 2005, appeared to belong to the late Mr Potgieter who was an Assistant Master of the High Court in

Pietermaritzburg at the time, and a person whom he had known for many years and who had in fact trained him. He further said that, in the circumstances, Mr Potgieter would also have signed the original will;

(i) Mr Clover, however, had no explanation as to why the disputed will should have ended up in the file of his late wife's estate. He had seen the disputed will in the file of the deceased's late wife stapled to her will;

(j) Mr Clover searched for the register which was supposed to reflect that the original of the disputed will was despatched to the Assistant Master dealing with wills on the 24th November 2005, but could not locate the register;

(k) there was also a second register which could have revealed the details of the lodging of the disputed will, but Mr Clover did not look for that register;

(l) Mr Clover asked his staff to look for the original of the disputed will, but it could not be located;

(m) in cross-examination, Mr Clover stated that although the registers were kept in the same strongroom as the wills, he had been unable to locate the missing register in this case. If it had been in the strongroom, he would have found it. Access to the strongroom was restricted to staff only;

(n) Mr Clover agreed that it was a very unusual occurrence that the register was mislaid. In addition, a thorough search had been carried out in the Master's office to try to locate the

original of the disputed will, but it could not be found. He conceded that he was unable to explain how the disputed will had ended up in the file of the deceased's late wife. He also conceded that there could have been a file in respect of the deceased, which had disappeared as the registers had done. He had been unable to locate anything relating to any other file on the computer. The only file relating to Haribans was the file under reference 1704/98. Mr Clover was unable to establish the identity of the person who had initially lodged the disputed will on the 26th June 2005; and

(o) under re-examination Mr Clover conceded that it was very unlikely that the file of the deceased's late wife could have been in the office of the Master at Pietermaritzburg in 2005. At that stage it would have been sent off to Docufile. He surmised that if the person who brought in the disputed will gave the registry clerk the number 1704/98 the clerk might have unthinkingly placed that number on the disputed will.

[12] The next witness was Mbuseni Mlaba :-

a) he testified that he had been employed until the 8th April 2010 at the Master's office in Pietermaritzburg as a senior administration clerk;

b) he was shown the requisition which had been lodged by Norosh's wife for the file of the deceased's late wife;

c) he confirmed that he had recorded the requisition in his register for the 12th November 2009. As a consequence of receiving the

requisition one of his colleagues contacted Docufile and Mr Mlaba personally received it on the 19th November 2009. (As he testified that it would have taken three to four days to arrive at the Master's office it would have reached there by the 17th November 2009);

d) Mr Mlaba recorded in his register the address of Norosh and Louana's attorney Mr Anand Nepal. He said he did so because Louana told him the name of their attorneys;

e) when Mr Mlaba opened the file he found a copy of the disputed will stapled to the will of the deceased's late wife and marked with the same estate reference number, 1704/98;

f) Mr Mlaba then made copies of both wills which he certified as true copies of the documents in the file and gave them to Louana, and she and Norosh were apparently surprised by what had been produced from the file, so much so that he described them as being "like shaking". Mr Mlaba then telefaxed a copy of the disputed will to the Master's office in Durban and one to Louana's office; and

g) Mr Mlaba had left the employment of the Master's office on the 8th April 2010, having been dismissed for allegedly failing to produce a sick note when he had taken sick leave.

[13] Johannes Pieter Swanepoel testified that he was a director of Docufile Durban (Pty) Ltd. They were a national enterprise with branches in the main cities. They provided storage facilities to businesses and the State, and:-.

(a) file 1704/98 would have been stored in the Docufile facility

around May of 2006;

(b) the first time it was retrieved from the facility thereafter was on the 17th November 2009 by one Deon Joubert an employee of the Master's office in Pietermaritzburg. It was requested a number of times after that.

(c) Mr Swanepoel told the court that files are requested by an email which is sent to the Docufile call centre. The information is then conveyed to an employee known as 'a picker' in the warehouse who will find the box in which the file is stored. The agent then goes into the box and retrieves the file. This is done by way of a bar code on the file, cross-referencing the reference number of the file and the name. Files requested before 10 o'clock in the morning are delivered to the Master on the same day and sealed in a plastic sleeve.

(d) the records of Docufile show that the file in question left the Docufile office on the 17th November 2009. Because of the standards required by the Department of Justice, Docufile is required to deliver the files within 24 hours. The contents of files mean nothing to the personnel working at Docufile because they simply go according to the bar coded numbers to locate the file. Their software systems are developed in-house and he was of the view that no-one from outside would be able to work with, or access, their software.

(e) Mr Swanepoel was unable to comment on what had happened to the file whilst it was in the Master's office in Pietermaritzburg

between the 17th and 19th days of November 2009. He described the facility in which Docufile kept the files as being very secure. Staff at Docufile were required to follow procedure in the recovery of a file and only a picker could do so. The picker, in any event, would go and fetch a box in which the file was contained.

[14] (a) The next witness was Michael John Irving whose expertise as a handwriting expert was not disputed. He had been shown the original of the will deposed to by the deceased on the 21st October 2004. He was also given certain admitted signatures of the deceased and asked to compare those signatures with the purported signatures of the deceased on the disputed will. He had, initially been given a faxed copy of the disputed will, but was later given the copy which had been stapled to the will of the deceased's wife. Because the document was a copy he could not be certain that the deceased had in fact affixed his signature to the original.

(b) Although he pointed out certain differences between the undisputed signatures of the deceased and his signatures on the disputed will, his view was that it was highly probable that the signatures on the disputed will were those of the deceased.

(c) The differences which Mr Irving identified were firstly that the deceased had a particular way of writing the first "a" in his surname. It appears that this involved the deceased doing a

circular movement, lifting his pen, and then making a down-stroke for the back of the “a”. The second difference was the last character which was an “s” which was more rounded in the undisputed signatures.

(d) Mr Irving testified that although no two signatures of an individual are identical, this is because of variations of speed, pen pressure and character formations. The signatures of adults, however, follow a consistent pattern and so it is important for a forensic document examiner to look at the interior construction of the signature and not the actual pictorial pattern. The problem with copies is that one is unable to determine variations in pen pressure, etc. He was initially of the view that the signatures on the disputed will were not the product of what is referred to as “cut and paste”.

(e) Significantly Mr Irving testified that there was a difference between the way the first “a” in Haribans was written in the undisputed signatures of the deceased and the way that letter was written in the disputed signatures. This applied only to the first “a” in Haribans. He conceded in cross-examination that in the disputed signatures the design of the character had been changed. In all the signatures the second “a” in Haribans was written in a conventional manner. Mr Irving also conceded under cross-examination that one was unable to tell whether a signature had been scanned onto a document if he was only shown a photostat copy. He did say that certain characteristics

on signatures could be identifiable, but it would depend on the clarity of the document he was looking at.

(f) Mr Irving testified that what he had examined was a copy of a copy of the disputed will. He also said that the signature of any person may differ from time to time according to whether that person was ill, under medication, his or her age, etc. One explanation for the difference in the first "a" in each of the signatures of the deceased on the disputed will is that signatures might have been taken from documents (and cut and pasted onto the disputed will) that were authored many years ago before the deceased established the peculiar pattern of signing the first "a" in Haribans.

(g) In re-examination Mr Irving pointed out that, despite the differences between the undisputed signatures and the signatures on the disputed will, he had found thirteen similarities between those signatures. He maintained that those similarities outweighed the differences and made it highly probable that the purported signatures of the deceased on the disputed will were genuine.

[15] Louana Haribans then testified. She told the court that she had married Norosh on the 21st December 2003, and that:-

a) Norosh had been deaf since birth and was only able to communicate through sign language;

b) after she had married him they moved into a house situated at 27

Shari Drive, Everest Heights, Verulam which was registered in the name of Norosh. They resided there with the deceased;

c) Norosh worked in the family business with the deceased and Shanil;

d) the business was a CMT business operating in the clothing industry;

e) Norosh had his own motor vehicle with a personalised number plate;

f) initially their relationship with the deceased was a good one. However problems arose because there was a flexibond over the home they lived in. That flexibond was apparently used from time to time to fund the running of the family business. Amounts were drawn against the bond to do so, and payments were made from time to time by the business. The business was apparently a surety on the flexibond account. In addition Norosh had a Standard Bank account against which monies were drawn for the business;

g) as a result of these withdrawals Norosh became unhappy. This was exacerbated during May of 2004 when the deceased was on a trip abroad and Shanil required Norosh to sign a further bond over his house against which further monies were withdrawn. When the deceased returned to South Africa the relationship between him and Norosh deteriorated to the point where the deceased asked him to leave the matrimonial home;

h) at about the same time in July 2004 the deceased and Shanil took away the car keys of the vehicle being used by Norosh. Things

deteriorated further and Norosh approached the bargaining council to assist him with his dismissal from the family business;

i) legal proceedings were then instituted by the deceased against Norosh relating to the property and the fact that Norosh had cashed in certain insurance policies, all or a portion of which were claimed by the deceased;

j) Norosh and Louana made certain payments servicing the bond on the matrimonial home for which they were responsible, but eventually they could do so no longer, and the property was sold in execution by the bank. There was also litigation over the motor vehicle which had been taken away from Norosh. The deceased continued to live in the matrimonial home but during 2005 became ill and was visited from time to time in hospital by Norosh;

k) in November 2005 the deceased went on holiday to Zanzibar with one of his grandsons, and the deceased died whilst scuba diving. Norosh caused a summons to be issued against Hari Fashions CC relating to the monies which were drawn against the flexibond, and in an affidavit in that action Shanil stated that the monies had been received by the deceased. The estate of the deceased was then joined in that litigation;

l) at some stage during 2009 Louana Haribans had been asked by their attorney to obtain a copy of the original will of the deceased's late wife, Taramathee Haribans. This was apparently because the attorney wished to trace back the process in terms of which the matrimonial property (originally registered in the name of

Taramathee) had become registered in the name of Norosh. Pursuant to those enquiries Louana and Norosh had gone to the Master's office in Durban, from where they were referred to the Master's Pietermaritzburg office. They had requisitioned a copy of deceased's late wife's will from that office and apparently went there on the 20th November 2009 to obtain a copy of that will. When they arrived in Pietermaritzburg they met Mr Mlaba from the Master's office and he gave them a copy of the deceased's late wife's will. Attached to that copy, which was certified by Mr Mlaba, was a copy of the disputed will. According to Louana Haribans that was the first time they had seen that document. They then caused a copy to be delivered to the Master in Durban;

m) in cross-examination by Mr *Topping* , Louana confirmed that part of the problem which had arisen with the deceased was because Norosh had spent money on their honeymoon in India on various items of electronic equipment. There was also an allegation that they had removed some jewellery from a safe in the matrimonial home when they had vacated it. That, however, was disputed;

n) Louana confirmed that various trusts existed including the Haribans Charity Trust, the beneficiaries of which were certain religious and charity organisations, the Trust Hari Fashions, the beneficiary of which was the charity trust, and a Trust Family Hari the beneficiaries of which were the family members;

o) there was also a Trust Norosh Haribans which was formed by the deceased, the purpose of which was to benefit the deceased's

children. No funds, however, were put into that trust. This trust was not referred to in the will of the 21st October 2004, but is referred to in the disputed will; and

p) in the application papers for the return of the BMW motor vehicle the deceased denied having insisted that the vehicle was removed from Norosh and denied intending to disadvantage Norosh. This was disputed in replying papers by Norosh.

[16] What seemed clear from the evidence of Louana, and what was put to her in cross-examination, was that the deceased suspected that she was behind the conduct of Norosh which the deceased viewed as being financially excessive.

[17] Mrs Manoranjani Pillay, who had been a legal secretary at attorneys Garach and Garach testified and confirmed that she appeared as a witness to the wills signed by the deceased on the 13th December 2001, the 3rd December 2003 and the 21st October 2004.

[18] Mr Benjamin Jhuri testified that he had been employed as a clerk at Garach and Garach. He was responsible for preparing draft wills and trusts documents for the firm. He identified his signature and that of Mrs Manoranjani Pillay on the wills of the deceased dated the 3rd December 2003 and the 21st October 2004. He was also involved in the preparation of the trust deed in the Haribans Charity Trust. He said that the deceased had been a long-standing client of the firm, for more than seventeen years. He believed

that Garach and Garach were the only firm used by the deceased for wills and trusts.

[19] Mr Jhuri was unequivocal that the disputed will was not prepared by Garach and Garach, and that he did not recognise the signatures of the witnesses on that will. He confirmed that in the will of the 21st October 2004 Norosh's name, which had been in the previous wills was removed and Norosh was deleted as a beneficiary of the Trust Family Hari. He confirmed that a month or so later the deceased had created the Trust Norosh Haribans. Mr Jhuri was of the opinion that the deceased was going to transfer assets into that particular trust.

[20] Shanil then testified. His evidence may be summarised as follows :-

a) his parents (the deceased and his wife) had started the family business in the clothing industry in 1972;

b) they had built up the business and at the same time built a house at 27 Shari Drive, Everest Heights, Verulam where the family lived. By 2003 Shanil was basically running the business overseen by his father on a weekly or fortnightly basis. At that time Norosh was also involved in the business and performing general duties. The business was run in the name of Hari Fashions CC the members of which were the deceased, Shanil, Shanil's wife and Norosh.;

c) there were a number of close corporations and trusts which catered for the family's business activities and interests. They included :-

(i) Hari Fashions CC which conducted the CMT business;

(ii) Niro Fashions which conducted a similar business but was there for tax purposes;

(iii) God's Glory CC which owned a building in Lorne Street, Durban and from which the family businesses traded;

(iv) Prop Hari Fashions in whose account money was banked for recreation facilities;

(v) Hari Fashions Recreation Club which catered for the interests of a football team started by the deceased;

(vi) Haribans Charity Trust formed for the purpose of building a temple and charity interests of the deceased;

(vii) H & R Creations, a wholesale company started by the deceased and a partner which ceased to operate during 1998, although the H & R Creations CC was still in operation;

(viii) Hari Fashions CC in which certain savings were held in a First National Bank account, which monies emanated from the business Hari Fashions; and

(ix) Trust Hari Fashions which was a charitable trust and nothing to do with the family business interests but apparently designed for the benefit of the Blind and Deaf Society;

d) Shanil testified to the unhappy relationship between Louana and the deceased. He confirmed the deceased's unhappiness at the fact that Norosh and Louana had overspent on the credit card on their honeymoon and the fact that Norosh had made an arrangement with the bank to pay off that account from the business bank account;

e) the deceased had given each of Shanil and Norosh a house. The houses were transferred into their names with no money exchanging hands at that point. Flexibonds were registered over both houses and those bonds were paid for by the business. The business used both bond accounts in order to obtain operating capital. In addition the BMW motor vehicle which was driven by Norosh was paid for by the business although it was registered in the name of Norosh;

f) after the disputes arose between the deceased on the one hand, and Norosh and his wife Louana on the other, the deceased decided to take back 50% of everything he had given Norosh, and to put that money into a trust account for the benefit of Norosh. This was because of his unhappiness with Louana. As a result of the deceased's unhappiness he removed Norosh as a beneficiary of the Trust Family Hari, although at approximately the same time he formed the Trust Norosh Haribans, the beneficiaries of which were the deceased's four children. That trust was apparently formed with the intention to protect Norosh. The deceased also removed Norosh as a trustee of the Trust Hari Fashions;

g) the deceased had also suspected that when Norosh and Louana had moved out of the matrimonial home, Louana had taken jewellery from the safe. A complaint about this was made to the police but the matter was not pursued;

h) Shanil confirmed the deceased's close relationship with attorney Kumar Garach and the fact that Garach and Garach had prepared

all the deceased's wills and that the deceased had no association or business dealings with anyone in Pietermaritzburg in that regard. In addition he had no relatives or friends in Pietermaritzburg;

i) Shanil stated that neither Norosh nor Louana would have known of the deceased's intentions to look after Norosh by claiming back the 50% of the monies which had been given to him. He confirmed that it was the deceased's wish as expressed to Mr Jhuri, that the Trust Norosh Haribans was ultimately for the benefit of Norosh;

j) Shanil was unable to explain how, in the disputed will, the statement appeared that the Trust Norosh Haribans was for the benefit of Norosh. Having conceded that ex facie the terms of the trust document in the Norosh Haribans Trust, the beneficiaries were the four children of the deceased, and that there was nothing in that document which suggested that the trust would be administered for the benefit of Norosh only, he suggested that it was possible that Norosh and Louana had privately been told this by the deceased. In addition, it appeared that the signature of Norosh as it appeared on the trust deed of the Norosh Haribans Trust had in fact, been put there by the deceased. He later said that even though that trust deed reflected all four children, he was aware that the trust was in fact for the benefit of Norosh;

k) Shanil also testified that the matrimonial home had not been sold to a third party but an agreement had been made between Louana and the trustee of the Trust Hari and that she and Norosh were still living in the house and also getting rent from it;

l) he was referred to the application papers in the matter relating to the BMW motor vehicle which the deceased reiterated his concern for Norosh and the fact that he would not abandon him. Shanil was of the view that the deceased did not intend to abandon Norosh and that he had been taken care of by way of various insurance policies and investments. He denied however the suggestion that the deceased would have made another will because he said that was never discussed with the family, and the deceased would not have made a new will without discussing it with the family;

m) in cross-examination, Mr *Shepstone,* appearing for Norosh, pointed out to Shanil that in terms of the disputed will Louana would not benefit, and further that both Shanil and his sister would continue to be executors, and the will would be administered by Garach and Garach;

n) in re-examination Shanil said that in 2009 everyone in the family knew the contents of the Norosh Haribans Trust; and

o) Shanil also said that he did not believe the deceased wanted to hand over the managing of the business to Norosh, which would be the effect of the disputed will, nor would the deceased want to disinherit virtually the entire family as they were the beneficiaries in the family trust, but instead only benefit Shanil, Norosh and his two sisters.

[21] That was the evidence of the witnesses. Having reviewed all the evidence, should the trial court have been satisfied that the disputed will was

in fact the last will and testament of the deceased? For the reasons which follow, I am in respectful disagreement with the approach taken by the learned judge in the court a quo.

[22] Mr *Topping* submitted there were sufficient suspicious circumstances which cast doubt on the validity of the disputed will. Most of these matters were raised before the learned judge.

[23] The first matter dealt with by the learned judge was the fact that there were two unexplained days between the 17th and 19th November 2009 when Docufile delivered the file to the Master's office and when it was seen by Norosh and Louana. This was at a time when the Master had indicated that he was about to finalise the estate in terms of the will dated the 21st October 2004 and which did not favour Norosh.

[24] The learned judge dismissed these fears on the basis that the copy of the disputed will bore a stamp from the Assistant Master dated the 24th November 2005 certifying that the disputed will had been registered and accepted on that date by the late Mr Potgieter whose signature was confirmed by Mr Clover who had worked with, and been trained by, Mr Potgieter. In addition the person or persons who received the will would have been in possession of a legitimate copy of the deceased's wife's will in order to be able to staple them together.

[25] In dismissing the appellant's suspicions, the learned judge assumed

that the disputed will had been contained in the Master's file since the time it purported to have been lodged – i.e. the 24th November, 2005. He also relied upon an adherence to the practices in the Master's office as reassurance for the genuineness of the disputed will.

[26] An acceptance of the fact that the disputed will had been sitting in file 1704/98 since its purported date of lodgement (the 24th November 2005) must be based upon a foundation of fact.

[27] The learned judge accepted as a fact that Mr Potgieter had seen the original will, signed it, copied it and given instructions to file it. He relies for this solely on the stamp appearing on the disputed will. As Mr Potgieter was deceased, his evidence was not available to verify his signature. Mr Clover who had worked under him, stated that he was sure that the signature was that of Mr Potgieter. However, in cross-examination he was less certain, and could not discount the possibility of the document having been a scan of Mr Potgieter's signature.

[28] What is clear from the evidence of Mr Clover is :-

(a) the original wills and registers are secured in a safe to which only the Master's staff has access;

(b) he could give no rational explanation for the disappearance of the original of the disputed will or the clerk's register and said that if they had been in the strong room he would have found them;

(c) he could not explain how the disputed will ended up in file 1704/98 –

the disputed will should have been placed in that file, and no other file had been opened to deal with the estate of the deceased;

(d) no file or document relating to the deceased could be found anywhere in the Master's office, nor yet on the computer system;

(e) the registry clerk usually placed the estate reference number on the will and if the Assistant Master was satisfied that the will complied with the provisions of the Wills Act, he would register and accept the will, by date stamping and signing it. No trace could be found of the registry clerk who did this.

[29] No evidence was led at the trial that any supporting documents (including the death certificate, inventory and death notice) relating to the deceased were in the file. Mr Clover's evidence was that where no such supporting documents are available, a file is nevertheless opened and given a number. An estate controller will be given written instructions to obtain the documents from the attorney (or, presumably, the person) submitting the will. When received, these documents are resubmitted to the Assistant Master for reconsideration. No correspondence existed to suggest the lack of supporting documents.

[30] Accordingly the learned judge's approach in accepting that the disputed will had been placed in file 1704/98 on the 24th November 2005 as a starting point in his analysis of the matter, is, with respect, not justified on the evidence.

[31] The probability the disputed will had been in file 1704/98 since four days after the death of the deceased is in any event disturbed by a number of circumstances and it is necessary to consider the cumulative effect of those circumstances, which are :-

a) the fact that no member of the deceased's family was aware of the existence of the disputed will until the copy emerged on the 20th November 2009;

b) the identity of the person who lodged the will with the Master's office was unknown. I respectfully differ from the learned judge's approach to this evidence. It seems inherently unlikely that a member of the family, or someone close to the deceased would have lodged the will and said nothing of it to any of the family members in the intervening period of over four years. This is a particularly strange circumstance when one considers that :

   (i) the competing will dated the 21st October 2004 was being relied upon and had been available to the Master and known to family members for a number of years; and

   (ii) the contents of that will, which differed significantly from the contents of the disputed will, had been the subject of a great deal of tension and discussion in the family of the deceased;

c) the standard procedure which should have been followed in the

Master's office was not adhered to. The learned judge relied on the assumption that the original will had been stamped and accepted by Mr Potgieter for the conclusion that standard procedures were in fact followed. The lack of supporting documents or correspondence together with a complete absence of any records indicating the receipt of the will clearly show that no evidence existed of standard procedures having been followed;

d) the unexplained two days when the file of the deceased's late wife lay in the Master's office. The learned judge dismissed the suspicions surrounding this period as pure speculation. He concluded that the fraudster must have had the foresight to predict the death of Potgieter. But that, of course, would only be correct if the will had been lodged on the 24th November 2005. When that fact itself is open to doubt, it cannot be relied upon to establish further facts.

e) a perusal of the wills dated the 13th December 2001, the 3rd December 2003, the 21st October 2004, and the disputed will, reveal uncanny similarities. These include :-

(i) the same paragraph numbering expressed in words;

(ii) the same introductory preamble;

(iii) the same spelling error in the first line of paragraph 1;

(iv) the same inappropriate capital letters;

(v) the same somewhat quaint language used in the paragraphs.

(f) Some of those similarities may be ascribed to traditional legal

usage, but in my view the similarities in the documents show that the same template stored on a computer was used in the production of the disputed will. As it did not derive from Garach and Garach it could only have been scanned and then altered;

(g) Also significant are the differences between the undisputed will and the disputed will, including :-

(i) the disputed will benefiting Norosh and significantly reducing the share of Shanil;

(ii) the disputed will not containing the Garach and Garach cover page;

(iii) the disputed will not containing the details of the unknown witnesses as provided for on the undisputed wills;

(h) the learned judge dismissed the concerns of the appellant regarding the disappearance of the original of the disputed will and the register as speculation.

[32] In addition, there is an aspect of the evidence which was not explored by the learned judge. That is the matter of the signatures of the deceased as they appear on the disputed will.

[33] Although Mr Irving believed that given the number of similarities between the signatures on the disputed will and the undisputed signatures of the deceased, the disputed will was probably signed by the deceased, that is

not the end of the matter.

[34] It is clear from even a layman's perusal of the signatures of the deceased on the disputed will and those of the undisputed signatures of the deceased, that there is a material difference in relation to the first "a" in "Haribans". What is significant about the difference is that it appears in precisely the same way in all three of the deceased's signatures on the disputed will. The last "s" in Haribans is also significantly different in the disputed will, when viewed against the admitted signatures of the deceased.

[35] Whilst it is true that Mr Irving testified that there are reasons why a person may change their signature, his evidence was also that individuals will tend to sign their signature in exactly the same way each time. Even if one takes into account Mr Irving's evidence that a person's signature might change due to that person being upset, or on medication, etc, that did not fully explain the disturbing features of the signatures on the disputed will.

[36] Mr Irving accepted that the signatures on the disputed will evidence a complete change in the way the deceased addressed the writing of his signature. In all the undisputed signatures there was not one in which the first "a" in "Haribans" matched those on the disputed will. Instead of writing, as he had always done, the first "a" as a "c" and then lifting his pen and making the down-stroke for the back of the "a", this was clearly not done in the disputed will where the handwriting was allowed to flow, writing the "a" in a continuous movement. This is not something which can lightly be dismissed on the basis

of the evidence given by Mr Irving.

[37] The learned judge also dismissed the suggestion that the contents of the disputed will demonstrated its falsity because of the relationship between Norosh and the deceased before the deceased's death. It is clear from the evidence that Norosh and the deceased were at loggerheads.

[38] Even though the deceased may have formed the Trust Norosh Haribans with the intention of benefiting Norosh it may well be that he died before being able to give effect to his intention. There is no doubt that the disputed will, excluding as it does beneficiaries in the previous will and benefiting Norosh with whom the deceased was at odds, is an improbable document. The learned judge dismisses the reasons for the deceased disinheriting Shanil and other members of the family as speculation, and then surmises as to why he may have done so.

[39] It is important when assessing the evidence in the matter not to take each individual circumstance, weigh that circumstance and apply it to the facts without considering the cumulative effect of all the individual factors which must be looked at and assessed.

[40] Looking at all the factors which militate against the possibility of the disputed will being the last will and testament of the deceased, in my view there are simply too many of them which are unexplained. In *Smit v Arthur* [1976] 3 378 (A) at 384 F – H, Miller AJA stated :-

'But the proper resolution of the issues in this case must be sought not by appraising each incident simply on its own circumscribed facts, but by a careful survey of the whole history of the relationship of the parties and of their behaviour at all relevant times. All the relevant facts must necessarily go into the melting pot and the essence must finally be extracted therefrom.'

[41] In making such an analysis it is not necessary to find that the disputed will was a forgery. The onus is on the party who avers that the disputed will is valid to prove it. The cumulative effect of the factors referred to above are sufficient that it cannot be said, on a balance of probabilities, that the disputed will was in fact the last will and testament of the deceased.

[42] In those circumstances the appeal must succeed, and the costs thereof should follow the result..

[43] The appellants also sought condonation for the late lodging by them of security in terms of rule 49(13)(a) of the Uniform Rules. That application was not opposed, and, in my view, ought to be granted.

[44] I make the following order :-

(a) the appellants failure timeously to lodge security in terms of rule 49(13)(a) is condoned;

(b) the appellants are to pay the costs of the application for condonation;

(c) the appeal is upheld with costs;

(d) the order made by the court a quo is set aside and replaced with the

following :-

"The application is dismissed with costs."

I agree.

_____

Ndlovu J

I agree.

_____

Seegobin J

Date of hearing : 12th August 2011

Date of judgment : 28th October 2011

Counsel for the Appellant : I Topping (instructed by Goodrickes)

Counsel for the Respondent : S Shepstone (instructed by Anand-Nepaul Attorneys)