

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00595

In the matter between:

CLEMENS KANGOMBE N.O

FIRST APPLICANT

HEINZ KANGOMBE

SECOND

APPLICANT

and

JOHN RAMAKUTLA

FIRST RESPONDENT

JOYCE RAMAKUTLA

SECOND RESPONDENT

Neutral citation: *Kangombe N.O v Ramakutla* (HC-MD-CIV-MOT-GEN-2022/00595) [2023] NAHCMD 784 (4 December 2023)

Coram: SCHIMMING-CHASE J

Heard: 1 August 2023

Delivered: 4 December 2023

Flynote: Common law — Burden of proof — A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence should succeed.

Practice — Applications and motions — Motion proceedings — Dispute of fact — Approach of court — Whether disputed allegations may be rejected on papers — Court to accept respondent's allegations unless clearly untenable.

Summary: The applicants in this matter are the sons of the late Mrs Rosovita Haininga. The first respondent is the son of the late Mr Robert Haininga. Mr and Mrs Haininga were married to each other in community of property at Windhoek on 7 May 1981. Both had children from previous relationships (including the applicants and the first respondent), and no children were born of their marriage. Mr Haininga passed away on 19 June 1999. Mrs Haininga was appointed executor in Mr Haininga's estate, however, she too passed away before finalising his estate on 26 June 2021.

The first applicant was appointed executor in the estate of Mrs Haininga on 23 August 2021. The first respondent was appointed executor in the estate of Mr Haininga, on 13 January 2023.

A dispute arose between the parties after the first respondent, in his capacity as executor in Mr Haininga's estate, allegedly permitted his daughter, the second respondent, to live in the immovable property jointly owned by the deceased couple. The applicants brought the present application alleging that the first respondent unlawfully dispossessed them of the property, and sought ejectment of the second respondent from the immovable property. The applicants further sought an order that the first respondent be restrained from interfering in the administration of the estate of the late Mrs Haininga, and that the second respondent be ordered to pay the municipal charges levied against the property, since her occupation thereof.

Each party accused the other of interfering in the administration of the aforementioned deceased estates.

The first respondent disputed that the applicants were in possession of or residing at the property, and admitted that the second respondent was residing

at the property. The first respondent argued that as executor of the estate of the first dying, Mr Haininga, that Mr Haininga's estate had to be liquidated and distributed before that of Mrs Haininga.

Held that, it is trite that he or she who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be should succeed.

Further held that, ex facie the record and argument, it was apparent that the estate of Mr Haininga, the first dying, had not yet been liquidated and distributed. Thus it was incumbent on the first respondent to execute his duties as executor in the finalisation of that estate according to the Administration of Estates Act 66 of 1965, whereafter the first applicant would be responsible to deal with the liquidation and distribution of his mother's estate.

Application dismissed.

ORDER

1. The applicants' application dated 9 December 2022 is dismissed.
 2. The applicants must pay the respondents' costs of suit.
 3. The matter is regarded as finalised and removed from the roll.
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JUDGMENT

SCHIMMING-CHASE J:

[1] This is an application which, at its core, involves a dispute over inheritance and management of estate property.

[2] The applicants represent themselves. The respondents are represented by Mr Shane Morwe of Morwe & Associates Incorporated.

[3] The applicants seek an order evicting the second respondent from certain immovable property, and an order restraining the first respondent from interfering in the estate of the late Rosovita Haininga. An order is also sought directing the first and second respondents to pay outstanding municipal accounts of N\$28 510 related to the immovable property and rent.

[4] From the documents presented to court attached to the papers of the litigants in this highly adversarial dispute between the parties, I have managed to glean the following.

[5] Mr Robert Haininga (born on 3 June 1908) married Ms Rosovita Hermann (born on 12 June 1948) at Windhoek on 7 May 1981. No antenuptial contract was provided, and the parties are therefore deemed to be married in community of property.¹

[6] It would appear that Mr and Mrs Haininga did not produce any children from their union, but each had their own children before the marriage. Messrs Kangombe, the applicants, are brothers and the sons of Mrs Haininga. They allege that they have been living in the immovable property that forms the subject matter of the dispute since Mr Haininga married their mother.

[7] The first respondent, Mr Ramakutla, is the son of Mr Haininga. The second respondent, Ms Joyce Ramakutla, is the daughter of the first respondent.

[8] Mr Haininga passed away on 19 June 1999. He did not leave a will. Mrs Ramakutla was duly appointed executor in the estate of the late Mr Haininga. It is not apparent from the letters of executorship, emanating from the Office of the

¹ Section 87(1) of the Deeds Registries Act 47 of 1937; See also *Sheehama v Sheehama* (HC-MD-CIV-ACT-MAT-2019/03183) [2022] NAHCMD 253 (20 May 2022) para 18.

Master of the High Court, when she was appointed executor in her late husband's estate, however Mr Haininga's estate was not finally disposed of in terms of the Administration of Estates Act 66 of 1965 ('the Act'), when Mrs Haininga passed away on 26 June 2021. Mrs Haininga too died intestate.

[9] Mr Clemens Kangombe, the first applicant, was appointed as executor in the estate of the late Mrs Haininga on 23 August 2021. Mr John Ramakutla was appointed executor in the estate of Mr Haininga on 13 January 2023.

[10] The joint estate comprises an immovable property known as Erf 6194, Katutura measuring 262 square metres, registered under Deed of Transfer number T142/1983. The property is free of debt.

[11] The dispute between the parties essentially relates to which of the applicants are the 'true' executor of their respective parents' estates. This is because Mr Kangombe, the first applicant, and Mr Ramakutla, the first respondent, each rely on the powers and duties accorded to them in their capacities as executors of their respective parents' estates, to justify their immediate possession, as it were, of the immovable property.

[12] The applicants allege that they have been living on the property with their late mother since Mr Haininga died, and that subsequent to Mrs Haininga's death that they have been dispossessed by Mr Ramakutla, who insisted that the property belongs to his late father Mr Haininga. Mr Ramakutla then dispossessed applicants of the property and placed his daughter there for the past 19 months without ensuring payment of municipal charges or rental. The applicants therefor insist that an order should be made ejecting the second respondent from the property together with an order to pay the municipal rates.

[13] In addition, Mr Kangombe alleges that he is being hindered in his responsibility to properly administrate his late mother's estate on the grounds of Mr Ramakutla's unlawful interference with the property.

[14] In opposition, Mr Ramakutla contends that a material dispute of fact

exists between the parties resulting in the court being unable to properly decide the application on the affidavits before it. He also states that Messrs Kangombe have no enforceable rights to the property at this stage because Mr Haininga's estate has not been liquidated and distributed. He relies on his letters of executorship in Mr Haininga's estate for this. Thus, he avers that as executor in the estate of the first dying, Messrs Kangombe have at best a vested right in the estate of the late Mrs Haininga, to be determined after Mr Haininga's estate has been liquidated and distributed in terms of the Act.

[15] It is further argued that the letters of executorship appointing Mr Kangombe as executor do so only in the estate of the late Mrs Haininga, and not in any joint estate of the late Mr and Mrs Haininga.

[16] Mr Ramakutla denies the spoliation alleged to have occurred. He denies that Messrs Kangombe resided at the property as alleged. In this regard, Mr Ramakutla alleges that he resided at the property with Mr Haininga before he remarried, and that after the marriage, Messrs Kangombe moved into the house with Mr and Mrs Haininga because they were still minors. Further, Mr Clemens Kangombe moved out of the property some ten years ago when he married, and that Mr Heinz Kangombe was evicted by his late mother during 2015.

[17] According to Mr Ramakutla, and at the time of Mrs Haininga's death, she resided at the property but rented available spaces to tenants. At this stage, several people are renting rooms informally without lease agreements since Mrs Haininga's death. According to Mr Ramakutla, Messrs Kangombe have not resided at the house for more than eight years, but demanded rental income from the property.

[18] It is admitted that Ms Ramakutla, the second respondent, moved into the house during July 2021, and that she does not pay water and electricity because there is no closure yet on the finalisation of the estate of Mr Haininga, and especially whether or not they are married in community of property. Mr Ramakutla avers that she (Ms Ramakutla) moved to the property because she obtained employment in Windhoek and needed a place to stay and that he gave

permission to her to stay at the property in the meantime.

[19] Based on the averments of the parties, dispossession is denied, and it was alleged that the applicants no longer live in the property for the reasons mentioned above. No replying affidavit was delivered and upon consideration of the affidavits filed of record, I find in favour of the respondents on this issue based on the respondents' version which is not untenable.²

[20] I must point out that the parties are not in agreement on the marital regime. Mr Ramakutla maintains that Mr and Mrs Haininga were married out of community of property, whereas Messrs Kangombe allege that they were married in community of property. A consideration of the marriage certificate and the place where the parties were married (Windhoek), makes it clear (as mentioned above) that Mr and Mrs Haininga were married in community of property because no ante-nuptial contract was registered.³

[21] Before dealing with the balance of the merits in this matter, there is a procedural aspect to consider which I do, only, for the sake of completeness. On 19 May 2023, this matter appeared before me on the residual court roll. Due to the opposition in the matter, and the substantive relief that the parties seek, the matter was postponed for hearing on the merits on a different day, as the residual court roll could not allow for a full substantive hearing. The matter was accordingly postponed to 1 August 2023.

[22] During the hearing of 19 May 2023 and before the matter was postponed for hearing, neither the applicants nor the respondents, found it appropriate to inform the court of any preliminary procedural issues. However, in the time period leading up to the hearing of 1 August 2023, it became evident that Messrs Kangombe on 5 May 2023 applied for rescission of an order by Parker AJ on the residual roll on 10 March 2023.

² *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others* 2013 (3) NR 664 (SC) para 102.

³ See fn 1 supra.

[23] The substance of this order only sets out dates for the exchange of pleadings on the merits of the application.

[24] During the hearing of 1 August 2023, the bulk of the submissions by Messrs Kangombe related to the rescission of the order of 10 March 2023 by Parker AJ setting out the dates for exchange of pleadings.

[25] Messrs Kangombe were present when Parker AJ gave dates for the filing of papers and no objections were made. However, they contend that the decision of Parker AJ was 'incorrect' and a 'misrepresentation', when the court decided the respondents may file answering papers without a condonation application, or an extension of time application, whether in writing or from the bar.

[26] Messrs Kangombe contend that Parker AJ placed reliance on fraudulent statements by Mr Ramakutla, when he informed the court that they did not file the papers (acting in person during that hearing), but that since then, they (the respondents) have obtained the assistance of a legal practitioner. The applicants contend their main concern is that since Mr Morwe came on record for Mr Ramakutla and Ms Ramakutla, they have not received a condonation application. It is noteworthy that Messrs Kangombe did not file heads of argument for the hearing of this application. Nor was a replying affidavit delivered. No condonation application was filed by them.

[27] That said, it is evident *ex facie* the record at pages 113 – 118, that during the hearing of 10 March 2023 before Parker AJ, both parties acted in person, and the following order was made:

- '1 The respondent shall file their answering affidavit on or before 28 April 2023.
- 2 The applicant shall file his replying affidavit on or before 4 May 2023.
- 3 The parties shall file their heads of arguments in terms of the rules.
- 4 The case is postponed to 19 May 2023 at 10:00 for Residual Court Roll hearing (Reason:Hearing).'

[28] On 13 March 2023, Mr Morwe entered appearance on behalf of the respondents, and in terms of the court order on 28 April 2023 answering papers were delivered.

[29] Given that the matter is ripe for hearing, I do not propose to deal further with the rescission application. The order of Parker AJ that set out the dates for the delivery of papers, and it would be an unnecessary burden on judicial resources to continue to deal with interlocutory applications that fall short of the overriding objectives of judicial case management. In any event, Messrs Kangombe were present in court on 10 March 2023, when the order was made and no objection was made. Papers were timeously filed on behalf of the respondents.

[30] Turning back to the merits. Both Mr and Mrs Haininga, married in community of property, died intestate. Whenever a deceased person leaves property which has not been disposed of by a valid will, it must be distributed, if the estate is solvent, according to the relevant laws of intestate succession.⁴ Therefore the laws of intestate succession apply to each of their estates.

[31] It is clear from the papers before me, or lack thereof, that Mrs Haininga did not finalise the liquidation and distribution of her late husband's estate before her passing. Therefore, Mr Haininga's estate, as the first dying must be finalised before Mrs Haininga's estate. As Mr Ramakutla was appointed executor in Mr Haininga's estate, it is his responsibility to manage the estate to finalisation as executor of the estate of the first dying, after which Mrs Haininga's estate must be liquidated and distributed.

[32] Counsel for the respondents relied on the concepts of *dies cedit* and *dies venit* summarised as follows:

'... according to our modern system of administration of deceased estates, the heir or legatee of an unconditional bequest obtains a vested right (*dies cedit*) to be

⁴ D Meyerowitz, *The Law and Practice of Administration of Estates and Estate Duty*, 6th Ed 1989 (19-1) at p. 3.

entitled to the bequest on the death of the testator (*a morte testatoris*). Such a right is transmissible but his claim is enforceable only at some future time when the executor's liquidation and distribution account has been confirmed (*dies venit*). He then has an enforceable right to claim payment, delivery, or transfer of his bequest (*ius in personam ad rem acquirendam*).⁵

[33] Thus, as counsel argued, *dies venit* only occurs once the liquidation and distribution account has been lodged with the Master of the High Court. The person with the greatest right, now, would be Mr Ramakutla, as the executor in the estate of the first dying. He would have to administer the estate of the late Mr Haininga, and only once that process is complete, will Mr Kangombe be required to administer the estate of Mrs Haininga. The children of both spouses would stand to inherit their respective shares according to the laws of intestate succession. I am in respectful agreement with this submission for the reasons advanced.

[34] Also, it is a trite principal of our law that he who alleges must prove. Damaseb JP in *Dannecker v Leopard Tours Car and Camping Hire CC*⁶ discussed the burden and found:

[44] It is trite that he who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be should succeed. A three-legged approach was stated in *Pillay v Krishna* 1946 AD 946 at 951-2 as follows: The first rule is that the party who claims something from another in a court of law has the duty to satisfy the court that it is entitled to the relief sought. Secondly, where the party against whom the claim is made sets up a special defence, it is regarded in respect of that defence as being the claimant: for the special defence to be upheld the defendant must satisfy the court that it is entitled to succeed on it. As the learned authors Zeffert et al *South African law of Evidence* (2ed) at 57 argue, the first two rules have been read to mean that the plaintiff must first prove his or her claim unless it be admitted and then the defendant his plea since he is the plaintiff as far as that goes. The third rule is that he who asserts proves and not he who denies: a mere denial of facts which is absolute does not place

⁵ *Lutchmi Gounden & Another v The Master of the High Court & Others* 3698/2014/CRBCD.

⁶ *Dannecker v Leopard Tours Car and Camping Hire CC* (I2909/2016) [2016] NAHCMD 381 (5 December 2016) paras 44-45.

the burden of proof on he who denies but rather on the one who alleges. As was observed by Davis AJA, each party may bear a burden of proof on several and distinct issues save that the burden on proving the claim supersedes the burden of proving the defence.'

[35] Based on the facts before me, Messrs Kangombe have not discharged their onus to prove what they allege on the facts or on the law, and their claim must fail as a result.

[36] A word of caution to both parties who are executors. An executor is legally vested with the administration of a deceased's estate. He or she is not free to deal with the assets of an estate in any manner he or she pleases. The position is a fiduciary one and an executor is required to act not only in good faith, but legally. Mr Ramakutla, as executor in the estate of the first dying, is required to collect all rentals received and place those funds into the estate account that he is required to open and manage in terms of the Act, should he not want to be held liable for money due to the estate.⁷ He also carries the responsibility to ensure that any municipal rates are paid so as not to place the estate under financial burden. The same goes for Mr Clemens Kangombe when it is his turn to liquidate and distribute his late mother's estate.

[37] As regards the question of costs, it is a settled principle of law that costs are in the discretion of the court. While the court is awake to the fact that the applicants are acting in person, the institution of the action led to the respondents engaging the services of a legal practitioner. No argument was led that costs should not follow the event, and considering the successful opposition entered by the respondents, I find no reason why the respondents should not be indemnified for their costs.

[38] In the result, I make the following order:

1. The applicants' application dated 9 December 2022 is dismissed.

⁷ Section 28 read with s 46 of the Administration of Estates Act 66 of 1965.

2. The applicants must pay the respondents' costs of suit.
3. The matter is regarded as finalised and removed from the roll.

E M SCHIMMING-CHASE
Judge

APPEARANCES

APPLICANTS:

C Kangombe

In person

Windhoek

RESPONDENTS:

S Morwe

Of Morwe & Associates Incorporated,

Windhoek