CASE NO.: (P) A 62/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ELSE KAVENDJAA **APPLICANT**

and

KENNETH KOO KAUNOZONDUNGE N.O. **1ST RESPONDENT**

MICHAEL TJIUEZA **2ND RESPONDENT**

THE ASSISTANT MAGISTRATE FOR THE DISTRICT OF WINDHOEK **3RD RESPONDENT**

CORAM: DAMASEB, JP

Heard on: 05.10.2004

Delivered on: 07.07.2005

JUDGMENT:

DAMASEB, JP: It may sound a heresy in present-day Namibia, but in the case now before me ethnicity and race are factors relevant to the outcome of a legal dispute involving a Namibian who died in 1994. In the Notice of Motion, the following relief is claimed:

> *"1. Declaring the provisions of Section 18 of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928) and the Regulations promulgated in terms thereof in Government Notice G.N. 70 of 1954 to be unconstitutional.*[1]

[1] In the unreported judgment of this Court in Magrietha Berendt & Another v Claudius Stuurman & 6 Others Case No.: 105/2003, Manyarara AJ made an order in the following terms:

2. *Declaring the appointment of the first respondent, by the third respondent in terms of Section 2(a) of the Government Notice 70 of 1954, under Letter of Executorship number 7/1/2-34/94 and dated the 11th of February 1994 to be null and void ab initio, alternatively removing the first respondent as executor of the estate late Nelson Kaunozondunge and appointing Mathew Karumbu as executor in his name place and stead.*

3. *Declaring the common law rule prohibiting illegitimate children from succeeding to their biological fathers' estate(s) to be discriminatory and as such unconstitutional.*

4. *Declaring the applicant to be the legitimate heir in and to the estate of the late Nelson Kaunozondunge and as such entitled to inherit ab intestatio in and to such estate.*

5. *Ordering and directing that the estate late Nelson Kaunozondunge, shall devolve and be administered in terms of the common law governing intestate succession as applicable in the Republic of Namibia and that certain erf number 4961, Katutura Township, Extension 11, situated in*

"…1)Sections18(1), 18(2) and 18(9) of the Native Administration Proclamation No 15 of 1928 (the Proclamation) and the regulations made under section 18(9) thereof are declared to be in conflict with the Constitution of Namibia. Parliament is required to remedy the defect by 30th June 2005.

2) Until the defect is remedied, or until the expiry of the time set by this Order, whichever be the shorter, ss 18(1) and 18(2) of the Proclamation and the regulations made under s 18(9) of the Proclamation shall be deemed to be valid."

In Government of the Republic of Namibia v The Master of the High Court & 3 Others Case No 105/2003 on application by the State to extend the order granted by Manyarara AJ in the Berendt matter supra , Heathcote AJ made the following order:

"1. That the applicant's inability to comply with the deadline set by this Court in case no. 105/2003 is hereby condoned;

2. That the time limit set by this Honorable Court in paragraph 1 of the order in case no 105/2003 is hereby extended to 30th December 2005."

the Municipality of Windhoek, Registration Division "K" in extent 260 (TWO HUNDRED AND

SIXTY) square meters and held by Deed of Transfer number T1680/1985 be transferred to and registered in the name of the applicant.

6. *Costs of the application.*

7. *Further and/or alternative relief."*

unconstitutionality of s 18 and the regulations made thereunder

As I have shown, this Court already declared ss 18(1), 18(2) and 18(9), and the Regulations made under s 18(a unconstitutional and gave Parliament time, since extended to December 2005, to rectify the defect found by the Court to exist (vide footnote 1). In argument, when I heard the present application, Mr. Skickerling submitted as follows in respect of prayer I of the Notice of Motion:

> '' It is respectfully submitted that in the premises [i.e. the fact that the court found the provisions unconstitutional but suspended the operation of unconstitutionality] the relief prayed for by the applicants in paragraph 1 of the Notice of Motion has become purely academic and until such time as parliament has remedied the defect the parties are bound by the provisions of the Proclamation and the Regulations promulgated in terms thereof". (emphasis supplied)

Mr. Kasuto, for the respondents, shares that view. I therefore accept, for the purposes of these proceedings, that the relevant provisions of s 18 and the Regulations under it are valid and govern the dispute now before me.

There are three respondents in this application: The first is Kenneth Kaunozondunge, a major male, who is the "executor" of the estate of late Nelson Kaunozondunge ("the deceased"), and appointed to that office by the third respondent. The first respondent is a brother of the deceased. The second respondent is Michael Tjiueza, an adult male, to whom was awarded, by first respondent as executor, the only immovable property from the deceased's estate. The second respondent is also a brother of the deceased. The third respondent is the assistant magistrate for the District of Windhoek, appointed in terms of the Magistrates' Court Act 32 of 1944 (as amended); and, according to the applicant, ''*cited in her capacity as contemplated by s 18 of the Native Administration Proclamation of 1928.*''[2] (Hereinafter I will refer to this legislation as "the Native Proclamation.'')

[2] S 18 provides as follows:

> "*(1)All movable property belonging to a Native and allotted by him or accruing under native law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and custom.*
>
> 2) *All other property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom.*
>
> 9) *The Administrator may make regulations not inconsistent with this Proclamation –*
>
> a) *prescribing the manner in which the estate of the deceased Natives shall be administered and distributed;*
> b) *dealing with the dishersion of natives;*
> d) *prescribing tables of succession in regard to Natives; and*
> *e)* *generally for the better carrying out of the provisions of this section.*
>
> *10)* *Any native estate which has, prior to the commencement of this Proclamation, been reported to the Secretary for South West Africa shall be administered as if this Proclamation shall apply in respect of every native estate which had not been so reported.*

Government Notice 70 of 1954 made s 18(9) operative with effect from 1st August 1950.

FACTS COMMON CAUSE TO PARTIES

The following critical facts are common cause: Late Nelson Kaunozondunge ("the deceased") died, without having executed a valid will, on 31st January 1994. The deceased hailed from the Herero ethnic group of Namibia and belongs to the Black race and is thus a "Native", defined in s 25 of the Native Proclamation as "*any person who is a member of any aboriginal race or tribe of Africa*…" The Herero are such a tribe.

At the time of his death the deceased was a ''*divorcee*'' from one Cynthia Kaunozondunge from whom he divorced on 17th November 1964. The marriage to Cynthia was solemnized in 1957 and he had one child with her. In life, the deceased owned immoveable property, being erf 4961, Katutura Township, Extension 11, situated in the Municipality of Windhoek, Registration Division "K" and measuring in extent 260 square meters and held by Deed of Transfer No. T 1680/ 1985 (hereafter "the disputed property"). After the deceased's death, the first respondent was appointed as executor of the estate of the deceased by the third respondent.

That appointment (annexure ''EK 1'') was on 11th February 1994 and is stated to be in terms of s 2(a) of Government Notice 70 of 1954,[3] and reads

[3]
S 2(a) states: If a Native dies leaving no valid will, his property shall be distributed in the manner following:

a) If the deceased, at the time of his death, was –

i) a partner in a marriage in community of property or under-ante nuptial contract; or

a widower, widow or divorcee, as the case may be, of a marriage in community of property or under ante nuptial contract and was not survived by a partner to a customary Union entered into subsequent to the dissolution of such

“LETTER OF ADMINISTRATION

This is to certify that (name of first respondent)

has been duly appointed the executor and is hereby authorized

as such to administer the estate of the late (name of deceased given)

who died at Windhoek on the 31.01.1994 ‘’.

Purporting to act as such executor, the first respondent awarded the disputed property to the second respondent. The deceased was survived by his father, one Alex Mieze (hereafter “late Mieze senior”), who died before the present proceedings were launched. The deceased had fathered eight children during his lifetime. Of those children, only one (Getrud Constantia Ndungana) is a legitimate child of the marriage with Cynthia. At the time of his death the deceased was not a partner in a marriage in community of property or out of community of property. The present application was brought approximately 9 years after the death of the deceased. The disputed property has not yet been registered in the name of the second respondent and remains vested in the deceased’s estate which, I may add, is a separate legal *persona* from the “executor”.

CONFLICTING VERSIONS OF THE PARTIES

The applicant, Else Kavendjaa, deposed to the main affidavit in this application. At the outset she sets out the reason for the application as being to have the provisions of s 18 of the Native Proclamation and the Regulations published in

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marriage, the property shall devolve as if he had been a European.”

terms thereof, declared unconstitutional, and to have the first respondent removed as executor of the estate of the deceased. (It has now become

unnecessary for me to resolve the dispute about the constitutionality or otherwise of s 18 of the Native Proclamation and the Regulations made thereunder.)

The applicant alleges that the deceased, during his lifetime, fathered the following 8 children: herself, one Mara Kavendjaa, Matthew Karumbu, Christiaan

Karumbu, Albertus Spiegel, Soa Spiegel, one Kavandare, and Getrud Kauzonondunge, the latter being the child of the marriage between the deceased and Cynthia and, of his 8 children, the only legitimate issue of the deceased. The applicant avers that when the deceased died he was not survived by any spouse, not even by virtue of a customary union; a fact, it is alleged, which required the deceased's estate to be administered and his property devolved as if he had been a "European", by virtue of the provisions of regulation 2(a) (i) and (ii) issued in terms of the Native Proclamation (hereafter "the Regulations").

The applicant alleges that first respondent's appointment as executor is void *ab origine* because the regulation under which the appointment was purportedly made by the first respondent makes no provision for the appointment of executors.[4] In the alternative, the applicant avers that the first

[4] In Magrietha Berendt *supra* (at p9) Manyarara, AJ said: *"Regulation 2(a) relates to the estates of so-called natives devolving as if the deceased were a "European". It is apparent that it is by necessary implication that magistrates have exercised the power to appoint executors to such estates. There is also no provision that deals with the powers of magistrates to administer the estates of black persons, which are to devolve in terms of customary law. It is again by necessary implication that magistrates have assumed the power to administer such estates and to appoint executors therein"* and concluded (at pp 10 and 11). *"Two hurdles stand in the way of Mr. Ndjoze's contention and both are*

respondent's appointment as executor falls to be set aside because he obtained such

appointment on the strength of false information furnished to the third respondent by first and second respondents.

In the further alternative, the applicant alleges that the appointment of first respondent as executor falls to be set aside because he had grossly failed in his duties as executor. In the final alternative, the applicant alleges that her paternal grandfather, guardian and family head (under customary law), late Mieze senior, should have been ''regarded'' as executor of the deceased's estate in terms of s 18(5) of the Native Proclamation. The applicant also relies on s 18 (7) of the Proclamation for the allegation that letters of executorship may only be issued to an heir (which the first respondent was not), or to a guardian in case of a minor; it being alleged that late Mieze senior, not the first respondent, was the guardian of the applicant. Ss 18(3), 18(5) and 18(7) were repealed by Act 27 of 1985, s 7(a). I will accordingly disregard all allegations and any legal submissions relying on them and hardly need to add that any relief founded on those provisions must fail.

The applicant alleges that the first respondent in an affidavit he had sworn to obtain his appointment as executor from the third respondent, falsely alleged that the "family'' of the deceased had agreed that he be so appointed. The applicant's case is that she, her siblings and late Mieze senior never partook in

insurmountable. The first such hurdle is the established principle of law that any action not covered by statutory authority is ultra vires and a nullity. The practice adopted by magistrates in Namibia in caught. See Skeleton Coast Safaris v Namibia Tender Board and Others 1993 NR 288 (HC) and Ministry of Agriculture and Fisheries v Matthews [1949] 2 All ER 724 (KB".

such a decision. If any family was involved, she says, it could only have been the extended family but not the '' *direct family such as the deceased's father, I or my brothers and sisters''.*

The applicant avers that in fact all close family were opposed to the appointment of the first respondent as executor. The applicant avers that the first respondent had called for a meeting before his appointment as executor at which she and late Mieze senior and her other siblings were present, but were then, because of their opposition to the first respondent's appointment as executor, excluded from the proceedings by the first respondent. The applicant annexes as "EK 7" and "EK 8", being affidavits by late Mieze senior and Matthew Karumbu (the latter being applicant's brother), as proof of the fact that those deponents opposed the appointment of first respondent as executor. The two affidavits, it is conceded, were drawn up long before the present proceedings but in "anticipation" thereof; a fact, it is alleged, which explains why the headings in those affidavits are different from that in the present application. The affidavit of late Mieze senior appears to have been deposed to on 26 January 2001 while the one of Karumbu appears to have been deposed to on 7 March 2001. The Notice of Motion in the present proceedings is dated 28 February 2003; while the applicant's affidavit was deposed to on 3 March 2003.

The applicant then avers that she and her other siblings only ''discovered'' the appointment of the first respondent as executor on 17th February 1994 from the third respondent. On the same date Getrud, being the only legitimate issue of the deceased, wrote a letter , annexed to the applicant's affidavit and addressed to ''**Magistrate, Department of Justice, Windhoek''** which, *inter alia*, reads as follows:

> *"Kindly issue an order to stop anything from touching the estate of my late father Nelson Kaunozondunge. Kindly read also my statement which is self-explanatory …Kindly treat this matter as urgent …possible because the family have already taken some items…''* (The existence of this letter is not disputed.)

The statement referred to is a document in long- hand wherein its author identifies themselves as Getrud Kaunozondunge and ‘’heir to the estate ‘’ of the deceased, and appointing in it ‘’attorney’’ Marlene Dammert as ‘’representative’’ of the estate of the deceased and giving directions as to how the assets of the estate should be dealt with and specifically says that the immovable property must be kept “in trust” for her.

The applicant avers that the only dependant children of the deceased at the time he died were herself and her brother, one Matthew, and that the deceased had indicated the two of them as his dependants in his employment records with the Municipality of Windhoek. As proof of this allegation the applicant annexes **EK 13.** In addition to being hearsay, **EK 13** is a document in Afrikaans and no sworn translation of it is provided. Consequently, it falls to be struck and whether or not regard will be had to it will necessarily depend on whether the allegation in support of which it is provided is admitted or not by the respondents. Aware that even if the estate of the deceased were to devolve in terms of the Intestate Succession Ordinance[5] read with the

[5] S 12 of 1946 provides:

(1)The surviving spouse of every person who after the commencement of this Ordinance dies either wholly or partly intestate, is hereby declared to be an intestate heir of the deceased spouse according to the following rules:-

a) if the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestate*, the surviving spouse shall succeed to the extent of a child’s share or to so much as together with the surviving spouse’s share in the joint estate, does not exceed six hundred pounds in value (which ever is the greater);

b) if the spouses were married out of community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestate*, the surviving spouse shall succeed to the extent of a child’s share or to so much as does not exceed six hundred pounds in value (whichever is the greater);

c) if the spouses were married either in or out of community of property, and the deceased spouse leaves no descendant who is entitled to succeed *ab intestate*, but leaves a parent or a brother or sister (whether of the full or half blood) who is entitled so to succeed, the surviving spouse shall succeed to the extent of a half share or to so much as does not exceed six hundred pounds in value (whichever is the greater);

d) in any case not covered by paragraph (a), (b), or (c) the surviving spouse shall be the sole intestate heir.

common law she still faces the hurdle that as an illegitimate child she would not be able to inherit from the deceased while there is legitimate issue of the deceased - the applicant alleges

that the common law rule preventing illegitimate children from inheriting from their fathers is unconstitutional and should be so declared so that she can inherit from the deceased *ab intestatio* '' *in accordance with his wishes*.''

The applicant also avers that should it be found that the estate of the deceased is to devolve in terms of customary law that such law does not require a written will and that effect is to be given primarily to the wishes of the deceased. The corollary to this allegation is the further allegation that customary law does not distinguish between legitimate and illegitimate children (presumably when it comes to inheritance) and that it had always been the wish of the deceased that she (the applicant) should inherit the disputed property- a wish which, it is alleged, was always respected by the applicant's siblings and the deceased's father, late Mieze senior. In support, the applicant annexes the confirmatory affidavit of a brother, Matthew Karumbu, dated 7 March 2001 whose surrounding circumstances I already explained.

The applicant alleges that the award of the disputed property by first respondent to second respondent was contrary to both the law and the wishes of the deceased. It is further alleged that the first respondent, in his administration of the estate of the deceased, acted in an arbitrary manner and negated the wishes of the deceased and those of the children of the deceased. The applicant also alleges that the first respondent allowed arrears to build up with the Municipality in respect of rates and taxes in excess of N$10 000, and that the second respondent continues to live in the disputed property without paying for the municipal services. The applicant annexes as "EK 17", an unpaid Municipality account, and says that on account of this the Municipality had given instructions to Du Toit Associates to foreclose on the disputed property. She alleges that she took action to stall the foreclosure until the finalization of

(2) For the purposes of this Ordinance any relationship by adoption under the provisions of the Adoption of Children Ordinance, 1927 (Ordinance No. 10 of 1927 (1) shall be equivalent to blood relationship.

the present application. The applicant further alleges that to this day the property had not been transferred and that the second respondent continues to live in it unlawfully without paying for municipal services.

The first respondent deposed to an affidavit in opposition to the relief sought. He, as would be expected, alleges that he had been properly appointed as executor in terms of applicable law and in terms of Herero customary law. He denies that the applicant was a dependant of the deceased.

The first respondent denies too that at the time of his death the deceased was not a partner in a customary law marriage. He asserts that the deceased had in fact been a partner in such a customary law union with one Meriam Kasuto. (The allegation is not confirmed by way of a confirmatory affidavit, nor is any explanation proffered for her inability, for any cause, to do so.) The allegation here is critical, for it is on the strength of it that the first respondent alleges that the estate of the deceased did not fall to be administered in terms of the Intestate Succession Ordinance read with the common law as if he had been a European, but in terms of Herero customary law.

The first respondent avers that the third respondent's administrative act of appointing him as executor of the estate of the deceased was a mere formality to confirm his appointment (by then already done) to that office by the relatives of the deceased who were entitled to make such appointment in terms of Herero customary law. He appears to be saying that the legally significant act was not so much the appointment by the third respondent as the decision of the relatives of the deceased taken at a meeting that took place for that purpose after the death of the deceased, in the presence of one Reverend Otniel Katzizeko Kaura (being a cousin of the deceased), and attended by the following: Samuel Kavezeri, Matthew Karumbu (son of deceased), Albertus Spiegel, Kasupi Mieze (half brother to deceased), Kavesorere Mieze, Theobald Tziueza (half brother to deceased), the first respondent himself, and others whose names he cannot remember. (In context,

the first respondent seems to be saying that those not indicated as the deceased's children were his half brothers.) The first respondent also makes the point that although in terms of customary law the children of the deceased were not entitled to participate in the meeting dealing with the division of the estate of the father (the deceased), some of them (Matthew Karumbi and Albertus Spiegel) were however present. He expresses surprise at the suggestion by Matthew Karumbi that he did not attend such a meeting. Based on this alleged meeting,

the first respondent denies that his appointment to the office of executor was obtained through false information.

The first respondent alleges that immediately after the meeting and before they approached the magistrate to appoint him as executor, the decision so appointing him was conveyed to all the relatives of the deceased, including the applicant. The first respondent refers to an affidavit by Otniel Katzizeko Kaura to buttress his version. The first respondent denies that he failed in the discharge of his duties as executor, as alleged by the applicant.

The first respondent maintains that should the Court find that the division was invalid, he, and others not identified, will have claims against the estate for expenses they incurred on behalf of the estate in an effort to prevent assets of the estate being attached and sold in execution; and that what they had so far expended to "rescue" the estate is more than the net worth of the disputed property. He says that the jewelry shop belonging to the estate had already been attached and sold in execution for unpaid debts.

The first respondent also denies that late Mieze senior was the guardian of the applicant and that, on the contrary, the guardian of an illegitimate child, under customary law, is its biological mother; and that applicant's mother is still alive. The first respondent states that the mother of the applicant was also present at the meeting where the division of the estate took place, but offered no objection.

The first respondent denies that late Mieze senior was *the* one entitled to be appointed as executor of the deceased's estate. He also avers that in terms of customary law the late Mieze senior was not entitled to inherit from his son, the deceased, who was illegitimate any way. He says that as a '' full brother '' of the deceased he (the first respondent) was entitled to inherit (including the disputed property) from his deceased brother but that he, out of respect of the wishes of the deceased and their mother, he decided to award the disputed property to the second respondent. He contended himself with taking care of the liabilities of the estate, that being the reason why it took so long to pay off the municipal debts owed by the estate in respect of the disputed property. The first respondent also

denies that he failed grossly in his duties as executor and that the applicant had ever brought such failure to his attention nor to that of Otniel Kaura or the third
respondent. He says that the division of the estate took place at the beginning of 1994.

The first respondent avers that the applicant and the deceased were not on good terms and that the deceased had actually chased the applicant away from his house and referred to her as a " crook''. He says that was either in the late 70s or early 80s. He thus disputes the suggested close relationship (by the applicant) between the applicant and the deceased from which she wants the inference drawn that the deceased, because of his affection for her, desired her to, upon his death, inherit the disputed property.

First respondent admits that he deposed to an affidavit in support of the request to be appointed as executor by the third respondent and says that it was in accordance with the wishes of the family, including some of the children of the deceased, being Matthew Karumbu and Albertus Spiegel who were also present at the division of the estate. He says that the estate was in fact insolvent and that it had only N$ 45.00 to its credit in the bank account, and that the children of the deceased had no interest in the estate because of its debts. He also states that, in her absence, the applicant was awarded the lounge suite from the estate and that the other children received their

respective shares from the estate. (The details of what each child allegedly received is set out in the affidavit of first respondent). According to the first respondent, the disputed property went to the second respondent in accordance with the wishes of the deceased. The first respondent avers that the applicant was invited to the division of the estate but chose not to be present.

The first respondent denies that the reason that the names of the deceased's children were entered in the records of the Municipality was because they were the deceased's dependants, and maintains that the names were thus entered because it was a requirement of the Municipality at the time to state that one had children in order to enter into a lease agreement. (That they were thus entered is not disputed and must be accepted as admitted.) The first respondent says that

the applicant was not brought up by the deceased and never stayed at his house, except for one week before she was chased away. As for Matthew Karumbu, first
respondent maintains that he was brought up by his (Karumbu's) mother in Omatjete and never stayed with the deceased.

The first respondent disputes that the affidavit allegedly deposed to by late Mieze senior was by the said Mieze, and suggests that it be sent to a hand-writing expert. He at some point expressly, but generally by implication, denies that late Mieze senior deposed to the matters attributed to him in the affidavit annexed as "EK 8" or that he knew the content of that affidavit considering it is in English, a language late Mieze senior was not familiar with. He also makes adverse comment about the fact that late Mieze senior could depose to an affidavit at all before the applicant deposed to an affidavit. He insists that the late Mieze senior was present when he (first respondent) was appointed as executor and also during the division of the estate. He suggests that this may very well be a matter to be referred to oral evidence.

The first respondent denies that the meeting called for the purpose of appointing him as executor took place at the house of the deceased and says it

took place at his (first respondent's) house. He denies that late Mieze senior was entitled to discuss the issue of his appointment as executor. He also denies that he ordered late Mieze senior away from the meeting and says that the suggestion is unthinkable.

The first respondent denies that the applicant and her other siblings came to learn of his appointment as executor only on 17th February 1994 and maintains that she knew soon after the decision was taken and the appointment made, and that he invited applicant to the meeting for the division of the estate but that she refused to attend. First respondent also refers to a letter (EK 16) directed to applicant's legal representative in which the fact that she refused to attend the meeting is mentioned but that no denial of that was ever made by the applicant and wants the Court to draw an adverse inference from that. According to the first respondent, some of applicant's siblings, whose names are given, were

present at such meeting. He says that in terms of customary law, any one dissatisfied with the division of the estate has a right up to one month from the date of such division, to lodge an objection. The first respondent avers that those present at the meeting for the division of the estate decided that the disputed
property be awarded to the second respondent as that was the wish of the deceased. The applicant was aware of that fact and accepted it, he says. He says that the applicant now lays claim to the disputed property because '' most of the debts of have been settled...'' First respondent says that the fact that the applicant had no interest in the estate of the deceased is evidenced by the fact that she even refused to accept the lounge suite that was awarded to her from the estate of the deceased.

As for the allegation that Getrud objected to the appointment of the first respondent as executor and that the third respondent failed to intervene, the first respondent says that he is not aware of the allegation and cannot comment, admit or deny same.

The first respondent denies that the applicant is entitled to inherit from the deceased *ab intestatio*.

The first respondent disputes the legal conclusions relied on by the applicant based on the facts that she relies on. He also denies that the Municipality could sell the disputed property as the second respondent had entered into an agreement with the legal practitioner of the Municipality on payment terms in respect of the outstanding debt. (The second respondent deposed to a confirmatory affidavit in which he confirms the allegations by the first respondent concerning him and the fact that the deceased wished that he, the second respondent, should inherit the disputed property). First and second respondents both allege that the reason the disputed property had not yet been transferred to second respondent is because there is still a debt due to the Municipality which second respondent is busy paying.

Otniel Kaura, who says that he is a Herero and acquainted with the customary laws and practices of that tribe, alleges, in his confirmatory affidavit, that he was brought up by the mother of the deceased and that the first and second respondents are his cousins. He confirms that after the deceased's death, he was
appointed to conduct the proceedings in respect of the division of the estate of the deceased and that he chaired the meeting called for that purpose. It is not clear who "appointed" him.

Kaura, apart from confirming the allegations of first respondent as far as those relate to him, alleges that he is the person entitled in terms of customary law and practice to see to it that the wishes of the deceased are implemented, in the absence of a desire on the part of the deceased that his estate be devolved in terms of customary law. (No other basis is laid to support the assertion of Kaura's entitlement in the way he alleges.) Kaura also alleges that the applicant's version, confirmed to the extent that it is, that the applicant and other close relatives were excluded by the first respondent from the meeting at

which the division of the deceased's estate was discussed, is not true. He states expressly that late Mieze senior was present at the meeting at the first respondent's house where the people gathered after the deceased's death and at the further meeting whereat Kaura was appointed as aforesaid, including the meeting at which the first respondent was ''appointed and recommended'' for appointment as executor. He avers further that the late Mieze senior in fact supported the appointment of the first respondent and partook in all deliberations relative to the appointment of the first respondent as executor. Kaura says that he was the one who was responsible for inviting the father of the deceased (late Mieze senior) to the meeting and that he had received no objection from anyone about the appointment of the first respondent. No such objection was received, according to him, a month after the estate had been distributed as required by customary law. Kaura also gives a list of all the relatives that attended the meeting, including the names of the children of the deceased, and the mother of the applicant.

As regards the allegation that the first respondent excluded the close family of the deceased from the meeting called to deal with the division of the estate of the deceased, Kaura states in terms that he could not have allowed the first respondent to exclude the children of the deceased from such proceedings.

Kaura alleges further that on more than one occasion the deceased had told him that upon his death he wished the disputed property to be inherited by the second respondent. He also expresses surprise at the content of the affidavit attributed to the late father of the deceased, the late Mieze senior.

The confirmatory affidavits of several other deponents are provided by the first respondent to buttress his case. I will deal with these briefly: the first one is of Elizabeth Ujara Tjiriange who says she is employed at the Windhoek Municipality and was a girlfriend of the deceased and was told by the deceased, when he was

still alive that when he (the deceased) dies it is his wish that the second respondent should inherit the disputed property. She says that she conveyed this information to those who attended the meeting at which the division of the estate took place. For what it is worth, she adds in her affidavit that she was told by the deceased that he did not like the applicant and that it was only in 2000 that the applicant *''came to me and said she has changed her mind and what to be registered owner''* (sic) of the disputed property. The next is one Theobald Michael Tjiueza who says that he is a brother of the deceased and that the deceased had told him, when he was still alive, that he wanted the second respondent to inherit the disputed property upon his death.

The other person to have deposed to an affidavit in support of the case of the first respondent, is one Rinaani Kandirikirira, a Herero male who says he is a member of the Kandirikirira Royal House and a Herero community leader. He says that he is acquainted with Herero customary laws and practices and confirms the allegations of the first respondent germane to customary laws of the Herero people. He appears also to know something about the circumstances around this case and states in his affidavit that he knew the late Mieze senior and that they were friends. He alleges that late Mieze senior supported the appointment of the first respondent as executor of the estate of the deceased although Mieze senior

was not entitled to have a say in the administration of the estate of the deceased as the deceased was not born in wedlock. He asserts that only the relatives of the deceased on the mother's line had a say in the administration of the estate of the deceased. He says too that late Mieze senior could not read or understand English. This deponent disputes the applicant's version that Herero customary
law does not recognize the concepts of legitimacy and illegitimacy and says that the contrary is the case. He states that the deceased, before his death, said to him that he wished the second respondent to inherit the disputed property. This deponent also deposes that according to Herero customary law, a person who is dissatisfied with the division of an estate has one month from the date of such division to lodge a complaint but that in this case that did not happen. He concludes that it was in accordance with Herero customary law for

the first respondent to be appointed executor of the estate of the deceased. The last deponent is one Johannes Kapuue Ndjambi Mootu who says that he previously
resided in the Old Location before their forced removal to Katutura in 1968. He says he had lived in Katutura for nearly 20 years and is thus acquainted with the practices of the Municipality and its relationship with its tenants. He confirms the allegations made by the first respondent *apropos* the reason why the applicant, and another of her siblings – Karumbu - appeared in the documents of the Municipality as dependants of the deceased. So much for the case of the first respondent.

The applicant deposed to a replying affidavit with a confirmatory affidavit by her mother and two others, including Getrud, the only legitimate issue of the deceased. I will summarize what they have to say. The reply is in essence a complete denial of the critical averments on which the first and second respondents rely in opposition to the relief sought by the applicant. To avoid prolixity I do not intend to repeat all that is said in the reply but to deal only with the salient averments contained in therein which add something new to the papers. The applicant denies that the deceased had ever entered into a customary union with Meriam Kasuto. She says that Meriam Kasuto was only a girlfriend of the deceased and that that relationship ended some six years before the death of the deceased. The applicant makes reference to the fact that there is

no confirmatory affidavit in support of the allegation that there was a customary union as alleged.

As for those persons that the first respondent says attended the meetings at which he was appointed and the division of the estate took place, the applicant replies that they are not ‘’ direct family’’ and repeats that they could not have validly taken any decisions as they had no interest in the estate: Samuel Kavezeri, Kasupi Mieze, Kavesorere Mieze and Theobald Michael Tzieza are placed in this category; and, she says, that Otniel Katjizeko Kaura is not related to the deceased and that his mother was only a friend of the deceased’s

mother. As for Albertus Spiegel, the applicant points to the absence of a confirmatory affidavit by the latter and wants an adverse inference drawn from such failure.

The applicant persists that the estate of the deceased is to devolve as if he were a ‘’European’’. The applicant also says that the first respondent sold the contents of the jewelry shop but did not account for the proceeds thereof thus showing that he grossly failed in his duties as executor. The applicant concedes that as a ‘’*general principle… mothers are guardians of illegitimate children*’’ but says that it is not an absolute principle and that in her case her father (the deceased) was her guardian, and after her father’s death, her grandfather, late Mieze senior. She denies that her mother attended any meeting and provides a confirmatory affidavit by her mother.

The applicant makes clear that she relies on the Municipality records (annexure EK 13) as to the intentions of her father (the deceased) in respect of the disputed property. She denies that it was her father’s intention that the property devolve in terms of customary law, or that it be inherited by the second respondent. The applicant says that the only meeting attended by late Mieze senior, her mother and her two brothers, Albertus and Matthew, was that at which the personal belongings of the deceased were distributed. She denies that she was disinterested in the estate of the deceased and denies that she received a lounge suite. Te applicant persists that the first time she became aware of the first respondent’s appointment as executor was on 17 February 1994 and that she

immediately brought it to the attention of Getrud and that, the children of the deceased, (she included) and late Mieze senior, always objected to the first respondent assuming office of executor of the estate of the deceased.

She also denies that under the Herero customary law a one month prescription period (if I can call it that) exists for the lodging of a complaint about the manner of administration of an estate.

The applicant alleges that when she became aware that the disputed property was awarded to the second respondent, she brought it to the attention of the deceased's only legitimate issue, Getrud, whom she expected to do something about the matter but that Getrud left for South Africa and only returned recently; which is when the present application was launched. (The deponent does not say when Getrud returned to Namibia from South Africa and why she had not acted earlier). The applicant also avers in reply that the disputed property is being let out to the second respondent and finds that strange if the wish of the deceased, according to the first respondent, was that it should be inherited by the second respondent. She also says that it is significant that the first respondent does not provide documentary proof to counter the allegation that the rates and taxes, water and electricity remain in arrear in respect of the disputed property; an allegation being relied upon by the applicant to demonstrate the alleged dereliction of duty, as executor, on the part of the first respondent, which has the potential of the disputed property being attached and sold in execution.

ISSUES REQUIRING RESOLUTION

constitutionality of the common law rule that an illegitimate child cannot inherit from the father

As I pointed out at the outset, there are only three respondents in this matter, only one of whom (third respondent) occupies public office but not having a direct interest in advancing the cause of justifying the constitutionality of the common law rule being challenged. In Moise *v Greater Germiston TLC:* Minister of

Justice Intervening 2001 (4) SA 491 Somyalo AJ writing on behalf of the Court said:

"[19] It is no longer doubted that, once a limitation has been found to exist, the burden of justification under s36(1) rests on the party asserting that the limitation is

saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity – indeed an

obligation – to do so. The obligation includes not only the submission of legal argument but the placing before Court of the requisite factual material and policy considerations. Therefore, although the burden of justification under s36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment. Indeed, this is such a case.

[20] The absence of evidence or argument in support of the limitation has a profound bearing on the weighing up exercise, the more so as the parties who chose to remain silent have special knowledge of provincial and local government administration''. [my emphasis]

In casu the Attorney General[6] has not been cited nor has any Minister of the government. The government has not chosen to remain silent: it was

[6] Article 86 of the Constitution provides that the powers and functions of the Attorney-General shall be inter alia:

"(b) to be the principal legal advisor to the President and Government;
(c) to take all action necessary for the protection and upholding of the Constitution."

consciously excluded by the applicant from these proceedings. That is fatal. It is an unwholesome practice to be discouraged for people to seek to challenge the constitutionality of a law without citing the government which carries the political responsibility for the continued existence of law. I am therefore in respectful agreement with what has been said by the Constitutional Court in the *Moise* matter. This leg of the relief must in the premises be refused.

The only issues then between the parties falling for determination by this Court revolve around prayers 2, 4 and 5 of the Notice of Motion. It is to that task I now turn.

The applicant's surviving case is that the first respondent's appointment as executor must be set aside for the following reasons: firstly because it was *ultra vires* the powers of the third respondent to appoint the first respondent; secondly because he obtained his appointment from the third respondent dishonestly in that he did not have the blessing of the direct family of the deceased; thirdly because he grossly failed in (or neglected) his duties as executor. On each of these issues there is, as I have shown, a monumental dispute on the facts. The first is a purely legal inquiry and I will deal with it first.

Is respondent's appointment as executor ultra vires the powers of third respondent?

Magistrates are appointed under the Magistrates' Courts Act. They therefore enjoy only such competence and powers as are given to them under law: no more, no less. In making the appointment of executors of estates of deceased natives, magistrates purport to perform a power. Now in order to do so, such power must be expressly granted by law or must be inferred by necessary implication.

I have already made reference to the finding by Manyarara AJ (vide footnote 4) that the appointment by magistrates of executors to native estates, as *in casu*, is not authorized by law and is thus *ultra vires* and that the magistrates purported to make such appointments ‘’ *by necessary implication”*.

I am not altogether sure what he had in mind when the learned Judge referred to “*by necessary implication*”. I say so for the reason that power is conferred in two ways: expressly and by necessary implication. To find, on the one hand, that a power is conferred *by necessary implication* while at the same time holding that it was not sanctioned by law, seems to me to be a contradiction in terms. As Baxter[7] comments:

> “In addition to the powers which are expressly conferred on public authorities, a proper construction of the empowering legislation might reveal that further powers have also been impliedly conferred. Powers may be presumed to have been impliedly conferred because they constitute a logical or necessary consequence of the powers which have been expressly conferred, because they are reasonably required in order to exercise the powers expressly conferred, or because they are ancillary or incidental to those expressly conferred”

What the learned Judge probably had in mind by referring to *“by necessary implication”* is that magistrates think that because the law does not prevent them from exercising the power, they are at liberty to do so. That clearly is untenable in a constitutional State. The principle is quite succinctly set out in

[7] Baxter, Lawrence **Administrative Law***: Legal Regulation of Administrative Action in South Africa* 1994 (Juta), 404 – 405.

characteristic eloquence (and I am in respectful agreement therewith) by Baxter (op cit at 384): when he says:

> " ...'power', in legal parlance, means *lawfully authorized* power. Public authorities [this concept includes public officials] possess only so much power as is lawfully authorized, and every administrative act must be justified by reference to some lawful authority for that act. Moreover, on account of the institutional nature of the public authority *itself* exists as an office created by law. A valid exercise of administrative power requires both *lawful authorization* for the act concerned and the exercise of that power by the proper or *lawful authority*."

(See Malherbe v South African Medical and Dental Council 1962 (1) SA 825 (N) ,829 G-830A; De Villiers v Pretoria Municipality 1912 TPD 626, 645-6; and Rose Innes, Judicial Review of Administrative Tribunals in South Africa , 1963, at 91.)

It is now settled law that a public authority or official is not entitled to argue that because a particular activity or exercise of a power is not prohibited by statute, they are entitled to perform it although not expressly given. (See *Burghersdorp Municipality v Coney* 1936 CPD 305.) I have not been referred to nor am I able to find, either in s18 of the Native Proclamation, nor in s 2(a) of the Regulations, on the strength of which annexure ''EK 1'' appointing first respondent as executor was issued, any authority or power in terms whereof, either expressly or by necessary implication, third respondent could lawfully appoint first respondent as executor to the estate of the deceased. It is for that reason that Manyarara AJ

found the practice to be *ultra vires* and declared it as such in the Magrietha Berendt matter. I agree with the learned Judge.

In his written Heads of Argument, as well as in oral argument, Mr. Kasuto raised several points. The first is that the Applicant must fail because there are disputes between the parties on just about every issue which cannot be resolved on the papers. Mr. Kasuto argues that the applicant must have foreseen

disputes arising but took the risk to proceed on notice of motion. He relies, amongst others, on *Mine Workers Union of Namibia v Rossing Uranium Limited* 1991 NR 299 (HC) where the following is said (at 302 D):

> *"A principle which is fundamental to all notice of motion proceedings is that if a litigant knows in advance that there will be a material dispute of fact, the litigant cannot go by way of motion and affidavit. If he nevertheless proceeds by way of motion he runs the risk of having his case dismissed with costs. Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A)".*

Next, he submits, that the Applicant must be non-suited because she delayed in bringing these proceedings. He appears to be saying that the Applicant is acting in an opportunistic fashion: when the deceased died all relatives realized that the estate was insolvent. In fact, apart from the disputed property, the estate only had N$45-00 to its credit in the bank account. There were debts to be paid; no one wanted to assume the responsibility. In the event he (the first respondent) was appointed executor, assumed the

responsibility of paying the debts of the estate, and now that those are settled, or about to be settled, the

Applicant who did nothing for nine years now opportunistically wants to take transfer of the disputed property. Mr. Kasuto appears to be suggesting that the Court should not allow her to do that. Learned Counsel did not refer me to any authority for the latter proposition. The only circumstance, to my knowledge, where delay may have this effect contended for by Mr. Kasuto is in the context of review proceedings in terms of Rule 53 of the Rules of this Court. This is not such a proceeding and in the absence of authority sustaining the point, it must fail. Besides, and this is common cause between the parties, the disputed property has not yet been transferred.

Before I go any further , I wish to deal with another point raised by Mr. Kasuto which raises a very interesting point of law ; and it is this: even if the "action" of magistrates to appoint executors in respect of native estates is not authorized by law, this Court must decline to declare it *ultra vires;* or better still , must suspend the operation of such an order in terms of Article 25 of the Constitution until Parliament has given effect to the order of this Court (per Manyarara AJ and since extended by Heathcote AJ) to rectify the defect. In that way, Mr. Kasuto argues, we will avoid the chaos that will follow in the wake of an order of illegality as native estates had for long been dealt with on that basis and it will cause disruption if the Court is to declare the practice illegal. I am not satisfied that the kind of action attributed to magistrates is of the nature contemplated by article 25(1)(a). It seems to me that the kind of action contemplated is action ‘*’which abolishes or abridges the fundamental rights*

and freedoms conferred in chapter 3''. Not every illegal action abolishes or abridges a fundamental right or freedom. The makers of our Constitution, it appears to me, intended to confine the saving

provisions of Article 25 to those actions which "abolish" or "abridge" fundamental rights and freedoms and not every action which is not authorized by ordinary law, in casu the Native Proclamation.

Mr. Kasuto has not pointed me to a particular right or freedom in chapter 3 which the "action" of appointing executors by magistrates is in breach of. I cannot guess which it is. It was not raised in that way in the papers and the applicant did not meet that kind of case. I therefore decline the invitation by Mr. Kasuto to apply Article 25(1) (a) in respect of the practice whereby magistrates appoint executors to the estates of '' Native " Namibians without the authority of law. This means that a case has been made out for the granting of relief prayed for in prayer 2 of the notice of motion but only to the following extent: *"Declaring the appointment of the first respondent, by the third respondent in terms of Section 2 (a) of the Government Notice 70 of 1954, under Letter of Executorship number 7/1/2-34/94 and dated the 11th of February 1994 to be null and void ab initio "*.

Applicant's case is that the estate of the deceased is to devolve as if he were a European in terms of s 2 (a) of the Regulations because at the time of his death he was (a) a divorcee, (b) he was not survived by a spouse in a customary law union, and (c) he did not leave a valid will. It is common cause that the deceased was a "divorcee" and did not leave behind a valid will. If the requirement of no surviving customary law spouse is met, the jurisdictional

facts for the application of s 2 (a) kick in and the law bestows on the deceased the status of “European”, a code word for “White person”.(I wonder if he knew that in death he would become

an Honorary White man). In that event a case would have been made out for the part of the relief in prayer 5 of the Notice of Motion which reads: *“Ordering and directing that the late Nelson Kaunozondunge, shall devolve and be administered in terms of the common law governing intestate succession as applicable in the republic of Namibia…”*, although not in those exact terms.

As must be apparent from my summary of the evidence, there is a dispute as to whether or not the deceased was survived by a customary law partner. The first respondent avers in his answering affidavit that the deceased, subsequent to his

divorce from Cynthia Kaunozondunge, entered into a customary law union with one Meriam Kasuto. This allegation is denied strenuously by the applicant whose case is that Meriam Kasuto was only a girlfriend who the deceased had parted with some 6 years before his death.

COURT’S APPROACH TO DISPUTE ON FACTS

A Full Bench of this Court recently said in the case of *Republican Party of Namibia and Another v Electoral Commission of Namibia and 7 Others* Case No. A387/2005 (unreported) delivered on 26th April 2005, as follows (at p 70):

" "It is trite law that where conflicts of fact exist in motion proceedings and there has been no resort to oral evidence, such conflicts of fact should be resolved on the admitted facts and the facts deposed to by or on behalf of the respondent. The facts set out in the respondent's papers are to be accepted unless the court considers them to be so far-fetched or clearly untenable that the court can safely

reject them on the papers. (*Nqumba v The State President,* 1988 (4) SA 224 (A) at 259 C – 263 D*).* At home it was recently said by Strydom CJ in the unreported Supreme Court judgment of *Walter Mostert v The Minister of Justice* (Case No. SA 3/2002) at p. 18, as follows:

> ...." *... as the dispute was not referred to evidence, the principles, applied in cases such as Stellenbosch Farmers' Winery (Pty) Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 at p. 235 E-G and Plascon-Evans Paints Ltd. v Van Riebeeck Paints (Pty) Ltd., 1984 (3) SA 623 (AD), must be followed. It follows therefore that <u>once a genuine dispute of fact was raised, which was not referred to evidence, the court is bound to accept the version of the respondent and facts admitted by the respondent ...</u>''* [our emphasis]

Generally: see *Plascon- Evans Paints v Van Riebeeck Paints 1984 (3) SA 623, and Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty)* Ltd 1957 (4) SA 234 (C) at 235 E-G.

It was said by Corbett JA in the *Plascon- Evans* case, *supra* (at 634-635):

> *"In certain instances the denial by respondent of a fact alleged by applicant may not be such as to raise a real, genuine or bona fide dispute of fact. If in such a case the respondent has not availed himself of his right to apply for*

the deponents concerned to be called for cross-examination under rule 6 (5) (g) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof..." "

The first respondent chose not to provide any confirmatory affidavit by Meriam Kasuto. One would have thought that to be the obvious and logical thing to do. Nor does he explain why it was not possible to provide such confirmatory affidavit. It is an averment so crucial to the case of the first respondent but appears not to be treated as such in the papers. For example, he does not deal at

all with the role she (Meriam Kasuto) played when it comes to the matter of his appointment as executor and the division of the estate. It is all the more inexplicable because he provided a confirmatory affidavit by a person referred to as a girlfriend of the deceased, one Tjiriange, about what the wishes of the deceased were before his death. The first respondent also does not provide any details about this customary law union: where was it conducted and when? He does not even allege that he was present when it was conducted, nor does he provide a confirmatory affidavit of a person who can positively assert to having witnessed it. It is thus a bald allegation. It is so far-fetched that I can reject it on the papers. I am not satisfied as to the inherent credibility in the version of the

respondent about the existence of a customary law union between the deceased and Meriam Kasuto at the time of his death. I find therefore that at the time of his death the deceased was not survived by a customary law partner. His estate therefore has to devolve as if he were a "European".

Does it follow that the applicant is entitled to succeed in respect of prayer 4?

The prayer asking for the declaration that the common law rule disentitling illegitimate children from inheriting from their fathers should be declared unconstitutional cannot succeed for the reasons I have given. The applicant is thus not entitled to inherit *ab intestatio* from the deceased.

Has she made out any other basis on which she can inherit? She suggests in her affidavit that it was the wish of her father that she should inherit the disputed property. That is disputed by the respondent. The applicant has also provided confirmatory affidavits to show not only that the deceased did not wish the applicant to inherit the disputed property but that the fact that their names were

entered in the records of the Municipality as dependants was not for the purpose why she says it was entered. The fact that she may have been entered as a dependant in the Municipality records does not, in my view, necessarily lead to the inference that the deceased wanted the applicant to inherit the disputed property. The version of the first respondent that the deceased never intended that the applicant should inherit the disputed property is not far-fetched and must therefore be accepted on the Plascon – Evans test discussed earlier in this judgment. In any event, it appears to me that the reason that the alleged action that the deceased wanted the applicant to inherit the disputed property was advanced was in the event that this Court were to find that the estate is to devolve in terms of customary law. At common law, the deceased having died without a valid will, what his wish was is really neither here nor there.

The relief sought in terms whereof the disputed property is to be transferred in the name of the applicant must therefore fail.

The deceased was not survived by a wife. He has only one legitimate issue, Getrud Siyambala. She deposed to a confirmatory affidavit in respect of the applicant’s replying affidavit. In that affidavit, she makes no mention of her

preferences in respect of the disputed property. She is also not a party to these proceedings. In fact in a document annexed to the found papers she expressed the wish that the disputed property be kept in trust for her.

In argument I was invited by Mr. Schickerling, for the applicant, that should I not feel disposed to ordering that the disputed property be transferred to the applicant, that I consider to make an order such as was made by Manyarara AJ in the Magrietha Berendt matter *supra* that the estate be reported to the Master of the High Court. The full circumstances that actuated Manyarara AJ to make the order he did were not argued before me and, besides, the Master of the High Court was cited as a party in the Berendt matter. I therefore opt not to go that route as the Master of the High Court is not a party to these proceedings and has not been afforded the opportunity to address me on the issue. In the premises, I consider that a more appropriate order is a declaration that the estate of the deceased is to devolve as if he were a "European" in terms of s 2(a) of the

Regulations so as to enable any interested party to exercise their rights according to law.

As for costs, the applicant is successful in having the first respondent's appointment as executor set aside and obtaining a declaration that the deceased's estate devolve in terms of s 2(a) of the Regulations. She has thus achieved substantial success. On the other hand, she failed in obtaining the other relief which was aimed at having the disputed property transferred into her name. In that respect the respondents achieved some success. Having considered carefully what kind of cost order to make in the circumstances in fairness to both parties and bearing in mind the added length to the proceedings because the applicant's case was, in a significant respect, predicated on provisions that had already been repealed, I take the view that the applicant should recover only 45% of her taxed costs from the respondents.

In the premises, it is ordered as follows:

1. The appointment of the first respondent, by the third respondent, purportedly in terms of s 2 (a) of Government Notice 70 of 1954, under Letter of Executorship number 7/1/2-34,94 and dated 11th February 1994 is hereby declared null and void;

2. Prayers 2 and 3 of the Notice of Motion are refused;

3. It is ordered that the estate of late Nelson Kaunozondunge shall devolve as if he were a ‘’European’’, in terms of s 2(a) of the Government Notice 70 of 1954, promulgated in terms of s 18(9) of the Native Administration Proclamation, 15 0f 1928;

4. It is ordered that the first and second respondents, jointly and severally, the one paying the other to be absolved, shall be liable for 45% of the taxed costs of the applicant occasioned by this application; such costs to include the costs of one instructed and one instructing Counsel.

DAMASEB, JP

ON BEHALF OF THE APPLICANT	**Mr J Schickerling**
Instructed by:	**Neves Legal Practitioners**
ON BEHALF OF THE RESPONDENTS	**Mr E K Kasuto**
Instructed by:	