REPORTABLE

CASE NO. SA 3/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MICHAEL DAVID MERORO	**Appellant**

and

MINISTER OF LANDS, RESETTLEMENT AND REHABILITATION	**First Respondent**
CHAIRPERSON OF THE LAND REFORM ADVISORY COMMISSION	Second Respondent
MINISTER OF AGRICULTURE, WATER AND RURAL DEVELOPMENT	Third Respondent
HILIA MERORO	Fourth Respondent

Coram:	MARITZ JA, CHOMBA AJA and MTAMBANENGWE AJA
Heard:	**12 June 2009**
Delivered:	**2 April 2015**

APPEAL JUDGMENT

MARITZ JA (CHOMBA AJA and MTAMBANENGWE AJA concurring):

[1] This appeal, in main, concerns the interpretation and application of s 53 of the Agricultural (Commercial) Land Reform Act, No. 6 of 1995 (the Act). The Act provides for the acquisition of agricultural land by the State for purposes of land reform and for the allocation thereof to Namibian citizens who do not own or otherwise have the use of any or adequate land and who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.[1] The Act contemplates the pursuit of this objective via a number of different avenues. The one followed in this case was the acquisition of agricultural land by the State in a commercial farming area;[2] the subdivision of the land into holdings, which were later surveyed and registered as separate farming units in the Deeds Office;[3] the allotment of the registered farming units to successful qualifying applicants under 99-year lease agreements[4] and the registration of the leases subject to the overriding application of a number of statutory conditions[5] - one of the conditions being that stipulated in s 53 which deals with the cancellation or assignment of such leases upon the death or mental incapacity of lessees.

[2] The farm Corsica No. 89 was acquired under the Act, subdivided into four holdings duly surveyed and subsequently registered with the Registrar of Deeds as farming units in terms of an allotment plan approved by the Minister of Lands, Resettlement and Rehabilitation[6] (the Minister) on 27 May 2002. Responding to

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[1]The objectives are conveniently summarised in the long title of the Act. Compare also s 14 of the Act.
[2] See: s 14(2) of the Act read with the definition of 'agricultural land' in s 1 and with ss 14(3), 17(4), 58 and 59 of the Act.
[3] Compare the definition of 'farming unit' in s 36 and the provisions of ss 38 and 39 of the Act.
[4] See: ss 41 and 42(1) of the Act.
[5] See: ss 42(2) and 43 to 56 of the Act.
[6]In terms of s 39 of the Act.

an official notice inviting applications for the allotment of those farming units by leases, Mr David Hosea Meroro, applied on 4 July 2002 to be resettled under a 99-year lease on one of those units, i.e. the one registered as farming unit B (the farm). His application was successful and, on 7 April 2003, he concluded a written 99-year lease with the Minister, the latter acting in his nominal capacity on behalf of the Government. Already of an advanced age and not in good health when he took occupation of the farm under the lease, he passed on a number of months later, i.e. on 18 January 2004. Upon his passing, he left behind his wife, Mrs Hilia Meroro and a number of children, amongst them, Mr Michael David Meroro. The latter is the appellant in this appeal and was the applicant in the proceedings before the court *a quo*.

[3] The deceased's surviving spouse, whom he had married during 1999 in a civil law ceremony concluded under the Marriage Act, 1961, was appointed as executrix in his intestate estate in terms of letters of executorship issued by the Magistrate, Windhoek shortly after his passing.[7] At the time, the magistrate's powers of appointment were derived from Reg 3 of the Regulations[8] framed under s 18(9) of the *Native Administration Proclamation*, 15 of 1928. Given the importance of the Regulations for purposes of the discussion that follows, I interpose here to point out that the Regulations were declared unconstitutional by the High Court on 14 July 2003 in *Berendt and Another v Stuurman and Others*[9] but that the Court suspended the declaration of unconstitutionality to accord Parliament an opportunity to redress the unconstitutionality by no later than 30

[7] The date of her appointment does not appear on the certified copy of the letter included in the record of appeal but the certification by the Namibian Police bears a date stamp of 8 March 2004. For that reason the original must have been issued before that date.
[8] Published in Government Notice 70 of 1954 on 1 April 1954
[9] 2003 NR 81 (HC) at 88E-F.

June 2005. The Court also ordered that, until the latter date or the date on which the unconstitutionality would be remedied, whichever would be the earlier, the Regulations made under s 18(9) of the Proclamation would be deemed valid. Parliament subsequently repealed s 18(9) of the Proclamation in s 1 of the *Estates and Succession Amendment Act,* 2005 on 29 December 2005 and, with that, also the Regulations made thereunder. The repeal did not affect the continuing application of the rules of the intestate succession that applied by virtue of the provisions of the Proclamation prior to the repeal[10] or, subject to certain provisions to which I shall refer later, the liquidation and distribution of the estates of deceased persons that was administered immediately before the date of commencement of the *Estates and Succession Amendment Act*.[11]

[4] The date of the deceased's passing and of the appointment of his surviving spouse as executrix of the deceased estate (the executrix) fell within the period of the subsection's deemed validity in terms of the High Court's order. Given the provisions of the *Estates and Succession Amendment Act*, the estate had to be administered, liquidated and distributed by the executrix in accordance with the rules of intestate succession that applied by virtue of the provisions of the Proclamation and in terms of the Regulations made under s 18(9) of the Proclamation. [12]

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[10]Section 1(2) of the *Estates and Succession Amendment Act, 2005* provides as follows: '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.'

[11]Section 1(2) of the *Estates and Succession Amendment Act, 2005* reads: 'The estate of a person who died before the date of commencement of this Act which was administered, immediately before that date, in terms of the Native Administration Proclamation, 1928 . . . must be liquidated and distributed and any matter relating to the liquidation and distribution of such estate must be dealt with as if this Act had not been passed.'

[12]It falls outside the scope of this judgment to deal with the specific manner in which the estate falls to be distributed but consideration should nevertheless be given on this point to Reg 2(a) of the

[5] By accepting the appointment, as she did, the entire deceased estate[13] vested in her as executrix.[14] She became the sole and nominal representative thereof and, by the act of acceptance, assumed the fiduciary duty[15] to administer the deceased estate in good faith, with due care and diligence[16] in accordance with the law. An incident of these duties is that an executrix or executor –

> 'is not free to deal with the assets of the estate in any manner he pleases. His position is a fiduciary one and therefore he must act not only in good faith but also legally. He must act in terms of the will and in terms of the law, which prescribes his duties and the method of his administration and makes him subject to the supervision of the Master in regard to a number of matters.' [17]

Regulations promulgated by Government Notice 70 of 1954 (SWA) on 1 April 1954 (as applied by Government Notice R192 of 1974) that provides: 'If a native dies without 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 . . . the property shall devolve as if he had been an European'. Compare also s 1(1)(*a*) of the Intestate Succession Ordinance, 1946 (as amended by s 1(a) of Act 15 of 1982).

[13] Although the letter of executorship refers to the estate of her husband only, it would have been more correct to refer to the joint estate: the marriage was concluded in community of property because it was solemnized in Windhoek without an antenuptial contract. Windhoek does not fall within the area defined as the 'Police Zone' to which the converse matrimonial regime contemplated in s 17(6) of the *Native Administration Proclamation, 1928* applies (Compare *Mofuka v Mofuka* 2003 NR 1 (SC) at 3H-4A; *Mofuka v Mofuka* 2001 NR 318 (HC) at 322B-C and *Valindi v Valindi and Another* 2009 (2) NR 504 (HC) at 510 B). By referring to the deceased estate, I do not mean to limit it to her late husband's portion of the estate only.

[14]Although the surviving spouse in a marriage concluded in community of property is under common law entitled to a half-share of the joint estate as his or her own property, that entitlement is not enforceable immediately upon the passing of the first-dying spouse *ab intestato*. Meyerowitz, 'The Law and Practice of Administration of Estates' (5 ed) at 125 deals with this aspect as follows:

> '12.23 Upon the death of a spouse married in community of property, the whole joint estate falls under the administration of the executor of the deceased, even if the survivor is the husband, and only the executor has *locus standi* to sue or to be sued.

Although the community of property is terminated by death, the surviving spouse is not automatically and immediately vested with *dominium* of half of each asset. It is the duty of the executor of the joint estate to discharge all its liabilities and it is the half of the net balance of the joint estate which vests in the surviving spouse.'

[15]*De Wet NO v Attie Badenhorst (Edms) Bpk* 1963 (3) SA 117 (T) at 119B-D

[16] Compare: *Clarkson NO v Gelb and Others*, 1981 (1) SA 288 (W) at 293D – 294C and the authorities cited therein.

[17]See: Meyerowitz, *supra*, p 123." If the estate has not been brought under the supervision of the Master in terms of s 3(3) of the Estates and Succession Amendment Act, 2005, the reference to 'Master' in the quotation must be read as 'Magistrate'.

It is trite that her main duties as executrix were to secure possession of the assets of the estate; to determine the liabilities of the estate; to liquidate the estate to the extent required to meet its liabilities and, ultimately, to distribute the remainder of the estate to the rightful heirs and other beneficiaries in accordance with the law.

[6] Subject to the provisions of the Act, the rights and obligations that the deceased had under the 99-year lease immediately prior to his passing became part of the aggregate of assets and liabilities comprising the deceased estate that vested in the executrix upon her appointment. Of those provisions, s 53 is the most pertinent to determine the ambit of the rights and obligations under the lease that vested in the executrix; to consider the legality of the conduct and decisions of the parties pertinent to the issues at hand and to assess the validity of the conflicting contentions and claims put forward in this appeal. It is therefore necessary to quote it extensively:

> ‘53 Death or mental illness of lessee
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> (1) 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, as the case may be, may assign the lease to any person who is approved in writing by the Minister on the recommendation of the Commission.
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> (2) Pending the assignment of the lease in accordance with the provisions of subsection (1), the executor or curator shall continue the lease on behalf of the estate or the lessee, as the case may be, subject to the provisions of this section and the terms and conditions of the lease, and which shall be fulfilled by the executor or curator or on his or her behalf by a person nominated by him or her and approved in writing by the Minister.

> (3) If the executor or curator fails to assign the lease within the period of three months after the date of his or her appointment as executor or curator or such longer period as the Minister may allow, the Minister may cancel the lease, in which event, the executor or curator shall be entitled to be paid by the State, in accordance with the provisions of section 45, compensation for the benefit of the deceased estate or the lessee, as the case may be.
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> (4) Notwithstanding anything to the contrary in any other law contained, the Minister may deduct from any compensation payable in terms of subsection (3), any rent due or any other debt owing to the State in respect of the farming unit.
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> (5) If, pending the assignment of the lease or during the period the lease is continued by the executor or curator as provided in subsection (2), the executor or the curator or the person nominated by him or her in terms of that subsection, as the case may be, fails to comply with any requirement of this Part which was applicable to the lessee or fails to fulfil any term or condition of the lease, the provisions of section 50 and 51 shall apply.'

[7] It is clear from a reading of subsec (2) that, subject to the other provisions of the section, the executrix was obliged to continue the lease on behalf of the estate pending the assignment or cancellation thereof. She sought to assert these rights and obligations as executrix/nominal lessee in respect of the farm, but the appellant, who, *de facto* occupied the farm at all relevant times after the passing of his father, resisted her endeavours. The appellant claimed that he had been considered by his late father to be his successor and that his father intended that he should 'take over' the lease upon his passing. He also alleged that, because of his father's ailing health and advanced age, he had carried on the farming activities at his own expense on behalf of his father ever since the conclusion of the lease agreement. Eager to substitute his late father as lessee under the lease or otherwise obtain a lease in respect of the farm, he sought the Minister's

approval to that effect, purporting to do so in terms of s 53 of the Act. A letter of the appellant's lawyers dated 4 March 2004 accompanied his application. In the penultimate paragraph of the letter they captured the essence and purpose of his application:

> 'Under the circumstances our client is eager and willing to be substituted as lessee under the lease agreement and is it our instructions in terms of section 53 of the Land Reform Act to request your approval for the cession of the lease agreement by the executor to our client or alternatively to cancel the existing lease and to enter into a new lease agreement with our client as all our client's machinery and livestock are already located thereon. For purposes of the above we annex hereto an application form duly completed for your consideration. We also submit that our client is a fit and proper person and complies with all the requirements to be resettled.' (Emphasis added)

[8] As it happened, the executrix and a number of other members and representatives of the Meroro family co-authored a letter to the Permanent Secretary on the same day. In it, they collectively protested the fact that the appellant was acting as if the farm was his property and that he had refused to give the executrix or any other member of the Meroro family access to the farm. The letter includes a request by the family members that 'registration of the farm should . . . (be) passed to Mrs Hilia Meroro as the Head of the Family'; states that she, as the new head of the family, would be responsible together with the children of the deceased for the 'well-being' of the farm; records that they collectively authorise the Ministry of Lands, Resettlement and Rehabilitation (the Ministry) to transfer the farm to 'Ms Hilia Meroro and the family' and calls on 'the Director and the Permanent Secretary to intervene by issuing an order to stop or prevent' the

appellant and his brother from entering onto the farm without the consent of the executrix, the family and the Ministry.

[9] The Permanent Secretary of the Ministry responded on 19 April 2004 to the appellant's application. He advised that the lease was subject to the conditions of the Act; that the lease in respect of the farm could only be dealt with in terms of s 53 of the Act and other relevant policies of the Ministry; that in terms of the Act ‘Mrs. Hilia Meroro, the widow of the late David Meroro, is the beneficiary’; that the Ministry was ‘therefore not in a position to advise unless we are advised differently by the family or other legally constituted structures (as prescribed by the law)’ (*sic*). He also attached a copy of the letter that he had received earlier from the executrix and other members of the family for the appellant's information.

[10] The appellant took umbrage at the Permanent Secretary’s response. In a letter to the Minister, written by his lawyers on 12 July 2004, he challenged the Permanent Secretary's position that the deceased’s wife was the beneficiary under the Act and stated that the Act required 'a beneficiary to assign the lease to a person by the Honourable Minister, in writing, and on the recommendations approved by the commission' (*sic*). He again asserted that he had been ‘named as one of the beneficiaries' by the deceased. As regards the letter signed by members of the Meroro family, he maintained that not all the members of the family had signed the letter and that there were others, more directly related to the deceased, who were in favour of his request that the lease should be assigned to him.

[11] The issues surrounding the farm were tabled at a meeting of the commission on 15 July 2004 and the minutes reflect the following:

> 'The son of the late Mr Meroro is attempting to evict the widow from the unit, after the death of Mr Meroro. The surviving spouse should take over the allotment unless there is a will to the contrary according to the policies and procedures set out by the Ministry. The information, in our possession indicates that there is no will in existence that has been prepared contrary to the policy of the Ministry with regard inheritance of an allotment.
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> Resolution: Mrs. Meroro has the right to inherit the allotment and the son has no right to deprive the widow of access to the property in accordance with our policies and procedures.'

[12] Pursuant to this resolution, the Minister, the chairperson of the commission and the chairperson of the National Resettlement Committee co-authored a letter to the executrix on 14 July 2004 in which she was advised as follows:

> 'The Ministry of Lands, Resettlement and Rehabilitation herewith confirms the transfer of lease right on the farm Corsica, Farm No 89, farming unit B in the Khomas Region, from the Estate of the late David Meroro to his wife Mrs. Hilia Meroro, to whom he was married in community of property under the Namibian Marriage Act.
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> This is done in accordance with section 53, paragraph 1 of the Agricultural (Commercial) Land Reform Act (Act No 6 of 1995), which deals with the death of a Lessee.'

[13] The date of the letter notwithstanding, the appellant and the executrix were apparently only informed during October 2004 of the Minister's decision – in the case of the appellant, only after he had heard rumours about the decision and had

written to request particulars thereof. Before that, on 2 September 2004, the lawyers of the executrix demanded of him to vacate the farm within seven days, failing which, she (in her capacity as executrix) would take 'whatever steps might be necessary to secure his eviction or removal from the . . . farm'. The demand was repeated on 3 November 2004 but that time around, in her personal capacity as ‘lawful holder of the lease right granted to her by the Minister’.

[14] Aggrieved by the decisions adverse to his interests, the appellant brought an application in the High Court against the Minister, the chairperson of the commission, the Minister of Agriculture, Water and Rural Development and the executrix (cited as first to fourth respondents respectively) in which he sought an order in the following terms:

> ‘1. Reviewing and/or correcting and/or setting aside the first, second and third respondents’ decision dated 15 July 2004 to dismiss the applicant’s application for resettlement/lease in respect of farm Corsica, No 89 unit B, registration division “K”, Khomas Region.
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> 2. Reviewing and/or correcting and/or setting decide the first, second and third respondents’ decision dated 1 October 2004 to award and allocate the farm Corsica, No 89 Unit B, registration division “K”, Khomas Region to the fourth respondent.
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> 3. Declaring the decision of the first, second and third respondents dated 1 October 2004 to award and allocate the farm Corsica, No 89 Unit B, registration division “K”, Khomas Region to the fourth respondent to be in conflict of Articles 12 and 18 of the Constitution.

4. Directing that the first, second and third respondents (and in the event of the fourth respondent opposing) pay the costs of this application, jointly and severally, the one paying the other to be absolved'.

[15] All the respondents initially opposed the application but the executrix, who, in her personal capacity was the beneficiary of the decisions, later withdrew her opposition. The Permanent Secretary of the Ministry deposed to an answering affidavit on behalf of the remaining three respondents. The matter was eventually heard by Parker J and, on 5 December 2007, he made the following order:

'1. That the decision of the 2nd respondent made on 15 July 2004 to recommend to the 1st respondent to approve the assigning of the farm Corsica No. 89, Unit B, Registration "K", Khomas Region, by the 4th respondent to herself and the decision of the 1st respondent to approve the said assignment on 20 July 2004 is hereby reviewed and set aside.

2. That the applicant must vacate the farm referred to in the next preceding paragraph of this order (i.e. para (1) hereof) within 14 days of the date of this judgment in order toallow the 4th respondent to take occupation of the said farm and in order to continue the lease peaceably on behalf of the estate of the deceased lessee.

3. That the 4th respondent must, within three months of the date of this judgment, assign the lease in the said farm to any person in terms of s. 53(1) of Act No. 6 of 1995. Ifthe 4th respondent fails to assign the lease within the aforementioned time limit, the relevant provisions of s. 53 of Act No. 6 of 1995 shall come into force as contemplated therein.

4. That there shall be no order as to costs.'

[16] The appellant noted an appeal against paras 2, 3 and 4 of the order and the first and second respondents noted a cross-appeal against para 1 of the order. For

reasons of convenience, I shall first deal with the cross-appeal against para 1 of the order and, thereafter, with the appeal against the remainder of the order. Before I do so, I must point out that, although the court *a quo* dealt in its judgment with facts and issues relevant to prayers 1 and 3 of the Notice of Motion, it neither granted nor dismissed the relief sought therein. No appeal has been noted against this omission. This is probably so because the appellant accepted the findings of the court *a quo* that, given the provisions of ss 41(1) and 53 of the Act, the appellant's application to be substituted for the deceased as lessee under the lease was misconceived and bad in law and, therefore, that there was 'no application by the applicant before the first respondent in terms of s 41 of the Act'. This finding implies that no decision, on which the relief in para 1 of the notice of motion was premised, had or could have been taken. As regards prayer 3 of the Notice of Motion for a declarator, the court found that Art 18 of the Constitution (entrenching the right to fair administrative justice) should have been complied with in respect of the administrative decisions that had been taken and, on that premise, decided the remainder of the relief asked. Given the reasoning of the Court, the applicant might well have been satisfied that it was not necessary for the Court to expressly declare, in addition to the order setting aside the decisions, that they were taken in conflict with Art 18 of the Constitution.

[17] I now turn to the first to third respondent's cross-appeal against the order of the court *a quo* reviewing and setting aside the decision of the commission taken on 15 July 2004 to recommend to the Minister that the assignment of the farm by the fourth respondent to herself should be approved and the latter's approval of the assignment on 20 July 2004. The court *a quo* set aside the commission's

decision to make the recommendation in question to the Minister on the ground that the commission had acted unfairly for a number of reasons – with which I shall deal presently - and, because the Minister acted on that recommendation, also set aside the Minister's decision.

[18] The first reason given by the court for invalidating the commission's decision is based on the commission's failure to direct that the appellant's application for resettlement on the farm should be brought to the attention of the executrix for her to determine to whom she was going to assign the lease. The court reasoned that, being aware of the appellant's 'demonstrated genuine and legitimate interest in succeeding to the lease' as disclosed in the application, the commission should have so directed or 'rerouted' the application to the executrix, had it been 'minded to be fair and reasonable in the exercise of its statutory discretionary power'. The second reason is that the executrix failed to consider the 'suitability' of the appellant to be assigned the lease before deciding to assign it to herself.

[19] My difficulty with the court's reasoning is twofold: it does not appreciate (a) that the principles applicable under common law and the law of succession by which an executor/executrix must identify who should benefit from a disposition by means of assignment in a deceased estate are completely different from the considerations that may bear on the question whether the assignee is a 'suitable' person who may benefit from the land reform mechanisms provided for in the Act and (b) that the procedures applicable and authorities appointed to ensure the legality of dispositions by assignment under the law of succession are entirely

different from those contemplated by the Act for the approval of assignments in furtherance of the objectives of the Act.

[20] The power of an executor to 'assign the lease to any person' contemplated in s 53(1) is not unfettered and cannot be exercised in an arbitrary fashion as pointed out earlier. This may perhaps be best illustrated by a rhetorical question: if a lessee under such a lease were to leave a will in which he or she directs that the lease should be assigned to a named beneficiary upon his or her passing, will the executor be at liberty to assign it instead to any other person favoured by him or her (the executor)? If not, should it be any different when the lessee died without leaving a valid will but the rightful heir is identifiable by the principles of either customary or common law on intestate succession (whichever one of the two sources of law applies in the circumstances)?

[21] As I have remarked earlier in the judgment, the rights and obligations that the deceased had under the lease become part of the aggregate of assets and liabilities comprising the deceased estate upon his passing. This is also, in my view, in line with what the Legislature intended when it promulgated s 53. Subsection (2) requires of the executor to 'continue with the lease *on behalf of the estate*' and, should the lease be cancelled by the Minister in terms of subsec (3), 'the executor . . . shall be entitled to be paid by the State . . . *compensation for the benefit of the deceased estate* . . . .'

As such, all the rights and obligations of the deceased under the lease vested in the executrix upon his passing.[18] She had the fiduciary duty to administer his intestate estate 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[19]. As a matter of substantive law, the person to benefit from the assignment of the lease must be determined by reference to the applicable laws of 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.

[22] If the general principles of common law[20] relating to intestate succession must be applied – as seems to be the case[21] 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. So regarded, none of the particulars in the appellant's application for resettlement and the lawyer's covering letter dated 4 March 2014 was of relevance to the executrix in assessing his entitlement to benefit by assignment of the lease under the law of succession other than the fact that he

[18]Section 53(5) of the Act expressly require her to comply with the requirements of Part V of the Act that were applicable to the lessee and with the terms and conditions of the lease, failing which, the lease may be cancelled in terms of s 50 of the Act and any debt due to the State in terms thereof would be payable forthwith.
[19]For the sake of convenience, I shall collectively refer to those laws, in so far as they bear on the distribution of deceased estates as the 'laws of succession'.
[20]As modified by the Constitution and statute.
[21]Compare: Reg 2(a) of the Regulations framed under s 18(9) of Proc 15 of 1928 and the references and comments in fn 8.

was one of the deceased's children willing to accept such benefit. The latter was well-known to the executrix. Any referral of the appellant's application for resettlement by the commission to the executrix – as the court *a quo* held that it should have done - would not have assisted her in determining which beneficiary would be entitled to the assignment of the lease according to the principles of the law of intestate succession.

[23] Moreover, as regards the legality of the disposition of the rights and obligations under the lease by assignment to the executrix, it should be borne in mind that the supervising authority to see to it that the laws applicable to intestate succession and the prescribed procedures were followed in administering and distributing the estate under consideration in a transparent, accountable and legal manner was the magistrate, Windhoek[22] and/or the Master of the High Court.[23] Any complaint about the administration, liquidation or distribution of the estate by the executrix (which would include an assignment of the lease to herself), had to be lodged with the magistrate or the Master, as the case may be – not with the Minister. The Minister and the officials in the Ministry do not have supervisory authority over the administration, liquidation and distribution of deceased estates and do not have structures in place within the Ministry to exercise such supervision. That authority generally resides in the Master of the High Court or, in certain instances (such as the one under consideration), in the Magistrate of the district in which the deceased resided upon his or her passing. Neither does the

[22] See: Reg 3 referred to in fn 8 read with s 10(1)(*a*) of Act 27 of 1985 and s 3(2) of Act 15 of 2005.
[23] See: The court held in *Berendt and Another v Stuurman and Others* 2003 NR 81 (HC) that the Master had concurrent jurisdiction with the magistrate pending the steps to be taken by Parliament to redress the unconstitutionality of s 18(9) and the Regulations framed thereunder and, since the promulgation of s 3(3) and (4) of the Estates and Succession Amendment Act, 2005, the Master will have exclusive supervisory powers, if a person with an interest in the estate requests him or her in writing to administer the estate.

Minister or any official in the Ministry have the power to make decisions and give directions on those matters – there is not even a provision that they should generally be informed of matters concerning the administration of estates. They, therefore, would not have known which claims or objections the appellant or any other beneficiary in the estate might have made; whether they have been considered by the executrix or the magistrate/Master or precisely on which legal basis in the law of succession the executrix was entitled to assign the lease to herself (assuming for the moment that she had done so). Not knowing whether the facts and submissions advanced in the appellant's application for resettlement were in law relevant to the assignment, it does not seem to me that there was a duty on the commission to refer the appellant's application for resettlement to the executrix. Consequently, its failure to 'redirect' the appellant's application for resettlement to the executrix did not render the proceedings before the commission unfair.

[24] In the view I take, the Minister does not have any authority in terms of s 53 to assign a lease or to approve or disapprove of the executor's act of assigning a lease *per se*. The lease, being for a period of 99 years, of necessity extends beyond the lifetime of the lessee. It is therefore expressly provided in s 38 of the Act that it may be assigned by the executor upon the passing of the lessee.[24] He or she may do so as of right. The Minister's authority is circumscribed. The Minister may either approve or not approve (on the recommendation of the commission)

[24]Even without such a provision, there would have been a presumption in favour of assignment. Compare Wessels: *The Law of Contract in South Africa*, by Sir JW Wessels (2 ed) edited by AA Roberts *et al*, Butterworths, 1951 where he states in para 1739: '"The real question . . . to determine is whether our law implies that a lease of property in *longum tempus* is a lease to the tenant only, or to the tenant, his heirs and assigns. Now, the longer the period, the greater is the presumption that the parties intended the contract with all its obligations to be transmissible to the assigns of the lessee.'

the person to whom the lease has been assigned by the executor - the operative phrase of the section being: '*to any person who is approved* in writing by the Minister on the recommendation of the Commission'.[25] The Minister's approval or disapproval of the assignee is not informed by the applicable principles and provisions of the law of succession but by the provisions and objectives of the Act, i.e. to benefit, foremost, Namibian citizens who have been socially, economically, or educationally disadvantaged by past discriminatory laws or practices and who do not have access to any or adequate land. The converse is equally true: an executor's decision to assign a lease to a particular person is not informed by the 'suitability' of the assignee under the Act but by the person's legal right to such assignment on the applicable principles and provisions of the law of succession. I interpose here to note that, if the legitimate heir identified by the executor within the parameters of the law of succession as assignee of the lease is on good cause not approved by the Minister as 'suitable' within the parameters and objectives of the Act, the executor and beneficiaries in the deceased estate may well have to address the quandary by means of a redistribution agreement or through other available legal mechanisms. This concern does not arise in this case and it is therefore not necessary to make any definite finding on the available alternatives in such instances.

[25] The stated purpose of the appellant's application for resettlement was to seek the Minister's approval 'for the cession of the lease agreement by the executor' or, alternatively, for the Minister 'to cancel the existing lease and to enter into a new lease agreement' with the appellant. It was in pursuit of those purposes

[25]To quote the concluding provisions of s 65(1).

that the appellant included particulars and contentions to the effect that he was 'a fit and proper person (who complied) with all the requirements to be resettled'. Aspects of the application dealing with the request to cancel the lease, to resettle the appellant on the farm and the appellant's suitability for resettlement fell outside the ambit of the legal considerations which the executrix had to apply in determining who the lease should be assigned to. The only part of the application that could have been of relevance to her decision on the assignment of the lease was that, as the son of the deceased, he desired that the lease should be 'ceded' to him. That said, it is trite that, in the absence of a renunciation by a beneficiary, an executor must generally depart from the premise that legatees and other heirs and beneficiaries in a deceased estate are desirous or amenable to accept the benefits that they are entitled to in law. The fact that the appellant was keen to be resettled on the farm was also apparent from his conduct and the executrix could not have been mistaken on that point. For these reasons, the commission's referral of the appellant's application to the executrix would not have added anything to what she already knew about the appellant's relationship to the deceased and his desire to succeed the deceased as lessee of the farm.

[26] Consequently, I find myself unable to agree with the finding of the court *a quo* that the appellant's application should have been brought to the attention of the executrix 'to enable her to consider whether she should assign the farm to the (appellant), to herself, or to another person'. It must also be noted that the appellant did not seek an order to review or set aside any decision by or conduct of the executrix. It was not necessary, therefore, for her to defend the legality of her decisions or for the court *a quo* to determine whether the fairness or

reasonableness of her actions or decisions were affected by her failure to consider the appellant’s application to the Minister.

[27] The third reason for the court's finding that the commission's decision was unfairly taken is because the Ministry did not disclose its policies on resettlement and certain ‘facts’ to the appellant - the only ‘fact’ referred to being an entry appearing in the minutes of the commission's meeting on 15 July 2004 that he was trying to evict the executrix from the farm. I shall first consider the finding of unfairness based on the failure of the Ministry to disclose its policies on resettlement to the appellant and, thereafter, with the finding by the court that the decision was unfair because the commission based its decision on an 'allegation’ that the appellant 'was attempting to evict the widow . . . from the . . . farm, after the death of the deceased without giving (him) an opportunity to be heard on the point’.

[28] The National Resettlement Policy of the Ministry is set out in a printed document available from the Ministry. It has not been alleged by the appellant in his founding affidavit that he was not aware of the existence of the policy or of its terms. He was represented by legal practitioners at all relevant times to the application and the attention of his lawyers was specifically drawn by the Permanent Secretary in para 1 of the Ministry’s letter on 19 April 2004 to the fact that the farm had been leased to the deceased 'conditional to the provisions of the . . . Act . . . and that of the National Resettlement Policy (and administrative guidelines)' of the Ministry (my emphasis). In para 2 of the same letter, the appellant's lawyers were advised that the farm could, therefore, only be dealt with

in terms of s 53 of the Act 'and other relevant policies of the Ministry'. It is of some significance on this issue that, in their response on 12 July 2004 to the Permanent Secretary's letter, the appellant's lawyers did not make any reference to the resettlement policy or requested copies thereof - as the commission could reasonably have expected them to do, had they been unaware of the terms or existence of the policy, given the Ministry's express and specific reliance thereon in the letter. On these facts, I do not find support for the finding of the court *a quo* that the policy, which is a public document, had not been disclosed as it should have been.

[29] I am also not persuaded that the 'allegation' that the appellant was trying to evict the executrix from the farm was a 'fact' which should have been disclosed to him prior to the commission's meeting so that he could respond thereto either by letter or personal appearance before the commission – as the court held. It is my understanding of the minutes that, what the appellant now labels as an 'allegation', was actually a finding of the commission based on the facts and circumstances that they considered at the meeting. That being the case, the timeline made disclosure thereof before the meeting and an invitation to respond thereto – as the court required – impossible. The question should rather be whether the commission, applying its mind to the facts before it, could have reasonably arrived at that conclusion?

[30] The letter of the Meroro family to the Permanent Secretary on 4 March 2004 was undoubtedly an important source of the facts considered by the commission. In the letter it was expressly stated that the appellant was treating the farm as his

property and that he was the only person having access to it. The Permanent Secretary forwarded a copy of this letter to the appellant's lawyers on 19 April 2004 – well before the commission's meeting - and, although the lawyers commented on other matters mentioned in the letter, they did not deny these allegations. The veracity of allegations is further supported in broad terms by the statements made by the appellant's lawyers in the letter that accompanied the appellant's application for resettlement on 4 March 2004. The letter states on his behalf that, after the death of his father, the executrix 'has neither lived, reside or settled on the farm at all and any effort by her and her extended family to obtain residence will be *mala fide*'; that the appellant had 'exercised daily personal control over the day-to-day management of the farm (and) held the keys to the farm entrance to prevent unauthorised entry'. The application, I should add, was intended to secure a 'cession' of the lease to the appellant to the exclusion of the executrix and, ultimately, his resettlement on the farm. If these facts are considered against the background of possession under the lease that the executrix jointly exercised over the farm through the estate that she had jointly shared with her husband during his lifetime by virtue of their marriage in community of property; the obligation imposed on her as executrix by s 53(2) of the Act to continue with the lease on behalf of the estate after his passing; the consequences which may result should she fail as executrix to comply with any of the requirements that had been applicable to her late husband under Part V of the Act or fail to fulfil any term or condition of the lease, the inference is inescapable that the appellant's conduct amounted to a *de facto* deprivation of occupation which she jointly had with her husband before his passing and a denial of access after that event. These considerations, in my view, reasonably informed the

commission's inference that, on the totality of facts and circumstances placed before it by the appellant and the Meroro family, the appellant was attempting to 'evict' her from the farm.

[31] It is for these reasons that I cannot support the grounds on which the court *a quo* found that the decisions of the commission and Minister should be set aside. It does not, however, follow that the cross-appeal should succeed without more: the appellant also challenged the validity of the decisions on a number of other grounds raised in his founding affidavit and it is only if those grounds lack merit that the cross-appeal must be dismissed.

[32] The appellant alleged, amongst others, that the jurisdictional facts required for the exercise of the Minister's discretion under the Act were not present; that the commission and the Minister did not appreciate the nature of their duties and discretion in terms thereof and that they acted *ultra vires* those provisions. Read in the factual context of this case, these assertions raise the following questions: Did the executrix assign the lease for the Minister to approve of the assignee as contemplated in s 58 of the Act? If not, did the Minister appreciate that, without such an assignment, he could neither effect nor 'confirm the transfer of the lease right' on the farm to the executrix or, for that matter, approve of an 'assignee'? To the extent that the commission recommended an assignment of the lease or the Minister purported to assign the lease to the executrix, did they act within their powers in terms of the section? It is to these questions that I shall turn next.

[33] The concept of an ‘assignment’ (and its derivatives), when used in the context of lease agreements, is a term of art with defined legal substance and consequences: it contemplates the cession of all rights and the delegation of all obligations under a lease to the assignee. If effected by the lessee, his or her rights under the lease accrue to the assignee, who, at the same time also assumes the obligations thereunder. It terminates the rights and discharges the obligations of the previous lessee, thus effectively substituting the assignee as tenant in lieu of the lessee for the remainder of the lease.[26] Wessels J remarked in *Rolfes, Nebel & Co v Zweigenhaft*[27] that ‘an assignee is a person who enjoys the benefits and takes over the obligations of the lessee’ under the lease.

[34] The transfer of the remainder of the lease in this way is, in substance, what s 58(1) of the Act required of the executrix to do. What she purported to do, however, was something completely different. In the Meroro-family’s letter of 4 March 2004, they requested and authorised the Ministry to pass ‘registration of the farm’ to the executrix as head of the family. The letter was co-signed by the executrix as one of the members of that family, not in her official capacity as executrix in the deceased estate. But even if I were to accept that she also made the request in her nominal capacity, the request made and authorisation given therein was for the Ministry to ‘transfer the farm’ to 'Ms Hilia Meroro and the family'. What she and the family sought to achieve is not what s 58(1) contemplates or allows. The proprietary rights which vests in a new owner upon

[26] In *Green v Griffiths* (1886) 4 SC 346 De Villiers CJ remarked (at 351): '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 lessee - in other words, of transferring the lessee's contractual obligations towards the lessor from the lessee to the assignee'. Compare also the discussion by Goldin JA in General Finance Co (Pvt) Ltd v Robertson 1980 (4) SA 122 (ZA) at 130

[27] 1903 TS 185 at 189

the transfer of a farm in his or her name are vastly different from the aggregate of rights accruing to and obligations assumed by an assignee in respect of the remainder of a lease over a farm. 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 or persons entitled to the 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 new lessee under the lease. Inasmuch as the Meroro-family letter was the only formal communication of the executrix' intentions, could it be said that by asking for the transfer of the farm to her and the family, she appreciated that she would at best only become a co-lessee under the lease and, by implication, consented to be bound as such by the terms and conditions thereof? The question needs only be asked for its answer to be apparent. The Permanent Secretary of the Ministry stated in his answering affidavit on behalf of the first to third respondents that the executrix had made repeated requests that the farm should 'be transferred to her as per the decision of the Meroro family' and, based thereon, submits that she either expressly or by conduct assigned the farm to herself. For the reasons already given, the evidence lacks the required factual basis to substantiate the submission. Counsel was also unable to refer us during argument to any statement that would support the inference suggested. In my view, the conclusion is inescapable on the evidence that the executrix never assigned the lease to herself or any other person in terms of s 53(1) of the Act.

[35] It is evident from a reading of the subsection that it is framed on the premise that, if an assignment is to be effected because of the lessee's passing, the assignment may only be done by the executor/executrix appointed to administer the deceased lessee's estate. On this point, I agree with the court *a quo* where it held that 'only the executor of the estate of the deceased has the statutory power to assign the remainder of the lease . . . .'.[28] In the absence of an assignment by the executrix (acting in her nominal capacity) to a lawful beneficiary in the deceased estate, the Minister had no power or authority under s 53(1) to 'assign' the lease to her in her personal capacity or, for that matter, to any other person. By deciding to confirm 'the transfer of lease right on the farm' to the executrix, the Minister failed to appreciate that the subsection precluded any person other than the executrix to assign the lease and that he had no power to do so. Inasmuch as he purported to effect the assignment on the recommendation of the commission, he acted *ultra vires* his powers under the Act. For that reason, his decision was null and void and the High Court was correct in setting it aside - albeit for different reasons. In the result, the first to third respondents cross-appeal against par 1 of the order of the High Court must fail.

[36] The main appeal is directed against paras 2, 3 and 4 of the order of the court *a quo*, i.e. that the appellant must vacate the farm within 14 days of the date of the order for the executrix to take occupation thereof; that the executrix must assign the farm within 3 months of the date of the judgment failing which, the Minister

[28] In para 10 of the judgment, I do not agree with the remainder of the sentence that the Minister 'merely approves of the assignment'. As I have held earlier, the executrix had the right to assign the lease and the Minister's power was limited to either approve or not to approve of the assignee, given the objectives and provisions of the Act to mainly benefit previously disadvantaged Namibians.

may cancel the lease and, finally, that there will be no order as to costs. Aside from the order dealing with costs, none of these orders have been sought on motion by any of the litigants – least of all by the appellant who brought the application in the first instance.[29]

[37] The specific relief that the appellant sought and the respondents opposed is contained in the notice of motion. In application proceedings, the affidavits lodged by the litigants in support or opposition of the relief prayed for 'take the place not only of the pleadings, but also of the essential evidence'[30] that would be adduced in action proceedings at a trial. The relief, as formulated in the notice of motion, determines the cause that must be shown and the evidence that must be presented by applicants in their founding papers. It also informs the respondents of the case they are required to meet in answer and of the orders that may be granted against them should they fail to do so. In this instance, there was also no counter-application for relief against the appellant that he had to answer to. I interpose here to remark that had the Permanent Secretary of the Ministry been mindful to seek an order that the appellant should vacate the farm, he should have obtained authority from the first to third respondents to bring a counter-application to that effect rather than simply noting a request to that effect in the answering affidavit filed on their behalf.

Neither was there an application to amend the notice of motion at or before the hearing, which may sometimes be allowed in the absence of prejudice and on

[29] This must be evident from a comparison between the relief set forth in the notice of motion as quoted in para [14] of this judgment and the terms of the order recited in para [15] above.
[30] Hano Trading CC v JR 209 Investments (Pty) Ltd and Another, 2013 (1) SA 161 (SCA) para 10.

good cause shown. As it were, the executrix had withdrawn her opposition to the application prior to its hearing and an amendment at the hearing contemplating an order compelling her to perform a specific act within a set period would have required further notice to her.

[38] Had the first to third respondents moved a counter-application against the appellant that he should vacate the farm within a period of 14 days, the appellant may have raised a number of defences. He could conceivably have resisted such a prayer on the ground that he had a right to retention over the farm until compensated for necessary expenses incurred by him during his late father's lifetime. Whether he had a defence which would have been good in law is not known, because he was never called upon to meet such a case. At the very least, he should have been accorded an opportunity to raise the defences that he might have had. The order in para (2) made against him to vacate the property within 14 days came without affording him a procedurally fair and adequate opportunity to resist it. For that reason, it was irregular and cannot be sustained.

[39] The order that the executrix must assign the lease within 3 months, failing which the Minister may cancel the lease, was also not part of the relief sought by the appellant. The order was made without any notice to her and without affording her an opportunity to resist it. Unlike s 53(3) of the Act, the 3 month-period set by the court's order does not even allow for an extension of the period by the Minister. Such extensions may well be required if claims against the estate or the manner in which the executrix proposes to distribute the assets of the estate (including a proposed assignment of a lease) is disputed by an interested party. I also find it

difficult to understand that she was directed to assign the lease in circumstances where the judgment of the court *a quo* was premised on the fact that she had assigned the lease to herself and, as I have pointed out earlier, the application did not challenge the legality of any act or decision of the executrix. All of the substantive relief that the appellant sought, was directed against the decisions of the first to third respondents - not any of the decisions made by the executrix. For these reasons, the proceedings resulting in the order made in para (3) *a quo* is also irregular and that order falls to be set aside.

[40] The reason why the court *a quo* declined to award costs to the appellant was because his 'misconceived and misrouted' application to be resettled on the farm formed a major part of the application and was the basis on which he sought part of the relief. It is indeed so that he was unsuccessful in obtaining the relief prayed for in para 1 of the notice of motion (i.e. to have the decision of the first to third respondents to dismiss his application for resettlement on the farm set aside) and that it formed a major part of his application. It is trite that a trial court has a wide discretion in awarding costs and I am not persuaded that the appellant has shown good cause why we should interfere with the judicial exercise of that discretion.

[41] The refusal of the appellant's application for resettlement did not feature in this appeal and the same considerations that informed the order of costs made in the High Court do not find any application here. The costs in the appeal should follow the result.

For these reasons, the following order is made:

1. The main appeal against paras (2) and (3) of the order of the High Court under Case No (P) A 221/06 succeeds and those orders are set aside.

2. The cross-appeal against para (1) of the order of the High Court is dismissed.

3. The first to third respondents in the main appeal and first to third appellants in the cross-appeal jointly and severally, the one paying the other to be absolved, pay the costs of the appeal and cross-appeal, such costs to include the costs of one instructing and one instructed counsel.

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MARITZ JA

_____
MTAMBANENGWE AJA

_____
CHOMBA AJA

APPEARANCES

APPELLANT:	J A N Strydom
	Instructed by Koep & Partners
RESPONDENTS:	M Nixon
	Instructed by Government Attorney