

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON ABSOLUTION FROM THE INSTANCE

Case Title: Johannes Nicolaas Benade and Sarah Maria Catharina Benade Elizabeth Harker Thelma Juliana Kunze Daniella Hendrin Du Plessis Sonia Catherine Angermund Nicolette Christine Smith Vilinchia Theola Van Wyk Master of the High Court Registrar of Deeds (Rehoboth)	Plaintiff 1 st Defendant 2 nd Defendant 3 rd Defendant 4 th Defendant 5 th Defendant 6 th Defendant 7 th Defendant 8 th Defendant 9 th Defendant	Case No: HC-MD-CIV-ACT-OTH-2022/01413 Division of Court: High Court, Main Division
Coram: Honourable Justice Coleman	Heard: 11 - 13 September 2023 Delivered: 14 September 2023	
Neutral citation:	<i>Benade v Benade</i> (HC-MD-CIV-ACT-OTH-2022/01413) [2023] NAHCMD 568(14 September 2023)	

Order:

1. The 1st defendant's application for absolution from the instance is granted in respect of prayers 1, 2 and 3 of the plaintiff's particulars of claim.
2. The plaintiff is ordered to personally pay the 1st defendant's costs to include one instructing and one instructed counsel.
3. The parties are directed to take time and endeavour to settle the outstanding disputes.
4. The parties must deliver a joint status report on or before **28 September 2023**.
5. The matter is postponed to **26 October 2023** at **15:00** for a status hearing to determine the further conduct of the matter.

Reasons:

COLEMAN J:

Introduction

[1] This is an application for the absolution of the instance on behalf of the 1st defendant after the plaintiff's case was closed. The action concerns a dispute between a son and mother about the inheritance of the Farm Witkrans in the Rehoboth district.

Pertinent facts

[2] The plaintiff had summons issued herein on 31 March 2022. While nine defendants are cited he asks for relief only against the 8th defendant in prayer 1 of his particulars of claim and in prayer 2 he asks for relief which affects the rights of the 1st defendant (his mother). The other

defendants are cited for the interest they may have in the matter.

[3] The plaintiff sues herein in his capacity as executor of the estate of late Martinus Benade, his father who passed away on 10 March 2011. He relies on the joint Will of his late father and mother who were married in community of property. His mother is the surviving spouse. This Will, executed in Afrikaans on 18 December 2006, is annexed as annexure 'C' to the particulars of claim, with a translation in English, as annexure 'D'. It ended up as exhibits before court (Exhibits 'JNB4' and 'JNB5'). The validity of the Will is not disputed.

[4] The plaintiff's case is that the 7th defendant, a legal practitioner whom he appointed as his agent to administer the estate of his late father, drafted a First and Final Liquidation and Distribution Account ('L & D Account') dated 24 November 2011. This L & D Account is annexed as annexure 'F' to the particulars of claim and also is an exhibit before Court (Exhibit 'JNB8'). It is common cause that the plaintiff signed this L & D Account on 24 November 2011 in his capacity as executor.

[5] The plaintiff alleges that this L & D Account was lodged with the 8th defendant (The Master of the High Court) and on 7 March 2013 (it appears the letter was actually signed on 7 March 2012) the Master issued a letter of non-objection.

[6] The plaintiff's case is that the L & D Account reflects his mother as the sole heir of the movable and immovable properties of the deceased, which is contrary and inconsistent with the provisions of the joint will. Furthermore, it is the plaintiff's case that the Master wrongly accepted the L & D Account. He alleges that the 7th defendant and the Master have misdirected themselves in their interpretation of the Will.

[7] The core stipulations of the joint will reads as follows:

'The survivor remains the possessor of all movable and immovable property. After the death of the survivor all movable property shall be equally divided amongst the above mentioned heirs.

The Farm Witkrans No. 342 goes to the son Johannes N Benade and to the youngest daughter Nicolette C Smith.

The farm Witkrans may under no circumstances be alienated. Should any of the sisters be interested to start farming the heirs may not oppose.'

[8] In prayer 1 of his particulars of claim the plaintiff asks for the following relief:

'An order in terms of which the First and Final Liquidation and Distribution Account dated 24 November 2011 accepted by the eight defendant and the non-objection letter issued by the eight defendant on 7 March 2013 be reviewed and set aside as null and void.'

[9] In prayer 2 of his particulars of claim the plaintiff asks for the following declaration:

'An order declaring that the interpretation of the provisions of the Last Will and Testament dated 18 December 2006 pleaded herein at paragraph 13 as correct and directing the eight defendant to accept it as such.'

[10] In prayer 3 the plaintiff claims consequential relief to the effect that the 7th defendant be ordered to amend the L & D Account.

[11] The allegations in paragraph 13 of the particulars of claim alluded to in prayer 2 thereof essentially state that the survivor (the plaintiff's mother) remains in possession of all the movable and immovable property, subject thereto that on her death the movable property shall be divided equally amongst the heirs. Furthermore, it is alleged that, according to the Will, the plaintiff and the 6th defendant are to inherit, as a 'special bequest', the Farm Witkrans.

[12] In his testimony the plaintiff explained why he signed the L & D Account and why it took him about ten years to challenge it. He said he was emotional at the time and only got advice about the L & D Account in 2021. It appears to coincide with his retirement and plans to settle on the farm. He also testified about his late father's wishes and how he interprets the Will. A certain Mr Angermund was also called as witness on his behalf.

Conclusion

[13] When the plaintiff's counsel closed her case, counsel for the 1st defendant applied for absolution of the instance. As I understand him, he essentially contends that the plaintiff made no case for the review in prayer 1 of the particulars of claim and that for prayers 2 and 3 he relies on the mistaken interpretation of the Will. In particular, he submits that by virtue of the marriage in community of property the surviving spouse owns 50 percent of the farm in question and on the plaintiff's interpretation it means he inherits it while she is alive. Counsel for the plaintiff submits that absolution should not be granted since the 1st defendant should still come and testify about the joint Will. She further submits that the stipulation in the Will regarding the farm is a special bequest and the L & D Account should be taken as incorrect. If I understand her correctly she contends that the reference to the survivor retaining possession of the immovable property should be taken as a usufruct.

[14] I considered all the facts and submissions on behalf of the parties and will address only those that I consider relevant for the purposes of my conclusions herein.

[15] As far as prayer 1 is concerned, it asks for the review of the acceptance of the L & D Account and the issue of the non-objection letter by the Master of the High Court on 7 March 2012 – 11 years ago. As far as I am concerned this is not a reviewable decision. The Master did nothing wrong. Reliance was placed on the L & D Account signed by the plaintiff as executor. In addition, the Master issued the non-objection letter after there was no objection to the L & D Account. Consequently, I agree with counsel for the 1st defendant that no case is made for the relief asked for in prayer 1.

[16] In approaching prayers 2 and 3 I have to consider paragraph 13 of the particulars of claim together with the will and the L & D Account. The plaintiff alleges in paragraph 13.2 that he and the 6th defendant are to inherit, as a special bequest, the Farm Witkrans. The L & D Account reflects that Portion 1 and the Remainder of the Farm Witkrans is awarded and to be transferred to Sarah Maria Katrina Benade (1st defendant).

[17] I will start with the interpretation of the Will. It is trite that in interpreting a Will the testator's

wishes are paramount.¹ In a joint will it is obviously the wishes of both the testators. The 1st defendant pleads that it was the intention that the nominated heirs, including the plaintiff inherits under the joint Will upon her death. Although she has not testified yet this is an indication of her stance. Reading the Will clearly demonstrates that all the movable property of the joint estate shall be equally divided amongst the mentioned heirs upon the death of the survivor.

[18] While the Farm Witkrans is not mentioned in the same sentence reference to it follows immediately after the sentence making the disposition of the movable property upon the death of the survivor. In my view a benevolent approach determines here that the wish of both testators is that only upon the death of the survivor will the Farm Witkrans be bequeathed to the plaintiff and the 6th defendant. This is in my view why the farm is specifically mentioned in the joint Will.

[19] As far as costs are concerned, the plaintiff sues here in his capacity as executor, but in essence acts in his own personal interest. While this is inherent in situations like this, where executors are also heirs, great caution should be exercised by executors. The plaintiff signed the L & D Account, which essentially corroborates the 1st defendant's stance on 24 November 2011 and only on 31 March 2022 does he pursue this action against his mother contradicting the L & D Account he signed. This appears to coincide with his retirement plans to settle on the farm. In my view, it is disconcerting that a son takes his elderly mother to court and creates a dispute on a Will of which she is the co-testator and the surviving spouse.

[20] Accordingly I make the following order:

1. The 1st defendant's application for absolution from the instance is granted in respect of prayers 1, 2 and 3 of the plaintiff's particulars of claim.
2. The plaintiff is ordered to personally pay the 1st defendant's costs to include one instructing and one instructed counsel.
3. The parties are directed to take time and endeavour to settle the outstanding disputes.

¹ *Egerer v Executrust (Pty) Ltd* (A248-2015) [2016] NAHCMD 221 (22 July 2016) para 39.

4. The parties must deliver a joint status report on or before **28 September 2023**.
5. The matter is postponed to **26 October 2023** at **15:00** for a status hearing to determine the further conduct of the matter.

Judge's Signature	Note to the parties:
Counsel:	
Plaintiff	First Defendant
E Katjaerua Of Katjaerua Legal Practitioners, Windhoek	W Boesak (assisted by WT Christians) Instructed by WT Christians Legal Practitioners, Windhoek