REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-MOT-GEN-2019/00183

In the matter between:

STEFANUS IPINGE IMONGUA **APPLICANT**

and

MAGNAEM ETUNA SHILOMPOKA **1ST RESPONDENT**
MASTER OF THE HIGH COURT **2ND RESPONDENT**
REGISTRAR OF DEEDS **3RD RESPONDENT**

Neutral Citation: *Imongua v Shimpoka* (HC-MD-CIV-MOT-GEN-2019/00183 [2022] NAHCMD 33 (4 February 2022).

CORAM: MASUKU J
Heard: **Determined on the papers**
Delivered: **4 February 2022**

Flynote: Administration of Estates – Application to transfer immovable property – Section 6 of the Deeds Registries Act 47 of 1937 discussed – Registered deeds not to be cancelled except upon an order of court – Powers of the Court to remove an executor or executrix of a deceased estate in terms of s 54 (1) of the Administration of Estate Act 66 of 1965 – Deputy Sheriff's jurisdiction – Legal Ethics – duty of legal practitioners to assist the court in respect of providing authority for legal contentions

advanced – *Locus standi* of heir to bring proceedings, notwithstanding the presence of the executor or executrix.

Summary: The applicant, an heir to a deceased estate is before court seeking an order that immovable property situated in the district of Swakopmund, Namibia transferred from the executrix of that estate's name and registered back into the deceased's estate. Further the applicant applies to this court that should the executrix refuse to sign the transfer documents of the immovable property, the deputy sheriff for the district of Windhoek must be authorised to sign such documents on behalf of the executrix. Lastly, applicant seeks the removal of the executrix and that a new executor must be appointed in terms of the applicable law.

The first respondent (executrix) is of the view that the property cannot be transferred in the absence of an order setting aside the transfer and registration of the property into her name. She further points out that the Deputy-Sheriff for the district of Windhoek does not have jurisdiction to deal with property outside Windhoek. Finally, she takes the view that in terms of s 54(1) of the Administration of Estate Act 66 of 1965, the court does not have the jurisdiction to remove the executrix as administrator of the estate. The court found as follows:

Held: The district in which the immovable property is situate, (Swakopmund) is an area that does not resort under the jurisdictional area of the deputy sheriff of Windhoek. As such, the court is not at large to grant the alternative prayer sought by the applicant, to have the deputy-sheriff of Windhoek sign the documents, if the respondent fails to do so.

Held that: The court has the power to remove an executor or executrix on application in terms of s 54(1) (a) of the Administration of Estate Act 66 of 1965, where it is satisfied that it is undesirable for the executor or executrix to act or to continue acting in that office.

Held further that: In the absence of a court order to set aside the registration of the immovable property from the deceased estate into the executrix's name this court in

terms of s 6 of the Deeds Registries Act 47 of 1937 cannot order the transfer even if the transfer was obviously effected irregularly.

Held: that legal practitioners have an abiding ethical duty to assist the court as its officers. Where they make legal submissions, it is their duty to avail authority for the proposition contended for and not for the court to go hunting for the relevant authority.

Held that: ordinarily, the executor or executrix is the official clothed with authority to bring matters before court appertaining to a deceased estate. There are however, instances where an heir may have to bring proceedings in his or her name, such as in the instant case where the relief sought is against the executrix in the handling of the matter before court.

ORDER

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1. The Respondent's point of law *in limine* relating to incompetent relief, is hereby upheld.
2. The matter is struck from the roll.
3. The Applicant is ordered to pay the costs of the application.

JUDGMENT

MASUKU J:

<u>Introduction</u>

[1] This is an opposed application in which the applicant seeks an order directing the 1st respondent to sign all documents necessary for the transfer and registration of certain property into the name of the Estate of the Late Fillipus Imongua, failing which, the deputy-sheriff of Windhoek be authorised to do so. He further seeks an

order for the removal of the 1st respondent as the executrix of the deceased's estate, together with costs.

The parties

[2] The applicant is Mr. Stefanus Ipinge Imongua, an adult Namibian male, resident in Swakopmund. The 1st respondent is Ms. Magnaem Etuna Shimpoloka, an adult Namibian female who resides in Swakopmund. She is cited in her capacity as the executrix of the estate of the Late Fillipus Imongua. The 2nd respondent is the Master of the High Court, cited in her official capacity. The 3rd respondent is the Registrar of Deeds, who has also been cited in the official capacity, duly represented by the Office of the Government Attorney.

[3] The applicant was represented by law firm from Sisa Namandje & Co Inc, whereas the 2nd respondent, was represented by Mr. Nanhapo. By consent of the parties, this matter was decided on the papers, without resort to oral argument.

[4] For the reason that the 2nd and 3rd respondents do not oppose the application, there is effectively one respondent, namely the 1st respondent. I will therefor refer to the applicant as such and to the 1st respondent, merely as 'the respondent.'

Background and the parties' respective cases

[5] The facts giving rise to this application appear to be largely common cause. The law applicable thereto may be the basis for the disagreement. Briefly stated, the facts are the following: the applicant is the biological son of the deceased Mr. Fillipus Imongua, ('the deceased'), who left for the celestial jurisdiction at Uukwaludi on 12 August 2012.

[6] It is common cause that the respondent, who was a niece to the deceased, was appointed as the executrix of the deceased's estate by the office of the Master of the High Court. This was done under the Master's reference No: 125/08 by the Outapi Magistrate. The deceased was, during his lifetime, the registered owner of landed property described as Erf. No. 49 Mondesa in the Municipality of

Swakopmund. It would appear that at the time of the deceased's death, he had not registered a valid Will and Testament, meaning that he died intestate.

[7] It is the applicant's case that he, together with his siblings, discovered that the property referred to above, had been irregularly registered by the respondent in her own name. This was brought to the attention of the Master, who through her legal practitioners, sought an explanation from the respondent. Such was not forthcoming.

[8] The applicant thereafter instructed his legal practitioners to pursue the matter and called upon the respondent to cause the property to be registered in the name of the deceased estate, to no avail. It is the applicant's case that the deceased's property should have, by law, devolved on his heirs and that it is improper for the executrix to cause the property of the deceased's estate to be registered in her name.

[9] The respondent's case, as would be expected, is horse of a different colour. She neither admits nor denies that the deceased died intestate. What she states categorically though is that 'before his death, he specifically and expressly informed me that I am the sole beneficiary of the property, hence, I caused it to be transferred and registered into my name.'[1] The respondent contends that there was nothing sinister or unlawful in the said transfer and registration of the property in her name.

[10] Regarding her role as the executrix, the respondent deposes that she performed her duties accordingly and that before the distribution, she did not receive any objections from the respondent and his siblings. As such, she further states, she does not understand why the objections should be lodged after the distribution of the assets. In sum, the respondent contends that the applicant is not entitled to the relief that he seeks and moves the court to dismiss the application with costs.

Points of law *in limine*

[11] The respondent, in her heads of argument, raised three points of law *in limine.* The first is that the applicant has sought incompetent relief in that he seeks an order

[1] Paragraph 12.1 of the answering affidavit.

directing the respondent to sign the documents of transfer to the deceased's estate without having sought an underlying order declaring the transfer of the property into the respondent's name unlawful.

[12] Second, the respondent takes the point that the applicant sought an order, in the event the respondent does not sign the papers of transfer of the property, for the deputy-sheriff of Windhoek to sign the said papers. It is alleged that the said deputy-sheriff has no jurisdiction to deal with property outside the Windhoek jurisdictional area.

[13] Last, the respondent contends that this court does not have jurisdiction to grant the relief sought regarding the removal of the respondent as an executrix of the deceased estate. Much store, in his regard, is laid on the provisions of s 54(1) of the Administration of Estates Act, ('the Act'),[2] and to which reference will be made as the judgment unfolds.

Determination

[14] I should perhaps start by observing that it is a queer position for the respondent, who was duly appointed to be an executrix to be non-committal on the question whether the deceased died testate or intestate. An executor or executrix must know whether the deceased had executed a Will or not because how the estate is eventually distributed will, for the most part, hinge heavily on whether there was a valid Will and Testament or not. This hesitancy on the respondent's part, does not sit well with the court on so crucial and determinative a question.

[15] I am of the considered view that the question can be settled in favour of the applicant, who states on oath that the deceased died intestate. If the position were otherwise, the deceased's last Will and Testament would have been paraded by the respondent and the Master, would have stated so in clear terms as well.

[16] I am of the considered view, although this is not raised as a legal question by the respondent, that the applicant clearly has *locus standi in judicio* (standing in law),

[2] Act No. 66 of 1965.

to bring these proceedings. His contention on oath, that he is the biological son to the deceased is not controverted. As such, his claim that he is an heir to the estate, cannot be questioned. By extension, his right to seek the relief he seeks, cannot be seriously placed in doubt or contention.

[17] If any authority for the correctness of that proposition is needed, one does not need to look further than *Brink and Another v Erongo All Sure Insurance and Others*[3] where the court expressed itself in the following terms:

> 'In relation to the authority submitted by counsel for both parties, it is clear that courts have followed the principle that only the executor/executrix has the authority to institute proceedings on behalf of the estate. However, as stated in *Stellemacher v Christians,* it is permissible in appropriate cases, for such a beneficiary to sue on his or her own behalf in order to safeguard his right to inheritance where the right is infringed or threatened to be infringed.'

[18] What an appropriate case may be, for purposes of the heirs suing will always depend on the circumstances of the case. What renders the instant case an appropriate one in which an heir can bring proceedings in his name, is the fact that the relief sought is against the executrix in relation to her performance as such in the deceased's estate.

[19] It would be folly to expect the respondent to bring proceedings against herself, especially in a case like this, where she has not offered to abide by the decision of the court, but has come out guns blazing, defending every blade of grass traversed in the proceedings. It would be unwise and possibly irresponsible of the applicant to have waited for the respondent to move an application against herself, for her removal and disentitling herself to the property the applicant claims she is not entitled to at law. Clearly, there is a dissonance in the interests of the applicant and the respondent.

Jurisdiction of the Windhoek Deputy-Sheriff

[3] *Brink and Another v Erongo All Sure Insurance and Others (69 of 2016) [2018] NASC (22 June 2018) para 33*

[20] I now turn to the points of law *in limine*. I will deal with the last point first. It is true that the deputy-sheriff of the district of Windhoek does not have jurisdiction to deal with property that falls outside his jurisdictional area. As such, the contention that the alternative order sought, in the event the respondent does not sign the necessary document, is not competent, is well taken.

[21] It is clear from the applicant's very papers that the property sought to be transferred to the deceased's estate is situate in the district of Swakopmund. This is an area that does not resort under the jurisdictional area of the deputy-sheriff of Windhoek. The question that follows is whether that argument should result in the application being dismissed.

[22] I do not think it would be proper to do so in the circumstances. While the respondent makes a good point, that does not render the entire prayer objectionable. It may be read with the doctrine of severance in mind by, granting the main prayer, namely, ordering the respondent to sign the necessary documents on demand. There is nothing from the papers, or the argument by the respondent that renders the main prayer objectionable.

[23] I would accordingly grant the main prayer, if I am otherwise satisfied that the applicant is entitled to it and leave him to his devices as to what to do in the event the respondent does not comply with the main relief, namely, signing the documents of transfer. To dismiss the entire application or that relief on that basis would be clearly disproportionate and uncalled for. I will accordingly not uphold the first point of law *in limine*.

[24] To buttress this point, some useful remarks were made in *Geza v Minister of Home Affairs and Another*:[4] In that case, the court said:

> 'In *Johannesburg City Council v Bruma Thirty-Two Ltd,* Coetzee J described the prayer for alternative relief as being "redundant and mere verbiage" in modern practice adding that whatever a court "can validly be asked to order on papers as framed, can still be asked without its presence" and that "it does not enlarge in anyway the terms of the express claim"'.

[4] *Geza v Minister of Home Affairs and Another* (1070/2009) [2010] ZAECGH 15 (22 February 2010).

[25] The above reasoning, in my considered view, applies to the facts of the instant matter, suggesting that it is proper to dismiss this point of law *in limine,* as I hereby do.

Lack of this Court's jurisdiction

[26] The respondent, as foreshadowed above, further contends that this court does not have the jurisdiction to grant the relief sought by the applicant, namely, removing the respondent from the office of an executrix. It is argued that the court, in terms of s 54 of the Act, does not have the power to remove an executor or executrix. In this connection, as I understand the respondent's argument, this court may only interfere with an appointment made on review in circumstances where an aggrieved person seeks an order by the Master appointing a particular person as executor or executrix to be set aside. Is there merit in this argument?

[27] Section 54(1)(a) of the Act, has the following rendering:

> 'An executor may be removed from office –
>
> (a) by the Court –
> (b) ..
> (c) …
> (d) …
> (e) if for any reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned.'

[28] It is accordingly clear that in terms of the Act, it lies within the power of this court to remove an executor, where it is satisfied that it is proper to do so. This will be in cases where the court finds that there it is undesirable for the executor or executrix to act or to continue acting in that office. It is abundantly clear that the court does not, in terms of the Act, only have powers on review, where a person questions the appointment made by the Master. The court has power to remove a person on application in terms of the said provision.

[29] In *Mpasi N.O. v Master of the High Court*[5] the Supreme Court expressed itself unequivocally on this very issue. It stated the following:

> 'Undoubtedly, our High Court which is the court with the requisite jurisdiction in terms of the Act, has the power to remove an executor from office pursuant to s 54(1)(*a*). Similarly s 95 of the Act empowers the court on appeal or review to confirm, set aside or vary the appointment by the Master. There is, however, no provision in the Act for the appointment of an executor by the court.'

[30] In view of the binding nature of the Supreme Court, which is directly on point, it is clear that the respondent is merely clutching at straws in her argument. Her argument in this regard has no substance, not least because the Act states in clear and unequivocal terms that this court may remove an executor or executrix from office. This is in addition to the powers of the court in terms of s 95 of the Act, to deal with the decision of the Master in appointing a person to the said office on appeal or review. This point of law *in limine* is thus destined for failure and it accordingly dismissed.

Incompetent relief

[31] The last point of law *in limine* relates to the argument that the relief sought by the applicant is incompetent because the applicant did not first seek an order setting aside the transfer and registration of the property into the respondent's name. It is contended in this connection that this court can only transfer the property into the deceased's estate once the transaction in terms of which it was registered in the respondent's name has first been set aside.

[32] I am compelled to seriously decry the fact that the respondent's legal practitioner levels this attack on the papers without presenting any authority in support of his contention. In the order of things set by the respondent, this court is then required by the respondent to go into the forest of legal authority, spanning over many years, in order to find whether or not authority exists which supports the respondent's legal contention.

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[5] *Mpasi N.O. v Master of the High Court* 2018 (4) NR 909 (SC), para 27.

[33] Clients pay their legal practitioners to do their job and in full. As officers of the court, legal practitioners are ethically enjoined to ensure the court fully derives the benefit of their presence and actively assist the court to navigate obscure points of law. It is irresponsible for officers of the court to make legal submissions and leave the court at the mercy of the elements or to its own devices as it were in examining the sustainability of the legal contentions made.

[34] In dealing with the contention raised by the respondent, it is appropriate to refer to *Minister of Finance v Merlus Seafood Processors (Pty) Ltd*,[6] where the Supreme Court cited with approval the following sentiments expressed by Lord Radcliffe in *Smith v East Elloe Rural District Council*[7] :

> 'An administrative order . . . is still an act capable of legal consequences. It bears legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of the invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'

[35] In the *Merlus* case, the Supreme Court further made the following remarks:

> 'The respondent or its legal practitioners should not have abandoned the review of the minister's decision and this is where I disagree with the court below that under the circumstances/facts of this case, it had a discretion to grant the declaratory order. The declaratory relief was dependent on for its survival on the granting of the review relief. The decision of the minister and the declaratory order by the court below cannot co-exist on the same issue. The second order on the same issue is invalid.'

[36] Although the case deals with issues of administrative powers, I am of the view that the reasoning resonates and applies with equal force in these proceedings. What cannot be gainsaid is that there is an *ex facie* valid process in terms of which the property was transferred and registered in the respondent's name, according to the relevant legislation. That transfer and registration remain valid until set aside by a competent court. It is clear in the instant case that no order was sought and granted

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[6] *Minister of Finance v Merlus Seafood Processors (Pty) Ltd* 2016 (4) NR 1042 (SC) at 1051D-E.

[7] *Smith v East Elloe Rural District Council* [1956] AC 736 (HL); (1956] 1 All ER 855; [1956] 2 WLR 888 at 769-770.

in the applicant's favour setting aside the transfer and registration of the property in the respondent's name.

[37] In this connection, and to drive the point home, it is necessary to have regard to the provisions of s 6 of the Deeds Registry Act, No. 47 of 1937. The said provision reads as follows:

> '6(1) Save as otherwise provided in this Act or in any other law no registered deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court.'

[38] This provision provides that in the absence of a provision in the Deeds Registry Act or other law, no registration of property may be cancelled by the Registrar of Deeds save on the strength of an order of court. It is clear that the applicant has not sought any such order in the instant case nor has he pointed to any provision in the Deeds Registry Act or other law that allows the cancellation without an order of this court. As such, the contention by the respondent presents an insuperable difficulty in the applicant obtaining the relief he seeks.

[39] It is accordingly clear that the relief sought by the applicant runs counter to the provisions of the Act in that it seeks to have the property in question transferred and registered in the name of the deceased estate without him having obtained a prior or simultaneous order cancelling the title deed registered in the respondent's name.

[40] That being the case, it stands to reason that the order registering the property in the respondent's name stands. As such, this court cannot properly issue a new order transferring and registering the property in the name of the deceased's estate in the absence of an order from this court to the Registrar of Deeds declaring the transfer and registration of the property in the respondent's name unlawful and invalid and setting it aside for that reason. It is only once such an order i.e. a declarator, has been granted in favour of the applicant that this court may competently order the Registrar of Deeds to transfer and register the property in question in the name of the deceased estate.

[41] In other words, a legal process setting aside the underlying existence of the registration of the property in the respondent's name should be set in motion and be granted. Only once the transfer and registration of the property in the respondent's name has been set aside by a competent court may the order sought by the applicant registering the property in the name of the estate, be possible and permissible in terms of the law.

[42] The fact that the registration of the property in the respondent's name may be attended by, littered or riddled with what may be considered obvious and glaring illegalities or irregularities does not obviate the need to obtain an order declaring the registration and transfer of the property in the respondent's name invalid. It is a necessary step that paves the way to the order prayed for, namely, transferring the property and registering it in the name of the deceased's estate.

Conclusion

[43] In the premises, and in view of the discussion above, together with the conclusion on the last point of law *in limine,* I am of the considered view that the respondent's argument is on the money. It is good in law and precludes the court from registering the property in the deceased estate's name. This is so even if the court may be persuaded to find in the applicant's favour that the respondent had no right in law to register the property in her name.

[44] In the stark absence of a specific prayer by the applicant and an order by the court setting aside the transfer and registration of the property in the respondent's name, it does not follow that the court can properly grant an order registering and transferring the property into the deceased estate's name in the circumstances.

[45] In the premises, it appears to me that this point of law *in limine* cuts across the entire matter and would preclude the court from granting any of the relief sought by the applicant at this stage. This includes the relief relating to the removal of the respondent from the position as executrix. I say so for the reason that it would have to be shown in the first place that the registration and transfer were unlawful and a

declarator along those lines issues by the court before a reason could conceivably be found necessitating the removal of the respondent from her office as the executrix.

[46] In view of the conclusion above, it is unnecessary, for present purposes, to deal with the balance of the issues necessary to be traversed on the merits. The consequence of this finding is that the application cannot be granted.

Order

[47] In view of the issues canvassed and the conclusion reached immediately above, I am of the considered view that the following order is appropriate:

1. The Respondent's point of law *in limine* relating to incompetent relief, is hereby upheld.
2. The matter is struck from the roll.
3. The Applicant is ordered to pay the costs of the application.

T.S. Masuku

Judge