REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-OTH-2017/04498
(INT-HC-RECOD-2023/00121)

TUKONDJA TJIVIKUA	**FIRST APPLICANT**
KOKUWA TJIVIKUA	**SECOND APPLICANT**

and

VICTORINE NGUMERITIZA TJIVIKUA	**FIRST RESPONDENT**
MASTER OF THE HIGH COURT	**SECOND RESPONDENT**
TUISANE TJIVIKUA	**THIRD RESPONDENT**
UNDJEE JACKY TJIVIKUA	**FOURTH RESPONDENT**
ANNA KAMATUUA TJIVIKUA	**FIFTH RESPONDENT**
MARCELLA UEJAA ZERUA	**SIXTH RESPONDENT**
MERCIA KATUPOSE	**SEVENTH RESPONDENT**

Neutral citation: *Tjivikua v Tjivikua* (HC-MD-CIV-ACT-OTH-2017/04498) [2024] NAHCMD 148 (4 April 2024)

Coram: SIBEYA J
Heard: **19 February 2024**
Delivered: **4 April 2024**

Flynote: Motion proceedings – Application for rescission of judgment or order – Curator *ad litem* appointed, authorised and mandated to represent the applicants (minor children) in an application to be instituted regarding the validity of a copy of a Will – The application was dismissed on technical grounds, action proceedings later instituted – The effect of the authorisation of the curator *ad litem* in an application discussed to determine its applicability to the action proceedings – The effect of failure to substitute the curator *ad litem* for the applicants after attaining majority discussed – The settlement agreement found to affect the interests of the applicant and the order sought to be rescinded found to have been sought and obtained in the absence of the applicants and in error.

Summary: The applicants, the children of the late Bartholomeus Tjivikua seek the rescission of an order of 23 October 2022 that made the settlement agreement entered into between their mother and the respondents (Undjee Jacky Tjivikua and Anna Kamatuua Tjivikua), an order of court. The applicants, who were minors had a curator *ad litem* appointed and authorised by a court order to represent them in an application to be launched by their mother to seek an order to declare a copy of the last Will and Testament of the late Bartholomeus Tjivikua as the only valid Will and Testament. The application was dismissed on technical grounds and an action was instituted where the curator *ad litem*, Adv Yoleta Campbell was cited as the seventh defendant, but did not defend the matter. The applicants' mother and the respondents entered into a settlement agreement regarding the inheritance of the respondents in the absence of the applicants. The settlement agreement was made an order of court and it is this order that the applicants seek to rescind. The respondents oppose the application.

Held: rule 16 of the rules of this court does not find application to the present rescission application as the application was brought outside the prescribed 20 days period of the knowledge of the order within which to bring a rescission application.

Held that: rule 103 finds application to this rescission application and the appointment of the curator *ad litem* was only in respect of an application to be

brought and did not extend to action proceedings, therefore, the applicants were not parties to the action proceedings.

Held further that: the curator *ad litem* was not substituted for the applicants despite the applicants attaining the age of majority thus denying them the right to a fair trial and representation of own choice.

Held: that the settlement agreement affected the applicants and their interest in the inheritance, which settlement agreement was concluded in their absence and, thus, erroneously sought and granted. The application, therefore, succeeded.

ORDER

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1. The applicants' application for rescission of the order of 23 October 2022, making the settlement agreement entered into between the first, fourth and fifth respondents in the absence of the applicants is upheld and the said order is hereby rescinded in terms of rule 103 of the rules of this court.

2. The applicants are granted leave to join the main action instituted by the first respondent either as plaintiffs or defendants as they may elect.

3. The respondents must pay the applicants' costs of the rescission application including costs of one instructing and one instructed legal practitioner.

4. The matter is postponed to 18 April 2024 at 08:30 for a status hearing.

5. The parties must file a joint status report on or before 15 April 2024.

JUDGMENT

SIBEYA J:

Introduction

[1] This court is seized with an application for rescission of an order granted on 23 October 2022. The application is launched from different fronts. It is opposed by the fourth and fifth respondents.

The parties and representation

[2] The first applicant is Ms Tukondja Tjivikua, a major female resident of Windhoek. Where reference is made to the first applicant she shall be referred to as 'Tukondja'.

[3] The second applicant is Ms Kokuwa Tjivikua, a major female resident of Windhoek. Where it becomes necessary to refer to the second applicant, she shall be referred to as 'Kokuwa'.

[4] Where it becomes necessary to refer to Tukondja and Kokuwa jointly, they shall be referred to as 'the applicants'.

[5] The first respondent is Ms Victorine Ngumeritiza Tjivikua, a major female farmer and businesswoman, residing at farm Sargberg in Otavi district. The first respondent shall be referred to as 'Victorine'.

[6] The second respondent is the Master of the High Court, whose address of service, is care of the Office of the Government Attorney, 11th floor, Sanlam Building, Independence Avenue, Windhoek. The second respondent shall be referred to as 'the Master'.

[7] The third respondent is Mr Tuisane Tjivikua, a major male resident of Okahandja. The third respondent shall be referred to as 'Tuisane'.

[8] The fourth respondent is Ms Undjee Jacky Tjivikua, an adult female resident of Windhoek. The fourth respondent shall be referred to as 'Undjee'.

[9] The fifth respondent is Ms Anna Kamatuua Tjivikua, a major female resident of the Republic of Sweden. Her address of service is care of the address of Undjee. The fifth respondent shall be referred to as 'Anna'.

[10] The sixth respondent is Ms Marcella Ueja Zeraua, a major female resident of Windhoek. The sixth respondent shall be referred to as 'Marcella'.

[11] The seventh respondent is Ms Mercia Katupose, a major female resident of Windhoek. The seventh respondent shall be referred to as 'Mercia'.

[12] Only the fourth and fifth respondents (Undjee and Anna) oppose the application. Where reference is necessarily made to Undjee and Anna jointly, they shall be referred to as the respondents.

[13] The applicants are represented by Mr Rukoro while the respondents are represented by Ms Hans-Kaumbi.

Background

[14] The applicants are biological children of the late Bartholomeus Tjivikua who died in 2015. Victorine filed an application for the appointment of a curator *ad litem* in respect of the applicants, who were minors by then, for the purposes of being represented in the application to be launched. On 24 March 2017, this court appointed Adv Yoleta Campbell as the curator *ad litem* to represent the applicants in the application to be launched by Victorine where she will seek an order to declare a copy of the Will and Testament of the late Bartholomeus Tjivikua to be the only valid Will and Testament of the late Bartholomeus Tjivikua.

[15] On 27 September 2017, the application launched by the applicant was dismissed on technical grounds.

[16] Victorine instituted action proceedings under the present case number seeking similar relief. Adv Campbell was cited as the seventh defendant in a representative capacity for the applicants. The summons were served on Adv Campbell but she did not defend the action. She also did not participate in the settlement negotiations that led to a settlement agreement that was concluded on 21 October 2022 and made an order of court on 23 October 2022.

[17] The applicants are the biological children of Victorine, but Victorine had no mandate to represent them in the action proceedings. The applicants lived with Victorine. The respondents contend that the applicants were aware of the proceedings and further that Kokuwa was present at court during the initial day of the scheduled trial.

[18] The applicants contend that the said settlement agreement concluded without their involvement compromised their rights. The respondents contend contrariwise that they concluded a settlement agreement with Victorine, acting in her personal capacity and not as an executrix of any estate, and, therefore, having no effect on the interests of any other person.

[19] It should be pointed out that the applicants failed to file their replying papers in accordance in accordance with the timeline set out by the court. They filed an application for condonation for the default. The application for condonation was found to lack merits and was dismissed. This left the founding and answering papers as the only papers on which this rescission application is to be determined.

Points *in limine*

Locus standi

[20] The respondents raised a point *in limine* that the applicants seek a rescission of the court order of 23 October 2022, which made a settlement agreement

concluded between Victorine and the respondents on 21 October 2022, and in their absence, an order of court. The respondents contend that the applicants are not affected by the order of 23 October 202, therefore they lack the necessary *locus standi* in terms of rule 103(1)*(a)*.

[21] The respondents contend further that the applicants seek to set aside an order that does not affect them, and which order relates to a settlement agreement that they were not party to. The respondents contend further that Victorine entered into the settlement agreement in her personal capacity and not in any representative capacity or as the executrix of any estate.

[22] The applicants dispute the assertion that they lack *locus standi*. They contend that the settlement agreement prejudices and disinherits them. I have to determine this point *in limine* together with the merits of applicants' rescission application as the said point *in limine* and the merits are, in my considered view, intertwined.

Lack of security for costs and filed out of time provided for in rule 16

[23] The respondents raised another point *in limine* that the applicants, in the alternative to their reliance on rule 103, seek relief to set aside the order of 23 October 2022, on the basis of rule 16 of the rules of this court. Rule 16(2) requires of a party that seeks to invoke its provisions in a rescission application to furnish security in the amount of N$5000. The said security must be provided unless the party in whose favour default judgment has been granted consents in writing to the waiver of security, or in the absence of such consent, the court, on good cause shown, dispenses with the requirement of security.

[24] The respondents contend that the applicants did not furnish security or request for waiver of such security. This, the respondents contend, is fatal to the applicants' rescission application.

[25] The applicants, on their part, and in the founding affidavit deposed to by Tukondja, state that they are unable to pay security and, therefore, pray to the court

to waive the required security. They aver that they are unemployed and thus have no income. Victorine only assisted them with payment for legal fees.

[26] The respondents further contend that the rescission application was not launched within a period of 20 days after having knowledge of the judgment or order. The application was filed after a period of six months had lapsed without an explanation for the delay and this, contended the respondents, is fatal to the applicants' rescission application.

[27] In *Gibeon Village Council v Development Bank of Namibia,*[1] the Supreme Court was seized with an appeal against the dismissal of a rescission application that was launched against a default judgment. The rescission was launched under rule 103. The High Court dismissed the rescission application on the basis that rule 103 relates to orders and judgments excluding default judgments. The High Court found that default judgments can only be set aside under rule 16 which calls for such an application to be brought within 20 days of having knowledge of the default judgment.

[28] The Supreme Court restated the three approaches to rescind a judgment or order. They are:

'[21] Firstly, there is rule 16, entitled "Rescission of default judgment" … It permits a defendant to apply to the court to set aside a judgment within 20 days of becoming aware of it. A defendant would need to establish good cause to succeed with such an application.

[22] Then there is rule 103(1)(a). The heading of this rule is "Variation and rescission of order or judgment generally"…

[23] Finally an applicant may apply to set aside a judgment under common law which empowers a court to set aside a judgment obtained in default of appearance provided that sufficient cause is shown.'

[1] *Gibeon Village Council v Development Bank of Namibia,* Case number SA 40/2020, delivered on 21 October 2022.

[29] The Supreme Court found that a judgment or order taken in the absence of a party may be set aside on anyone of the above three methods.[2] It further found that the above-mentioned three methods find application to judgments, including default judgments, and that rule 103(1)*(a)* does not exclude default judgments. At paragraph [25], the Supreme Court remarked as follows:

> '[25] As was also stressed by the Chief Justice in *De Villiers*, the fact that an application for rescission is brought in terms of one rule does not mean that it cannot be entertained pursuant to another rule or the common law provided of course that the requirements of each of the procedures would be met.'

[30] The Supreme Court cleared the air that an order or a judgment, including a default judgment, may be rescinded in any of the three forms discussed above.

[31] I hold the view that where a particular rule is to be invoked, the applicant must comply with the requirements set out in the said rule. It is on this basis that I find that the applicants' non-compliance with rule 16 can be disposed of without breaking a sweat. Rule 16(1) provides that a defendant may within 20 days of becoming aware of the default judgment, apply to the court to set it aside. Rule 16(2) requires the applicant to furnish security of N$5000 unless the person in whose favour default judgment was granted consents in writing to the waiver of security or, on good cause shown, the court dispense with the requirement of security.

[32] By the applicants' own papers, they became aware of the settlement agreement and the related order on 28 February 2023. They launched the rescission application on 27 April 2023, after a period in excess of the 20 days prescribed in rule 16 had lapsed. No specific condonation is sought for failure to comply with the said 20 days period. It is on the basis of the applicants' failure to meet the 20 days' requirement that I find that it places the rescission application beyond the circumference of rule 16. I, thus, find that the alternative relief sought by the applicants on the premises of rule 16 is misplaced.

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[2] *Gibeon Village Council v Development Bank of Namibia (Supra) para [24]. See also: De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 (SC) paras 9-10.

Relief sought

[33] The applicants, in their notice of motion, seek the following orders:

'1. Condoning applicants' non-compliance with the rules, and in particular condoning applicants' late filing of this application for rescission of judgment, to the extent deemed necessary;

2. Rescinding and/or setting aside the court order dated 23 October 2022, making the settlement agreement between the 1st, 4th and 5th respondents in the absence of the applicants, an order of court as contemplated in Rule 103 of the Rules of this Honourable Court;

3. In the alternative, rescinding and/or setting aside the court order dated 23 October 2022, making the settlement agreement between the 1st, 4th and 5th respondents and in the absence of the applicants, an order of court as contemplated in Rule 16 of the Rules of this Honourable Court;

4. Granting leave to the applicants to join the main action instituted by the 1st respondent either as plaintiffs or defendants as they may elect;

5. An order waiving applicants' requirement to pay security for cost;

6. In the further alternative, an order granting leave to the applicants to substitute Adv Y. Campbell as defendants in their own right as provided for under Rule 43 of the rules of the High Court;

7. Cost;

8. Further and/or alternative relief.'

The merits

Applicants' case

[34] The applicants, in an affidavit deposed to by Tukondja, and confirmed by Kokuwa, state that the settlement agreement, which was made an order of court on 23 October 2022, reveals that they will not inherit anything from their late father. The

applicants allege that in terms of the settlement agreement only Victorine and the respondents were to inherit from their late father.

[35] The applicants spent a great deal of time and energy on the alleged legal advice received from Victorine's erstwhile legal representative. The said legal representative is nameless, and no confirmatory affidavit was filed to confirm the advice. The advice, therefore, is and remains inadmissible hearsay evidence, and I treat as such. Nothing further requires mention on the advice.

[36] The applicants contend that Adv Campbell was only appointed to represent them in the application proceedings and no other.

[37] The applicants contended further that Kokuwa attained majority on 4 June 2020, and had the right as of that date to represent herself in the action proceedings, and that rule 43 should have been invoked. On that basis, they state, the judgment obtained was erroneously granted. They contended further that the authority that Adv Campbell had to represent the applicants would have lapsed automatically upon the applicants attaining majority. Tukondja, on the other hand, was still a minor who required a curator *ad litem*, but no efforts were made to protect her rights. They state further that Adv Campbell was not invited to participate in the discussions that led to the settlement agreement.

[38] During arguments, Mr Rukoro conceded to the assertion of the respondents that Tukondja attained majority on 13 April 2020, and Kokuwa on 30 January 2019.

[39] Based on the common law, the applicants aver that they were not cited in the action proceedings; they at all material times were not aware of the action proceedings; they were not represented and could not fully partake in the proceedings, therefore, their default was not willful or *mala fide*. They further state that the settlement agreement disinherits them.

[40] Tukondja stated that she became aware of the settlement agreement and the related court order on 28 February 2023. On 22 March 2023, the applicants caused a letter to be addressed to the respondents.

Respondents' case

[41] As is apparent by now, the respondents' primary contention is that they entered into the settlement agreement with Victorine while acting in her personal capacity and not as an executrix of any estate. As a result, they state, the settlement agreement has no bearing on the applicants and does not disinherit them.

[42] The respondents conceded that once Kokuwa attained majority she had the right to choose her own representative. The respondents contend that the applicants resided with their mother Victorine throughout the action proceedings, and were, therefore, fully aware of the action proceedings. The respondents averred that Kokuwa was present at court on the first day of the trial on 19 October 2022. Anna who deposed to answering affidavit in opposition of the rescission application alleges that the applicants were aware of the settlement agreement as she spoke to them before she left the country.

[43] The respondents state that before the applicants attained majority, they were represented by a court appointed curator, Ms Campbell, who elected or neglected not to defend the action.

[44] The respondents further stated that Victorine, the plaintiff and the *dominus litis* in the action proceedings, had the responsibility in terms of rule 43 to apply for the substitution of the Adv Campbell with Kokuwa upon attaining majority and later with Tukondja upon becoming a major, which she failed to do.

Arguments in brief

[45] Mr Rukoro argued that the rescission application relates to the validity of a Will of the applicants' late father and the settlement agreement regarding the inheritance concluded in their absence. Therefore, Mr Rukoro submitted, the applicants have a direct and substantial interest in the settlement agreement and the related order issued. He argued further that Adv Campbell was appointed to represent the minor children in application proceedings only.

[46] Mr Rukoro further argued that Tukondja attained the age of majority on 13 April 2020, while Kokuwa became a major on 30 January 2019 respectively. He submitted further that nothing should be made out of Kokuwa's presence at court on 19 October 2022, as she was not served with the papers and was excluded from settlement negotiations. He submitted also that if the court finds that the applicants' late father died intestate, then their inheritance would increase. He submitted that the value of the estate Bartholomeus Tjivikua is yet to be determined.

[47] Ms Hans was not to be outmuscled. She argued with all force and might at her command that the settlement agreement does not bind the estate, and therefore, the applicants are not disinherited. This is due to the fact that the parties to the settlement agreement concluded agreement in their personal capacities. She argued that the agreement does not affect the applicants.

[48] Ms Hans argued further that half of the estate valued at about N$50 million belong to Victorine by virtue of her marriage to the late, in community of property. She submitted further that the applicants do not intend to oppose the validity of the Will. They appear to agree that the Will must stand. Ms Hans submitted that Victorine, the biological mother to the applicants, who is responsible for paying the legal fees of the applicants, intends to resile from the settlement agreement by using the applicants who are not prejudiced by the said agreement. She called for the rescission application to be dismissed with costs.

Analysis

[49] Having disarmed the applicants earlier of the benefit of rule 16, I proceed to consider the applicability of rule 103.

[50] Rule 103(1) of the rules of this court provides that:

'103. (1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time rescind or vary any order or judgment –

a) erroneously sought or erroneously granted in the absence of any party affected thereby;

b) in respect of interest or costs granted without being argued;

c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission; or

d) an order granted as a result of a mistake common to the parties.'

[51] In *Gibeon Village Council v Development Bank of Namibia,*[3] *supra,* the law was settled that a rescission application may be brought in terms of the rules of court and common law. The duty is that of the applicant to establish that the judgment or order granted was erroneously sought or granted.

[52] Whilst considering a rescission application of a summary judgment brought in terms of the old rule 44 of the rules of this court, which substantially resembles the present rule 103(1)*(a)*, and common law, the Supreme Court in *Labuschagne v Scania Finance Southern Africa (Pty) Ltd*[4] said the following at paragraphs 18 – 20:

'[18] There are two legal bases upon which an order of summary judgment granted in the absence of an affidavit by the respondents resisting summary judgment may be rescinded: under the common law and under rule 44(1)(a). The common law requires an applicant for rescission to show sufficient or good cause, which requires both an explanation for the default (in this case the failure to file the affidavit resisting summary judgment) and a *bona fide* defence that has some prospects of success.[5]

[19] Under rule 44(1)*(a)*, there is no requirement of good cause.[6] Instead an applicant must show that the order was "erroneously sought or erroneously granted in the absence of a party affected thereby". As the South African Supreme Court of Appeal (SCA) said in a

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[3] *Gibeon Village Council v Development Bank of Namibia,* Case number SA 40/2020, delivered on 21 October 2022.
[4] *Labuschagne v Scania Finance Southern Africa (Pty) Ltd* 2015 (4) NR 1153 paras 18-20.
[5] *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A), cited with approval by this court in *De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 (SC) para 9 and followed by the High Court, in *Grüttemeyer NO v General Diagnostic Imaging* 1991 NR 441 (HC) at 448; *Jack's Trading CC v Minister of Finance and Another (Ohorongo Cement (Pty) Ltd Intervening)* 2013 (2) NR 491 (HC) para 31.
[6] See *De Villiers v Axiz Namibia (Pty) Ltd supra* para 10.

recent decision referred to by the first respondent *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*:[7]

"The trend of the Court over the years is not to give a more extended application to the Rule to include all kinds of mistakes or irregularities."

[20] There is a reason for this: the rule supplements the common-law rule, which, as long as good cause is shown, is relatively open-ended as to the circumstances in which an order may be set aside. Rule 44 on the other hand is designed to deal with a narrow class of cases where it is not necessary to show good cause, but simply to show that an order has been erroneously sought or granted.[8] The focus of rule 44 is procedural and not substantive as the SCA has recently confirmed in *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*.[9] A judgment to which a party is procedurally entitled cannot be considered to have been erroneously granted by reason of facts of which the judge who granted the judgment, as he was entitled to do, was "unaware" or" in the light of a subsequently disclosed defence". These two SCA judgments have been recently followed by the High Court in *Jack's Trading*.'[10]

[53] Can it be said that order of 23 October 2022, was erroneously sought or granted? How did the order of 23 October 2022, come about and did it exclude the applicants to their detriment or not?

The involvement of Adv Campbell

[54] It is common cause that Adv Campbell was appointed to as curator *ad litem* to represent the applicants on 24 March 2014 by order of court. The court order reads further that:

'2 ADV YOLETA CAMPBELL is appointed as curator *ad litem* in respect of the minor children KUKOWA TJIVIKUA and TUKONDJA TJIVIKUA for the purposes of being duly represented in the application to be launched by the applicant wherein she will seek an order

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[7] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113; [2003] ZASCA 36).
[8] See *De Villiers v Axiz Namibia (supra)* para 10.
[9] *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA).
[10] *Jack's Trading CC v Minister of Finance and Another (Ohorongo Cement (Pty) Ltd Intervening)* (supra)

to declare a copy of the Last Will and Testament of the late Bartholomeus Tjivikua to be the only valid Will and Testament of the late Bartholomeus Tjivikua.'

[55] On 27 September 2017, the application that was launched by Victorine, where Adv Campbell was cited as the seventh respondent, was dismissed on technical grounds. Victorine thereafter instituted action proceedings seeking the same relief as in the dismissed application. No new appointment was sought for Adv Campbell who was cited as the seventh defendant.

[56] Adv Campbell deposed to an affidavit where she stated, inter alia, that she was served with the summons and particulars of claim on the basis of the 24 March 2017 order, to represent the applicants in the application. She deposed further that on 7 September 2021, she received a draft pre-trial report and a status report in the pending action. She deposed further that she was not aware that a settlement agreement was concluded in the action and she was not involved in the prior discussions or negotiations relating to the matter.

[57] Can it be said that Adv Campbell had the required mandate to represent the applicants in the action instituted by Victorine when her appointment as curator *ad litem* was in respect of an application? Adv Campbell derives her authority to represent the applicants from the order of 24 March 2017. In terms of the said order, Adv Campbell was appointed to represent the applicants in the application to be launched by Victorine, where she would seek an order to declare a copy of the last Will and Testament as the only valid Will of Mr Bartholomeus Tjivikua.

[58] It is elementary that an application is distinct from an action in any manner, shape or form. Whilst an action is a proceeding commenced by summons or a writ, an application bought on notice of motion, supported by affidavits, which set out the facts on which the application is based. The order of 24 March 2017, in my view, places Adv Campbell on the same footing as a person who is provided with authority to litigate. The order permits her to represent the applicants as authorised therein. The order, in my view, infringes on the applicants' rights to represent themselves in court proceedings to the extent that it calls for restrictive or narrow interpretation.

[59] A narrow interpretation of the 24 March 2017 order, lays bare that Adv Campbell was authorised by the court to represent the applicants in the application to be launched by Victorine and not in an action. By the time that the application was dismissed on technical grounds, Victorine ought to have brought an application to court for an order to authorise Adv Campbell to represent the applicants in the action sought to be launched. As the situation stands, no order was sought by any person to authorise Adv Campbell to represent the applicants in the action in question. It follows, therefore in my view, that Adv Campbell was not authorised or mandated to represent the applicants in the action where a settlement agreement was entered into and made an order of court.

[60] It further follows as a matter of consequence that, Adv Campbell was not authorised or mandated to represent the applicants in the action proceedings, the applicants were, therefore, not cited. The result is that the settlement agreement was entered into without their involvement, and thus, the order obtained was, in my view, erroneously sought and granted. I further find that, as a result that the point *in limine* raised of *locus standi* lacks merit and ought to be dismissed, as I hereby do.

[61] The respondents contended that Adv Campbell was cited in the action proceedings as the seventh defendant and was served with the summons, where after she neglected or elected not to defend. It should, therefore, be taken that the applicants elected not to defend the action and should not be seen to cry foul at present.

[62] It should be remembered that it was all along the contention of the respondents that Tukondja attained the age of majority on 13 April 2020 and Kokuwa on 30 January 2019. As stated this much was conceded to by Mr Rukoro during oral argument.

[63] Section 10 of the Child Care and Protection Act 3 of 2015 which came into force on 30 January 2019, provides that:

> ‘10. (1) A person attains the age of majority on attaining the age of 18 years.

(2) If, on the commencement of this section, a person has already attained the age of 18 years but has not yet attained the age of 21 years, that person is considered to have attained the age of 18 years on the date of commencement of this section…'

[64] A calculation of the dates of birth of the applicants reveals that Tukondja attained the age of majority on 13 April 2020 while Kokuwa attained the age of majority on 30 January 2019. This means that by 30 January 2019, Adv Campbell could not competently represent Tukondja, and Kokuwa as of 13 April 2020, as the applicants were no longer minor children. Mindful of the order of 24 March 2017, that the court authorised Adv Campbell to represent the applicants as minor children, such order would, in my view, terminate as a matter of course in respect of any of the applicants that attain the age of majority.

[65] In consideration of the above, I find that notwithstanding my aforesaid conclusion that Adv Campbell was not authorised to represent the applicants in the action proceedings, her mandate terminated when the applicants attained the age of majority. I find that even though Adv Campbell was served with the summons and for reasons unknown to the court, she appears to have made no attempts to defend the matter, the applicants were entitled, at the time that they became majors, to be substituted in place of Adv Campbell and to be cited in their own capacity and for them to acquire their own representation in terms of rule 43. The failure to substitute them, in my view, denied them of the right to a fair trial.

[66] I state further that rule 43 does not only oblige a plaintiff to bring an application for substitution of a party. To the contrary it provides in rule 43(2) that a party to the proceedings must without delay apply for substitution. The contention raised by the respondents that Victorine, as the plaintiff, ought to have brought the application for substitution is not entirely correct as rule 43 vests such responsibility on the parties without exonerating any from doing so.

[67] I find that the argument raised by the respondents that Adv Campbell was served with the summons, the pre-trial order and the status report, is of no moment, in view of the conclusions reached hereinabove. I further find that it is also of no consequence that Kokuwa was present at court proceedings of 19 October 2022,

whereas she was not cited, and not represented at her own choice. She was strictly not a party to the action proceedings.

The settlement agreement

[68] The settlement provided as follows in clause 4 to 7:

'NOW THEREFORE THE PARTIES AGREE AS FOLLOWS

…

4. That the 3rd defendant (Undjee) shall be paid the sum of N$5 500 000.00 in full and final settlement of the 3rd defendant's share of her inheritance in and to the estate of the late Bartholomeus Tjivikua with the exception of that part of her inheritance contained in clause 4 of the Will and Testament of the late Bartholomeus Tjivikua executed on the 9th of July 2007, which portion of her inheritance as she is entitled to in terms of Clause 4 of the Last Will and Testament of the late Bartholomeus Tjivikua is not included as part of this settlement.

5. Subject to the paragraph 4 *(sic)* of this settlement agreement and in order to avoid any further disputes between the parties the 3rd defendant herewith renounces all right, title or interest in any gift, inheritance, bequest or other property or assets of the estate of the late Barholomeus Tjivikua.

6. That the 4th respondent (Anna) shall be paid the sum of N$5 500 000.00 in full and final settlement of the 4th defendant's share of her inheritance in and to the estate of the late Bartolomeus Tjivikua.

7. Subject to the aforesaid and in order to avoid any further disputes between the parties the 4th defendant herewith renounces all right, title or interest in any gift, inheritance, bequest or other property or assets of the estate of the late Barholomeus Tjivikua.'

[69] Victorine and the respondents further agreed, as part of the settlement agreement, that Victorine shall pay the respondents the amounts of N$5 000 000 on or before 31 December 2022, and N$6 000 000 on or before 30 June 2023, respectively, free of any deduction or set off of any kind. The parties further agreed

that in the event of default of payment by Victorine, then the full outstanding balance shall carry interest at 20% per annum.

[70] The applicants contend that Victorine and the respondents compromised their rights without involving them as they were not involved in the discussions leading to the settlement agreement yet they had an interest in the related estate of their late father. The contention by the respondents that the settlement agreement was entered into by the signatories in their personal capacities, in my view, cannot stand. This is so because although Victorine did not sign the settlement agreement in her capacity as the executrix of the late estate, it is apparent from the settlement agreement that she agreed to pay out the respondents their share of the inheritance in the amount of about N$11 million free from any deductions.

[71] I opine that where the valuation of the estate is yet to be ascertained the settlement agreement affects all the heirs of the concerned estate. I further find that paying N$11 million or at the very least making an undertaking to pay the said amount from the estate of the late free from deductions also affects the interests of the heirs. It, therefore, becomes imperative that where there are settlement negotiations regarding the inheritance or settlement of part of the estate of the late, the heirs must participate or be consulted, and heard on the proposed settlement terms. In *casu*, the applicants were left out of the settlement negotiations and on this basis, I find that the point *in limine* of lack of the necessary *locus standi* lacks merit.

[72] I find it difficult to appreciate the argument of the respondents that the applicants are the biological children of Victorine and that they live with her, therefore, they were informed of the proceedings and this application is a front by Victorine to resile from the settlement agreement.

[73] The applicants and Victorine have competing interests as they all seek to inherit from the estate of the late Barholomeus Tjivikua. Money has divided families to the extent that some divisions are akin to permanent dissolution of a family unit. It thus, offers no surprise that the applicants and Victorine, with competing interests, may not necessarily be looking after each other's inheritance. I, therefore, find that Victorine, who failed to join or substitute the applicants to the action, entered into a

settlement agreement, particularly where the valuation of the concerned estate is yet to be conducted, which detrimentally affected the applicants.

Unreasonable delay

[74] The respondents complain of the unreasonable delay to launch the rescission application. The order sought to be rescinded was issued on 23 October 2022, and the applicants filed the rescission application on 27 April 2023. The applicants explained that they became aware of the settlement agreement and the related court order on 28 February 2023. In March 2023, they engaged the respondents in correspondence to obtain certain undertakings, and in April 2023, they launched the rescission application.

[75] Rule 103 does not provide for a period within which a rescission may be brought. The rule provides that the rescission application must be brought within reasonable time. The Supreme Court in *Keya v Chief of the Defence Force and Others*[11] had occasion to discuss what constitutes unreasonable delay to launch proceedings and O'Regan AJA remarked as follows:

'[21] This court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay.[12] In considering whether there has been unreasonable delay, the high court has held that each case must be judged on its own facts and circumstances[13] so what may be reasonable in one case may

[11] *Keya v Chief of the Defence Force and Others* 2013 (3) NR 770 (SC).

[12] See *Krüger v Transnamib Ltd (Air Namibia) and Others* 1996 NR 168 (SC) at 170 – 171, citing with approval the South African decision *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 798G – 799E. See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others; Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another* 2009 (1) NR 277 (HC); *Namibia Grape Growers and Exporters v Minister of Mines & Energy and Others* 2002 NR 328 (HC); *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) paras 41 – 43 and *Ogbokor and Another v Immigration Selection Board and Others*, unreported decision of the High Court [2012] NAHCMD 33 (17 October 2012). For other South African decisions, see *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39 B – D; Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander 1986 (2) SA 57 (A); *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) ([2004] 4 All SA 133) paras 46 – 48; *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) ([2006] 3 All SA 245) paras 5 and 22.

not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.'[14]

[76] Having considered the facts and circumstances of the present matter, the basis on which it should be determined whether or not the applicants unreasonably delayed the launching of the rescission, I opine that the period between 23 October 2022, and 27 April 2023, is, in the present matter not unreasonable. This is further supported by the fact that the applicants only became aware of the settlement agreement and the related order on 28 February 2023. The acted upon it in March 2023, and in April 2023, the application was filed. I find that there was no unreasonable delay to file the rescission application.

Conclusion

[77] In view of the foregoing findings and conclusions reached hereinabove, the rescission application ought to succeed as Adv Campbell was only authorised and mandated to represent the applicants in an application to be filed and not in an action to be instituted. The applicants were further prejudiced when they were not substituted for Adv Campbell upon attaining the age of majority. I further find that the applicants were prejudiced by being excluded from the discussions that led to the settlement agreement that was made an order of court. I further find on the basis of the above conclusions, that the order of 23 October 2022 that makes the settlement an order of court, was erroneously sought and granted. It thus falls to be rescinded.

Costs

[78] It is well settled in our law that costs follow the result. No reasons were brought to the fore why this well-established principle should not be followed, neither could the court establish otherwise from the record. The applicants were successful

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[13] See *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC) at 132 (per Strydom JP). See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others*; *Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another* cited above in footnote 6 para 14.

[14] See *Radebe* cited above in footnote 6 at 798I; *Setkosane* cited above in footnote 6 at 86E – F; *Gqwetha* cited above in footnote 6 para 48.

in their rescission application and they shall accordingly be awarded costs.

Order

[79] In the result, it is ordered that:

1. The applicants' application for rescission of the order of 23 October 2022, making the settlement agreement entered into between the first, fourth and fifth respondents in the absence of the applicants is upheld and the said order is hereby rescinded in terms of rule 103 of the rules of this court.

2. The applicants are granted leave to join the main action instituted by the first respondent either as plaintiffs or defendants as they may elect.

3. The respondents must pay the applicants' costs of the rescission application including costs of one instructing and one instructed legal practitioner.

4. The matter is postponed to 18 April 2024 at 08:30 for a status hearing.

5. The parties must file a joint status report on or before 15 April 2024.

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O S SIBEYA

JUDGE

APPEARANCES

APPLICANTS: S Rukoro

Instructed by Jerhome Tjizo & Company Inc, Windhoek

RESPONDENTS: A Hans-Kaumbi

Of Ueitele & Hans Inc, Windhoek