SUMMARY

CASE NO.: A 170/2007

DR FRANZ F STELLMACHER **Applicant**

and

W T CHRISTIAANS **First Respondent**
JACOBUS DIERGAARDT **Second Respondent**
BASIL DIERGAARDT **Third Respondent**
STOLZE DIERGAARDT **Fourth Respondent**
INVESTMENT TRUST CO. (PTY) LTD **Fifth Respondent**

SILUNGWE, AJ

06/12/2007

PRACTICE - LOCUS STANDI – Applicant sought declarator against respondents as to validity of lease agreement between him and second applicant regarding part of farm registered in second respondent's name – Second applicant married to mother of first up to fourth respondents – Marriage dissolved – Court found partnership existed between former couple in equal shares – Dissolution of partnership and appointment of fifth respondent as liquidator – Mother of respondents 1–4 executed will bequeathing part of farm registered in respondent's name – Mother subsequently died – Prior to distribution of deceased's assets, second respondent entered

into lease agreement with applicant concerning part of the farm – Applicant sought declarator against respondents as to validity of agreement – Applicant raised a preliminary point alleging that respondents 1, 2 and 4 had no *locus standi* to oppose application, firstly, because these respondents had averred in answering affidavits that the farm in second respondent's name and other assets of the deceased vested in executor, i.e. fifth respondent; and secondly, that first and fourth respondents, being heirs whose inheritance was yet to be distributed to them, were not entitled to oppose the application – Held that respondents 1, 2 and 4 had *locus standi* in the matter.

CASE NO.: A 170/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DR FRANZ F STELLMACHER	**Applicant**

and

W T CHRISTIAANS	**First Respondent**
JACOBUS DIERGAARDT	**Second Respondent**
BASIL DIERGAARDT	**Third Respondent**
STOLZE DIERGAARDT	**Fourth Respondent**
INVESTMENT TRUST CO. (PTY) LTD	**Fifth Respondent**

CORAM: **SILUNGWE, AJ**

Heard on: 2008.02.04

Delivered on: 2008.02.21

JUDGMENT:

SILUNGWE, AJ: [1] At this stage of the proceedings, the Court is called upon to consider and determine a point *in limine* raised by Mr Mouton, learned

counsel for the applicant. The point is that the first, second and fourth respondents have no *locus standi* to oppose this application. This preliminary point is, needless to say, resisted by Mr Barnard, learned counsel representing the first, second and fourth respondents. In order to put the issue into perspective, a brief sketch of the matter is apposite.

[2] The first, second, third and fourth respondents are kinsmen of the same family. The second respondent was married to Martina Louisa Diergaardt (born Christians) (hereafter referred to as Martina), the mother of the first, third and fourth respondents. At the dissolution of the marriage between Martina and the second respondent, the fifth respondent was appointed by this Court as liquidator, for the liquidation and distribution of assets of a partnership between Martina and the second respondent. The fifth respondent is not opposing this application.

[3] It is common cause that Farm Groendraai, No. 367 (Farm Groendraai) which is 88,003,890 hectares in extent, is registered in the name of the second respondent.

[4] At the instance of Martina, the marriage between her and the second respondent was dissolved on June 06, 1996, and, consequently, the Court made, *inter alia*, the following orders:

> …
>
> (3) that a partnership existed between the parties in equal shares;
>
> (4) that the aforesaid partnership be dissolved; and
>
> (5) that Investment Trust Co. (Pty) Ltd (i.e. the fifth respondent) be appointed as a liquidator with authority to realize the whole of the partnership's assets, to liquidate the liabilities of the partnership, to prepare a final account and to pay the plaintiff (i.e. Martina) half of the net profit made by the partnership.

[5] On April 17, 1998, Martina executed a will and thereby bequeathed, *inter alia*, a total of 6,600 hectares of her undivided share of Farm Groendraai to the first, third and fourth respondents. Further, she bequeathed the residue of her estate to the fourth respondent.

[6] On February 09, 2006, the applicant, a registered owner of Farm Brakkom No. 365, which is adjacent to Farm Groendraai, entered into a lease agreement with the second respondent in terms of which the western portion of Farm Groendraai, covering 29,070,000 hectares, was leased to the applicant for a period of fifteen years for a consideration of N$3-00 (three Namibian Dollars) per hectare per annum.

[7] On July 04, 2007, the applicant filed an application against the respondents for an order in the following terms:

1. declaring the applicant to be the rightful lessee in terms whereof the applicant rightfully leases from the second respondent the western portion of the farm Groendraai measuring 2098 000 hectares as per annexures “C” and “D” which portion borders the farm Brakkom;

2. that the first respondent be ordered to refrain from any action whatsoever which in any way would interfere and or disturb the free and undisturbed possession and enjoyment by the applicant of the western portion of the farm Groendraai as rented by the applicant from the second respondent as per annexures “C” and “D” hereto;

3. that the first respondent be ordered to refrain from any action which in any way would interfere with the cattle and/or any livestock of the applicant to graze on the western portion of Groendraai as described in annexures “C” and “D”;

4. that the first respondent be ordered to pay the costs of this application; and

5. that, in the event of second, third and fourth respondents opposing this application, they be ordered to pay the costs of this application jointly and severally the one paying the other to be absolved.

[8] In their opposing affidavits, the first, second and fourth respondents aver, *inter alia*, that:

(1) although Farm Groendraai is still registered in the name of the second respondent, it does not presently belong to the second respondent since "a liquidator/Executor" has been appointed to liquidate and distribute the assets of the estate of the late Martina Louisa Diergaardt, which includes Farm Groendraai;

(2) the second respondent could not have entered into a valid lease agreement until such time that the estate had been finalized and each heir received his/her specific inheritance. Any agreement or dealing with the assets of the estate can only be performed by the fifth respondent, which has not been done.

[9] Reverting to the point *in limine*, Mr Mouton's submission is that the first, second and fourth respondents have no *locus standi* to oppose this application. According to Mr Mouton, this submission is underpinned by the said respondents' own versions that the assets of a deceased vest in an executor – in this case – the fifth respondent. However, Mr Mouton goes on, the fifth respondent is not opposing this application.

[10] The argument advanced against the second respondent in the preceding para 9 is flawed in that, not only is the second respondent not a beneficiary of the deceased's estate, but more importantly, he is a party to the very lease agreement which is the subject-matter of this application. For this reason, it goes without saying that the second respondent clearly has *locus standi* to oppose the application.

[11] It is further submitted that an heir to a deceased's estate (such as the first and fourth respondents) has no rights to the assets of such estate; that ownership passes to an heir "only once the property is registered in his/her name"; and that, in the result, the first and fourth respondents have merely acquired "a *spes* (hope)" until such time as the estate has been wound up. To bolster the argument, Mr Mouton cites the South African case of *Nyati v*

Minister of Bantu Administration and Others 1978(3) SA 224 (ECD) the head-note of which reads:

> *"An executor is the only person who is looked upon by the Court as the person to represent the estate of a deceased person and conversely an heir is not placed in a position to being able to deal with the assets of the estate without executor's consent."*

The foregoing quotation is also reflected at 227A-B.

[12] It is indeed trite law that "the executor, and he alone", is legally recognized as the person to represent the estate of the deceased. In reality, no legal proceedings can be instituted against a deceased's estate, or for the recovery of, or laying claim to, any assets belonging to such estate, without joining the executor of the estate as a party to the suit. See *Nyati's* case, *supra*, at 226G-227A, and the authorities there cited.

[13] There is, however, a distinction between an heir against whom proceedings have been instituted as a respondent or a defendant in his/her personal capacity and an heir who takes legal action to vindicate the estate. With regard to the latter, as previously shown, it is not open to a beneficiary to vindicate the assets of the estate since it is only the executor that can legitimately do so. But it is permissible, in a suitable case, for such a beneficiary to sue on his own behalf in order to safeguard his right to inheritance where the right is infringed or threatened to be infringed. Although the facts in *Director of Education, Transvaal v McCagie and Others* 1918 AD 616, are dissimilar to the facts in the present matter, I find the remarks of Innes, CJ, pertinent. Those remarks, which appear at 621, read as follows:

> *"The principle of our law is that a private individual can only sue on his own behalf … The right which he seeks to enforce, or the injury in respect of which he claims damages, or against which he desires protection, will depend upon the nature of the litigation. But the right must be available to him personally, and the injury must be sustained or apprehended by himself."*

[14] What is more, in the instant case, is that it is the applicant who has brought the proceedings against all the respondents (inclusive of the first and fourth respondents) to seek a declarator (as to the validity of the lease agreement between him and the second applicant) primarily against the second respondent which, if granted, would allegedly impact negatively upon the first and fourth respondents' rights of inheritance. In these circumstances, to claim, as the applicant does, that the first and fourth respondents are devoid of *locus standi* to oppose this application is a misconception. These two respondents (like the other respondents) are interested persons who were properly joined in the application for a declaration of rights, and therefore they are entitled to oppose the main application. The significance of this is that a declarator, once granted, affects only the rights of persons who are parties to the proceedings to the extent that it becomes binding upon them in the sense of *res judicata*.

[15] It thus follows, as Van Dijkhorst aptly observed in *Family Benefit Friendly Society v Commissioner for Inland Revenue* 1995(4) SA 120 (T) at 125J-126A, that -

> "[T]he interested person against whom or in whose favour the declaration will operate must be identifiable and *must have had an opportunity of being heard in the matter. Ex Parte Van Schalkwyk N O and Hay N O* 1952(2) SA 407(A) at 411C and D; *Aglo-Transvaal Colliers Ltd v South African Mutual Life Assurance Society* 1977(3) SA 631(T) at 636C-F and see 1977(3) SA 642(A) at 655D."
> (Emphasis is provided).

Hence, the first and fourth respondents are entitled to be heard in the matter. In other words, they do have *locus standi* in this case.

[16] The expression *interested person* judicially means someone who has a direct and substantial interest in the subject matter and the outcome of the litigation. The interest must be a real interest, not merely an abstract or

academic interest. A mere financial or commercial interest will not suffice. See: *Family Benefit Friendly Society* case, *supra*, at 124F-J.

[17] A further jurisdictional factor, where a declaration of rights is sought, as in this case, is that there must be a right or obligation which becomes the object of enquiry. Such right or obligation may be existing, future or contingent, but it must be more tangible than the mere hope of a right or mere anxiety about a possible obligation. See: *Family Benefit Friendly Society* case, *supra*, at 125A. On the facts, it is self-evident that the jurisdictional factor operates in favour of the first and fourth respondents.

[18] In any event, to argue that an heir (or anyone else) against whom proceedings have been instituted (and an order is sought against him or her, a situation in which the first respondent finds himself, and/or upon whom a judgment or such order would be binding) has no *locus standi* to be heard in the matter defies logic and is untenable in law.

[19] In conclusion, and for the reasons give above, the following order is made:

1. the first and fourth respondents have *locus standi* to oppose the main application.

2. accordingly, the applicant's point *in limine* is dismissed with costs.

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SILUNGWE, AJ

COUNSEL ON BEHALF OF THE APPLICANT:

Mr Mouton

Instructed by: Conradie & Damaseb

COUNSEL ON BEHALF OF THE 1ST, 2ND AND 4TH RESPONDENTS:

Mr Barnard

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