REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2020/00399

In the matter between:

JOSEPHINE TUNOMUKWATHI NGHIMTINA **APPLICANT**

and

ERRKI NGHIMTINA **1ST RESPONDENT**
RAMON MAASDORP **2ND RESPONDENT**
PAULINA PETRUS **3RD RESPONDENT**

Neutral Citation: *Nghimtina v Nghimtina* (HC-MD-CIV-MOT-GEN-2020/00399) [2022] NAHCMD 127 (22 March 2022).

CORAM: MASUKU J
Heard: **21 September 2021**
Delivered: **22 March 2022**

Flynote: Administrative Law – review of ruling by receiver regarding estate for want of jurisdiction – nature and duties of receiver and like officials - Law of Property – manner of transfer of property - meaning of bequeathing and disposal of property discussed – Civil Practice – the impropriety of raising new legal issues during the

hearing, without having raised these in the papers, the case management report and the heads of argument.

Summary: The applicant and the first respondent were married out of community of property. Their marriage went through tempestuous waters as a result of which they ended up divorcing by consent. A settlement agreement was signed by the parties and in terms of which a receiver was appointed to determine the accrual of the estate property of each spouse. The settlement agreement was made an order of court. The parties thereafter appeared before the receiver for purposes of determining the accrual in terms of the settlement agreement. The first respondent raised the issue that he had executed a Will in terms of which all his property, both movable and immovable had been bequeathed to a Ms. Petrus. As such, there was not property of the first respondent's which was subject to accrual. The receiver upheld this point of law.
Dissatisfied with this ruling, the applicant approached the court on review, seeking an order setting aside the ruling by the receiver.

Held: that a receiver, liquidator or curator, by whichever name the officer is called, is appointed by the court and is tasked with collecting, realising and dividing the estate of the parties.
Held that: the receiver is an officer of the court and is thus liable to give a report to the court once the division of the estate has been finalised, including issues or conduct they are of the view should be inquired into further by the court.
Held further that: the fact that the appointment of the receiver in this case was pursuant to a settlement agreement did not detract from the fact that the receiver was answerable to the court since the settlement agreement signed by the parties was endorsed and made an order of court.
Held: that in terms of the settlement agreement, the receiver was appointed to determine the accrual from the parties' respective estates. The issue of the effect of the Last Will and Testament of the first respondent fell outside his remit and jurisdiction. As such, he did not have the jurisdiction to determine that issue and should have referred the matter to the managing judge for directions.
Held that: property in Namibia is transferred to another person either by delivery or registration. As such, the bequeathal of property in a Will does not result in the testator thereby disposing of the said property.

Held further that; because the receiver, although in good faith, equated bequeathal of property to disposal of same, his ruling was in that sense unreasonable, unfair and unjust and thus liable to be set aside.
The court granted the application with costs.

ORDER

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1. The Second Respondent's Ruling On Interpretation of ANC No. 346/2006, delivered on 27 February 2020 be and is hereby set aside.
2. The First Respondent is ordered to pay the costs of this application, consequent upon the employment of one instructing and two instructed legal practitioners.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU, J:

Introduction

[1] At issue in this judgment, is the legal correctness of a ruling dated 26 February 2020, made by the 2nd respondent, Mr. Ramon Maasdorp, in his capacity as the receiver in the estate of the applicant, Ms. Josephine Nghimtina and the first respondent, Mr. Errki Nghimtina.

[2] The applicant. Ms. Nghimtina cries foul and has moved this court to set the said ruling aside on the basis that it fell outside the jurisdiction conferred on the second respondent by an agreement made by the parties, namely, the applicant and the first respondent. As such, contends the applicant, the second respondent did not have the power to entertain and rule on the point of law raised on behalf of the first respondent in the matter then serving before him.

The parties

[3] The applicant is Ms. Josephine Tunomukwathi Nghimtina, an adult female resident in Windhoek. The first respondent, is Mr. Errki Nghimtina, an adult male Namibian. He similarly resides in Windhoek. The second respondent is Mr. Ramon Maasdorp, a legal practitioner of this court, duly admitted as such. His practice is also based in Windhoek. Mr. Maasdorp is cited in these proceedings in his official capacity as receiver in terms of an agreement signed by the applicant and the first respondent. The third respondent is Ms. Paulina Petrus, an adult Namibian female.

[4] I will, for ease of reference, refer to the parties in the matter as follows: Ms. Nghimtina will be referred to as 'the applicant'. Mr. Nghimtina, will be referred to as 'the respondent'. Mr. Maasdorp will be referred to as 'the receiver'. Ms. Paulina Petrus, the third respondent, will be referred to as 'Ms. Petrus.' Where I make reference to both Ms. Nghimtina and Mr, Nghimtina, I will refer to them jointly as 'the parties'.

[5] I have chosen to refer to Ms. Petrus as such for the reason that she hardly features in the determination, considering that she was cited for any interest that she might have in the matter. No relief was sought from her or the receiver. Despite service of the papers on her, Ms. Petrus did not oppose the application, nor did she make common cause with the applicant. It is for that reason that I refer to Mr. Nghimtina as the respondent. He is effectively the only active respondent in the matter.

[6] Because both the receiver and Ms. Petrus did not oppose the proceedings nor make common cause with either party, the only protagonists effectively are the applicant and the respondent. The applicant was represented by Mr. Heathcote, whereas the respondent was represented by Mr. Namandje. The court expresses its deep debt of gratitude to them both for the assistance they dutifully rendered.

Background

[7] The facts which give rise to the present dispute do not generate much controversy. They can be summarised in the following manner: The applicant and the

respondent joined in matrimony on 9 September 2006 in Windhoek. They were, by agreement, married out of community of property and in terms of the accrual system. To this end, they signed an ante-nuptial contract, ('ANC').

[8] It would appear that as time went on, the relationship between the parties navigated on tempestuous seas. This resulted in the respondent instituting divorce proceedings before this court. It is not necessary for purposes of this judgment to delve into the reasons behind the divorce.

[9] On 5 September 2016, the matter was settled *inter partes*. The parties entered into a settlement agreement, which they agreed would be made an order of court. On 27 September 2016, the court issued a final decree of divorce and issued an order in the following terms:

'1. The bonds of marriage subsisting between the plaintiff and the defendant be and are hereby dissolved.
2. The settlement agreement marked Exhibit "E" is hereby made an order of court.'

[10] It is certain portions of the settlement agreement that are the cradle of the present application. There are certain clauses of the settlement agreement, being clauses 5 to 8 that are in contention in this matter. One of the contentious clauses relates to the power of the receiver appointed by the parties, with power to calculate the accrual due in terms of the ANC. In terms of the agreement, the receiver had power to require any further documentation that he would deem necessary for the performance of his duties. I will deal with the powers imbued on the receiver by the settlement agreement in due course.

[11] In this connection, the applicant approached this court on motion wherein she sought an order compelling the respondent to comply with paragraphs 6 to 8 of the settlement agreement. The applicant further sought an order compelling the respondent to avail to the applicant all relevant documentation requested, together with granting the applicant access to properties that were liable for evaluation in order to give effect to the terms of paragraphs 6 to 8 of the settlement agreement.[1]

[1] HC-MD-CIV-MOT-GEN-2018/00435.

[12] This application, was however, not persisted in as the parties were invited to appear before the receiver on 12 December 2019. In that appearance, the parties presented argument before the receiver and it would appear that the question he was called upon and did determine, was at behest of the respondent. The question presented for determination *in limine*, related to the effect of a last Will and Testament of the respondent concluded by him on 3 December 2003, three years before he was joined to the applicant in matrimony.

[13] In terms of the said Will, the respondent appointed Ms. Petrus as the sole heiress of his 'entire estate, consisting of movable or immovable property and wherever situated, nothing excepted'. The respondent's argument was that in line with the testamentary disposition, the salient portion of which is quoted in this paragraph, no part of his estate could be subject to accrual under the ante-nuptial agreement the parties had signed before their marriage.

[14] It was accordingly the respondent's contention in that regard that there was no need to determine the difference in accrual between the respective parties' estates as the value of his estate, in light of the bequest to Ms. Petrus, was effectively N$0.

[15] The receiver, after hearing argument presented by both parties' representatives, found in favour of the respondent in a ruling he delivered on 27 February 2020. In summation, the receiver concluded as follows at paragraph 39 of his ruling:

> 'I have found that Mr. Namandje's interpretation of the parties' antenuptial contract registered on 13 September 2006 is accurate. There is no dispute that Mr. Nghimtina's will executed on 3 December 2003 is valid. In terms of clause 4 of his will, Mr. Nghimtina bequeathed all of his property, movable and immovable, nothing excepted, to Ms. Petrus. It follows that none of the Mr. Nghimtina's assets can be considered to determine the accrual of his estate under clauses 6 to 11 of the antenuptial contract.'

[16] It is this very ruling that the applicant has approached the court to have set aside. It is her case that the ruling is unreasonable, improper, irregular, unfair and unjust. In this connection, the applicant contends that the receiver's duties were set out in clause

8.5 of the settlement agreement, namely, the determination of the accrual amount to which either of the parties would be entitled to in terms of the settlement agreement. It was the applicant's contention that the receiver was accordingly bereft of the jurisdiction to interpret the provisions of the ANC as he purported to do. On this basis alone, the court was at large to set the ruling aside.

The applicant's contentions

[17] As intimated above, the applicant contends that the receiver did not have the jurisdiction to determine the issue raised by the respondent. In this connection, the applicant argues that the settlement agreement was clear as to what the receiver's duties were. They did not include the power to determine the issue that the receiver purported to do.

[18] It was the applicant's further case that the decision by the receiver, was not only grossly unreasonable at common law, but it also had the ominous effect of breaching the provisions of Art 12 of the Constitution. The applicant argued that in terms of the law the respondent did not dispose of any property by the making of the Will. Taken to its logical conclusions, if what the respondent did was tantamount to disposing of property as he claims, then people would merely draft and sign Wills, without more and claim that the property mentioned therein has been disposed of and that the testator would no longer be owner of the said property although still alive.

The respondent's contentions

[19] The contentions by the respondent were a horse of a different colour. It was argued on his behalf that the ANC effectively granted the receiver power to implement the provisions of the ANC in so far as they related to the accrual system. It thus follows, it was submitted, that any matter of interpretation or application of the provisions of the ANC in so far as they pertained to accrual fell within the jurisdiction of the receiver.

[20] It was submitted in this connection that interpretation of the ANC was accordingly incidental or an essential corollary to the power to implement the settlement agreement.

As such, it was argued and quite forcefully too that the contention that the receiver exceeded his jurisdiction must fail.

[21] It was further argued that the applicant did not, during the argument before the receiver, challenge the receiver's power or jurisdiction to entertain the issue raised by the respondent *in limine*. It was accordingly argued that considered in the proper context, there was nothing in the nature of a vitiating irregularity that was committed by the receiver in entertaining the matter. His decision was either unreasonable, unfair, or unlawful, concluded the respondent.

[22] Mr. Namandje further argued that even if the receiver can be said to have been incorrect in his decision, having regard to the interpretation he accorded the settlement agreement, he was not acting as an arbitrator, whose decisions may be assailed on the grounds raised by the applicant. In this case, the receiver was a chosen specialist in the private law realm. As such, as I understood Mr. Namandje, the decision was not subject to the court's powers of review. He accordingly moved the court to dismiss the application with costs.

The relevant portions of the settlement agreement

[23] I am of the considered view that it is unnecessary at this juncture to refer generally to the terms of the settlement agreement. Reference will only be made to those clauses of the agreement which have a bearing on the questions submitted for determination, chiefly whether the receiver acted in excess of his jurisdiction, as contended by the applicant.

[24] Clause 8 is relevant for the purpose of determining the issue. It reads as follows:

'8. That Advocate Ramon Maasdorp (or such other person as agreed to between the parties in writing should he be willing to act in such capacity) be appointed as receiver to calculate the accrual due and for that purposes (*sic*):

8.1 The parties shall simultaneously on a date to be determined by the aforesaid receiver render an account supported by documentary proof containing full particulars of the value of each

party's estate in order to determine the difference in the accrual between the parties' respective estate (*sic*);
8.2 That the receiver may require such further documents as he may deem necessary;
8.3 A debatement of the aforesaid accounts;
8.4 That the receiver shall then determine the amount to which the Plaintiff/Defendant may be entitled in terms of the Antenuptial Contract;
8.5 That the parties shall bear the costs of the receiver in equal shares;
8.6 That any of the parties shall have the right to appeal the decision of the receiver by filing a notice of appeal to the managing judge within 10 days from his decision.'

[25] It is to these provisions that the court shall have regard in the determination of the jurisdiction of the receiver and whether, as contended by the applicant, he exceeded his remit by assuming jurisdiction in the making of the ruling in question. Before I do so, however, it is important that I make a few preliminary comments regarding the nature and scope of the office of the receiver, or like office.

The legal nature and duties of a receiver

[26] In dealing with this aspect of the matter, the court expresses its indebtedness to Mr. Heathcote for the assistance he rendered. I must mention that Mr. Namandje did not in any manner challenge the submissions made by Mr. Heathcote in this particular regard. I shall, in drawing up the nature of the duties and responsibilities of receivers and like officials, refer to relevant case law.

[27] In *Gillingham v Gillingham* 1904 AD 609, Innes CJ made the poignant point that the duty to divide the estate of parties who have been divorced rests on the court, if the parties are unable to agree on a suitable agreement on the question. His Lordship the Chief Justice proceeded to state the following:[2]

'The question then arises, who is to administer the joint property, in respect of which both spouses continue to have rights? As a general rule, there is no practical difficulty, because the parties agree upon a division of the estate, and generally, the husband remains in possession pending such division. But where they do not agree the duty devolves upon the Court to divide the estate, and the Court has the power to appoint curators it may nominate and

[2] *Ibid*, p 613.

empower someone (whether he is called a liquidator, receiver or curator – perhaps curator is the better word) to collect realise, and divide the estate.'

[28] It is a matter of comment, which does not however detract from the accuracy of the statement of law made by the Chief Justice that the terrain has changed dramatically from the time that the judgment was drafted. It is not necessarily the case in this day and age that the husband remains in possession of the estate pending division of the estate. There are many cases where the wife remains in possession.

[29] Having made the observation above, I proceed, At p 614, the learned Chief Justice continued and said, 'The liquidators out of the proceeds in their hands pay to each of the former spouses such amount of maintenance as under the circumstances they shall deem fit. The liquidators to submit a report to the Court when the estate has been subdivided, bringing to the notice of the Court any conduct on the part of either of the parties which may call for an enquiry. The costs of this motion stand over pending the liquidators' report.'

[30] Yet earlier, at p 611 the headnote of the same case records as follows:

'If either party is dissatisfied with the division it would be open to him or her to come to the Court and seek to have it set aside or rectified.'

I will revert in due course to extract certain principles from the portions of the judgment quoted, once other relevant ones have been consulted on the subject.

[31] In *Johnson v Johnson and another* 1935 CPD 325, the court, per Sutton, J, remarked as follows on the subject at page 328:

'The appointment of the receiver and liquidator in the present case is final in form, and I do not think that the Judge who made the order contemplated any variation of that order in future, at any rate so far as the appointment of the receiver and liquidator was concerned. Nevertheless the receiver and liquidator appointed is an officer of the Court delegated by the Court to effect a division of the joint estate until. The Court retains control over the joint estate

until it is finally liquidated and in my opinion, therefore it is competent for the Court to vary its order on good cause shown.'

[32] What is plain from the references to the above cases is the following: first, a person who is appointed to distribute the joint estate of parties who have been divorced, may be called by different names. These names include receiver, liquidator and or curator. There is accordingly, no hard and fast rule regarding how the person is referred to as long as they are tasked with dividing the joint estate of the divorced parties.

[33] Second, the persons, by whichever name they are referred to, are delegates and an extension of the court's hands in effecting the division of the joint estate. They have the duty to collect, realise and divide the estate of the parties in respect of which a decree of divorce will have been issued by the court.

[34] Third, once appointed as receiver, liquidator or curator, the court does not, in the manner of Pontius Pilate of Biblical times, wash its hands off the officer appointed, leaving them to be a law unto themselves. In this connection, the court retains control over the joint estate until it is finally liquidated. As such, any party dissatisfied with the division, has a right to approach the court to have the division set aside on good grounds.

[35] Fourth, these officers are in this particular connection, officers of the court. Once they have completed the task given to them by the court, they have a duty to report back to the court on the task performed. In this connection, they have to file a report to the court on the process, including any issues or conduct by either party that they opine need further inquiry by the court.

[36] In the present case, the receiver stood in no different position. The fact that his name was agreed upon by the parties does not make his position any different. This is so because it is clear that his appointment was recorded by the parties in the settlement agreement. That was not, however, the end of the matter as the settlement agreement was subsequently made an order of court.

[37] It is therefor plain that by endorsing the settlement agreement, the court gave its imprimatur on the receiver's appointment, thus rendering the appointment one made by the court. As a corollary, the receiver has a duty, once he has completed his mandate, to report to the court on the performance of his duties as a receiver. He is not necessarily accountable to the parties, although they pay his fees.

[38] It must be made plain that the court was not bound by the choice of the receiver agreed upon by the parties. If there was, for instance, some reservation the court had about the receiver agreed upon the parties, the court would have had the right to decline the receiver agreed upon and according to the authorities, appoint one it considers suitable for the purpose.

[39] Having investigated the nature, role and function of receivers and the like, it is now opportune that I should deal with the questions submitted for determination. I do so presently, commencing with the question of jurisdiction.

Did the receiver have jurisdiction to entertain the question submitted by the respondent?

[40] As intimated earlier in the judgment, the first line of attack by the applicant is that the receiver overstepped the bounds of his powers by entertaining the issue raised by the respondent, which resulted in the impugned ruling. I am in unqualified agreement with Mr. Heathcote that the determination of this question must rest solely on the interpretation of clause 8 of the settlement agreement quoted earlier in the judgment.

[41] The nature and scope of the powers extended to the receiver, are clearly stated in para 8, namely, 'to calculate the accrual due'. That was the extent of his powers in terms of the agreement, which was made an order of court. This was the source, nature and extent of the receiver's power. He was not authorised by the settlement agreement to perform any other function than to calculate the accrual due to both parties.

[42] The extent of the powers imbued on him, were extrapolated in the sub-clauses of para 8. In para 8.1, he was entitled to require any documentary proof relating to the value of each party's estate 'in order to determine the difference in the accrual between the respective parties' estates'. Furthermore, clause 8.4, also emphasised what his

primary, secondary and only duties were. It records that he was, from the information availed to him, including that he may have deemed necessary to request from the parties, then required to ‘determine the amount to which the Plaintiff/ Defendant may be entitled in terms of the provisions of the Antenuptial Contract.’

[43] From a reading of all the clauses referred to above, it becomes abundantly clear that the operative words regarding the receiver’s duty, was the word ‘determine’ or ‘calculate’ the accrual due to each of the parties. It becomes plain that it was in the parties’ contemplation that there was some property due for inclusion in the calculation and which would form part of the accrual. It was for the receiver to obtain all the necessary information and then do his calculations and determine what was due to each party.

[44] A proper reading of the clause and sub-clauses does not appear, even on an expansive interpretation, to grant any plenary powers to the receiver. I do not therefor accept that he had powers to consider any legal questions that may be termed incidental or contiguous to his duties mentioned in clause 8. That latitude was not given to him in the enabling instrument, which was endorsed by the court.

[45] There is an interesting case, which in my view touches on the aspects of this case. In *Van Biljon v Coleman N.O.* HC-MD-CIV-MOT-REV-2020/137) [2021] NAHCMD 365 (11 August 2021), Angula DJP had to deal with a case in which an arbitrator was in terms of a written private agreement tasked with determining with finality a dispute between the disputants about alleged theft of cattle on a farm where grazing arrangements had been made by the parties. After hearing the evidence of the parties, the arbitrator came to conclusion that the claimant had failed to make a case and he therefor granted absolution from the instance.

[46] The applicant was dissatisfied with the ruling on absolution from the instance and applied for a review of the said decision. He argued that the said decision was beyond the jurisdiction of the arbitrator in terms of the agreement by the parties. The court agreed with the applicant and found that the award in the matter lacked the attributes of finality and decisiveness between the parties. The award was set aside on that basis.

[47] In dealing with the question whether the arbitration agreement precluded the granting of absolution from the instance, the court reasoned as follows at para [14]:

'As regards the first defence, I have already found that the arbitrator was mandated to deliver an award which has the attributes of finality. He failed to do so. This award is flawed. In my view, just because the arbitration agreement did not specifically exclude absolution from the instance does not mean that it is included. Clause 8.2 of the arbitration agreement specifically states in part: "The arbitrator's award shall be final and binding on the parties . . ." "Finality" and "absolution" are poles apart in the sense that finality in this context means an end of the dispute, *res judicata* – the matter is adjudged. Absolution on the other hand means the defendant/respondent is released from liability for the time being but the plaintiff/applicant may institute fresh proceedings against the defendant/respondent based on the same cause of action supported by additional evidence.'

[48] I am of the considered view that the reasoning, although in respect of a different set of facts, applies in the instant matter. As in the *Van Biljong* case, the arbitration agreement stated that the award had to be final in nature and effect. With the arbitrator granting absolution from the instance, it shows that he went beyond the scope of the powers that had been given to him by the parties.

[49] In similar vein, in this case, the receiver was in terms of the agreement given power to calculate and determine what was due to each party in terms of the accrual. Deciding the question that he eventually decided, namely that there was no property amenable to accrual was in my view an exercise in excess of his jurisdiction that the court is entitled to set aside.

[50] Mr. Namandje, not to be outdone, took the argument further. He submitted that the applicant submitted himself to the jurisdiction of the receiver in so far as the issue of the Will is concerned. She cannot, at this stage, be heard to complain about the lack of jurisdiction as she submitted herself thereto.

[51] I am not satisfied that Mr. Namandje is correct. It is trite law that the doctrine of waiver does not apply as easily as is submitted in this case. For the doctrine to apply, the person alleged to waive his or her rights must do so with their eyes wide open and

fully appreciating the implications of the waiver. They must also reconcile themselves to the consequences of their choice. This has not been shown to be the case. I accordingly find that the respondent's argument is not plausible in the circumstances of the case.

[52] It must, in any event be remembered, as recorded elsewhere in this judgment, that the receiver is an officer of this court and his jurisdiction is subject to this court's supervision. Where the court is satisfied that he has exceeded the bounds of the powers and jurisdiction extended to him by the relevant enabling instrument, this court cannot, as the enabler of the receiver to act, fold its arms helplessly and allow a receiver's decision to do what he was not entitled to do, to stand.

[53] Having regard to the considerations above, together with the conclusions reached, I am of the considered view that the applicant has made out a case for the setting aside of the decision on this basis alone. There can be no question that the receiver, probably in good faith, exceeded the powers that were accorded to him in black and white by the parties and endorsed by this court's order. He cannot be allowed to overstep those powers. His decision must, therefor, be set aside as I hereby do.

No substantive relief sought for declaring the receiver's decision null and void

[54] This argument was raised by Mr. Namandje during argument. It was neither foreshadowed in the answering affidavits nor in the heads of argument. Nor, should I mention, was it included in the joint case management report, which was made an order of court.

[55] One of the main objectives of judicial case management, is to deal with disputes fairly and justly. In this connection, parties are required to indicate the issues in dispute, be they legal or factual, in the case management report, which the court adopts and makes an order of court. In this connection, the parties also submit legal questions for the court's determination.

[56] It sits ill to the court and the opponent, on the date of hearing and without any notice whatsoever, for the respondent, as in this case, to raise new legal argument for

the court's determination. This is inimical to the incidents of fairness and robs the other party of performing its proper role to assist the court in the determination of the matter.

[57] It must be stated that legal issues that are introduced to the court via the side door, or window, without having followed the case management route, will most likely find themselves out in the cold and eventually consigned to the court's dustbin. The party who for whatever reason has an epiphanous moment regarding a new legal issue or argument, must at the very least apply for the amendment of the joint case management report for the court to consider the inclusion of the epiphanous issue belatedly sought to be raised.

[58] In this matter, Mr. Namandje argued that the relief sought by the applicant is not competent for the reason that there is no substantive order seeking the declaration of the decision by the receiver, null and void or such other epithet. The setting aside, as claimed by the applicant, must be consequential to an underlying order declaring the decision bad in law, he argued.

[50] I do not wish to devote much time or energy to this argument. In *Vidav*sky *v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA), the Supreme Court of South Africa said:[3]

'The authorities are clear that want of jurisdiction in judicial or quasi-judicial proceedings has the effect of nullity without the necessity of a formal order setting the proceedings aside.'

[60] This statement of the law, in my view provides a full answer to the argument raised on the respondent's behalf. I have already found that the receiver did not have jurisdiction to deal with the question that was submitted to him for determination. On that basis alone, his decision was thus null and void and did not require a declaration to that effect before the ruling is set aside.

[61] There can, in the circumstances, be no sustainable argument to the effect that the proceedings before the receiver were neither judicial or quasi-judicial. They were clearly quasi-judicial[4] proper regard had to their nature and more importantly, their

[3] *Ibid* at para [14].

[4] *Estate Milne v Donohoe Investments (Pty) Ltd and Others* 1967 (2) SA (A) at 373H.

effect. I accordingly dismiss this argument as totally unsustainable when proper regard is had to the facts of the instant matter, coupled with the findings made above.

The implications of the respondent's Will

[62] As recorded earlier in the judgment, the question falling for determination at this juncture, is whether the receiver's decision is, as the applicant claims, unreasonable, improper, irregular, unfair and unjust by finding that the respondent has, because of the Will he executed, no property liable for consideration in the determination of the accrual the receiver was mandated to conduct in terms of clause 8 of the settlement agreement.

[63] It is accepted that the respondent, in his Will, concluded three years before the marriage to the respondent, appointed Ms. Petrus as the sole heiress of his entire estate, consisting of both movable and immovable property, excepting nothing? What is the legal effect of such a clause?

[64] In answering this question, it is necessary to go back to the basics. How is property in our jurisdiction transferred from one person to another, so as to deprive the transferor of the property of ownership thereof? The learned authors Silberberg and Schoeman' s,[5] state the following in relation to the acquisition of property:

'Where ownership is acquired by a person with the co-operation of the current titleholder, the derivative mode of acquisition of ownership is involved. This refers to the fact that the ownership passes and it is acquired by the means of a bilateral legal act between the current owner, that is the transferor, and the prospective owner, that is the transferee. In our law, ownership does not pass merely because the parties agree to transfer ownership, but pursuant to an act of publicity of the change in legal relationships to third parties. This public function is fulfilled by either delivery of the thing (in the case corporeal movables) or registration of the transfer in the case of immovable).'

[65] What is clear from the above, is that for property whether movable or immovable, to be transferred from one person to another, there must be duality of legal acts between the transferor and the transferee. The first is the intention by the transferee to

[5] Silbergerg and Schoeman's, *The Law of Property,* 5th edition, LexisNexis, Durban, p 175.

acquire the property in question. The second, is the transfer of the said property by the transferor to the transferee, either by delivery of the property, if movable, or registration, if immovable.

[66] The question that confronts the court in this connection is whether the respondent can, in terms of the law, be said to have disposed of his property in this case by means of his Will. I am of the considered view that the answer, which is resounding in the circumstances, is 'No'. This is so because in terms of the law, the fact that one has made a Will and in terms of which one bequeaths his or her property to another, does not take effect when both the testator and the beneficiary, are still alive. In that connection, the property still vests in the testator.

[67] The mere fact that the respondent in this case, bequeathed all his property to Ms. Petrus in his Will does not by itself result in the respondent disposing of the said property. If that were the law, it would be the cradle of absurd results, namely that a person could in his or her Will direct who the property would be owned by and he would from that time be regarded as having disposed of that property without the property having been transferred in terms of the law. The testator would therefor cease to own that property, despite his or her appointment with death not having materialised. If one for instance checks the records of immovable property, one is likely to find that, the municipal rates and taxes are not paid by Ms. Petrus but by the respondent.

[68] If the position adopted by the respondent were to be allowed, namely for Wills to take effect before the death of the testators, persons who are indebted to others may get away with their debts as they would have disposed of their assets through their Will, to the prejudice of the creditors. Another absurdity would be that if the testator outlives the heir, his property would already have been disposed to the heir and this impoverish the testator unduly in the circumstances. It is accordingly clear that disposition is a process that takes place after the testator's death.

[69] It is thus clear, from what has been stated above, that the respondent cannot be said to have disposed of his property, in the circumstances, such that he is no longer possessed of any assets, whether movable or immovable as a result of the contents of the Will. The property referred to in the Will, both movable and immovable, has not been

transferred to the transferee as the testator remains alive. The applicant is alive and has a vested right to share in the accrual relating to the respondent's property in respect of which no transfer has legally taken place.

[70] It is sound law that if there is an unconditional bequest in a Will, then the legatee acquires a vested right in the bequest from the time the testator dies, i.e. *dies cedit.* That right cannot, however be enjoyed until the time for enjoyment has ripened, so to speak, i.e. *dies venit*.[6] Ms. Petrus accordingly has no vested right in this matter.

[71] Another consideration to take into account relates to the provisions of Art 16(1) of the Constitution. It provides the following:

> '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 appropriate…..

[72] It is clear, from reading the above provision that Parliament, in its manifold wisdom, chose to employ two different words regarding property, namely to dispose of property and to bequeath it. They have different meanings. According to the Black's Law Dictionary, to bequeath is 'to give property (usu. personal property) by will." The same dictionary speaks of disposition, derived from the word 'dispose', as employed in Art 16. It defines it as 'The act of transferring something to another's care or possession, esp. by deed or will; the relinquishing or property.'

[73] It is accordingly clear that the one, namely bequeathing, is the giving of property to another in a Will. The other, namely, disposing, refers to the actual transfer of that property to the person named in the Will and in which case ownership of the property in question is relinquished by the testator and surrendered to the person named in the Will. This happens at the death of the testator.

[74] Having regard to the argument by the respondent, and taking it to its logical conclusions, it would mean that there is no difference between the two processes. The

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[6] *Greenberg and others v Estate Greenberg* 1955 93) SA 361 (A) at 364G-H.

argument renders the distinction between the concepts of bequeathing and disposing of property non-existent. Furthermore, it equates bequeathing property to transferring same to the heir or legatee, and that this disposing of the property happens instantaneously with the making of the bequest.

[75] It requires no further elaboration that this position is clearly untenable in law and renders itself liable to be placed in a pigeonhole of the unreasonable. As such, I am of the considered opinion that a receiver, properly directed would not reach such a conclusion. The arrival at such a decision is, in my view, although clearly done in good faith, perverse in the circumstances.

[76] It is accordingly clear to me that the decision by the receiver that the respondent had no property to be considered in the determination of the accrual because of the contents of the Will is clearly untenable. On the whole, that ruling, though I have no doubts was made in good faith, commends itself as being unreasonable and wrong in law, considering what has been stated above. Furthermore, it is also unfair and unjust to the applicant given the entire matrix of the circumstances of the instant case.

[77] This then takes me to the beginning of Mr. Heathcote's heads argument. He commenced the heads of argument with the following statement, 'In Namibia, everyone who has a Will, has no assets.' If the court were to accept the respondent's argument, it would, in effect be lending credence to what is clearly a preposterous proposition magnified by Mr. Heathcote in his heads of argument. A person who has executed a Will has assets, even if they have been bequeathed in the Will.

Conclusion

[78] Having regard to the discussions above, together with the conclusions reached, the view I take is firstly that the receiver had no jurisdiction to entertain the issue raised by the respondent concerning the effects of the respondent's Will. If anything, the receiver should have as an officer designated by the court to finalise the accrual between the parties, submitted that dispute to the court for directions.

[79] Secondly, the ruling by the receiver was unreasonable, unjust, unfair and flawed in so far as it endorsed the respondent's position that because he had by Will bequeathed all his property to Ms. Petrus, he had no property at all that would be considered in the determination of the accrual as agreed in the settlement agreement between the parties.

Costs

[80] The proper approach to costs has become a beaten track. As such no elaborate rendition of the applicable principles is necessary. The general rule is that costs should follow the event. In that connection, it is clear that the applicant has been successful in this application and must be reimbursed for her costs.

Order

[81] In view of what has been stated above, including the findings and conclusions, the following order presents itself as being condign to issue in the circumstances of this case:

1. The Second Respondent's Ruling on Interpretation of ANC No. 346/2006, delivered on Thursday 27 February 2020, be and is hereby set aside.
2. The First Respondent is ordered to pay the costs of the application consequent upon the employment of one instructing and two instructed legal practitioners.
3. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

APPLICANT:	R. Heathcote (with him J.P Ravenscroft-Jones)
Instructed by:	Etzold-Duvenhage
1ST RESPONDENT:	S. Namandje
	Of Sisa Namandje & Co. Inc.