

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING ON SPECIAL PLEA OF LOCUS STANDI**

Case no: I 597/2015

In the matter between:

DORSIA KATJIHOKO KANDJEO

PLAINTIFF

and

AGAPE INVESTMENT CC

FIRST DEFENDANT

NIXON KATUNOHANGE

SECOND DEFENDANT

MANFRED-FREDDY KANDJEO

THIRD DEFENDANT

JOHNSON KANDJEO

FOURTH DEFENDANT

IZAK VAN TONDER HOHNE N.O

FIFTH DEFENDANT

THE MASTER OF THE HIGH COURT OF NAMIBIA

SIXTH DEFENDANT

THE REGISTRAR OF DEEDS

SEVENTH DEFENDANT

AGRICULTURAL BANK OF NAMIBIA LIMITED

EIGHT DEFENDANT

THE MINISTER OF LANDS AND RESETTLEMENT

NINTH DEFENDANT

TML FINANCIAL SERVICES CC

TENTH DEFENDANT

BANK WINDHOEK LIMITED

ELEVENTH DEFENDANT

Neutral citation: *Kandjeo v Agape Investment CC* (I 597/2015) [2018] NAHCMD 222 (19 July 2018)

Coram: USIKU, J

Heard on: 23-24 January 2018 and 09 April 2018

Delivered: 19 July 2018

Flynote: Administration of estates – Heir instituting action for the return and administration of a farm as an asset in the estate of the deceased – Defendants raising a special plea of lack of *locus standi* – Court upholding the special plea – Heir having no standing to institute the action for the relief she seeks.

Summary: The Plaintiff instituted an action against the defendants seeking an order, among other things, for the return and administration of a farm as an asset of the deceased estate. The 1st, 2nd and 3rd defendants raised a special plea averring that the plaintiff lacks standing to institute the action for the relief she seeks. Court upholding the special plea on the ground that the executor appointed in the estate is the only person, in the circumstances, legally authorized to represent the estate of the deceased and to claim for the relief that the Plaintiff now seeks. Court holding further that there are no exceptional circumstances in this matter justifying departure from the general legal principles. Court upholding the special plea with costs.

ORDER

1. The special plea raised by the 1st, 2nd and 3rd defendants that the plaintiff does not have *locus standi* to institute the present proceedings is upheld.

2. The plaintiff is ordered to pay the costs of the 1st, 2nd and 3rd defendants, such costs to include costs of one instructing and two instructed legal practitioners.
3. The matter is removed from the roll and regarded finalized.

RULING

USIKU J:

Introduction

[1] In this matter the 1st, 2nd and 3rd defendants take issue with the *locus standi* of the plaintiff to institute the claim in the present proceedings. In the main action the plaintiff prays for an order, among other things, for the return and registration of certain farm Okamaruru No.220 situated in the Registration Division “B” Otjozondjupa Region, into the name of Estate Late Gotfried Raanda Kandjeo. The essence of the aforesaid defendants’ special plea is that, there is an executor appointed in the deceased estate and the plaintiff has no right to approach the court for the relief she seeks.

Background

[2] On or about 12 February 2011 Gotfried Raanda Kandjeo (“the deceased”) died. The Master of the High Court (the 6th defendant) appointed the plaintiff, on 31 March 2011, as executrix in the intestate estate of the deceased.

[3] On the 6 July 2012 the plaintiff, in her capacity as executrix of the estate, entered into a written agreement in terms of which the plaintiff sold immovable property, namely:

Certain: Farm Okamaruru No.220

Situate: In the Registration Division “B”, Otjozondjupa Region (“the farm”)

forming part of the deceased estate, to Manfred-Freddy Kandjeo (the 3rd defendant) or nominee.

[4] On the 31 October 2012 the farm was transferred from the deceased and registered in the name of Agape Investment CC (the 1st defendant). The 3rd defendant and Nixon Katunohange (the 2nd defendant) have 50% interest each in the 1st defendant.

[5] During December 2012 the plaintiff discovered a Last Will and Testament executed by the deceased. This will was accepted and registered by the 6th defendant on or about 23 January 2013.

[6] Clause 3.5 of the will provides as follows:

'I bequeath my immovable property being the farm OKAMARURU, NO 220, in the District of Grootfontein, together with all buildings thereon, to my women DORSIA KATJIHOKO KANDJEO and LUCRECIA KANDJEO in equal shares subject to the condition that the said property shall not be mortgaged or sold during their lifetime and on the death of the survivor of them said immovable property together with all buildings thereon shall go to my two sons JOHNSON KANDJEO and MANFRIED KANDJEO in equal shares. It is my wish that the aforesaid DORSIA KATJIHOKO KANDJEO and LUCRECIA KANDJEO and my two sons JOHNSON KANDJEO and MANFRIED KANDJEO shall harmoniously live on the farm OKAMARURU, NO.220. If my two sons do not co-operate with my woman DORSIA KATJIHOKO KANDJEO and LUCRECIA KANDJEO, my aforesaid women may at their sole consensual discretion exercise their right to order my aforesaid sons to leave the farm for as long as it may please the said DORSIA KATJIHOKO KANDJEO and LUCRECIA KANDJEO, but this right of the said DORSIA KATJIHOKO KANDJEO and LUCRECIA KANDJEO shall terminate and be of no further force and effect after the death of the surviving of the said DORSIA KATJIHOKO KANDJEO and LUCRECIA KANDJEO.'

[7] Furthermore, Izak Van Tonder Hohne (the 5th defendant) was nominated in the will as executor of the deceased estate. The 6th defendant appointed the 5th defendant

as the executor on 10 April 2013, and at the same time the 6th defendant revoked the appointment of the plaintiff as executrix.

[8] On 24 April 2013 the 1st defendant, registered a mortgage bond over the farm in favour of Bank Windhoek Limited, the (11th defendant).

[9] The 5th defendant resolved not to institute legal proceedings to have the sale of the farm declared null and void because he is of the view that there would be no prospects of success in such litigation.

[10] On or about the 26 February 2015 the plaintiff instituted the present proceedings citing, among other persons, the executor in the deceased estate, as the 5th defendant, seeking an order:

- (a) declaring the sale agreement in terms of which the plaintiff as executrix sold the farm to the 1st defendant null and void, alternatively that such agreement be set aside;
- (b) declaring the registration of transfer of the farm into the name of 1st defendant null and void, alternatively that the same be set aside, subject to the rights of the 11th defendant as bond holder in respect of the farm;
- (c) directing the 1st, 2nd and 3rd defendants to produce original Deed of Transfer for the farm and hand it to the 6th defendant to give effect to this order;
- (d) authorizing the Registrar of Deeds (the 7th defendant), to make such entries in his records as may be necessary, to give effect to this order and the final will and testament of the deceased;
- (e) directing the 5th defendant to administer the deceased's estate, including the farm, in terms of the provisions of the will; and ,

(f) granting costs of suit against the 1st, 2nd and 3rd defendants jointly and severally, and any other party defending the action, including costs of one instructing and two instructed legal practitioners.

[11] The 1st, 2nd and 3rd defendants defend the action. The other defendants do not defend the action. I shall therefore refer to the 1st, 2nd and 3rd defendants as “the defendants” except where the context otherwise indicates.

The special plea

[12] The defendants raised a special plea of *locus standi* of the plaintiff to sustain the action. It was contended that the plaintiff as an heir has no *locus standi* to institute proceedings for the return and administration of the farm as an asset in the estate of the deceased. It was further argued on the part of the defendants that the 5th defendant cannot in law be compelled to institute proceedings for the recovery of the farm. The defendants submitted further that the right of the 5th defendant, as executor, has not been ceded to the plaintiff and therefore the plaintiff lacks *locus standi* to institute legal proceedings to vindicate an asset of the deceased estate.

[13] Apart from the arguments outlined above, the defendants did not lead evidence in support of the special plea and closed their case.

[14] The plaintiff called the 5th defendant (the executor) to testify. In his testimony the 5th defendant stated, among other things, that:

(a) in his capacity as executor, he obtained legal opinion, and on that basis, he is not willing to utilize the funds in the estate for instituting legal action to have the sale of the farm declared null and void, as he was requested to do by the plaintiff, because he is of the view that there would be no prospects of success in such litigation.

- (b) he does not intend to defend the action instituted by the plaintiff and shall abide by the ruling of the court, as he:
- (i) wants clarity on the legal position on the validity of the sale of the farm;
 - (ii) appreciates that his view on prospects of success of the current litigation , may turn out to be wrong;
 - (iii) is satisfied with the fact that the plaintiff alone would be liable for the legal costs, if any, in respect of the action she instituted.

[15] On the basis of the testimony of the 5th defendant as outlined above, the plaintiff contends that she has the consent of the 5th defendant to have instituted the present action, subject to the condition that the plaintiff alone would be liable for the legal costs.

[16] The plaintiff further argues that the 5th defendant is in support of the present action initiated by the plaintiff, in view of the fact that the 5th defendant prefers to have certainty on the matter through a decision by this court.

[17] Furthermore the plaintiff contends that based on the pleadings, testimony and on the legal submissions outlined above, the plaintiff has a direct and substantial interest as both heir and erstwhile executrix, in the subject matter and the outcome of the litigation. Therefore, the plaintiff did not require any cession, as contended by the defendants, from the present executor before instituting the claim.

The legal principles

[18] In a recent judgment of this court, *Brink and Another v Erongo All Sure Insurance and Others (I 3249/2015)[2016] NAHCMD 200 (08 July 2016) (Unreported)*, Masuku, J after analysing various authorities on a similar issue, observed at paragraphs 13 and 14 as follows:

'It is clear from the foregoing authorities that the preponderance of legal opinion seems to suggest that where there is any property that is the subject of any action after the death of the deceased, the party authorized to deal therewith, including any proceeding related thereto, is not the heir or legatee, even if they may have an interest in that property. The proper person, to move any action or proceeding in relation to that property, is the executor or executrix, who in terms of the law takes charge of the administration and eventual distribution of the assets and settling the debts of the estate.

It is also suggested that if the executor or executrix refuses or neglects to take whatever steps are necessary to deal with or to protect the property, the remedy that ordinarily lies in the hands of the heirs and legatees of the estate, is to apply for an order of court removing the said executor or executrix for that failure or neglect. It would appear that the proposition that the heir or legatee can move an action in his or her name and cite the executor or executrix as a co-defendant does not gain universal acclaim and approval.'

[19] On appeal against the decision in the above matter, the Supreme Court after referring to a number of authorities referred to by both parties, remarked that:

'In relation to the authority submitted by counsel for both parties, it is clear that courts have followed the principle that only the executor/executrix has the authority to institute proceedings on behalf of the estate. However, as stated in *Stellemacher v Christians*, it is permissible in appropriate cases, for such a beneficiary to sue on his or her own behalf in order to safeguard his right to inheritance where the right is infringed or threatened to be infringed.'¹

[20] In the *Brink* matter, on appeal, the Supreme Court found that there were exceptional circumstances warranting departure from the general principle that only the executor has authority to institute proceedings on behalf of the estate, namely that:

- (a) the heir (the 2nd Appellant) did not approach the court as a lone plaintiff but she did so with the consent of the executrix and the two joined forces as co-plaintiffs to assert the heir's rights;

¹ *Brink and Another v Erongo All Sure Insurance and Others SA 46/2016 and SA 69/2016*, para 33.

- (b) the court has not been informed of any other heirs/legatees that stand to benefit from the farm in question;
- (c) the effect of the order sought was not to “liquidate or distribute” the assets of the estate but to safeguard the heir’s right to inherit the property being the subject matter of the usufruct. Therefore, a potential threat or infringement of that right ought to be protected, by approaching the court of law as the heir did.²

[21] In the case of *Gramowsky v Kahl and Another 1998 NR115 O’linn AJ* (as he then was), dealing with the issue of cession of a right of action by an executor to an heir, observed as follows:

‘the allocation of the right of action in the confirmed accounts and the acceptance of the allocation by the heir, (inferred from the conduct of the heir), is tantamount to an agreement of cession between the executor and heir, in which the executor is the cedent and the heir the cessionary and in which the intention of transfer of the right of action from cedent to cessionary is manifest.’³

[22] In the *Gramowsky* case the court found that the causa for the transfer of the right of action by the executor to the plaintiff-heir, was also self-evident from the “transfer agreement” read with the last will and testament of the deceased.⁴

Application of the law to the facts

[23] It is common cause that in the present matter the plaintiff is not the executrix in estate. It is also common knowledge that in the instant case the plaintiff is not the only legatee with an interest in the asset sought to be vindicated; there being Johnson Kandjeo and Manfred Kandjeo, with interest in the estate as set out in last will and testament of the deceased. Furthermore, unlike in the *Brink’s* case, the plaintiff did not

² Ibid at para 35.

³ *Gramowsky v Kahl* at 126B-C.

⁴ Supra at 126C.

join forces with the executor in the estate as a co-plaintiff, but approaches this court as a lone plaintiff.

[24] The facts in the present case are therefore different from the ones that obtained in the *Brink's* case.

[25] However, in the present matter the plaintiff contends that she has the consent of the 5th defendant (the executor) and that the executor seems to support the plaintiff in the present proceedings.

[26] In the *Gramowsky's* case, the court found, in effect, that the allocation of a right of action from an executor to an heir, set out in the confirmed liquidation and distribution accounts, and the acceptance of the allocation by heir amounted to an *agreement* of cession between the executor and the heir.⁵

[27] Proceeding by way of an analogy, I am of the opinion that the consent required for the present purposes should be in a form of an *agreement* in terms of which the right of action is transferred from the executor to the heir, and in which the *intention* is manifested of the executor to transfer the right and the intention of the heir to accept the transfer. Another form of consent which is sufficient for the present purposes is when facts exist as set out in the *Brink's* case.⁶

[28] In the instant matter there are no facts or circumstances from which the intention of the executor to transfer the right of action, and the intention of the heir to accept such transfer, can be inferred. In fact the 5th defendant in his testimony did not go as far as saying he had transferred such right. It therefore goes without saying that if the executor has not "*allocated*" or *transferred* the right of action to the plaintiff, the plaintiff cannot properly claim to have instituted the action with the "*express*", "*implied*" or "*aid*" or "*through*" the executor.

⁵ *Gramowsky v Kahl* at 126 B-C.

⁶ See para [20] hereof regarding the exceptional circumstances found to exist in *Brink v Erongo All Sure Insurance*.

Conclusions

[29] For reasons foregoing I am of the view that there are no exceptional circumstances in the present case warranting the plaintiff to sue for the relief she seeks, as the right to so sue vests in the executor. The only person authorised in terms of the law to take necessary steps to vindicate the property of the estate is the 5th defendant.

[30] It accordingly follows that the special plea raised by the defendants stands to succeed, with costs.

[31] In the circumstances, I make the following order:

- (a) The special plea raised by the 1st, 2nd and 3rd defendants that the plaintiff does not have *locus standi* to institute the present proceedings is upheld.
- (b) The plaintiff is ordered to pay the costs of the 1st, 2nd and 3rd defendants, such costs to include costs of one instructing and two instructed legal practitioners.
- (c) The matter is removed from the roll and regarded finalized.

B Usiku
Judge

APPEARANCES

PLAINTIFF :

R Heathcote (with him CJ Van Zyl)

instructed by Van Der Merwe-Greeff Andima
Inc, Windhoek1st, 2nd and 3rd DEFENDANTS:

GS Hinda (with him G Narib)

instructed by Dr Weder, Kauta and Hoveka Inc,
Windhoek