NOT REPORTABLE

CASE NO: A 205/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

RACHEL NATHANIëL-KOCH, N.O.	**1st APPLICANT**
RACHEL NATHANIëL-KOCH	**2nd APPLICANT**
and	
EVERHARDUS PETRUS FACKULYN GOUS N.O.	**1st RESPONDENT**
CHRISTOFF TSCHARNKTE N.O.	**2nd RESPONDENT**
JOHN PULESTON AS THE DEPUTY SHERIFF OF TSUMEB	**3rd RESPONDENT**
LA ROCHELLE (PTY) LIMITED	**4th RESPONDENT**
BANK WINDHOEK OF NAMIBIA LIMITED	**5th RESPONDENT**
THE MASTER OF THE HIGH COURT OF NAMIBIA	**6th RESPONDENT**
THE REGISTRAR OF THE HIGH COURT OF NAMIBIA	**7th RESPONDENT**
THE REGISTRAR OF COMPANIES	**8th RESPONDENT**
THE EXECUTOR OF THE ESTATE LATE DANIE VAN VUUREN	**9th RESPONDENT**

MUNICIPAL COUNCIL FOR THE MUNICIPALITY

CORAM: **SMUTS, J**

Heard on: 23 May 2011

Delivered on: 07 June 2011

JUDGMENT

---

1. **SMUTS J:** [1] The applicant has brought this application in her personal capacity and in her capacity as executor of the estate of her late husband, Mr HJ Koch. The applicant met the late Mr Koch in 2004-2005 and married him in 2006. He died in October 2008. He was a German national who was subjected to lengthy extradition proceedings in which he ultimately succeeded in staving off his extradition to Germany. Those proceedings were initiated in 2002. He finally succeeded in his appeal in the Supreme Court against an extradition order some four years later.

2. [2] On 1 November 2002, Mr Koch was instrumental in creating a trust although he was not the original founder or one of its original trustees. Its two trustees are the first and second respondents in this application, although the second respondent was only appointed a trustee some time after the trust was established.

3. [3] Several years before establishing the trust, it would appear that Mr Koch was instrumental in the acquisition of shares in a company, La Rochelle (Pty) Ltd, which owns two farms in the Tsumeb area. The shares in this company, cited as the fourth respondent in these proceedings, were originally held by the late Mr Koch's previous wife until December 1997 when they were transferred to the late Mr Koch in December 1997. According to the share register, a certain Ms Rita Schwalm with whom Mr Koch subsequently cohabited, acquired the shares held by him. In terms of a deed of settlement attached to the papers, Ms Schwalm transferred the shares to the trust in November 2002 in exchange for a consideration referred to in that settlement. It would appear from the settlement that there were disputes between the late Mr Koch and Ms Schwalm and that their cohabitation ended at the time. The parties were represented and entered into that deed of settlement. Since then, the shares have been held by the trust.

4. [4] Before Mr Koch's death and in November 2007, he and the applicant executed a joint will in which they each nominated each other as sole heir/heiress of their respective estates.

5. [5] Prior to Mr Koch's death, the trust had loaned a substantial amount to the company (fourth respondent). This loan was thereafter called up by the trustees in an action instituted against the company for payment of the loan in the sum of N$11,25 million. It was instituted on 9 December 2009. On

15 December 2009 the applicant's former legal practitioners of record served a notice in that matter entitled "Notice to Intervene (join) and Defend". This notice is attached to the applicant's founding affidavit. It states:

> **"Kindly take notice that Rachel Nathaniël-Koch who was served with a summons in the above matter shall be instituting proceedings in due course to join the action and to defend."**

6. [6] No application for intervention was subsequently filed and default judgment was granted by the Registrar on 10 March 2010 in favour of the trustees and against the fourth respondent for the amount claimed.

7. [7] In this application, the applicant seeks wide ranging relief against several respondents. In the first instance, Part A of the notice of motion is directed against the default judgment. The applicant seeks to review and set it aside, alternatively to declare the granting of a default judgment as unlawful. Part B of the notice of motion is however directed at declaring the transfer of shares in the fourth respondent by Ms Schwalm to the trust as unlawful and declaring that the shares belong to the estate of the late Koch. An order is also sought in part B to declare the trust, created in November 2002, as unlawful and unenforceable and declaring that the shares in the fourth respondent belonged to the estate of the late Koch and that the loan account was thus in favour of the estate of the late Koch (instead of the trust).

8.

9. [8] The trustees, cited as first and second respondents, and the fourth respondent, oppose the application.

10. [9] Ms Schwalm is cited as the third respondent and the Registrar of the High Court cited as seventh respondent. The executor of the estate of one of the capital beneficiaries of the trust is also cited as a respondent. But the three other capital beneficiaries, two of whom are apparently located in Germany, are not however cited in this application. Certain other parties are cited for reasons best known to the applicant. These include Bank Windhoek of Namibia Limited, the Master of the High Court and the Registrar of Companies. They do not oppose this application.

11. [10] The applicant also seeks to sets aside a settlement agreement entered into by her. She contends that that settlement agreement is unlawful and unenforceable, alternatively that clause 1 of that agreement is unlawful and unenforceable. The applicant also seeks costs against any respondent opposing the application.

12.

13. [11] When the matter was called, the applicant appeared in person and submitted both written and oral argument. This had followed prior postponements in the matter after the withdrawal of her erstwhile legal practitioners of record. The postponements were granted in order to afford the applicant the opportunity to secure the services of other practitioners. That did not occur and the applicant appeared in person. The first, second and fourth respondents were represented by Mr Schickerling although written heads of

argument were prepared in advance of the hearing by Mr Heathcote SC and Mr Schickerling.

14. **Factual background**

15.

[12] Before turning to the relief sought by the applicant, I first briefly refer to certain provisions in the deed of trust. The trust contemplates two kinds of beneficiaries. In the first instance, there are current beneficiaries. These are defined as persons or bodies who benefit from the income and capital of the trust during the currency of the trust in terms of the discretionary powers vested in the trustees. They are defined as the late Mr Koch and his spouse or consort from time to time and any of their descendants and their spouses and any charitable organisation which the trustees select with the consent of the late Mr Koch.

16. [13] The second class of beneficiaries are the capital beneficiaries. There are four of them specified in the deed of trust. The vesting date of the trust is defined as the date upon which the trust fund or a part thereof vests in the capital beneficiaries in whose favour the trust has been created. The vesting date further defined is to be either a date upon which the trustees made distributions which then vested in them or the day after the death of Mr Koch subject to the proviso that the trust would continue until the capital beneficiaries have reached the age of 25 years.

17.

18. [14] During Mr Koch's lifetime, the applicant was a current beneficiary

in her capacity as his spouse until his death.

This application

19. [15] The applicant contends that the default judgment should be reviewed and set aside on the basis that she was entitled to a hearing after serving the notice which I referred to above – indicating an intention to bring an application to intervene. She also contends that the allegations contained in the summons do not make out a case in law and that the Registrar did not properly apply her mind to the enquiry before her when granting default judgement. In her written and oral arguments, the applicant primarily confined herself to the procedural question of being entitled to be heard as a consequence of her notice.

20. [16] The applicant's attack upon the transfer of shares in the fourth respondent and upon the legality of the deed of trust and subsequent settlement are based upon assertions that the establishment and creation of the trust was illegal and unenforceable because it was established at the time when the extradition proceedings were to commence and for the purpose of concealing assets given the uncertainty about the outcome of the extradition proceedings. As the applicant only met Mr Koch in 2004 the events leading to the setting up of the trust were not within her knowledge. She relies upon a number of hearsay allegations lacking in specificity with reference to her claim of the trust being illegal and unenforceable.

21. [17] The respondents raised a number of defences to the application.

The first instance, they take issue with the applicant's *locus standi* to claim both forms of relief sought by her. Secondly, they contend that the relief sought in respect of the trust is precluded by the settlement agreement which she also attacks. The respondents also contend that the application should also fail on the merits as the applicant has not made out a case for the relief which she seeks.

The counter application

22.

23. [18] The fourth respondent has also brought a counter-application against the applicant in her personal capacity for her eviction from the farm La Rochelle and for her to pay the costs of the counter-application. It is common cause that the applicant continues to reside on the farm La Rochelle where she lived with the late Mr Koch during their marriage and has stayed on the farm after his death. The counter-application is based upon the fourth respondent's ownership of the farm and that the basis upon which the applicant stayed after the deceased's death was an appointment as manager of the lodge which has since come to an end. It was alleged that she was appointed to that position by the former director of the fourth respondent on 12 February 2009 for a period of 1 year but that this agreement had been terminated when the applicant commenced employment with the Legal Aid Directorate of the Ministry of Justice at the end of July 2009. Correspondence setting out these developments is attached as well as the letter of appointment, setting out conditions, as well as notices provided to her are attached to Mr Holz's affidavit in support of the counter-claim. The correspondence includes reference to the termination of

employment and requesting her vacation of the premises. Mr Holz is the current director of the fourth respondent.

24. [19] In answer to the counter-application, the applicant admits her occupation of the farm. She disputes the appointment of the current director and his authority to bring the application. She does so without any evidential support. She also does not properly dispute her employment but rather submits, quite inexplicably, that the letters amount to inadmissible hearsay evidence as they were not confirmed by the authors. This despite the fact that the author of the letter, Mr Knouwds, made an affidavit to confirm the correspondence which he directed to her in his capacity as former director of the company. The applicant instead contends that she was **"given a lifelong right to use the house (on the farm) by the late Koch at a time when he was the director"**. This is the right asserted by her to be in possession or occupation of the farm after Mr Koch's death in defence to the counter application for her eviction.

Default judgment

25. [20] The respondents' attack upon the applicant's *locus standi* to review the default judgment is in my view well founded. The applicant had not brought any application to intervene after providing her inept notice to which I have referred. The applicant also does not provide any explanation as to why this was not done prior to the granting of default judgment. It is common cause that there were negotiations between the parties' legal representatives at the time. But no explanation is provided why a simple intervention application could not have been brought.

26.

27. [21] Rule 12 of the Rules of this Court entitles a person to join as a defendant in an action on notice to all parties at any stage of the proceedings and to apply for leave to intervene. In such an application, this Court has held that an applicant must establish a direct and substantial interest in the subject matter of the litigation and that the application is made seriously and not frivolously. [1] It is presumably because of this requirement that no application was brought, given the fact that the applicant does not establish in her founding affidavit a direct and substantial interest in the subject matter of the action in question. In the absence of intervening as a defendant in the matter, as the applicant was entitled to seek by way of application, there was no need or requirement for the Registrar to accord the applicant any form of hearing by virtue of the inept notice filed on her behalf. For this reason alone, the relief directed at the granting of the default judgment must fail.

28.

29. [22] Part A of the notice of motion directed at the default judgment would also fail by reason of the fact that the applicant has not established any proper basis for that relief. In oral argument, the applicant accepted that she bears the onus of establishing review grounds to set aside the default judgment. As I have already indicated, the applicant had no right or even any expectation to be heard by the Registrar in the absence of a proper intervention application as a defendant. Furthermore, the challenge upon the cause of action set out in the summons was not addressed in her written heads of argument nor raised in her oral argument. This was understandable. This is because it is clear to me

[1] Ex parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd 1993(2) SA 737 (NmHC).

that the simple summons did indeed disclose a cause of action by stating that the claim was for:

> **"Payment in the sum of N$11,250,000.00 being respect of monies lent and advanced at the defendant's special instance and request by means of a shareholders' loan, which amount was due and payable on demand but which amount, demands notwithstanding, the defendant failed to pay the plaintiff to date."**

30. [23] The applicant has thus failed to discharge the onus upon her to show why it should be set aside. This is quite apart from lacking the standing to seek that relief in the first place.

31.

32. **Attack upon share transfer and deed of trust**

33.

34. [24] The applicant's standing in respect of Part B of the notice of motion in which this relief is sought is also challenged by the opposing respondents. They contend that a current beneficiary would not have standing to seek this form of relief upon vesting as such a beneficiary would no longer have an interest in the trust. It is not necessary for me to express a final view on this issue by reason of the conclusion I reach with regard to the relief itself. The applicant would in any event have standing to apply to set aside the settlement agreement she entered into.

35.

36. [25] At the hearing, the applicant also accepted that she had the onus of establishing the requisites for the relief sought and directed at setting aside the share transaction, the deed of trust and the settlement agreement which she had entered into.

37.

38. [26] This the applicant would need to discharge with reference to admissible evidence. As I have already indicated, the applicant's allegations concerning the establishing of the trust are based upon inadmissible hearsay evidence. The respondents have understandably brought an application to strike out the inadmissible hearsay evidence in that regard raised by the applicant in these proceedings.

39.

40. [27] As was correctly pointed out on behalf of the respondents, joinder of Ms Schwalm as a respondent, if it were a misjoinder, would not cure the inadmissible nature of the hearsay attributed to her. In the founding papers, the applicant merely contends that the trust was created *in fraudem legis* and was a sham transaction, illegal and/or against public policy and invalid and unenforceable. These legal conclusions are asserted without a proper evidential substratum.

41. [28] It is correctly contended on behalf of the respondents that the applicants in essence seek relief in the form of an *actio pauliana*. In order to be successful in such an action, it should be brought by a creditor who would need to establish that the late Mr Koch alienated his assets and thereby diminishing his estate and that the alienation did not belong to the person who received

same and that this was done with the intention to defraud his creditors and indeed had that effect. Not only is the applicant in either capacity not a creditor of the late Mr Koch, but she also fails to identify any creditors from whom assets were allegedly concealed or who were defrauded in the process. It would not seem to me that the *actio pauliana* would find application in the present factual context. This is because the requisites for that form of relief have not been established. But quite apart from this, the applicant has not established with reference to any admissible evidence that the trust itself was a sham or was illegal or unenforceable or against public policy.

42.

43. [29] In the absence of establishing this in a proper manner, the applicant would not be entitled to the relief sought directed at setting aside the share transfer and the deed of trust. There is also nothing before me which could give rise to the setting aside of the share transfer in question.

Attach upon the settlement agreement

44.

45. [30] The applicant also challenges the deed of settlement she entered into, alternatively clause 1 of the agreement which provides:

46.

47. **“ACCEPTANCE OF DEED OF TRUST**

48. **The parties hereto agree that the deed of donation into trust dated the 1st of November 2002 of the La Rochelle Ranch Trust, executed by Danie Jansen van Vuuren on that date is accepted by all parties cited herein as valid and**

binding on them."

49. [31] The applicant says in her founding affidavit that after the death of the late Mr Koch, she became involved in a dispute with the trustees which resulted in an urgent application being brought in December 2008. The application became settled and a settlement agreement was entered into by her at a time when she was then represented by senior and junior counsel. It embodied clause 1 quoted above and certain further other provisions. Clause 5 of the agreement states:

> **"In full and final settlement of all applicant's claims against any of the respondents jointly and severally from whatever cause and how so ever arising, the parties hereto agree that on distribution of the trust assets of the La Rochelle Trust, the trustees shall pay the second applicant 20% of the amount to be distributed to the Namibian Capital Beneficiaries, being the second and third respondents."**

50. [32] The second applicant referred to in clause 5 is the applicant in this application (in her personal capacity). The applicant contends that the settlement agreement was unenforceable and against public policy because, she in essence contends, the trust is a sham and an illegality and that she would not be bound by her assent to the agreement

51. [33] It was pointed out by the respondents that in her urgent

application, (which resulted in the settlement agreement), the applicant had in late 2008, already then questioned the validity of the trust and the deed of donation which established it. In particular, I was referred to the following passage in her affidavit in support of that urgent application:

> **"Applicants' legal practitioners will investigate all of this in a forensic way. All the transfers of shares in La Rochelle (Pty) Ltd will also be forensically examined. The applicants reserve all their rights in this regard. All of this will be addressed in the trial to come".**

52. [34] Instead of proceeding with an investigation in that regard, the applicant elected, upon advice, to settle the urgent application and in doing so accepted the validity of the trust and that it was binding upon her.

53. [35] Despite the declared intention to forensically investigate the trust and its establishment and the share transactions referred to and thereafter accepting that they were, where applicable, binding upon her, the applicant has not established quite why this deed of settlement should not be binding upon her. Despite her stated intention, there is no reference to any factual matter or inference arising from an investigation after the urgent application. On the contrary, the applicant has not established any basis for the relief sought in Part B. There is instead a mere resort to empty epithets and legal conclusions and a failure to place any material before me which would lead to the trust and the transfer and settlement agreement being set aside or declared unenforceable.

54.

55. [36] The applicant's attack upon the prior settlement agreement is thus unsupported and also unsupportable in the circumstances. It follows that this attack must also fail.

Counter-application

56. [37] I have already referred to the basis for the counter-application seeking the eviction of the applicant from the farm La Rochelle. I have also referred to the applicant's defence to it.

57.

58. [38] It is clear to me that the applicant has not properly placed in issue the factual basis for the claim for eviction, based upon her employment following the death of the deceased, on the basis of the Plascon-Evans test with regard to disputed facts in motion proceedings. [2]

59. [39] The applicant instead bases her defence upon what she terms to be a **"lifelong right to use the house"** given to her by the late Mr Koch at a time when he was director of the fourth respondent.

60. [40] For such a right to be valid and enforceable, it would need to have been created by way of a testamentary disposition or in writing and would only be valid and binding upon third parties if registered against the title deed of the farm, as is correctly submitted by the respondents. Furthermore, the applicant

[2] Plascon-Evans Paints Ltd v Riebeek Paints (Pty) Ltd 1984(3) SA 623 (A) repeatedly followed in this Court.

does not even contend that any right was accorded to her by the registered owner of the farm itself, but rather by the late Mr Koch at a time when he was a director of the fourth respondent, and not by the fourth respondent itself.

61. [41] The applicant would also appear to base her claim upon her right to reside on the land by virtue of her marriage to Mr Koch. The respondents however point out that the nature of such a right is personal and not a real right in land and not enforceable against *bona fide* third parties and that it would only exist during the marriage and would cease when the marriage is dissolved by death. They do so with reference to Dique NO v Van der Merwe en andere. [3] The holding of that judgment is neatly summarised in the head note where the following is stated in the English translation:

> **"The right which one spouse has to reside on the property of the other during the subsistence of the marriage relationship is a *sui generis* right. It is a personal right and not a real right in land because it is not enforceable against *bona fide* third parties. It exists only during the marriage and ceases to exist when the marriage is resolved by death."**

62. [42] I accept that this also reflects the position in Namibia.

63.

64. [43] It follows that the applicant has failed to properly raise a defence to the counter-application and that it should thus be granted.

---

[3] 2001(2) SA 1006 (T) at 1009 - 1011

Conclusion

65. [44] In the result, I make the following order:

66.

(a) The application is dismissed with costs.

(b) The counter-application is granted with costs and the second applicant is evicted from the farm La Rochelle.

(c) The costs in question will include the costs of two instructed counsel, where engaged.

_____

SMUTS, J

ON BEHALF OF THE APPLICANTS In person

ON BEHALF OF 1st, 2nd AND 4th

RESPONDENTS Adv Schickerling

Instructed by: Koep & Partners