

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

RULING

CASE NO: HC-NLD-CIV-MOT-GEN-2020/00002

In the matter between:

OLIVIA TUYOLENI MICHAEL

FIRST APPLICANT

JOSEF NGHILIFANANDE MICHEAL

SECOND APPLICANT

PIUS NGHIELEKWA MICHEAL

THIRD APPLICANT

and

ESTER TSHIWALO

RESPONDENT

Neutral citation: *Michael v Tshiwalo* (HC-NLD-CIV-MOT-GEN-2020/00002)
[2020] NAHCNLD 60 (3 June 2020)

Coram: MASUKU J

Heard: 01 June 2020

Delivered: 03 June 2020

Flynote: Administration of estates- Points in limine- Non-compliance with peremptory provisions of Rule 65 (7) – The Court is not willing to condone material non-compliance- The matter is removed from the roll.

Summary: The applicants are the biological children of the late Justine Nangula Nghihadelwa. They brought an application against the executrix of the late Nghihadelwa's estate.

The application was opposed and the respondent raised a few points in limine. The court found it fitting to deal with just one point of law that was raised. Rule 65(7) makes it a requirement that any person who makes an application to the court in connection with the estate of a deceased person before the application is filed with the registrar must submit the application to the master for his or her consideration and report.

The court held: That the rule 65(7) does not create exceptions in its application. The applicants have evidently not complied with the mandatory requirements of the sub rule in this case and as such the matter stands to be removed from the roll and the applicants are liable for cost of the application.

ORDER

1. The application filed by the Applicants, is removed from the roll for non-compliance with the provisions of Rule 65(7) of the Rules of this Court.
2. The Applicants are ordered to pay the costs of the Respondent jointly and severally, the one paying and the other being absolved.

RULING

Introduction and the parties

[1] The first, second and third applicants are the biological children of the late Justine Nangula Nghihadelwa. On 5 February 2020, they approached this court seeking the executor of the estate of the late Nghihadelwa, Ms Tshiwalo also known to them as their late Mothers sister, to make the Will and Last Testament of the deceased available to them for inspection. They also seek a

declaratory order that the applicants are the rightful and legitimate beneficiaries of the estate of the late Justine Nangula Nghihadelwa.

[2] The Respondent is Ms Ester Tshiwalo, cited in her capacity as the executrix of the estate of the late Justine Nangula Nghihadelwa. She received her appointment as executrix on 16 May 2001.

Grounds of opposition

[3] The respondent opposes the application. She has, in this regard, raised some preliminary points of law, in her answering affidavit, namely that the application is improperly before court because of the applicants' non-compliance with the provisions of rule 65(7) of this court's rules; that this court does not have jurisdiction to entertain this matter by virtue of the applicants' non-compliance with the provisions of s 18 of Proclamation 15 of 1928 and that there is the non-joinder of the Master of the High Court, alternatively, the Eenana Magistrate's Court.

[4] I am acutely aware that the first applicant informed the court that her co-applicants were not able to attend the hearing because they failed to obtain the requisite clearance to attend court in line with the Covid 19 regulations issued by the President of this Republic, as they reside in the Erongo Region.

[5] In this regard, Mr. Greyling, for the respondent, was amenable to the court postponing the matter to another day when all the applicants would be in attendance and be able to advance whatever submissions they may find are necessary to persuade this court to find for them.

[6] Without in anyway being perceived to be negating the applicants' rights to be heard, I have found it fitting to deal with just one point of law that was raised by Mr. Greyling and this is the first point, namely, the non-compliance with rule 65(7), which is reproduced below.

[7] Rule 65(7) provides the following:

'(7) A person who makes an application to the court in connection with the estate of a deceased person or alleged to be a prodigal or under any legal disability, mental or otherwise must, before the application is filed with the registrar –

- (a) submit the application to the master for his or her consideration and report;
- (b) likewise submit any suggestion to the master for a report, if any person is to be proposed to the court for appointment as curator to property, but this subrule does not apply to an application in terms of rule 72, except where that rule otherwise provides.'

[8] I will, for convenience, engage in a process of elimination. Rule 72, referred to above, relates to *ex parte* applications. It is accordingly clear that the current application is not an *ex parte* application as it was served on the respondent and some relief is sought from her. That being the case, it follows naturally that the provisions of this subrule do apply without reservation to the current application.

[9] The effect of the above subrule, is to state or require an applicant, who seeks to lodge an application in respect of an estate of a deceased person or of a person under some legal or mental disability, to first submit the application to the master of this court before the application is filed with this court.

[10] It is important to mention that having regard to the language used by the rule-maker, in crafting this subrule, it is clear that the requirements of this subrule are mandatory and a party has no choice but to comply with the requirement of first submitting the application to the master before filing it with this court. Failure to comply with the terms of the subrule has devastating consequences for the non-compliant party, in this case the applicants.

[11] The applicants have evidently not complied with the mandatory requirements of the subrule in this case. It is important to observe that the

sub-rule does not create exceptions in its application. There being none, the applicants cannot claim any exemption from compliance with the said subrule.

[12] The reason for the rule-maker to require the submission of such applications before they are lodged, is to enable the office of the master of this court, to give a report on the deceased's estate or other person under disability and where applicable, make recommendations to the court on the further progress of the matter. This, the master's office is able to do because of its peculiar statutory position as the primary repository of records relating to matters referred to in (a) and (b) of the subrule in question.

[13] I have deliberately not had regard to Mr Greyling's heads of argument in this matter as they have been belatedly filed and without leave I must add. That being said, the respondent did properly raise the issue of the application of rule 65(7) in her answering affidavit.

[14] As indicated above, it appears that the failure to comply with this subrule by an applicant, is fatal to the application. By saying this, I do not mean that the application should be dismissed for that reason. It means that the court cannot properly adjudicate upon it until such time that the provision in question has been complied with. The application is, in these circumstances, not properly before court for adjudication. If the court would have been properly placed to deal with the other substantial issues raised on the respondent's behalf, and the court found for the respondent in that regard, the court may well be within its rights, if so persuaded, to dismiss the application.

[15] I am averse to dismissing an application on a procedural requirement like the present one when the merits of the matter have not been traversed. This is what the Supreme Court appears to have said in the *Shetu Trading CC v Chair of the Tender Board of Namibia and others* matter.¹ It must be pointed out though that in that context, the issue under consideration was the dismissal of an application because it was held not to be urgent. The court

¹ 2006 (2) NR 696, para 22.

held that it was wrong to dismiss the application therefor, as the matter had not been determined on the merits. The same principle applies to the instant case in my considered view.

[16] I also take into account the fact that the applicants are acting in person and are further unlettered in law. They, for that reason, would benefit from a measure of guidance from the court at this stage of the hearing. This will be evident also from the order that follows below. I have deliberately not dealt with the other preliminary points of law raised by the respondent as these can be properly dealt with once the application is properly before court, in the sense that the mandatory provisions of rule 65(7) above, have been complied with by the applicant.

Costs

[17] The law as to costs is relatively settled. Costs should generally follow the event. In this regard, there is no running away from the fact that the applicants have not followed the proper and mandatory procedures before launching this application. The respondent should not be placed out of pocket by the applicants' non-compliance with the rule in question.

Order

[18] In the premises, the following order would commend itself as appropriate in the instant case:

1. The application filed by the Applicants, is removed from the roll for non-compliance with the provisions of Rule 65(7) of the Rules of this Court.
2. The Applicants are ordered to pay the costs of the Respondent jointly and severally, the one paying and the other being absolved.

T.S. Masuku

Judge

Appearances

Applicant: Ms O Michael (In person)
Olukolo, Ondangwa

Respondent: Mr J Greyling
Of Greyling & Associates,
Oshakati

