

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. A 189/2015

In the matter between:

THOMAS WYSS

1ST APPLICANT

THOMAS WYSS N.O.

2ND APPLICANT

And

LEEVI HUNGAMO

1ST RESPONDENT

TEREZA HUNGAMO

2ND RESPONDENT

LACONIA CC

3RD RESPONDENT

FNB TRUST SERVICES (NAMIBIA) (PTY) LTD

4TH RESPONDENT

THE MINISTER OF TRADE AND INSUTRY, NAMIBIA

5TH RESPONDENT

THE ATTORNEY GENERAL

6TH RESPONDNET

THE MASTER OF THE HIGH COURT, WINDHOEK

7TH RESPONDENT

Neutral citation: *Thomas Wyss vs Leevi Hungamo & 6 Others* (A 189/2015) [2016]
NAHCMD 264 (13 September 2016)

CORAM: ANGULA, DJP

Heard: 8 June 2016

Delivered: 13 September 2016

Flynote: Applications and motions – Constitutionality of Section 35 of the Close Corporations Act 26 of 1988 – Consent of remaining members required when disposing off a deceased member’s interest in a close corporation - Not infringing upon a person’s right enshrined in Article 16(1) of the Constitution to acquire and dispose off property – A member during his life time has the option to dispose of his member’s interest as he wishes by making ‘other arrangements’ in the form of a testamentary disposition.

Section 58 of the Agricultural (Commercial) Land Reform Act 6 of 1995 – Prior ministerial consent required before foreign nationals may enter into an agreement in terms of which a foreign national is acquiring a right of occupation or possession in an agricultural land for a period more than 10 years or an indefinite period – Failure to obtain such consent shall result in the agreement being invalid – Application dismissed.

Summary: Applicant’s father, a foreign national, was during his life time a member of a Close Corporation which owns agricultural land. He owned 49% member’s interest. The members had concluded an association agreement which stipulates how their members’ interest would be disposed e.g. through testamentary disposition. The association agreement also granted the applicant’s father dwelling rights and hunting rights on the farm. No prior ministerial consent had been obtained by the parties pursuant to the provisions of section 58 Agricultural (Commercial) Land Reform Act, 1995, before the conclusion of the of the agreement. The deceased died intestate whereupon the applicant became the sole heir *ab intestatio* to his father estate consisting of, *inter alia*, the 49% deceased member’s interests. The remaining members refused to agree to the transfer of the deceased member’s interest to the applicant pointing out that in terms of the association agreement the deceased ought to

have made provision for the disposition of his member's interests through testamentary disposition but failed to do so. Furthermore the respondents, as the remaining members, relied on the provisions of section 35 of the Close Corporation Act, 1988 which vests them with a pre-emptive right, for their refusal to grant consent the applicant as executor of his father's estate to have the deceased member's interest transferred to the applicant in his capacity as heir. Applicant then brought an application seeking an order that as an heir *ab intestatio* he is entitled to the full and unfettered ownership of the 49% member's interest held by his late father in the Close Corporation; an order directing the executor to transfer the deceased member's interest to the applicant in his capacity as heir; and an order declaring that certain portions of section 35 of the Close Corporations Act are unconstitutional as they infringe upon the executor's right to dispose of the deceased estate's property as well as the heirs' right to receive his inheritance.

Held that - a deceased estate is not a legal *persona* and therefore has no legal rights.

Held further that - the deceased's estate, between the death of the deceased and the appointment of the executor, enjoys statutory protection through the provisions of the Administration of Estates Act of 1965 and by extension constitutional protection.

Held further that - the association agreement which gave 'a dwelling right' which was in essence an 'a right of occupation', to the deceased—who was a foreign national, to occupy an agricultural land for a period in excess of the period prescribed by the Land Reform Act—without prior Ministerial consent was in contravention of the provisions of Section 58 (1) (b) and for that reason the association agreement was illegal and void *ab initio*.

Held further that - the applicant was entitled to inherit all of the deceased's member's interest which had vested upon him at the death of his father on 30 January 2014 which was prior to the repeal of Section 62 of the Land Reform Act.

Held further that - during his lifetime the deceased's right to own and dispose his property was not interfered with or limited by the provisions of Section 35 of the Close Corporation Act, 1988; that the deceased had the right to make other arrangements as stipulated both in the association agreements and in Section 35: and that on the facts before court the applicant had failed to prove in which manner Section 35 violated the deceased's right during his lifetime to dispose of his property.

Held further that - given the nature of the office of an executor which has been described as *sui generis*, an executor does not possess an unfettered and exclusive property right or beneficiary right in respect of the property of the estate, envisaged in Article 16(1).

Held further that - on the facts before court, the applicant failed to prove in what manner the provisions of section 35 interfered with, violated and limited the executor's constitutional right to own, possess and dispose of estate property.

Held further that - upon the death of the deceased, the applicant, as intestate heir, was not vested with the *dominium* of the member's interest held by the deceased in the Close Corporation, but merely acquired a personal right against the executor for the transfer of such right or equivalent of the value of such right. The applicant's *dominium* is his personal right against the executor, represented by the residue value of the estate. The applicant as an intestate heir has no constitutional right to inherit a specific asset, such as the deceased member's interest.

Held further that - the fact that the differentiation between the testamentary heir and intestate heir is not discriminatory as it serve a rational purpose which is connected to a legitimate object. The rational purpose found its expression or recognition in the fact that the Legislature has made two statutes, the Wills Act 1953, and the Intestate Succession Act, 1934 each dealing separately with each institution of succession.

ORDER

1. The application is dismissed.
2. There shall be no order of costs against both the applicant in his capacity as an heir and the third respondent,
3. As for the applicant in his capacity as an executor and the first and second respondents, each party shall bear their own costs.
4. The Registrar of this court is directed to forward a copy of this judgment to the Minister of Lands in view of the finding in this judgment that the parties to the association agreement of Laconia CC which owns an agricultural commercial land, namely Farm Laconia No 141 situated in Otjiwarongo district, contravened the provisions Section 58 of the Agricultural (Commercial) Land Reform Act, 1995 (Act No 6 of 1995) and for the Minister to take action that the law might requires him to take in the event of the contravention of the provisions of the Land Reform Act such as in this instant matter.

JUDGMENT

ANGULA, DJP:

Introduction

[1] The first applicant is Thomas Wyss, a foreign national, residing in Switzerland who brought this application in two capacities; firstly in his personal capacity as a beneficiary and an ab intestate heir of his late father's estate; and secondly in his capacity as the appointed executor of the estate of his late father. As the first and second applicants are in fact one person acting in different capacities, they will simply be referred to as "the applicant" in this judgment.

[2] The first respondent is Leevi Hungamo. The second respondent is Tereza Hungamo. No further particulars have been provided about first and second respondents, for example whether they are related to one another in any way, say as husband and wife or brother and sister. The third respondent is a Close Corporation incorporated under the laws of Namibia with its principal place of business situated at Farm Laconia Nr 141, Otjiwarongo District (“the Close Corporation”). The Close Corporation owns and operates Farm Laconia 141. The farming activities conducted on the farm are said to be cattle and game farming, as well as conservancy. The fourth respondent is FNB Trust Services (FNB), to whom the applicant, in his capacity as an appointed executor of his late father’s estate, entrusted the administration thereof. The fifth respondent is the Minister of Trade and Industry, cited herein by reason of the interest he has in administering the Close Corporation Act, Act No 26 of 1988 (“the Act”). Some portions of a section in the Act are sought to be declared as being unconstitutional in this application. The sixth respondent is the Attorney General, cited herein in accordance with the rulings of this court that the Attorney General to be joined as a party to the proceedings where the constitutionality of a statute is being challenged.¹ The seventh respondent is the Master of the High Court in her capacity as such. According to the applicant, the third to seventh respondents are cited herein purely by reason of the interest that they might have in this matter, and as such no substantive relief is sought against them. It is only the first and the second respondent who are opposing this application. Accordingly unless stated otherwise when reference is made to the “respondents” in this judgment it is meant to refer to the first and second respondents only.

Background

[3] The applicant’s late father, Kurt Wyss (“the deceased”), was during his lifetime a member of the Close Corporation. He held 49% of the members’ interests in the Close Corporation. The respondents held the remaining 51% of members’ interests in Laconia.

¹Kavendja v Kaunazondunge N.O and Others 2005 NR 450 page 465

An Association Agreement (“the association agreement”) as envisaged by Section 44 of the Act, was concluded amongst the members during 2008.

[4] The deceased died intestate on 30 January 2011, leaving behind an estate, part of which *inter alia* consisted of his 49% of the members’ interests in the Close Corporation. On 29 July 2014, the applicant was appointed as an executor of the deceased’s estate. In the meantime, the applicant’s two sisters and a brother renounced their inheritance in the deceased’s estate which resulted in the applicant being the sole heir of the deceased’s estate. The applicant then appointed First National Bank as his agent to administer, liquidate and distribute the deceased’s estate.

[5] After the deceased’s death, the respondents put in dispute the applicant’s right to inherit the deceased 49% of members’ interests held in the Close Corporation. The respondents’ position was conveyed to the applicant’s agent, FNB, by letter dated 16 December 2014 from the respondents’ legal representative, in which it was stated that the applicant, as an intestate heir, is not entitled to inherit his late father’s 49% of members’ interest in the Close Corporation; and secondly that the respondents were entitled to be offered the deceased member’s interest at the price stipulated in clause 5.1 of the association agreement. It was further pointed out that that clause 5.3 of the association agreement, which allows for a deceased member’s interest to be bequeathed according to the testamentary dispositions made by a deceased member, did not apply to the applicant because the deceased died intestate. Furthermore, that clause 5.4 of the association agreement prohibits the transfer of a member’s interests without the unanimous consent of the remaining members. Finally, that Section 35 of the Act provides that the deceased membership can only be transferred to the heir if the remaining members consent to such a transfer. It was then recorded that the respondents will not consent to the transfer of the deceased member’s interests, whether in terms of the agreement or in terms of the Act. It was further recorded that in the event that a liquidation and distribution account of the deceased’s estate is published whereby the deceased’s interests are to be transferred or sold to any third person other than the respondents, a formal objection would be filed with the Master of

the High Court. The respondents then offered to buy the deceased member's interests at the price stipulated in the association agreement.

[6] As it would be expected, the applicant did not agree with the interpretation the respondents sought to place on those relevant clauses of the association agreement mentioned in the letter. In addition, the applicant's position was that Section 35 of the Act unlawfully interferes with, limits and violates the constitutional rights of both his father and his father's deceased estate which he is managing in his capacity as executor, to own, possess and dispose of property as contemplated by Article 16 (1) of the Constitution. Furthermore that the section interferes with, limits and violates his right to property that vests in him, upon the death of his father, to receive and own the member's interests held by the deceased. The respondents' attitude thus prompted the applicant to launch this application.

Relief sought

[7] The applicant is seeking the following relief:

"1. Declaring the following portions of section 35 of the Close Corporations Act, Act 26 of 1988 to be unconstitutional and irreconcilable with the provisions of the Namibian Constitution of 1990, and to be invalid and unenforceable:

1.1. The phrase in subsection 35(a) "...if the remaining member or members of the corporation (if any) consent to the transfer of the member's interest to such person;"

1.2. The entire subsection 35 (b).

2 Ordering and directing that the applicant is entitled to be the full and unfettered owner of the 49% member's interest in the third respondent held by the late Mr Kurt Wyss, as heir ab intestatio in the estate of Mr Kurt Wyss.

3 Ordering and directing the fourth respondent to transfer to the first applicant the 49% members' interest in the third respondent, held by the late Mr Kurt Wyss, in winding up his deceased estate under Estate number 1212/12, and to reflect such transfer in the

final Liquidation and Distribution Account to be presented in the winding up of such estate.

4. In the alternative to the above, declaring that the applicant shall be entitled, in his capacity as duly appointed executor in the deceased estate, shall be entitled in the deceased estate of the late Mr Kurt Wyss, to order and direct any entity performing the duties as estate administrator on behalf of the applicant, to transfer to the first applicant, the 49% member's interest in the third respondent, held by the late Mr Kurt Wyss, in winding up his deceased estate under the Estate number 1213/12, and to reflect such transfer in the final Liquidation and Distribution Account to be presented in the winding up of such estate.

5 Granting to the applicants such further and/or alternative relief as this Honourable Court may deem fit.

6. Directing the first and second respondents, jointly and severally, the one to pay the other to be absolved, to pay the costs of this application.

7. Directing any other respondent(s) who oppose(s) the relief sought herein to pay the costs of the application jointly and severally with the first and second respondents."

The case for applicant

[8] Most of the facts are common cause between the parties. Essentially the main disputes between the parties concern the interpretation of the clauses of the association agreement and the alleged unconstitutionality of Section 35 of the Act. As indicated above, the applicant in essence disputes, firstly the interpretation the respondents' sought to place on the provisions of clauses 5.1 and 5.3 of the association agreement; and secondly raises the question whether certain portions of Section 35 of the Act are unconstitutional. With respect to clause 5.1 of the association agreement, the applicant points out that the clause contemplated a sale of a member's interest *inter vivos* and thus it was not meant to apply to intestate succession. With regard to the provisions of clause 5.3, he argues that upon a proper interpretation of the said clause, the parties tacitly or impliedly intended that upon the death of a member the consequences of

either a testamentary disposition or intestate right to inherit will prevail over the right or demands of the remaining members.

[9] Regarding the provisions of Section 35 of the Act, the applicant contends that the section is unconstitutional in that it interferes with, limits and derogates from both the deceased and his estate's right to own, possess, and dispose his property as enshrined in Article 16 (1) of the Constitution. This is due to the fact that it compels the executor to first obtain the consent of the remaining members of the Close Corporation before the deceased member's interests can be transferred to the said heir; and by providing a mechanism through which the heir can be deprived of the property to which such heir is legally entitled. The applicant further points out that Section 35 fails to comply with the provisions of Article 22 of the Constitution in that it does not state upon which Article of the Constitution the purported entitlement to limit the applicant's Article'16 (1)'s property rights to inherit his from father's estate, whether testamentary or *ab intestatio*, is based.

The case for the respondents

[10] In opposition to the applicant's case, the respondents' main opposing affidavit is framed in response to the prayers as set out in the notice of motion.

[11] With respect to prayer 1 seeking for an order declaring certain portions of Section 35 of the Act to be declared unconstitutional, the respondents adopted the position that they will abide by the decision of the court.

[12] Regarding prayer 2 of the notice of motion in which the applicant is seeking for a declaratory order that he is entitled to be the full and unfettered owner of the deceased member's 49% interests in the Close Corporation, the respondents' position is that the property of the Close Corporation is owned by the Corporation itself and that a member only has a personal right to claim a share of the surplus assets of the Close Corporation upon dissolution. Furthermore that the interests are limited by the provisions of the association agreement. In addition, the interests would be curtailed or limited by the provisions Section 58(1) (b) of the Agricultural (Commercial) Land Reform Act (Act 6 of

1995) as amended, commonly referred to as the 'Land Reform Act', which place certain restrictions on the acquisition of agricultural land by foreign nationals and further prohibit the transfer of agricultural land to foreign nationals without the prior written consent of the Minister responsible for the land portfolio. In this respect it is pointed out that the applicant is a foreign national. Finally the respondents allege that the association agreement is null and void as being in contravention of the provisions of the Land Reform Act.

Issues for determination

[13] The issues for determination in this matter are:

13.1 Whether a deceased estate has constitutional rights.

13.2. Whether the association agreement is illegal and invalid for being in contravention of the provisions of Section 58 (1) (b) of the Land Reform Act; and

13.3 Whether certain portions of Section 35 of the Close Corporations Act are unconstitutional.

[14] I will consider the issues for determination in the sequence set out above.

Whether a deceased estate has constitutional rights

[15] The applicant's first complaint is that Section 35 of the Act is unlawful in that it interferes with, limits and violates the constitutional rights of his deceased father's estate. It is argued on behalf of the respondents in that regard that the deceased estate does not have rights; that the deceased's estate is an aggregate of assets and liabilities; and that it is not a legal person as envisaged by Article 16 of the Constitution as capable of being a holder of rights. In countering this argument, Mr Barnard for the applicant submits that if the respondents' argument were to be correct it would lead to an absurd result in that the property which is constitutionally protected under Article 16 (1) would enjoy constitutional protection up to the point of the deceased's death but before such property is transferred to the heir or the legatee, such property would not have constitutional protection and could be ravaged at liberty by any party riding roughshod over the rights that were so jealously protected by the Constitution during the deceased's life. And then when such property is transferred to the heir or legatee the constitutional protection would be revived.

[16] Mr Barnard did not refer the court to any authority for his proposition that a deceased estate has constitutional rights. Mr Corbett for the respondents on his part, in support for his position that an estate is not and does not have rights, referred the court to the matter of *Clarkson NO v Gelb*² where the following was stated:

"A deceased estate is an aggregate of assets and liabilities. It has no legal personality and, when referring to it as an entity, one must be careful not to imply or understand thereby that one is dealing with anything like a persona. The executor is vested with its administration and he alone has the power to deal with this totality of rights and obligations. He is not merely a procurator or agent. His primary duty is to obtain possession of the assets of the deceased, to realise them as far as may be necessary, to make payment of debts and expenses, to frame a liquidation and distribution account and thereafter to effect a distribution to the heirs and legatees. Heirs and legatees can claim whatever is due to them only after confirmation of the liquidation and distribution account (in terms of s 35 (12) of the Act) according to its tenor."

²1981 (1) SA 288 (W) at 293

[17] Similarly in the matter of Yoonuce v Pillay NO & Another³ the court expressed itself on the matter as follows:

“It is convenient to consider first the question whether a deceased estate is ‘a person’ capable of holding a trading licence. In considering the juristic nature of a deceased estate the learned CHIEF JUSTICE observed in Commissioner for Inland Revenue v Emary, N.O., 1961 (2) SA 621 (AD) at p. 624, that a deceased estate is an aggregate of assets and liabilities, and that, if it is a legal persona at all, it would belong to the less common class_of juristic persons which does not have natural persons as members. Lower down on the same page it was held that

‘whatever the position may in particular circumstances be before the appointment of an executor, there can be little room for the legal personality of a deceased estate once, as is the case here, an executor has been appointed’.

The question whether at common law a deceased estate, before the appointment of an executor, is a legal entity was thus left open, but the status of a deceased estate which is being administered by an executor was decided. It is unnecessary to decide definitely in this case whether a deceased estate which is not so administered is a legal persona. It appears to me the better view is that it is not. It cannot, for example, as such sue and be sued. Cf. Estate Hughes v Fouche, 1930 T.P.D. 41; Muter and Stone v Spangenberg, 2 Menz. 457”.

[18] It appears from the case law referred above that the legal position is settled namely that a deceased estate has no rights and is not a legal *persona*. That position has been reaffirmed and reiterated in a number of cases and by legal writers or commentators.⁴ Mr Barnard’s argument on this point must thus fail.

[19] The question raised in argument by Mr Barnard as to where the property resides immediately after the deceased’s death and before distribution to the heir has been considered by the learned authors in their work, Corbett *et al The Law of Succession in South Africa*⁵ at page 13, where they have the following to say:

³1964 (2) SA 286 (D) at 289

⁴See: Meyerowitz: The Law and Practice of Administration of Estate 4th edition at page 106

⁵Corbett, Hofmeyer G, and Kahn E: The Law of Succession in South Africa, 2nd edition.

“Since individual assets do not vest in an heir or legatee until they have been delivered, transferred or ceded to him the question arises in whom dominium vests: (1) before an interim curator or an executor is appointed; (2) after an interim curator but before an executor is appointed; (3) after an executor is appointed; and (4), should this come to pass, after administrators have taken over. The answer to (4) is clear: since the administrators are in the position of trustees, the ownership of assets entrusted to them vest in them, until they hand them over to the beneficiaries.⁷⁹ The answers to questions (1), (2) and (3), on the other hand, cannot be regarded as settled.⁸⁰ It may well be that, until the executor takes over, the estate forms a complex of right and duties without an owner, on the analogy of the “resting inheritance” (hereditas jacens) of Roman law.”

[20] I prefer Shrand’s view⁶ that during the interval between the date of death and the issuance of letters of executorship appointing an executor, provision is made in terms of Section 11 of the Administration of Estates Act, (Act No 66 of 1965) for the temporary custody of the estate. The question, however, is whether an estate enjoys legal or constitutional protection? In my view the estate enjoys legal protection through the provisions of the Administration of Estates Act, which vests jurisdiction over the deceased’s estate upon the Master of the High Court. The interval has been catered for by Section 11(1) (b) of the Administration of Estates Act which provides that any person who at or immediately after the death of any person has possession or custody of any property of such deceased person at the time of his death shall, unless the Master otherwise directs, retain such possession or custody of such property until an executor has been appointed. Disposal of the estate’s property by the person in possession is not only a criminal offence, but in addition, the person in possession will be liable for any estate duty payable in respect of the property concerned.⁷ It follows therefore in my view that the deceased’s estate between the death of the deceased and the appointment of the executor enjoys statutory protection through the provisions of the Administration of Estates Act of 1965. It further follows in my view as a matter of law, that during such interval, the estate property while in possession of any person or in custody of any person, such estate property enjoys constitutional protection through the provisions of the Administration of Estates Act.

⁶The Administration of Estates in South Africa, 3rd edition at page 61.

⁷See also Meyerowitz on Administration of Estates, 4th edition pages 58 -59.

Whether the association agreement is contravention of Section 58 of the Land Reform Act

[21] I will now proceed to consider whether the provisions of the association agreement are invalid as being in contravention of provisions of Section 58 (1) of the Land Reform Act.

[22] Section 58 of the Land Reform Act reads:

“58 Restriction on acquisition of agricultural land by foreign nationals

(1) Notwithstanding anything to the contrary in any other law contained, but subject to subsection (2) and section 62, no foreign national shall, after the date of commencement of this Part, without the prior written consent of the Minister, be competent-

(a) to acquire agricultural land through the registration of transfer of ownership in the deeds registry; or

(b) to enter into an agreement with any other person whereby any right to the occupation or possession of agricultural land or a portion of such land is conferred upon the foreign national-

(i) for a period exceeding 10 years; or

(ii) for an indefinite period or for a fixed period of less than 10 years, but which is renewable from time to time, and without it being a condition of such agreement that the right of occupation or possession of the land concerned shall not exceed a period of 10 years in total.

(2) If at any time after the commencement of this Part the controlling interest In any company or close corporation which is the owner of agricultural land passes to any foreign national, it shall be deemed, for the purposes of subsection (1)(a), that such company or close corporation acquired the agricultural land in question on the date on which the controlling interest so passed”. (the underlinings are mine, for emphasis)

[23] Clauses 11 and 12.1 of the association agreement afforded the deceased an unconditional right to dwell and hunt on the Farm. The said clauses read as follows respectively:

“ 11 DWELLING RIGHTS

The parties agreed that KW [the deceased] shall have the sole, unconditional dwelling right on Farm Laconia. LH [the first respondent] is entitled to accommodate a farm labourer in the existing staff quarters on Farm Laconia.

12 HUNTING RIGHT

12.1 The parties are agreed that KW shall have the sole unconditional hunting rights on Farm Laconia. LH may hunt predatory game if severe damage is caused to LH's cattle stock.”

[24] As has been noted from the relief sought and quoted earlier in this judgment, the applicant is seeking in prayer 2 of the notice of motion for a declaratory order that the first applicant ‘is entitled to be the full and unfettered owner’ of the 49% of members’ interest previously owned by the deceased in the Close Corporation. The respondents, took issue with the phrase ‘full and unfettered ownership’. The respondents—correctly, in my view—point out that such right or interests would be limited by the provisions of the association agreement to which the deceased was a party. Furthermore that such right or interest would be subject to any statutory provisions pertaining to the exercise of such right. It is clear that the statutory provisions are those contained in Section 58 of the Land Reform Act.

[25] In considering the provisions of Section 58 against the facts at hand, it appears that most of the facts fall within the purview of the provisions of Section 58. It is common cause that the Close Corporation is the registered owner of the Farm Laconia Number 141 situated in Otjiwarongo district. It is further common cause that such Farm is a commercial agricultural land and the rights attached to the Farm are subject to the provisions of the Land Reform Act as amended. It is not further in dispute that Section 58 (1) prohibits foreign nationals from entering into an agreement with any other person whereby any right to the occupation or possession of agricultural land is conferred on a

foreign national, for a period exceeding 10 years, or for an indefinite period, without the prior written consent of the Minister in charge of the land portfolio. It is common cause that the applicant is a Swiss national and thus for the purpose of the Section 58, is a foreign national. Finally, it is not in dispute that the Minister's prior consent had not been obtained before the association agreement was concluded by the parties thereto.

[26] Regarding the terms of the association agreement referred to above, it is submitted on behalf of the respondents that the unconditional dwelling and hunting rights afforded to the deceased amount at the very least, to occupation of the Farm for a period exceeding 10 years and/or an indefinite period. In countering the argument of the respondents', counsel for the applicant argues that that even though the applicant is a foreign national, he is not currently residing in Namibia and that he does not intend to occupy the Farm contrary to the provisions of Section 58 (1) (b). Furthermore, that the section contemplates rights of occupation and possession of a permanent nature, rather than a fleeting visit to a farm once or twice per year.

[27] I think there is substance in the respondents' argument that the words 'sole and unconditional dwelling rights' convey a sense of permanent occupation and not a mere visit to the Farm. A "dwelling right" is a right of occupancy which entitles a person to occupy a dwelling for as long as he/she wishes but such person is not entitled to buy the dwelling house. Clause 5.5 of the association agreement imposes an obligation on the respondents to take over from the deceased, at cost price, all the fixed improvements which were solely paid for by the deceased. The fixed improvements are described in the association agreement to include, *inter alia*, the "economic buildings" and "residential staff compound". Having regard to the main activities carried on at the Farm as indicated earlier in this judgment, namely cattle and game farming as well as conservancy, it is fair to say that these activities ordinarily require closer monitoring and attention. It would appear to me from the wording of the association agreement that the intention of the parties was that the Farm would be occupied on a rather permanent basis and would not be visited only once or twice per year, as the applicant would appear to suggest. This view is further fortified by the fact that the association agreement gave the right to the deceased to have "friends and guests" on the Farm to

hunt free of charge on the Farm. Ordinarily a person can accommodate guests on his place of residence.

[28] It is not disputed by the applicant that the association agreement is an agreement within the meaning of the provisions of Section 58 (1). Neither is it disputed that it is not subject to the provisions of Section 58 (1). Clause 8 of the association agreement provides for the effective date of the association agreement to be 15 October 2008. Having stipulated the effective date, the agreement does not stipulate a duration period or termination or expiry date. The inescapable conclusion, in my considered view, is that the agreement was concluded for an indefinite period, in contravention of the provisions of Section 58.

[29] The applicant does not allege that a written consent of the Minister had been obtained or granted prior to the conclusion of the agreement by the parties. As a matter of fact, the respondents who are party to the agreement state that according to their knowledge no Ministerial consent was obtained. The respondents are Namibians; they must have been aware of the provisions of the Land Reform Act.

[30] It has been held that an agreement whereby a foreign national purports to acquire a member's interest in a close corporation owning agricultural land for the periods prohibited in Section 58 without the Minister's consent would fall foul of the provisions of that section.⁸ In my considered view the conclusion is unavoidable, namely that the association agreement which gave occupational right to the deceased—who was a foreign national to occupy an agricultural land for a period in excess to that prescribed by the by the Land Reform Act—without prior Ministerial consent is in contravention of the provisions of Section 58 and the association agreement is therefore illegal and void *ab initio*.

[31] It is clear from provisions of the association agreement, coupled with the clear admission by the respondents that no Ministerial consent had been obtained prior to entering into the association agreements. The association agreement dealt in part with issues related to agricultural land and for that reason it is reasonable to infer that the

⁸See: Marot and Others v Cotterell 2014 (2) NR 340 (SC) at par 20

parties knew or were aware of, or alternatively ought to have known of the provisions of the Land Reform Act but chose to deliberately ignore it. For that reason I will make an order at the end of this judgment directing the Registrar of this Court to forward a copy of this judgment to the Minister of Lands and to draw the attention of the Minister to the finding of this court in the preceding paragraphs, and for the Minister to take action that the law might require him, to take in the event of the contravention of the provisions of the Land Reform Act such as in this instant matter.

[32] In a bid to avoid the consequences of the invalidity of the association agreement, counsel for the applicant sought to rely on the exemption which was contained in Section 62 of the Land Reform Act.

[33] Section 62 stipulated as follows;

“62. Exemptions under this part-

(1) The provisions under this part shall not apply to the acquisition of agricultural land by a foreign national-

(a) by virtue of any succession ab intestatio or testamentary disposition”

[34] I agree with counsel for the applicant’s submission that the words “this Part” referred to Part VI of the Land Reform Act encompassed Section 58. In other words, the effect of Section 62 was to exempt the applicability of the provisions of Section 58 on the acquisition of agricultural land by a foreign national by virtue of *ab intestate* succession or testamentary disposition. Counsel was under the impression that although there was an amendment that provided for the repeal of Section 62, such amendment was never implemented. Mr Corbett for the respondents then produced before court the Government Gazette of 17 March 2014 through which the amendment was brought into operation. It appeared from the Gazette that Section 62 (1) (a) was deleted from the principal Act by the Agricultural (Commercial) Land Reform Amendment Act, Act No 1 of 2014. The exemption thus no longer exists.

[35] A question then arises whether any of the applicant’s rights to inherit the deceased’s member interest had survived the consequence of the repeal of Section 62

of Land Reform Act. This question emerges as a result of the well-known principle of our law that the legislature would not deprive a person of his/her vested right through an amendment of a statute; and that there is a strong presumption against retrospective application of an enactment.⁹ Mr Corbett submits that the applicant's right as a sole intestate heir of the deceased member's interest only vested after the Land Reform Amendment Act, 2014, came into operation. Alternatively, only a quarter of the applicant's inheritance right vested at the death of the deceased and the other three quarters only vested in the applicant when his siblings renounced their intestate inheritance on 4 May 2014. In support of his submission Mr Corbett referred this court to the matter of *Harris v Assumed Administrator, Estate Macgregor*¹⁰ where the court stated the following at page 575;

"The position according to our common law regarding the vesting of an intestate estate and the determination of the intestate heirs may therefore be summarised as follows:

1. Where a deceased dies without having made a valid will at all, or without leaving a valid will, his intestate estate vests on the date of his death when his intestate heirs have to be determined."

[36] Furthermore the court in the matter of *Elliot v Spheris NO and Another*¹¹ expounded the principle as follows:

"Although the heirs acquire a vested claim against the executor for payment, or delivery or transfer of the property comprising his or her share, this claim is enforceable only after the liquidation and distribution account has been confirmed. But the heir becomes the owner of immovable property comprising his share only upon registration of transfer: Estate Smith v Estate Follett, 1942 AD 364 at p. 383. The result is that the heir has only a personal right, a jus in personam ad rem acquirendam, against the executor (Estate

⁹E.A Kellaway: Principles of Legal Interpretation at pages 326 -327

¹⁰1987 (3) SA 563 (A) at 575

¹¹1977 (1) SA 190 at 194

Smith case, supra; Ex parte Craig, 1946 W.L.D. 475) and obtains ownership only on transfer in pursuance of a distribution ab intestatio.”

[37] Applying the above principle to the facts, it is common cause that the deceased died intestate on 30 January 2011; and that the applicant has two sisters and a brother. The deceased estate vested upon the applicant on the date of his father’s death. It is further common cause that the applicant’s three siblings renounced their shares of the inheritance in favour of the applicant

[38] Mr Corbett’s submission that only one quarter of the deceased’s estate vested upon the applicant lost sight of the legal effect of the renunciation or repudiation. The legal position appears to be that renunciation or repudiation operates retrospectively to the date of vesting. In the matter of *Kellerman NO v Van Vuuren and Others*¹² the question before the court was whether or not the heir’s repudiation constituted a disposition of the insolvent’s right to acquire property which could be set aside as a voidable disposition in terms of s 26 of the Insolvency Act 24 of 1936. The court held amongst others that:

“[A]diation or repudiation are the two options that are available to a legatee. If he adiates, then, with retrospective effect, the right to the legacy becomes an asset in his estate. If, prior to adiating, he repudiates, or waives his right to the legacy, then, as was stated by Voet, the legacy is retrospectively rejected and never belonged to him and accordingly the right did not form part of his insolvent estate.”

[39] The legal position is therefore that if an heir elects to repudiate the inheritance or benefit, it is taken in law that the right has never vested upon such an heir. The inheritance is retrospectively rejected and never belonged to the said heir.

[40] From the principles outlined above and taking into account Mr Corbett’s argument in this regard, it would therefore appear that the three quarters of the deceased’s estate which was renounced by the sisters and the brother in the applicant’s favour is

¹²1994 (4) SA 336 at page 338 H-I; See also Meyerowitz: The Law and practice of Administration of Estates 4th Edition at pages 224-225

considered, in law, to have never vested in the said sisters and the brother. It was retrospectively rejected to the date of death of the deceased on 30 January 2011. Consequently the deceased's estate vested upon the applicant as a sole heir at the date of the deceased's death. Such vesting took place long before the repeal of Section 62 by the Land Reform Amendment Act, 2014 which only came into operation on 17 March 2014. It follows therefore, in my view, that the applicant is entitled to inherit all of the deceased's member's interests which had vested upon him at the death of his father on 30 January 2014 which was prior to the repeal of Section 62 of the Land Reform Act.

[41] It is to be recalled that in prayer 3 the applicant is seeking an order that his agent, FNB, be ordered and directed to transfer to the applicant, in his capacity as heir, the deceased member's interests held in the Close Corporation. The respondents oppose that order on two grounds: firstly that during the deceased's life time his right to own and dispose of property was limited by the provisions of Section 35, which grants the respondents the pre-emptive right to buy the deceased's members interest; and secondly, that the deceased was a party to the association agreement in terms of which the deceased had the right to make 'other arrangements', in particular, the arrangement to dispose his member's interest through testamentary disposition.

[42] I have, earlier in this judgment, found the association agreement to be in contravention of Section 58 of the Land reform Act and declared it to be invalid and void *ab initio*. The respondents' basis for the second objection to having the deceased member's interest inherited by the applicant has thus fallen away. I do not understand the Land Reform Act to prohibit a foreign national to hold a minority interest in a Close Corporation which owns a commercial agricultural land without such foreign national owning any specific right of occupation or possession granted to such foreign national. As was pointed out by the Supreme Court in the *Marot and Others* matter *supra* at para 21, a foreign national may occupy or possess agricultural land for those periods not prohibited by Section 58 (1) (b) of the Act and provided that the minister's consent has been obtained: and that the legislature chose to regulate and not to prohibit agricultural land ownership by foreign nationals.

[43] The applicant is an 'heir' within the meaning of the Section 35 of the Act. I have also found earlier in this judgment that the applicant became the sole heir of the deceased's estate following the repudiation by the sisters and the brother of their inheritance; and that such inheritance vested upon him prior to the repeal of Section 62 of the Land Reform Act. Finally, the applicant is a natural person as required by Section 29 of the Close Corporation and thus qualifies to be a member of a Close Corporation. The applicant thus qualifies to have the deceased's 49% member's interest in the Close Corporation transferred to him, except that he needs the consent of the remaining members.

[44] As indicated earlier in this judgment the respondents, as remaining members, have adopted the stance that they will not grant their consent that the applicant's portion of the deceased member's interest be transferred to the applicant. The respondents' position is premised on the provisions of Section 35 (1) (a) which vests them with a preemptive right to purchase the deceased member's interests. The applicant is driven by the respondents' stance to the conclusion that certain provisions of Section 35 (1) (a) and the entire subsection (b) are unconstitutional.

Whether certain specific provisions of Section 35 are unconstitutional

[45] The applicant has specified the provisions of Section 35 which he contends are unconstitutional, namely the following words "*if the remaining member or members of the corporation (if any) consent to transfer of the member's interests to such person*" and the entire sub-section (b). The applicant is advancing three grounds why he contends that those provisions are unconstitutional. The first ground is that Section 35 (a) is unconstitutional in that it interferes with, limits and violates the constitutional rights of both the deceased and his estate represented by the executor to own, possess and dispose of property as contemplated by Article 16 of the Constitution. Secondly, that the section interferes with, limits and violates his right to property that vested in him upon the death of the deceased, to inherit, receive and own the member's interests formerly held by the deceased. Thirdly, that the section interferes with his constitutional right

under Article 10 to be treated equally as any other testamentary heirs standing to inherit from a deceased's estate. He is accordingly seeking an order declaring those specific parts of Section 35 to be unconstitutional.

[46] Counsel for the applicant argues that Article 16 (1) of the Constitution expressly protects the rights of the "heirs or legatees" and further protects the right of an owner of property to dispose of his property to such heirs or legatees; that such protection includes both testamentary as well as intestate succession and thus applies to both legatees and heirs. Counsel then proceeds to pit the provisions of Section 35 against the provisions of Article 16 (1) and submits that the section interferes with the fundamental right to property insofar as it compels the executor to first obtain the consent of the remaining members before the deceased's members interest could be transferred to the heir and by providing a mechanism through which the heir can be deprived of the property that he/she is legally is entitled to. It is further argued that the Close Corporation Act fails to comply with the provisions of Article 22 by not stating upon which Article of the Constitution the purported entitlement to limit the Article 16 (1) property right of the legatees or heirs is based. Counsel points out that even though the Close Corporation Act bears the year 1988, it only came into operation on 25 July 1994 and thus long after the coming into operation of the Namibian Constitution. With regard to equality before the law, counsel submits that there should be no differentiation between intestate and testamentary heirs; that if a testamentary heir would be entitled to inherit the deceased member's interest in a close corporation, there can be no constitutional basis upon which the section can discriminate against an intestate heir by depriving him/her of such right to inherit.

[47] The respondents have indicated that they will abide by the decision of the court with respect to the constitutionality or otherwise of Section 35.

[48] It is would be apposite to quote the provisions section 35 parts of which are sought to be impugned as well as the relevant Articles of the Constitution which are being relied upon, in determining the constitutionality or otherwise of Section 35.

[49] Section 35 of the Close Corporations Act reads:

35 *“Subject to any other arrangement in an association agreement, an executor of the estate of a member of a corporation who is deceased shall, in the performance of his or her duties-*

- (a) *Cause the deceased member’s interest in the corporation to be transferred to a person who qualifies for membership of a corporation in terms of section 29 and is entitled thereto as legatee or heir or under a redistribution agreement, if the remaining member or members of the corporation (if any) consent to the transfer of the member’s interest to such person; or*
- (b) *If any consent referred to in paragraph (a) is not given within 28 days after it was requested by the executor, sell the deceased member’s interest-*
 - (i) *To the corporation, if there is any other member or members than the deceased member;*
 - (ii) *To any other remaining member or members of the corporation in proportion to the interests of those members in the corporation or as they may otherwise agree upon; or*
 - (iii) *To any other person who qualifies for membership of a corporation in terms of section 29 in which case the provisions of subsection (2) of section 34 shall mutatis mutandis apply in respect of any such sale.”*

[50] Article 16 (1) reads as follows:

‘All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens’

[51] Article 22 reads as follows:

'Limitation upon Fundamental Rights and Freedoms

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised any law providing for such limitation shall:

- (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;*
- (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest"*

The deceased constitutional right to bequeath his property

[52] In this context, counsel for the applicant submits that Article 16 (1) protects and enshrines the right of an owner of property to dispose of his property to such heirs or legatees; and that such protection applies to both the intentional disposition of property by testament as well as to the disposition thereof to intestate heirs through deliberate decision not to have a testament with the knowledge and the intention that, in the absence of a will the intestate heirs will inherit *ab intestate*. As a general statement of law, I agree with counsel's statement. There is no doubt that a person's right to bequeath his or her property is constitutionally protected by Article 16 (1). Furthermore a person's right to acquire all forms property is also constitutionally protected. It is stating the obvious to say that in this matter, during his lifetime the deceased's right to own and dispose his property was not limited by the provisions of Section 35. Indeed the deceased had the right to make other arrangements as stipulated both in the association agreements and by Section 35. As a matter of fact the deceased was a party to the association agreement which obliged him to make provision for the disposition of his member's interest through testamentary arrangement. It is common cause that the deceased failed to make a testamentary disposition of his member's interests. No facts have been placed before court to support the allegation that Section 35 interfered with the deceased's constitutional right during his life to bequeath his

property. On the facts before court the applicant has failed to prove in which manner Section 35 violated the deceased's right during his lifetime to dispose of his property.

The executor's constitutional right to own, possess and dispose of the estate's property

[53] I will proceed to consider counsel's second leg of argument, namely that Section 35 interferes with, violates and limits the executor's constitutional right to own, possess and dispose of property as contemplated by Article 16 of the Constitution. As I understand the legal position of an executor, he/she does not receive unfettered ownership of the property of the estate upon assuming office; the ownership vests in him or her only for the purpose of winding up and distributing the assets in the of the estate to beneficiaries, The estate of the deceased remains separate from the executor's personal estate. It would seem to me that the executor's right in respect of the estate's properties is merely possessory and temporary. He cannot for instance dispose of the estate's property for his own benefit. It is said that the executor acquires naked ownership and not the beneficiary ownership of the assets of the estate.¹³ The executor acts as intermediary between the deceased and the heir or legatee. According to Corbett *et al The law of Succession in South Africa*, the executorship is *sui generis*, a special office; an executor merely represents the estate.¹⁴ An executor is legally vested with the administration of the deceased's estate. An executor is not a principal and represents neither the heirs nor the creditors. Furthermore the executor does not succeed to the *persona* of the deceased; the executor and the deceased are distinct and separate persons.¹⁵ It would appear therefore from the authorities referred above that an executor does not possess an unfettered and exclusive property right in respect of the property of the estate envisaged in Article 16.

[54] Counsel did not specify in which way the right of the executor to possess the estate's property in this matter has been violated. On the facts of this matter as I understand it, after the executor was appointed, he took possession of the estate's

¹³Willes's: The Principles of the South African Law, 8th edition at page 354.

¹⁴ At page 6.

¹⁵Meyerowitz page 106

properties. Through his agent, FNB, the executor is in legal possession and control of the estate property.

[55] I do not agree with the argument by the applicant's counsel that Section 35 interferes with the fundamental right to property in so far as it compels the executor to first obtain the consent of the remaining members before the deceased member's interest can be transferred to the heir. The executor has no obligation or legal right to transfer a specific property to an *ab intestatio* heir like the applicant in the instant matter. The situation would have been different if the applicant was a legatee to whom the member's interest had been bequeathed. The obligation or duty of the executor is to realise the estate and thereafter to distribute the residue to the heirs. In my view the executors' right to realise the estate's property in the form of the member's interest has not been interfered with. The executor has a right to sell the member's interest to the remaining members. It is one method of realizing the estate.

Violation of applicant's constitutional property right to inherit the deceased member's interest

[56] I now move to consider the argument that Section 35 interferes with, limits and violates the applicant's Article 16 right to property that vested upon him in his capacity as heir upon the death of the deceased, to inherit, receive and own the member's interests formerly held by the deceased.

[57] It is trite that one mode of acquiring property is through inheritance, either as a legatee or as an heir. The difference between the legal position of a legatee and an heir is that: a legatee acquires a vested right to a specific thing, say a sum of money; whereas an heir acquires a vested right to what is left of the estate after debts and legacies have been paid.¹⁶

[58] Upon the death of the deceased the dominium of the deceased's estate is not vested in the heirs. The heirs are not vested with the ownership of specific assets in the estate. An heir or a legatee acquires a personal right against the executor for the

¹⁶See Corbett at page 12.

delivery or transfer of the property comprising his or her share of the estate.¹⁷ A personal right is an incorporeal property.¹⁸ Shares in a company have been recognized in South African law as incorporeal moveable property over which usufruct can be established, thereby making it easier to recognize shares as a constitutionally protected property right.¹⁹ By parity of argument, I feel persuaded by the reasoning in *Cooper's* matter to hold that the same position prevails in Namibia, namely that an incorporeal right such as shares or membership interest enjoys protection under the Constitution.

[59] Applying the legal principles outlined above, it would appear to me that upon the death of the deceased, the applicant as an intestate heir, was not vested with the *dominium* of the member's interest held by the deceased in the Close Corporation, but merely acquired a personal right against the executor for the transfer of such right or equivalent of the value of such right. The applicant's *dominium* is his personal right against the executor represented by the residue value of the estate. In my view, the applicant as an intestate heir has no constitutional right to inherit a specific asset, such as the deceased's member's interest in the instant matter. The applicant's personal right to claim from the executor the transfer of the value of the right represented by the member's interest have not in any manner been interfered with or violated by the provisions of Section 35. It follows therefore, in my considered view, that Section 35 does not interfere with, limit or violate the applicant's Article 16 right to property.

Equality before law for the intestate and testamentary heirs

[60] Counsel for the applicant submits that there should not be any differentiation between intestate and testamentary heirs, both of whose rights are protected by the Constitution. If a testamentary heir would be fully protected to inherit the member's interests in a Close Corporation, then there can be no constitutional basis upon which Section 35 can discriminate against an intestate heir by depriving him/her such right to

¹⁷Commissioner for Inland Revenue v Estate Crew 1943 AD 656 at page 692

¹⁸Silberberg and Schoeman's The law of Property p 40-41, 4th edition

¹⁹Cooper v Boyes NO and Another 1994 (4) SA 521

inherit. In support of his submission, counsel cited the judgment in the matter of *Frans v Paschke and Others*²⁰ where the court had an occasion to consider whether certain common law rules were discriminatory in that they prohibited a certain class of intestate heirs from deriving a benefit from a deceased's estate from which they would otherwise have been entitled to inherit. Applying the judgment in *Muller v President of the Republic of Namibia*²¹ the court held that there should be no differentiation between legitimate and illegitimate children in determining whether children from any categories could inherit intestate from their parents. Counsel then submits that by the same token there should be no differentiation between intestate and testamentary heirs.

[61] The way I read and understand Article 16, is that it vests the right in a person to bequeath his/her property to his/her heirs or legatees. It recognizes and embraces the right to testamentary freedom. If counsel's argument were to be accepted as correct, it would throw overboard the whole institution or system of intestate succession as applied today. In my view, the argument also undermines the testator's constitutional right to dispose his property to whom he chooses. Furthermore if the differentiation between testate and intestate heir were to be done away with it might result in a situation where the intestate heir may demand to inherit specific property which the deceased did not bequeath to or intend that such intestate heir should inherit such property.

[62] The approach of a court to Article 10 (1) right, was first set out in the matter of *Mwellie v Minister of Works, Transport and Communication and Another*²² which was confirmed by the Supreme Court in the matter of *Muller supra*. The court reasoned as follows:

'article 10 (1) ... is not absolute.... It permits reasonable classifications which are rationally connected to legitimate object and that the content of the right to equal

²⁰2009 (1) SA 527 HC

²¹1999 NR 190 (SC)

²²1995 (9) BCLR 1118 (NmH).

protection takes cognizance of “intelligible diferencia” and allows provisions therefore’

[63] The Supreme Court confirmed the reasoning in the *Mwellie* matter as follows:

“The questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose”.

[64] In my view the differentiation between an intestate heir and a legatee is not discriminatory as it serves a rational purpose connected to a legitimate purpose. The law of testate succession is to be found in the Wills Act No 7 of 1953 and the common law. The common law of testate succession is based on the principle of freedom of testation which guarantees that the testators’ constitutional right to dispose of his property to whomever he or she wants, is respected and implemented after his or her death. According to the principle, testators are free to dispose of their assets regardless of the interests of intestate heirs.²³ The law of intestate succession is to be found in the Intestate Succession Act, 1934, (Act No 13 of 1934) and the common law. The fact that the differentiation between the testamentary heir and intestate heir serves a rational purpose found its expression or recognition in the fact that the Legislature has made two statutes, the Wills Act and the Intestate Succession Act dealing with each institution. In my view, if the differentiation were to be done away with, not only would it violate the testator’s constitutionally protected right of freedom of testation but it would also have the undesirable consequence in that the entire system of succession as known and applied today will be in turmoil.

[65] In support of the submission that Section 35 is unconstitutional, Mr Barnard referred the court to the critic of the provisions of Section 35 by the learned authors of

²³Corbett et al Succession at page 33-34

Henochsberg on Close Corporation (Electronic Version) at page 79 where the following is stated:

“The intention of the Legislature is not clear. It is provided that the executor is obliged to transfer the interest to the legatee or heir “entitled thereto” if the remaining member or members (assuming his or their existence) “consent to the transfer of the member’s interest to such person”; and it is further provided that this is “Subject to any other arrangement in an association agreement”. Does this mean, first, that, assuming there is no “other arrangement”, a refusal of consent by the remaining member or members may effectively prevent the enforcement of the right of the legatee or heir to the transfer even though derived ab intestate or under a will or a redistribution agreement? If this is the meaning, it is submitted that the situation created is quite extraordinary: it entails that such member (members) has (have) the power to prevent the executor distributing the interest otherwise according to law and, in the case of a right derived from a will or a redistribution agreement, to frustrate the intentions of the testator or the parties to such agreement. Assuming, second, that there is another “arrangement”, ex hypothesi the deceased would have been a party to it (s 44 (1)). If it provides for a devolution of the interest otherwise than in accordance with the entitlement of the heir or legatee derived ab intestate or under a will or a redistribution agreement, is it intended that it is to override such entitlement? If it is, is it also intended that, notwithstanding its terms, the remaining member or members (assuming his or their existence), who ex hypothesi also was a party, or were parties, to it, can effectively prevent its implementation by refusing to consent to the relevant transfer? It is submitted that, if it is the case, this is also an extraordinary situation: it entails that, in this context, one may breach a contract with impunity. If it is not intended that the “other arrangement” is to override such entitlement, it is difficult to understand what purpose the reference to it is supposed to serve.”
(emphasis supplied)

[66] The learned authors continued (at page 80):

“Accordingly, how in practice is one to apply these provisions (assuming they are not open to attack as being constitutionally invalid)? If there is another “arrangement”, and it

creates a right in A to transfer of the interest, it is respectfully considered that, on the basis that the Legislature does not intend to authorise breach of contract, the executor must transfer the interest to A if he is qualified for membership and the remaining member or members (assuming his or their existence) cannot prevent the transfer by purporting to withhold his or their consent; in other words, the part of the section reading "Subject to any other arrangement in an association agreement" controls also the words "if- the remaining member or members of the corporation (if any) consent to the transfer of the member's interest to such person". Thus, A is entitled to the interest even if he is not, entitled thereto qua legatee or heir or under a redistribution agreement; and further, if another is entitled thereto qua legatee or heir or under a redistribution agreement, such entitlement must yield to A's entitlement. If there is no "other arrangement", it is respectfully submitted that, giving language its ordinary meaning, the conclusion is inescapable that the Legislature intends to empower the remaining member or members, if any, to veto a transfer of the interest even to one who is entitled thereto qua legatee or heir or under a redistribution agreement; and he or they may exercise this power for any reason whatsoever and even if their object is ultimately to exercise the right of pre-emption under para (b) (iii). The legislature thus intends that inter alia a member's interest is not property necessarily capable of unrestricted distriacted disposition by will." (emphasis supplied)*

[67] I agree with the learned author's conclusion that the Legislature intends to empower the remaining member or members, if any, with the right to veto a transfer of the interest even to one who is entitled thereto *qua* legatee or heir or under a redistribution agreement; and he/she or they may exercise this power for any reason whatsoever, even if their object is ultimately to exercise the right of pre-emption under Para (b) (iii). The learned author's conclusion appears to be well founded when the veto to transfer the deceased member's interests involves a legatee or under a redistribution agreement. That is not my concern in the present matter. I am not called upon to decide the right of a legatee to inherit a member's interests. The issue before me relates to an intestate heir. I have already concluded that the remaining members' veto does not impugn or violate the personal right of the intestate heir because such heir has no right to inherit a specific property, such as a member's interest.

Costs

[68] There remains the issue of costs. Counsel for the respondents submits that no order of costs should be made against the first, second and third respondents. On the other hand counsel for the applicant submits that it would be unreasonable to allocate any part of the costs order to the third respondent and therefore no cost order should be allocated to the third respondent. I agree. In my view, the third respondent was neutral on the issues in dispute between the applicant and the respondents. For that reason I cannot see any basis why it should be saddled with costs.

[69] The applicant in his capacity as heir has tried to assert what he perceived as his constitutional right, which he thought or was advised to have been violated. Citizens should not, in deserving cases, be discouraged or punished by adverse costs orders, to approach the court to assert what they perceived to be or had been advised to consider that their constitutional rights had been violated. In my considered view this was one of those deserving cases. Accordingly there shall be no order of cost against the applicant in his capacity as heir.

[70] I have found that the respondents and the deceased were parties to an unlawful and illegal transaction. The deceased's estate is represented by the executor in this matter. I consider it to be appropriate and as measure of disapproval of the conduct of the parties to an illegal transaction that there should be no order of costs. Accordingly, the applicant as an executor and the first and second respondents, each party shall bear their own costs.

[71] In the result, I make the following order:

1. The application is dismissed.
2. There shall be no order of costs against both the applicant in his capacity as an heir and the third respondent,

3. As for the applicant in his capacity as an executor and the first and second respondents, each party shall bear their own costs.

4. The Registrar of this court is directed to forward a copy of this judgment to the Minister of Lands in view of the finding in this judgment that the parties to the association agreement of Laconia CC which owns an agricultural commercial land, namely Farm Laconia No 141 situated in Otjiwarongo district, contravened the provisions Section 58 of the Agricultural (Commercial) Land Reform Act, 1995 (Act No 6 of 1995 and for the Minister to take action which the law might requires him to take in the event of the contravention of the provisions of the Land Reform Act such as in this instant matter.

H Angula
Deputy Judge President

APPEARANCES

APPLICANTS:

Mr Barnard

Instructed by Mueller Legal Practitioners

1st, 2nd & 3rd RESPONDENTS:

Mr Corbett

Instructed by Ellis Shilengudwa Inc.

5th, 6th & 7th RESPONDENTS:

Ms Van der Byl

Instructed by Government Attorney