REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA **MAIN DIVISION, WINDHOEK**

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2018/00367

In the matter between:

DAVID GABRIEL **APPLICANT**

and

JULIA NEHEMIA (BORN NAKASHOLE) **FIRST RESPONDENT**
THE REGISTRAR OF DEEDS **SECOND RESPONDENT**
THE MASTER OF THE HIGH COURT **THIRD RESPONDENT**

Neutral citation: *Gabriel v Nehemia* (HC-MD-CIV-MOT-GEN-2018/00367) [2019] NAHCMD 564 (6 December 2019)

Coram: ANGULA DJP
Heard: **16 October 2019**
Delivered: **6 December 2019**
Reasons: **25 February 2020**

Flynote: Opposed motion – Intestate succession in terms of the customary rules of succession promulgated under the Native Administration Proclamation by Government Notice No. 70 of 1954 – Inheritance to take place in terms of customary rules of succession – The first respondent not related to her deceased in any degree of consanguinity not entitled to inherit from her from her deceased husband in terms of customary rules of succession.

Summary: The late Sem Nehemia, ('the deceased') was married to the first respondent out of community of property – During his lifetime he entered into a loan agreement with National Housing Enterprises (NHE) in terms of which he bought an immovable property, a certain Erf No. 689 McNamara Street, Okuryangava, Extension 5, Katutura ('the property') – This loan had not been fully re-paid at the time of his death – Since the deceased died intestate, his mother inherited the immovable property in accordance with customary laws of the Ovambo people.

Upon the death of the deceased's mother, the applicant, a cousin of the deceased, similar in terms of customary law, inherited the property and took over the repayment obligation in respect of the property towards NHE's loan.

Subsequent thereto the applicant moved into and had since then been residing on the property for twenty years at the time these proceedings were instituted. After the loan to NHE had been redeemed, and the applicant had to have the property transferred into his name, the first respondent, as the widow of the deceased, was appointed, by the Master of the High Court, as the executrix of her late husband's estate. The applicant then requested the first respondent to transfer the property into his name in accordance with the decision of the family members of the deceased taken in terms of the customary laws. It was a point of dispute between the applicant and the first respondent whether the first respondent voluntarily agreed to transfer the property or whether she acted under duress as she claimed.

The first respondent instead of transferring the property into the name of the applicant she transferred the property into her own name. She thereafter instituted eviction proceedings against the applicant to evict the applicant from the property. The applicant then launched this application, seeking an order *inter alia*, that the property be transferred from the first respondent and into his name.

Held; that the deceased's mother renounced or repudiated her inheritance whereupon the inheritance devolved upon the applicant in accordance with the rules of customary intestate succession.

Held further that; the first respondent has no right, in terms customary law of intestate succession, to inherit the property as she is not related to the deceased in any degree of consanguinity.

Held further that; the applicant's lineage follows matrilineal rules of inheritance and as the deceased's cousin, was thus entitled to inherit from the deceased's mother.

ORDER

1. The transfer of the immovable property situated at Erf No. 689 (a portion of Erf No. 2331) McNamara Street, Okuryangava, Extension No. 5, Windhoek, Namibia ('the property') to the respondent, Julia Nehemia (born Nakashole) is hereby set aside.

2. It is directed that the property is to be transferred to and registered into the name of the applicant.

3. The respondent is directed to cause the preparation of all the documents for the transfer of the property by a conveyancer and to sign all the documents for the necessary transfer of the property into the name of the applicant.

4. Should the respondent refuse or fail to cause the transfer documents to be prepared or fail to sign the said transfer documents, the deputy-sheriff for the district of Windhoek is hereby authorised to sign all the said documents as may be necessary, to effect the transfer of the property into the name of the applicant.

5. The first respondent is to pay the costs of transferring the property from her name into the name of the applicant.

6. The second respondent is directed to do everything necessary to implement this order.

7. The first respondent is to pay the costs of this application.

8. The matter is removed from the roll and is considered finalised.

JUDGMENT

ANGULA DJP:

Introduction:

[1] The dispute for adjudication in this matter concerns an immovable property bought by a deceased person from the National Housing Enterprise commonly referred to as 'NHE' but the property had not been fully paid off at the time of the decease's death and thus had not been transferred and registered into his him. The dispute between the applicant and the first respondent is: who is the lawful heir of the said immovable property. The applicant and the first respondent are related to the deceased in their own separate ways. In respect of the applicant, he is a cousin to the deceased. The first respondent on the other hand is a widow of the deceased. She was married to the deceased out of community of property. The immovable property is currently registered in her name. The applicant alleges that he inherited the property from the deceased according to customary law. The first respondent, for her part, contends that she inherited the property by operation of the provisions of the Intestate Succession Ordinance, No. 12 of 1946.

Factual background

[2] The factual background is, by and large, common cause between the parties. The applicant is the cousin of the late Sem Nehemia ('the deceased'). The deceased was married to the first respondent out of community of property. The applicant is the deceased's cousin. During his lifetime the deceased had entered into a loan agreement with NHE in terms of which he bought a dwelling house, situated at Erf No. 689, McNamara Street, Okuryangava, Extension 5, Katutura, Windhoek, ('the

property') from NHE through a loan scheme. At the time of the deceased's death the loan had not been fully repaid.

[3] Following the deceased's death, it was decided by the family members, in accordance with customary laws and practices, that the property would be inherited by the deceased's mother. The deceased's mother, however, died before the property could be transferred into her name. After the death of the mother of the deceased, it was further decided, again in terms of customary laws and practices that, that the property would be inherited by the applicant. As a consideration, the applicant would settle the balance due to NHE in respect of the loan owed by the deceased in respect of the property. Thereafter, the applicant moved into and has been residing on the property for about 20 years before the present proceedings were instituted.

[4] After the applicant had paid off the outstanding loan owed to NHE, he requested that the property be transferred into his name. NHE however advised him to approach the office of the Master of the High Court, since the property was in the name of a deceased's estate. The Master then appointed the first respondent as executrix of her late husband's estate. Thereafter the applicant approached the first respondent with the request to transfer the property into his name, to which the respondent agreed. However, instead of causing the property to be transferred into the applicant's name the first respondent transferred the property into her own name. She then instituted eviction proceedings against the applicant. The applicant successfully resisted the eviction proceedings and instituted the current proceedings against the respondent.

Case for the applicant

[5] The applicant alleges that the first respondent initially agreed to transfer the property into his name. To that end she had made two written declarations in which she agreed to transfer the property into the applicant's name. The first declaration was signed before a headman of the respondent's village situated in Ohangwena Region. The second declaration was signed at Oshikango police station in which she declared that the property had been allocated to the applicant by the family. The applicant alleges that by transferring the property into her name, the respondent

acted unlawfully and fraudulently, and abused her power as the executrix of the estate of her late husband.

Case for the first respondent

[6] The first respondent raised three points *in limine*. The first point *in limine* is that the there had been non-compliance with the requirements of the provisions of the Formalities of Contracts of Sale of Lands Act, Act No. 71 of 1969 in that no written agreement had been concluded between the applicant and the first respondent for the sale of the property.

[7] The second point *in limine* is that there is a dispute of facts on the papers which the applicant should have foreseen and should therefore not have instituted application proceedings but should have instituted action proceedings. For this reason, the application should be dismissed. I will later in this judgment refer in detail to the alleged disputes of fact.

[8] The third point *in limine* is that the statute applicable to the facts of this matter is the Intestate Succession Ordinance[1], 1946, and not the Native Administration Proclamation of 1928 and the regulations promulgated under the said Proclamation This is, so the argument goes, because by virtue of the Estate and Succession Amendment Act[2], subsections 18(1), (2), (9) and (10) of the Native Administration Proclamation of 1928 were repealed as they had been held by this Court to be unconstitutional.

Submissions on behalf of the parties

[9] Mr Ntinda, who appeared on behalf of the applicant, submitted in his heads of argument that the first respondent had no right in the property and had no lawful basis on which she could have transferred the property into her name. Therefore, so the argument goes, the respondent conduct in causing the property to be transferred into her name was unlawful and fraudulent and had no basis in law.

[1] 12 of 1946 as amended.
[2] Act No. 15 of 2005.

[10] Mr Karsten for the respondent submitted in his written submission that the first respondent was caused to sign the declarations under duress by the applicant; that the applicant threatened, intimidated and forced the respondent to sign the declarations. Accordingly, counsel submitted that the declarations are null and void.

[11] Mr Kirsten further argued that the applicant failed to provide proof that he had paid the sum of N$1 500 to the mother of the deceased which would entitle him to succeed to the rights of the deceased's mother in respect of the property. Furthermore, the applicant failed to prove that he was indeed the heir in terms of the customary laws and practices within his family's inheritance lineage and that a mere agreement amongst the family members that the property would be inherited by him was not sufficient to provide him with a right to inherit the property.

Points *in limine* considered

First point in limine: Non-compliance with the requirements of the provisions of the Formalities of Contracts of Sale of Lands Act, Act No. 71 of 1969.

[12] As mentioned earlier in this judgment, the first point *in limine* raised by the first respondent is that there had not been compliance with the provisions of the Formalities in respect of Contracts of Sale of Land Act, 1969. This point is, in my view, misconceived. The provisions of the said Act do not find application in the present matter. Firstly, the inheritance through intestate succession is not a sale transaction. Secondly, the *causa* for the transfer is not the sale of land but the *causa* is the intestate succession by operation of the law.

[13] Mr Ntinda correctly pointed out that it is not the applicant's case that the declarations made by the first respondent, collectively constituted a sale agreement in respect of the property within the meaning of the Formalities in respect of Contract Sale of Land Act. The declarations, to my understanding, simply served to record the decision of the family members of the deceased as to who should inherit or succeed to the right in respect of the property. In any event, in view of the fact that the transaction is not a sale of land, the executor is not required to lodge a deed of sale with the Registrar of Deeds in order to transfer the property to an heir or legatee. In order to pass transfer to an heir or legatee, the executor is only required to lodge

with the Registrar of Deeds a certificate by the Master which certifies that the proposed transfer is in accordance with the liquidation and distribution account which the Master of the High has approved[3].

[14] It is necessary to point out in this connection that the respondent states that: 'I became aware therefore that the applicant made payments on the loan account on behalf of the deceased that was still due and owing'. This statement in my view corroborates the applicant's version that it was agreed that he takes over the 'ownership of the property from the deceased's mother; that he pays N$1 500 to the deceased's mother and takes over the repayment obligation of the outstanding loan'. My finding on this point is that what transpired here, is that the deceased's mother repudiated or renounced the inheritance, whereupon the inheritance devolved upon the applicant[4].

[15] Regarding the issue of proof of payment of N$1 500 raised by counsel for the respondent, it is clear that the payment is not related to the sale of land which is the respondent's main point of contention. I think this court can take judicial notice that NHE houses are meant for lower-income earners and that their prices are not market-related. The applicant took over the repayment obligation during 1998. Unfortunately, he does not say what the balance outstanding was at that time. Furthermore, the statements of account by NHE attached to the founding affidavit do not go back to 1998 and only start at around 2001. On perusal of the statements of account from NHE it appears that during May 2007 the balance outstanding was sum of N$5 315. It would be fair to conclude under the circumstances that the amount of N$1 500 had no relation to the market value of the house. The payment appears to be a mere sign of appreciation to the deceased's mother for having repudiated or renounced the inheritance to the applicant's benefit.

[16] For those reasons the first point *in limine* stands to be dismissed.

Second point in limine: disputes of fact:

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[3] Section 42 of the Administration of Estates Act, No. 66 of 1965.
[4] D Meyerowitz: *The Law of Practice of Administration of Estate*, 3rd edition page 258-259.

[17] As regards the second point *in limine,* in motivating her allegation that there are disputes of fact on papers, the first respondent says the following in her answering affidavit:

> '6.1. I dispute the facts as contained in the [founding] affidavit and Annexures "DG2 and DG3";
>
> 12.5.1. I state that I signed the declaration [DG2] under duress; and
>
> 13.2. The applicant brought the complete sworn declaration, attached as "DG3" to the applicant's founding affidavit to my house and forced me to sign the said document.'

[18] Mr Karsten attempted to elaborate further in his written submissions on the alleged dispute of facts and listed six instances of the alleged factual dispute. I have considered the list and formed the view that at least three of the alleged factual disputes are in fact questions of law and need not concern the Court. The remainder of the so-called 'factual disputes' are:

> 'the legality of DG2 and DG3 and whether the first respondent was forced to sign these documents'; whether the first respondent acted unlawfully and maliciously when she transferred the property into her name; and who is/are the rightful heir/heirs to the property in dispute, either in terms of the native/customary law or by statute.'

[19] In my judgment the questions raised by counsel in the immediately preceding paragraph do not involve disputes of fact. Instead, the questions call for legal conclusions to be drawn from the facts. I have earlier found that the declarations do not form the basis for the transfer of the property from the deceased to the applicant; it merely served as a record of the decision take by the family members that the property is to be inherited by the applicant in terms of customary laws and practices.

[20] In any event, generally speaking, the mere fact that there are disputes of fact on the papers, does not automatically lead to the application being dismissed for the mere fact that the applicant should have foreseen that a dispute of fact would arise. The courts have over the years developed mechanisms and techniques to resolve

disputes of fact in motion proceedings such as the well-known *Plascon-Evans rule*[5]. The court retains the discretion either to dismiss the application or to refer the dispute to oral evidence or to trial. It has been held in this connection that 'a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence[6].

[21] Having regard to the legal principle referred to above I found it to be impermissible for the first respondent (leaving the issue of duress aside for the moment) to simply state that she disputes 'the facts contained in the affidavit and annexures 'DG2 and DG3'. The respondent is required to state the facts or to state the basis of her denial of the allegations in the founding affidavit and the annexures. In the absence of such facts or basis her denial amounts to 'uncreditworthy denial' and stands to be rejected out of hand. I found that there is no genuine or *bona fide* dispute of facts between the parties[7].

[22] For the foregoing reasons and considerations, the first respondent's second point *in limine* is liable to be dismissed. I next move to consider the third point i*n limine*.

Third point in limine: The Intestate Succession Ordinance is the applicable law upon which the estate of the deceased is to be distributed, and not in terms of the provisions of Native Administration Proclamation of 1928.

[23] In this regard, it is the first respondent's contention that by virtue of the provisions of the Intestate Succession Ordinance, 1946 ('the Ordinance') she and her children born from her marriage to the deceased, are the sole intestate heirs of the deceased's estate. Furthermore, since the value of the property was less than N$50 000, the provisions of the Ordinance made her the sole heir and she was thus entitled to have the property transferred into her name.

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[5] *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[6] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52 ;2006 (4) SA 326 (SCA) at para [55].
[7] *New Africa Dimensions CC & Others v Prosecutor- General* 2018 (2) NR 340 (SC) p 346-347 par 17-19.

[24] It is further the respondent's contention, as I understand it, that since the provisions of section 18 of the Native Administration Proclamation, 1928 which regulated intestate succession of black people, particularly subsections 18(1), (2), (9) and (10) of the said Proclamation and the regulations made thereunder were declared unconstitutional by the High Court during 2003, in the *Berendt matter*[8], customary law is accordingly not applicable to the estate of the deceased in the present matter, instead the provisions of the Intestate Succession Ordinance are applicable.

[25] The applicant for his part argues contra wise, namely that the provisions of the Intestate Succession Ordinance are not applicable to the estates of black persons who were married north of the so-called Police Zone; and that the intestate succession takes place in accordance with customary law.

Issue for determination

[26] It would appear to me, based on the parties' conflicting claims, that the issue for determination is, which statute is governs or regulates to the succession the deceased's estate in the present matter: The Intestate Succession Ordinance, 1946 or the Native Administration Proclamation, 1928?

[27] Before considering the question posed above, it is necessary to briefly set out the historical legislative development with regard to intestate succession amongst the different ethnic groups in the Republic. Historically, section 18 of the Native Administration Proclamation regulated intestate succession in respect of estates of black persons north of the of the Police Zone with effect from 1 August 1950, and the whole of section 18 applies everywhere in Namibia, effective from 15 February 1974[9]. The Estates and Succession Amendment Act 15 of 2005 repealed subsections 18(1), (2), (9) and (10), following the judgment by the High Court in *Berendt and Another v Stuurman and Others*[10] which declared the said subsections to be unconstitutional in that they discriminated against black persons.

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[8] *Berendt and Another v Stuurman and Others* 2003 NR 81 (HC).
[9] Annotate Statutes: Native Administration Proclamation, sections 17-18 and 23-27.
[10] 2003 NR 81 (HC).

[28] Intestate succession in the Rehoboth Gebiet was, until 2005, regulated by Proclamation No. 36 of 1941. The Proclamation was similarly repealed by the Estates and Succession Amendment Act, 2005. The Act, however, provides that despite the repeal of the said Proclamation, the rules of intestate succession that applied in the 'Gebiet' before the date of their repeal continue to be of force in relation to persons (the Baster persons) to whom the said rules would have been applicable had the said provisions not been repealed.

[29] The Intestate Succession Ordinance, 1946, regulates the intestate succession amongst the white persons (including coloured people).

[30] Until 2005, when the Estates and Succession Amendment Act, 2005, was promulgated, the estates of deceased persons in the country were administrated based on race or ethnic origin of the deceased person. Following the repeal of the aforementioned subsections of the Native Administration Proclamation,1928 and the whole of the Administration of Estates (Rehoboth Gebiet) Proclamation, 1941, the administration of all deceased estates in the country was harmonised and is since being conducted in terms of the provisions of the Administration of Estates Act, 1965 under the supervision of the Master of the High Court.

[31] The Intestate Succession Ordinance, 1946, was amended by Intestate Succession Amendment Act No. 15 of 1982. In terms of the said amendment, the surviving spouse of every white person who dies either wholly or partly intestate, is declared to be an intestate heir of the deceased spouse and the following rules apply:

(a) If the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as together with the surviving spouse's share in the joint estate, does not exceed fifty thousand rand in value (whichever is the greater).

(b) If the spouses were married out of community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed fifty thousand rand in value (whichever is the greater).

(c) If the spouses were married either in or out of community of property, and the deceased spouse leaves no descendant who is entitled to succeed *ab intestato* but leaves a parent or a brother or a sister (whether of the full or half-blood) who is entitled to succeed, the surviving spouse shall succeed to the extent of a half share or to so much as does not exceed fifty thousand rand in value (whichever is the greater).

(d) In any case not covered by paragraphs (a), (b), or (c) the surviving spouse shall be the sole intestate heir.

[32] As regards to marriages contracted between black persons, the proprietary rights of the surviving spouse were previously governed by subsections 18(1), (2), (9) and (10) of the Native Administration Proclamation,1928. However as mentioned before, the Estates and Succession Amendment Act, 2005 repealed the said subsections of the Native Administration *Proclamation, 1928* but did not repeal the rules of intestate succession.

[33] The rules of intestate succession in respect of black persons were published in terms of the Native Administration Proclamation, 1928 in Government Notice No. 70 of 1954. It reads as follows:

'If a native die leaving no valid Will, his property shall be distributed in the manner following:

(a) If the deceased, at the time of his death, was-

(i) A partner in a marriage in community of property or under ante-nuptial contract; or

(ii) A widower, widow or divorcee, as the case may be, of a marriage in community of property or under ante-nuptial contract and was not survived by a partner to a customary union entered into, subsequent to the dissolution of such marriage, the property shall devolve as if he had been a European;

(b) If the deceased does not fall in a class described in paragraph (a) hereof, the property shall be distributed according to native law and custom.'

[34] Mr Karsten argues in his heads of argument, that section 1(2) of the Estates and Succession Amendment Act, 2005, the applicable is the Intestate Succession Ordinance,1946, read together with the Intestate Succession Amendment Act, 2005, are the applicable law in this matter since subsections 18(1), (2), (9) and (10) and the Regulations published in GN 70 of the Native Administration Proclamation,1928 were declared unconstitutional and consequently repealed.

[35] Mr Ntinda submitted, with reference to the rules of succession in respect of black persons' deceased estates, as well as to the facts of the present matter, that in view of the fact that the deceased was not a partner in a marriage in community of property nor was he a partner in a marriage under ante-nuptial contract, therefore regulation 2*(b)* of the Regulations published in GN 70 of 1954 applies to the estate of the deceased in this matter, and therefore customary law applies.

Statutory provisions and arguments considered

[36] It is common cause that the deceased as well as the parties to the present proceedings are black persons. It is further common cause that the deceased and the respondent were married out of community of property. As outlined herein before, when I dealt with the historically statutory provisions of intestate succession amongst various ethnic groups in Namibia, it emerged that intestate succession in respect of black persons has been regulated by the provisions of the Native Administration Proclamation, 1928. My finding is that the provisions of the Intestate Succession Ordinance, 1946, never regulated intestate succession in respect of black persons, but only regulated and still regulates interstate succession in respect of white persons.

[37] It is argued on behalf of the respondent that since sections 18(1), (2), (9) and (10) of the Native Administration Proclamtion,1928 and the Regulations published in GN 70 of 1954 have been repealed, the statutes regulating the intestate succession of the deceased's estate in the present matter are the Intestate Succession Ordinance, 1946 and the Intestate Succession Amendment Act, 2005.

[38] The respondent's argument is premised on the incorrect reading of the Intestate Succession Amendment Act, 2005 in that, that Act did not repeal the Regulations promulgated in Government Notice 70 of 1954. This is because subsection 1 of section 1 the Act reads: 'Section 18 of the Native Administration Proclamation, 1928 is amended by the repeal of subsections (1), (2), (9) and (10).' No mention is made of the Regulation published in GN 70 1954 having been repealed. As a matter of fact, the said Regulations are still on the statute book.

[39] It is further clear, in my view, from the reading of section 2 of the Intestate Succession Amendment Act, 2005 that Act retained and did not repeal the rules of intestate succession in respect of estates of black persons. In this connection section 2 reads:

> 'Despite the repeal of the provisions referred to in subsection (1), the rules of intestate succession that applied by virtue of those provisions before the date of their repeal continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed'.

[40] It follows therefore, in my view, that from the reading of the provisions of section 2 of the Intestate Succession Amendment Act, 2005, the intestate succession Regulations which apply to intestate succession estates of deceased black persons, are still applicable.

[41] There is a further reason why the argument advanced on behalf of the first respondent cannot be sustained. This is: the Estates and Succession Amendment Act, 2005 which repealed subsections (1), (2), (9) and (10) of the Native Administration Proclamation, 1928, did not stipulate that since those provisions have been repealed, the provisions of the Intestate Succession Ordinance, 1946 will hence forth apply to all intestate successions in the Republic. It thus fair to conclude that had the Legislature intended that the provisions of the Intestate Succession Ordinance,1946 would apply to the estates of black persons following the repeal of the aforesaid subsection of the Native Administration Proclamation,1928, it would have said so in clear and precise language. As matters stand, the first respondent's argument that the provisions of the Intestate Succession Ordinance, 1946 apply to

the deceased estates of all persons in the Republic and thus to the estates of the deceased in the present matter, is not supported by any evidence or law. It is baseless and is liable to be rejected. I proceed to apply the intestate succession rules published in GN 70 of 1954 to the facts of the present matter.

[42] As regards the provisions of regulation 2*(a)(i)* of the regulation published in GN 70 of 1954, it is common cause that the deceased, at the time of his death was not a partner in a marriage in community of property or under ante-nuptial contract. Section 17(6) of the Native Administration Proclamation, 1928, provides that the marriage between black persons solemnised north of the Police Zone is automatically out of community of property. The deceased and the respondent were married at Engela in the Ohangwena Region, which is situated north of the Police Zone. This regulation 2*(a)(i)* therefore does not apply to the present matter.

[43] As far as the provisions of regulation 2*(a)(ii)* are concerned, it is common cause that the deceased was not at the time of his death a widower or divorcee, of a marriage in community of property or under an ante-nuptial contract and was not survived by a partner to a customary union entered into subsequent to such marriage. Accordingly, his estate cannot devolve as if he were a white person and thus the provisions of the Intestate Succession Ordinance, 1946 do not apply to the deceased's estate in the present matter.

[44] Lastly, as regards the provisions of regulation 2*(b)* it is common cause that the deceased does not fall in any of the classes stipulated in regulation 1*(i)* or *(ii)*. It follows therefore that the deceased estate 'shall be distributed according to native law and custom' as per regulation 2*(b)*.

[45] In the light of the conclusion I have arrived at, as regard to applicable law, it follows as a matter of law that the estate of the deceased is to be administered and distributed according to customary law as stipulated by regulation 2*(b)* of the Regulations published in GN 70 of 1954. I proceed to consider the respondent's alternative argument.

[46] The respondent argues, in the alternative, that if it is found by this Court, that the provisions of the Intestate Succession Ordinance, 1946 are not applicable to the

deceased's estate in the present matter, then in that event, it is submitted, the applicant has failed to provide a *prima facie* proof of the inheritance lineage of his family.

[47] Professor Amoo in his book[11] *Property Law in Namibia*, correctly, in my view, points out that the customary rules on intestate succession are different from community to community, depending on whether a particular community follows a matrilineal or patrilineal system of succession. It follows therefore that with regard to immovable property, the rights of a widow of such marriage will be determined by the relevant customary law.

[48] It is a matter of record and general knowledge that the Ovambo community, to which the parties in this matter belong, follows a matrilineal system. Historian Martti Eirola, a Finnish missionary who was born and bred in what was then Ovamboland states in his book, *The Ovambogefahr; the Owamboland Reservation in the Making (1992*) about the intestate succession amongst the Ovambo traditional community at page 41 as follows:

'There *was no common property within the household, but everything was divided between the master, his wives and his fully-grown children. When a man died, his wives and children inherited nothing from him, but the property returned matrilineally to his clan. Correspondingly, a man has no right to his wife's property, as it belonged to her clan*.'

[49] In my view the facts of the present matter support what Eirola says in his book. This is demonstrated by the fact that the property was allocated by the family members to the deceased's mother and not to the deceased paternal uncles. This fact is further demonstrated by the fact that before the deceased's mother died it was agreed between the applicant and the deceased's mother and the members of the family of the applicant that the applicant, as a maternal cousin to the deceased, would inherit the property.

[50] I have therefore arrived at the conclusion that there is sufficient evidence before this Court which proves that the applicant's family lineage follows the matrilineal rules of inheritance. The respondent not being related to the deceased in

[11] Amoo SK: Property Law in Namibia 2014 at page 214-215.

any degree of consanguinity, as Eirola states, in terms of the rules of intestate succession of the Ovambo, has no right to inherit from her deceased husband.

[51] In view of the conclusion I have arrived at, it is unnecessary to consider the issue of alleged duress exerted upon the respondent by the applicant to sign the so-called declarations to transfer the property to the applicant. My finding is that the respondent has no right to inherit the property in terms of the customary law. The property vested in the applicant by operation of the customary law. Mr Ntinda – correctly in my view – submitted that the intestate succession inheritance had already been finalised in 2003 following the death of the mother of the deceased. What remained was for the respondent in her capacity as executrix of the deceased's estate, to transfer the property into the applicant's name but instead, the respondent transferred the property into her name. The letter of authority directed the respondent to 'transfer the residue of the estate to the heir/heirs entitled thereto by law.'

[52] I have found that the respondent is not in terms of customary law entitled to inherit from her deceased husband and for that reason she was not entitled in law to have transferred the property into her name. On the facts of this matter I found that she transferred the property knowing that in terms of customary law she had no right to inherit from her late husband. The respondent appears to have been wrongly advised that the provisions of the Intestate Succession Ordinance, 1946, applied to her deceased's husband estate, which, as has been found, does not apply, and that instead the Regulations promulgated in GN 70 of 1954 apply.

[53] In the result I make the following order:

1. The transfer of the immovable property situated at Erf No. 689 (a portion of Erf No. 2331) McNamara Street, Okuryangava, Extension No. 5, Windhoek, Namibia ('the property') to the respondent, Julia Nehemia (born Nakashole) is hereby set aside.

2. It is directed that the property is to be transferred to and registered into the name of the applicant.

3. The respondent is directed to cause the preparation of all the documents for the transfer of the property by a conveyancer and to sign all the documents for the necessary transfer of the property into the name of the applicant.

4. Should the respondent refuse or fail to cause the transfer documents to be prepared or fail to sign the said transfer documents, the deputy-sheriff for the district of Windhoek is hereby authorised to sign all the said documents as may be necessary, to effect the transfer of the property into the name of the applicant.

5. The first respondent is to pay the costs of transferring the property from her name into the name of the applicant.

6. The second respondent is directed to do everything necessary to implement this order.

7. The first respondent is to pay the costs of this application.

8. The matter is removed from the roll and is considered finalised.

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H Angula

Deputy-Judge President

APPEARANCES:

APPLICANT:	M NTINDA Of Sisa Namandje & Co. Inc., Windhoek
FIRST RESPONDENT:	L KARSTEN Of Louis Karsten Legal Practitioner, Windhoek c/o W Horn Attorneys