REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 314/2011

In the matter between:

1.1.1.1.	**JORAM JANINGAPARA TJAMUAHA**
	1st APPLICANT
1.1.1.2.	**MAANDERO MARKUS TJAMUAHA**
	2nd APPLICANT
And	
MASTER OF THE HIGH COURT	**1st RESPONDENT**
CONSTANTIA TJAMUAHA	**2nd RESPONDENT**
ABSA TRUST LIMITED: TRUST SERVICES	**3rd RESPONDENT**
AGRICULTURAL BANK OF NAMIBIA	**4th RESPONDENT**
AUGUSTINUS KUHANGA	**5th RESPONDENT**
HANNCHEN SCHNEIDER N.O.	**6th RESPONDENT**

Neutral citation: *Tjamuaha v Master of the High Court (A 314-2011) [2015] NAHCMD 245 (12 October 2015)*

Coram: Schimming-Chase AJ

Heard: 19 June 2015

Delivered: 12 October 2015

Flynote: Trustee – removal of – appointment of new trustee.

Fideicommissum – meaning of – requirements – restraint against alienation.

Curator *ad litem* – necessary to represent minor and unborn children.

Prescription – Extinctive prescription – debt what constitutes. Claim for *rei vindicatio* not constituting debt - Accordingly not prescribing after 3 years – Prescription Act 68 of 1969 s 10.

Applications and motions – factual disputes – final relief granted on facts averred in applicant's affidavits admitted by respondent together with facts alleged by the respondent unless denial raises fictitious disputes, or is so implausible as to justify rejection on the papers.

Contract – Formation of - Consensus *ad idem* – misrepresentation – party to – when concluding a redistribution agreement signatory was not aware what she was signing, nor was she aware at the time, that by signature, she relinquished her right to her half share in a joint estate comprising immovable property. Caveat *subsciptor* principle not applicable.

Summary: Applicants and second respondent are the two surviving sons and widow respectively of the deceased. Second respondent was married to the deceased in community of property. The deceased purported via testamentary trust to bequeath the entire joint estate comprising in a farm to his administrator in trust, which he was not entitled to do, The administrator was given the obligation to manage the Trust and to pay the income from the farming

activities to the second respondent until she died, thereafter to the applicants until they died, thereafter the capital and accumulated income to the descendants of the applicants, failing which the nephew of the testator. Subsequent to the deceased's death the second respondent signed a redistribution agreement in terms of which she relinquished her half share in the joint estate to the administrator in trust, subject to the conditions set out in the deceased's will. Second respondent moved to the farm where she had been farming on an uninterrupted and commercial basis since 1990. The administrator did not manage the farm or fulfil any of the requirements and obligations imposed, and summarily resigned in 2007. The applicants discovered that the second respondent registered a mortgage bond over the farm in 2010. Applicants applied to be appointed as administrators of the Trust by virtue of the provisions of the redistribution agreement. Second respondent in a counter application applied to set the redistribution agreement aside and claim her half share in the farm on the grounds that there was no consensus *ad idem* when the redistribution agreement was signed. It was represented to her that she was only signing documents in relation to her husband's estate, it was never explained to her that she was entitled to half of the joint estate, or that she could obtain a division of the estate.

With regard to the plea of prescription raised by the applicants, the court approved the principles in ABSA v Keet[1] that a vindicatory claim is not a debt for purposes of section 10 of the Prescription Act, No 68 of 1969. It accordingly does not prescribe in 3 years, but in 30 years. Applying the Plascon-Evans rule, the court found that the facts in support of the allegations by the second respondent of lack of consensus *ad idem* could not meaningfully be gainsaid by the applicants. The administrator, though served with papers, chose not to place any facts on record to dispute them. In the result the application was granted. The court set aside the redistribution agreement and directed the Master to appoint an executor to administer the will. The court further directed that an independent administrator be nominated by the President of the Law

[1] 2015(4) SA 474 SCA

Society of Namibia to manage and administer the deceased's portion of his estate via the testamentary trust.

ORDER

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1. The redistribution agreement concluded on 14 March 1989 between the second respondent and H Fourie in his capacity as executor of the estate late: Kaimbire Tjamuaha and J van Zyl as nominee of Bank Corp Trust and administrator of the estate late: Kaimbire Tjamuaha Testamentary Trust is declared to be of no force and effect and set aside.

2. The first and final liquidation and distribution account in the estate of the late Kaimbire Tjamuaha dated 12 October 1989 is hereby set aside.

3. The supplementary first and final liquidation and distribution account in the estate of the late Kaimbire Tjamuaha dated 26 May 1999 is set aside.

4. The Master of the High Court is directed to appoint an executor with the power to administer, liquidate and distribute the half share of the late Kaimbire Tjamuaha in the joint estate as at the time of his death in accordance with the terms set out in his last will and testament.

5. The Master of the High Court shall further direct the executor so appointed to transfer one half share in the aforesaid joint estate to the second respondent.

6. An independent administrator shall be appointed to the estate late: Kaimbire Tjamuaha Testamentary Trust No 173/1989 by the

President of the Law Society of Namibia.

7. The aforesaid administrator appointed by the President of the Law Society of Namibia is exempted from the duty of providing security to the Master of the High Court for his or her duties as administrator and shall be entitled to compensation in terms of the last will and testament of the late Kaimbire Tjamuaha.

8. There shall be no order as to costs in respect of the applicants' application.

9. The applicants are directed to pay the costs of the counter application, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

SCHIMMING-CHASE, AJ

(b) The applicants, in what I shall refer to as the main application, seek an order removing the third respondent, ABSA Trust Limited: Trust Services, formerly Bankorp Trust Bpk ("ABSA Trust") from their offices as administrators of the Testamentary Trust (No 173/89) ("the Trust") of the estate of the late Kaimbire Tjamuaha (the deceased), and an order that the applicants replace ABSA Trust as administrators of the Trust, subject to the terms and conditions of the deceased's last will and testament. The two applicants are the sons of the deceased.

(c) The first respondent is the Master of the High Court. The second respondent is the widow of the deceased. She was married to the deceased in community of property. She opposes the application in limited form[2]. In a

[2] The second respondent does not oppose the portion of the application seeking the removal of

substantive counter application, the second respondent applies for the following wide ranging relief:

(d)

(a) an order declaring a redistribution agreement concluded on 14 March 1989 between her and one Hermanus Johannes Fourie (in his capacity as the executor of the deceased's estate), as well as one Jacobus Adriaan Louw Van Zyl (as nominee of Bankorp Trust (now ABSA Trust)) to be of no force and effect;

(b)

(c) an order setting aside the first and final liquidation and distribution account in the deceased's estate dated 12 October 1989, as well as the supplementary first and final liquidation and distribution account dated 26 May 1999;

(d) an order directing the Master to appoint an executor to administer, liquidate and distribute the half share of the deceased in their joint estate at the time of the deceased's death in accordance with the terms set out in his will;

(e) an order that the duly appointed executor be directed to transfer one half share in the aforesaid joint estate to the second respondent;

(f) an order that the second respondent is appointed as administrator of the deceased's estate in the Trust created by the deceased;

(g)

(h) in the alternative and in the event that the court finds that neither the applicants or the second respondent should be appointed as administrators of the Trust, directing that an administrator be appointed by the President of the Law Society of Namibia;

(i) in the event that the court grants the relief sought by the applicants, directing the applicants to furnish security to the value of the

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ABSA Trust as administrators of her husband's testamentary trust. She opposes the appointment of the applicants as administrators.

Trust property, such value to be determined by a property valuator appointed by the President of the Law Society.

(e) This matter has a long, drawn out and complicated history.

(f) At issue is certain immovable property, namely Portions 5 (Okauta Noord) , measuring 3190,9527 hectares, and Portion 6 (Koue Water) measuring 3239,2849 hectares of the Farm Otjombindi, No 234, Gobabis held by Deed of Transfer No T742/1989 ("the Farm"). The farm was registered in the deceased's name on 14 March 1989.

(g) The common cause background facts are the following: The second respondent and the deceased were married in community of property on 18 September 1985. They did not have any children together. At the time the parties married, the second respondent already had 5 children from a previous relationship and the deceased had two sons from previous relationships. As stated above, those two sons are the applicants.

(h) The deceased passed on 15 May 1989. He suffered from cancer and travelled to Cape Town from time to time for treatment. Unbeknownst to the second respondent, the deceased executed a last will and testament in Cape Town during November 1988. In terms of the will, the deceased bequeathed "his estate", comprising the Farm (registered in his name) and some moveable assets, in trust to his administrator,[3] and directed that the net income of the Trust was to be paid to the second respondent until her death. After her death, the income was to be paid to the applicants until the death of the last dying of them. The Trust would then terminate on the date of the last dying of the second respondent and the applicants, with the trust capital and accumulated income to be transferred to the applicants' children or their lawful issue by representation or failing such issue to the deceased's nephew, Augustinus Kuhanga (the fifth respondent and nephew of the deceased) or his lawful issue, per *stirpes*.[4]

(i) On 12 July 1989 the second respondent signed a redistribution

[3]Referred to as administrator or trustee

[4]The fifth respondent has elected to abide by the decision of the court.

agreement in terms of which she relinquished her half share of the joint estate to the Trust to be dealt with in terms of the deceased's will. She was also given ownership, it would seem, of the movable farm property, but the difference between the value of her half share of the farm and the value of half the movable property, resulted in a debt of N$50,000.00, owing to her which the Trust would repay on her death.

(j) The second respondent has been permanently residing on and managing the farm commercially since 1990, some six months after the deceased's passing. Apart from a couple of visits the administrators appear to have done nothing in line with the fulfilment of their obligations, and I deal with this aspect in more detail below. The value of the farm has in the meantime increased to over N$4 million. Since taking over, the second respondent invested some N$120,000.00 into the farm, which she received from one Mr Minaar.[5] She took her first personal loan from the fourth respondent in the amount of N$62,000.00 and a further personal loan of N$96,600.00 which was used to effect further improvements and repairs to the farm. The loans were fully paid off by the second respondent. The applicants resided on the farm with the second respondent for a period of time both before and subsequent to the deceased's passing. This is where the essential commonality of the background facts ends.

(k) It is necessary for purposes of this judgment to reproduce the salient extracts from the deceased's last will and testament, as well as the redistribution agreement[6] that the second respondent seeks to set aside in her counter-application.

"A.

I bequeath my estate as follows:

1. My immovable farm property, farming vehicles, farming equipment, farming implements, livestock, any shares that has a nexus with my

[5] Referred to in more detail below.

[6] Both the will and distribution agreement are in the Afrikaans language. The quoted portions are extracted from the sworn English translation.

farming activities and all other movable assets that are associated with my farming business, in a trust, to my Administrator to whom I shall confer the powers and bestow the following obligations:

1.1 to accept, control administer, rent out, to sale (*sic)* or to covert into currency the assets, or to rent or purchase any movable and immovable property, as they deem it fit in their exclusive discretion to be in the interest of the trust. It is my wish that my farm property will not be sold.

1.2 To invest any cash in such a manner as they may decided (*sic)* it to be proper and fit without being influenced in any way by any considerations which might otherwise lead to limit it to investments in recognised trustee-securities. The administrator is also hereby authorised to recall any investments and to invest the fruitage thereof in conformity with the preceding provisions.

1.3 To borrow any amount of money in the execution of any provisions of this trust and to provide any form of security for the appropriate repayment thereof, including the power to bond assets of the trust, to mortgage, or to burden with mortgage.

1.4 To pay the net income from the trust to my spouse, CONSTANCIA TJAMUAHA (born KAVEZEPA), until her demise. After the demise of my spouse the income should be paid to my two sons JORAM and MARKUS until the death of the last dying.

1.5 At the termination of the trust at the death of my mentioned spouse and my mentioned sons and the trust capital as it existed, together with any accumulated income be paid to my mentioned sons children or their lawful decendants by substitution or, by lack of any descendants to comit (*sic)* it or pay it over to my sisters child, AUGUSTINUS KUHANGA, or his lawful descendants *per stirpes*.

2. The remainder to me *(sic)* mentioned spouse, or if she does not survive me, to my children, MARKUS and JORAM, or their lawful escendants

per stirpes.

B. …….

C.

I appoint BANKORPTRUST LIMITED as Executor of my estate and Administrator of any trust created herein and I exempt them from the duty of providing security to the Master of the High Court.

For their duties as administrators BANKORPTRUST LIMITED shall be entitled to compensate *(sic)* against a tariff as laid down from time to time, by the said company.

BANKORPTRUST LIMITED is further authorised to make use of the services of any subsidiary or related company to their discretion and shall consequently be entitled to any compensation, for such services rendered.

Signed at Cape Town on this 9th day of November 1988 in the presence of the undersigned witnesses, all simultaneously present"

(l)

(m) On 12 October 1989 (approximately five months after the deceased's death), the second respondent signed a redistribution agreement as follows:

"REDISTRIBUTION AGREEMENT
ESTATE LATE K TJAMUAHA
ESTATE NUMBER 173/89

Agreement entered into between and by

(a) CONSTANCIA TJAMUAHA (born KAVEZEPA) surviving spouse in my personal capacity and as natural guardian of my two minor children JORAM TJAMUAHA And MARKUS TJAMUAHA.

AND

(b) HERMANUS JOHANNES FOURIE as nominee of Bankorptrust and as such executor in the estates late K TJAMUAHA in terms of executors letter no. 173/89 dated 22 June 1989 issued by the

Master of the High Court, Windhoek, SWA.

AND

(c) JACOBUS ADRIAAN LOUW VAN ZYL as nominee of Bankorptrust and as such administrator of the trust created in the estate of K TJAMUAHA, No. 173/89

WHEREAS the said KAIMBIRE TJAMUAHA died on the 15 May 1989.

WHEREAS the said KAIMBIRE TJAMUAHA drawn *(sic)* up a valid testament on the 9th November 1988 at Cape Town.

WHEREAS the said KAIMBIRE TJAMUAHA bequeath his portion of the joint estate in the said single testament as follows:

(a) My immovable farm property, farming vehicles, farming equipment and implements, livestock and any other shares and movable property that has regard with the farming to my administrator in trust, subject to the conditions as mentioned in the annexed copy of the testament.

(b) The remainder to my said spouse or if she does not survive me, to my children, MARKUS and JORAM or their lawful descendents.

WHEREAS the assets in the joint estate consist of:-

1. FARM PROPERTY:

Certain portion 5 (Okatau North) of the farm OTJOMBINDI – Measuring 3190,952 hectare

Certain portion 6 (Koue Water) of farm OTJOMBINDI – Measuring 3239,2849 hectare R200 000,00

2. Farming vehicles, implements and livestock:

Truck	R6 000,00
Tractor	9 000,00
Horse cart	300,00
Welding machine	3 500,00
Cattle	74 000,00

	Bulls	3 000,00	
	Goats	2 460,00	
	Sheep	1 050,00	
	Horses	1 400,00	
	Donkeys	560,00	99,070,00
3.	Furniture		2,000,00
4.	Vehicle		35,000,00
5.	Fire-arms		1,425,00
6.	Cash after payment of liabilities estimate		110,000,00

WHEREAS the deceased was under the impression that his marriage was one out of community of property.

WHEREAS the deceased was however married in community of property and consequently only had disposal over one-half of the joint estate which was practically non-executable for the reasons that:

(i) The farm property cannot be subdivided.

(ii) The trust that was created only dissolves at the death of the minor children of the deceased, and that it was practically impossible to maintain half of the movable goods that has regard to the farming and livestock.

(iii) That it is more practical and to the benefit of the various legatees, in that the legatees wish that a redistribution of the assets takes place.

WHEREAS the parties as stated in a, b, and c have decided to deviate from the provisions of the testament as far as it deals with the bequeathment of the farm property and farming vehicles, equipment, implements and livestock is concerned.

NOW THEREFORE AND CONSEQUENTLY THE PARTIES AGREED AS FOLLOWS:

(a) The farm as stated above is in its entirety awarded to the administrator in trust subject to the conditions as stated in the testament and the surviving spouse does away with her half interest therein.

The value amounts to R200 000,00 (Two hundred thousand Rand).

(b) All farming vehicles, equipment, implements, livestock as mentioned, are awarded to the surviving spouse – C

TJAMUAHA. The value amounts to R99 070,00 (Ninety nine thousand and seventy Rand.

(c) That the difference of half the value of the farm property, namely R200 000,00 and half of the value of the farming vehicles, equipment, implements, and livestock, namely R99 070,00, that is an acknowledgement of debt to the amount of R50 465,00 handed to C TJAMUAHA by the administrator of trust. The amount shall become repayable at the death of the said C TJAMUAHA, the surviving spouse."

(n) Turning back to the main application, the applicants seek to be appointed as administrators of the Trust. They allege that they became aware during February 2011 that the second respondent had caused a mortgage bond to be registered over the Farm without authorisation from the duly appointed administrator in 2010. It was also established that Bankorptrust Bpk no longer did business as estate administrators, and that ABSA Trust "administered" the Trust until it resigned as nominated trustee during October 2007 via letter addressed to the second respondent. The applicants further submit that as they have a beneficial interest in the Trust and the Trust property, and since they have been involved in management and administration of communal and commercial farms, they are fit and proper to take over as administrators in order to ensure that the Farm is preserved for their children as per the wishes of their deceased father.

(o) The second respondent admits that she caused the mortgage bond to be registered over the farm, and that, in as far as her deceased husband's portion of their joint estate is concerned, new administrators should be appointed to the Trust, and ABSA Trust formally removed. However she wants to be appointed as administrator to the Trust instead of the applicants, alternatively that an independent administrator be appointed by the President of the Law Society of Namibia. Should the court appoint the applicants as administrators, the second respondent requests that they be required to provide security. It is apparent that the applicants and the second respondent no longer understand each other,

(p) The will does not provide for what should happen in the event of the resignation of the administrator. It is therefore necessary to appoint someone in his stead. ABSA Trust is accordingly hereby removed as administrator of the Trust.[7] I propose to deal below with the appointment of a new administrator/s to the Trust after the determination of the merits of the counter application.

(q) I am however constrained to express at this stage, the court's dismay at the poorly drafted will and redistribution agreement, and more importantly, at the conduct of the administrator/trustees, which to my mind manifested a dereliction of fiduciary duties. Together with the executor, the administrator was completely absent almost from the outset. The attitude after having been served with all the papers in this application as expressed by ABSA Trust's legal practitioners, were to confirm the resignation of ABSA Trust as trustee, and that there would be no objection to the relief sought by the applicants, provided no costs order was taken against them. As regards the counter application the parties were informed of the following:

> "4. As far as the counter-application of the Second Respondent is concerned, one of our client's employees at that stage was also the Executor of the estate. The Estate has been finalized, as you will note, many years ago and our client was relieved as the executor.
>
> 5. Our client is therefore *functus officio* and has no further concern in respect of the relief sought as an executor.
>
> 6. Taking the aforementioned into consideration and as long as no recourse or relief is sought against our client in its capacity as Executor, and no order for costs is sought, our client will also abide by the Court's decision.
>
> 7. Under the circumstances we await both the Applicant's and the Second Respondent's urgent written confirmation that they will not seek:
>
> (a) any relief against our client;

[7] See Lee and Honoré: Family, Things and Succession, 2nd ed para 696 and the authorities there collected.

(b) any order for costs against our client either as administrator or as executor;

In which event our client will then abide."

(r) In her counter application, the second respondent claims her half share in the Farm by virtue of her marriage in community of property to the deceased, and applies to set the redistribution agreement aside on the grounds that the aforesaid agreement is of no force and effect. The basis for the second respondent's application (and the ancillary relief sought, which would essentially flow from the declaratory relief sought), is that she signed the redistribution agreement by mistake, based on misrepresentations of one Riaan Minaar who asked her to sign a lot of documents shortly after her husband's death without explaining to her what she was signing, or that she was renouncing her half share in the farm property when she signed it. She was under the impression that she was signing documents for purposes of finalisation of her husband's estate. She never met the executor or the administrator. She further states that at the time of her husband's death she was not even aware that she was entitled to half of the estate, or that the deceased was not entitled to deal with their joint estate in the manner that he did.

(s) As the relief sought by the second respondent affects the position of those children of the applicants not yet born, the court appointed[8] the sixth respondent as curator *ad litem* to represent their interests and to file a report. In this regard, the first applicant also opposes the counter-application as natural guardian of his three own minor children.[9] The second applicant has no children as yet.

(t) In her report, the curator *ad litem* evaluated the effect that the redistribution agreement had on the unborn children of the applicants. According to the curator *ad litem*, on a proper interpretation of the deceased's

[8]On application of the second respondent

[9]The second applicant was also joined in this capacity in the counter-application

will, certain rights were created by him at the time in favour of the applicants' unborn children similar to those of a *fideicommissum,* in that at the termination of the Trust (on the death of the last dying of the applicants and the second respondent), the Trust capital together with any accumulated income must be paid to those unborn children. Because the deceased expressed the wish that the farm property not be sold, the curator *ad litem* submitted that an implied *fideicommissum* in favour of the applicants' unborn children was created. The curator relied on the learned authors Lee & Honorè: Family, Things and Succession[10] where the principle was stated to be that if a testator prohibits alienation of property, except to defined persons, he or she creates, in the absence of an express *fideicommissum*, an implied *fideicommissum* in favour of those persons, provided all the requirements for a valid *fideicommissum* are present.

(u) The curator *ad litem* further submitted that because the redistribution agreement influenced the benefits created by the deceased in his will for the descendants of the applicants (through the implied *fideicommissum)*, they should have been represented by a curator *ad litem* when the redistribution agreement was concluded in order for the rights of these unborn children to have been considered. As this was not done, the redistribution agreement is invalid and cannot stand. In support of her conclusion, the curator relied on the principle expressed in Ex Parte Sem NO en Andere[11], that the court's common law powers to grant relief can be somewhat restricted where the interests of unrepresented minor or unborn children are concerned. The court would in these circumstances not grant an order unless the order is necessary to protect the estate against loss.

(v) Ms Visser for the applicants disagrees with the above conclusions. She disputes that a *fideicommissum* was created and maintains the validity of the redistribution agreement. Ms Bassingthwaighte for the second respondent, aligns herself with the curator *ad litem*'s submissions, but also maintains reliance on the second respondent's counter application to set the redistribution

[10] *Supra a*t paras 646, 659-660

[11] 1970(4) SA 403 (NK) at 405-406

agreement aside.

(w) The report of the curator *ad litem* will be considered first. Should the redistribution agreement be found to be invalid on the grounds raised by the representative of the applicants' unborn children that would be the end of the matter.

(x) To be determined at the outset, is whether or not the deceased created an implied *fideicommissum* in favour of the applicants' unborn children. In this regard, a couple of additional facts are to be considered. The redistribution agreement is expressed to be signed by the second respondent in her personal capacity and in her capacity "as natural guardian of my two minor children JORAM TJAMUAHA and MARKUS TJAMUAHA" (the applicants). However it is common cause that the second respondent is not the biological mother of the applicants. It is also common cause that the first applicant was 21 and second applicant just shy of 21 on the date that the second respondent signed the redistribution agreement.[12]

(y) The general rule in interpreting a will was succinctly expressed by Davis AJA quoting Blackburn J in Allgood v Blake[13], in Cumings v Cumings[14] as follows:

> "The general rule is that, in construing a will, the court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words.
> The words in brackets "or ought to have been" seem to me fully to cover the point".[15]

[12] The second applicant was born on 17 April 1968

[13](1873) LR 8 Exch 160 at 162

[14]1945 AD 201 at 213

[15]Quoted with approval by Levy J in Brummond v Brummond's Estate 1992 NR 306 (HC) at 311I-312A; Gordon's Bay Estate v Smuts 1923 AD 160 and 165.

(z) If the language of the will is clear and unambiguous, there is no room for the application of rules of construction or presumption. In Robertson v Robertson's Executors[16], Innes ACJ (as he then was) authoritatively stated the principle as follows:

> " 'Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used and, when these wishes are ascertained, the Court is bound to give effect to them, unless we are prevented by some rule of law from doing so.'

This has been taken to mean that 'the object is not to ascertain what the testator meant to do but his intention as expressed in the will' (Ex parte Estate Stephens 1943 CPD 397 at 402). It is hence possible for a testator to express a specific intention by the use of certain words in his will which intention may differ from what he actually had in mind. The Court is, however, bound by the expressed intention and is not empowered to look beyond such intention with a view to establishing what may be believed to have been the testator's actual intention. See Cuming v Cuming and Others 1945 AD 201 at 206 - 7; Bell v Swan 1954 (3) SA 543 (W) at 550; Ex parte Eksekuteure Boedel Malherbe 1957 (4) SA 704 (C) at 710. It follows that evidence tendered to prove that the actual wishes of the testator are in conflict with or differ from his clearly and unambiguously expressed intention is not admissible. See De Klerk v Estate De Klerk and Others 1950 (3) SA 62 (T) at 65. Only if the words in question are ambiguous or uncertain may recourse be had to extrinsic evidence. This is a principle which dates back to Roman times, as appears from the dictum of the Roman jurist, Paul, when he states in Digest 32.25.1: 'Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio.' Voet Commentarius ad Pandectas 34.5.1 repeats this principle:

> 'Voluntates testatorum aliae clarae atque perspicuae sunt, aliae dubiae et ambiguae. Quod si nulla in verbis ambiguitas sit, etiam voluntatis quaestio admittenda non est....'"

(aa) The curator *ad litem* and Ms Bassingthwaighte argued that the deceased

[16] 1914 AD 503 at 507

made it clear in his will that it was his wish that his farm property not be sold and that the second respondent, and thereafter the applicants, live off the income from farming activities during their lifetimes, with the Trust capital, namely the Farm, and accumulated income being given to the descendants of the applicants.

(bb) Ms Visser argued that a clear and unambiguous feature of the will of the deceased is that he created a testamentary Trust in which he bequeathed *inter alia* the farm property to the trust to his administrator upon whom he conferred the following powers:

> "to accept, control, administer, rent out, to sale (sic) or purchase any movable and immovable property as they deem fit in their exclusive discretion to be in the interest of the trust." (emphasis supplied)

(cc) Only after this sentence did the deceased express the following:

> "It is my wish that my farm property will not be sold."

(dd) If I consider the clear language of the will, irrespective of what the deceased intended or not, he gave the power to the administrator to sell the Farm if necessary, in spite of his wish that the Farm not be sold. It is clear that he intended the income of the Trust to be earned from farming activities on the Farm, but the power to dispose of the farm was still given to his administrator. The "alienation" of the farm property was accordingly not prohibited. Thus the unborn children at the relevant time would inherit whatever trust capital and accumulated income was available at the time at the termination of the Trust, and not the Farm per se. I think Ms Visser's arguments are sound on this point, an implied *fideicommissum* was not created.

(ee) To be appreciated is the principle that there is a general presumption against the creation of a *fideicommissum*, the rule being that in a case of reasonable doubt, the construction should be against a *fideicommissum*.[17] In

[17]Lee and Honorè, Family, Things and Succession *supra* at par 643

any event, the *fideicommissum* and the Trust are also distinct legal institutions, each of them having its own distinct legal rules.

(ff) I now turn to the second leg of the curator *ad litem's* argument, namely that because the terms of the redistribution agreement influenced the benefits of the applicants' unborn descendants at the time of its conclusion, their interests should have been represented when the redistribution agreement was concluded, the failure of which rendered it invalid. The following authorities were cited in support of her argument, namely Ex parte Erasmus[18], Brink N.O. and Others v Gain N.O. and Others[19] and Ex parte Sem N.O. en Andere[20].

(gg) In Ex parte Erasmus, the applicant under the will of her mother had been bequeathed a third share subject to a *fideicommissum* in favour of the testatrix's descendants.[21] A division was later effected and the applicant then got transfer of her share subject to the condition of the will. In an application to have the *fideicommissum* expunged from her title deed, she contended that with the consent of her only major child, and seeing that she is past child bearing age, she was entitled to the relief sought. The court gave three different interpretations to the the meaning of "kindskinderen", namely either the grandchildren of the testatrix by the applicant, or all the testatrix's grandchildren or all the testatrix's grandchildren and further descendants. In the result the court refused to grant the order in the absence of those who would have an interest in the second and third possible interpretations and appointed a curator *ad litem* to the minor grandchildren born and unborn of the testatrix.[22]

(hh) In Ex parte Sem, a usufructuary and other interested parties applied for confirmation of a transaction where immovable property in an estate was sold in terms of a provisional deed of sale. The court refused the application because it was not satisfied that it would be to the advantage of the minors and unborn

[18]1947 (1) SA 425 (T) at 427

[19]1958 (3) SA 503 (C) at 507A-H

[20]*supra* at 405-406

[21] Referred to as "kindskinderen" in the textatrix's will.

[22]At 427-428

issue who might have had an interest therein.

(ii) In the Brink case, the minor children of the first, second and third plaintiffs, as well as the fourth and fifth plaintiffs were *fideicommissary* heirs in terms of the same will. In an action for the redistribution of all the assets of the community estate based upon the true and accurate value thereof, an exception in the form of the non-joinder of the fiduciaries as well as non-joinder of a curator *ad litem* to the unborn children of such fiduciaries was raised. It was argued[23] that from the plaintiffs' declaration as it stood, the unborn issue had nothing to lose but everything to gain. If the plaintiffs succeeded, the inheritance of the unborn issue would be increased. If unsuccessful, they would be no worse off than they were at the time.

(jj) After a discussion of the relevant authorities, Van Winsen J stated[24] that there was no absolute rule that under all circumstances unborn issue must be represented by curators. In each case, the court must exercise its discretion according to the circumstances of the case. In the result, it was held[25] that it was not essential in the circumstances that the unborn children be protected by representation through a curator *ad litem* and the exception was dismissed.

(kk) The main issue as I see it, is that in the absence of the redistribution agreement, the unborn heirs were only entitled to the Trust capital and accumulated income of half the estate by virtue of the marriage in community of property. The effect of the redistribution agreement is that they instead became entitled to the capital and income of the whole estate.

(ll) The provisions of the redistribution agreement were in actual fact, clearly in favour and to the benefit of the applicants' unborn children. I cannot see that the absence of a curator *ad litem* to represent their interests at the time the agreement was concluded renders it invalid.

(mm)

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[23] At 509D

[24] At 510A

[25] At 510D

(nn) I am also mindful by the principle set out by the learned author Sir AFS Maasdorp, The Institutes of South Africa Law, Vol III, The Law of Contracts[26], that a minor may bind him/herself by contract in all cases in which, and to the extent to which, he/she is enriched thereby at the expense of another, and by the word "enriched" is to be understood not merely that the minor has had the best of the bargain, but that considering all the circumstances, the contract was for his/her benefit.

(oo) In light of the foregoing, I disagree with the curator's report and on that basis, cannot find that the redistribution agreement is invalid in the circumstances and on the grounds mentioned by the curator *ad litem*.

(pp) I now deal with the second respondent's counter application to set the redistribution agreement aside. Firstly, I deal with the plea of prescription raised by the applicants.

(qq) Ms Visser argued that the second respondent's claim is contractual and not vindicatory in nature because it is a claim to set an agreement aside. Accordingly the second respondent's claim was a debt as contemplated by sections 11 and 12 of the Prescription Act. She further submitted that for purposes of section 10 of the Prescription Act the word "debt" in this section is wide enough to include any liability arising from and being due (*debitum*) or owing under a contract.[27] She also argued that the second respondent has not fulfilled the necessary requirements for a vindicatory action, because the second respondent is in possession of the property. In the alternative, the second respondent is not entitled to the relief because, through her conduct over some twenty years she elected to adiate the terms of the agreement and therefore to accept, not just the benefits in terms of the redistribution agreement, but also the benefits in terms of the deceased's will, as a result of which she is estopped from seeking the relief.

(rr) Ms Bassingthwaighte argued that the essential feature of the second

[26] 5th Ed at 10

[27] Stockdale v Stockdale 2004(1) SA 68 (C) at 72D-E.

respondent's application is her ownership of half of the farm and thus vindicatory in nature, and further that a claim based on ownership of a thing cannot be described as a claim for satisfaction of a debt. Accordingly the three year prescription period did not apply. In the alternative, the second respondent only became aware of her claim during 2011 when she was properly advised and became aware of the entire set of facts that gave rise to her claim and accordingly the period of prescription commenced to run during 2011. As regards the question of possession for purposes of a vindicatory claim, the second respondent possessed the farm as agent of the administrator, and that she has effectively been managing it on their behalf since 1990.

(ss)

(tt) I pause shortly to deal with the argument of possession for purposes of a vindicatory claim. The *rei vindicatio* is available to an owner for the recovery of his or her movable or immovable thing from whomsoever is in possession or has detention of the thing, irrespective of whether the possession or detention is *bona fide* or *mala fide*. The owner instituting the *rei vindicatio* must on the balance of probabilities prove that he/she is the owner of the thing, that the thing is still in existence and clearly identifiable, and that the defendant has possession or detention of the thing at that moment the action is instituted.[28] The rationale for this requirement has been authoritatively explained[29] as being to ensure that the defendant will be in a position to comply with an order for restoration. I am in respectful agreement with this rationale.

(uu) It is common cause that the second respondent has been residing on and managing the Farm in the absence of the administrator since 1990, but neither the applicants nor the second respondent are entitled *per se* to reside on the farm. Her presence on the farm today was at the leisure of the administrator. The property she claims is in existence and clearly identifiable. I cannot understand how a person who wants to claim ownership of property should be barred from claiming that ownership became she happens to be in possession of the property especially if that ownership is being contested, as is being done in these proceedings. To my mind. this is a clear vindicatory claim .

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[28] LAWSA Vol 27 first reissue Butterworths par 381 and the authorities collected at footnote 19.

[29] in LAWSA *supra* at par 381

The next question is whether this type of claim is a debt that prescribes after 3 years.

(vv) Ms Visser argued that the second respondent's claim is a debt, and that the debt (the reason for termination or setting aside of the redistribution agreement) became due once she acquired as creditor a complete cause of action for the recovery thereof, and when the entire set of facts which a creditor must prove in order to succeed with his or her claim against the debtor are in place.[30] Ms Visser submitted that the second respondent came to know of her complete cause of action by latest 6 April 2000 on the papers and that accordingly her claim, having been instituted in 2012, has prescribed.

(ww) Ms Bassingthwaighte's argued that the word "debt" was not defined in the Prescription Act and that a vindicatory claim is not a debt as contemplated by the Prescription Act. I was referred by her to a number of authorities that run counter to her argument. In particular cases such as Evins v Shield Insurance Co[31], Barnett v Minister of Land Affairs[32], Grobler v Oosthuizen[33], Leketi v Tladi N.O.[34] and a decision of this court in the matter of Ongopolo Mining Ltd v Uris Safari Lodge (Pty) Ltd and Others[35].

(xx) The Evins case concerned a claim for injuries arising out of a motor vehicle accident. At issue was whether a claim for personal injuries and a claim for damages for loss of support arising from the death of the plaintiff's husband were separate claims or a single debt for purposes of prescription. King J stated that:

> "The word 'debt' in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for

[30]See Stockdale v Stockdale 2004(1) SA 68 (C) at 72D-E; Truter v Deysel 2006(4) SA 168 (SCA) at par 16; Van Staden v Fourie 1989(3) SA 200 (A) at 216A-D; Seaflower White Fish Corportaion v Namibian Ports Authority 2000 NR 57 (HC).

[31]1979 (3) SA 1136 (W)

[32]2007 (6) SA 313 (SCA)

[33] 2009 (5) SA 500 (SCA)

[34][2010] ALL SA 519

[35]2014 (1) NR 290 (HC)

> example, a debt for the vindication of property. While this is so 'debt' cannot embrace all rights between two persons. In my view 'debt' in ss 10 and 15(1) of the Prescription Act means an obligation or obligations flowing from a particular right."[36]

(yy) In the Barnett case, the South African Supreme Court of Appeal was faced with a special plea of prescription raised by persons who had occupied and built structures on state land. It was argued that the 'debt' was vindicatory relief which the government sought to enforce. Brand JA writing for the court stated that he was prepared to accept that the vindicatory relief that the government sought to enforce constituted a debt as contemplated by the Prescription Act, even though the Prescription Act did not define the term "debt". Reliance was placed on the wide and general meaning ascribed to the term 'debt' and that it included an obligation to do something or refrain from doing something. Thus, there was no reason why a debt would not include a claim of an owner's right to property.[37]

(zz) The dictum in Barnett was approved in the Grobler case[38] another Supreme Court of Appeal decision. In this matter, the question was whether a claim to recover the proceeds of certain insurance policies ceded to the applicant's late husband had prescribed. The court *a quo* held on the basis of the application of the pledge theory, that what the applicant sought to enforce was a vindicatory claim that prescribed after 30 years. Brand JA again writing for the court rejected this finding and stated[39] that:

> "…the prescription period of 30 years in s 1 of the Prescription Act relates to acquisitive prescription. For extinctive prescription, the period can, in the present context, only be the three years provided for in s 11(d) of the Act …"

(aaa)

(bbb) The court referred to the Evins and Barnett cases in support of that proposition, but in the end the case was decided on other grounds.

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[36] *Supra* at 245D.

[37] *Supra a*t par 19, and the authorities collected there.

[38] *Supra* at 508G

[39] *Supra a*t 508G

(ccc) In the Leketi case, the appellant alleged that his grandfather had fraudulently caused certain immovable property to be registered in his own name instead of the name of his late father. His claim was directed at setting aside the registration in the name of his grandfather and then procuring transfer of the property for his late father's estate. The sole question for decision at the trial was whether the applicants' claim had prescribed, given that the fraud which formed the basis of the claim and the right to sue on that fraud took place some twenty years before. The court following Barnett[40] described the claim as a debt. The case in essence dealt with knowledge of the alleged fraudulent transfer and did not relate to a vindicatory claim.

(ddd) The argument put forward by Ms Bassingthwaighte is that the Evins case concerned a claim for injuries arising from a motor vehicle accident and that the statement, relating to the vindication of property was made by a single judge, *obiter* and without any analysis of whether an action for vindication of property by its owner constitutes a debt. In Barnett, there was also no discussion on the issue of whether an action for vindication of property by the owner constituted a debt. In Leketi, the court dealt with the knowledge of the alleged fraudulent transfer and the matter also did not relate to a vindicatory claim.

(eee) I was invited instead to adopt the reasoning of Blignaut J in Staegemann v Langenhoven and others[41]. In this matter, the applicant claimed the return of his vehicle from the first respondent who had bought it from a third party to whom it was fraudulently sold by the third respondent. The first respondent resisted the applicant's claim, contending that the claim had prescribed. This plea was rejected after a thorough analysis of *inter alia* the above authorities. The court held that the *rei vindicatio* was not a debt within the meaning of section 10 of the Prescription Act.

(fff) A distinction was drawn in Staegemann between a real right and a personal right which has been consistently recognised in South African

[40] at par 8

[41] 2011(5) SA 648 (WCC).

jurisprudence. The distinction drawn in the Prescription Act between acquisitive prescription of real rights (ownership and servitude - which is dealt with in Chapters 1 and 2) and extinctive prescription of obligations (dealt with in Chapter 3) was pointed out, and a clear statement was made that as a *rei vindicatio* is a claim to ownership in a thing, it cannot be described as a claim for payment[42].

(ggg) In the Schmidt Bou Ontwikkelings CC case, the Supreme Court of Appeal again raised the question whether a vindicatory claim constituted a debt though it was not an issue for the court to decide. Brand JA again writing for the court expressed support for the reasoning in Staegemann, decides:

> "The conclusion thus reached renders it unnecessary to decide whether a claim based on the *rei vindicatio* is a debt which prescribes after three years. This issue arose from the liquidators' submissions that a claim for rectification is to be equated with the *rei vindicatio.* For the proposition that a claim of the latter kind prescribes after three years, they relied on the judgment of this court in Barnett and others v Minister of Land Affairs and others 2007(6) SA 313 (SCA) (2007) 11 BCLR 1214 (para 19). But the correctness of that judgment has since been doubted in Staegemann v Langenhoven and others 2011(5) SA 648 (WCC) paras 14 to 28. Though Barnett has been confirmed by this court in Grobler v Oosthuizen 2009(5) SA 500 (SCA) para 18 and in Leketi v Tladi NO 2010(3) All SA 519 (SCA) paras 8 and 21, I must admit that I find the reasoning in Staegemann attractive and, at least on the face of it, quite convincing. I therefore have no doubt that the case will come where this court will have to reconsider the correctness of the decisions in Barnett, Grobler and Leketi that the *rei vindicatio* is extinguished by prescription after three years. But this is not that case, simply because the liquidators' prescription defence has already been held to found on other grounds."[43]

(hhh) The reasoning in Staegemann was, however, criticised in the judgment of Damaseb JP in the Ongopolo Mining casewith preference expressed for the reasoning in Barnett. In that matter, plaintiff alleged that its immovable property

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[42]At *inter alia* par 17, 18, 20 and 21

[43]2013(1) SA 125 (SCA) at 131-2 para 15

had been fraudulently transferred into the defendant's name and sought an order rectifying the title deed and evicting the first defendant. The plaintiff excepted to the defendant's special plea of prescription on the grounds that a claim for the return of property fraudulently obtained was not a debt as contemplated in the Prescription Act, and even if it were a debt, prescription would be interrupted as the unlawful possession of a farm is continuous wrong that creates a series of debts.

(iii)

(jjj) Ms Bassingthwaighte sought to distinguish Ongopolo Mining on the basis that the issue was considered in the context of an exception to a plea of prescription and no final finding and binding decision was made as to whether or not a *rei vindicatio* constituted a debt in the circumstances. Accordingly, the approach in Ongopolo Mining is not binding on this court.

(kkk) Ms Visser in reply maintained reliance on her earlier argument and invited the court to adopt the reasoning in the line of authority emanating from the Evins case. She submitted that the Ongopolo judgment was clear authority for the proposition that a vindicatory claim is a debt, and that I should follow it.

(lll) Subsequent to judgment being reserved in this matter, the legal practitioners of the second respondent via letter sought to submit additional authority emanating from the Supreme Court of Appeal of South Africa, which overturned its own earlier decisions on the issue. It was held that a *rei vindicatio* is not a debt and does not prescribe after 3 years. This was the matter of Trust Bank v ABSA[44]. This judgment was delivered on 28 May 2015, some 3 weeks before the matter was heard in this court.

(mmm) Because the ABSA case was decided before the matter was heard, the applicants' representatives were provided with an opportunity to deliver supplementary heads of argument. The respondents would respond thereto if necessary. Both parties filed additional heads of argument. In essence Ms Visser maintained reliance on the stream of cases holding that a vindicatory action is a debt within the meaning of section 10 of the Prescription

[44]2015 (4) SA 474 (SCA)

Act, with special emphasis on the Namibian position in the Ongopolo case, whereas
Ms Bassingthwaighte relied on the ABSA case to support and cement her argument.

(nnn) In the ABSA case, the appellant brought an action in the High Court seeking confirmation of its cancellation of an instalment sale agreement and recovery of a vehicle after the respondent defaulted on payments. The respondent's special plea of prescription succeeded in the court *a quo* on the basis that the appellants' claim for repossession of the vehicle was a 'debt' as contemplated by section 10 of the Prescription Act, and had thus prescribed after three years. The Supreme Court of Appeal, after a thorough consideration of all the relevant authorities held that those which characterised a vindicatory claim as a debt were wrong and contrary to the scheme of the Prescription Act.

(ooo) Writing for the court, Zondi JA restated the clear distinction between real rights and personal rights, which was reflected in the Scheme of the Prescription Act.[45] He stated that:

> "[20] In my view there is merit in the argument that a vindicatory claim, because it is a claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act. The High Court in Staegemann (para 16) was correct to say that the solution to the problem of prescription is to be found in the basic distinction in our law between a real right (jus in re) and a personal right (jus in personam). Real rights are primarily concerned with the relationship between a person and a thing, and personal rights are concerned with a relationship between two persons. The person who is entitled to a real right over a thing can, by way of vindicatory action, claim that thing from any individual who interferes with his right. Such a right is the right of ownership. If, however, the right is not absolute, but a relative right to a thing, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right."[46]

[45] See paras 21 and 22

[46] at para 20

(ppp) I have considered the arguments of counsel, both before and after presentation of the ABSA case. I would have considered the reasoning in Staegemann to be persuasive without the benefit of the hindsight of the South African Supreme Court of Appeal in ABSA. What appeals to me from the reasoning in Staegemann, is that at its core is a well established distinction between a real right (a relationship between a person and a thing) and a personal right (a relationship between two persons). This is also found in the scheme of the Prescription Act and the distinction there between extinctive and acquisitive prescription. Similarly, it is indeed difficult to reconcile the provisions of section 1 of the Prescription Act, which allows a person to become an owner of a thing through open and uninterrupted possession as if the person was an owner for an uninterrupted period of thirty years, with the principle that a person has only three years to claim ownership of a thing. I am in respectful agreement with the principle that an acquisitive period should be applied to the *rei vindicatio*. I believe that the position was now decisively put to rest in the ABSA case where the following was stated:

> "[25] In the circumstances the view that the vindicatory action is a 'debt' as contemplated by the Prescription Act, which prescribes after three years is in my opinion contrary to the scheme of the Act. It would, if upheld, undermine the significance of the distinction which the Prescription Act draws between extinctive prescription on the one hand and acquisitive prescription on the other. In the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a 'debt', becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing. To equate the vindicatory action with a 'debt' has an unintended consequence in that by way of extinctive prescription the debtor acquires ownership of a creditor's property after three years instead of 30 years that is provided for in s 1 of the Prescription Act. This is an absurdity and not a sensible interpretation of the Prescription Act."

(qqq) As regards the Ongopolo judgment, I hold the view that this case is distinguishable because it related to an exception to a special plea of prescription, and is accordingly not binding. In any event, I understand this case to have been decided on the basis of a continuing wrong. I also do not understand the criticism of Staegemann to have fully decided the issue in our jurisdiction. In dealing with the test for adjudicating an exception, Damaseb JP stated[47] that if the relief sought was susceptible of being construed as a debt and not a continuous wrong which interrupts prescription, the plaintiff's exception had to fail and the first defendant would be allowed to introduce proposed amendments which postulated that the plaintiff should have instituted proceedings within three years of becoming aware of the alleged fraudulent conduct. He then stated that:

> "If I uphold the exception I will be laying down a rule of law that a claim for the recovery of property fraudulently acquired is not a debt and that the legislature did not intend the Prescription Act to apply to such property. No binding precedent has been cited for such far reaching conclusion. In that sense, this is a case of first impression. A court should be slow to lay down such a precedent set in rule of law in a case of first impression without full argument and consideration of all the ramifications of doing so, especially where the Constitution is relied on, although only indirectly. The exception procedure seems to me ill-suited for such a result."[48]

(rrr) In light of the foregoing I find that a claim under the *rei vindicatio* is not a debt, and that it prescribes after thirty years. The plea of prescription accordingly fails.

(sss) I now turn to determine whether or not the second respondent has made out a case for claiming her half share in the Farm and setting aside the redistribution agreement, as well as the ancillary claims.

(ttt) The second respondent states that she cannot properly read or write English or Afrikaans. She further states that the affidavit, as well as the

[47] At para 15

[48] At para 45

applicants' application was read and explained to her by her daughter, Ms Dorisday Merora in the Otjiherero language.

(uuu) After her husband's death on 15 May 1989, a certain Riaan Minaar and a certain Mr Engelbrecht came to read her late husband's will to her and her in laws. At the time when the two gentlemen came to read the will her husband had not even been buried yet and she was grieving and not in any condition to deal with such an issue. She had also taken ill and was unwell. She does recall that her in laws were unhappy with the content of the will. I point out at this stage, that whilst this allegation is not disputed, none of the parties state that they understood the terms of the will.

(vvv) At the time of her husband's death, they were both employed on a fulltime basis and only went to the farm on weekends. However, Mr Minaar told her that she should quit her job and go and live on the Farm permanently. The applicants had also not finished high school at that time. She moved to the farm permanently after resigning from her job during 1990 and the applicants resided with her there until approximately 1995.

(www) The second respondent confirmed that she signed the redistribution agreement on 21 July 1989, some 2 months after the deceased's death. At the time, she was under the impression that she was signing documents for the finalisation of her husband's estate. She recalled that Mr Minaar asked her to sign a lot of documents. When she signed the documents, Mr Minaar did not explain to her that she was signing a redistribution agreement in which she renounced her half share in the farm property. He also did not explain to her that she had a choice not to sign it, as her husband was only able to dispose of half the estate. Had Mr Minaar explained to her exactly what she was signing and what the consequences were of signing the redistribution agreement, she would not have done so because she has five children of her own. She would never have signed a document that resulted in her denying her own inheritance in favour of her husband's children if she did not need to. Had Mr Minaar explained to her that she had a choice to retain her half share in the farm, she would have certainly elected to do so. Thus, she never agreed to the terms of

the redistribution agreement. The second respondent also stated that she never met the executor or the trustee appointed to manage the Trust, who were signatories to the redistribution agreement. The executor similarly never explained anything. *Ex facie* the agreement, they signed it separately in Cape Town and Bellville. These gentlemen have also never been on the farm. The only communication she ever received related to payment of administration fees and the registration of ABSA Trust and administrators.

(xxx) The second respondent has been managing the farm on her own since her husband had died. The second respondent annexed a list of improvements which she effected on the farm since 1990. Mr Minaar came to the farm every year for about two years to apparently see how she was doing but he did not hold any inspection, nor did he assist her in any way in managing the farm. All he did on the visits was to greet her, hunt on the farm and leave. She did not question him at the time because according to the second applicant, he had her husband's will and seemed to be in charge of their money.

(yyy) After moving to the farm on Mr Minaar's instructions, it required some improvement. She informed Mr Minaar that she could not manage the farm without any money and he promised her that he would pay an amount of N$134,000.00 into her bank account to assist her to manage the farm. Initially he paid N$2,000.00 every month, but stopped after about 3 months. When he came to visit the farm again sometime during 1990, she had asked him why he stopped the payments. He informed her that something must have gone wrong and that he did not stop the payments. Eventually through the assistance of a certain Mr Marais who rented grazing land from her, she was informed that she could insist on a once-off payment of N$134,000.00 which she was informed was due to her. Once this money was paid into her account, she invested about N$120,000.00 of this money on advice from Mr Minaar and took her first loan from the fourth respondent, using the investment as collateral.

(zzz) During about 1997/1998 when she approached the fourth respondent for the loan, one of the officials asked her why she was using her investment as security. She provided him with her documents and he then told her that the

Farm is registered in a trust. This was the first time that she found out that the Farm was registered in a trust. Prior to that, she was under the impression that the Farm was in her name. She states that she had specifically seen her name on an endorsement on the last page of the title deed and thought that it meant that the property was transferred to her. The fourth respondent's officials then explained to her that the endorsement was there to show that the property was held in Trust.

(aaaa) She apparently approached several lawyers to assist her to no avail. Their names are specifically dealt with in her papers, and all of them are legal practitioners. No confirmatory affidavits have been filed on their behalf. She also approached a legal practitioner at the Legal Assistance Centre who found a document prepared by a conveyance, Mr Carel Jacobus Richard van der Merwe with the heading "Transportbesorger Sertifikaat". This is an endorsement dated 26 July 1990 in terms of which it is indicated the Farm was transferred to the second respondent from the estate of the deceased. The document was signed on 11 October 1990 by Mr van der Merwe. The second respondent only saw the document during 2009 when the Legal Assistance Centre explained that according to the documents, the Farm belongs to her. After receiving the information, she thought that she no longer needed to be concerned, as a result of which the fourth respondent granted her the loan using the Farm as security for the first time. The mortgage bond was registered over the Farm in favour of Agribank on 20 January 2010.

(bbbb) She borrowed a further N$96,000.00 out of her own funds which was also paid off and taken against the investment as collateral. This loan was used to effect further improvements and repairs on the farm. During or about 2006/2007 she took another loan of N$40,000.00 which has also been paid off. She used that money to buy bulls.

(cccc) On 4 March 2011 her former legal representatives received a letter from Dr Weder, Kauta & Hoveka Inc informing that she had no authority to pledge the farm as security. After receiving this correspondence, the second respondent went to her legal representatives of record who undertook the process of

establishing what the correct information was. Mr van der Merwe was also approached regarding the certificate issued. He deposed to an affidavit in 2012, stating that the endorsement made by him was mistakenly made and incorrect.

(dddd) During this time, the application was served on the second respondent and it is when she consulted again with her legal representative that explained to her for the first time, the true meaning of what her husband had done in his will. It was then that she was advised that he was not entitled to deal with the joint estate in the manner that he did, that the second respondent was entitled to half the estate at the time of her husband's death and that it was also possible for the executor to deal with her half share in the estate separately from his and to still give effect to the desires expressed by the deceased in his will as to what should happen to his share of the joint estate.

(eeee) It was also the first time that someone explained to her that she had renounced her half share in the farm when she signed the redistribution agreement.

(ffff) Had Mr Minaar explained to her what exactly the consequences were of signing the redistribution agreement, she would never have signed it because she had five children of her own and she would never deny them an inheritance. In fact, so the second respondent alleges, had it been explained to her that she had a choice to retain her half share in the farm she would certainly have elected to do so. Apart from paying an administration fee of N$570.00 per month no one from ABSA Trust ever managed the farm and she could not even understand their claim to this money.

(gggg) On this basis it was submitted that the redistribution agreement should be declared of no force and effect on the grounds that it is invalid.

(hhhh) The applicants raised a number of denials. They denied that the second respondent cannot speak, read or write English. In amplification they sought to point out that the second respondent had sufficient knowledge of the English language to be able to transact and enter into various loans and to farm commercially for the past 22 years. In reply, the second respondent stated that

the applicants knew very well that she could not speak, read or write English and that she converses mainly in Otjihereo. When necessary she speaks Afrikaans which is a language used in the community in which she operates as a farmer. Whenever a transaction or engagement requires the use of the English language, she is accompanied by one of her daughters or a translator is provided. During all her transactions with Agribank, she was either assisted by a person who could speak Otjiherero or Afrikaans.

(iiii) The applicants also alleged that the second respondent had usurped the powers of the administrator by registering a mortgage bond over the Farm, but they correctly did not dispute that at the time the deceased's will was drafted, he could not dispose of the joint estate in the manner that he did. Instead, it was submitted that the second respondent at no stage obtained a personal right in the form of a *habitatio* and/or a usufruct in respect of and/or over the Farm.

(jjjj) The applicants highlighted that from 1997/1998 when the second respondent learned that the farm was held in a trust, her allegations concerning the different lawyers she visited between 1998 and 2009 (when she discovered the certificate of endorsement in her name by Mr van der Merwe) are not plausible especially as no confirmatory affidavit had been filed by those lawyers, and she took 15 years from then to claim her share and apply to set aside the distribution agreement.

(kkkk) The applicants denied that the second respondent never agreed to the terms of the redistribution agreement. They submitted that the second respondent was at the time of the deceased's death well aware that she was entitled to 50% of the joint estate and that she was well and truly appraised of her rights. They also submitted that through her conduct, the second respondent unequivocally elected to accept not just the benefits in terms of the redistribution agreement but also the benefits of the will.

(llll) Regarding the issue of adiation, it is clear that this is not a massed will or a joint will and as such I do not think the principles relating to adiation are apposite here, this argument is accordingly without merit.

(mmmm) Through the Plascon-Evans rule, it is now well established if not trite in our courts that where disputes of fact arise in motion proceedings, final relief can only be granted at the facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify an order, unless the respondent's version consist of bold or uncredit worthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched, and so clearly untenable that the court would be justified in rejecting the respondent's allegations on the papers.[49] In the application of the above principle to the facts, in my opinion, none of the denials raised are in any way relevant to the second respondent's claim. It is also clear from the papers filed in this application that that the applicants are not in a position to deny the following

(a) the events that took place between the second respondent and Mr Minaar or the events that led to the signing of the distribution agreement, including what was explained to her and what was not;

(b) that loans were made by the second respondent relying on an investment of N$134,000.00, and thereafter out of her own pocket which loans were all repaid;

(c) that the second respondent resided on and managed the farm for the past 22 years, and that as far as she was concerned the document obtained in 2009, proved her ownership of the farm;

(d) that the administrator, apart from obtaining an administration fee of N$570.00 for the past 22 years did not do anything to fulfil any of the obligations in terms of the trust deed;

(e) that the second respondent applied for a loan and was permitted to register a mortgage bond over the property on the strength of that

[49]See Republican Party v Electoral Commission of Namibia 2010(1) NR 73 (HC) at 108 C; Bahlsen v Nederlof and another 2006(2) NR 416 HC.

"incorrect" endorsement.

(nnnn) Neither can it be denied that

(a) the redistribution specifically states that the second respondent signed the agreement as natural guardian of the applicants. This is clearly not true, and the first applicant was in any event a major and should have been an independent party to it;

(b) it is doubtful that the second respondent would have signed the redistribution agreement as natural guardian of children that are not hers;

(c) the agreement was signed between herself and HJ Fourie and J Adriaan Louw whom she had never met in her life;

(d) only on 14 August 2012 was there an indication by Mr van der Merwe that the endorsement that he signed was effectually incorrect.

(e) the applicant has five children of her own to whom she would have wanted to bequeath her property.

(oooo) I also note from terms of the redistribution agreement that it specifically states that the joint estate was non-executable because

(pppp)

(a) the farm property could not be subdivided;

(b) it was practically impossible to maintain half of the movable goods "that has regard to the farming and livestock"; and

(c) that it would be more practical and to the benefit of the various legatees in that the legatees wish that a redistribution of the assets take place.

(qqqq) This is not true. In the first place, despite the fact that the farm was only registered in the name of the deceased, the parties by virtue of their marriage in community of property owned the assets in equal undivided shares.[50] Secondly, where a spouse who is married in community dies, the whole of the joint estate falls under the administration of the executor who must first discharge all liabilities of the joint estate and then pay over half of the net balance of the joint estate to the surviving spouse.[51] The executor has to have regard to the interest and wishes of the surviving spouse in realising the assets of the joint estate and where this is not necessary, to realise the assets of the estate to meet liabilities, the executor must obtain the consent of the surviving spouse before disposing of her half share in the joint estate.[52] Thirdly, the farm could indeed have been subdivided with the permission of the Minister of Agriculture in terms of sections 3 and 4 of the Subdivision of Agricultural Land Act, 70 of 1990. It is also clear from the allegations of the second respondent that she never had a discussion with HJ Fourie, the executor.

(rrrr) This is one of those cases where the applicants are not in a position to gainsay the allegations of the second respondent concerning the events leading to the conclusion of the agreement. The only ones who could have shed any light on this matter are those who from the outset were completely derelict in their duties as administrators. ABSA Trust was served with the application, and is cited as a respondent. Yet, as referred to above they only wish not to have any cost order against them. With regard to the counter application they say that they are *functus*.

(ssss) There are some very serious allegations made against the gentlemen in this affidavit. Having received this information one would have thought that those with any form of fiduciary duty or sense of honour, for that matter, would have considered preparing answering papers to dispute this claim. However, nothing was said.

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[50]HR Hahlo, The South African Law of Husband and Wife, 5th ed at 158.

[51]See D Meyerowitz, The Law in Practice of Administration of Estates 5th ed at 125 para 12.23

[52]See D Meyerowitz *supra* at 131 para 12.9

(tttt) The court is accordingly faced with allegations made by the second respondent that cannot be meaningfully disputed by the applicants and areas where it does not appear that any evidence can be led to the contrary.

(uuuu) I find on the balance of probabilities that the second respondent did not know what the document she was signing contained, and that neither the executor, the administrator nor Mr Minaar explained to her what the document means. Thus, there was no consensus. In particular, I believe that Mr Minaar knew what the terms were, whilst the second respondent did not.[53]

(vvvv) It is a bare trite principle of the law of contract that a contract only comes into existence when there is the consensus between the parties, failing which, it would be a nullity.[54]

(wwww) On the above facts, I am persuaded that the second respondent has discharged her onus to prove that she had no idea what she was signing when she appended her signature to the distribution agreement. She appears since the outset to have dealt with the Farm as if it was her own. I also find it difficult to believe that a parent would knowingly disabuse his or her own seed of an inheritance in an immovable property with knowledge that ownership of that property existed. In light of the foregoing, the redistribution agreement is declared to be invalid. The second respondent is entitled to her share of the joint estate.

(xxxx) In light of the above finding, an executor must be appointed to the estate of the deceased. The Master has authority to appoint an executor with the power to administer, liquidate and distribute the half share of the deceased in the joint estate, and to transfer one half share in the aforesaid joint estate to the second respondent.

(yyyy) As regards the appointment of an administrator, I am concerned by the

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[53]See Van Wyk v Otten 1963(1) SA 415 (O); Payne v Minister of Transport 1995(4) SA 153 (C).

[54]See RH Christie, The Law of Contract in South Africa 3rd ed at 23; National Address Buro v South West African Broadcasting Corporation 1991 NR 35 HC at 58G.

acrimony between the parties and it seems to me that it would be difficult to have them agree on anything considering the intensity and negativity present in these papers. I believe that in the result neither the second respondent nor the applicants should be appointed as administrators to the trust of the deceased. An independent administrator to be nominated by the President of the Law Society of Namibia would be best suited to take over the management and affairs of the Trust as set out in the will.

(zzzz) As regards the question of costs, it was submitted by Ms Visser that the applicants should not pay the costs of the counter application because the second respondent should have claimed costs from ABSA. However, there was extensive opposition by the applicants to the counter application and most of the hearing was devoted to the prescription issue, as well as the merits thereof. As the applicant was successful in her counter application, I see no reason why costs should not follow the event. As regards the applicants' application, neither of the parties were successful in being appointed as administrators, and an independent administrator will be appointed. On this basis there should be no order as to costs.

(aaaaa) In the result, I make the following order:

1. The redistribution agreement concluded on 14 March 1989 between the second respondent and H Fourie in his capacity as executor of the estate late: Kaimbire Tjamuaha and J van Zyl as nominee of Bank Corp Trust and administrator of the estate late: Kainbire Tjamuaha Testamentary Trust is declared to be of no force and effect and set aside.

2. The first and final liquidation and distribution account in the estate of the late Kaimbire Tjamuaha dated 12 October 1989 is hereby set aside.

3. The supplementary first and final liquidation and distribution account in the estate of the late Kaimbire Tjamuaha dated 26 May 1999 is set

aside.

4. The Master of the High Court is directed to appoint an executor with the power to administer, liquidate and distribute the half share of the late Kaimbire Tjamuaha in the joint estate as at the time of his death in accordance with the terms set out in his last will and testament.

5. The Master of the High Court shall further direct the executor so appointed to transfer one half share in the aforesaid joint estate to the second respondent.

6. An independent administrator shall be appointed to the estate late: Kaimbire Tjamuaha Testamentary Trust No 173/1989 by the President of the Law Society of Namibia.

7. The aforesaid administrator appointed by the President of the Law Society of Namibia is exempted from the duty of providing security to the Master of the High Court for his or her duties as administrator and shall be entitled to compensation in terms of the last will and testament of the late Kaimbire Tjamuaha.

8. There shall be no order as to costs in respect of the applicants' application.

9. The applicants are directed to pay the costs of the counter application, such costs to include the costs of one instructing and one instructed counsel.

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SCHIMMING-CHASE

Acting Judge

APPEARANCES

APPLICANTS:	Ms Visser Instructed by Krűger, Van Vuuren & Co
SECOND RESPONDENT:	Ms Bassingthwaighte Instructed by ESI