

HIGH COURT OF NAMIBIA MAIN
WINDHOEK



DIVISION,

JUDGMENT

Case no: I 2068/2010

In the matter between:

ERIKA PENELOPE HUSSELMAN 1ST PLAINTIFF

SHARON HILLARY SAEM 2ND PLAINTIFF

MILDRED JULIANA BESSER 3RD PLAINTIFF

ANNA JEANETTE DIERGAARD 4TH PLAINTIFF

GLYNIS BEATRICE SAEM 5TH PLAINTIFF

ELRIKA BEUKES 6TH PLAINTIFF

and

HAROLD ADOLF SAEM 1ST DEFENDANT

NORMAN LYNDON SAEM 2ND DEFENDANT

IAIN ROBERT MCLAREN 3RD DEFENDANT

THE MASTER OF THE HIGH COURT 4TH DEFENDANT

Neutral citation: *Husselman v Saem* (I 2068/2010) [2013] NAHCMD 65 (08 March 2013)

Coram: MILLER AJ

Heard: 18 February 2013

Delivered: 08 March 2013

ORDER

The result is that on the pleadings the plaintiffs did not discharge the onus resting upon them to establish *locus standi* and the special plea is upheld. I grant absolution from the instance with costs which will include the costs of one instructing and one instructed counsel.

JUDGMENT

MILLER AJ :

[1] This matter comes before me by way of a special plea raised by the first defendant against the action instituted by the plaintiffs.

[2] The special plea challenges the *locus standi* of the plaintiffs in the action. It is generally accepted that a plaintiff who institutes proceedings must on his/her pleadings make the necessary averments which will *ex facie* the pleadings establish that he/she has *locus standi* to do so. *Mahe Construction (Pty) Ltd v Seasonaire* 2002 NR 398 (SC).

[3] It is for that reason that I turn to the particulars of claim which after some amendments read as follows:

1. The FIRST PLAINTIFF is ERIKA PENELOPE HUSSELMAN, an adult female residing at erf 204 Block D, Rehoboth, Republic of Namibia.
2. The SECOND PLAINTIFF is SHARON HILLARY SAEM, an adult female residing at erf 79 Block B, Rehoboth, Republic of Namibia.
3. The THIRD PLAINTIFF is MILDRED JULIANA BESSER, an adult female employed at Ministry of Education, Rehoboth High School, Rehoboth, Republic of Namibia and residing at erf 267 Block F, Rehoboth, Republic of Namibia.
4. The FORTH PLAINTIFF is ANNA JEANETTE DIERGAARD, an adult female employed at Taeuber 'n Corssen, 11 Ruhr Street, Northern Industrial, Windhoek, Republic of Namibia, and residing at erf 959 Bonn Street, Otjimuiise, Windhoek, Republic of Namibia.

5. The FIFTH PLAINTIFF is GLYNIS BEATRICE SAEM, an adult female employed at City of Windhoek, City Police, PA De Wet Building, c/o Sishen and Essen Street and residing at erf 171 Antilla Street, Dorado Park, Windhoek, Republic of Namibia.
6. The SIXTH PLAINTIFF is ELRIKA BEUKES, an adult female employed at Ministry of Education, Exam Department, Government Office Park, Luther Street, Windhoek, Republic of Namibia and residing at erf 215 Block B, Rehoboth, Republic of Namibia.
7. The FIRST DEFENDANT is NORMAN LYDON SAEM, an adult male residing at erf 236 Block B, Rehoboth, Republic of Namibia.
8. The SECOND DEFENDANT is NORMAN LYNDON SAEM, an adult male residing at erf 236 Block B, Rehoboth, Republic of Namibia.
9. The THIRD DEFENDANT is IAIN ROBERT MCLAREN IN HIS CAPACITY AS EXECUTOR OF THE ESTATE LATE ELIZABETH KATRINA SAEM, an adult male with his principal place of business at Room 5, 2nd floor, Hidas Centre, Windhoek, Republic of Namibia, and appointed under letters of executorship issued to him by the fourth defendant on 27 February 2009, and annexed hereto marked "A".
10. The FOURTH DEFENDANT is THE MASTER OF THE HIGH COURT, WINDHOEK, REPUBLIC OF NAMIBIA, with her offices located at the High Court Building, Windhoek, Republic of Namibia.
11. The late Elizabeth Katrina Saem and the late Adolf Saem were the parents of the first to fifth plaintiffs and first and second defendants. They were also the grandparents of the sixth plaintiff.
12. On 22 August 2007 the late Elizabeth Katrina Saem and the late Adolf Saem deposed a joint last will and testament. (Hereinafter referred to as the "will".) A copy of the will and a translation thereof comprises annexure "B" hereto.
13. On or about 5 July 2004 it came to plaintiffs' knowledge that there existed a document entitled "TESTAMENT", dated 12 March 2004 and purporting to be a second joint last will and testament of the aforementioned testators (hereinafter referred to as the "purported will"). A copy of the purported will and a translation thereof comprises annexure "C" hereto.
14. All the plaintiffs and first and second defendants are beneficiaries in terms of the will.
15. The late Adolf Saem passed away on 21 June 2004.
16. The late Elizabeth Katrina Saem passed away on 27 February 2008.

17. At the time of execution of the purported will – annexure “C” – the late Adolf Saem lacked the necessary mental capacity/capability to execute a valid will, in that he was unable to appreciate the nature or contents of his acts. Accordingly, he lacked the necessary testamentary capacity to execute a will and/or sign same.
18. Furthermore, the purported will – annexure “C” – is invalid, as it does not comply with the Wills Act 7 of 1953, as amended. In particular, it does not comply with:
 - 18.1 Section 2(1)(a)(i); and/or
 - 18.2 Section 2(1)(a)(ii); and/or
 - 18.3 Section 2(1)(a)(iii); and/or
 - 18.4 Section 4.
19. The late Adolf Saem and late Elizabeth Katrina Saem left only annexure B” as their valid will.’

[4] I do not deem it necessary to refer to the full text of the will executed in the year 1977. In that will the testators declared that the survivor of the first dying testator shall become the sole heir of the latter’s entire estate. The plaintiffs together with the first and the second defendants would only benefit in equal shares from the estate in the event that the testators both died simultaneously or within a period of 90 days of each other.

[5] On the pleadings neither of these latter events happened with the result that none of the plaintiffs nor the first and second defendants stand to derive any benefit from that will.

[6] The will executed during 2004 contains some different provisions and reads as follows:

WILL

This the last WILL and TESTAMENT of us, ADOLF SAEM ELIZABETH and KATRINA SAEM, born BEUKES, married in community of property and currently residing at Rehoboth.

This Will revokes and cancels our previous will made on the 22nd day of August 1977.

1.

We nominate our seven children born from our marriage to be our sole and legal heirs namely:

1. Anna Jeanette Diergaardt, born Saem.
2. Harold Adolf Saem
3. Erika Penelope Husselmann, born Saem
4. Sharon Hillary Saem
5. Mildred Juliana Besser, born Saem
6. Norman Lyndon Saem and
7. Glenis Beatrice Louw, born Saem and our granddaughter Erika Saem

2.

We herewith declare that there shall be no division of our joint estate at the death of the first dying of us. The survivor of us remains in full possession of all our assets, movable as well as immovable. Division of our estate shall thereafter take place as follows:

3.

Our farm OAGOUB No. 385 measuring 2 757. 1347 hectare we bequeath to our two sons, HAROLD ADOLF and NORMAN LYNDON SAEM in equal undivided shares with everything that is on the farm except the livestock of us. The farm may not be alienated, i.e. the farm may not be sold to somebody who is not our heir but they may buy each other out.

4.

Our farm Bossieskolk No. 822 measuring 3 (*illegible*), 8517 hectare we also bequeath to our two sons, HAROLD ADOLF and NORMAN LYNDON SAEM in equal undivided shares. The farm may also not be sold to somebody who is not our heir, i.e. no alienation but they may buy each other out.

5.

Our erven at Rehoboth town with buildings thereon, Erf No. 78 Block B and Erf No. 27 Block B, measuring 924 sq. metres and 2124 sq. metres respectively we bequeath to our five daughters, Anna Jeanette Diergaardt, Erika Penelope Husselmann, Sharon Hillary Saem, Mildred Juliana Besser and Glenis Beatrice Louw in equal shares. They must buy each other out in accordance with their choices and in accordance with municipal valuations. All furniture and household goods must be divided equally between them.

6.

All livestock and any cash which there shall be must be divided equally between all our heirs mentioned under paragraph 1 herein above. We bequeath the 30-60 musgrave fire-arm to Norman Lyndon Saem and our .222 Brno fire-arm to Harold Adolf Saem.

Signed at Rehoboth on this 12th day of March 2004 in the presence of the undersigned two witnesses.

AS WITNESSES:

1..... (Signature) (Signature)
TESTATOR

2..... (Signature)(Signature)
TESTATRIX

7.

It is an express condition of this Will that no asset or interest in asset which may be received by a by virtue of this Will, shall not form part of a joint or communal estate which such a beneficiary may possess together with a spouse.

8.

As Executor of our estate we nominate and appoint Mr. Giel Diergaardt of Diergaardts A ub and release him from any security to the Master of the High Court.

9.

We retain the right to amend this will at any time or add thereto as we may think fit at the foot hereof or per separate act.

Thus done and signed at Rehoboth on this 12th day of March 2004 in the presence of the undersigned two witnesses.

AS WITNESSES:

1..... (Signature) (Signature)
TESTATOR

2..... (Signature)(Signature)

[7] Ms. de Jager who represented the first defendant submits that the plaintiffs lack *locus standi* since they have no interest in the will executed in 1977. Consequently the proceedings they instituted, which so it is contended, if successful will have the effect that the will executed in 1977 is the only will executed by the testators.

[8] It is apparent from the submissions made by Mr. Phatela who represented the plaintiffs, that the plaintiffs contend that they are beneficiaries under the first will as well as the common law. Clearly they did not become beneficiaries in terms of the will executed in 1977.

[9] In terms of that will the entire estate devolved upon the late Elizabeth Katrina Saem consequent upon the death of the late Mr. Adolf Saem on 21 June 2004.

[10] The plaintiffs would have benefited from the estate of the late Mrs. Saem had she left no further will at her death on 27 February 2008, based on the law of intestate succession and if the 2004 will is declared invalid.

[11] That, however, is not how the plaintiffs pleaded their case and by their pleadings they must stand or fall. Instead they allege that the will executed in 1977 is the only valid will, a matter in which they have no interest, and from which they can not derive any benefit given the facts.

[12] The result is that on the pleadings the plaintiffs did not discharge the onus resting upon them to establish *locus standi* and the special is upheld.

[13] I grant absolution from the instance with costs which will include the costs of one instructing and one instructed counsel.

P J MILLER
Judge

APPEARANCES

PLAINTIFFS:

T C PHATELA
Instructed by Isaacks & Benz Incorporated,
Windhoek

DEFENDANTS:

B DE JAGER
Instructed by Delport Attorneys, Windhoek