



CASE NO.: A 326/2010

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JAKOBUS PETRUS KLAZEN

APPLICANT

and

THE MASTER OF THE HIGH COURT OF NAMIBIA

1ST RESPONDENT

IRVIN DAVID TITUS N.O

2ND RESPONDENT

GERHARD ENGELBRECHT

3RD RESPONDENT

CORAM: MILLER, AJ

Heard on: 07-08 February 2012, 01 March 2012

Delivered on: 04 April 2012

JUDGMENT

MILLER, AJ.: [1] In this matter the applicant seeks a declarator that he was legally adopted by the late Maria Engelbrecht and her husband on 21 March 1967.

[2] The matter is opposed by the third respondent who is the only biological child of the late Mrs. Engelbrecht to whom I shall refer to henceforth as the deceased. The first and second respondents took no part in the proceedings.

[3] Although the deceased left a will, the presiding magistrate at Rehoboth found the will to be invalid and ordered that the deceased's estate be dealt with as an intestate estate in terms of Section 4 of Proclamation 36 of 1941.

[4] Likewise a Deed of Donation dated 17 February 1997 allegedly signed by the deceased and in terms whereof the deceased donates her farm, Riet No. 287, and an immovable property namely Erf 91, Block B, Rehoboth to the third respondent was not accepted by the first respondent. The first respondent was of the view that, based on facts obtained from the police, the purported signature of the deceased was placed on the Deed after she had passed away. There the matter remained and nothing turns on either the will or the impugned Deed of Donation in this matter.

[5] The only issue which requires consideration is whether the applicant succeeded in establishing on a balance of probabilities that he was in fact legally adopted by the deceased and her then husband.

[6] In his founding affidavit the applicant states in October 2004 the third respondent alleged that the applicant was not adopted by the deceased and her husband and challenged the applicant to provide proof of that fact.

[7] The applicant states that he then made enquiries at the magistrate's office in Rehoboth.

[8] Eventually as he says, he was provided with a certified extract of the Adoption Record Book kept at the magistrate office. He annexed this extract to his affidavits as "JPK4".

[9] I attach a copy of the sworn translation of this extract to this judgment. With reference to the entry numbered 4/66, he claims that to be a record of his adoption.

[10] Not surprisingly perhaps, this extract became hotly contested by the third respondent.

[11] The third respondent argues that by itself the extract is not sufficient to establish that there had been compliance with all the legislative provisions required to lawfully adopt a child.

[12] When the matter was first argued before me Mr. Narib who appeared for the third respondent submitted in addition that Annexure “JPK4” was not admissible by its mere production.

[13] I need not say more about this argument. The reason for that is that I directed that the circumstances relating to the entry numbered 4/66 be referred to oral evidence, and postponed the matter for this purpose. I subsequently heard the evidence of several witnesses on this issue.

[14] The first witness called was Ms. Vleermuis. She is employed at the Rehoboth magistrate’s court as a principal legal clerk. She produced in evidence the original Adoption Record Book from which the extract Annexure “JK4” was made. According to her, the purpose of the book is exactly what its name implies. In it is recorded the details of all applications to adopt a child, as well as the names of the applicants, those of the child and the parent or parents of the child. Once finalised the finding is recorded and in this regard she refers to the word “granted” in the appropriate column. The relevant file together with the adoption order in triplicate is then forwarded to the Registrar of Adoptions. According to her a copy is returned by the Registrar of Adoptions together with the serial number of the Registrar of Adoptions. In this case she refers to the number 1127 in the appropriate column.

[15] She also testified that the Adoption Record Book is kept in a strong room to which only she and the magistrate have access. This fact is confirmed by Mr. Hangalo, the magistrate at Rehoboth.

[16] The adoption papers together with the file has disappeared and cannot be traced according to her.

[17] I turn to the evidence given by Mr. Hillebrecht. He is the chief archivist at the National Archives. He personally conducted a search for the files of the Registrar of Adoptions which should have been archived. Although he was able to locate file number 1126 and 1128, file 1127, which is the applicant's file was not there. He then established that at some stage in the past, the adoption files were separated. The adoption files relating to members of the white population were separated from the rest and re-numbered. The remaining files were transferred to various other Ministries.

[18] This according to him took place in 1973. He was not able to ascertain where those files presently are.

[19] Mr. Marcus, who is the head of administration at the Rehoboth magistrate's office confirms that the files pre-dating 1973 cannot be found.

[20] There is nothing to suggest on the evidence in its totality that the entry made in the Adoption Record Book is anything other than authentic and made in

the ordinary cause of proceedings at the time. Clearly there was an application made by the deceased and her husband to adopt the applicant. The record book reflects that the application was granted. In the absence of anything to the contrary, I accept that the order made in granting the application was a lawful and binding order. The evidence is sufficiently cogent and persuasive to warrant such a finding and I say this despite the fact that the relevant records of the adoption could not be produced. It must also be borne in mind that the adoption order, once made by the magistrate remains a valid order until it is set aside by a competent court.

[21] In the result I grant paragraph 1 of the prayers in the Notice of Motion together with an order that the third respondent must pay the applicant's costs. Such costs will include the costs of one instructing and one instructed counsel.

MILLER AJ

ON BEHALF OF THE APPLICANT:

Mr. Small

INSTRUCTED BY:

Francois Erasmus & Partners

ON BEHALF OF THE 3RD RESPONDENT:

Mr. Narib

INSTRUCTED BY:

Kwala & Company Incorporated