**REPORTABLE**

CASE NO: SA 5/2010

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**SIMON NEKWAYA** **APPELLANT**

(herein cited in his personal capacity and in his
Capacity as new executor in the estate of the
Late Andreas Nekwaya)

and

**ANNA NEKWAYA** **FIRST RESPONDENT**

**TANGI NEKWAYA** **SECOND RESPONDENT**

(herein assisted by their mother and natural
Guardian Elizabeth Malju as far as need be)

**Coram:** MARITZ JA, MAINGA JA and STRYDOM AJA

**Heard:** **20 March 2012**

**Order:** **20 March 2012**

**Delivered:** **13 December 2016**

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**APPEAL JUDGMENT (REASONS)**

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STRYDOM AJA (MAINGA JA concurring):

[1] Argument in this matter was heard on 20 March 2012 before three judges, namely Maritz JA, (presiding) Mainga JA and myself. After discussions the court allowed the appeal and indicated that its reasons would follow. I will later refer more fully to the order issued. The learned judge presiding was designated to write the judgment of the court. The learned judge retired during 2014 without writing the judgment and I was now requested by the learned Chief Justice to deal with the matter. It now seems that as a result of health problems the learned presiding judge is no longer available to participate in the writing of this judgment. However, in terms of s 13(4) of the Supreme Court Act, Act 15 of 1990, two judges, forming the majority, can still give a valid judgment, provided that they agree. See also *Wirtz v Orford & another* 2005 NR 175 (SC).

[2] For the sake of convenience I will refer to the parties as they appeared in the court *a quo* or by name as there is more than one deceased and most of those involved have the name Nekwaya with a different first name.

[3] The two applicants, both minors, assisted by their mother and natural guardian, Ms Elizabeth Malju, brought an application in the High Court of Namibia for a declaratory order and other relief. When the application was launched there also was a second respondent cited, namely the Ongwediva Town Council of the Municipality of Ongwediva. The Municipality did not oppose the application and did not file any affidavits. They did not join in the appeal and consequently played no active role in the appeal.

[4] Because of certain faulty allegations and omissions in the founding affidavit of the applicants the respondent, in his answering affidavit, gave notice of points *in limine* he intended to take at the hearing of the matter. This caused the applicants to file an amending affidavit correcting the offending allegations and omissions. Although initially opposed by the first respondent the opposition was later on withdrawn and the court *a quo* allowed the applicants to amend their application.

[5] The relief applied for by the applicants, as now set out in an amended notice of motion, was the following:

> '1. A declaratory order in terms of which the court declares that first and second applicants are the sole and exclusive joint owners of Stand 063, Ongwediva;
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> Alternatively
>
> 2. That first and second applicants are the only persons having a “permit (sic) to occupy (PTO)” in respect of Stand 063 Ongwediva and thereby are the only persons in whose favour the second respondent should register ownership of Stand 063 once registration of ownership commences in the Deeds Office of Windhoek in respect of the area in which Stand 063 Ongwediva is situated.
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> 3. That the second respondent is ordered to record in its records first and second applicants as the correct and only persons presently holding a PTO (permit (sic) to occupy) and thus are entitled to be registered as joint owners of Stand 063 Ongwediva and that the second respondent will not change such entries in its records without prior written notice to and consent by first and second applicants or their natural guardian or legal representative first having been obtained.
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> 4. The first respondent is ordered to desist claiming ownership and/or a right to occupation or any other right to the use of Stand 063, Ongwediva;

5. The first respondent is ordered to prepare an account reflecting all monies he received from any tenant in the form of rental or otherwise in respect of Stand 063, Ongwediva and the buildings thereon and is further ordered to pay over to First and Second Applicants such funds received by him from the date of the agreement in terms of which Stand 063, Ongwediva was awarded to first and second applicants by the previous executor of the late Andreas Johannes Nekwaya, namely Martin Nekwaya and date hereof;

6. The first respondent is ordered to file a comprehensive estate account in respect of all assets under his control as executor that previously belonged to his father, the late Andreas Johannes Nekwaya, showing in such account how he proposes to distribute the assets to the children of the late Andreas Johannes Nekwaya;

7. Costs of this suit against any respondent who opposes this application.'

[6] The applicants were successful and they obtained an order in line with their alternative prayers. Although there had been no prayer to that effect the learned judge *a quo* declared the alleged contract of lease, between the first and second respondents, null and void for lack of material allegations to support the contract.

[7] The first respondent was not satisfied with this outcome and appealed to this court.

The law

[8] Before Independence no private individual, could own landed property in, what had then been known, as a native or Bantu reserve. In order to secure certainty of tenure an occupier of land could apply for a Permission to Occupy (PTO) such property. Generally speaking the PTO protected the possession of the holder thereof

against all comers, except the State. Certainty of tenure had the further effect that holders thereof started to develop their properties.

[9] The court *a quo* dealt with the law concerning PTO's and pointed out that according to reg 1 of the Bantu Areas Land Regulation made under s 25(1) of the Bantu Administration Act, 1927 (Act 38 of 1927) read with s 21(1) and 48(1) of the Bantu Trust and Land Act, 1936 (Act 18 of 1936) a permission to occupy means:

> '. . . permission in writing granted or deemed to have been granted in the prescribed form to any person to occupy a specified area of Trust Land for a specific purpose. . . . '

[10] The learned judge, who wrote the judgment of the court, concluded as follows:

> '[14] Thus, in the scheme of things of the applicable colonial law, "ownership" of land was the exclusive preserve of whites, and "permission to occupy" land applied exclusively to blacks. By the South African Bantu Trust in South West Africa Proclamation, 1978 (AG 19 of 1978), the administration of the South African Bantu Trust was transferred to the Administrator-General of South West Africa. A significant effect of AG 19 was that the system of PTO that applied to Bantus or blacks in South Africa became applicable to blacks in South West Africa. Thus, in South West Africa like in South Africa, blacks could only be granted "permission to occupy" land in the so-called homelands, as opposed to "ownership" of land. "Homelands" was part of land north of the Police zone as defined in the First Schedule to the Prohibited Areas Proclamation, 1928 (Proclamation 26 of 1928).'

[11] According to Namlex: *Index to the Laws of Namibia* 2010; researched and compiled by the Legal Assistance Centre, under the heading ‘Blacks’ *(Namlex),* the Native Administration Proclamation, 1928 (Proclamation 15 of 1928) applied to all of South West Africa with the exception of Chapter IV thereof. Only selective parts of

this Chapter were later on applied to Ovamboland and other territories north of the Police Zone. These were s 17(6), concerning native marriages, and s 18(3) and (9) concerning succession. This came about by GN 67 of 1 April 1954 which applied with retroactive effect from 1 April 1950. GN 70 of 1954 which only applied 'to native estates in that portion of the territory north of the Police Zone', contained regulations concerning inheritance and was issued in terms of s 18(9) of Proclamation 15 of 1928. (See *Namlex*). It is common cause that Ovamboland was such a part of the territory north of the Police Zone.

[12] RSA Proclamation R 192 of 15 February 1974 applied all the provisions of s 18 of Proclamation 15 of 1928, and the regulations made under GN 70 of 1954, to all of South West Africa with the exception of Ovambo, Kavango and Caprivi. As a result only ss 17(6), 18(3) and 18(9) applied to Ovambo before the transfer proclamation 19 of 1978 was issued.

[13] Proclamation AG 19 of 1978, transferred, *inter alia,* the provisions of Act 18 of 1936, an Act which had, until then, only applied to the Republic of South Africa, to apply to the then South West Africa. This also brought into play the regulations made in terms of that Act. (See the regulations promulgated by Proclamation No. R 188 of 11 July 1969) (the 1969 regulations). This is made clear by s 1(2) of the transfer Proclamation which provides as follows:

> 'A reference in this Proclamation to any particular law, shall be construed as including a reference to a regulation, rule or other enactment made under or relating to that law.'

[14] After the Independence of Namibia the Constitution, Art 100, vested the ownership of all land that had not previously been lawfully owned, in the Government of Namibia. See in this regard also Schedule 5 of the Constitution. The Constitution took effect on 21 March 1990, the day of Namibia's Independence. A further development in this regard was brought about by the Communal Land Reform Act, 2002 (Act 5 of 2002). In terms of s 17(1) all communal land areas shall vest in the State to be held in trust for the benefit of the traditional communities residing in those areas. This included Owamboland. See Schedule 1.

[15] This Act further provides that where a local authority is situated or established within the boundaries of any communal area the land comprising such local authority area shall not be communal land. Read with the provisions of the Local Authorities Act, 1992 (Act 23 of 1992) the ownership in such land shall vest in the particular local authority.

[16] As far as is relevant to this case ss 18(1), 18(2) and 18(9) and GN 70 of 1954 were declared unconstitutional in the case of *Berendt & another v Stuurman & others* 2003 NR 81 (HC). The order granted was postponed till 30 December 2005 to afford Parliament an opportunity to correct any defect in the said law. (See Art 25(1) *(a)* of the Namibian Constitution).

[17] In turn the 1969 regulations were repealed by R38 of the regulations made in terms of the Communal Land Reform Act, Act 5 of 2002.

[18] Although the Estates and Succession Amendment Act, Act 15 of 2005, repealed those sections declared unconstitutional by the *Berendt*-case, (*supra),* namely ss 18(1), 18(2), and 18(9) and also s 18(10) it continued to state::

> 'Despite the repeal of the provisions referred to in subsection (1), the rules of intestate succession that applied by virtue of these provisions before the date of their appeal 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.'

[19] It seems that thereby the provisions of the 1969 regulations were resurrected with retroactive effect and, as pointed out by *Namlex,* as far as intestate estates were concerned, the legal position was again the same as before the *Berndt* judgment had been delivered.

[20] As a result of the above I am of the opinion that at the time of the death of Mr Andreas Nekwaya, in May 2001, the law which applied to the administration and the distribution of the estate had been the 1969 regulations and GN 70 of 1954. That then is in my opinion the law in terms of which this court must decide the issues in this matter.

The background

[21] Mr Andreas Nekwaya was a wealthy business man who had been the holder of many PTO's of landed properties, which properties were developed by him. One such property is Stand 063, Ongwediva, on which was built a three storey business building with shops leased to various tenants. According to the affidavit of Ms Elizabeth Malju the first respondent was born out of the relationship between Mr

Andreas Nekwaya and one Cecelia Junius. Later Mr Andreas Nekwaya allegedly married the mother of first respondent, Ms Junius.

[22] According to Ms Malju she had a liaison with Mr Andreas Nekwaya for some ten years, until his death on 11 May 2001. From this relationship the two applicants were born.

[23] Mr Andreas Nekwaya died without leaving a will. Ms Malju further stated that according to their custom, his eldest brother, Mr Martin Nekwaya, was appointed by the magistrate of Oshakati as executor of the estate of Mr Andreas Nekwaya. This happened on 18 May 2001.

[24] Mr Martin Nekwaya thereafter transferred the PTO in regard to Stand 063, also known as Plot 2, old Ongwediva, to himself in his personal capacity. He then transferred the property to the two applicants in lieu of maintenance. This is further confirmed by a written agreement between Mr Martin Nekwaya and the mother of the applicants Ms Elizabeth Malju, dated May 2002. In a further written agreement, dated 31 October 2003, between Mr Martin Nekwaya, Ms Cecilia Nekwaya, the mother of Simon Nekwaya, and Mr Simon Nekwaya, it was again confirmed that Stand 063 would be transferred to Martin. At the time it was not yet possible to register ownership in the property to the applicants.

[25] However, Mr Martin Nekwaya also died on 10 April 2005 and Mr Simon Nekwaya (first respondent in the application) was then appointed as executor in the estate of Andreas Nekwaya. Both his appointment as executor, and that of Mr Martin

Nekwaya had been done by the magistrate of Oshakati, purportedly in terms of the provisions of Government Notice 70 of 1954.

[26] After his appointment Simon Nekwaya laid claim to Stand 063, Ongwediva. As a result the Municipality of Ongwediva (the second respondent) granted to Mr Simon a PTO in respect of Stand 063, Ongwediva and allegedly entered with him into a contract of lease in regard to the property.

[27] However, attempts by the legal practitioner for the applicants, to safeguard for them their claim to Stand 063, did not meet with success as a result whereof this application was brought by them.

The appeal

[28] As a result of the appellant's non-appearance on the date of set down of the appeal in this court, he applied for condonation of his non-appearance, an order to re-instate the appeal and further condonation for his delay in bringing this application. The appellant also applied for leave to introduce further evidence in this Court. This concerns evidence pertaining to the PTO granted to him by the second respondent. This PTO was attached to the affidavit of Ms Malju who only attached the first two pages thereof. The first respondent now wants to also put the missing pages before the court.

[29] The court granted the condonation prayers and re-instated the appeal. The application for leave to introduce further evidence must still be decided if necessary.

[30] Ms Bassingthwaighte, who appeared on behalf of the first respondent, now the appellant, submitted that the evidence presented by the applicants failed to support the relief claimed by them. I agree with counsel. The first problem facing the applicants is their failure to prove what the conditions under which the PTO, awarded to Mr Andreas Nekwaya and on which their claims were based, provided.

[31] Without knowing what the rights and obligations are in terms of the PTO, the respondents' entitlement to what they claim are without any foundation. Without such knowledge it is not even possible to determine the respondents' claim to this particular property to the exclusion of all other heirs. There is evidence that there are also other children born out of the relationship between Mr Andreas Nekwaya and Ms Junias although we do not know the number of children so born.

[32] Apart from the fact that the court is left in the dark as to the provisions of the PTO of Mr Andreas Nekwaya there is also no evidence when this PTO had been granted, and by whom. It could have been granted by either the Administrator-General or the Government of Namibia.

[33] The regulations, applied to the then South West Africa by AG Proclamation No 19 of 1978, namely the 1969 regulations, distinguished between 4 types of PTO's. (See R 47(1)*(a)*). In s (iii) of R 47(1)*(a)* reference is made to trading allotments which, according to the evidence of Ms Malju, one can infer that this was the use to which this building was put. In this regard she attached a number of receipts to the application which, according to her, represented payment of rent by various lessees who leased space in this building for purposes of doing business.

[34] R 56(1)*(b)* of the 1969 regulations published on 11 July 1969, *inter alia,* also applied to trading allotments. This regulation provided as follows:

> '56(1)*(b)* trading allotment or any other allotment for any purpose not specified in this subsection shall not –
>
> (i) be transferred, hypothecated, leased, sub-let or otherwise disposed of to a person who is not a Bantu without the approval of the Minister, nor shall such allotment or land be subdivided or held by more than one person;
>
> (ii) be transferred, hypothecated, leased or sub-let or otherwise disposed of to a Bantu without the approval of the Secretary or his authorised representative.'

[35] See further R 47(1)*(a)* which provided that a trading allotment was subject to the general and special conditions prescribed in annexures 28 and 32 of the regulations. One of the conditions prescribed by annexure 28, which contained the general conditions applicable to all allotments, namely condition 3, provides as follows:

> '3. The rights of the holder in or to the allotment or any improvements thereon shall not be transferred, mortgaged, ceded, leased, sub-let or otherwise disposed of except in accordance with such prior approval in writing and in such manner as is or may be lawfully prescribed.'

[36] There is no evidence that any prior, or for what it may be worth, at any later stage, approval was obtained from the relevant authority to transfer the PTO in regard to Stand 63, Ongwediva to Mr Martin Nekwaya in his personal capacity and then to transfer it from him to the two applicants. Once the PTO had been

transferred to Mr Martin Nekwaya he did not act in his capacity as executor in the estate when he again transferred it to the two applicants. It is so that the second respondent granted to Simon a PTO in respect of Stand 63, Ongwediva, but it is doubtful whether it could do so where there had already been a PTO in existence. Again the lack of evidence restrain this Court from making any definitive finding in this regard.

[37] There are also the uncertainties in regard to the relationships between Mr Andreas Nekwaya with Ms Junius and Ms Malju. According to Ms Malju, Mr Andreas had been married to Ms Junius in community of property. However, no marriage certificate, or copy thereof, had been attached to the application. Neither did Ms Mulja qualify herself as a person who witnessed the civil marriage ceremony and who could, from her own personal knowledge, testify to the fact. Her evidence in this regard is therefore no more than hearsay. She described her relationship with Mr Andreas Nekwaya as a liaison which seems to me to be something different from a union according to customary law. Uncertainty in this regard may have an effect on how the estate should be administered and who qualifies as heirs in the estate.

[38] Ms van der Westhuizen, appearing for the two minor applicants, submitted that the fact that the Municipality did not oppose the application must be seen as some admission and support by them that the conditions of the PTO of Mr Andreas Nekwaya were consistent with, and did not prohibit the steps taken by Mr Martin Nekwaya in regard therewith. This is no more than speculation and to me it seems that the Municipality was happy to leave the dispute in the hands of the court to solve

it for them. They say so in so many words in a letter by their legal practitioner, dated 18 August 2008, addressed to the legal practitioner of the two minor applicants.

[39] A further insurmountable obstacle which the applicants face is the appointment of Mr Martin Nekwaya and Mr Simon Nekwaya as executors in the estate of Mr Andreas Nekwaya by the magistrate of Oshakati. In two decisions in the High Court of Namibia the learned judges concluded that the appointments of executors by magistrates in regard to intestate estates, are invalid and void *ab initio.* See in this regard the *Berendt*-case, a judgment by Manyarara AJ and the case of Kavendjaa *v Kaunozondunge NO & others* 2005 NR 450 (HC), a judgment by Damaseb JP (as he then was). Ms Bassingthwaighte submitted that this was a purely legal issue and that the said cases were correctly decided.

[40] Ms van der Westhuizen did not challenge the correctness of these decisions but submitted that this court need not decide this issue seeing that Mr Martin Nekwaya's appointment as executor of the estate of Mr Andreas Nekwaya had been in terms of the customary laws. This argument must fail as there was no evidence as to what the customary law is in this regard'.

[41] In the *Berendt*-case Manyarara, AJ, found that the distinction drawn in regard to the administration of estates between whites and blacks rests on one of the enumerates mentioned in Art 10 of our Constitution, namely race, and is consequently based on discrimination. (See *Muller v President of the Republic of Namibia & another* 1999 NR 190 (SC) at 199).

[42] Also in the *Berendt*-case the executor of the estate had been appointed by the magistrate of the particular district and the court was requested to declare such appointment null and void. The learned judge granted the order because he found that there was no statutory authority that magistrates could appoint executors. I understand this to mean that there was also no authority whereby magistrates were empowered by necessary implication to appoint an executor in this instance.

[43] In the *Kavendjaa*-case Damaseb JP (as he then was) pointed out that magistrates are appointed under the Magistrates' Act and that they therefore only enjoy such competence and powers as are given to them under law. By appointing an executor for the estate of a deceased native, a magistrate is performing a power. Such power can only exist if it is expressly granted by law or can be inferred by necessary implication. Support for this was found in Baxter, Lawrence: *Administrative Law: Legal Regulation of Administrative Action in South Africa,* 1994 at 404-5 and see also p 384. The learned judge examined various relevant statutory enactments and concluded that he could not find 'any authority or power in terms whereof, either expressly or by necessary implication, third respondent (the magistrate) could lawfully appoint first respondent as executor to the estate of the deceased'. The learned judge President therefore agreed with the conclusion reached in the *Berendt*-case.

[44] I agree with the learned judges regarding the appointment of executors by magistrates. In the present instances both magistrates cited GN 70 of 1954 as the enactment whereby they were empowered to appoint the executors in the estate of Mr Andreas Nekwaya. GN 70 of 1954 consists of three sections of which s 3 of the

notice empowered the particular Native Commissioner to supervise the administration of intestate estates where, at the time of the deceased's death:

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

(ii) where he was a widower, or divorcee of a marriage in community of property and was not, subsequent to his marriage, survived by a partner in a customary union, in which instance the property shall devolve as if he had been a European.

[45] There is consequently no express empowerment to magistrates to appoint in these circumstances executors to estates nor could I find any indication that would suggest that magistrates are so empowered by necessary implication.

[46] I have also considered all the other relevant legislations but could find no express empowerment, expressly or by necessary implication, that would have empowered magistrates to appoint executors in this instance. I therefore agree that the above two cases were correctly decided and consequently that the appointments of Mr Martin Nekwaya and Mr Simon Nekwaya as executors in the estate of Mr Martin Nekwaya by the magistrate of Oshakati, are null and void.

[47] For the above reasons it follows that the appeal must succeed. There were various other side issues such as whether the holder of a PTO has a real right or whether the right was only personal; whether the right forms part of the estate of a

deceased person and was transferable to the heirs; whether European or customary law is applicable in this instance. Apart from the fact that some of these issues have not been covered by the application and the relief prayed for I do not find it necessary to deal with these issues because of the conclusion to which I have come herein before.

[48] For the reasons set out herein before this court issued at the time, the following order:

1. That the appeal succeeds.

2. That the order of the High Court made on 17 February 2010 is set aside and the following order is substituted:

   '(i) The application is dismissed.

   (ii) The first and second applicants jointly and severally, the one paying the other to be absolved, is ordered to pay the costs of the 1st respondent.'

3. The appellant is ordered to pay the wasted costs of the respondents occasioned by the postponement of the appeal on the 29 March 2011, as well as the costs occasioned by the appellant’s application for condonation and reinstatement.

4. Subject to para 3, the respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of the appellant in the appeal, such costs to include the costs of one instructed and one instructing counsel.

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**STRYDOM AJA**

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**MAINGA JA**

APPEARANCES

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|---|---|
| APPELLANT: | N Bassingthwaighte<br>Instructed by Shikongo Law Chambers |
| RESPONDENTS: | C E van der Westhuizen<br>Instructed by Andreas Vaatz & Partners |