REPORTABLE

CASE NO: SA 44/2013

SUPREME COURT OF NAMIBIA

In the matter between

SELMA KAMUHANGA N.O.	**Appellant**
and	
MASTER OF THE HIGH COURT	**First Respondent**
BENGO INVESTMENTS CC	**Second Respondent**
EMMERENTIA COETZEE	**Third Respondent**
ALEXANDER KAMUHANGA	**Fourth Respondent**
EMMERENTIA KAMUHANGA	**Fifth Respondent**

Coram: DAMASEB DCJ, STRYDOM AJA and O'REGAN AJA

Heard: 16 June 2015

Delivered: 13 November 2015

APPEAL JUDGMENT

O'REGAN AJA (DAMASEB DCJ and STRYDOM AJA concurring):

[1] On 14 December 2010, the appellant, Ms Selma Kamuhanga, launched an application in the High Court seeking, amongst other things, an order reviewing and setting aside a decision of the Master of the High Court (the Master) dated 15

November 2010. In that decision, the Master had dismissed an objection the appellant had lodged to a liquidation and distribution account in terms of s 35(7) of the Administration of Estates Act 66 of 1965 (the Act). The High Court dismissed the application with costs. This appeal followed.

Facts

[2] The facts can be briefly stated as follows. The appellant, Ms Selma Kamuhanga, is the executrix of the estate of her late husband, Mr Simeon Kamuhanga, who died in November 2008. Her husband was one of three heirs in the intestate estate of his late father, Mr David Kamuhanga, who died on 18 July 1997 and whose estate had not been finalised at the time of the death of Mr Simeon Kamuhanga. The other two heirs in the estate of Mr David Kamuhanga are Mr Alexander Kamuhanga (the fourth respondent in these proceedings) and Ms Emmerentia Kamuhanga (the fifth respondent). The executors of Mr David Kamuhanga's estate are Bengo Investments CC (the second respondent), represented by Ms Emmerentia Coetzee (the third respondent), who for ease of reference shall be referred to in this judgment as 'the executrix'.

[3] Mr Simeon Kamuhanga and the appellant had six children, of whom all but two were majors by the time this litigation was commenced. In addition, Mr Simeon Kamuhanga had a seventh child, whose mother was not the appellant. That child was born in 1995 and was thus also a minor at the time the litigation commenced.

[4] According to the liquidation and distribution account approved by the Master in relation to the estate of Mr David Kamuhanga, the estate contained two assets: a farm in the Omaheke region (remaining Portion of the Farm Usagei Number 367) measuring just over 2000 hectares (the farm), and a 1990 Nissan bakkie (the vehicle), which was valued in the liquidation and distribution account at N$18 000. According to the account, both the farm and the vehicle were sold to one of the heirs, Mr Alexander Kamuhanga (the fourth respondent), for N$1,3 million and N$18 000 respectively. After subtraction of the liabilities, N$1 247 865,30 was available for distribution to the three heirs, being N$415 955,10 each.

[5] Before turning to the nature of the appellant's objection to the liquidation and distribution account, it will be useful to set out the events relevant to the sale of the farm. Initially, on 26 November 2009, the Master wrote a letter to the executrix instructing her that as the heirs in the estate included minor children, being the heirs of Mr Simeon Kamuhanga, the proviso to s 47 of the Act was applicable. That proviso stipulates amongst other things that where the heirs to an estate include minors the property of the estate shall be sold in the manner directed by the Master.[1] The Master further instructed the executrix to consider the highest purchase price for any asset, and that should the heirs disagree on the purchase price, the Master's office may consider sale by public tender.

[1]Section 47 provides as follows: 'Unless it is contrary to the will of the deceased, an executor shall sell property . . . in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: provided that – (a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or (b) if the said heirs are unable to agree on the manner and conditions of the sale, the executor shall sell the property in such manner and subject to such conditions as the Master may approve.'

[6] On 6 April 2010, the executrix applied to the Master in terms of s 47 of the Act for the Master's consent to sell the farm to Mr Alexander Kamuhanga by private treaty rather than by way of public auction. She indicated in her letter that she was struggling to obtain the consent of the heirs to the sale of the property. The Master responded to this letter on 23 April 2010 approving the request to sell the farm by private treaty, on condition that the purchase price was not less than N$1,3 million, that the majority of heirs consent to the sale and that preference be given to beneficiaries.

[7] As indicated above, the executrix then sold the farm to Mr Alexander Kamuhanga for N$1,3 million. Mr Kamuhanga signed the deed of sale on 26 April 2010 and the executrix signed on 3 May 2010. The sale in April 2010 followed a long chain of events in which various offers had been made to purchase the farm.

[8] In June 2009, the executrix obtained a valuation of the farm from an independent appraiser valuing the farm at N$1 249 320 and Mr Alexander Kamuhanga then agreed to purchase the farm for that price. At about the same time, according to the third respondent, a Mr Hoveka, who apparently also goes under the name Mr Tjakazenga Kamuhanga Kamuhanga, made an offer to purchase the farm for N$900 000. It is common cause that Mr Hoveka is not an heir in Mr David Kamuhanga's estate. When his offer was refused, Mr Hoveka then made a second offer on 9 July 2009 in the amount of N$1 000 000. On 13 July 2009, he amended the offer to N$1 100 000. The executrix explained to Mr Hoveka that the farm had been sold to Mr Alexander Kamuhanga. On 28 July 2009, Mr Hoveka made another offer of N$1,3 million for the farm. Mr Alexander

Kamuhanga then agreed that he would match the selling price of N$1,3 million notwithstanding that he had already signed a deed of sale on the basis of a purchase price of N$ 1 249 000.

[9] Although there is some confusion on the record as to what happened next, it appears that Mr Hoveka offered, at least orally, to pay N$1,4 million for the farm. It is not clear when this offer was made, but it seems certain that it was made before 6 April 2010, because as set out above, on that date the executrix wrote to the Master setting out what had happened with regard to the sale of the farm, and applying, in terms of s 47 of the Act, for the Master to consent to her selling the farm. In her letter, the executrix set out the facts many of which have been set out in the previous paragraphs, including the valuation of the farm, and mentioning that Mr Hoveka had made an offer of N$1,4 million for the farm.

[10] The executrix also noted that she was being pressured to sell the farm on public auction, which, the executrix pointed out would not be 'cost-effective' because it was not certain that the farm would attain a purchase price at auction equal to the current valuation, given the state of repair of the farm as reflected in the valuation report. The executrix pointed out that according to the valuation report 'a large amount of money' would be necessary to make the farm 'a viable farming operation'. The executrix also noted that if the farm were to be sold to a person other than an heir, it would be necessary to apply for a waiver from the government in terms of s 17(1) of Act 6 of 1995. The letter concluded with the executors requesting the Master 'to assist us in this very urgent and long overdue matter and give us permission and consent to sell to Mr Alexander Kamuhanga.'

[11] As mentioned above, the appellant's legal representatives lodged an objection to the account in terms of s 35(7) of the Act on her behalf. It is the dismissal of that objection by the Master that the appellant seeks to have set aside in these proceedings. The objection referred to five aspects of the account. It is reproduced here in full:

> 'Ad item 1 thereof:
> (i) What happened to the offer of Mr Tjakazenga Kamuhanga Kamuhanga in the amount of N$1,4 million which appears to be N$100 000 more than the offer "accepted" by the executrix?
>
> (ii) if the executrix decided to sell to the beneficiaries, why was the agent of the executrix in the estate of late Simeon Kamuhanga not informed of this new development to enable her to share this information with her principal?
>
> Ad item 2 thereof:
> Since the said vehicle was under the direct control of Alexander Kamuhanga since July 1997, kindly reflect its book value as at the date of death, which surely will be more than the reflected amount. When was it decided that the said vehicle should be sold to Mr Alexander Kamuhanga? Again this aspect was not communicated to us. It appears that Alexander Kamuhanga is getting preferential treatment with respect to the assets in this estate.
>
> Ad item 11 thereof:
> What was the bond of security taken out for, as the executrix was only appointed in 2009?
>
> Ad Income and Expenditure account:
> Will the executrix kindly request Alexander Kamuhanga to pay in rentals since date of death of David Kamuhanga (July 1997) as he has been farming there since July 1997. Our instructions are that at all material times Alexander Kamuhanga had in excess of 200 cattle and hence he is indebted to the estate in the amount of

approximately N$360 000. That is a conservative rental amount of N$20 per head of cattle.

Ad Certificate:
It is as such incorrect and misleading that the executrix declare that to best of her knowledge and belief that income collected subsequent to the death of the deceased to date have been disclosed when made no effort to collect from certain debtors of the estate, ie tenant at Farm Usagei.'

[12] Upon receipt of the objection, the Master forwarded the objection to the executrix as the legislation requires her to do.[2] The executrix provided her with a response to each of the grounds of objection on 13 September 2010 and the Master then responded to appellant's legal representatives on 15 November 2010 as follows.

'Ad para 1 thereof:
I refer you to our letter addressed to you dated 25 August 2010.

Ad para 2 thereof:
Having taken cognizance of the fact that the 2.5 Nissan motor vehicle is a 1990 model and that certain efforts were made by Bengo Investments to value same we hereby accept that the value per the liquidation and distribution account until concrete proof is presented to our office to the contrary.

Ad para 3 thereof:
We refer you to our letter addressed to you dated 25 August 2010.

Ad para 4 thereof (Income and Expenditure account)
The allegations contained herein were refuted and it has come to light that your client the late Simeon Kamuhanga resided on the farm till death without paying

[2] See s 35(7) of the Act.

> rent, that Alexander Kamuhanga acted [as] caretaker of [the] farm without remuneration and also maintained [the] farm at [his] own cost.
>
> After due consideration of your objection and having systematically dealt with same, we hereby reject your objection and instruct Bengo Investments to finalise the administration process.'

[13] The Master's letter of 25 August 2010, referred to in the letter of 15 November 2010 set out above, was sent to the appellant's legal representatives, Dr Weder, Kauta and Hoveka. It read, in relevant part, as follows:

> 'Kindly take notice that Emmerencia Coetzee of Bengo Investments CC was appointed executrix by our office after same provided security in terms of s 23 of Act 66 of 1965. The bond of security is dated 12 March 2009 and the letter of executorship was issued on 31 March 2009.
>
> Emmerencia Coetzee approached our office for approval i t o s 47 of Act 66 of 1965 regarding the sale of the immovable property. The Master gave approval to the sale by private treaty provided the purchase price is not less than N$1 300 000.00 and the beneficiaries are given first option to purchase.
>
> Hope this clarifies certain issues raised in your objection. We forwarded your objection to the executrix and hope for a prompt response.'

Proceedings in the High Court

[14] The High Court emphasised that the application sought to review and set aside the decision of the Master to dismiss the objection raised by the appellant. It observed that the Master's decision was based on a discretion conferred upon the Master by the Act. The High Court also noted that the legal basis for the review application was Art 18 of the Namibian Constitution and that the applicant bore the

burden of satisfying the court that grounds exist to review the decision of the Master.

[15] The High Court held that the Master's letter of 25 August 2010 must be read together with her letter of 15 November 2010 in which it was stated that she gave due consideration to the objections lodged on behalf of the appellant. The High Court also noted that the Master had given consent to the sale of the property in her decision in terms of s 47 of the Act, and that decision was neither unfair nor unreasonable. The High Court concluded that the appellant had failed to show that the Master acted in bad faith, or from improper motives, or on the basis of extraneous considerations, or under an incorrect view of the law of facts. Accordingly the High Court dismissed the application with costs.

Appellants' submissions

[16] As to the preliminary objections raised by the respondent relating to the standing of the appellant and the service of the notice of motion on the Master, counsel for the appellant argued that there had been proper service on the Master and the fifth respondent; and that the *locus standi* of the appellant to object to launch these proceedings was established in the founding affidavit, and was based on the fact that the appellant is the executrix in the estate of Mr Simeon Kamuhanga, one of the heirs of Mr David Kamuhanga.

[17] Counsel for the appellant also submitted that the Master had acted unlawfully, unfairly and unreasonably and contrary to the provisions of Art 18 of the Namibian Constitution[3] in failing properly to take into account:

(a) the fact that the fourth respondent had had possession of the farm since 1997, and benefited from that possession, yet that benefit was not reflected in the liquidation and distribution account;

(b) the offer to purchase the farm made by Mr Hoveka in the amount of N$1,4 million when stipulating as a condition for sale that the farm should be sold for an amount of not less than N$1,3 million;

(c) the fact that the fourth respondent had benefited from the use of the vehicle since 1997;

(d) that no written consent was received from the appellant for the sale of the farm;

(e) that the appellant was not informed of the preferent right to purchase the farm;

(f) the interests of the minor children of Simeon Kamuhanga.

[3] Article 18 provides that: 'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[18] Counsel for the appellant also submitted that the Master's decision was unfair because the Master had initially instructed the executrix to sell the farm to the highest bidder, and then had changed her mind and said that the farm should be sold for a minimum price of N$1,3 million, without affording the appellant a hearing.

Respondents' submissions

[19] Counsel for the respondents raised several preliminary challenges to the appeal. They first raised the question whether there had been proper service on the first and fifth respondents. Counsel pointed out that in the court below respondents had objected to the absence of proper service on the Master, but that the High Court had noted that the original notice of motion bore the stamp of the Office of the Master, as well as a date stamp which led the court to conclude that there had been proper service on the Master, even if a return of service was not filed by the Deputy Sheriff. Counsel for respondents persisted with their argument that there had not been proper service on the first respondent and also argued that there had not been proper service on the fifth respondent, who had, nevertheless, filed a notice of intention to defend.

[20] The second preliminary argument raised on behalf of the respondents related to the *locus standi* of appellant. Respondents argued that the basis of appellant's *locus standi* was not clearly set out in the founding affidavit.

[21] In response to the grounds of review raised on behalf of the appellant, counsel for the respondents argued, amongst other things, that –

(a) there were no minor beneficiaries of the estate of the late Mr David Kamuhanga, and the appellants' assertion that the minor beneficiaries of the estate of his son, the late Mr Simeon Kamuhanga, should be taken into account in finalising the estate of his father was incorrect;

(b) that it was not unreasonable or unfair of the Master to stipulate a minimum price of N$1,3 million for the farm, even given the offer of Mr Hoveka for N$1,4 million, given that Mr Hoveka was not a beneficiary of the estate;

(c) that the conduct of the executrix cannot be attributed to the Master, and therefore complaints about the conduct of the executrix cannot form the basis of a review of a decision of the Master; and

(d) that it appeared from the record that the Master had properly applied her mind to each aspect of the objection raised by the appellant and responded thereto and that it could not be said that the content of her responses was unfair or unreasonable.

[22] Before turning to the issues to be considered in this appeal, there are several preliminary issues that need to be addressed.

<u>First preliminary issue: Service on the Master and her failure to lodge an affidavit</u>

[23] The first respondent, the Master of the High Court, did not lodge a notice of intention to oppose, nor file an affidavit setting out her response to the issues raised in these proceedings. The High Court found that the record disclosed that there had been proper service on the Master. Nevertheless, it is a matter of concern to this court that it should have to determine this appeal on the basis of a record that does not include an affidavit from the Master. As it happens, the record in this case contains a range of documents which clarify the Master's position, but in cases where questions remain as to the reasons for the conduct of the Master, it may well be appropriate given the important public mandate of the Master for a court pertinently to call for an affidavit to be lodged by the Master.

Second preliminary issue: *locus standi* of appellant

[24] Respondents persist on appeal with their assertion that the appellant has not clearly established the basis upon which she has *locus standi* to prosecute these proceedings. The respondents argue that it is not clear whether appellant is acting in her personal capacity, or in a representative capacity. Respondents further argue that the appellant does not say explicitly that she launched the application in her capacity as executrix of the estate of Mr Simeon Kamuhanga. The High Court dismissed their objection. It is clear that as executrix of that estate appellant would have *locus standi* to lodge an objection to the liquidation and distribution account relating to Mr David Kamuhanga's estate given that Mr Simeon Kamuhanga was one of the heirs in that estate. The appellant pertinently described herself in the founding affidavit as acting in a *nomine officii* capacity, and avers that she is the executrix of Mr Simeon Kamuhanga's estate, as well as one of his heirs. Given the express reference by appellant in the founding affidavit

to the fact that she is acting *nomine officii* and her statement that she is executrix of Mr Simeon Kamuhanga's estate, there is little room for doubt that the appellant has *locus standi* and that she asserts it in her capacity as executrix of Mr Kamuhanga's estate. Respondents' arguments to the contrary cannot therefore be accepted.

Third Preliminary issue: Application for condonation to supplement the appeal record with missing affidavit

[25] The respondents brought an application to supplement the appeal record by including within it a confirmatory affidavit made by the executrix on 30 July 2012, which apparently was omitted from the answering affidavits lodged in the High Court in error. The appellant did not oppose the inclusion of the confirmatory affidavit and no material prejudice will be occasioned by its inclusion at this late stage. Accordingly at the hearing the court granted the application but reserved the question of any costs relating to it for later decision. This is matter to which I will return at the end of this judgment.

Issues for decision

[26] The following issue arises for decision: Should this court review and set aside, in terms of s 35(10) of the Act, the Master's dismissal of the objection lodged on behalf of the appellant in terms of s 35(7) of the Act? This will require a consideration of –

(a) the proper approach to reviews brought in terms of s 35(10) of the Act;

(b) whether the Master's determination of the objection should be set aside; and

(c) What relief should be ordered, if any.

Each of these will be considered in turn.

The proper approach to reviews of decisions taken by the Master in terms of s 35(10) of the Act

[27] Section 35(1) of the Act provides that the executor of a deceased estate shall lodge a liquidation and distribution account with the Master. The account will then lie for inspection at the Master's office[4] and the executor shall publish a notice stating that the account is open for inspection.[5] Any person interested in the estate may lodge an objection, giving reasons, with the Master to the liquidation and distribution account.[6] The Master will provide the executor with copies of the objection[7] and the executor must respond to the objection within fourteen days.[8] Having received the response from the executor, the Master then determines whether the objection is well-founded or not, and may direct the executor to amend the account or make such other direction as she deems fit.[9]

[28] Section 35(10) then provides that –

[4] Section 35(4) of the Act.
[5] Section 35(5) of the Act.
[6] Section 35(7) of the Act.
[7] Id.
[8] Section 35(8) of the Act.
[9] Section 35(9) of the Act.

> 'Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.'

[29] It was argued on behalf of the appellant that the review jurisdiction conferred on a court by s 35(10) should be construed consistently with Art 18 of the Constitution, which would require a court reviewing a decision of the Master to determine whether the Master had acted reasonably, fairly and in compliance with legal requirements in her determination of the objection to the liquidation and distribution account. The respondents did not suggest that this approach was incorrect. Is this the correct approach to be followed?

[30] The provisions of s 35 are almost identical to the provisions of s 35 of the South African Administration of Estates Act and, accordingly, South African jurisprudence is of some assistance in interpreting the provisions of s 35. The generally accepted approach in South Africa is that the Master cannot be expected to determine factual disputes that exist between creditors, interested parties and the estate as the section does not provide any procedures or structures to enable the determination of factual disputes.[10]

[31] Section 35(10) is drafted in almost identical terms to s 407(4) of the Companies Act 61 of 1973, as well as s 111(2) of the Insolvency Act 24 of 1936, although these other provisions relate to the accounts drawn in relation to

---

[10] See, for example, *Broodryk v Die Meester en 'n ander* 1991 (4) SA 825 (C) at 830H–I; *CP Smaller (Pty) Ltd v The Master and others* 1977 (3) SA 159 (T) at 163D–E; and *Ferreira v Die Meester* 2001 (3) SA 365 (O) at 370F–H.

liquidated companies, in the case of the Companies Act provision, and insolvent estates, in the case of the Insolvency Act provision. In interpreting these provisions, South African courts have taken the view that the power of the court is to adjudicate a matter *de novo,* rather than as a matter of review, partly because of the language of the section that provides that a court 'may make such order as it may think fit'.[11] Nevertheless, it has also been held that where the court is considering the question on the same record as the Master in that no new facts have been placed before the court –

> 'the Court should hesitate to substitute its own opinion for that of the Master . . . unless it is clear that any particular ruling by the Master is tainted by irregularity or error.'[12]

[32] It is clear therefore that although the South African courts have interpreted their jurisdiction under these provisions in a broad manner, they have also acknowledged that the Master's rulings, particularly on the facts, 'ordinarily deserve deference'.[13] There are good reasons for courts to be respectful of rulings made by the Master given that she is the official entrusted with the administration of deceased estates and is therefore an expert in the field. There are limits of course to this principle. The Master must act fairly and reasonably, and in compliance with law. These are the requirements that Art 18 of the Namibian Constitution imposes upon administrative bodies and administrative officials.

---

[11] See, for example, *South African Bank of Athens Ltd v Sfier (aka Joseph) and others* 1991 (3) SA 534 (T) at 536F–537A; *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and others* 1991 (4) SA 514 (N) at 523H–525G.
[12] See *Van Zyl NO v The Master* 2000 (3) SA 602 (C) at 607H.
[13] Id. At 607G.

[33] Having considered the approach in South Africa, it seems to me that the correct approach in Namibia to a court's powers under s 35(10) is to adopt the approach proposed by the appellant and followed by the court *a quo* which is to determine whether when the Master determined the objection brought on behalf of the appellant, she acted fairly, reasonably and in compliance with the law when it dismissed the objections brought on behalf of the appellant. I turn now to consider that question on the facts of this case.

Did the Master act fairly, reasonably and in compliance with the law?

[34] It will be helpful to consider each of the three remaining objections separately.

(a) The sale of the farm

[35] The first objection had two parts, both relating to the sale of the farm. The first issue raised the question whether in determining that the farm should be sold for N$1,3 million proper attention had been paid to the offer of Mr Hoveka in the amount of N$1,4 million. The second raised the question why the appellant had not been informed of the Master's decision to sell the farm to beneficiaries.

[36] The executrix sold the farm to the fourth respondent after seeking permission from the Master in terms of s 47 of the Act. In seeking that permission, the executrix informed the Master of the offer of N$1,4 million by Mr Hoveka, who was not an heir, but also informed the Master that if the farm was sold to a person other than an heir, it would be necessary to apply for a waiver from the

government in terms of s 17(1) of Act 6 of 1995. The request by the executrix, contained all the relevant facts including the fact that there had been an offer of N$1,4 million by a non-heir. After considering the request, the Master granted the executrix' application in terms of s 47, on condition that the purchase price was not less than N$1,3 million, that the majority of the heirs consent to the sale, that the sale was by private treaty and that preference must be given to beneficiaries.

[37] The appellant has never sought to review the Master's decision in terms of s 47 and it is arguably not open to the appellant now to seek to challenge the Master's decision made in terms of s 47 by way of s 35(10) of the Act. She seeks to challenge that decision indirectly by challenging, amongst other things, the price for which the farm was sold. Assuming that the appellant may challenge the price stipulated by the Master for the sale of the farm in these proceedings, something we do not decide, it cannot be said that the price set by the Master was in the circumstances unfair, unreasonable or unlawful.

[38] In stipulating the price as well as the other conditions for the sale, the Master clearly took into account the interests of heirs. She set the price higher than the independent valuation of the farm (N$1 249 320), and expressly recognised the desirability of giving preference in relation to the sale of the farm to heirs over third parties, given that the farm was a family asset. She also required that a majority of the heirs consent to the sale. It is correct that in so doing the Master permitted the sale of the farm at N$100 000 less than had been offered by a third party, but that decision recognised, as pointed out by the executrix, that the sale to a third party would require a waiver from the government in terms of s

17(1) of Act 6 of 1995 which would, at the least, occasion delays and would mean that the farm would no longer be held by a member of the family of the deceased but would be acquired by a third party.

[39] In assessing the Master's decision, it is important to recognise that there were a range of reasonable decisions that the Master could have made in this regard, both in relation to the determination of the minimum price and the conditions set. It would not be appropriate for this court to seek to 'second-guess' the Master's decision given the special role conferred upon the Master in relation to the administration of deceased estates, unless there is a sense that the decision made by the Master is unfair or unreasonable in relation to the relevant facts and interests. It cannot be said that the Master's decision in terms of s 47 of the Act to permit the executrix on stipulated conditions was unfair or unreasonable.

[40] Appellant argued that because the Master did not explicitly refer to the offer by Mr Hoveka to pay $1,4 million for the farm in her letter of 25 August 2010, she did not apply her mind to the fact of the offer. But it cannot be inferred that simply because the Master did not refer to the offer in her letter of 25 August 2010 that she did not apply her mind to that offer. Indeed, the circumstances would suggest otherwise. The executrix pertinently drew the attention of the Master to the fact that as Mr Hoveka was not an heir in the estate, selling the farm to him would require seeking permission for the sale, something that would not necessarily be granted. Indeed, the Master's express condition that the sale should be to a beneficiary of the estate is an implicit acknowledgement of this risk. Appellant's argument on this score therefore must be rejected.

[41] The appellant also argued that the Master did not adequately take the interests of Mr Simeon Kamuhanga's minor children into account in reaching her decision. The record suggests the contrary, however. That the Master was aware of the minor children is evident as she had referred to that fact in her letter of 26 November 2009. There is accordingly nothing on the record to suggest that the Master did not consider their interests in reaching the decision she did and appellant's arguments in this respect cannot succeed.

[42] Appellant also argued that the Master should not have amended the conditions for the sale of the farm initially set in her letter of 26 November 2009 without affording the heirs an opportunity to be heard in that respect. Here the appellant seeks to challenge the process by which the decision under which s 47 was reached. In our view, that is not something the appellant can do as part of an objection to the liquidation and distribution account. The appellant could have sought to renew and set aside the Master's decision in terms of s 47 but chose not to do so. It is not permissible to the appellant to seek to do so indirectly through the mechanism afforded by s 35(10).

[43] The second leg of this objection relates to the alleged failure of the executrix to draw the attention of the appellant to the conditions set by the Master for the sale of the farm. In written and oral argument, counsel for the appellant sought to extend this aspect of the objection to include the alleged failure by the executrix to obtain the appellant's written consent to the sale of the farm, which it was argued, was required in terms of s 47 of the Act, as well as the failure of the

executrix to offer the farm for sale to the appellant, and to inform the appellant that beneficiaries of the estate had a preferent right to purchase the farm in light of the conditions set by the Master. The first thing that should be noted in this regard is because the Master had issued a special instruction in relation to the sale of the farm under s 47, the ordinary requirement of s 47 that requires the heirs to consent to the manner of the sale of estate property has no application to the sale of the farm.[14] The appellant's argument in this respect falls to be rejected.

[44] There is a dispute of facts on the papers as to whether the executrix informed the appellant of the preferent right of the heirs to purchase the farm, and whether she asked her to consent to the sale. The executrix asserts that the appellant was informed of the conditions for the sale of the farm stipulated by the Master and given an opportunity to purchase the farm. The appellant denies this. On the ordinary rules governing motion procedure, the applicant's case (here, the appellant) must be determined on the facts alleged by the appellant that are not disputed by the respondent, together with the facts asserted by the respondent, as long as any denial by a respondent raises a real or bona fide dispute of fact, as it does here. [15] Accordingly the appellant's case cannot succeed.

[45] Moreover, it is clear that this is an objection that does not relate to the liquidation and distribution account, nor does it relate to the conduct of the Master. It relates to the conduct of the executrix. It is not a matter, therefore, that can be

[14] See text of s 47 at n 1 above.
[15] See *Mostert v Minister of Justice* 2003 NR 11 (SC) at 21G-H and *Hepute v Minister of Mines & Energy* 2008(2) NR 399 (SC) at 405E-F. This rule is often referred to as the "Plascon-Evans" rule, after the leading South African case *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634H–635C.

raised by way of the procedure stipulated in s 35 (10), which is a procedure to determine whether objections to the liquidation and distribution account should be sustained. Section 35(10) does not create a general mechanism for relief in relation to heirs' complaints about the conduct of an executor in finalising an estate. On this basis too, appellant's claim cannot succeed.

[46] We note finally that the fact that s 35(10) does not provide a remedy to the appellant here does not mean that a dissatisfied heir has no remedy for maladministration by an executor. On the contrary, dissatisfied heirs have a common-law cause of action against an executor to recover loss they have suffered as a result of the executor's maladministration of the estate.[16] To succeed in such a case an heir will have to establish loss caused as a result of maladministration by the executor. This is not a matter we need to consider further here. What is clear is that the second aspect of the objection relating to the sale of the farm, and the ancillary issues that appellant sought to raise in these proceedings, do not relate to the liquidation and distribution account and cannot therefore be raised under s 35(10) of the Act.

(b) The valuation of the vehicle

[47] The appellant complained that the vehicle had been sold to Alexander Kamuhanga for N$18 000, the amount reflected in the liquidation and distribution account. The objection noted that the vehicle had been under the control of Alexander Kamuhanga since July 1997 and that the vehicle should therefore have been valued at a higher value, namely the book value of the vehicle in 1997,

[16] See *Clarkson v Gelb and others* 1981 (1) SA 288 (W) at 295C–D.

although the objection did not indicate what the book value of the vehicle was in 1997.

[48] The executrix informed the Master in response to this objection that she had approached several motor dealers for quotations in respect of the vehicle, and that they confirmed the current value of the vehicle to be N$18 000, although they told her that the vehicle was no longer in their systems, apparently because of its age. The executrix also asserted that she had asked Ms Emmerentia Kamuhanga whether she wished to purchase the vehicle, but she had declined and indicated that the executrix could sell the vehicle for Mr Alexander Kamuhanga for N$18 000. The executrix also stated that she offered the vehicle to the appellant who also declined to purchase the vehicle and stated that the vehicle could be sold at book value. The appellant denies that she received this offer, but again as the approach referred to in para [44] above, the respondent's version in this regard must be accepted.

[49] In the light of the executrix' response, the Master dismissed the objection on this ground by saying that the vehicle was a 1990 vehicle, that the executrix had taken steps to value the vehicle, and that the Master was satisfied until a contrary valuation was received by the Master that the valuation proposed by the executrix should stand.

[50] The vehicle in question was twenty years old at the time that the liquidation and distribution account was finalised. It is not denied that the vehicle has been utilised by Mr Alexander Kamuhanga in the period since the death of Mr David

Kamuhanga, although no details of the nature or extent of that use appear from the record. Moreover, as the Master's letter makes plain the appellant in her objection proposed no alternative valuation for the vehicle. In the circumstances, it cannot be said that the Master's rejection of the objection on this basis was unfair, unreasonable or unlawful.

(c) Occupation and use of the farm by Mr Alexander Kamuhanga not valued and reflected in liquidation and distribution account

[51] The appellant also complained that the fact that Mr Alexander Kamuhanga had been farming on the farm since July 1997 should have been reflected in the liquidation and distribution account. The Master responded to this objection by stating that it appeared that the appellant's husband, Mr Simeon Kamuhanga, had also resided on the farm until his death without paying rent and that Mr Alexander Kamuhanga had served as a caretaker on the farm without remuneration, and had maintained the farm at his own cost.

[52] Again, the Master's response seems to be fair and reasonable in the circumstances. The farm appears to have been a family farm on which several of Mr David Kamuhanga's heirs resided after his death without paying rental. It does not seem to have been unreasonable for the Master to take the view that it was not necessary for the liquidation and distribution account to reflect in cash terms the benefits received by the heirs who resided on the farm after the death of their father. Nor does it seem unreasonable for the Master to have taken the view, on the advice of the executrix, that Mr Alexander Kamuhanga had performed a

service to the estate by acting as caretaker of the farm without charge to the estate.

[53] The Master's response to this objection can also therefore not be faulted.

Conclusion

[54] In the circumstances, it cannot be said that the Master's dismissal of the objection was unfair, unreasonable or unlawful. Accordingly, appellant's appeal must fail.

Costs

[55] The appellant has failed in her appeal and there is no reason why costs should not follow the result. The only exception to this is that the appellant should not be required to pay the costs incurred by respondent relating to the application for condonation for the supplementation of the appeal record with the confirmatory affidavit made by the executrix, discussed above at para [25]. There is no reason why the appellant should carry the costs of the oversight by the respondents in this regard.

Order

[56] The following order is made:

1. The appeal is dismissed.

2. The appellant is ordered to pay the costs of the appeal, such costs to include the costs of one instructing and one instructed counsel, but not to include the costs incurred by the respondent in relation to the application to supplement the appeal record.

_____
O'REGAN AJ

_____
DAMASEB DCJ

_____
STRYDOM AJA

APPEARANCES

APPELLANT:	G. Narib Instructed by Dr Weder, Kauta & Hoveka Inc.
2nd, 3rd and 4th RESPONDENT:	B de Jager Instructed by Du Pisani Legal Practitioners.