

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 4079/2014

In the matter between:

PRIESKA TJAPAKA N. O.

PLAINTIFF

and

KAMUPINGENE TJAPAKA

1ST DEFENDANT

AGRICULTURAL BANK OF NAMIBIA

2ND DEFENDANT

GIDEON KATUPOSE AND ELDA KATUPOSE

3RD DEFENDANT

KANDUU TJAPAKA

4TH DEFENDANT

VICTORINE HIIHO (born TJAPAKA)

5TH DEFENDANT

ELIPHAS TJAPAKA

6TH DEFENDANT

ALEXANDRINE TJUMBINDI (TJAPAKA)

7TH DEFENDANT

GABRIEL TJAPAKA

8TH DEFENDANT

UERIHEKA TJAPAKA

9TH DEFENDANT

Neutral citation: *Prieska Tjapaka N.O. v Tjapaka* (I 4079/2014) [2018] NAHCMD 41
(26 February 2018)

Coram: OOSTHUIZEN J
Heard: 25 April 2017 – 3 May 2017 and 16 – 23 January 2018
Hearing of Absolution: 25 January 2018
Delivered: 26 February 2018

Flynote: Whether Farm Sannaspost No 224 is the property of first defendant or whether it should form part of the estate of the late Stefanus Tjapaka.

Summary: Absolution of the instance. Test to be applied

Held, In *Stier v Henke* 2012 (1) NR 370 SC at 373, paragraph 4, the Namibian Supreme Court adopted and restated the test to be applied when an application for absolution of the instance is considered. It is incumbent on a court, applying its mind reasonably to the evidence presented by the plaintiff, to be satisfied whether such evidence could or might result in a finding favourable to the plaintiff.

I am seized to pronounce on the dispute before me and in the absence of evidence by the first and third defendants, I am not inclined to make definitive findings, save to find at this stage that I could or might find that first defendant acquired Farm Sannaspost No 224 as the nominee of the late Stefanus Tjapaka.

ORDER

Having heard counsel for the plaintiffs and counsel for the defendant –

IT IS ORDERED THAT:

1. The application for absolution is declined.
2. Cost of the application shall stand over for determination at the end of the trial.

3. The case is postponed for a status hearing on 12 March 2018 at 12h00 to determine trial dates for the continuation of the matter.

RULING

OOSTHUIZEN J:

[1] The estate of the late Stefanus Tjapaka who died intestate on 2 February 2011 devolved in accordance with the law custom and usage of the Ovaherero people of Namibia.¹

[2] During 1999 the late Stefanus was in search of a farm to buy. The evidence thus far show that he was assisted in his search by at least two of his biological sons. He found a farm and entered into a Deed of Sale to purchase farm Sannaspost No 224, measuring 3694,6696 hectares on 12 October 1999.

[3] The Deed of Sale was subject to a suspensive condition that the deceased obtains written approval of a loan from the second defendant for an amount of N\$800 000 on or before 30 November 1999.

[4] Because of the deceased age at that stage, a ripe 80 years, the second defendant was not willing to grant him the loan in order to register as a first bond over the property.

[5] Plaintiff, a biological daughter of the late Stefanus was eventually appointed as executrix of the estate of the deceased during 2013.

¹ Pre-trial order, Pleadings Bundle, pp 237 and 242.

[6] First defendant, another biological son of the deceased bought the same farm by way of a Deed of Sale dated 23 November 1999. The said Deed was subject to the very same suspensive condition.

[7] First defendant could not qualify for the loan from second defendant without the financial assistance of the late Stefanus and some of his biological siblings and they all contributed to accumulate the required deposit and to put first defendant in a position to have enough cattle in order to qualify for the loan.

[8] Plaintiff's evidence had it that the late Stefanus nominated the first defendant to acquire the farm on his behalf.

[9] At the end of the plaintiff's case the first and third defendants applied for an absolution of the instance.

[10] Third defendant bought a portion of the said Farm Sannaspost during 2009, a sale that was allegedly perfected during 2014. Plaintiff alleges that third defendant bought with the full knowledge that Farm Sannaspost in actual fact belonged to the late Stefanus Tjapaka (and/or the late Stefanus' estate).

[11] Plaintiff's claim is for Sannaspost No 244 (before subdivision, including the portion sold off) to be transferred to the estate of the late Stefanus Tjapaka.

[12] During a traditional meeting of the biological descendants of the late Stefanus and Alma Tjapaka on 7 and 8 February 2011, the plaintiff's case is, that first defendant admitted that Sannaspost No 224 forms part of the estate of the late Stefanus.

[13] There is a dispute over the correctness of the minutes of the meeting by the descendants.

[14] In *Stier v Henke* 2012 (1) NR 370 SC at 373, paragraph 4, the Namibian Supreme Court adopted and restated the test to be applied when an application for absolution of the instance is considered. Without repeating the whole of the said paragraph, it is incumbent on a court, applying its mind reasonably to the evidence presented by the plaintiff, to be satisfied whether such evidence could or might result in a finding favourable to the plaintiff.

[15] I am seized to pronounce on the dispute before me and in the absence of evidence by the first and third defendants, I am not inclined to make definitive findings, save to find at this stage that I could or might find that first defendant acquired Farm Sannaspost No 224 as the nominee of the late Stefanus Tjapaka.

[16] In the result the application for absolution is declined.

[17] Cost of the application shall stand over for determination at the end of the trial.

[18] The case is postponed for a status hearing on 12 March 2018 at 12h00 to determine trial dates for the continuation of the matter.

GH Oosthuizen
Judge

APPEARANCES

PLAINTIFF: Kamuhanga
of Kamuhanga Hoveka Inc., Windhoek

DEFENDANTS: Bassingthwaighte
instructed by Sisa Namandje & Co Inc., Windhoek