IN THE HIGH COURT OF NAMIBIA

CASE NO: (P) I 1548/2005

In the matter between:

LOTTA FRANS **PLAINTIFF**

and

INGE PASCHKE **FIRST DEFENDANT**

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA SECOND DEFENDANT
THE MASTER OF THE HIGH COURT THIRD DEFENDANT
MR C HATTINGH FOURTH DEFENDANT

CORAM: **DAMASEB, J.P et**
HEATHCOTE, A.J

Heard on: 28 June 2007

Delivered on: 11 July 2007

JUDGMENT

HEATHCOTE, A.J:

[1] Emperor Justiniun, who died in 565 AD, ordained:

> "*But those who are born of a union which is entirely odious to us, and therefore prohibited, shall not be called natural children and no indulgence whatever shall be extended to them. But this fact shall be punishment for the fathers, that they know that children who are the issue of their sinful passion will inherit nothing.*"[1] and that;

[1] Novel 74.C.6 [The Novels or Novellae were in essence legislation promulgated by Emperor Justiniun] and formed part of the *corpus iuris civilis*. See: JAC Thomas, Textbook of Roman law @ 57.

In the case where a mother of two children, one legitimate and the other illegitimate, died, the illegitimate one could not inherit, either through will or intestacy, if the legitimate child was still alive at her death. The reason for this rule was given as:

> "*for the preservation of chastity is the first duty of freedom of an illustrious woman*" and because it would
>
> "*be unjust, and very oppressive and unworthy of the spirit of our age, for bastards to be acknowledged.*"[2]

[2] It is debatable whether or not the above statements were only applicable to children born out of an incestuous relationship. Nevertheless, Dutch writers such as Voet, regarded adultery not a less heinous crime than incest. Accordingly, the sins of fathers who committed adultery were also visited upon their children. They could also not inherit intestate from their fathers.[3]

[3] The rule that an illegitimate child cannot inherit intestate from his father "*the common law rule*" was applied when the late Mr Jurgen Eichhorn ("the deceased") died intestate at Windhoek on 30 May 1991. The plaintiff claims that the deceased was his father who did not marry his mother. It is common cause that the plaintiff did not inherit anything from the deceased as a result of the common law rule. Instead the deceased's entire estate was awarded to the first defendant, who, according to plaintiff, is his sister.

[2] See: The Civil Law, a translation by AP Scott, Volume 14 @ p. 86 and p. 87
[3] See: Green v Fitzgerald and Others 1914 AD 88 @ 99

[4] Alleging that the common law rule was unconstitutional at the time of his father's death, plaintiff instituted an enrichment claim against first defendant alternatively a claim for an award under Article 25 of the Constitution. The parties have agreed, that the issue as to the constitutionality of the common law rule should be heard as a separate issue under Rule 33(4) of the rules of this Court.

[5] In the pleadings, (as was submitted by Mr Smuts SC, who appeared for the plaintiff) it is contended by the plaintiff that the common law rule has been unlawful and invalid since the inception of the Namibian Constitution in that it violates, abridges and/or infringes one or more of the following of plaintiffs' right(s):

(i) not to be discriminated against on the ground of the plaintiff's social status (Article 10(2) of the Namibian Constitution);

(ii) to equality before the law (Article 10(1) of the Constitution);

(iii) to dignity (Article 8(1) of the Constitution);

(iv) to know and to be cared for by both his parents (Article 15(1) of the Constitution);

(v) to acquire property (Article 16(1) of the Constitution).

[6] Defendant denied the alleged unconstitutionality of the common law rule

and in amplification of this denial pleaded that:

> "(a) *Plaintiff states that in terms of Article 66 of the Namibian Constitution the said common law rule shall remain valid to the extend that it does not conflict with the Constitution. First defendant states that since it does not conflict with the Constitution, it is and remains part of the law of Namibia. First defendant further states that despite the fact that Namibia has been governed by the said Constitution for now 15 years, the said rule has not in terms of Article 66(2) been repealed or modified by an Act of Parliament.*
>
> *(b) First defendant further states that Article 140 of the Namibian Constitution expressly provides that all laws in force immediately before the date of independence – and on the said common law rule was in force in Namibia immediately before the date of independence – shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent court. The said rule has not been repealed by an Act of Parliament nor been declared unconstitutional by a competent court and was thus at the time when the distribution of assets was made by the fourth defendant still in force and binding on all parties as an existing and enforceable rule of law and the said rule still is an existing and enforceable rule of law.*

[7] The Roman law rule in terms of which children, whose fathers have "*sinned*", were prohibited from inheriting intestate (and indeed testate) from their fathers was received in South Holland in a slightly different form. There, the maxim, een wyft maakt geen bastaard – "*a mother procreates no bastard*" was recognized.[4] Nevertheless children born out of adulterous, incestuous or normal "*out of wedlock*" relationships, were hit by the maxim. No illegitimate child could inherit from his/her father, but in respect of all three categories, the child could always inherit from the mother (whether testate or intestate).[5]

[4] Van der Keesel Thes 345

[5] See: Green v Fitzgerald, supra, per Innes JA @ 108

[8] For purposes of this judgment, reference to an "*illegitimate*" child refers to a child whose father and mother were not legally married to each other at the time of the child's conception or birth or at any subsequent time. No distinction is made between degrees of "*illegitimacy*", such as incestuous, adulterous or mere "*out of wedlock*"- children. While I fully agree with the sentiments expressed by *Langa, DCJ in BHE and Others v Magistrate, Khayelitsha and Others 2005(1) SA 580 (CC) @ 595*[6], that the word illegitimate should be avoided in future, I use the concept merely to illustrate the stigma which attaches to the common law rule.

HOW DID THIS RULE OF HOLLAND BECOME PART OF NAMIBIAN LAW?

[9] In 1652 the Cape of Good Hope came into possession of the Vereenigde Geoctroyeerde Oost Indische Compagnie "*the VOC*". It was one of the first companies,- in the structure of a modern company limited by shares,- in the world and was a subject of the Republic of the United Netherlands "*the Republic*". This Republic consisted of seven provinces (including Holland, Zeeland and Friesland). The provinces were administered by the Estates General (which consisted of one representative from each province). This Estates General had no power to interfere in the domestic affairs of the

[6] "The expression 'illegitimate children' has been used by lawyers in South Africa for may years, and was used by the Cape High Court in the BHE case and by the lawyers in this case to describe children who are conceived or born at a time when their biological parents are not lawfully married. I choose not to use the term, however. No child can in our constitutional order be considered 'illegitimate', in the sense that the term is capable of bearing the meaning, that they are 'unlawful' or 'improper'."

Provinces, but did deal with the control of overseas possessions of the Republic.[7]

[10] The VOC operated under Charter (Octrooi) of the Estates General of 1602, putting the ownership of the Cape under that of the Estates General and the use of the land under that of the VOC. The Charter also granted a monopoly of trade to the VOC. The head quarters of the VOC were at Batavia, presided over by the Governor General and the "*Council of India*". The Cape, as an out-station, was also subject to the Governor General and the Council of India. During March of 1621 already, the Estates General instructed the VOC to apply in its possessions, the laws and statutes of Holland including the Political Ordinance of 1 April 1580. Although the Estates General could pass legislation for its possessions, there is only one Octrooi which was passed and still survived by 1 January 1920[8], and that was the Octrooi of January 10, 1661, which regulated the law of intestate succession.

[11] And so it happened that the law of South Holland became the law of the Cape Colony[9]. But what was the law of Holland which became applicable in the Cape Colony? "*In Raubenheimer v Executors of Van Breda*, supra, Chief Justice de Villiers outlined the subject historically: He remarked, inter alia: "…*The law bearing upon these questions, although complicated, is by no means obscure. The Charter granted by the States-General to the Dutch East India Company, on*

[7] See: The British Commonwealth, The Development of its laws and constitution, Volume 5 "*The Union of South Africa*"

[8] The date upon which The Administration of Justice Proclamation, 1919, became applicable in South West-Africa.

[9] See: Raubenheimer v Executor of Von Breda (Foord III), read with Green v Fitzgerald – supra @ 99 - 100

the 10th January, 1661, regulates the law of succession ab intestato in this Colony. That Charter adopted as the law of succession the provision of the Political Ordinance of 1580[10]*, as interpreted by and Edict of the States bearing the date 13th May, 1594*[11]*, with one modification*…" Prior to the enactment of the Political Ordinance of 1580, the law of North Holland was known as

[10] See: The Administration of Estates, Howard, 1908 @ 80 – 83 who summarizes articles 20 – 29 of the Political Ordinance, as read with the Interpretation Edict of 1594 as follows:

Art. 20: Firstly, children and other direct descendants ad infinitum succeed by representation or per stirpes.

Art. 21: If both parents of the intestate be alive, they succeed absolutely upon failure of children and descendants of remoter degree.

Art 22: If both, [or one, -this is not applicable in Cape law; see the Charter of 1661-] of the parents be dead, the succession must go absolutely to the intestate's brothers and sisters and their children and grandchildren per stirpes or by representation.

Art. 23: Half-brothers and half-sisters, their children and grand-children, and other collateral relations who were related to the intestate through one parent only, take with the "half hand" and according to the degree of consanguinity in which they stood related to him.

Art. 24: Failing all descendants, father, mother, brothers and sisters and their children and grandchildren, the uncles and aunts, and their children, take per stirpes.

Art. 25: But, however, if grandfather and grandmother on the one side be both alive, they succeed, as regards property derived from that side, in preference to the uncles and aunts and their children descended from these grandparents of the intestate; but these grandparents do not oust the intestate's brothers and sisters as regards such property.

Art. 26: In the case of [parents and] other ascendants, when the bed has been severed and one alone survives, the latter does not participate in the succession. (See Charter of 1661).

Art. 27: "The estate of the deceased shall go to his next of kin on the father's and mother's side, and be divided into two equal parts, without any distinction being made whether the deceased inherited more from his father than from his mother, or vice versa" (per De Villiers, CJ in Raubenheimer vs Executors of Von Breda). "Now, the context clearly shows that this section was intended to apply to the case in which the deceased died without either descendants or parents him surviving. In such a case the general rule is laid down that the succession shall be per lineas, one-half of the estate going to the next of kin on the paternal side, and the other half to the next of kin on the maternal side."

Art. 28: "Representation shall not be admitted among collaterals, further than the grandchildren of brothers and sisters, and the children of uncles and aunts, inclusively, and all other collaterals, being the next of kin of the deceased, and in equal degrees, shall take per capita, to the exclusion of all who are in a more remote degree of consanguinity, the nearest excluding those more remote."

Art. 29: Children who have received from their parents any money or property given as a marriage gift, or for the purpose of benefiting the children in business affairs, or otherwise in such matters, must collate or bring into the estate of their parents such money or property before sharing the estate with the other successors. The amount to be collated is the value of the donation at the time it was made, if the property had not had a valuation placed upon it; but if such was the case, the valuation must be followed in collating. The property must then be divided into equal parts, one half going to the surviving spouse, and the other half the heirs take: whether the marriage was a first, second, or third one. The foregoing rules regarding succession and collation rule when no contrary provisions exist by virtue of a "testament, antenuptial contract, deeds executed before the Orphan Chamber, or any other contracts."

[11] "Interpretation" of 13th May, 1594.

This Interpretation essayed to elucidate the difficult and doubtful points that arose in regard to the

"Aasdoms," and that of South Holland, as "Schependoms." The two systems were by no means the same. When the Political Ordinance of 1580, and its interpretation were forced upon both North and South Holland, the former took objection to being subjected to the principles of the Schependoms law, the bulk of which was included in the Political Ordinance, to the exclusion of Aasdoms. Thereupon the Placaat of 1599 was promulgated, restoring to the North, part of the old law, whilst in the South, the Political Ordinance and the Interpretation of 1594 continued to rule.

[12] In the Cape Colony, as was the case in Holland, the punishment for adultery was severe. In 1756 a couple was found guilty of adultery. The man was

terms of the Political Ordinance: Half-brothers and half-sisters must succeed with the half-hand if both of the parents of the intestate predeceased him; that is, the full brothers and sisters or their children or grandchildren by representation must take one-half of the estate, whilst the other half they share equally with the half-brothers and half-sisters, or their children or grandchildren by representation, who are related to the intestate on the one side only. But if that parent alone is dead through whom the half-brothers and half-sisters have their claim upon the intestate, the other parent of the intestate being still living, they, or their children or grandchildren by representation, succeed with a full hand: not otherwise, however. The same applies to the case of other collaterals, in their various degrees, when related to the intestate on the one side only. [Compare, however, the rule stated below, regarding collaterals related through other ascendants.] Further descendants of brothers and sisters, in the fifth and remoter degrees, rank before grandparents and remoter ascendants, as also uncles and aunts, their children and grandchildren, and further descendants, and they succeed per capita, not per stirpes. If, on the one side, only one of the ascendants [as in Art. 26, the application hereof to parents is nullified by the Charter of 1661] be alive, neither he, nor any persons, related to the intestate through the deceased spouse alone, will succeed to the intestate. [Those so related on the side of the surviving grandparent are naturally excluded by him or her, ipso facto.] The division of the intestate's estate per lineas, to the father's and the mother's side equally, occurs only when the parents are both dead. And the above rules must govern. Charter of 10th January, 1661.

In applying the above laws to the Indies, this Charter partially altered Art. 26 of the Ordinance: When the marriage of the intestate's parents has been dissolved, and only one of them is living, he or she will succeed to the intestate along with the brothers and sisters, whether of the full or the half blood, or their children or grandchildren by representation. The is, the surviving parent takes one-half, and the brothers and sisters, or their children or grandchildren by representation, take the other half; but the half relations in order to succeed must be related to the intestate through his deceased parent. If there be neither brothers nor sisters alive, their children or grandchildren by representation will in like manner take on half, the parent taking the other. If there be neither, brothers, sisters, their children nor grandchildren alive, the surviving parent of the intestate will succeed to the estate absolutely, and exclude all collaterals. Land, houses, and other immovable property must follow the law and customs of the Provinces, Districts of places wherein it is situated."

sentenced to imprisonment for a month, with bread and water only. The woman had to stand for three consecutive Sundays before one of the church doors with a card on her breast inscribed with the word "*whore*".[12]

[13] This common law rule of South Holland found its way into Namibia by virtue of The Administration of Justice Proclamation, 1919, which provides that the common law of South West Africa shall be the Roman – Dutch law as "*existing and applied*" in the Province of the Cape of Good Hope. In *Tittel v The Master of The High Court, 1921 (SWA) 58***,** Gutsche J, found that the words "*existing and applied*" meant any legislation enacted in the Cape of Good Hope immediately before 1 January, 1920 (i.e. the date the Proclamation became applicable) formed part of the Namibian Common law. The learned judge stated @ 60;

> "*The plain and natural meaning, it seems to me, of those words, the Roman-Dutch law "as existing and applied" in the Province of the Cape of Good Hope shall be the common law of this country, is that the law as "applied" there by the Courts, giving effect to customs and desuetude and other modifications, and as "existing" by reason of the modifications, that is by abrogations and fresh enactments introduced by statute, shall be the law of this country. That, to my mind, seems to be the natural meaning to give to that section and to the words "as existing and applied". If it were not so, the result would be - for I see no reason for distinguishing in this respect between abrogating and enacting statutes – that the laws of this country would be thrown back many generations, and that the antiquated provisions of the law, such as, for instance, those which deal with the Palcidian and Trebellian portions, the Lex hac edictali*

[12] See: Green v Fitzgerald, supra, @ 101 - 102

or filial portion, the legitimate portion and other restrictions on the freedom of testation, as well as the law dealing with prescription, in regard to immovable property, the law dealing with maritime and shipping, fire, life and marine insurance, stoppage in transitu, bills of lading,letting and hiring, laesis enormis and many other modifications which occur to one, would be of force and effect here. A system would have been introduced which, in so far as it affects some of the most important and frequent transactions of daily life, is archaic and behind the requirements of the age. That seems to me to be against the intention of the Legislature as indicated by this section, and further indicated by legislation which has been introduced since the 1st January, 1920."

If the common law rule is constitutional, the plaintiff in this matter would have been barred from inheriting from the deceased, as article 66 of the Namibian Constitution provides that:

"*(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.*

(2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods."

[14] The common law referred to in article 66 of the Namibian Constitution embraces, fully, the concept of "*Roman Dutch Law as existing and applied in the Cape of Good Hope*" as explained by Gutsche J in the Tittel Case, supra. Accordingly, Roman Dutch Law which was applied in the Cape of Good Hope through legislation, judicial precedent, custom or the pre-codal system of Old

Authorities (such as the decisions of the High Court of Holland, Grotius, Voet ect) are common law as envisaged in article 66 of the Namibian Constitution to the extent it has not fallen in disuse. This becomes abundantly clear if regard is had to the wording of section (1)(1) of the Administration of Justice Proclamation which provides that the "*Roman Dutch Law as existing and applied in the Province of Good Hope…shall…be the Common Law of the Protectorate*". The concept "*Common Law*" as used in the Proclamation, and "*common law*" as used in Article 66 of the Namibian Constitution, must and does have the same meaning.

DID THE COMMON LAW RULE WHICH PROVIDES THAT ILLEGITIMATE CHILDREN CANNOT INHERIT INTESTATE FROM THEIR FATHERS, SURVIVE THE ADVENT OF THE NAMIBIAN CONSTITUTION?

[15] Article 10(2) of the Namibian Constitution provides:

> "*No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.*"

[16] In the authorotive judgment of the Namibian Supreme Court in *Muller v President of the Republic of Namibia, 1999 Nr 190 (SC),* Strydom CJ dealt with article 10(2) and stated:

> "*In regard to art 10(2), there seems to be no basis, on the strength of the wording of the sub-article, to qualify the extent of the impact hereof and to save legislation which discriminates on one of the enumerated grounds*

from unconstitutionality on the basis of a rational connection and legitimate legislative object test. As was pointed out by Mr Light this would permit a relevant legislative purpose to override the constitutional protection of non-discrimination. Article 10(2) which guarantees non-discrimination on the basis of the grounds set out therein would be defeated if the doctrine of reasonable classification is applied thereto and would be to negate that right. See Thibaudeau's case supra at 36 and Egan's case supra 103 to 197. The grounds mentioned in art 10(2), namely sex, race, colour, ethnic origin, religion, creed or social or economic status, are all grounds which, historically, were singled out for discriminatory practices exclusively based on stereotypical application of presumed group or personal characteristics. Once it is determined that a differentiation amounts to discrimination based on one of these grounds, a finding of unconstitutionality must follow." and further

"*The steps to be taken in regard to this sub-article are to determine-*

(i) *whether there exists a differentiation between people or categories of people;*

(ii) *whether such differentiation is based on one of the enumerated grounds set out in the sub-article;*

(iii) *whether such differentiation amounts to discrimination against such people or categories of people; and*

(iv) *once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of art 23 of the Constitution.*"

[17] Applying the test as laid down by Strydom C.J in the Muller – case, supra,

I conclude that;

(i) as far as intestate inheritance is concerned, there indeed exists a differentiation between legitimate and illegitimate children. In fact that is what the common law rule is all about;

(ii) as I endeavored to point out, the differentiation is based on the social status of illegitimate children. Mr Vaatz who appeared for first defendant, submitted that, today, society looks upon illegitimate children in a much more benevolent manner than was the case a couple of hundred years ago. That may be so, but it is not modern day society's views which are in issue in this matter. It is the rule of the common law prohibiting illegitimate children to inherit intestate from their fathers. That common law rule still crucifies illegitimate children for the sins of their "*lustful parents*". As I have endeavored to show, the existence of the common law rule is rooted in punishment, and not, as Mr Vaatz suggested, to create certainty for the executor when he finalizes the estate. Today, loving partners and parents, have the right to live together as a family with their children without being married. But should the father die intestate, his children may not inherit. The common law rule knows no boundaries. Whether a child was born from love or "*lust*", the rule discriminates, simply based on the status which was forced upon the child by ancient rule.

(iii) the differentiation indeed amounts to discrimination against "*illegitimate children*". By design or result, the social stigma which attached to adulterous and incestuous children was transferred to children born out of wedlock. This appears to be the case simply because the maxim "*een wyft maakt geen bastaard*" had been echoed from generation to generation, apparently without much legal philosophical reflection;

(iv) having come to the above conclusion, I hold that the common law rule did indeed became invalid, and unconstitutional on 21 March 1990. See: *Myburgh v Commercial Bank of Namibia, 2000 NR 255 (SC) @ 263 E,* where Srydom C.J, stated the following:

> "*Coming to sub-art (b) it seems to me that when interpreted in context with arts 66(1) and 140(1) that there is no conflict in this regard. Article 66(1), as previously pointed out, renders invalid any part of the common law to the extent to which it is in conflict with the Constitution. As also pointed out, this occurred when the Constitution took effect. The article does not require a competent Court to declare the common law unconstitutional and any declaratory issued by competent Court would be to determine the rights if parties where there may be uncertainty as to what extent that common law was still in existence and not to declare any part of the common law invalid.*
>
> *That has already occurred by operation of the Constitution itself where there is conflict. Seen in this context it follows that the*

> *words 'any law' in art 25(1) (b) and 'all laws' in art 140(1) can only refer to statutory enactments and not also the common law because in the first instance such laws, which were in force immediately before Independence, remain in force until amended, repealed or declared unconstitutional by a competent Court. The Constitution therefore set up different schemes in regard to the validity or invalidity of the common law when in conflict with its provisions and the statutory law. In the latter instance the statutory law immediately in force on Independence remains in force amended, repealed or declared unconstitutional."*

[18] Mr Vaatz, acting on behalf of the first defendant, made much about the fact that a declaration of unconstitutionally at this stage may have far-reaching consequences. What about the possible floodgates of litigation which may now be opened?; he asked rhetorically, and invited us to refer the issue to Parliament to be rectified. Such a request cannot be acceded to. Firstly because Parliament has already spoken. Although the Act is not yet in force, section 16(2) of the Children's Status Act, No 6 of 2006, determines that:

> "*Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance, either intestate or by testamentary disposition, be treated in the same manner as a person born inside marriage.*"

Secondly, the Namibian Constitution, as authoritively interpreted by Strydom C.J in the Myburgh-case, supra, prohibits us from referring the matter to Parliament. This is so because the words "*any law*" in article 25 of the Constitution (in terms of which a referral may take place) is not applicable to common law. Moreover, if such a referral is made, the common law rule will be deemed to be valid until Parliament has dealt with the issue.[13] What Mr Vaatz is requesting us to do, is to

[13] See: Article 25(1) (b) of the Constitution.

blow new life into a constitutionally dead common law rule as a result of such referral.

Lastly, I am quite unable to subscribe to the "*flood-gates*" argument. The Constitution is the supreme law. Inevitably, consequences will result upon a declaration of unconstitutionality, be it in respect of common law rules or legislation. But the concern should not be the consequences. With that, the law must deal in due course. "*Floodgate-litigation-arguments*" cannot cause an unconstitutional rule to survive. Sometimes, as in this case, it is indeed necessary to open the floodgates to give constitutional water to the arid land of prejudice upon which the common law rule has survived for so many years in practice.

[19] It follows that the plaintiff is entitled to the declaratory order sought.

(i) it is declared that the common law rule in terms of which illegitimate children could not inherit intestate from their fathers, became unenforceable on 21 March 1990;

(ii) the first defendant is ordered to pay the costs of the proceedings in terms of which this issue was decided, such costs to be limited to disbursements of the plaintiff, but including the cost of employing instructed counsel.

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HEATHCOTE, A.J.

I agree.

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DAMASEB, J.P.

ON BEHALF OF THE PLAINTIFF: **LEGAL ASSISTANCE CENTRE**

INSTRUCTED COUNSEL: **DF SMUTS SC**

ON BEHALF OF THE DEFENDANTS: **ANDREAS VAATZ & PARTNERS**