CASE NO.: (P) A 21/2005

IN THE HIGH COURT OF NAMIBIA

'SPECIAL INTEREST'

In the matter between:

JACOBUS BEUKES	**FIRST APPLICANT**
PETRUS BEUKES	**SECOND APPLICANT**
FREDRIKA BEUKES	**THIRD APPLICANT**
ALBERTUS DAWID KLAZEN	**FOURTH APPLICANT**
KATHARINA BEUKES	**FIFTH PLAINTIFF**

and

GERHARD NICHOLAAS ENGELBRECHT	**FIRST RESPONDENT**
BERNADETTE JENHEFIR BEUKES	**SECOND RESPONDENT**
MARIA MAGDALENA RAGUL STANLEY	**THIRD RESPONDENT**
THE REGISTRAR OF DEEDS (REHOBOTH)	**FOURTH RESPONDENT**
THE MAGISTRATE FOR REHOBOTH	**FIFTH RESPONDENT**
MINISTER OF AGRICULTURE, WATER AND RURAL DEVELOPMENT	**SIXTH RESPONDENT**

CORAM: DAMASEB, JP

Heard on: 2005.01.31

Delivered on: 2005.08.05

JUDGMENT:

DAMASEB, JP: In these proceedings brought by way of Notice of Motion, two separate applications are involved: In the first application brought by the first to fifth applicants, the following relief is claimed:

> "1. Setting aside the Deed of Donation dated 11 December 2001 in terms whereof the first respondent *inter alia* donated 199, 1432 hectares undivided shares in the farm Aubgous No. 447, inherited from the late

Maria Magrieta Beukes, to the 3rd respondent as being null and void *ab initio;*

2. Setting aside the Deed of Donation dated 11 December 2001 in terms whereof the second respondent *inter alia* donated 199, 1432 hectares undivided shares in the farm Aubgous No. 447, inherited from the late Maria Magrieta Beukes, to the 3rd respondent as being null and void *ab initio;*

3. Setting aside the registration of transfer of the undivided share in the farm Aubgous No. 447 referred to in 1 and 2 above and registered by the fourth respondent on 6 February 2002 in the name of the third respondent as null and void *ab initio;*

4. Setting aside the registration of transfer by the fourth respondent on the 27th of August 1990 into the name of the fourth applicant of 199, 1431 hectares undivided share in the farm Aubgous No. 447, inherited by the fifth applicant from the late Maria Magrieta Beukes as being null and void *ab initio;*

5. Authorizing and directing the fourth respondent to register into the name of the fifth applicant 199, 1431 hectares undivided share in the farm Aubgous No. 447, inherited by the fifth applicant from the late Maria Magrieta Beukes.

6. Authorizing and directing the fourth respondent to register the following further condition against the Land Title number 447 of each of the first-, second,- third and fifth applicants, the first- and second respondents:

"The land may under no circumstances whatsoever be alienated, encumbered, pledged or leased, save as in accordance with the last will and testament of Maria Magrieta Beukes dated 24 November 1981."

7. Ordering and directing the first-, second-, third- and fourth applicants and the first-, second- and third respondents to, for the above purposes, hand in the original last will and testament of Maria Magrieta Beukes and the original land title of each of the applicants and the first to third respondents, within 14 days from date of this order.

8. Ordering the first and second respondent's to pay the costs of this application.

9. Further and or alternative relief."

This first application I shall refer to as the "main application". There is then a counter-application by the third respondent against all the applicants wherein she seeks relief against them in the following terms:

"1. Interdicting the said respondents from preventing applicant to enter and enjoy her ownership of the portion of FARM AUBGOUS 447, district Rehoboth, Identified in annexure MS1 to her answering affidavit filed herein, alternatively, that respondents permit applicant full access and enjoyment of her share of FARM AUBGOUS 447, district Rehoboth;

2. That respondents pay applicant N$16 800-00 plus interest at the rate of 20% per year calculated from the date on which this application is filed;

3. That respondents pay application N$700-00 per month plus interest at the rate of 20% per year a *tempore morae* for every month subsequent to 31 May 2004 which respondents persist in preventing applicant from gaining access to her share of the said farm;

4. That respondents deliver applicant's 10 goats plus their progeny since November 2002 to applicant; and

5. That respondents pay the costs of this application".

This application I shall refer to as the "counter-application".

Mr. Strydom appears for the applicants while Mr. Coleman appears for the respondents.

THE FIRST APPLICATION

On 12th April 1986 Maria Magrieta Beukes, then a widow domiciled in Rehoboth, passed away. She left behind a will which she executed on 24th November 1981 at Rehoboth, in which she provides as follows:

"

FINAL WILL AND TESTAMENT

I, MARIA MAGRIETA BEUKES, born BEUKES, a widow and currently residing in the Rehoboth District, South West Africa, on the Remaining portion of AUBGOUS, farm no. 447, hereby revoke, cancel and destroy all previous testaments, codicils and other testamentary deeds made by me and declare that this is my Final Will and Testament.

1. I nominate and declare the following people heirs of my entire estate and legacy:

a)	Junius Gerhard Beukes	Born 16 April 1940
b)	Petrus Beukes	Born 3 November 1941
c)	Gerhard Nicholaus Engelbrecht	Born 25 January 1951
d)	Johannes Beukes	Born 17 November 1945
e)	Jacobus Beukes	Born 30 November 1947
f)	Katharina Beukes	Born 20 November 1954

2. I nominate no executor at this time. I give the survivors of the heirs jointly the capacity to nominate and appoint an executor and administrator for the estate, and that such executor and administrator:

   a) does not have to provide security;
   b) must deal with my legacy of whatsoever nature or sort and wheresoever situated, without obtaining a mandate from the Master of the Supreme Court in terms of section 47 of the Estates Act.

3. I give and bequeath my entire estate and legacy of whatsoever nature and sort and wheresoever situated, with no exceptions, to my children or their descendants by substitution per stirpes, as follows:

3.1 I direct that the farm, Remaining portion of AUBGOUS? No 447, with a size 1194 ha (one thousand, one hundred and ninety-four hectares) must be divided equally between all six above named heirs;

3.2 On the understanding that JACOBUS BEUKES shall receive the big house and the two boreholes and that the land or share of the inheritance that is due to him, around the aforesaid namely the house and the two boreholes, shall be awarded to him and that said heir shall then pay out the other members for the old homestead (dwelling house), the stone dam and the wind pump at an amount to be determined by the living heirs.

3.3 Junius Gerhard Beukes must receive the top post, situated on the western part of the farm, with the existing homestead (house) and water installation, and that said heir must also pay the other members for the house, wind pump and the corrugated iron dam at an amount to be determined by all the heirs.

3.4 The land may under no circumstances whatsoever be disposed of, burdened, mortgaged or leased. Only the heirs of this estate shall have an option to purchase some of the land, i.e. the one heir may purchase from the other if it appears that the portion of such heir is too small for economic farming and such heir decides of his own free will to take such a step;

3.5 Leasing of the land must also take place amongst heirs, but with the intervention of a person who is not an heir of said estate, it can take place if all the heirs give their permission for this, on the understanding that if one or more of the aforesaid heirs farms on the farm, leasing to a person who is not an heir is not permissible.

4. All movable property or livestock must be divided equally amongst the heirs.

5. The two heirs, to whom the water rights accrue, must allow the other members to enjoy rights to water until such time as they have set up their own water installations." [My underlining for emphasis]

The present application is aimed at assigning to paragraph 3.4 of the aforesaid will an interpretation, or effect, that the late Maria Magrieta Beukes created a valid and binding *fideicommissum* which had to be registered against the land titles of all her heirs; and that the undivided share held by each of the heirs, or their successors-in –title, cannot form part of the joint estate of any of them or their successors-in title, and that such undivided shares cannot be alienated to anyone except to one or more of such heirs, or their successors-in-title.

The purpose of the application is set out in paragraph 12 of the founding affidavit of Jacobus Beukes (first applicant) as follows:

> "The purpose of this application is to declare null and void the donations by each of the first and second respondents of an undivided share in the Remainder of the Farm Aubgous No. 447, situated in the district of Rehoboth to the third respondent as being contrary to the last will and testament of the late Maria Magrieta Beukes and to set aside the subsequent registration of transfer by the fourth respondent of such shares into the name of the third respondent."

The undisputed facts

The late Maria Magrieta Beukes (the testatrix) was married to Johannes Beukes (patriarch Beukes) who predeceased her. Patriarch Beukes owned Farm Aubgous. In 1978, upon the death of patriarch Beukes, his following children, namely: Junius Gerhard Beukes (d.o.b 16 April 1940); Gert Nicolaas Engelbrecht (d.o.b 25 January 1949); Johannes Beukes

(d.o.b 17 November 1945); Jacobus Beukes (d.o.b 30 November 1947); Petrus Beukes (d.o.b 3 November 1946), and Kathrina Beukes (d.o.b 20 November 1954), each inherited from the said patriarch 208, 5000 Ha undivided share in Farm Aubgous. The remainder of the farm went to the testatrix. It is worthy of note that no limitations were imposed on these undivided shares inherited from the patriarch. (Now that was in 1978 well before the death of the testatrix.) On 12 April 1986, some 8 years after the above inheritances from the patriarch, the testatrix passed away, having, on 24 November 1981 (3 years following the initial inheritances from the patriarch), executed the will which I quoted at the start of this judgment. This is the will which is the subject-matter of the dispute in the main application.

Upon the death of the testatrix her estate was reported, in terms of s 2 of the Administration of Estates (Rehoboth Gebiet) Proclamation 1941, to the Registrar of Deeds, Rehoboth (the fourth respondent). The fourth respondent then appointed one Hendrik Beukes as executor of the testatrix's estate.

Executor Beukes then passed transfer of the undivided share in and to the Remainder of the Farm Aubgous to the beneficiaries named in the testatrix's will, including to Albertus Dawid Klazen, a husband married in community of property to Katharina Beukes (d.o.b. 20 November 1954.) This was in July and August 1990. (The relief sought in prayers 4 and 5 is aimed at this transfer.) All these transfers were duly registered by the fourth respondent in the Rehoboth Deeds Registry in terms of the Registration of Deeds in Rehoboth Act, 93 of 1976.

One of the testamentary heirs of the testatrix was Johannes Beukes (d.o.b 17 November 1945). Johannes Beukes died intestate on 18 May 2001 leaving behind 2 legitimate children, namely: Enrico and Jennifer.

(Jennifer is the second respondent in the main application). Enrico and Jennifer were born of Johannes' marriage with third respondent, Maria Magdalena Ragul Stanley. When Johannes died he was no longer married to the third respondent. Upon the death of Johannes Beukes, his two children, Enrico and Jennifer, as sole heirs, inherited his whole estate, including Johannes Beukes' undivided share in Farm Aubgous. During the administration of the estate of Johannes Beukes, his son Enrico, gave his share in the undivided share of Aubgous, owned by the estate of his deceased father, to his sister, Jennifer, in the following terms:

> ''I, Enrico Beukes ID 76072000479 herewith declare that I give full ownership of property- farm Aubgous to Bernadette Beukes. Farm section inherited from my late father Johannes Beukes. Etc, etc".

Transfer of Johannes Beukes' share in the undivided share of the Remainder of Farm Aubgous into the name of his daughter Jennifer, the second respondent, was effected by the fourth respondent on 12 December 2001.

On 11 December 2001 the first and second respondents each executed a deed of donation in terms whereof they transferred their respective rights and title in the undivided share of the Remainder of Farm Aubgous to the third respondent.

On 17th January 2002, the sixth respondent issued Consent in the following terms:

> "By virtue of the powers delegated to me by the Government of the Republic of Namibia consent is hereby granted in terms of Section 4(2) of the Subdivision of Agricultural Land Act, Act 5 of 1981, for the transfer of:

1. Certain 407, 6432 hectares undivided shares of the Farm Aubgous No. 447, situated in the registration division “M” and held by Bernadette Jenhefir Beukes born 17 October 1971,

2. Certain 407, 6432 hectares undivided shares of the Farm Aubgous No. 447, situated in the registration division “M” and held by Gerhard Nicholaas Engelbrecht born 25 January 1949, in undivided shares into the name of;

Maria Magdalena Ragul Stanley, born 05 March 1956

CONDITIONS PERTAINING TO THIS CONSENT

1. Simultaneously with registration of transfer, a condition must be registered against the title deed of the undivided shares to the effect that without the written consent of the Government of the Republic of Namibia, the undivided shares may not be transferred separately, mortgaged separately or otherwise dealt with separately.

2. This consent is valid for three years from the date of issue.

3. This Consent does not exempt any person from any provision of any other law, and does not purport to interfere with the right of any person who might have in interest in the agricultural land. (My emphasis)

DR VAINO SHIVUTE
PERMANENT SECRETARY 17 January 2002”

On 6th January 2002, having received the Consent of the sixth respondent, the fourth respondent registered the transfer of the undivided share held by each of the first and second respondents into the name of the third respondent. This registration by the fourth respondent - along with the donations to third respondent by the first and second respondents which gave rise to it - are the subject-matter of the challenge in the main application.

The above are the undisputed facts.

The main affidavit in support of the relief sought has been deposed to by Jacobus Beukes, the first applicant. This deponent alleges that all the beneficiaries under the will of the testatrix are bound by the provisions of that will, as are their heirs. He alleges that the donations by the first and second respondents are in direct conflict with the *'clear and unequivocal limitations imposed by the last will and testament'* of the testatrix, and that the subsequent transfers are also *null and void* and fall to be set aside and the title deeds of all the heirs to be rectified to include therein the condition created in paragraph 3.4 of the will of the testatrix. That much is denied by the respondents, especially the third respondent, who deposed to the main affidavit in opposition to the relief sought. The case for the respondents can be summed up as follows: the will of the testatrix does not create a *fideicommissum* and that the prohibition in paragraph 3.4 is a *nudum praeceptum*, i.e. a nude prohibition which is not legally binding. Their case further is that even if this Court were to find that para 3.4 of the will constitutes a *fideicommissum*, it does not assist the applicants because, in that event, the first respondent and the late Johannes Beukes were only fiduciaries and that a disposition by the fiduciaries contrary to the *fideicommissum* would result in the rights adhering in their heirs as fideicommissaries – heirs who are not before Court. In the case of Enrico and the second respondent, the allegation goes, the two would be *fideicommissaries* in respect of the shares inherited by Johannes Beukes from the testatrix and they are under no prohibition to deal with their rights in respect of the undivided share in the remainder of Farm Aubgous.

It is unnecessary to deal in any further detail with the factual issues in the main application. The raft of the issues will resolve themselves depending on the conclusion that I come to on the nature of the disposition contained in paragraph 3.4 of the will.

Both counsel have submitted heads of argument and I am indebted to them for their industry.

The respondents have raised 3 points *in limine*. I need to deal with them first. The first point *in limine* is that the applicants lack *locus standi* for failing to establish *"a real and substantial interest"* in respect of the land registered in the name of the third respondent. The argument goes that the raft of the relief sought, if granted, will only result in the land reverting to the first and second respondents (both of whom do not want the land as evidenced by their donations to the third respondent.) With respect, this is a circular argument: if a *fideicommissum* is found to exist, the applicants would be entitled to argue that the land should never have been donated to the third respondent and that the possibility existed that it would be offered to them, or their heirs, if those properly entitled to own it were not interested in it. I must assume, in dealing with the point *in limine* in respect of *locus standi,* that the disposition of the testatrix in paragraph 3.4 of her will creates a valid *fideicommissum*. Once that assumption is made, it becomes clear that as beneficiaries under the will, with the right to enforce its terms, the applicants would have the necessary *locus*. This point therefore fails.

In respect of the points *in limine* relating to sections 23, 24, 25 and 26 of the Proclamation, I agree with Mr. Strydom that these provisions are intended to apply to matters involving the administration of estates, and the executor's role in regard thereto and to disputes that may arise as a result of such administration. I may just add that in my considered view

the provisions are not intended to bestow jurisdiction on the Magistrate, to the exclusion of the High Court, to interpret the provisions of a will – which, in reality, is the gravamen of the dispute between the parties in the present proceedings.

Then there is the final point *in limine* taken by the respondents involving s 53 of the Registration of Deeds in Rehoboth Act, 93 of 1976. The section reads thus:

> *(N)o act in connection with any registration in the registry shall be invalidated by any formal defect, whether such defect occurs in any deed passed or registered, on in any document upon the authority of which any such deed has been passed or registered or which is required to be produced in connection with the passing or registration of such deed, unless a substantial injustice has, according to a finding in an enquiry held in terms of the provisions of section 54, occurred and such injustice cannot be remedied by virtue of an order issued in such enquiry."*

The respondents say that no "enquiry" was held and that the applicants did not even attempt to address any injustice suffered by them in view of the fact that they rely on 'formal defects' which are squarely within the contemplation of s 53. The applicants' response to this point *in limine* is two-fold: the first argument is that s 53 was not intended to oust the jurisdiction of this Court. The second argument is that the section does not apply. In the view that I take on the main issue of whether or not a valid *fideicommissum* has been created, I do not find it necessary to decide the point *in limine* relative to s 53. It is to that main issue that I now turn.

In LAWSA (vol. 31) para 247 (and the authorities there collected), the following instructive statement of the law appears:

> *"It is generally recognized that bequests should, if possible, be construed in a manner that leaves the property in question as unburdened as possible. Because a fideicommissum is regarded as being "odious" in so far as it burdens the property affected by it, there is a general presumption against the creation of fideicommissa. Consequently, the rule is that, before a testamentary disposition can be construed as a fideicommissum, the court must be satisfied beyond reasonable doubt that the testator intended to burden the bequest in this way.*
>
> *Care must be taken not to misapply this presumption. It can only be used if reasonable doubt as to the testator's intention does in fact exist and not if it is merely difficult to establish that intention. As it was put by Centlivres CJ in Van Zyl v Van Zyl: "The correct approach is first to enquire from the language used what did the testators intend and, if it appears that it is impossible to say with reasonable certainty what the intention was, then and only then can it be said that a doubt exists.*
>
> *The presumption operates only in those cases where the antithesis is between unrestricted ownership and ownership burdened with a fideicommissum, or when it is between direct as opposed to fideicommissary substitution. Where it is clear that the testator intended to impose a burden on a bequest and the question is whether the burden is that of a fideicommisum or a modus, there is no presumption favouring the one above the other. When the dispute is whether the interest conferred is fiduciary or usufructuary, the presumption is actually in favour of a fideicommissum rather then as usufruct."* [My underlining for emphasis]

The requisites for a valid fideicommissum are well known and need not to be repeated here – see Corbett, Hahlo, Hofmeyer et Khan , *The Law of Succession of South Africa (1980*) 267ff. I wish to place emphasis though on the following requisites as they are relevant to the resolution of the present dispute: (i) ‘’**an intention on the part of the testator to burden his disposition with a fideicommissum‘’,** and (ii)‘’ **a clear indication that upon the occurrence of the fideicommissary condition the property is to devolve upon another or, as it is often put, an effective ‘gift over’ in favour of the fideicommissary’’.** Corbett et al, op cit, 267.

Although the testatrix directs that the land may ‘*under no circumstances whatsoever be disposed of, burdened, mortgaged or leased’* she conjoins the option she gives to the co-legatees to purchase the land from the other heir(s) with a two-way discretion: the first discretion appears to be given to a potential purchaser who may wish to purchase the land of another heir in order to make his portion economically viable; while the second discretion appears to be given, by implication, to the potential seller to agree whether or not to sell. Neither one of them is placed under any compulsion upon the breach of a prohibition. According to Corbett et al, op cit, at 269-270 (and see the authorities there cited)

> *“ … inasmuch as an obligation upon the fiduciary to pass on the property in question to the fideicommissary is of the essence of a fideicommissum, a provision whereby the testator confers upon the person to whom the property is initially bequeathed, or entrusted, an unfettered discretion as to whether to pass it on or not does not create a valid fideicommissum. But on the other hand, where the will obliges him to pass on the property but vests him with a discretion merely as to the*

manner and time of doing so or as to the choice of persons to whom it is to be passed on, there is a valid fideicommissum''.

There is, as I said, no obligation placed on an heir to pass on the land to another upon the occurrence of the fideicommisary condition and, therefore, in my view, the exception pointed out by the learned authors in the second sentence of the above quotation does not apply.

It is trite that a fideicommissum is created either expressly or by implication. I must consider the language used in the will to see if a fideicommissum was intended. Mr. Strydom suggests that what is intended in the will is an implied fideicommissum. He says: " *...the deceased intended by clear implication that the property should not fall to anyone other than those nominated in the will and testament because to allow it would defeat the prohibition in the will against alienation , mortgage or burden of the property to any person , other than the heirs or their progeny.''*

Mr. Strydom then continues that on a proper construction of the limitation contained in the will the only conclusion that the Court can reach is that the testatrix intended to create a *fideicommissum* in respect of the undivided shares held in the Remainder of Farm Aubgous.

I must be satisfied beyond reasonable doubt, upon consideration of the will as a whole, read in the light of its surrounding circumstances, that the testator intended that her directions create a fideicommissum. Mr. Coleman submits that the following factors point to the fact that the testatrix did not intend to create a *fideicommissum*: the will does not determine in whose favour the prohibition is made or upon whom it will

devolve if the prohibition is breached; that the prohibition is too vague and open-ended as to duration; and that there is no stipulation that the property should remain in the family.

The will, as I earlier remarked, only bestows, on an heir, in a very tentative fashion, the possibility to acquire the portion held by another heir if he or she needs such additional land to farm economically, but only if the other heir is prepared to sell. If those two conditions are not met, the land does not have to remain in the family. That can hardly be the basis for implying the creation of a *fideicommissum*. At best for the applicants, the disposition only amounts to a restraint against alienation by the co-legatees in order to give a right of pre-emption against co-legatees. (Compare *Bodasing v Christie* NO 1961 (3) SA 553 (AD).) That would be an interpretation which places the least burdensome obligation on the fiduciary beneficiaries under parragraph 3.4 of the will – as to which see *Ex parte Malan's Executors 1911 TPD 1188 at 1192; Ex parte Wessels' Estate 1942 CPD 464 at 465, and Ex parte Dell 1957 (3) SA 416 (C) at 419-20; Standard Bank Ltd NO v Trollip NO 1965 (2) SA 175 (C) at 178 -9.* Such right of pre-emption, in my view, would only be binding on the first beneficiaries named under the will and would not anyway apply to collateral descendants such as the second respondent, and her brother Enrico. But that of course is not the end of the matter.

The other complaint by Mr. Coleman is directed at what he suggests is a failure to make effective 'gift over' by the testatrix. It is trite that no valid fideicommissum can be created unless there is a direction by the testator that the burdened property will devolve upon another upon the happening of a fideicommissary condition. The fiduciary must stand divested of the burdened property upon the happening of the condition, otherwise there is no fideicommissum. (See *Ruskin NO v Sapire* NO 1966 (2) SA 306 (W) at 308; *Hiddinghs Trustee v Colonial Orphan Chamber*

and Hiddingh (1883) 2 SC 273: the facts and conclusion of the Hiddingh case are summarized in Corbett et al, op cit. at 273-4.)

In *casu* there is no attempt, either expressly or by implication (not even a disguised attempt), to divest the interest of an heir in the fideicommissary property if a prohibition is breached. The fideicommissary heirs are not given any right to, as was stated by De Villiers JP in *Fick and Fick v Murray & Co 1917 TPD* 226 at 229, ‘*’come in upon the contingency*” upon the occurrence of the fideicommissary condition. In my view the test I must apply is whether the applicants, relying on clause 3.4, could come to Court and succeed in enforcing a sale on the strength of a desire to buy out any co-legatee’s inheritance of the undivided share; or on the strength of an attempt by a co-legatee (in breach of the clause) to alienate their portion of the land to a stranger, without such heir being able to demonstrate an interest on their part to acquire another’s portion, or without establishing the willingness of the other heir to sell to the heir wanting to acquire the undivided share of another. The question only needs to be asked to be answered. (In *casu* there is not even the allegation that the applicants desire to acquire the portions since donated to the third respondent.) The important requirement of divestment of a fiduciary beneficiary upon breach of a prohibition is, therefore, also not met. The disposition in paragraph 3.4 of the will is therefore *nudum praeceptum* and the heirs were left free to deal with their share of the inheritance unburdened and as belonging freely and absolutely to them.

In *Eksteen v Registrar of Deeds for Rehoboth & Others 1994 NR 217*, O’ Linn J (as he then was) was called upon to decide whether a will which prohibited the beneficiaries from disposing, burdening or pledging the immovable property inherited in terms of the will, “except to other family members”, amounted to a *fideicommissum*. The learned Judge

does not set out in full in his judgment the terms of the will but, it appears, from his judgment (at 220 E), that the will included the descendants of the heirs as beneficiaries of the prohibition to the effect that the heirs may not alienate, mortgage or burden such property except to the heirs or their descendants or progeny.

The Eksteen case is therefore distinguishable on its facts from the present case where the collateral beneficiaries are not specifically mentioned as being the beneficiaries of the prohibition against alienation.

I come to the conclusion, therefore, that paragraph 3.4 of the will of Maria Magrieta Beukes does not create a valid fideicommissum and that each of the heirs named under her will inherited their respective portions of the undivided share in the Remainder of Farm Aubgous No 447 absolutely.

The relief sought in prayers 6 and 7 of the main application is not at first blush controversial, and appears to me unaffected by the finding that clause 3.4 of the will of the testatrix does not amount to a valid *fideicommissum*. That finding necessarily implies that the clause is not legally binding being a nude prohibition only. In the light thereof, it is really an exercise in futility to grant the relief sought in those prayers. Prayers 4 and 5 of the main application are not opposed by the respondents although they do not admit the legal basis on which that relief is sought. Those prayers must therefore be granted.

THE COUNTER APPLICATION

I already set out at the outset the relief claimed in the counter-application. First, the third respondent seeks interdictory relief on the

basis that the respondents prevented her from entering and enjoying her ownership of the portion of Farm Aubgous- portions of land which are not even the subject matter of any dispute and lawfully acquired by her. A circumstance which, she says, compelled her to seek alternative grazing for her animals at some expense to herself. First applicant, Jacobus Beukes, who deposed to the main affidavit on behalf of the applicants, denies that the applicants prevented the third respondent (as counter-applicant) access to her part of Farm Aubgous. He therefore denies that the third respondent suffered loss in the amount of N$ 16, 800 in mitigation of her damages and puts the third respondent to the proof of her claim.

The applicants also deny that the third respondent is the owner of the 10 goats she alleges to have been prevented from retrieving from Farm Aubgous, and first applicant avers that those goats actually belong to someone else. That denial and assertion is sought to be buttressed by means of a confirmatory affidavit. The third respondent has not applied for the disputes to be referred to oral evidence and I am unable to decide the disputes on the papers. I am equally unable to conclude that one version is inherently more probable than the other. The more appropriate course in that event is the hearing of *viva voce* evidence (See *Kalil v Decotex (PTY) Ltd and Another 1988 (1) SA 943 at 982 A .)* The eventual scope of the dispute is not immediately apparent to me and, therefore, the safer course is to refer the mater to trial in terms of Rule 6 (5) (g) of the Rues of this Court (See *Oblowitz v Oblowitz 1953 (4) SA 426*.)

In the premises I make the following orders:

AD THE MAIN APPLICATION

i) Prayers 1, 2, 3, 6, and 7 of the Notice of Motion are refused, with costs, including the costs of one instructed and one instructing counsel.

ii) Prayers 4 and 5 are granted, but no order is made as to costs.

AD THE COUNTER-APPLICATION

(1) The relief contained in Paragraphs 1- 5 of the Notice of Motion (counter application) of the third respondent are referred to trial in the High Court of Namibia at a time and date to be arranged with the Registrar by the parties. The third respondent shall be the plaintiff in such action and the first to fifth applicants the respective defendants with the various affidavits filed of record in connection with the counter application constituting, *mutatis mutandis*, the pleadings therein;

(2) The Notice of Motion (counter application) together with that part

of the answering affidavit of the third respondent containing the averments in support of the counter application shall constitute the particulars of claim; the answering affidavits by and on behalf of the respondents shall constitute the pleas of the respective defendants to such particulars of claim.

(3) The evidence to be led at the trial shall be that of any witness whom the parties or either of them may elect to call, subject, however, to what is provided in para (4)(a) hereof;

(4) Save in the case of the second and third respondent, on the one

hand, and all the applicants on the other hand, neither party shall be entitled to call any witness unless:

(a) it has served on the other party at least 14 days before the day appointed for the hearing (in the case of a witness to be called by the plaintiff) and at least 10 days before such date (in the case of a witness to be called by the defendants), a statement wherein the evidence to be given in chief by such person is set out;

or

(b) the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his/her evidence.

(5) Either party may subpoena any person to give evidence at the trial, whether such person has consented to give a statement or not ;

(6) The fact that a party has served a statement in terms of paragraph (4) (a) hereof, or has subpoenad a witness, shall not oblige such party to call the witness concerned;

(8) Within 21 days of the making of this order, each of the parties shall make discovery in terms of Rule 35 and the parties shall conduct a conference, contemplated in Rule 37, within 15 days of such discovery.

(9) The costs incurred up to now in respect of the counter application shall be determined at the trial.

DAMASEB, JP

ON BEHALF OF THE APPLICANTS:	**Mr. J A N STRYDOM**
INSTRUCTED BY:	**M B DE KLERK & ASSOCIATES**
ON BEHALF OF 1ST, 2ND & 3RD RESPONDENTS:	**Mr. G B COLEMAN**
INSTRUCTED BY:	**A VAATZ & PARTNERS**