

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2020/00182

In the matter between:

CHARLES RICHARD SMITH

1ST APPLICANT

RIAAN MARTIN SMITH

2ND APPLICANT

and

JULIA ESTHER FERIS

1ST RESPONDENT

RALPH BAZIL STRAUSS

2ND RESPONDENT

MASTER OF THE HIGH

3RD RESPONDENT

Neutral Citation: *Smith & Other vs Julia Esther Feris & Others* HC-MD-CIV-MOT-GEN-2020/00182 [2021] NAHCMD 203 (05 May 2021)

CORAM: MILLER AJ

Heard: 18 March 2021

Delivered: 05 May 2021

ORDER

- (1) The application is dismissed.
- (2) The applicant are ordered jointly and severally to pay the costs of the first respondent, which will include the costs of one instructing and one instructed counsel where employed.
- (3) The matter is finalised and removed from the roll.

Judgment

MILLER AJ:

[1] The proceedings before me are a sequel to certain

[2] The matter is opposed by the first respondent.

[3] In essence this is a dispute about the assets of a last will and testament executed by Tobias Johannes Smith (who is now deceased) and Rachel Smith his spouse, in 2018. This will was accepted by the third respondent. The material terms of the will are the following:

- 3.1 All prior wills and Codicils were revoked.
- 3.2 The survivor of the testators will be the sole heir of the Massed estate.
- 3.3 A testamentary trust was created. The beneficiaries of that trust were.
 - 3.3.1 The first respondent;
 - 3.3.2 Lorisa Ekario Feris;
 - 3.3.3 Cornelia Rosa Beukes; and

3.3.4 David Perus Tiro Smith.

[4] The first respondent raises two points in *limine*. They are.

- 4.1 The *locus standi* of the applicants and;
- 4.2 The non-joinder of Rachel Smith, the surviving spouse and heir.

[5] I will consider these first, before delving into the merits or otherwise of the applicants' case. I will consider the non-joinder of the non-joinder of Rachel Smith. There can be no doubt that as the sole heir of the will executed in in 2018, she has a direct and substantial interest in the proceedings. The applicants advance the argument that Rachel Smith suffers from dementia, and for that reason it is impossible to have cited her as a respondent. The allegations regarding the mental capacity advanced by the applicants, are disputed by the first respondent and confirmed in the papers by Rachel Smith herself, who deposed to a supporting affidavit. In determining the dispute, I must apply an approach in the *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd*¹ and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*² These cases were adopted as part of Namibian law. It follows that, on the papers, the version of the first respondent is to be accepted.

[6] On that version there remains no reason why Rachel Smith was not joined to the proceedings. The failure to do so has the consequences which as in the case of *Maletzky v Minister of Justice and Others*³ must follow. Where the need for joinder is established, the court has no discretion and will not allow the matter to proceed. The applicants were in any event alerted to the issue of non-joinder but elected to try and advance their case without taking any steps to have Rachel Smith joined.

[7] It is also apparent that neither of the applicants stood to benefit in any way from the will executed in 2018. None of them are cited heirs or legatees, nor are they cited as beneficiaries of the Trust. They lack the necessary *locus standi* to institute these

¹ *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C)

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) Sa 623 (A)

³ *Maletzky v Minister of Justice and Others* 2014 (4) NR 956 (HC)

proceedings. There is some suggestion by the applicants that the 2018 will may be declared invalid. The short answer to that is that, in this case there is no prayer to that effect. If that will is to be declared invalid, it is for the applicant's to institute proceedings to have it declared invalid. It serves no purpose to make allegations in the affidavit that Rachel Smith did not have the mental capacity to execute a will and leave it at that.

[8] I am of the view that the case advanced by the applicants falters on any one of the points raised by the first respondent.

[9] The result is that the applicants' claim must be dismissed.

[10] In the result I make the following order:

- (1) The application is dismissed.
- (2) The applicant are ordered jointly and severally to pay the costs of the first respondent, which will include the costs of one instructing and one instructed counsel where employed.
- (3) The matter is finalised and removed from the roll.

K MILLER
Acting Judge

APPEARANCES:

APPLICANT:

Z Grobler
Grobler & Co.

1st RESPONDENT:

Z Majiedt
Engling Stritter & Partners

2nd RESPONDENT

R Strauss
Dr Weder, Kauta & Hoveka Inc.

3rd RESPONDENT

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