

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING ON SPECIAL PLEA OF NON-JOINDER

HC-MD-CIV-ACT-OTH-2016/02293

In the matter between:

ERIKA PENELOPE HUSSELMANN	1ST PLAINTIFF
SHARON HILLARY SAEM	2ND PLAINTIFF
MILDRED JULIANAN BESSER	3RD PLAINTIFF
ANNA JEANETTE DIERGAARDT	4TH PLAINTIFF
GLYNIS BEATRICE SAEM	5TH PLAINTIFF
ELRIKA SAEM	6TH PLAINTIFF

and

ELROY HAROLD SAEM	1ST DEFENDANT
NORMAN LYNDON SAEM	2ND DEFENDANT
IAN ROBERT MCLAREN	3RD DEFENDANT
THE MASTER OF THE HIGH COURT	4TH DEFENDANT

Neutral citation: *Husselmann v Saem* (I 2016/02293) [2017] NAHCMD 183 (7 July 2017)

CORAM: MASUKU J.

Heard: 20 June 2017

Delivered: 07 July 2017

Flynote: LAW OF SUCCESSION – ADMINISTRATION OF ESTATES – Special plea of non-joinder – Whether executor who has been released from his duties as such must be cited as a party to proceedings in challenging the validity of a will – **RULES OF COURT** – Whether party bringing a special plea of non-joinder needs to comply with rule 32 (9) and (10).

Summary: The plaintiffs, who are joint heirs in terms of a will of the late Adolf Saem brought an action against the defendants in which they are challenging the validity of the will, executed in 2004, for want of compliance with the formalities stipulated in the Wills Act 7 of 1953. An executor, appointed by the Master was subsequently released from his duties in terms of a certificate issued by a Magistrate in the Rehoboth district in 2009. It is the defendant's contention that this executor needed to be joined as a party to the proceedings instituted by the plaintiffs challenging the validity of the will in question. It is the defendants further contention that the estate of the late Adolf Saem has an interest in the matter and hence a call for his executor to be cited in such proceedings.

The plaintiffs further aver that the defendants failed to comply with rule 32 (9) and (10) before launching the special plea and as such, the matter should be struck from the roll.

Held – that special pleas do not normally raise a defence on the merits. For that reason, one would incline, on first principles, to regard the plea of non-joinder, as one in respect of which the parties can properly resort to rule 32 (9) in the first instance, particular regard had to the effect it has on the proceedings, namely it is dilatory. The court, however, left the issue open for future determination.

Held – further that an executor who has been discharged is *functus officio* and if there is an action against the deceased estate in terms of which he has been released, he cannot merely resume his appointment but will have to be appointed afresh. It follows from this reasoning that an executor who has been released of his duties does not need to be cited in an action against the deceased estate which he has fully dealt with and has been fully discharged of his duties.

Held – that the office of the Masters of the High court is directed in terms of the relevant laws to appoint a person who will represent the interests of the said Mr. Adolf Saem in the present legal debacle.

RULING

MASUKU J.;

Introduction

[1] The question for determination in this judgment is whether the above-named plaintiffs are guilty of the non-joinder of a necessary party to the proceedings. This question, for determination, was raised by way of a special plea and the court found it convenient to decide it first before dealing with the matter on the merits at the appropriate juncture.

Background

[2] The plaintiffs, together with the 2nd defendant are biological offspring of the late Harold Adolf Saem whom, it is common cause, passed on to the celestial jurisdiction on 21 June 2004. The 1st defendant, on the other hand, is the biological child of the late Harold Adolf Saem. It is alleged in the particulars of claim that the late Mr. Adolf Saem, and his spouse, Mrs. Elizabeth Ketrina Saem, executed a joint will dated 22 August

1977 in terms of which the plaintiffs and the 2nd defendant, together with the 4th plaintiff's child with Mr. Saem, would be the joint heirs in equal shares in the event of the testators dying simultaneously or within 90 days of each other.

[3] It is averred further that at the reading of the will of Mr. Adolf Saem at Rehoboth, in 2004, the 2nd defendant produced what purported to be the last will and testament of the testators dated 12 March 2004 and which purported to revoke the 1977 will referred to above. The latter will, it is further averred, was accepted by the Master of the High Court, the 4th defendant. The distribution of the property in the latter document differs fundamentally from that spelt out in the earlier one but I need not, for present purposes, mention the effect of either as this is not important for present purposes.

[4] The plaintiffs allege in their particulars of claim that the second document, purporting to be the last will and testament of the testators (of the year 2004), is invalid for non-compliance with the formalities stipulated in the Wills Act.¹ It is contended in this regard that the said will and testament was not signed by Mr. Adolf Saem, as required and that furthermore, that it was not signed by the testators in the presence of witnesses at the same time nor was it signed it is also contended, by the witnesses in the presence of the testators. In the alternative, should the court find that the grounds advanced above do not hold, it is averred that the said will was signed at a time when Mr. Adolf Saem was not of such a mental state as to appreciate the nature and effect of his executing the said will as required by the Wills Act.

[5] The court is therefore moved to make a declaration that the latter 'will and testament' is invalid for the reasons advanced above and that the late Ms. Elizabeth Saem, as the sole heiress in the estate of the late Mr. Saem, by virtue of the 1977 last will and testament, died intestate as she executed no further will at the time she died in 2008. A further declarator is sought that the plaintiffs and the 2nd defendant are the intestate heirs of the late Ms. Elizabeth Saem and stand to inherit in line with the laws of intestate succession. The plaintiffs also seek that the properties be transferred to the

¹ Act No. 7 of 1953.

aforesaid parties and that if the properties have already been transferred, for the distribution to be set aside and for same to be dealt with in terms of the laws of intestate succession.

[6] The 1st and 2nd defendants joined issue and dealt with the allegations stated above pound for pound in their plea. I need not traverse these for present purposes. What they also allege, and which is the subject matter of this judgment, is pertinently raised, namely that: it is clear from the averrals in the particulars of claim that the estate of Mr. Adolf Saem has a direct and substantial interest in the order that is sought by the plaintiffs and stands to be prejudicially affected thereby.

[7] It is, for that reason, argued that the executor Mr. Adolf Saem's estate should be joined in these proceedings for the reason that he is a necessary party. They also allege that one Erika Saem (Beukes), according to the will dated 12 March 2004, was nominated as one of the heirs and thus has a direct and substantial interest in the current proceedings and should, for that reason, have been joined as a party in these proceedings. The main question for determination, in the circumstances, is whether the executor of Mr. Saem's estate has a direct and substantial interest in the action by virtue of having been appointed earlier.

[8] It is in this regard pertinent to mention that Mr. Diedricks, for the plaintiffs, in responding to the contention of non-joinder, argued that the said executor in the said estate, had been released by the Master and is for that reason no possessed of any direct and substantial interest in the said estate. A certificate dated 23 February 2009, from the office of the Magistrate in Rehoboth releasing the said executor was attached in support of this contention.

[9] It accordingly follows that what the court has to do in the first instance, is to determine whether executor has an interest in representing the estate of Mr. Adolf Saem in the first place. This question will then have to be examined particularly in the light of the release, which would suggest that the executor has, since the release,

become *functus officio*. It is pertinent to state in this regard that the position adopted by the defendants to the release was that same not accepted and is a matter that will have to be proved in the normal course by evidence. I intend to deal with all these arguments in due course.

Compliance with Rule 32 (9) and (10)

[10] Before dealing with the matter on the merits, there is an argument that Mr. Diedericks raised in his heads of argument, namely that the defendants did not comply with the provisions of rule 32 (9) and (10) before launching the special plea. For that reason, he contends that the matter should be struck from the roll for non-compliance with the said subrules.

[11] That matters which are interlocutory but there has been no observance of rule 32 (9) and (10) face being struck off from the roll is now trite. In *Appolos v Mukata*,² Mr. Justice Parker made plain that the provisions of rule 32 (10) and (11), which require parties, before launching interlocutory applications, to first seek an amicable resolution of same, are peremptory and a party may not choose not to comply therewith. I agree entirely with the reasoning of the learned Judge in that regard.

[12] There is no question that there was no attempt to comply with the said provisions in this matter. The main question for determination, however, is whether a special plea of non-joinder can be properly referred to as an interlocutory proceeding within the meaning of the rule in question.

[13] Mr. Diedericks, in his able argument, contended that the said plea is interlocutory and that the non-compliance with the rule in question should haunt the defendants. He, however, as is expected of this court's officers, drew this court's attention to the case of *Uvanga v Steenkamp And Others*,³ where this court came to the conclusion that a

² (I 3396/2014) NAHCMD 54 (12 March 2015).

³ (I 1968/2014) [2016] NAHCMD 378 (2 December 2016).

special plea of *locus standi in judicio* is not interlocutory in nature and that the provisions of rule 32 find no application thereto.

[14] I must hasten to mention that the said question arose in the context of the review of a taxation in terms of rule 75 where it was contended that the costs to be taxed were to be kept to the ceiling prescribed in rule 32 (11) because the said plea was interlocutory. The court held, in that instance, that the special plea was not interlocutory as it was capable, if upheld, of bringing the proceedings to an end. Furthermore, the court considered that evidence was led for some days to enable it to decide the matter at the end of the day.

[15] In the instant case, the issue of the applicability of rule 32 was raised in the heads of argument and unfortunately, the defendants do not appear to have had sufficient time to deal with it so as to enable the court to deal with this issue in a comprehensive and decisive fashion. In this regard, special pleas do not normally raise a defence on the merits. They normally put up pleas with the object to delay the proceedings i.e. a dilatory plea, or one that seeks to object to the jurisdiction of the court, i.e. a declinatory plea, or one that seeks to quash the proceedings altogether, i.e. a peremptory plea.⁴ For that reason, one would incline, on first principles, to regard the plea of non-joinder, as one in respect of which the parties can properly resort to rule 32 (9) in the first instance, particular regard had to the effect it has on the proceedings, namely it is dilatory.

[16] Because I have not had the benefit of full argument on this issue, I am not comfortable in making a definitive finding in this regard. All I can say, is that legal practitioners should, upon receiving instructions, reflect deeply on the pleadings and the steps needed to be taken. In this regard, the overriding principles of judicial case management must take effective sway in informing the direction the matter ought to take. For instance, even if it can be held that the special plea of non-joinder or misjoinder is not interlocutory in nature, the legal practitioners should still explore and

⁴ Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, vol I, Juta & Co, 5th ed at p 598.

take the advantage of submitting same to rule 32 (9) and (10) in a bid to cut out chaff and go for the grain proper, so to speak. This is clearly inexpensive and conduces to the early determination of the real issues, enabling the parties to apply a sieve to the proceedings, allowing the liquids to pass, so to speak, in order to properly deal with the solids that remain as it were.

[17] For the foregoing reasons, I am unable, on the papers presently filed, to come to a firm conclusion on this aspect. Food for thought in this regard will include deciding whether this special plea is an interlocutory proceeding within the meaning of the rule in question. I can only hope that this is a question that shall find appropriate determination soon in order to give legal practitioners much needed guidance on such issues. I accordingly am of the view that in light of the doubt that afflicts my mind in this regard, the doubt should enure to the benefit of defendants in this matter. All the parties were otherwise ready to deal with the main issue and observance of the overriding principle of determination of the real issues without needless waste of time and resources favour the defendants in this connection.

The executor in this matter

[18] It would appear from the will that is sought to be set aside in this matter that the testators had appointed an executor testamentary, i.e. an executor appointed by the testators in the will. In this regard, Mr. Giel Diergaardts was appointed. The executor was, in terms of the will, excused by the testators from putting up any security for the due fulfilment of the duties of his office as executor in the estate. It would appear however, from the pleadings that the person eventually appointed to assume the office of the executor was one Mr. Albertus Bock and who was released in terms of the certificate referred to earlier.

[19] I am not require to investigate the manner of his appointment and how the executor testamentary ended up not taking or relinquishing office, as the case may well be. I shall, in principle confine myself to the question whether the estate has a direct

and substantial interest in the matter thus calling for the executor to be cited in these proceedings as a necessary party as contended on the defendants' behalf.

The role and function of an executor

[20] In order to place the question eventually up for determination, as indicated above, I find it prudent to generally deal with the role and functions of an executor in a deceased estate. The learned author Meyerowitz says the following regarding the duties of an executor:⁵ that the duty of the executor is to liquidate the estate i.e. to reduce it into possession, clear all debts and leave the estate assets free for enjoyment by the heirs. In *Lockhart Estate v North British & Mercantile Insurance*,⁶ the court mentioned the following as being the duties of an executor, namely to obtain possession of the assets of estate of the deceased, including the rights of action; to realize such of the assets as may be necessary for payment of estate debts, taxes and the costs of the administration and winding up of the estate; to make payments and to distribute the assets and money that remain after the debts have been paid among the legatees under the will or among the heirs in cases of intestacy.

[21] In this regard, I find it appropriate to quote the following extract from the learned author Joubert:⁷

'It has been said that the executor holds an office *sui generis*. His position has been likened to that of a common law "bewindhebber", to a curator or tutor, to the trustee of an insolvent estate . . . The executor does not succeed to the *persona* of the deceased. He is not merely a procurator or representative of the heirs; he has no principal and acts upon his own responsibility. He alone can deal with the totality of rights and obligations comprising the estate. The executor is the party to sue and be sued as representing the estate, and it is not possible to issue process in the name of the deceased estate itself.'

⁵ Para 12.24

⁶ 1959 (3) SA 295 at 302 (AD).

⁷ The Law of South Africa, Vol 31 para 185.

[22] Regarding the latter element, the learned author Meyerowitz on Administration of Estates, Estate Duty, Capital Transfer Tax,⁸ states the following:

'No proceedings can be taken against the estate without making the executor a party to them. Similarly, no person can institute proceedings on behalf of the estate except the executor. The estate cannot sue or be sued until an executor has been appointed and when the estate sues or is sued all the executors must be joined either as co-plaintiffs or co-defendants. . . No civil legal proceedings instituted by or against any executor lapses merely because he has ceased to be an executor.'

[23] At para 16.9, the learned author Meyerowitz says the following:

'No action against an estate can be taken until an executor has been appointed and all the executors must be joined as defendants. The executors in their capacity as such must be sued and not the estate itself.'

[24] To place this matter beyond any question or doubt and on a level of certainty by citing case law, the following appears in *Estate Hughes v Fouche*:⁹

'The usual way in which an estate sues or is sued is through the executors, and the summons and pleadings allege who the executors are, what kinds of executors they are, and when letters of administration were issued to them.'

[25] What is clear from the above authorities is that in matters that affect the estate of a deceased person, it is proper and necessary to cite the executor of that estate as a party. The reason for doing so, it seems, is that the executor is appointed for the main part to take care of the interests of the estate and to ensure that all propriety and legal requirements, together with the wishes of the testator are carried out. For that reason, any party that institutes litigation against the estate should therefor cite the executor.

⁸ 6th ed, June 1998, at 12.21.

⁹ 1930 TPD 41.

[26] Pertinently, the learned author Meyerowitz (*supra*) states the following peculiarly in respect of an action, such as this, in which the court is being moved to set aside a will as invalid:¹⁰

'All interested parties, i.e. beneficiaries as well as the executor under the challenged will, should be joined in the proceedings either as plaintiff or defendants. This may not be necessary where only a portion of the will is being attacked, but no judgment or declaration as to the validity of the will or any provision of it will be binding upon any beneficiary or person directly interested in the subject-matter of the judgment or declaration unless he has been made a party thereto . . . If an executor has been appointed by virtue of the challenged will, it is his duty to defend the action if he has no reason to doubt the validity of the will, but where the action is being defended by a beneficiary it may be unnecessary for the executor to defend and if he does so he may have to pay his own costs.'

[27] In view of the foregoing, it would appear to me that the legal position deduced is unmistakably that an executor needs to be cited in such matters as he or she represents the interests of the estate. It therefor appears that the position taken by the defendants in raising the issue of non-joinder is eminently correct and finds support from the authorities I have cited above.

The effect of the executor's release

[28] The next question for determination is what effect, if any, the release of an executor from the duties of an executor or executrix, having performed same to the satisfaction of the Master, has on the imperative need to cite him or her in cases such as the present where the will is sought to be set aside as invalid. In other words, the question is whether it is proper to cite an executor or executrix, who has since become *functus officio* for him or her to be a party to the case notwithstanding that he has finalized his duties and made the necessary acquittances?

[29] In this regard, the learned author Meyerowitz says the following:¹¹

¹⁰ *Ibid* at para 4.20, p 4-17.

¹¹ P11-6, at para 11.10.

'When the executor has completed the liquidation and distribution of the estate to the satisfaction of the Master and he is satisfied that the estate duty payable has been paid or secured, or the Commissioner for Inland Revenue consents, the executor is entitled to obtain his discharge from the Master . . . An executor should take great care that in fact the estate has been fully cleared of the assets, because once he has been discharged he is *functus officio* and if later it is found that there are still assets to be dealt with, he cannot merely resume his appointment but will have to be appointed afresh. . . After the executor's discharge no one may institute proceedings against him in respect of any claim against the deceased estate or any benefit out of that estate. But this provision does not exempt the discharged liquidator from liability in respect of any fraudulent dealing in connection with the estate or its liquidation or distribution.' (Emphasis added).

[30] I am of the view that notwithstanding what was said earlier in this judgment, it would seem that once an executor or executrix has been released from his or her office, having duly and faithfully carried out his or her duties in relation to the deceased estate, his or her role as such ceases and if there are further duties that are uncovered after release that need to be performed by him or her, the appointment that has ceased cannot be extended but there has to be a fresh appointment. This, clearly, is in the light of the effect of his discharge from the office, meaning that his or her duty and responsibilities have finally ceased.

[31] This appears to me to be the position in this case. I say so for the reason that the plaintiff asserts that the executor of the estate had been released at the time the new challenge to the validity of the will arose. There appears to be no allegation of fraud impropriety on the part of the executor in this case and in that regard, it must be accepted that upon release by the relevant official, there was nothing untoward and there was no unfinished business on his or her part. I interpose to mention that it is not alleged that the Magistrate did not have the power to issue the said certificate in this matter.

[32] For that reason, it would seem to me that the released executor cannot, having become *functus officio* be reinstated into the office in relation to a new challenge to the

will. In this regard, the proper position, from what the learned author says above, is that he should either be reappointed or the Master can, in the circumstances, appoint another executor or executrix in terms of the law in order to deal with the aspects related to the challenged will on behalf of the said Mr. Adolf Saem.

[33] In essence, I do agree with the defendants that the executor does have to be joined in the proceedings. The point of departure, however, is that it cannot necessarily be the executor who had been appointed in terms of the will or previously appointed by the Master, considering the effect of the release and the end of the mandate. As indicated, he would have to be re-appointed for the new responsibility or a new one would have to be appointed by the office of the Master to represent the said estate in the new proceedings.

[34] The argument raised on the defendants' behalf that they do not accept the fact of the release and that it is a matter of evidence to be led in the future cannot, in my view be sustained in the present circumstances. I cannot accept that the certificate issued by the Magistrate is not to be accepted unless evidence to the effect of the release has to be proved in evidence in a trial. I am of the view that the provisions of the Civil Proceedings Act¹² apply in this matter.

[35] In this regard, the provisions of s. 18 (1) of the Act, which provides as follows, is instructive:

'Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from proper custody, any copy thereof or extract therefrom proved to be to be an examined copy or extract by the officer to whose custody the original is entrusted, shall be admissible in evidence.'

Their effect is that if there is produced an official document by an authorized office declaring a particular state of affairs, that position must be accepted unless there is

¹² Act No. 25 of 1965.

evidence contrariwise. This should apply to the certificate issued by the Magistrate referred to earlier.

[36] If the position advocated by the defendants was to be countenanced, many official activities would not be carried out, as there would have to be investigations behind every official document, to find out if the official document truly represents what it purports. In this regard, the workings of government would be hamstrung and public inconvenience would be the order of the day as clarity in people's status and responsibility would have to be suspended pending the enquiry. I accordingly am not persuaded as to the correctness of the defendants' position in this regard. They are, in my view, skating on thin ice in pursuing this argument.

[37] In the premises, I am of the view that the defendants are correct in so far as the insistence that the interests of the said Mr. Adolf Saem must be taken care of by an executor or executrix, as the case may be. In this regard, I am of the view that the said person should not necessarily be the one who had been previously appointed in the light of the release adverted to earlier. In this regard, it appears to me that the responsibility is on the Master of the High Court, to appoint a person who will represent the interests of the said Mr. Adolf Saem in the present legal debacle.

[38] The other issue that must not be allowed to sink into oblivion is that if the executor who had previously been appointed to wind up the estate of Mr. Adolf Saem were, without more, to re-assume the responsibility of this case, having been previously released, he or she would stand the potential to be personally mulcted with costs should the defence he or she enters to the plaintiffs' claim be dismissed in the absence of a re-appointment. It would accordingly be reckless and indeed unjust of this court to allow such a scenario to play out when it is avoidable and ought to be avoided like a plague.

Conclusion

[39] In sum therefore, I am of the view that the legal point raised by the defendants that an executor or executrix should be cited as a party to represent the interests of the said Mr. Adolf Saem is whole some. In this regard, I am of the considered view that the Master of the High Court should carry out the necessary formalities prescribed by the law to ensure that an executor or executrix is appointed without delay so that he or she can be cited in these proceedings.

[40] It would therefor appear to me that in view of the foregoing, it would be inappropriate for the matter to proceed any further until the appointment of the executor or executrix to the estate of the said Mr. Adolf Saem. I would, in the circumstances, implore the office of the Master to expedite the appointment in terms of the law. This would be to ensure that this matter is laid to rest as soon as practicable. Any delay would be inimical to the heirs, the office of the Master and the interests of justice generally speaking, particularly in this epoch of judicial case management in which the overriding objectives frown upon undue delays in finalising matters already submitted to the courts for determination.

Order

[41] In the premises, I am of the considered view that the following order is condign:

1. The 1st and 2nd defendant's special plea of the non-joinder of the executor/executrix of the late estate Mr. Harold Adolf Saem is upheld.
2. The office of the Master of the High Court is directed, in terms of the relevant law, to cause the appointment of a suitably qualified person to occupy the office of the executor of the Estate Late Harold Adolf Saem within thirty (30) days of the issue of this order.
3. The current proceedings are stayed pending the appointment of the executor/executrix as directed in paragraph 2 above.
4. The matter is postponed to **3 August 2017 at 15: 15hrs** for a status hearing.

5. The executor/executrix so appointed in terms of paragraph 2 above is to be present in court on 3 August 2017 in person or by legal representative for the court to give further directions in the further progression of this matter.
6. The plaintiffs are ordered, jointly and severally, the one paying and the other being absolved, to pay the costs occasioned by the special plea, consequent upon the employment one instructing and one instructed counsel.

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFFS:

J Diedericks

Instructed by:

Diedericks & Associates

1 and 2 DEFENDANTS:

B. De Jager

Instructed by:

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