

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

HC-MD-CIV-MOT-REV-2017/00248

In the matter between:

JOHANNES DAMASEB

APPLICANT

and

MINISTER OF LAND REFORM

FIRST RESPONDENT

CHAIRPERSON OF THE LAND REFORM

ADVSORY COMMISSION

SECOND RESPONDENT

MASTER OF THE HIGH COURT

THIRD RESPONDENT

MARIA SHAALUKENI

FOURTH RESPONDENT

IMMANUEL SHILONGO

FIFTH RESPONDENT

AMALIA HARASES

SIXTH RESPONDENT

SIMON SHAALUKENI

SEVENTH RESPONDENT

PAULUS HARASEB

EIGHTH RESPONDENT

FLORENCE SHALUKENI

NINTH RESPONDENT

LUKAS DAMASEB

TENTH RESPONDENT

Neutral Citation: *Damaseb v The Minister of Land Reform* (HC-MD-CIV-MOT-REV-2017/00248) [2019] NAHCMD 143 (10 May 2019).

CORAM: Masuku J

Heard on: 28 June 2018

Delivered on: 10 May 2019

Flynote: Legislation – Land (Agricultural) Reform Act, Act No. 6 of 1995 and Wills Act, No. 7 of 1953 – Assignment of lease hold rights after death of rights holder – whether the leasehold rights form part of the joint estate of the deceased's estate – procedure for assignment – Minister to approve assignment acting on the recommendation of the Land Reform Advisory Commission – purported assignment of the rights by the 4th respondent is ineffectual because it was not approved by the Minister in writing – validity of Will – does not depend on suspicions even correctly held by Executrix but rather on whether the mandatory formalities prescribed in the Wills Act have been followed – Will of the deceased found to conform to the Wills Act and the assignment to be considered in line with the wishes of the deceased who had nominated the applicant as the assignee.

Summary – The applicant was nominated by his deceased father in a Will as an assignee to leasehold rights the latter held over a farm in Otjiwarongo. The 4th respondent challenged the validity of the Will on various grounds, including that the testator could not write and that he did not tell her about the assignment and the Will. She assigned the leasehold rights over the said to herself, as the executrix claiming that same were part of the joint estate and that she had been nominated to be the assignee in line with the wishes of the members of the family.

Held that – the Will complied with the mandatory provisions of the Wills Act and that whatever forebodings the 4th respondent may hold will not assist her if the Will conforms to the formalities in the Wills Act.

Held further – that the leasehold rights were personal in nature and were in the form of a usufruct and were therefor not amenable to devolve on the joint estate of the deceased and the 4th respondent his wife.

Held that – the assignment purported to be made by the 4th respondent to herself was ineffectual because it had not been approved by the Minister of

Land Reform, acting on the recommendation of the Land Reform Commission.

Held further that – the Minister acted incorrectly in withdrawing the leasehold rights for the reason that there were family disputes regarding the assignee to be approved by the Minister in line with the Act.

Held that – the deceased was at large to nominate the assignee of the leasehold rights in terms of the Will as the said rights were personal and could devolve in accordance with the wishes of the holder, subject to the approval by the Minister in terms of the Act.

The application for review was thus granted by the court with costs, and the Minister was ordered to consider the assignment of the leasehold rights in line with the Will of the deceased.

ORDER

1. The decision of the Minister of Land Reform to the effect of withdrawing the lease of Unit A of Farm Okorusu No. 88, Otjiwarongo district, Otjozondjupa region, Namibia, is hereby reviewed and set aside as being invalid and of no force or effect.

2. The Executrix of the estate of the late Daniel Shaalukeni is to assign the lease of Unit A of Farm Okorusu No. 88, Otjiwarongo district, Otjozondjupa region, Namibia to the applicant within 15 days of an order in terms hereof.

3. The Land Reform Advisory Commission is compelled to consider, with the view of recommending to the Minister of Land Reform the assignment of the lease of unit A of Farm Okorusu No. 88, Otjiwarongo district, Otjozondjupa region, Namibia to the applicant, and in the event it not recommending the assignment to the Applicant, that it provide written reasons of its decision to the Applicant within sixty (60) days of this order.

4. In the event of a recommendation in favour of the applicant by the Land Reform Advisory Commission, ordering and compelling the Minister of Land Reform to consider to approve the assignment of the lease of Unit A of Farm Okorusu No. 88, Otjiwarongo district, Otjozondjupa region, Namibia to the applicant, and in the event that he does not approve the assignment of the said lease to the applicant, that the Minister of Land Reform provides written reasons of his decision to the Applicant, within forty (40) days from the date of the written decision of the Land Advisory Commission.

5. The Minister of Land Reform and the Fourth to the Ninth Respondents are to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

6. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J;

Introduction

[1] This is an application for review in terms of which the applicant, Mr. Johannes Damaseb, seeks an order for review of the decision of the Minister for Land Reform, to whom I shall refer as “the Minister. The relief sought by the applicant is couched in the following terms:

‘1. Reviewing and setting aside the decision of the Minister of Land Reform to the effect of withdrawing the lease of Unit A of Farm *Okorusu* No. 88, Otjiwarongo District, Otjozondjupa Region, Namibia, and declaring the said decision to be invalid and of no force or effect.

2. Ordering and compelling the Executrix of the estate of the late Daniel Shaalukeni to assign the lease of Unit A of Farm *Okorusu* No. 88, Otjiwarongo District, Namibia, to the Applicant within 15 days of an order in terms hereof.

3. Ordering and compelling the Land Reform Advisory Commission to consider, with a view to recommending to the Minister of Land Reform, the assignment of the lease of Unit A of Farm *Okorusu*, No. 88, Otjiwarongo District, Namibia, to the Applicant, and in the event it not recommending the assignment of the said lease to the Applicant, that it provide written reasons of its decision to the Applicant within 30 days of an order in terms hereof.

4. In the event of an recommendation in favour of the Applicant, by the Land Reform Advisory Commission, ordering and compelling the Minister to consider to approve the assignment of the lease of Unit A of Farm *Okorusu*, No. 88, Otjiwarongo District, Namibia, to the Applicant, and in the event that it not approving the assignment of the said lease to the Applicant , that the Minister of Land Reform provide written reasons of his decision to the Applicant, within 40 days of an order in terms hereof.

5. Ordering the Minister of Land Reform to pay the costs of the application, together with such further Respondents electing to oppose this application, jointly and severally, the one paying and the other being absolved.'

[2] The application is not opposed by any of the respondents cited above, save the 4th respondent to the 9th respondents. The 4th respondent not only opposed the application but she also launched a counter-application, whose terms and validity shall be considered in due course. I mention the latter statement for the reason that Mr. Tjombe submitted that the purported counter-application is abortive as it is lacking in procedural validity. I will deal with the sustainability of this issue later as the judgment unfolds.

Background

[3] The facts giving rise to this dispute are fairly straightforward and they acuminate to this:

- (a) the late Mr. Daniel Shakuleni was the husband to the 4th respondent. He was also the applicant's father sired from another relationship than his marriage to the 4th respondent, which would appear to have been later;
- (b) in 2006, the deceased was allocated a 99 year lease over the commercial farm fully described in the notice of motion above. This lease was allocated in terms of the provisions of the Land Reform Act¹, ('the Act'). I shall refer to the said property as "the Farm";
- (c) Mr. Daniel Shalukeni, the 4th respondent's husband passed on 23 February 2014 and the 4th respondent, his wife, married in terms of civil rites, and in community of property and loss, was appointed as the executrix of his estate;
- (d) as it is often wont to, after the demise of the deceased, tensions and misunderstandings arose among members of the family regarding the continuation of the lease to the applicant;
- (e) as a result of the dispute amongst the family members, the Minister, in his wisdom, revoked or withdrew the lease in respect of the Farm and it is that decision to revoke the lease that has singularly given birth to the present application.

[4] It would appear that a Will and Last Testament of the deceased surfaced and in terms of which the deceased appointed the applicant as the beneficiary in relation to the Farm in question. The validity of this Will is contested by the opposing respondents and on a number of grounds that shall be traversed at the appropriate juncture in the judgment. It is also clear that after the deceased's death, the 4th respondent, as the executrix of the estate, assigned the lease to herself.

Issues for determination

[5] It would appear that the following are the major issues fall for determination in this judgment:

¹ Agricultural (Commercial) Land Reform Act, Act No. 6 of 1995.

- (a) the validity of the deceased's Will and testament;
- (b) whether the lease formed part of the joint estate of the deceased and the 4th respondent;
- (c) the validity of the assignment of the lease by the 4th respondent to herself;
- (d) the validity of the counter-application and whether it should be granted; and
- (e) costs of the application.

[6] I shall deal with the live issues identified above in turn. I should in this regard mention that the applicant and the 4th to the 9th respondents part company on all these issues, save that the applicant does not seriously contest the granting of the order prayed for in the counter-application, provided, I should pertinently mention, it is held by the court to be procedurally in order. I deal with the issues below.

Validity of the deceased's Will

[7] The 4th respondent has attacked the validity of the Will on a number of bases. I will not enumerate them all but they include the following:

- (a) the purported Will is not compliant to the provisions of the Wills Act;
- (b) the deceased was illiterate and therefor he could not have made the mark attributed to him in the Will;
- (c) the document in question does not indicate that it was intended by its author to be a Will of the deceased and there is, in any event, no bequest made therein;
- (d) the testator did not appoint an executor or executrix in the Will;
- (e) the Will is a recent fabrication which the applicant conjured up;
- (f) the applicant did not state how he learnt of the Will nor did he disclose where he obtained the copy he produced from;
- (g) the testator did not discuss the issue of the Will with the 4th respondent, his wife;

- (h) the deceased did not, in the Will, deal with the other assets in his assets;
- (i) the witnesses did not sign the Will in full;
- (j) the witnesses did not file any affidavits to authenticate the Will and that the Will is not authenticated;

[8] I think it must be stated from the onset that no matter how suspicious a document purporting to be a Will and Testament of a deceased person may be, either from how it looks or in view of certain surrounding circumstances, those features which raise a sense of disquiet about the validity of the Will may have to pale into insignificance if the Will otherwise complies with the requirements set out in the Wills Act.² The primary source to be consulted on the validity of the Will is the Wills Act, which stipulates in mandatory terms what a valid will should contain.

[9] In this regard, I should probably engage in the exercise of elimination and debunk the suspicious issues that the 4th respondent raises as casting a doubt on the validity of the Will, as I hereby do. First, the fact that the deceased may not have told his wife that he had executed a Will, though suspicious to her, is not a valid reason to consider it invalid. Many a spouse is taken aback once the Will and Testament of their loved one is read out once the author has departed from the jurisdiction of the living. It may be the very reason that they do not want to be asked and called upon to answer difficult questions that they may keep the fact of the making of the Will and its contents under wraps.

[10] Furthermore, the fact that the deceased may, according to the 4th respondent may be illiterate, does not mean that he did not execute the Will. There are people, and judicial notice may be taken of this, that illiterate people in some cases are able to sign or make a mark on a document. I draw the reader's attention in particular, to the provisions of s. 2(1) (a) below as quoted in para [14] below.

² Wills Act, No.7 of 1953.

[11] The fact that the deceased did not make dispositions regarding his other properties is not a sound reason for declaring that the Will is not valid. It may be suspicious to the 4th respondent but it is not, viewed objectively. I say so because testators may choose which properties to include in the will and which are to be left to intestate succession.

[12] Equally worthy of rejection is the contention that the deceased did not appoint an executor or executrix in the Will. This is not unusual nor an isolated occurrence and this is borne out by what is in law called an executor or executrix dative. This is an executor or executrix who is not appointed in terms of a Will, even if there is one. A testator is not compelled in law to appoint an executor or executrix. They may leave that choice to the office of the Master and the provisions of the Administration of Estates Act.

[13] I do not wish to burden this judgment unduly by dealing with each and every attack launched by the 4th respondent, in what appears to have been a kitchen sink approach to the issue of the validity of the Will. I intend now to examine the relevant provisions of the Wills Act and then to consider whether the document produced as the deceased Will stands up to scrutiny.

[14] Section 2 (1)(a) of the Wills Act provides the following:

‘Subject to the provisions of section *three* and *three bis* –

(a) no will executed on or after the first day of January, 1954, shall be valid unless –

(i) the will is signed at the end thereof by the testator or by some other person in his presence or by his direction; and

(ii) such signature is made by the testator or such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and

(iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and

(iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person and by such witnesses anywhere on the page; and

(v) if the will is signed by the testator by the making of a mark or by some other person in the presence in the and by the direction of the testator, a magistrate, justice of the peace, commissioner of oaths or notary public, certifies at the end of thereof that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and if the will consists of more than one page, each page other than the page on which it ends, is also signed, anywhere on the page, by the magistrate, justice of the peace, commissioner of oaths or notary public who so certifies;'

[15] It is also helpful in this regard, to consider the provisions of s. 4 of the said Act. They read as follows:

'Every person of the age of sixteen years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at the time, shall rest on the person alleging the same.'

[16] From the foregoing provisions, starting with the latter, it is clear that any person above the age of sixteen years is entitled to make a Will unless that person is mentally incapable of appreciating the nature and effect or consequences of his or her act. There is no allegation in the papers that the deceased suffered from any mental incapacity that would have challenged his mental faculties, thus rendering him incapable of having appreciation of the import and consequences of his conduct. It can be safely assumed in the premises that he was of sound legal and thus capable of making a will.

[17] The earlier provision, it would seem to me, is the one that stipulates the formalities of a valid Will and that if there is any non-compliance therewith, that would render the Will invalid and not capable of enforcement. For starters, I will not deal with the allegations by the 4th respondent to the effect that the Will is invalid for the reason that it violated the provisions of the

Married Persons Equality Act.³ I postpone doing so for the reason that the question whether the lease fell to be regarded as part of the joint estate of the deceased and the 4th respondent remains live.

[18] First, it is clear that the Will was signed at the end thereof by the testator. It does not appear that he directed any other person to do so on his behalf. Another pertinent issue is that the Will consists of a single page and was signed by two witnesses, which appears to be in line with the mandatory provisions of the Act. There is no allegation that it was not signed in the presence of the testator and the witnesses and I am of the view that this would be a contention that the 4th respondent has to be possessed of some evidence in order to dislodge this.

[19] For the reason that the testator did not make a mark on the Will or order another person to sign on his behalf, there was no need, in my considered view, for a magistrate, justice of the peace, notary or commissioner of oaths to follow the provisions of s. 2(1) (v), namely, to satisfy him or herself of the identity of the testator and that the Will so signed is that of the testator.

[20] I need to consider an argument raised on behalf of the 4th respondent to the effect that the Will should be authenticated. In support of this proposition, the 4th respondent placed reliance on the provisions of s. 36 of the Civil Proceedings Act.⁴ It read as follows:

‘In any civil proceedings an instrument to the validity of which attestation is requisite may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive: Provided that nothing in this section contained shall apply to the proof of wills or other testamentary writings.’

³ Act No. 1 of 1996.

⁴ Act No. 25 of 1965.

[21] In interpreting this provision, the 4th respondent's representatives submitted the following in their heads of argument:⁵

'The effect of this provision is that where a document is a will (or a testamentary writing) it has to be proved by at least one of the attesting witnesses unless all the attesting witnesses are dead, incompetent to testify, outside the jurisdiction or unable to be traced.'

I seriously beg to differ. My difference of opinion is to be found in the very provision quoted. That provisions states in very clear and unequivocal terms that the requirement for documents to be attested by witnesses does not apply to the proof of wills or other testamentary writings.

[22] There is no doubt whatsoever that the document whose validity is contested in this matter is a Will. A proper reading and understanding of the above provisions shows quite indubitably that if the document in question is a will or other testamentary writing, e.g. a codicil, then the otherwise mandatory provision of the section in question does not apply. I accordingly find that the argument by the 4th respondent is misplaced and premised on a wrong understanding of the provision.

[23] In any event, there is a canon of statutory interpretation called *generalia specialibus non derogant*, which is interpreted to mean that a general provision should not be used to override a specific provision. In this regard, the Wills Act does not require authentication of Wills generally. For that reason, it would be improper to then import provisions of another Act and cause them to place obligations that are not otherwise required by a specialised Act of Parliament. I will say no more of this matter.

[24] From the foregoing, it would appear to me that the Will conforms to the requirements of the Act and this is so notwithstanding the criticisms and suspicions that the 4th respondent rightly or wrongly harbours. In this regard, the timeless remarks of Ueitele J in *Mwoombola v The Master of the High*

⁵ At para 106.

Court,⁶ where the learned Judge emphasised the freedom of testation. He reasoned as follows:

'I am therefore of the view that the first principle of the law of wills enshrined in our Constitution is the freedom of testation. Although the legislature limits the power of testation in various ways within the province that remains to the testamentary power, virtually the entire law of wills derives from the premise that a person has the fundamental right to dispose of his or her property as he pleases in death as in life. The rules governing testamentary capacity and the construction of wills must, therefore, not result in interfering with or depriving a testator testatrix of his or her freedom of testation.'

[25] In the absence of evidence to the contrary, and in view of what appears to be a document that complies with the legal formalities of a Will as prescribed by the Wills Act, I am of the view that there is no reason in policy or law for not giving effect to what the deceased wished as evidenced by his Will. It must, in the circumstances be correct that the onus to establish that the Will is invalid rests with the respondents and they have, in my view, failed to discharge that onus.

[26] I accordingly come to the conclusion that there is proper reason why the Will should not be declared to be invalid but compliant with the provisions of the relevant Act. In the premises, I am of the view that there is nothing, subject to other considerations dealt with below, why the wishes of the deceased, as contained in the Will should not be effectuated.

Was the 4th respondent properly assigned the leasehold rights?

[27] In doing so, it is clear that the 4th respondent assigned the estate to herself in her capacity as the executrix of the estate and obviously subject to the notion that the said lease continued to form part of the joint estate after the deceased's demise.

⁶ 2018 [2] NR482 at para [28].

[28] I presently turn to deal with the issue of the assignment of the lease to the 4th respondent. In her answering affidavit, the 4th respondent states that when the Will surfaced, the assignment of the lease had already been done to by her in line with the wishes of the family members' wishes.

[29] In dealing with the validity of the assignment in this case, we have to look at the provisions of the s. 53 (1) of the Land Reform Act which reads as follows:

'If a lessee dies, or if a curator is appointed for a lessee under any law relating to mental health, the executor of the lessee's estate or such curator may assign the lease to any person who is approved in writing by the Minister on the recommendation of the Commission.'

[30] What is the import of the above provision? It provides for two different situations. The first is where the lessee dies or if the lessee suffers as a result of mental health and a curator is appointed in that lessee's estate. In either event, it would seem, the executor or executrix and the curator must assign the lease to any person who is approved by the Minister in writing.

[31] What raises eyebrows in this matter, is that the 4th respondent assigned the lease, not to another person but to herself. As she says, this was with the blessing, it would seem, of the majority of the family. I do not find it necessary to investigate the propriety of the 4th respondent assigning the lease to herself, nor is any evidence given that this was in line with the wishes of the family.

[32] The critical question is whether the assignment fully complied with the provision quoted above. For the assignment to so comply, it would seem to me that there are two processes involved. The first is the determination of the new lessee to whom the assignment is proposed to be made. Once the determination is made by the family or other persons, the nomination must be given to the Minister to approve. In this regard, the Minister does not act on

his own in terms of the law. He has to act on the recommendation of the Commission, which is cited as the 2nd respondent in this matter.

[33] The 4th respondent does not state anywhere in the papers that her name was submitted to the Minister for approval and that the latter gave his approval, acting on the recommendation of the 2nd respondent. In this regard, the Minister and the 2nd respondent are also silent. They do not mention that they received a nomination of the 4th respondent as the proposed assignee of the lease and that the Minister approved the assignee acting in so doing, on the recommendation of the 2nd respondent.

[34] What appears plain from the foregoing is that the fact that the 4th respondent's family may have wished for her to be the assignee of the lease is inconsequential in the proper assignment of the lease in terms of the law. What the family should have done, was to present the name to the Minister, who would approve the assignment proposed. In doing so, the Minister does not act in unison. His approval must be in writing and pursuant to a recommendation of the 2nd respondent.

[35] Neither the Minister nor the 2nd respondent, have confirmed that the provisions of the law as encapsulated above were followed. In this regard, the 4th respondent has not produced a letter from the Minister approving her proposed assignment. It would seem to me that in approving the assignment, the Minister should, in the letter of approval, state that he acts in so doing, on the recommendation of the 2nd respondent.

[36] Mr. Tjombe, in support of his contentions on this point, referred the court to the case of *Green v Griffiths*,⁷ where the following appears regarding the issue of assignment of rights leasehold rights:

'In regard to assignees, however, by our law, agreeing in this respect with that of Scotland, but not with that of England, an assignment is not complete as such unless it has the effect of substituting the assignee as tenant in lieu of the original

⁷ (1886) 4 SC 346 at 351.

lessee – in other words, of transferring the lessee's contractual obligations towards the lessor from the lessee to the assignee.'

[37] This process clearly did not take place in this as the approval of the Minister is required, with the necessary corollary requirement, and without which the rights and obligations and rights of the original lessee could legally not pass to the assignee. They were merely firing blank shots as it were.

[38] In the premises, it would appear to me, and this is my finding, that the assignment of the lease by the 4th respondent to herself was ineffectual. The wishes only remained wishes or a mere proposal from those members of the family who were inclined to the 4th respondent eventually becoming the assignee of the lease. In the premises, I am of the considered view that the purported assignment of the lease to the 4th respondent was unlawful as it was not in keeping with the requirements of the Act and this is regardless of how many members of the family wished for her to be the eventual assignee of the leasehold rights.

Did the leasehold right form part of the joint estate?

[39] The next question for determination is whether the 4th respondent is correct in treating the lease, which had been granted in favour of the deceased as part of the joint estate. In her heads of argument, the 4th respondent states the following in this regard:

'It is trite law that in a marriage "in community of property", all of the assets and liabilities of the husband and wife constitute one joint estate. This includes assets possessed at the time of marriage and those acquired during the marriage. . . . The leasehold is a long-term lease for a specific period, which may exceed the user's lifetime and not necessarily expire on his death. The remaining term of the lease after the holder dies is subject to assignment in terms of the ACLRA. A usufruct is not dealt with under the ACLRA. It is a common law burden on another's property for the duration of that person's natural life. A usufruct will terminate on the death of the holder of the right.'

[40] Mr. Tjombe, in argument likened the leasehold rights in this case to a usufruct and accordingly argued that the said rights did not form part of the joint estate and could not, for that reason, devolve upon the 4th respondent according to the law of intestate succession, putting aside for one moment the will.

[41] In support of his argument, Mr. Tjombe referred to the case of *Mutrifa v Tjombe*.⁸ In that case, B. Usiku J, dealing with a usufruct, mentioned the following attributes of a usufruct:

- (a) it is granted in favour of a particular individual, and entitles the holder to have use and enjoyment of the property of another;
- (b) the holder does not acquire ownership of the leased property and must use the property in the manner it was intended to be used;
- (c) the right endures for the natural life of the holder;
- (d) upon the demise of the holder, the right reverts to the owner for re-allocation; and
- (e) if the holder has made improvements to the property, he or she is entitled to compensation therefor. That notwithstanding, improvements made may under certain circumstances be removed, provided the right holder makes good the damage cause by the removal may occasion.

[42] In colloquial language, they normally say that if it walks like a duck, quacks like a duck, then it is a duck. I am of the view that the rights extended by the Government to the deceased were in the nature of a usufruct as all the above attributes of a usufruct are fully applicable. There is no doubt that in terms of the law, the rights revert to the Government, for the Minister to approve the assignment of the rights to a new person.

[43] It accordingly follows naturally, as night follows day, that those rights, if they revert to the property owner upon the demise of the leasehold rights holder, as in a usufruct, they cannot, in those circumstances form part of the estate and be subject to be dealt with by the executrix as if it was part of the

⁸ (I 1384/2016) [2017] NAHCMD 162 (14 June 2017).

joint estate. I accordingly do not agree with Ms. Van Wyk in her submissions in that regard.

[44] Although speaking in respect of communal land rights in the *Mutrifa* case, I am of the considered opinion that the pertinent remarks the learned Judge made appear *mutatis mutandis* (with necessary modifications) to the instant enquiry at para [35] and [36]:

[35] It appears to me, from the provisions of the Act, that a customary land right may not be allocated to more than one person jointly. Thus, the concept of joint-ownership, as claimed by the Defendant, does not find support in the provisions of the Act. Had Parliament intended the same, it would have said so either expressly or by necessary implication. And had it done so, it would have made provision for what would become of the right in the event of the first-dying spouse joint-holder or in the event of a joint-holder demanding a partition of the right (or the property).

[36] I am of the view that, the fact that a customary land right endures for the natural life of the holder makes it a personal right, inseparable from its holder, and cannot and does not, by operation of the law, fall into community of property between husband and wife. Such right is, therefore, not an asset of the joint estate.' See also *WWB v Johannes Aipanda NO*, per Prinsloo J.⁹

[45] I endorse these remarks and find them applicable to the question confronting the court in this matter. The compelling exposition by the learned Judge, in my view, fits hand in glove in the present case and I adopt it wholeheartedly. As a result, Ms. Van Wyk's argument, albeit compellingly advanced, is accordingly rejected.

[46] I will later inevitably have to deal with the distinction, if any, between the positions of the applicant, on the one hand, and the 4th respondent regarding the question the leasehold not forming part of the joint estate. The question will be why, if at all, the applicant should be entitled to the orders he seeks, yet the 4th respondent was found offside as a result of the laws on intestate succession.

⁹ *WWB v Johannes Aipanda NO* (I 402/2014) [2018] NAHCMD 22 (09 February 2018).

Is the applicant entitled to the relief he seeks?

[47] As indicated in the immediately preceding paragraph, the issue to be tackled is whether the applicant is entitled to the relief he seeks and this is particularly so in the light of the court holding that the rights of leasehold do not form part of the estate. How does this finding affect the position of the applicant, considering, as we should that he is relying on a will for the relief he seeks.

[48] In support of the application, Mr. Tjombe referred the court to *Merero v The Minister of Land Resettlement*.¹⁰ In that case, an executrix sought to have a leasehold right assigned to her but the son of the deceased challenged her attempt to have the assignment made in her favour.

[49] In dealing with the issue, the Supreme Court, reasoned as follows¹¹:

‘Her request evidences no appreciation that she, as executrix, had the duty to assign the lease: that she had to do it in favour of a person entitled to assignment under the law of succession: that, upon approval of the assignee by the Minister, the assignee would become the lessee under the lease (not the owner of the farm) and that the limited rights acquired and multiple obligations assumed as such would be those stipulated in the lease and prescribed by the Act and that the assignee, with full appreciation of these consequences, consented to become the lessee under the lease.

[50] Earlier in the judgment, the Supreme Court had remarked as follows:

‘She [the executrix] had a fiduciary duty to administer his intestate and, ultimately, to distribute the available assets in accordance with the applicable dictates of law, whether they derive from customary law, common law, the provisions of the Constitution or statute, a redistribution agreement concluded amongst the heirs or any combination thereof. As a matter of substantive law, the person to benefit from

¹⁰ *Merero v Minister of Lands, Resettlement and Rehabilitation and Others* 2015 (2) NR 526 (SC)

¹¹ At para [34] of the judgment.

the assignment of the lease must be determined by reference to the applicable laws of the succession – not by the wishes or whims of the executor or by his or her view of the beneficiary's "suitability" based on criteria falling outside the ambit of those laws.

If the general principles of common law relating to intestate succession must be applied – as seems to be the case in this instance – the appellant's place in the order of succession and his entitlement, if any, that the lease should be assigned to him as an heir must be determined as a matter of substantive law. So too, the entitlements of all the other children and those of the executrix (in her personal capacity), who had been married to the deceased in community of property under civil law.'

[51] What is plain from the foregoing, is that the Supreme Court did not hold that the leasehold rights in relation to the property formed part of the joint estate, in which case, the surviving spouse would in all probability, have the decisive say as to who should assume the rights that had been assumed by the deceased. In the above case, the Supreme Court stated quite categorically that the issue of the identity of the person to be assigned the leasehold rights must be determined in accordance with the laws of succession.

[52] Having said this, it becomes plain that as the court has found that the Will of the deceased was valid, and in that Will he had appointed the applicant as the one to be assigned the leasehold rights he had, his wish in respect of the personal right he held in the leased property, in that regard has to be respected and followed as that is what the law of succession dictates. If it had been part of the joint estate, the surviving spouse would have been the one ahead of the queue. The presence of the Will throws a new vagary altogether in the circumstances.

[53] It is plain that the Minister has not opposed the relief sought by the applicant and has contented himself with abiding by the court order in this matter. The 2nd respondent has assumed a similar stance. The significance of this is that the Minister appears to have revoked the leasehold not merely

because the deceased passed on, with a view to taking away the rights to have the lease assigned to another member of the deceased's family.

[54] The primary reason that appears to have forced the Minister's hand to revoke the leasehold rights was that . . . 'this Farming Unit has been for long under the unresolved family dispute on who to take over the Farming Unit or being nominated in that regard.'¹² It does not appear that Minister has any preference or aversion to giving the necessary approval, particularly considering the finding by the court that the deceased had made a nomination himself of the assignee in his Will.

[55] In the premises, I am of the considered view that the applicant has made out a good case for the relief sought in the notice of motion. In the circumstances, it appears clear that the reason for the withdrawal of the lease would understandably not have taken into account the legal underpinnings that have been traversed in this judgment. In point of fact, the Minister, by revoking the leasehold rights, deprived the family of the deceased the rights it may have enjoyed ordinarily in terms of the law, and particularly for the applicant, the decision consigned the deceased's wishes recorded in the Will, to the dustbin and this should not be allowed to prevail.

The counter-application

[56] The 4th respondent filed a purported counter-application, whose legal and procedural validity is questioned by the applicant. The latter, in view of the stance it took the application, implored the court to dismiss the application as it is not compliant to the relevant rules.

[57] The counter application is couched in a rather unconventional manner. For starters, it does not have a notice of motion and does not give directions to the respondent thereto what he, or any other party should do if they wish to oppose same and when they should take the steps. Furthermore, no parties are cited or described in this application. In the premises, it does not appear

¹² See annexure "E" to the Applicant's affidavit.

who the parties interested in same are and the bases upon which they may have an interest worth protecting.

[58] It is very unusual to adopt the convenient approach the 4th respondent adopted, namely to make a counter application part of the answering affidavit or an appendage thereto. It must be clear that a counter application is a full application of its own and does not depend for its validity or completeness on the main application. It deserves to be treated and dealt with as such.

Costs

[59] The rule relating to the awarding of costs is quite trite. Normally, the costs follow the event. There is no question, if the general rule is followed, that the respondents who opposed the application should be ordered to pay the costs. The main question is whether the Minister should pay the costs despite the fact that his office did not oppose the application?

[60] I am of the view that the fact that a party subsequently does not oppose a matter does not necessarily constitute a bar against them being mulcted in costs. This is primarily so where their conduct or inaction, as the case may be, leads to the proceedings being initiated, resulting in an order unfavourable to them as in this case. In the premises, I would grant an order for costs against the 1st, 4th to 9th respondents, as I hereby do.

[61] Finally, I wish to record the court's appreciation to counsel on both sides for the insightful heads they filed and the assistance rendered to the court in this unusual matter. They performed their twin duties to the court and their respective clients admirably.

Order

[62] In the premises, I issue the following order:

1. The decision of the Minister of Land Reform to the effect of withdrawing the lease of Unit A of Farm Okorusu No. 88, Otjiwarongo district, Otjozondjupa region, Namibia, is hereby reviewed and set aside as being invalid and of no force or effect.
2. The Executrix of the estate of the late Daniel Shaalukeni is to assign the lease of Unit A of Farm Okorusu No. 88, Otjiwarongo district, Otjozondjupa region, Namibia to the applicant within 15 days of an order in terms hereof.
3. The Land Reform Advisory Commission is compelled to consider, with the view of recommending to the Minister of Land Reform the assignment of the lease of unit A of Farm Okorusu No. 88, Otjiwarongo district, Otjozondjupa region, Namibia to the applicant, and in the event it not recommending the assignment to the Applicant, that it provide written reasons of its decision to the Applicant within sixty (60) days of this order.
4. In the event of a recommendation in favour of the applicant by the Land Reform Advisory Commission, ordering and compelling the Minister of Land Reform to consider to approve the assignment of the lease of Unit A of Farm Okorusu No. 88, Otjiwarongo district, Otjozondjupa region, Namibia to the applicant, and in the event that he does not approve the assignment of the said lease to the applicant, that the Minister of Land Reform provides written reasons of his decision to the Applicant, within forty (40) days from the date of the written decision of the Land Advisory Commission.
5. The Minister of Land Reform and the Fourth to the Ninth Respondents are to pay the costs of the application, jointly and severally, the one paying the other to be absolved.
6. The matter is removed from the roll and is regarded as finalised.

T.S Masuku
Judge

APPEARANCES:

APPLICANT:

N. TJOMBE

Of Tjombe-Elago Inc, Windhoek

RESPONDENT:

C. VAN WYK

Of the Legal Assistance Centre, Windhoek