

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2017/00118

VICTORINE NGUMERITIZA TJIVIKUA

APPLICANT

And

MASTER OF THE HIGH COURT

FIRST RESPONDENT

TUISANE TJIVIKUA

SECOND RESPONDENT

UNDJEE JACKY TJIVIKUA

THIRD RESPONDENT

ANNA KAMUTUUA TJIVIKUA

FOURTH RESPONDENT

MARCELLA UEJAA ZERAUA

FIFTH RESPONDENT

MERCIA KATUPOSE

SIXTH RESPONDENT

YOLLETTA CAMPBELL N.O

SEVENTH RESPONDENT

Neutral citation: *Tjivikua v Master of the High Court* (HC-MD-CIV-MOT-GEN-2017/00118) [2017] NAHCMD 278 (09 October 2017)

Coram: UEITELE J

Heard: 20 September 2017

Delivered: 27 September 2017

Reasons Released 09 October 2017

Flynote: Will - Where the original will has been destroyed or lost or otherwise cannot be produced, although not cancelled or set aside- the absence of the original will must be satisfactorily accounted for.

Summary: Bartholomeus Tjivikua, the deceased, of Farm Sargberg in the District of Otavi, died suddenly and unexpectedly on the 9th of November 2015. His surviving spouse, Victorine Ngumeritiza Tjivikua, is the applicant in this matter. On the 9th of July 2007 the deceased, duly attested to a Last Will and Testament.

The applicant when she reported the deceased's estate to the Master of the High Court could not produce the original of the will. She could only produce a copy of the will. When the Master of the High Court refused to accept a copy of that Will the applicant approached this Court amongst other reliefs seeking an order directing the Master of the High Court to accept a copy of the deceased's Will that was executed and duly attested to, on the 9th of July 2007.

The third and fourth respondents opposed the applicant's application. The basis on which they opposed the application is their allegation that during his lifetime the deceased informed them that he had executed a new will in which he had taken care of all the children and his wife.

Held that before the Court can direct the Master of the High Court to accept a copy of a Will as the last Will and Testament of a deceased person the applicant must, on a balance of probabilities show (a) that the will was properly executed and attested to in the first place (b) that the original will was not revoked by the deceased and (c) that there was no unrebutted presumption that the deceased had revoked the will.

Held further that a principle which is fundamental to all notice of motion proceedings is that if a litigant knows in advance that there will be a material dispute of fact, the litigant cannot go by way of motion and affidavit. If he nevertheless proceeds by way of motion he runs the risk of having his case dismissed with costs.

Held further that the applicant ought to and must have foreseen that a dispute of facts will arise on the affidavits but she penned her hope on prayers to intercede, but that the hope and the prayers did not intercede. The application was accordingly dismissed.

ORDER

- 1 The application is dismissed.
- 2 The costs of this application must be paid from the estate, such costs to include the costs of one instructing counsel and one instructed counsel in respect of both the applicant and the respondents.
3. It is recommended to the Master for her to consider appointing joint executors, one nominated by the major children of the deceased and one nominated by the applicant.

REASONS

UEITELE, J:

Introduction

[1] Bartholomeus Tjivikua, (I will, in this judgment refer to him as the deceased) of Farm Sargberg in the District of Otavi, died suddenly and unexpectedly on the 9th of November 2015. His surviving spouse, Victorine Ngumeritiza Tjivikua, is the applicant in this matter. The applicant amongst other reliefs seeks probate of a will which, was executed by the deceased, and duly attested to, on the 9th of July 2007.

[2] The first respondent is the Master of the High Court, the second, third and fourth respondents are the biological children of the deceased and the seventh respondent is the curator *ad litem* for the minor children of the deceased and the applicant. The status of the fifth and sixth respondents was not set out in the pleadings before me.

[3] The Master of the High Court refused to accept the copy of the will dated the 9th of July 2007, as of course she is obliged to do without an order of this Court. Although the Master has refused to accept a copy of the will she does not oppose

the application and has indicated that she will abide by the decision of this Court. The second respondent has also not opposed the application, but the third and fourth respondents, oppose the application and have filed answering affidavits.

Background

[4] The background facts of this matter are briefly these: The deceased left Namibia as a political refugee during the mid-1960s. When he left Namibia, the deceased left behind a son by the name Tuisanee Tjivikua, who is the second respondent in this matter. The deceased lived and studied in Poland during the mid-1960s until 1971 when in July 1971 he moved to Sweden.

[5] While in Sweden he met a lady by the name Karin Elsa Margareta Bergman and married her on 22 March 1975. From the marriage between the deceased and the said Karin Bergman -Tjivikua one child by the name Anna Kamatua Tjivikua was born, she is the fourth respondent in this matter. From the papers before me it is not clear as to when the deceased returned to Namibia, but what is clear is that on 5 October 1984 the marriage between Karin and the deceased was dissolved by a divorce decree.

[6] On his return to Namibia the deceased married a lady by the name Charlotte and from his marriage with Charlotte Tjivikua a girl by the name Undjee Jacky Tjivikua, was born she is the third respondent in this matter. Charlotte Tjivikua died on 1 August 1997. During 1997 or 1998 the deceased met the applicant and during their relationship two children, Kokuwa Tjivikua, a minor girl, (born on the 4th of June 1999), and Tuukondja Tjivikua, a minor girl, (born on the 13th of April 2002) were born. These two minor children are represented by the seventh respondent in her capacity as *curator ad litem* and she in that capacity does also not oppose the application. During the year 2002 the deceased and the applicant concluded a traditional marriage.

[7] The third respondent alleges that the deceased suffered from an enlarged heart from the time that he was a political refugee in Sweden and that in the year 2000 he underwent a heart surgery in South Africa and was also fitted with a

pacemaker. In the year 2007 the deceased had a stroke. On 9 July 2007 the deceased executed a Will. The original Will could not be produced but the applicant produced a copy of the will and hence this application. During January 2008 the deceased and the applicant concluded a civil marriage.

[8] In terms of the Will executed on 9 July 2007, the deceased:

- (a) appointed the applicant as the Executrix of his estate;
- (b) bequeathed, in equal shares, his house situated at Erf No 3691 Katutura, Windhoek, together with all the furniture at the time of his death to UNDJEE JACKY TJIVIKUA, KOKUWA TJIVIKUA and TUKONDJA TJIVIKUA on the condition that they will reside at the said house until the youngest reach the age of 21 (twenty one) years, whereafter they can decide whether they want to sell it or not;
- (c) bequeathed to NGUMEE KAUTIRA (who is the applicant) his farm SARGBERG NO 585, Situate in the Otavi District; all his livestock at the time of his death, his Ford Bantam motor vehicle and the cash in his estate after paying all his debts at the time of his death including the costs of winding up his estate.

[9] With the above brief background I now turn to deal with the relief sought. I do so by first briefly setting out the legal principles governing the relief sought.

The basic legal principles

[10] Before the Court can direct the Master of the High Court to accept a copy of a Will as the last Will and Testament of a deceased person the applicant must, on a balance of probabilities show:

- (a) that the will was properly, executed and attested in the first place;¹

¹ *Prinsloo and Another v Master of the Supreme Court (OFS) and Others* 1960 (3) SA 882 (O).

- (b) that the original will was not revoked by the deceased;² and
- (c) that there was no unrebutted presumption that the deceased had revoked the will.³

[11] In the matter of *Mineworkers Union of Namibia v Rössing Uranium Ltd*⁴, Levy J stated that a litigant desiring judicial relief can proceed to Court in one of two different ways. The litigant can issue an appropriate summons with particulars of claim in which its case is set out and the defendant will have to file a plea to reply to the allegations in the particulars of claim. The plaintiff can, but rarely does, replicate to the plea. In any event the matter will then be set down for trial and both sides will call witnesses to give oral evidence. The witnesses are cross-examined and their credibility will be assessed by the court.

[12] The learned judge went on to say that the other procedure is by way of notice of motion and affidavits. There can be no cross-examination of affidavits and therefore an assessment of credibility of witnesses is hardly possible. Consequently the procedure by way of summons is the only correct procedure where there is a genuine and substantial dispute of fact. If the matter proceeds by way of notice of motion and affidavits and a dispute develops (on the affidavits) the matter will be referred to trial for oral evidence. The net result is that very little, if any, time will be saved by initiating notice of motion proceedings. The judge said:

‘A principle which is fundamental to all notice of motion proceedings is that if a litigant knows in advance that there will be a material dispute of fact, the litigant cannot go by way of motion and affidavit. If he nevertheless proceeds by way of motion he runs the risk of having his case dismissed with costs.’⁵

² See the case of *In Re: Tempelman's Estate* 1900 (17) SC 226 the following was stated: ‘A case may arise, however, where the original will has been destroyed or lost or otherwise cannot be produced, although not cancelled or set aside. If the absence of the document can be satisfactorily accounted for, and the fact that it has not been cancelled established beyond a doubt, the court may give effect to the contents of the will without requiring the production of the document itself.’ Also see *Ex parte Warren* 1955 (4) SALR 326.

³ *Dreyer v Master of the High Court of Namibia and Another* (Case No. A 28/08) [2008] NAHC 107 (delivered on 28 July 2008) and also *Ex parte Warren* 1955 (4) SALR 326.

⁴ 1991 NR 299 (HC).

⁵ *Ibid.*

Did the applicant discharge the *onus* resting on her?

[13] In her founding affidavit the applicant set out the circumstances under which the Will dated 9 July 2007 was executed. On this point there is no doubt at all that the Will and the copy of the Will that is attached to the notice of motion were properly executed and attested.

[14] In her affidavit the applicant stated that after the deceased executed the will he left the original Will with the lawyer who drafted it. The lawyer who drafted the Will which forms the subject matter of this application confirms in an affidavit that he drafted it on the request of the deceased and that two of the staff members of the law firm that employed him at the time witnessed the signing of the Will and the two staff members also deposed to confirmatory affidavits confirming that they witnessed the signing of the Will. The lawyer states that the original Will was placed on the deceased file which was kept at the firm.

[15] The applicant further mentions the efforts she made, to no avail, to obtain the original of the Will that forms the basis of this application. She mentions that the deceased never informed her that he revoked the Will. The fact that there is no evidence that the Will was, on the probabilities, in possession of the deceased does in my view not give rise to the rebuttable presumption that the deceased destroyed the original *animo revocandi*. There is therefore no presumption which the applicant has to rebut.

[16] The only question that remains is whether the applicant has on a balance of probabilities established that the deceased did not revoke the Will which he executed on 9 July 2007. The applicant in respect of the Will dated 9 July 2007 stated the following in her affidavit:

'Up to the time of his passing, my late husband never once revoked his will and Testament. If he did he would have told me so but to the contrary he on several occasions reminded me about its existence and the fact that I has (*sic*) a copy thereof. To that end he, shortly and prior to his death, reminded me again of the fact that in the event of his death,

that everything would be dealt with in accordance with his will and Testament and that I should not be concerned about the children and my future as he has dealt therewith in his Will.'

[17] The above evidence is disputed by both the third and fourth respondents. The third respondent in her affidavit states that she and her father, the deceased, had from time to time been speaking and that during one such conversation he mentioned to her that he has drafted a Will and that he has taken care of all his children including those of the applicant from her previous relationship. Mr Strydom on behalf of the applicant applied that that part of the evidence be struck from the affidavit as it constitutes hearsay evidence. Ms Schimming-Chase who appeared for the third and fourth respondents conceded, in my view correctly so, that the third respondent's evidence as regards to what her father, the deceased, told her constitutes hearsay evidence and is thus inadmissible.

[18] The fourth respondent on the other hand testified, in her affidavit, as follows:

(7). I knew about my father's earlier will, a copy of which the applicant seeks to have received and accepted by this court as my father's last will and testament. I found out about the will during a conversation with my father in July 2008 when I visited Namibia with my partner and our first born. I was not happy about the will, but my father had had a stroke and told me he was anxious and wanted to make sure that the youngest children, who were minors, could be taken care of should he die, as the applicant neither had occupation nor income of her own, and Farm Sargberg was highly mortgaged. I accepted his decision.

(8). After the conclusion of the agreement of sale between my father and Ohorongo Cement (Pty) Ltd in August 2009, the couple became wealthy. In September 2009 my father, the applicant and my two minor siblings came to Sweden to visit my mother and me. They spend more than a week at my place in Gothenburg and during our conversations that week my father expressed great relief that the deed of sale was signed and he now had the possibility to arrange the future by leaving a legacy for all of his children. After the week in Gothenburg my father and his family spent a whole week with my mother at her place in Atran. After a couple of days I joined them in Atran and on one evening my mother, my father and I had the opportunity to sit down and talk about the future. My father expressed that once back in Namibia he planned to arrange for my and my child's future. I recall that during October 2009 after my father and his family returned to Namibia, I had a telephone

discussion with my father and he asked me to send him my extract of the Swedish population register including information on me, and my child, as he was busy planning his estate.

(9). I recall that during our visit at Farm Sargberg over Christmas and New Year 2011/2012 my father, the applicant and I had a meeting outside. My father told me about a new will and he was happy and proud that he now had secured the future for everyone in the family, even for generations to come. He told me this in front of the applicant and mentioned that he wanted to take all the children to see the will. The applicant raised no objections. Unfortunately there was no time to arrange such a visit as the extended family spend the holidays at the farm and at the couple's house in Swakopmund, after which I and my family returned to Sweden.'

[19] This evidence by the fourth respondent clearly raises a dispute of fact which in my view cannot be resolved on the papers. Mr Strydom requested me to exercise my discretion and refer the matter to oral evidence on that narrow aspect of whether a conversation during the year 2011/2012, where the deceased, the fourth respondent and the applicant were all present and where the deceased allegedly stated that he has a new Will in terms of which he has taken care of all his children, did take place. Mr Strydom motivated his request by submitting that the applicant did not foresee a potential dispute of fact.

[20] Ms Schimming-Chase disagreed and argued that the applicant foresaw or ought to have foreseen the dispute of fact but failed to state that in her founding affidavit. She further argued that when the facts were raised by the third and fourth respondents the applicant downplayed those facts.

[21] I have indicated elsewhere in this judgment that motion proceedings are only appropriate where it is not foreseeable that there will be material dispute of facts in the affidavits. Masuku AJA⁶, (as he then was) said the following:

⁶ *Groening v Standard Bank of Swaziland* (01/11) [2011] SZICA 7 (23 March 2011).

[22] . . . the applicant must fully consider the matter on the information available; its merits and demerits and cast his eyes ahead on the probabilities whether a dispute is likely, given all the facts at hand, to arise.

[23] In this regard, a reasoned, sober and mature assessment must be brought to bear on the entire conspectus of available facts and documentation then at the applicant's disposal.

[24] It is then, in my considered opinion, that an informed decision can properly be made as to whether in all the circumstances, a dispute of fact is likely to arise. In this regard, the applicant must, using reasonable foresight, act as a reasonable man, as the *diligens paterfamilias*, would. An applicant should not, at that stage, shoot from the hip as it were and institute application proceedings, resting on the forlorn hope and deep intercessory prayer that a dispute, though foreseeable, does not actually arise.'

[22] I am not convinced that the applicant in this matter did, on the entire conspectus of available facts and documentation, act as a reasonable person, as the *diligens paterfamilias*, would. The applicant in my view, and to borrow from the words of Justice Masuku, 'shot from the hip as it were and instituted application proceedings, resting on the forlorn hope and deep intercessory prayer that a dispute, though foreseeable, does not actually arise.'

[23] I say so for the following reason. In her affidavit the applicant states as follows:

'27. I have since his passing come to know that several claims have been submitted to the Master of the High Court against his estate' copies of these claims are annexed hereto marked "**VNT10**" and "**VNT 11**" respectively.

28. At the onset I wish to state that I do not agree with the allegations raised in these claims against me in person. I further must point out that I do not know the 5th and 6th respondents and to that end have never heard of them before. I can also not recall that my late husband has ever mentioned these persons as possible adopted children and/or possible heirs to his estate.

29. The unfortunate effect of his last will and Testament is that none of the 4th, 5th and 6th respondents stand to inherit from his estate' In the event of him passing

intestate, then the 5th and 6th respondents in any event would not inherit unless they can prove that he legally adopted them.'

[24] A proper reading of 'Annexure VNT 11' reveals that that document is not a claim against the deceased's estate but it is objection raised against the acceptance of the will executed on 9th July 2007. The document is titled: '*CONCERNS REGARDING E/L BARTHOLOMEUS TJIVIKUA FILE NO. 1808/2016*' and it amongst other things reads as follows (I quote verbatim from the Annexure VNT 11):

'1) THE WILL OF 2007 IS INVALID

(a) According to our dad this is not the last will

Information about the 2009/2010 will (that of course should have caused the revoking of the 2007 will) was told separately to Mr. Bartholomeus Tjivikua's grown-up daughters during the last couple of years before his passing. He talked about the will in great detail to Undjee and told her not to worry as Ngumee, the wife, had all the necessary information about where the will was drawn. It was a mutual will drafted in order to regulate everything should something happen to either of the spouses: both to guarantee that neither of husband and wife could ever cheat the other by stopping to care about the other's children and also to ensure that all children in the family were presented equally, i.e. Victorine N. Tjivikua's two grown-up daughters Yolanda and Gisella, from an earlier relationship, are added in Bartholomeus Tjivikua's will and in the same way, in Victorine N Tjivikua's will, are mentioned as heirs also Mr. B Tjivikua's grown-up daughter Anna Kamatuua and Undjee. We also know that Mr. B Tjivikua's son, Tuisanee Tjivikua born 1962-01-5, is excluded from the will, which Mr. Barth Tjivikua told his daughter Undjee.

A private meeting was held at Farm Sargberg at Christmas/New Year 2011/2012 with Bartholomeus Tjivikua, Victorine N. Tjivikua and Bartholomeus' daughter from Sweden, Anna Kamatuua Tjivikua. Barth told Kamatuua about the new will and that it was securing the future of the whole family and even generations to come. Bartholomeus even told Kamatuua that he wanted to take all the children to see the will. Unfortunately there was no time as the family spend the holidays at the Farm and at the couple's house in Swakopmund and because Anna Kamatuua Tjivikua and her family soon afterwards had to return to Sweden.

(b) The will is old and not updated.

The will from 2007 was drafted before the couple got married (in community of property) During this time Bartholomeus Tjivikua was in poor health from a stroke he had suffered and the couple lived on the pension from Mr. B. Tjivikua's job as an engineer.

The livelihood of the Late B. Tjivikua changed dramatically after 2009, whereby he acquired additional assets that are not reflected in the will dated July 2007. There was a significant sale of farm land to Ohorongo cement, an additional farm (Farm Mignan) and house (in Swakopmund) was purchased . . .'

[25] The document titled '*CONCERNS REGARDING E/L BARTHOLOMEUS TJIVIKUA*' was filed with the Master of the High Court on 21 November 2016 that is approximately six months before the applicant lodged this application. The Master of the High Court on 12 December 2012, by letter, brought this document to the attention of the applicant and requested the applicant to respond, within seven days from the date that the Master brought the complaints to her attention, to the complaints set out in that document. There is no indication that the applicant responded to the Master of the High Court's letter of 12 December 2012 or to the complaints and allegations set out in the document titled '*CONCERNS REGARDING E/L BARTHOLOMEUS TJIVIKUA*.'

[26] In that document the third and fourth respondents unequivocally challenged the validity of the will executed on 9 July 2007 and they also made it clear that the basis of their challenge is the information they received from the deceased during his lifetime. The applicant was given the opportunity (by the Master in her letter of 12 December 2012) to respond to the allegations made by the third and fourth respondents, she had a second opportunity (when she deposed to her founding affidavit) to deal with those allegations but she failed or neglected to deal with the allegations and now she wants a third opportunity, by requesting that I refer the matter to oral evidence. In those circumstances I am of the view that the applicant ought to and must have foreseen that a dispute of facts will arise on the affidavits but she penned her hope on prayers to intercede. I am afraid that the hope and the prayers did not intercede.

[27] I have indicated above that the dispute between the applicant and the fourth cannot be resolved on the papers. Had the applicant not known that there would be evidence, disputing the will dated 9 July 2007 as the last will and testament of the deceased, I would have referred this matter to trial and ordered the affidavits to stand as pleadings. However, as it is clear from the Master of the High Court's letter of 12 December 2012 and the applicant's affidavit she knew that there was a dispute regarding the revocation or not of the will dated 9 July 2007 prior to her issuing the notice of motion. The applicant should have proceeded by way of summons or at the least deal with the contentions of the third and fourth respondents in her founding affidavit. In the circumstances, I have no alternative but to dismiss the application.

[28] In prayer 3 of the notice of motion the applicant seeks an order whereby the Court directs the Master of the High Court to appoint her as the executrix of the estate of the late Bartholomeus Tjivikua. The only basis on which the applicant seeks this order is the fact that she was married to the deceased in community of property

[29] In her report the Master amongst other things reported as follows:

'Secondly we wish to point out that paragraph 4 of the relief sought by the applicant in this matter cannot be granted against us, as we unable to act as Executrix herein in our official capacity as our duties *inter alia*... includes the supervision of the administration of deceased estates and not act as executors. Which paragraph reads as follows: "*Alternatively, to paragraph 3 above and in the event of the court declaring that the late Bartholomeus Tjivikua died intestate, ordering and directing that the first respondent [being Master of the High Court] be appointed as the executrix of the estate of the late Bartholomeus Tjivikua.*" (Underlining mine)

We further wish to place on record that Section 18 (1) of the Administration of Estates Act requires us to appoint and grant letters of executorship to such person or persons whom we may deem fit and proper and that person is not necessarily the surviving spouse as alleged by the applicant. This person can be parent, spouse or child of the deceased, as they are exempted from furnishing security in terms of Section 23 of the Administration of Estates Act.

We also wish to place on record that the Applicant failed to report this estate to our offices despite various requests by our offices.

The applicant only reported this estate after she realized that the 3rd Respondent reported this estate to our offices and this was done with incomplete reporting documents. See our letter to that effect dated **12 December 2016** and marked '**MR 2**.'

[30] It is thus clear from the Master's report that the relief sought in prayer 4 of the notice of motion cannot be granted. In the letter which is attached to the Master's report and marked as "MR 2" the Master of the High Court indicates that the applicant submitted incomplete documents and the Master furthermore laments the applicant's disregard of the matter and her non cooperative attitude. This court can also not usurp the Master's power under the Administration of Estates Act, 1966 or dictate to the Master as to who she must appoint as the executor or executrix of the Estate of the late Bartholomeus Tjivikua. But in view of the circumstance of this matter and the facts that the Master has placed before Court the Court will recommend to the Master for her to consider appointing joint executors, one nominated by the major children and one nominated by the applicant.

Costs

[31] It remains to deal with the question of costs. At the hearing of this matter both Mr. Strydom and Ms. Schimming -Chase asked that all the costs be paid out of the deceased's estate. The basic rule is that, except in certain instances where legislation otherwise provides, all awards of costs are in the discretion of the court.⁷ In the matter of *Cuming v Cuming*⁸, the Court there held that in a suit relating to the interpretation of a Will costs are ordered to come out of the estate except where there are special considerations.

[32] There are, however, in the instant case no special considerations - warranting the Court to depart from the general rule that the costs of proceedings of this character, be paid out of the deceased's estate.

[33] I accordingly make the following order:

⁷ *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC); *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery* CC 2007 (2) NR 674.

⁸ 1945 AD 201 at p. 216.

- 1 The application is dismissed.
- 2 The costs of this application must be paid from the estate, such costs to include the costs of one instructing and one instructed counsel in respect of both the applicant and the respondents.
3. It is recommended to the Master for her to consider appointing joint executors, one nominated by the major children of the deceased and one nominated by the applicant.

SFI Ueitele
Judge

APPEARANCES

APPLICANT:	Mr. Albert Strydom. Instructed by Theunissen, Louw & Partners, Windhoek
FIRST & SECOND RESPONDENTS	No appearance.
THIRD & FOURTH RESPONDENT:	Esi Schimming Chase Instructed by Fisher Quarmby & Pfeiffer, Windhoek
FIFTH & SIXTH RESPONDENTS	No appearance.
SEVENTH RESPONDENT	No appearance.