



REPORTABLE

CASE NO: SA 21/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MARIA SHALUKENI

First Appellant

IMMANUEL SHILONGO

Second Appellant

AMALIA HARASES

Third Appellant

SIMON SHALUKENI

Fourth Appellant

PAULUS HARASEB

Fifth Appellant

FLORENCE SHALUKENI

Sixth Appellant

LUKAS DAMASEB

Seventh Appellant

and

JOHANNES DAMASEB

First Respondent

MINISTER OF LAND REFORM

Second Respondent

CHAIRPERSON OF THE LAND REFORM

ADVISORY COMMISSION

Third Respondent

MASTER OF THE HIGH COURT

Fourth Respondent

Coram: SHIVUTE CJ, HOFF JA and FRANK AJA

Heard: 4 November 2020

Delivered: 4 December 2020

Summary: This appeal deals with how a 99 year leasehold granted to Daniel Shalukeni (the deceased) in 2006 pursuant to s 37 of the Agricultural (Commercial) Land Reform Act 6 of 1995 (the ACLRA) should be dealt with. The parties in dispute are, the first appellant (Maria/the executrix) and her children with the deceased and the first respondent (Johannes), the son of the deceased, but not of Maria. The executrix and Johannes, independent of each other approached the Land Reform Advisory Commission (the Commission) for a recommendation to the Minister of Land Reform (the Minister) to approve each one of them as the sole assignee in respect of the leasehold. The Minister declined to approve either of them and withdrew the lease on the basis of the unresolved dispute in the family as to whom the lease should be assigned.

Johannes approached the court *a quo* to review and set aside the Minister's decision. Maria and her children opposed the application and filed a counter application also seeking to review the Minister's decision and further relief to the effect that Maria should be recommended by the Commission to the Minister as assignee and that pending this process, she as the executrix would be entitled to act in this capacity to keep the lease in place. She also sought an order against Johannes to submit certain books of account relating to the farm. The counter application seeking a review of the Minister's decision was held to be irregular by the court *a quo*.

The court *a quo* found in favour of Johannes and Maria and her children appealed this order.

On appeal, the appellants did not attack the order to review and set aside the Minister's decision to withdraw the lease. It is the consequential orders that flow from this order that are in dispute. The appellants maintain that the consequential orders should recognise Maria as the person whose recognition as assignee should be sought from the Minister acting on the recommendation of the Commission and not Johannes as ordered by the judge *a quo*. The appellants also took issue with the court *a quo*'s finding that a copy of the document relied on by Johannes, which was

not lodged with the Master of the High Court, bequeathing the lease to him, as a will of the deceased, when there is a factual dispute as to its validity.

This court was called upon to determine the following: (1) the process of appointing an assignee in terms of s 53 of the ACLRA; (2) whether the lease forms part of the joint estate; (3) whether a copy of the document relied on by Johannes is a valid will of the deceased; (4) whether the court *a quo* was correct in the main application when it found that the executrix was not entitled to present herself as the only assignee in respect of the leasehold.

Held that, the process of assigning a 99 year lease in terms of s 53 of the ACLRA, the interplay between the provisions of s 53 of the ACLRA and the law of succession are well established in *Meroro v Minister of Lands, Resettlement and Rehabilitation & others*. The parties in this matter, like those in *Meroro*, did not appreciate the process envisaged in the ACLRA and approached the Commission and the Minister based on equitable considerations.

Held, the court *a quo* was correct to label the alleged assignment by the executrix of the lease to herself (Maria) as ineffectual and this appeal ground stands to be dismissed. Johannes approaching the Commission and the Minister to become sole assignee was also equally flawed.

Held that, the court *a quo* was incorrect in its finding that the lease did not form part of the joint estate of Maria and the deceased and that appeal on this ground is successful.

Held that, to establish the existence of a will, Johannes had to produce the original or explain what happened to the original. This follows from the best evidence rule.

Held, the court *a quo* was wrong in its approach when accepting the validity of the will as this issue was not capable of being determined on the papers. Further, as agreed

to between the parties, Johannes must lodge the will with the Master of the High Court as he should have done and that the matter should then run its course as envisaged in the Administration of Estates Act 66 of 1965.

Held that, having found that Maria and Johannes independently approaching the Land Reform Advisory Commission for a recommendation to the Minister to approve each one of them as the sole assignee of the leasehold is flawed, and the Minister's decision to withdraw the lease having been set aside (and not appealed against) – this court orders an assignment afresh, by the executor to the Commission, so as to enable it to make recommendations to the Minister for approval.

Held that, the court *a quo*'s decision not to deal with the counter application was not to the detriment of the appellant as it was without merit.

Held that, the decision by the court *a quo* setting aside the Minister's decision to withdraw the lease kept the lease in place and vested in the executrix of the estate. Further, because the lease forms part of the joint estate created by the marriage in community of property between Maria and the deceased, she is entitled to be an assignee to at least 50 per cent interest in the lease and as far as the 50 per cent interest of the deceased in the lease is concerned the persons entitled to be assignees in respect thereof are to be determined by the law of succession. If the alleged will is accepted as valid and applicable, then Johannes will be entitled to be the assignee in respect of the full 50 per cent interest that the deceased had in the lease.

Held that, the decision on the validity of the will or testament, will determine and affect the number of persons entitled to be assignees and their portions.

Appeal succeeds.

APPEAL JUDGMENT

FRANK AJA (SHIVUTE CJ and HOFF JA concurring):

Introduction

[1] Daniel Shalukeni was married to the first appellant when he died on 23 February 2014. At the time of his death, Daniel Shalukeni (the deceased) was a lessor in respect of a 99 years leasehold granted to him in 2006 pursuant to s 37 of the Agricultural (Commercial) Land Reform Act¹ (ACLRA).

[2] First appellant (Maria) was appointed executrix of the estate of the deceased. A dispute arose as to how the leasehold should be dealt with in the estate of the deceased. I refer to first appellant as Maria where I refer to her in her personal capacity and as executrix where I refer to her in her capacity as such.

[3] Maria who was married to the deceased in community of property, with the consent of the children born from the marriage between her and the deceased (second to sixth appellants), were of the view that the lease should be assigned to her. The first respondent (Johannes) who is a son of the deceased but not of Maria contended that as he made improvements to the farm that is the subject matter of the lease and assisted his late father with the farming operations, he should be the

¹ Act 6 of 1995.

assignee of the leasehold. Apart from the contributions he made to improvements on the farm and his assistance in respect of the farming activities, he also relies on a document he alleges is a will of the deceased which according to him bequeathed the lease to him.

[4] Maria (as executrix) and Johannes, independently of each other, approached the Land Reform Advisory Commission (the Commission) for a recommendation to be made to the Minister of Land Reform (the Minister) to approve each one of them as the sole assignee in respect of the leasehold.

[5] The Minister declined to approve either of them and withdrew the lease on the basis of the unresolved dispute in the family as to whom the lease should be assigned.

[6] Johannes approached the court *a quo* to set aside the decision of the Minister to withdraw the lease and to compel the executrix to assign the lease to him and thereafter to submit the assignment for recommendation and approval to the Commission and the Minister respectively.

[7] Maria, her brother and her children opposed the application and in a counter application² also sought a review of the Minister's decision to withdraw the leasehold, and sought further relief to the effect that Maria should be recommended as assignee by the Commission to the Minister and that pending this process, she as the executrix

² The counter application was disregarded by the court *a quo* as it held that it amounted to an irregularity.

would be entitled to act in this capacity to keep the lease in place. She also sought an order against Johannes to submit certain books of account relating to the farm.

[8] The court *a quo* granted the order in favour of Johannes and Maria and her children appealed this order. Apart from the seventh appellant (also a son of the deceased), who did not partake in the litigation at all, the children referred to, who support Maria, are third to sixth appellants. The second appellant is Maria's brother who has been assisting her.

[9] The upshot of the appeal is that the order to review and set aside the Minister's decision to withdraw the lease is not attacked. It is the consequential orders that flow from this order that are in dispute. Thus, the appellants maintain that the consequential orders should have provided that Maria is the person whose recognition as assignee should be sought from the Minister, via the Commission, and not Johannes as ordered by the judge *a quo*.

Judgment *a quo*

[10] The court *a quo* dealt with the various issues raised in the application as discussed below.³

[11] In respect of the alleged will, it held that it was a will as it, on the face thereof, complied with the statutory requirements for a valid will and nothing was raised on behalf of Maria and the children to cast doubt on this conclusion.

³ The judgment of the court *a quo* is reported as *Damaseb v Minister of Land Reform & others* 2019 (3) NR 775 (HC) (*Damaseb*).

[12] The alleged assignment of the lease by the executrix to herself with the approval of the children was held to be ineffectual and it was not done per the correct procedure and neither was there any approval from the Minister of her as assignee.

[13] The leasehold right was held to be akin to a usufruct and hence a personal right of the deceased which did not form part of the joint estate created by the marriage in community of property, between the deceased and Maria.

[14] As the will of the deceased bequeathed the leasehold to Johannes, he was entitled to be the assignee in respect thereof and hence he was the only assignee whose name had to be forwarded to the Commission and the Minister in this regard.

[15] The counter application was disregarded as it did not comply with certain formalities. It was not accompanied by a notice of motion nor did it set time periods for the filing of further pleadings, nor were the parties thereto described and it was 'part of the answering affidavit or an appendage thereto'. It was not clear that it was 'a full application of its own' which did 'not depend for its validity or completeness on the main application'.

[16] The grounds of appeal are directed to all the findings set out above and I deal with them separately below.

Assignment

[17] The ACLRA provides for the assignment of 99 year leases entered into in terms of its provisions. Section 53 of ACLRA provides for this eventuality upon the death of a lessee. This court dealt extensively with s 53 and the interplay between the provisions of s 53 of the ACLRA and the law of succession in *Meroro v Minister of Lands, Resettlement and Rehabilitation & others*⁴. In summary the position can be stated as follows:

- (a) ‘. . . the rights and obligations that a deceased had under the 99-year lease immediately prior to his passing became part of the aggregate of assets and liabilities comprising the deceased estate . . .’⁵
- (b) The estate vests in the executor or executrix and pending the finalisation of the estate the executor must continue with ‘the lease on behalf of the estate’.⁶
- (c) Persons entitled to become assignees in respect of a 99-year lease must be determined with reference to the laws of succession and ‘not by the wishes or whims of the executor or by his or her view of the beneficiary’s “suitability” based on the criteria falling outside the ambit of those laws’.⁷

⁴ 2015 (2) NR 526 (SC) (*Meroro*).

⁵ *Meroro* para 6.

⁶ Section 53(2) of ACLRA and *Meroro* para 7.

⁷ *Meroro* para 21. See also para 22.

- (d) The Minister has no role to play in identifying potential assignees where a lessee of a 99-year lease dies. This must be done by the executor or executrix who must do this in accordance with the law of succession.⁸
- (e) Once the assignee(s) is (are) identified by the executor or executrix, the approval of the Minister (on the recommendation of the Commission) must be obtained in writing for the assignment to have legal effect.⁹
- (f) The Minister's approval (and by necessary implication, the Commission's recommendation) 'is not informed by the applicable principles and provisions of the law of succession but by the provisions and objectives of the Act, ie to benefit, foremost, Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practises and who do not have access to any or adequate land'.¹⁰
- (g) If the heir(s) identified by the executor or executrix for assignment would clearly not be a candidate or candidates that will qualify under the criteria set out in the ACLRA or because there are so many persons who are entitled to be forwarded as assignees in terms of the law of succession that the same problem arises, it will be up to the executor

⁸ *Meroro* para 24.

⁹ Section 53(1) of the ACLRA.

¹⁰ *Meroro* para 24.

and beneficiaries of the estate to address this issue 'by means of a redistribution agreement or through other available legal mechanisms'.¹¹

[18] The procedure to assign the lease upon the death of a lessee as prescribed in s 53 of ACLRA is as follows: The estate which includes the lease vests in the executor or executrix. The executor or executrix must within three months (or such longer period as the Minister may allow), identify the assignee(s) per the law of succession and then submit the assignee or assignee(s) to the Commission for them to make a recommendation to the Minister who must then in writing indicate his or her decision. Where an executor 'fails to assign the lease' within the period of three months, the Minister may cancel the lease, in which event compensation is to be paid by the State to the estate.

[19] It seems that all the parties in this matter, like those in *Meroro*, did not appreciate the process envisaged in the ACLRA and approached the Commission and the Minister based on equitable considerations. Thus, Maria could not rely on a family agreement as Johannes was a clear intestate heir and was not a party to the agreement.¹² Similarly, Johannes had no basis to claim to be the sole assignee based on his input, financial or otherwise, to the farming operations of the deceased. The court *a quo* was thus correct to label the alleged assignment by the executrix of the lease to herself (Maria) as ineffectual and this appeal ground thus stands to be dismissed.

¹¹ *Meroro* para 24.

¹² At the stage the Commission was approached, the will had not yet been discovered or disclosed.

Is the lease part of the joint estate?

[20] The court *a quo* held that the lease did not form part of the joint estate as it was akin to a usufruct. In support of this finding, the court *a quo* referred to case law dealing with customary law rights provided for in the Communal Land Reform Act¹³ which held that as these rights endured only for the natural life of the holders of such rights, they were personal rights that did not form part of the joint estate. The court *a quo* further stated that this court in *Meroro* 'did not hold that the leasehold rights in relation to the property formed part of the joint estate, . . .'.¹⁴

[21] Counsel for Johannes conceded that the court *a quo* erred in this regard and that the lease indeed forms part of the joint estate. In my view, this concession was correctly made. As this became common cause, I shall not dwell on this aspect but briefly indicate why the lease does form part of the joint estate.

[22] The right of a usufructuary is similar to that of a lessee and a usufruct may even be granted in consideration of, eg, the payment of an annual sum of money. The distinction however is that, in usufructs, the right comes to an end when the usufructuary dies. A usufruct cannot pass upon the death of a usufructuary as it attaches to a particular person and cannot exist apart from such person.¹⁵ To the contrary, a lease, as a general rule, is not terminated by the death of a party thereto, but the rights and obligations arising from the lease pass to the estate of the party

¹³ Section 26(1) of Act 5 of 2002.

¹⁴ *Damaseb* para 51.

¹⁵ C G Hall and E A Kellaway *Servitudes* 3 ed (1973) at 165 as the cases there cited.

who has died.¹⁶ That this is the position, is also evident from *Meroro* in which it was clearly stated that the lease forms part of the estate of the deceased¹⁷ and that the ACLRA clearly intended the right of the deceased to be regarded as a lease when the assignment is considered in this context.¹⁸

[23] It is correct that *Meroro* does not expressly state that a lease forms part of the joint estate despite noting that the parties were married in community of property. This is not because it does not form part of the joint estate, but because in terms of the law, the estate initially vests in the executor or executrix. In fact, upon a careful reading of the judgment, this court in *Meroro* clearly expressed the view that the lease does form part of the joint estate. Thus, the court stated that, ‘the entire deceased estate vested in her as executrix’.¹⁹ This is however explained by a footnote to indicate that ‘although the surviving spouse in a marriage concluded in community of property is under common law entitled to a half-share of the joint estate as his or her own property, that entitlement is not enforceable immediately upon the passing of the first-dying spouse *ab intestato*’ as the right to claim half of the estate only arises once the net balance of the joint estate has been established.²⁰

[24] In a situation where the State sold agricultural land over a 30 year period under conditions that the State remained the owner of the land until the purchase price had

¹⁶ A J Kerr *The Law of Sale and Lease* 3 ed (2004) at 492 and E Newman and D J McQuoid-Mason in Lee and Honore *The South African Law of Obligations* 2 ed (1978) para 323.

¹⁷ *Meroro* para 6.

¹⁸ *Meroro* para 24 and especially footnote 24 and para 33.

¹⁹ *Meroro* para 5.

²⁰ *Meroro* para 5 and footnote 14. See also *Tjamuaha & another v Master of the High Court & others* 2018 (3) NR 605 (SC) para 17 from which case it is clear that where one is dealing with a joint estate that arose from a marriage, the executor or executrix of such estate has a dual role, namely to divide the joint estate and to distribute the other half of the estate (the deceased's estate).

been paid in full; the purchaser could not dispose of his interest in the contract without the consent of the State; the purchaser had to reside on the land; the purchaser could not encumber the land and steps of execution could not be taken against the land and the State could cancel the purchase if the purchaser fell into arrears with more than three months, it was held that this was not a personal interest and did form part of the joint estate where a purchaser died prior to becoming owner of the land. In *Ex parte Malan NO*²¹ the following was said:

'Mr. *Miller* contended that the rights, which the testator had under the agreement before he had paid the full purchase price, were of so personal a nature that they did not fall into the community. He referred to the different terms of the agreement, such as that the purchaser could not cede his right under it without the consent of the Governor, that he had to reside on the land personally, that if he committed any of the crimes referred to he forfeited his rights under the agreement, that his rights under it could not be attached in execution and that if he died he could not dispose of his interest but that his executor with the approval of the Governor could transfer it to his major son or his widow or to a third person. He referred to cases such as *Ex parte van der Watt*, 1924 O.P.D. 9, and *Barnett and Others v. Rudman and Another*, 1934 A.D. 203, which decide that fiduciary property, as well as the interest of the fiduciary in the property do not fall into the community but only the fruits derived from such property. In *Barnett's* case DE VILLIERS, J.A., deals with the reasons why fideicommissary property does not fall into the community. He points out that *Coren* (Cons. 25) and *Matthaeus* state that it is on account of its inalienability, while *Voet* says that such property is in a sense *res aliena*. While the purchaser's rights under the agreement, before he has paid the full purchase price, cannot be freely alienated, they can, however, be alienated with the consent of the Lieutenant-Governor and this distinguishes them from fideicommissary property. It can also not be said that they are *res aliena*, for the rights acquired by the purchaser under the agreement belong to him. The fact that provision is made for a large number of events on the occurrence of which the purchaser may forfeit his rights under the agreement is also not a reason for

²¹ *Ex parte Malan NO* 1951 (3) SA 715 (O) at 719D-720A. See also *Peacock NO v Peacock NO* 1956 (1) SA 413 (T) at 415D-G and on appeal *Peacock NO v Peacock NO* 1956 (3) SA 136 (A) at 140B.

holding that they are excluded from the community. The general rule is that the community of property embraces all the property of the spouses movable, immovable and incorporeal, and would thus include rights such as the testator acquired under the agreement above referred to. I am of the opinion therefore that the rights which the testator had acquired under the agreement of sale at the death of his wife formed part of the assets of the joint estate, although the farm itself did not fall into the community.'

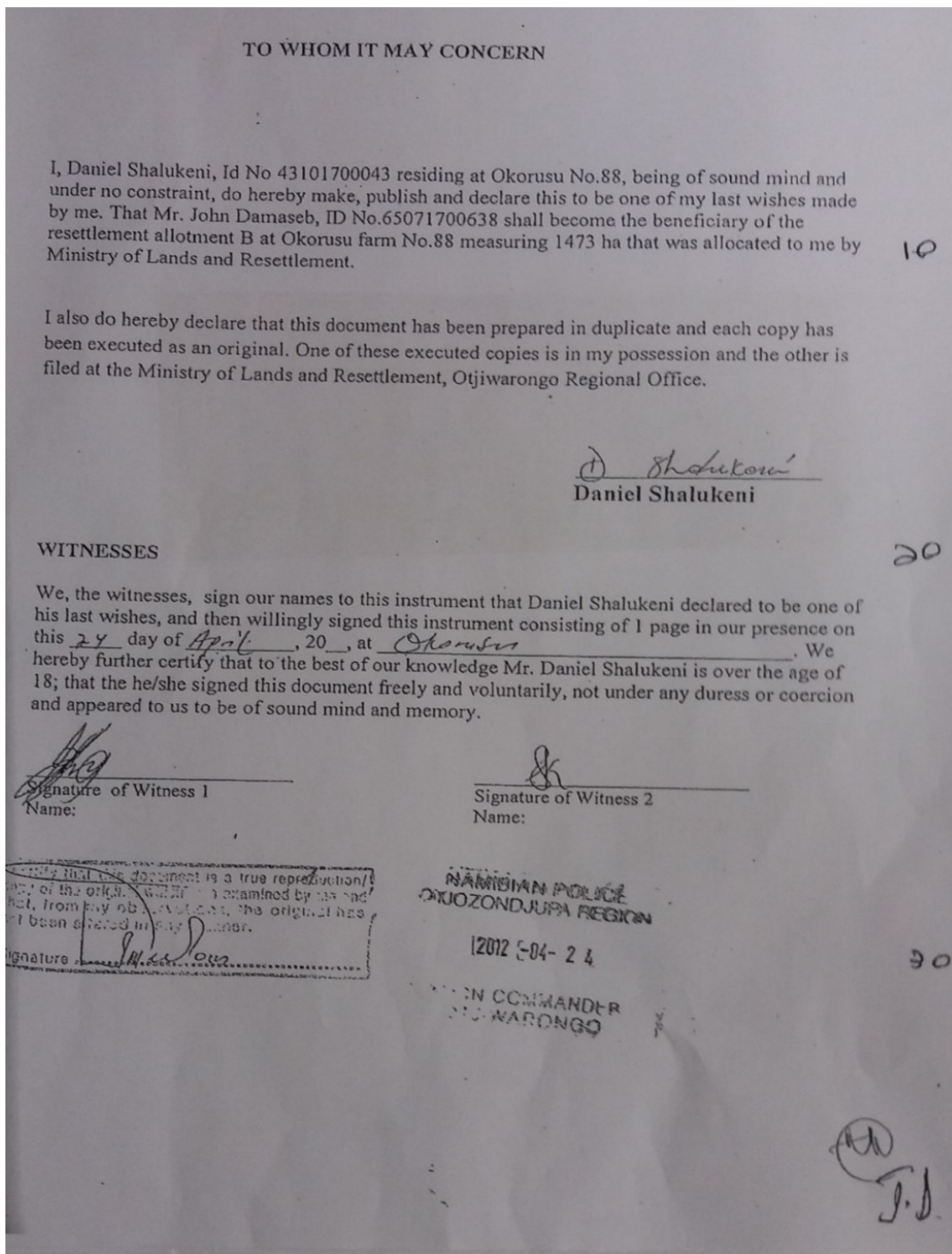
[25] It follows that the court *a quo* was incorrect in its finding that the lease did not form part of the joint estate of Maria and the deceased and the appeal on this ground is successful.

Validity of the will

[26] Johannes in the application to review the decision of the Minister to withdraw the lease relied on a copy of a will of the deceased which he maintains bequeathed the lease to him.

[27] Maria and her children took issue with the averment and pointed out that Johannes did not lodge this will with the Master of the High Court and only came up with it about two years after the passing of the deceased. They further took issue on a number of grounds which according to them, indicated that it was not a valid will and even disputed the averments that it was a will.

[28] The document relied upon by Johannes is headed 'To whom it may concern' and which reads as follows [I provide the said document as is for emphasis]:



[29] As it is evident from the body of the document set out above, there is a signature alleged to be that of the deceased as well as the signatures of two witnesses who state that the deceased signed the will in their presence. The date of

the will is 24 April but the year is not fully stated as the century is indicated (20__) but not the year. There is however a police stamp dated 24 April 2012 accompanying a certification of the will as a true copy.

[30] The court *a quo* found the document to be a will and as it, on the face thereof, complied with the statutory requisites for wills notwithstanding the protestations of Maria and the children that supported her. Due to the conclusion I have come to in this regard, it is not necessary for me to deal with the objections raised against the acceptance of the document as a will in detail and relied upon in the court *a quo*.

[31] It is clear that Johannes did not present the court with an original will but a copy of a will. He alleges that 'I learned that . . . the original is apparently in possession of the office of the Ministry of Land Reform in Otjiwarongo' but took no steps to verify this fact or to present evidence of the original will. It is also clear from the copy he attached that, the deceased had one original in his possession as the document expressly states that 'one of these executed copies is in my (deceased's) possession . . .'. To establish the existence of a will, Johannes had to produce the original or explain what happened to the original. This follows from the best evidence rule.

[32] The will indicates that the deceased signed it as a testator. Maria alleges that the deceased was illiterate and could not have signed the will but would only have been able to make a mark and hence disputes that it is his signature. The court *a quo* simply ignored Maria's averments in this regard.

[33] In my view, the considerations mentioned above are such that they cannot be dismissed out of hand. At best, there should have been a concern as to whether the will was proved. Firstly, no original was presented and apart from the statements in the will itself and from Johannes that he learned (probably from the copy of the will) that there is a duly executed copy in the offices of the mentioned Ministry, no evidence was presented that there is indeed such a copy of the will. It must be borne in mind that, if there is such executed copy at the said Ministry, it was supposed to have been filed with the Master subsequent to the deceased's death by the Ministry.²² Secondly, where a will that was in possession of the testator (as suggested in the copy) cannot be found upon his death, he is presumed to have destroyed it *animo revocandi* and it makes no difference that there may be a duplicate original kept elsewhere.²³ This is a rebuttable presumption which can be dispelled by evidence. Thirdly, the denial by Maria of the signature of the deceased could not simply be disregarded as it created a dispute of fact.

[34] It follows that the court *a quo* was wrong in its approach when accepting the validity of the will as this issue was not capable of being determined on the papers. Both counsel submitted that, should the court find that the matter could not be determined on the papers, as I do, that instead of the issue being referred to oral evidence, Johannes be ordered to lodge the will with the Master of the High Court as he should have done, and that the matter should then run its course as envisaged in

²² Section 8(1) of the Administration of Estates Act 66 of 1965 (the Administration of Estates Act).

²³ 31 *Lawsa* para 199 and cases there cited.

s 8(1) of the Administration of Estates Act. As the parties agree to this course of action, I shall issue an order in accordance with their agreement.

[35] It follows that the appeal on this ground that the court *a quo* wrongly accepted the will as valid is successful.

Conclusion relating to the main application

[36] It follows from what is stated above that the executrix was not entitled to present herself only as an assignee in respect of the lease. As she was not, at the time, aware of the alleged will, she should at least have indicated Johannes as a co-assignee in proportion to his share as an intestate heir of the deceased. The executrix's assignment was thus ineffectual.

[37] For Johannes to have approached the Commission and the Minister to become a sole assignee was equally flawed. Firstly, his entitlement to become an assignee did not fall within the discretion of the Commission or the Minister. Secondly, this has to be determined by way of the law of succession. It must be borne in mind that, Maria is entitled to be an assignee of at least 50 per cent interest in the lease. This does not follow from the law of succession but by virtue of the marriage in community of property between her and the deceased. The deceased's will (if accepted) cannot alter this fact as it is presumed to deal with only his half of the joint estate, and even if it intends to deal with Maria's half as well, she is not compelled to accept (adiate) it. Thus, if the will is accepted, it will entitle Maria and Johannes to be co-assignees in respect of the lease. If the will is not accepted and the deceased's

estate is to devolve in terms of the law of intestate succession, Maria will then be entitled to be an assignee of at least a 50 per cent interest (her share of the joint estate), plus her intestate share in the half share of the joint estate which makes up the estate of the deceased. All deceased's children will be entitled to be assignees to the extent of their intestate share in the half share of the joint estate that makes up the estate of the deceased. Thus, if it is accepted that there are six children, and that the surviving spouse is to be regarded as a seventh child for the purposes of intestate succession, each intestate heir will be entitled to be an assignee of one-seventh of the deceased's half interest in the lease, ie just over 7,14 per cent. This will mean that Maria will be entitled to about 7,14 per cent interest and each child also to about 7,14 per cent. Of course, where the children renounce their benefit in favour of Maria, her interest will increase accordingly.

[38] What kind of a proliferation of assignees, and in what shares the Commission and the Minister may accept seeing the objective of the allotment of leaseholds is not for me to say, but it goes without saying that the proliferation of assignees may be such that it will no longer serve the purpose for which 99 year leaseholds were intended. It is in such cases that redistribution agreements and other possible legal mechanisms should be considered by the beneficiaries of the estate or risk the non-approval of the suggested assignment by the Minister.

[39] It follows that as the decision of the Minister to withdraw the lease was set aside and as this decision is not on appeal, an assignment afresh by the executrix should be ordered for submission to the Commission so as to enable it to make

recommendations to the Minister for approval. For this purpose, it is obviously important to establish whether the deceased left a valid and enforceable will as this will affect those entitled to be assignees.

Counter-application

[40] Because of the conclusion reached in respect of the main application, it is not strictly speaking necessary to deal with the counter-application as the court *a quo* held it was an irregular application and thus did not deal with it, I do so briefly.

[41] It is correct that there is no notice of motion accompanying the counter application that sets out the relief sought. The basis for the counterclaim is laid in the answering affidavit and not in a separate founding affidavit which can confuse the time limits for its finalisation because it is not clear whether the respondent in the main application must in reply deal with the counter application that forms part of the answering affidavit, or whether two affidavits in response to the answering affidavit had to be filed, namely, a replying affidavit to the answering affidavit, and the answering affidavit to the counter application which would then lead to a replying affidavit on the counter application.

[42] It is thus also correct that, the counter application did not procedurally follow the usual practise and was irregular. This does not mean it was a nullity and unless Johannes could show prejudice because of the manner in which the counter application was brought, it should not have been disregarded. Here it must be borne in mind that Johannes was legally represented and that the counter application and

how to respond thereto might have caused confusion or prejudice to a layperson does not follow, it had the same effect in this matter.

[43] In the answering affidavit to the main application, Johannes was expressly forewarned that the answering affidavit in 'Part II' thereof will deal with a counter application and the relief sought pursuant thereto. In 'Part I' of the answering affidavit the founding affidavit is dealt with seriatim with reference to its paragraphs at the end whereof a prayer is sought seeking the dismissal of the application. Immediately thereafter, under the headings 'Part II' and 'Counter Application', and without reference to the founding affidavit at all, the counter-application is articulated in 34 paragraphs. After the articulation of the case for the counter-claim, the affidavit deals with the paragraphs containing prayers based on the facts and allegations made in the counter application.

[44] It is not surprising that in the above context, nothing was said suggesting that Johannes was prejudiced by the irregular manner in which the counterclaim was brought. In the absence of even an allegation of prejudice, I am of the view that the counterclaim should have been dealt with.

[45] The counter application however does not add anything to what I have already stated. It seeks an order to declare the 'purported' will of the deceased invalid. For the reasons already mentioned, the validity of the will was not established as there is a factual dispute in this regard that needs to be resolved. It seeks books of account and vouchers from Johannes to prove the expenditure he incurred in improving the farm

that forms the subject matter of the lease. This is irrelevant to the dispute under consideration as Johannes does not claim anything in this regard in the main application. The order to review the Minister's decision to withdraw the leasehold is of no moment as Johannes sought the order and the order is supported, albeit based on different considerations, by Maria and her children. The order sought against the Commission and the Minister to revisit their decisions is without merit as the assignee (Maria) forwarded to them by the executrix for approval was not properly done as already indicated and correctly held by the court *a quo* to be ineffectual. The order that the estate remains vested in the executrix pending the resolution of the application for approval as assignee simply follows from the fact that the assignment process has not been finalised as a matter of law and such order was thus unnecessary.²⁴

[46] It follows the fact that, the court *a quo* did not deal with the counter application was not to the detriment of the appellants as it was without merit in any event.

Conclusion

[47] As the Minister's decision to withdraw the lease has been set aside, it follows that the lease is still in place and vested in the executrix of the estate.

[48] As both applications to be recognised as assignees of the lease did not comply with the law relating to succession they were defective and should not have been considered by either the Commission or the Minister.

²⁴ Section 53(2) of the ACLRA.

[49] Because the lease forms part of the joint estate created by the marriage in community of property between Maria and the deceased, she is entitled to be an assignee to at least 50 per cent interest in the lease.

[50] As far as the 50 per cent interest of the deceased in the lease is concerned, the persons entitled to be assignees in respect thereof are to be determined by the law of succession. If the alleged will is accepted as valid and applicable, then Johannes will be entitled to be the assignee in respect of the full 50 per cent interest that the deceased had in the lease. If the assignees are to be determined on an intestate succession basis, the deceased's children and spouse (Maria) will be entitled to be assignees in the deceased's 50 per cent interest of the lease and the proportion they would be entitled to must be determined by the law of intestate succession.

[51] It follows that, it is essential that the validity and applicability of the alleged will be determined as soon as possible as this will affect the number of persons entitled to be assignees and their portions and also, possibly, considerations of the necessity for a redistribution agreement or other legal arrangements to ensure that the multiple assignees with concomitant small and (maybe) uneconomical portions do not scupper the approval by the Minister because such proliferation of assignees will not be in line with the objectives of the ACLRA.

[52] Neither party seeks costs against the other party and in the circumstances there will be no costs order as far as the costs of appeal are concerned. In the court a

quo, a costs order was granted against the Minister and the current appellants. The Minister is not a party to this appeal and the order against him remains. However, as far as the appellants are concerned, they are substantially successful as far as the appeal is concerned and the costs order against them in the court *a quo* should be altered so as not to mulct them with costs. They likewise do not seek a costs order in the court *a quo* against Johannes and I will thus not make such order.

Order

[53] In the result, the following order is made:

- (a) The appeal succeeds and the order of the court *a quo* is substituted with the following order:
 - (i) The decision of the Minister of Land Reform to the effect of withdrawing the lease of Unit A of farm Okorusu No. 88, Otjiwarongo district, Otjozondjupa region, Namibia, is hereby reviewed and set aside as being invalid and of no force and effect.
 - (ii) The applicant Johannes Damaseb is to lodge with the Master of the High Court the document he alleges is the last will and testament of the late Daniel Shalukeni within 14 days of this order to be dealt with in terms of the Administration of Estates

Act 66 of 1965 failing which the estate of the late Daniel Shalukeni shall be deemed to be an intestate estate.

- (iii) The executrix of the estate of the late Daniel Shalukeni shall within 14 days of the final determination envisaged in para (ii) above submit the name(s) of the intended assignee(s) to the Land Reform Advisory Commission together with the reasons for submitting the mentioned assignee(s) who shall consider same and make recommendations to the Minister of Land Reform for consideration pursuant to s 53 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
 - (iv) Pending the decision of the Minister of Land Reform mentioned above the lease shall vest in the executrix of the estate of the late Daniel Shalukeni.
 - (v) The Minister of Land Reform is to pay the costs of this application.'
- (b) There shall be no costs order in this appeal.

FRANK AJA

SHIVUTE CJ

HOFF JA

APPEARANCES

APPELLANTS:

C J van Wyk

Of Legal Assistance Centre, Windhoek

FIRST RESPONDENT:

N Tjombe

Of Tjombe – Elago Incorporated,
Windhoek