

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no: HC-MD-CIV-ACT-DEL-2020/02089

In the matter between:

<b>MARUZAAN MARTEZIA MOLLER N.O</b>	<b>1<sup>ST</sup> PLAINTIFF</b>
<b>MARUZAAN MARTEZIA MOLLER</b>	<b>2<sup>ND</sup> PLAINTIFF</b>
<b>RAYLAND BEUKES</b>	<b>3<sup>RD</sup> PLAINTIFF</b>

and

<b>THE MASTER OF THE HIGH COURT</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>MINISTER OF JUSTICE</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>MERVIN GAY VEUANISA KOZONGUIZI</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>KOZONGUIZI AND ASSOCIATES</b>	
<b>CLOSE CORPORATION</b>	<b>4<sup>TH</sup> DEFENDANT</b>

**Neutral citation:** *Moller N.O v The Master of The High Court* (HC-MD-CIV-ACT-DEL-2020/02089) [2022] NAHCMD 359 (21 July 2022)

**Coram:** MILLER AJ

**Heard: 24 February 2022**

**Delivered: 21 July 2022**

**Flynote:** Administration of Estate - Master of the High court appoints executor without consulting family of deceased-deceased estate misappropriated - Section 100 to hold the State liable for negligence or omissions to act by the Master - court held the State liable - the third and fourth defendants equally liable.

**Summary:** The late Yolandi Dorothea Beukes (the deceased) passed away on 8 February 2015. First defendant issued a letter of executorship to the third defendant. The third defendant provided a bond of security for the due administration of the estate to the sum of N\$ 2,000,000, which amount was later reduced.

The court held that it is apparent that the first defendant and its officials at no stage required the third defendant to account for any of the assets he was tasked to liquidate and distribute, prior to reducing the amount of security. It was further clear that the first defendant or its officials had not the slightest idea what assets were collected, which assets were distributed in the interim and which remained in the estate to be distributed later. Despite not having any idea, the third defendant was not called upon to account for any of the assets. The court noted that had that been done, the fact that certain assets were misappropriated would in all probability have come to light. The fact that nothing was done was not only a flagrant disregard for the provisions of section 24 of the Administration of estates Act, it is additionally grossly negligent.

As a result the second, third and fourth defendants were ordered to pay the first plaintiff the sum of N\$ 1,275,357.36 jointly and severally, the one paying and the other to be absolved.

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**ORDER**

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1. The second, third and fourth defendants are ordered to pay the first plaintiff

the sum of N\$ 1,275,357.36 jointly and severally, the one paying and the other to be absolved.

2. Interest on the aforesaid amount is payable at the rate of 20 % per annum calculated from the date of this judgment to the date of final payment.
3. Costs of suit, which will include the costs of two instructed and one instructing counsel.

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## JUDGMENT

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MILLER AJ:

### **A. Introduction**

[1] This matter is in essence an action in delict instituted by the plaintiff against the defendants. The plaintiffs seek the following relief:

- (a) Payment in the amount of N\$ 1,274,357.36;
- (b) Interest on the amount of 20% per annum as from 1 December 2015 until date of final payment;
- (c) Costs of suit, including the costs of two instructed counsel and one instructing counsel.

[2] As an alternative to what I term the main claim, the plaintiff sought in their pleadings, to claim the amount mentioned, in terms of Article 26 of the Namibian Constitution. Nothing more was said about this aspect of the case during the course of the proceedings. It is in any event not necessary to deal with it during the course of this judgment.

[3] The matter is defended by the first and the second defendant. The third and the fourth defendants did not defend the action and consequently took no part in the proceedings.

[4] Apart from denying that they were in law, liable, the first and second defendants raised a special plea of prescription. The plea was not persisted with at the trial.

## **B. The Parties**

[5] The first plaintiff is currently the executor in the estate of the late Yolandi Dorothea Beukes. She was appointed as the executor on 7 June 2016.

[6] The second plaintiff, apart from holding office as the executor of the estate, is an heir in the estate.

[7] The third plaintiff is a son and heir in the estate.

[8] The first defendant is the Master of the High Court, duly appointed in terms of section 2 of the Administration of Estates Act 66 of 1965 (the Act). She is sued in her official capacity.

[9] The second defendant is cited in her official capacity.

[10] The third defendant was initially appointed as the executor of the estate on 18 November 2015. This appointment was terminated on 2 June 2016.

[11] The fourth defendant is for all practical purposes the alter ego of the third defendant.

## **C. Chronology**

[12] The late Yolandi Dorothea Beukes (the deceased) passed away on 8 February 2015.

[13] On 5 March 2015, a firm of legal practitioners, Nakamhela Attorneys acting on behalf of the family, reported the estate to the first defendant. Amongst the documents included was a proposal that the former husband of the deceased, Mr.

Raymond Reginald Beukes be appointed as the executor. Mr. Beukes in turn signed a power of attorney on behalf of Nakamhela Attorneys to act on his behalf.

[14] The first defendant correctly pointed out that Mr. Beukes and the deceased were divorced at the time of her death. Consequently, the first defendant required that security be furnished in the sum of N\$ 2,055,000.00 which was the estimated value of the estate according to the inventory furnished when the estate was first reported.

[15] By letter dated 22 April 2015, the first defendant was advised that neither Mr. Beukes nor his heirs could provide security. It was suggested that the appointment of an executor be delayed until 9 November 2015 upon which date, the second plaintiff would turn 21 years of age.

[16] By way of a letter dated 26 November 2015, Nakamhela Attorneys advised the first defendant that the second plaintiff was now a major and requested that the letter of Executorship be issued to the second plaintiff.

[17] In response, the first defendant informed Nakamhela Attorneys of the fact that the third defendant had been appointed as executor on 18 November 2015.

[18] Nakamhela Attorneys wrote to the first defendant on 22 January 2016 and complained about the fact that the heirs and family of the deceased were not consulted about or informed of the appointment of the third defendant as the executor.

[19] The third and fourth defendants prior to the appointment of the third defendant as the executor provided a bond of security for the due administration of the estate to the sum of N\$ 2,000,000. As indicated already the first defendant issued a letter of executorship to the third defendant.

[20] Subsequent to his appointment, the third defendant opened a bank account in the name of the estate and transferred a major portion of the estate, which consisted of Unit Trusts to the value of N\$ 1,274,557.36, into the account.

[21] Shortly thereafter, on 3 December 2015, the third defendant transferred the sum of N\$ 1,000,000 from the estate's account to the account of the fourth defendant. The balance was also dissipated to the extent that by March 2016 the estate account was depleted.

[22] It is common cause that the third and fourth defendants unlawfully misappropriated the entire amount in the estate account.

[23] In a further development, the first defendant on 22 September 2016, reduced the amount for which security was provided, being N\$ 2,000,000 to nil.

[24] It is not in dispute that the loss of N\$ 1,279,557.36 has not been recovered.

#### **D. The Legal Requirements**

[25] This action, being one in delict, requires of a plaintiff, who bears the onus of proof, to establish upon a preponderance of possibilities, the following; An act or omission, on the part of the defendant which is wrongful, intentional or negligent and which causes damage.

[26] In the context of this case, I bear in mind the specific provision concerning the liability of the first and second defendants. Section 100 of the Act provides as follows:

##### Exemption from liability for acts or omissions in Master's office

100. No act or omission of any Master or of any officer employed in a Master's office shall render the State or such Master or officer liable for any damage sustained by any person in consequence of such act or omission: Provided that if such act or omission is mala fide or if such Master or officer has, in connection with such act or omission in the course of his duties or functions, not exercised reasonable care and diligence, the State shall be liable for the damage aforesaid.

[27] It is apparent from the reading of the proviso that the State may attract liability for acts or omissions on the part of the Master or an officer in the office of the Master . The proviso is in my view wide enough to include both *mala fide* and negligent acts and omissions. I did in any event not understand counsel for first and second defendants to take issue with my view. The negligence of the first defendant was placed in issue and the case proceeded on that basis.

[28] In their particulars of claim, the plaintiffs rely on various grounds upon which they allege that the first defendant was negligent. It is alleged that the first defendant or its officials were aware of the fact the first plaintiff was a major person when she appointed the third defendant as executor. It is alleged that in those circumstances the first defendant had to appoint the second plaintiff because section 18 of the Act prohibited the first defendant from appointing the third defendant. Section 18 of the Act confers upon the Master a discretion to appoint a person he or she deems fit to be appointed as an executor. In those circumstances, there is nothing to indicate that such a discretion was exercised negligently.

[29] It is alleged further that the first defendant should have been aware that the third defendant was not a fit and proper person. No evidence was adduced to warrant such an inference.

[30] It is alleged further that the first defendant should have taken reasonable steps to ensure that the third defendant complied with his statutory duties. This rather general statement should properly be read with the more specific allegations in paragraphs 30.3 and 30.4 of the particulars of claim. They read as follows:

‘30.3 ...pleaded that the first defendant should not have reduced security at all as there was no proper accounting by the third defendant, nor was there a sufficient basis to do so.

30.4 the first defendant and all its officials should have taken reasonable steps to timeously recover the monies which were misappropriated.’

[31] With reference to paragraph 30.3 above, section 24 of the Act provides as follows:

'(Reduction of security given by executors

24. If any executor who has given security to the Master for the proper performance of his functions, has accounted to the satisfaction of the Master for any property, the value of which was taken into consideration when the amount of such security was assessed, the Master may reduce the amount of the security to an amount which would, in his opinion, be sufficient to cover the value of the property which such executor has been appointed to liquidate and distribute, and which has not been so accounted for.

[32] From the evidence adduced, it is apparent the first defendant and the officials at no stage required the third defendant to account for any of the assets as he was tasked to liquidate and distribute, prior to reducing the amount of security. It is clear that the first defendant or the officials had not the slightest idea what assets were collected, which assets were distributed in the interim and which remained in the estate to be distributed later. Despite not having any idea, the third defendant was not called upon to account for any of the assets. Had that been done, the fact that certain assets were misappropriated would in all probability have come to light. The fact that nothing was done was not only a flagrant disregard for the provisions of section 24, it is additionally grossly negligent.

[33] It is also clear from the evidence that the Master or its officials took no real steps to enforce the terms of the bond of security. Ms. Beukes, who testified on behalf of the defendant, was questioned about this and replied that no steps were taken because she was worried that her office may become involved in litigation. With all due respect to Ms. Beukes, that is no reason not to act.

[34] It follows that I find that the Master or its Officials acted or rather omitted to act, wrongfully and negligently and without due care. In the process, the estate suffered a loss. Section 100 provides that in these circumstances, the State should be liable and not both the Master and the State.

[35] As far as the third and fourth defendants are concerned, I find that they are likewise liable.

**Order**



[36] I accordingly make the following orders:

1. The second, third and fourth defendants are ordered to pay to the first plaintiff the sum of N\$ 1,275,357.36 jointly and severally, the one paying and the other to be absolved.
2. Interest on the aforesaid amount is payable at the rate of 20 % per annum calculated from the date of this judgment to the date of final payment.
3. Costs of suit, which will include the costs of two instructed and one instructing counsel.

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K MILLER  
Acting Judge

## APPEARANCES

APPLICANT: Mr Phatela assisted By Ms Shifotoka,  
on instruction of Nakamhela Attorneys, Windhoek

RESPONDENT: Mr Tibinyane,  
Office of the Government Attorney, Windhoek