REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 34/2014

In the matter between:

EFRAIM TJINGAETE	**APPLICANT**

and

NIEL MARIUS LAKAY N.O.	
IN RE ESTATE LATE ERICH TJINGAETE	**1ST RESPONDENT**
MASTER OF THE HIGH COURT OF NAMIBIA	**2ND RESPONDENT**
SELLA HENGARI	**3RD RESPONDENT**
MARVIN NGUTJIWA HENGARI	**4TH RESPONDENT**

Neutral citation: *Tjingaete v Lakay NO (A 34/2014) [2014] NAHCMD 178 (11 June 2014)*

Coram: Smuts, J
Heard: 21 May 2014
Delivered: 11 June 2014

Flynote: Return date of a *rule nisi* granted *ex parte*. Applicant claimed to be

intestate heir as an adopted child under Herero customary law. Locus standi of applicant challenged by denying that he was an intestate heir. The need to prove customary law restated. The court found that the applicant failed to do so and that the claim under customary law was not established. But it was successfully argued that the applicant had standing under common law. The applicant however failed to establish a *prima facie* right to the relief sought in the form of a review. The court also found that there had been a material non-disclosure in the founding papers prior to the granting of the rule nisi. The rule would also have been discharged for that reason.

ORDER

The rule is discharged with costs

JUDGMENT

SMUTS, J

[1] On this return date of a rule nisi, interesting questions concerning the assertion of a claim of adoption under Herero customary law and whether this would entitle the applicant to be an intestate heir in the estate of the late Erich Tjingaete ("the deceased") are raised together with the requisite of establishing a prima facie right for an interim interdict and the need to make a full disclosure to court in *ex parte* applications.

Background facts

[2] These issues arise for determination in the following way. The applicant approached this court *ex parte* and as a matter of urgency for an interim interdict

pending the finalisation of a review application to be instituted against the Master of the High Court concerning the administration of the estate of the deceased. In essence, the applicant sought the preservation of estate assets in this application pending the outcome of that intended review application. The applicant claims to be an intestate heir of the deceased, who died intestate, by asserting that he would qualify to inherit under customary and common law by virtue of his assertion that he was adopted under Herero customary law.

[3] The applicant approached this court to prevent the delivery of cattle which belonged to the deceased pursuant to a sale which the estate representative appointed by the Master under s 18(3) of the Estates Act[1] (the Act) had entered into with the purchaser of the cattle, the fourth respondent. The estate representative is cited as the first respondent in this application and is the only respondent who opposes the interdict on this return date.

[4] The applicant contends that the sale of the cattle was considerably below their market value and approached this court urgently on an *ex parte* basis to prevent the delivery of the cattle to the fourth respondent. The applicant was then granted a rule nisi in the following terms:

> '1. A *rule nisi* hereby issues calling upon the respondents and any interested parties to show cause (if any) on/before **WEDNESDAY** the **02ND**day of **APRIL 2014** at **15h30** or as soon thereafter as counsel for the applicant may be heard, why the following order should not be made final:
>
> 1.1 Interdicting and restraining the first respondent from in any manner whatsoever, entering upon the administration of the estate of the late Erich Tjingaete and/or acting upon any authority purporting to be granted by letters of appointment No. 173/2012 and dated 18 September 2013;
>
> 1.2 Interdicting and restraining the first respondent from in any manner encumbering, disposing of or in any other manner whatsoever administer and/or deal with any asset(s) in the estate of the late Erich

[1] Act 66 of 1965

Tjingaete including in particular, but not limited to those assets listed in the Section 9 inventory dated 18 September 2013, to wit-

1.2.1 Erf 4856 Katutura;

1.2.2 All Cattle;

1.2.3 1 x 1970 model Opel model; or

from delivering or causing the delivery of assets of the deceased estate, in terms of any purported sale or disposition to any purported purchaser or other person and/or entity;

1.3 Interdicting and restraining the first and third respondents or anybody under them or their authority from entering upon or coming within 100 (ONE HUNDRED) metres from Unit I of the farm Kambingana, No. 204 Gobabis in the Omaheke region of Namibia;

1.5 Joining the said Mr. Hengari, whose full and further particulars are unknown to the applicant as fourth respondent in this application;

1.5 Ordering and directing the first respondent to pay the costs of this application.

2. Orders 2.1, 2.2 and 2.3 above shall operate as an interim interdict with immediate effect, pending the finalization of a review application against the second respondent's decision to appoint the first respondent as administrator of the estate late Erich Tjingaete in terms of section 18(3) of the Administration of Estates Act, Act 66 of 1965, such review application to be served within 15 days from date of this order.

3. Leave is granted to the applicant to serve a faxed copy of this order and application upon Mr. Hengari at Unit I of the Farm Kambingana No. 204, Gobabis in the Omaheke region in Namibia.'

[5] This is the extended return date of the rule.

[6] The further background to the granting of the application was that the

applicant stated that he was alerted to the sale very shortly before bringing the application. He had established that the cattle were about to be delivered to the fourth respondent, the purchaser. The applicant asserted that he was adopted by the deceased and was his sole intestate heir. He explained that he is a nephew of the deceased (his father being the older brother of the deceased). The deceased had died intestate on 22 January 2012. The deceased left no natural children and the applicant stated that the deceased had only one sibling, being a brother at the time of his death.

[7] The applicant pointed out that the third respondent had submitted the death notice of the deceased to the Master under the Act and had claimed to be his surviving spouse, having made a next – of – kin affidavit as is required by the Act. The third respondent had attached a marriage certificate. The third respondent had also provided an undated inventory including cattle and immovable property in Katutura. The aggregate value was accordingly to this inventory less than N$100 000. The Master, cited as second respondent, proceeded to appoint the third respondent under s 18(3) of the Act as estate representative on the basis that the value of the estate did not exceed N$100,000 with the need to appoint an executor thus being dispensed with.

[8] The Deputy Master states in a report provided to court that two different marriage certificates were provided which indicated that the third respondent was also married to a certain Simon Huambi and that she had entered into the marriage with the deceased while still married to Mr Huambi. The Master then sought and obtained the resignation of the third respondent as estate representative and then invited the first respondent in terms of s18(3) of the Act to take up the appointment as estate representative which he duly did. That appointment was made by the Master on the basis that the value of the estate was less than N$100 000.

[9] In the founding affidavit, the applicant points out that the value of the immovable property together with the cattle would far exceed that value. The Deputy Master in the report states that in view of the evidence on values set out in the application, the letter of authority under s18(3) in favour of the first

respondent would need to be cancelled and amended to provide for his appointment as an executor.

[10] The Deputy Master pointed out that the applicant had however not lodged any next-of-kin affidavit indicating his relationship with the deceased. Nor had he provided any inventory in terms of s 9 of the Act reflecting the true values of the estate assets as asserted in this application. The Deputy Master further pointed out that the first respondent had lodged the next-of-kin affidavit reflecting that the deceased was survived by two siblings, namely a brother and a sister (and not only a brother as asserted by the applicant). The applicant does not dispute that in reply. The Deputy Master further correctly accepts that the value of the estate exceeds N$100, 000 in view of the material contained in the founding affidavit, (re-inforced by what is stated in reply) and says 'I will cancel the letter of authority in favour of the first respondent and amend the appointment letter to letters of executorship, taking into account s23 of the Estates Act. . .' That statement is not dealt with in reply and the applicant persisted in seeking the confirmation of the rule.

[11] The applicant points out that the third respondent was, subsequent to the next-of- kin affidavit, charged and convicted of bigamy, by virtue of her marriage to the deceased (as she was already married at the time). The applicant points out that the fourth respondent (the purchaser of the cattle in the impugned sale) has the same surname of the third respondent and suspects that the third respondent colluded with the first respondent in securing that sale at values way below the market value of the cattle.

[12] It was for this reason that the applicant had approached the court urgently and *ex parte* to prevent that sale from being perfected, pending the review of the appointment of the first respondent under s 18(3) of the Act.

[13] In support of the applicant's claim of being the sole intestate successor of the deceased, he states that he was the deceased's "closest living relative and as such his only legitimate intestate heir". In support of this claim, he attaches a document which he says constituted 'the last will and testament' of the

deceased. It was apparently signed by the deceased and was in the Otjiherero language and dated 3 January 2008. In it the deceased states that he had no biological children and that after the death of his older brother, he took that brother's son, the applicant, "as my son" and declared that the applicant would then inherit 90 percent his estate together with the applicant's wife.

[14] The will is, however, not a valid will under the Wills Act[2] by virtue of the fact that it is only signed by the deceased and without any witnesses and thus not complying with the formalities required for the execution of a valid will under that Act. The invalidity of the will is correctly accepted by the applicant. But it is attached in order to show the deceased's 'state of mind' and how he regarded the relationship he contends for in this application. He further makes the statement that a document of the kind attached 'although not a valid will' under the Wills Act, would 'normally be accepted by the relevant traditional authority as valid and distributions are made in terms of such documents'. That is essentially the nature and extent of the applicant's claim to be the sole intestate heir of the deceased made in the founding papers. It is expanded upon in reply.

[15] The first respondent in his answering affidavit denies a collusive sale agreement of the cattle with the fourth respondent. It is however apparent that he had acted with the assistance of the third respondent in tracing the siblings of the deceased after pointing out that she was disqualified from inheriting. He was also aware of the invalid will and pointed out to her its invalidity to the deceased's brother. He stated that he was asked by the deceased's siblings to proceed with the administration of the estate and filed a next-of-kin affidavit reflecting them as the next-of-kin. He stated that the values given for the assets were pursuant to valuations he had received and which had been obtained by the third respondent.

[16] The first respondent also pointed out that the deceased and the third respondent jointly were accorded a leasehold in respect of a farm by the Ministry of Lands and Resettlement, but the value of his interest in that

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[2] Act 7 of 1953.

leasehold was however not included as an estate asset. This may be because he did not regard it as an estate asset or possibly because of difficulty in making a valuation of the deceased's interest in that leasehold at the time of his death. He also pointed out that the third respondent had instituted an action against the applicant for his eviction from that very farm. This had not been disclosed by the applicant in his founding papers when he approached this court on an *ex parte* basis. When I raised this on the return date with Mr Schickerling who, together with Mr S. J. Jacobs, appeared for the applicant, he argued that this was not relevant or material to the relief sought and that the application had been prepared with great urgency at the time.

[17] In his founding affidavit, the applicant provides his address as at Unit 1 of the farm Kambingana, No. 204, Gobabis ('the farm'). He refers to himself as the farm manager of the deceased. But it turns out in the first respondent's answering affidavit that the deceased and third respondent were jointly allocated a 99 year leasehold of the farm in an agreement to that effect with the Minister of Lands and Resettlement. The deceased and third respondent further entered into a loan agreement with Agribank for N$40 600 for the purpose of acquiring cattle to stock the farm. Even if the applicant were unaware of the terms of the loan – that is was to them jointly – he would certainly have been aware of the precise terms of the leasehold. This was because the third respondent had instituted an action against the applicant (as second defendant) for his eviction from the farm in October 2013. Attached to the particulars of claim was a copy of the leasehold agreement. The action was admitted by the applicant in reply but the statement was made that it is 'plainly irrelevant' and should be disregarded. This non-disclosure is referred to below after dealing with the issues of *locus standi* and whether a *prima facie* right has been established.

[18] The first respondent also explained that he proceeded with the sale of the cattle because of a loan which the deceased together with the third respondent had jointly received from the Agricultural Bank of Namibia ("Agribank") which needed to be repaid.

Standing and claims under customary law

[19] In his opposition to the application, the first respondent takes the point that the applicant lacks *locus standi*. In support of this point, the first respondent disputes that the applicant is a beneficiary in the deceased's estate and also points out that he does not even seek declaratory relief that he is an heir in the estate. The first respondent further denies that the applicant is an heir and states that the intestate heirs are the deceased's brother and sister in accordance with the law of intestate succession.

[20] When the matter was argued, Mr Diedericks who appeared on behalf of the first respondent, argued that the applicant lacked standing to bring the application for this reason. Whilst this point was raised in the context of a challenge to the applicant's standing, it would also go to the root of the requirement of the *prima facie* right to the relief asserted by the applicant. That is because of the assertion of the *prima facie* right by the applicant is inextricably tied up with his claim to be an intestate heir of the deceased.

[21] In the replying affidavit as well as in the argument advanced on behalf of the applicant, Mr J Schickerling submitted that the estate is to be administered in accordance with Herero customary law where it does not conflict with the Constitution or any other Namibian statute by virtue of Art 66 of the Constitution read with Art 140. Mr Schickerling contended that the Art 66 placed the common law and customary law on equal footing and that the applicant's claim to be an intestate heir under customary law would suffice and mean that the applicant was thus the sole intestate heir of the deceased. In a supplementary written note, Mr Schickerling, further argued that the applicant would qualify to inherit under customary law and the common law because he was nephew as son of the deceased's brother – and thus by representation even though this is not the basis asserted for his claim to be an intestate heir.

[22] Mr Schickerling submitted that the applicant's assertions contained in the applicant's papers of being adopted under customary law would mean that the applicant should be treated as a child in terms of intestate succession because customary and common law was placed on equal footing by virtue of Art 66. Mr

Schickerling argued that the applicant had thus established a *prima facie* right even though open to some doubt, as is required for an interim interdict. I must however stress that the *prima facie* establishing of the right (which may thus be open to some doubt in interim interdicts) relates to the degree of evidence to establish the existence of a right under substantive law.[3] The applicant would need to establish *prima facie* that he is an intestate heir on the basis claimed but also a *prima facie* right to the review of the Master's decision to appoint the first respondent, as I point out below.

[23] Mr Schickerling rightly referred to the Intestate Succession Ordinance, 12 of 1946 as amended[4], together with common law, as constituting the law of intestate succession. Mr Schickerling correctly pointed out that the 1946 Ordinance introduced a spouse's share in intestate succession, following South African legislation passed in 1934[5] to similar effect. Mr Schickerling argued that Art 66, by placing common law and customary law on equal footing – except where conflicting with constitutional and statutory provisions – would mean that an adoption under customary law should entitle adopted child to inherit as an intestate heir under the common law.

[24] He further contended that the first respondent did not contest the applicant's version of Herero customary law of intestate succession. Whilst the first respondent did not put up any contrary version as to what Herero customary law on the issue is, the first respondent did however squarely dispute the applicant's claim of being an intestate heir to the deceased on the basis raised and thus by clear implication did dispute that the applicant had established the basis to that asserted right.

[25] In the course of oral argument I enquired from Mr Schickerling as to whether the applicant had sufficiently established the Herero customary law in

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[3] Joubert et al *The Law of South Africa* Vol. 11, (2nd ed) at p420.

[4] as amended by the Intestate Succession Amendment Ordinance, 6 of 1963 and the Intestate Succession Amendment Act, 15 of 1982.

[5] The Succession Act, 13 of 1934.

question. I pointed to him that there had been no evidence, except for the applicant's unsupported assertion, of Herero customary law on the question. In the founding affidavit, the applicant merely asserts that he is an intestate heir by virtue of being adopted under Herero customary law. He does not in any way specify the nature and effect of the rules and customs relating to adoption and succession in Herero customary law and how these are observed, except for the unsupported assertions I have referred to.

[26] In a supplementary note, Mr Schickerling argued that this court should apply the customary laws of succession "as stated by the applicant". But the difficulty for the applicant is that he does not set out the rules relating to intestate succession in accordance with the Herero customary law or deal with adoption under Herero customary law in any coherent way. He merely makes the claim of adoption under customary law and the assertion that this would entitle him to succeed under Herero customary law.

[27] The first difficulty the applicant faces in this application is the proof of the customary law in question. As was held by this court, as previously constituted, of Herero customary law would need to be established. A way in which this can be done would be to tender evidence on customary law and the customs in question – both relating to adoption and to succession. This was stated by Bethune J in *Kaputuaza v Executive Committee, Administration for the Hereroes*[6] in the following way:

> 'Evidence was tendered concerning the alleged Herero customary law and considerable time was spent in canvassing this issue and questioning the qualifications of the persons who tendered the evidence. Mr Botha contended that customary law should be provided by qualified experts in the same manner as foreign law. It seems to me, however, that in so far as Herero customary law might be applicable, such law is part of the law of South West Africa of which the Court can take judicial notice, consequently it need not be provided in the same manner as foreign law. In the process of taking such judicial cognisance this Court may inform itself from history books. (See the remarks of Fagan CJ in *Consolidated Diamond Mines of South Africa Ltd v Administrator, SWA, and*

[6] 1984(4) SA 295 (SWA) at 301.

Another 1958 (4) SA 572 (A) at 610A.)

> The customs observed in the reserve (as opposed to customary law) can be proved in the same manner as any other custom, i.e. by ordinary persons who have knowledge of the nature of the customs and the period over which they have been observed. It has authoritatively been held that the party relying on such a custom must prove it beyond reasonable doubt (*Van Breda and Others v Jacobs and Others* 1921 AD 330 at 333).'

[28] Bethune J proceeded to refer to standard works on Herero customary law and the evidence placed before him in reaching a conclusion as to the customary law contended for in that matter.

[29] The applicant in this application has merely asserted that the testamentary document attached to his affidavit would "normally be accepted by relevant traditional authority as a valid distribution made in such a document". No other evidence was tendered as to the content of the customary law and its observance and its effect. The only work relied upon in argument by the applicant was by Becker and Hinz *Marriage and Customary Law in Namibia*. The extracts provided do not support the applicant as to the content of customary law contended for.

[30] The assertion of his right to succeed would thus appear to be based upon the document setting out a testamentary intention of the deceased as being recognised under customary law rather than his adoption being accepted for purposes of intestate succession. Mr Schickerling argued that he would qualify on to inherit on both scores. It would seem to me that he may have conflated the two questions.

[31] The question is thus whether or not the applicant has mounted the first hurdle necessary to establish his standing, namely that he is *prima facie* an intestate heir under customary law by providing sufficient proof as to the customary law relied upon. The mere assertions of being an adopted child under Herero customary law and does not establish the customary law of adoption and

its consequences for succession as an adopted child.

[32] I understood Mr Schickerling to contend that the applicant, as an adopted child under Herero customary law, should enable him to succeed under the common law as an adopted child.

[33] As I have already indicated, reliance was placed on Art 66(1) of the Constitution. It provides:

> '(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.'

[34] By virtue of the Administration of Justice Proclamation, 21 of 1919, the Roman-Dutch common law applied in the Province of the Cape of Good Hope became the common law of Namibia. Mr Schickerling correctly points out that the common law on intestate succession was based upon the old Political Ordinance of 1580 and the Interpretation Ordinance of 1594, as modified by the Octrooi of 1661, all passed in the Netherlands and imported to the Cape Colony.[7] The system was based upon consanguinity (blood relationships). The unfairness of intestate succession under the common law upon a spouse was ameliorated in South Africa by the Succession Act, 1934[8] by conferring rights of intestate succession upon a surviving spouse. Similar legislation was enacted in Namibia some 12 years later when the Intestate Succession Ordinance, 1946 was passed. The Ordinance amended the common law of intestate succession by providing that the surviving spouse of a deceased is declared to be an intestate heir of the deceased's spouse according to certain rules set out in that ordinance which essentially provide for a surviving spouse to succeed to the extent of a child's share or a certain amount whichever was the greater. The amount in question was subsequently increased in amendments to the

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[7] Corbett, Hahlo, Hofmeyr The Law of Succession in South Africa (2nd ed) at p565.

[8] Act 13 of 1934

Ordinance in 1963[9] and again in 1982.[10]

[35] The 1946 Ordinance contained an important further provision in s 1(2) to the following effect:

> 'For the purposes of this Ordinance any relationship of adoption under the provisions of the Adoption of Children Ordinance, 1927 (Ordinance No 10 of 1927) shall be equivalent to blood relationship.'

[36] According to CP Joubert,[11] prior to that amendment of the common law, intestate succession under the common law was governed exclusively by blood relationships, consanguinity (*consanguinitas*), between the testator and the intestate heirs. It was only through the amendment to the common law through legislation, firstly in South Africa in 1934 (and subsequently in Namibia in 1946), that the common law was thus amended – by statute – to provide for intestate succession of adopted children and spouses. This is made clear by CP Joubert in his article with reference to the provisions of the old Political Ordinance of 1580, the Interpretation Ordinance of 1594 and the Octrooi of 1661[12]. He also does so with reference to Voet.[13] The amendment relating to the succession by adopted children was brought about in Namibia by the 1946 Ordinance read with the Adoption of Children Ordinance, 1927.

[37] There was thus no intestate succession under common law for adopted children in Namibia prior to the statutory amendment to the common law brought about by the 1946 Ordinance.

[38] The statutory amendment made it clear that adopted children for the purpose of intestate succession are those adopted pursuant to the then applicable legislation relating to the adoption of children being Ordinance 10 of

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[9] Ordinance 6 of 1963.

[10] Interstate Succession Amendment Act, 15 of 1982.

[11] Later Joubert, JA in an article in article 'Adopsie in die Suid-Afrikaanse Versterfreg' in (1955) 18 THRHR 140.

[12] Supra at p140.

[13] 38:17.

1927 which was subsequently replaced by the Children's Act, 1960.[14]

[39] In terms of the 1927 Ordinance, an adopted child is defined as meaning 'a child concerning whom an order of adoption has been made as hereinafter provided.' A "child" is further defined as meaning "a boy or girl who is in the opinion of the court exercising jurisdiction under this ordinance, under the age of 16 years". The Ordinance proceeds to provide for adoption of children by way of adoption orders. The adoption of children under that ordinance is thus only effected by means of an order of adoption pursuant to its provisions. A similar regime of adoption, being by means of adoptive orders, was in essence continued in the replacing legislation, the Childrens Act, 1960. Thus, only children adopted pursuant to adoption orders could become interstate heirs under the Ordinance and subsequently under the Children's Act. There was no other form of intestate succession for adopted children, as was made clear by CP Joubert.[15]

[40] The applicant does not contend that he was adopted by way of any adoptive order. On the contrary, the single allegation concerning his apparent adopted status is made in the following way:

> 'Upon my father's death the deceased, in terms of Herero customary law adopted me as his son. I refer to the deceased's purported last will and testament annexed hereto in which he clearly describes me as "my son".'

[41] He further states that the act of adoption pursuant to Herero custom and customary law occurred upon his father's death. In his replying affidavit, the applicant states that his father died on 23 April 1993 and that he was then adopted by the deceased. The applicant does not attach any adoption order in support of this claim. Nor could he. He furthermore does not state his age when this occurred. His age is also not stated in the application except for the reference to him in the invalid will of the deceased which referred to him

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[14] Art 33 of 1960.

[15] Supra.

together with his identity number. It indicated a date of birth in 1955, as was confirmed during oral argument. It would follow that at the time of the applicant's father's death, and the apparent adoption under Herero customary law the applicant was one month short of his 38th birthday. He had long since ceased to be a minor and was at that time not a child for the purpose of the then applicable legislation relating to the adoption of children. There thus could not have been any question of being adopted under the applicable legislation.[16]

[42] For the purpose of intestate succession, the common law as amended by the 1946 Ordinance, it is only adoption under the applicable legislation which is equivalent to blood relationships. With the exception of a surviving spouse and adopted children under the provisions of applicable legislation, blood relationships under the common law would determine intestate succession under the common law.

[43] In order to succeed under the law of intestate succession on the basis of being adopted, adoption under applicable legislation would need to be established. That is not the applicant's case. He does not assert adoption under the erstwhile ordinance or the Childrens Act, 1960, but adoption under Herero customary law. Mr Schickerling's submission concerning Art 66 does not take the matter further – even if sound, which is not necessary to decide for the purpose of this matter. The common law was after all changed by the 1946 Ordinance to provide that adoption under the 1927 Ordinance is equivalent to blood relationships. In the absence of an adoption order, the relationship would not be equivalent to blood relationships upon which common law intestate succession is based.

[44] It follows that the applicant has not established a *prima facie* right to inherit under the common law of intestate succession by virtue of his assertion of being an adopted child of the deceased under Herero customary law.

[45] The assertion in the founding affidavit that distributions are made

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[16] The Children's Act 1960.

pursuant to the testamentary documents of the kind attached to his affidavit 'by the relevant traditional authority' also does not avail the applicant. Once it purports to be a document providing for testamentary dispositions, which it does, then in order to have that effect, it would need to meet the requisites for validity under the Wills Act. It does not do so. The applicant did not explain in what context and for what purpose the document would be recognised and given effect to according to Herero customary law. It was incumbent upon him to do so. But what is clear for present purposes is that the document would not determine the basis for the distribution of the deceased's estate when reported with the Master under the Estates Act by reason of its invalidity as a will.

[46] In his supplementary note Mr Schickerling points out that as a nephew of the deceased – which was not disputed – the applicant would in that capacity be an intestate heir. This is because he would be an intestate heir by representation, together with the deceased's brother and sister.[17] That is entirely correct.

[47] But that is not the basis upon which the applicant approached this court or the Master. As is pointed out in the Master's report, the applicant has not filed a next-of-kin affidavit setting out his relationship to the deceased claiming to be an intestate heir on the basis of that relationship. He instead approached this court on the basis of being the 'sole legitimate heir' to the deceased under Herero customary law without being able to sustain that claim. Only after oral argument was heard and his claims questioned by the court was this claim for standing advanced in a subsequent supplementary written note.

[48] It thus turns out that the applicant would have standing to bring this application as an intestate heir of the deceased (as a nephew by representation, given the death of his father who was the deceased's brother).

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[17] Corbett et al *The Law of Succession in South Africa* (1st ed) at 585 – 586. (The second edition of this worthy work deals with the order of succession in South Africa brought about by the Intestate Succession Act, 81 of 1987.)

[49] Even though this was not the basis for the applicant's claim for standing raised in both the founding and replying affidavits and in oral argument, the facts which support such a claim are common cause and were set out. Standing to bring the application is a conclusion of law drawn from facts which would establish a direct and substantial interest in relief which is sought. The fact of being a nephew, who would succeed by representation under the common law, would confer upon the applicant standing to seek the review relief. The fact that this was not the basis upon which he approached the court (and in the absence of an assertion of this claim to the Master by way of a next-of-kin affidavit) would have an impact upon a costs award. But his would not arise in this application for reasons which follow.

Prima facie right to review relief

[50] Even though the applicant would thus have standing, his difficulties do not end there. He would need to establish a prima facie right to the review of the Master's decision to appoint the first applicant under s18(3). That is the right which the applicant is to establish on a *prima facie* basis – after establishing his standing in the form of being an intestate heir of the deceased. The appointment is primarily challenged on the basis of the value of the estate exceeding N$100 000 and that an appointment under s18(3) would thus be invalid.

[51] The Master acted upon values provided in a provisional inventory in making the appointment under s18(3). Once it became clear that the actual values turned out to be in excess of N$100 000, the Master correctly conceded that the first respondent's appointment under s18(3) should be cancelled and be replaced by letters of executorship. The need to review that earlier appointment on that basis falls away. The applicant thus does not have a *prima facie* right to that relief. At best, he could assert a claim for costs to the date upon which the Master's report was filed. That would not however arise because of my view as to the consequence of the applicant's failure to disclose material facts. But this would not in any event arise by reason of the failure on the part of the applicant to have provided an inventory setting out such values (in excess of N$100 000) together with a next-of-kin affidavit reflecting his relationship to the Master prior

to bringing this application.

Failure to disclose material facts

[52] I have already referred to the failure on the part of the applicant to disclose the material fact of the third respondent's 99 year leasehold right to the farm and that she had instituted an action against him for his eviction. He was clearly aware of both these facts, as I have demonstrated.

[53] It is well settled that an applicant in *ex parte* proceedings is required to make a full and proper disclosure to the court and owes a duty of utmost good faith to the court. This duty has been usefully summarised in the following way after a thorough survey of previous authorities[18]:

> '(1) in *ex parte* applications all material facts must be disclosed which *might* influence a court in coming to a decision;
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> (1) the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission; and
>
> (2) the court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.'[19]

[54] Not only does the applicant make serious allegations of collusion in fraud of the heir(s) against the third respondent, but he also sought and obtained the relief set out in paragraph 2.3 of the court order quoted above, interdicting the third respondent from entering upon or coming within 100 metres from the farm. It is plainly in this context a most material fact to disclose to this court that the third respondent enjoys a 99 year leasehold over the farm and that she had instituted proceedings against the applicant to evict him from the farm. Indeed had these facts been disclosed, it is most unlikely that this relief would have even been granted against the third respondent. Had these facts been disclosed to the applicant's lawyers, it is also very unlikely that relief in those terms would

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[18] In *Schlesinger v Schlesinger* 1979(4) SA 342 (W) approved of by this court in *Standard Bank of Namibia v Potgieter and Another* 2000 NR 120 (HC) (full bench) at 125 F-H and *Doeseb and Other v Kheibeb and Others* 2004 NR 61(HC) at 87C.

[19] Supra at p349 A-B.

have been sought against the third respondent. But what is clear is that these circumstances could have influenced the court to grant or withhold relief. They should have been disclosed and they were not in breach of this well established rule in *ex parte* proceedings.

[55] In the exercise of my discretion this failure to disclose these facts would in any event have resulted in the discharge of the rule with costs.

Costs

[56] The first respondent contended in the answering affidavit that the application was an abuse of process by reason of the applicant's lack of standing. He sought a special order as to costs – on attorney and own client scale – as a consequence. The point of the non-disclosure of the third respondent's joint leasehold and action against the applicant were not raised as grounds for the discharge of the rule and for a special costs order. The issue of non-disclosure was raised by the court after these facts were raised in the first respondent's answering affidavit. In his heads of arguments, Mr Diedericks sought a lesser (but still punitive) scale as between attorney and client. The thrust of the complaint is a lack of standing. Although the applicant's basis for standing turned out to be unsustainable, it however transpired that he did in fact have standing. The misplaced basis for standing raised in the founding affidavit in this matter would not in my view give rise to a special costs order. The failure to disclose material facts in an ex parte application would invariably warrant a sanction by a court. That sanction in this matter would be the discharge of the rule on this basis alone. As this issue was not raised by the first respondent in this context, I decline in the exercise of my discretion to grant a special costs order in his favour on that basis.

Conclusion

[57] In view of the conclusion I have reached it is not necessary for me to deal with the other requisites for an interim interdict, including the absence of an

alternative remedy. I refer to this in view of the persistence on the part of the first respondent to proceed with the sale of the cattle at values which would appear to be considerably below their market value. An executor's position is a fiduciary one.[20] This means that he must not only act in good faith but also in accordance with the law.[21] The realisation of estate assets is governed by the Act. The Act lays down[22] that an executor is not to sell estate assets otherwise than by public auction unless the Master has authorised a sale by public tender or out of hand. There is no allegation to that effect. It would not necessarily avail the first respondent to contend, if challenged on the sale, that the purchase price he had agreed to was in accordance with values at the time of the death of the deceased some 2 years before of values were considerably higher at the time of the sale, as would appear to be the case. As a finding on the issue of the absence or otherwise of an alternative remedy is not necessary in this matter, I take this issue no further.

[58] It follows from the above that the rule is to be discharged with costs.

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DF SMUTS

Judge

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[20] *Lindenberg v Giess* NO 1957(3) SA 31 (SWA).

[21] Meyerowitz *The Law and Practice of Administration of Estate* (5th ed) p123.

[22] S47 of Act 66 of 1965.

APPEARANCES

APPLICANT:	Adv J Schickerling assisted by J Jacobs Instructed by Dr Weder, Kauta & Hoveka Inc
FIRST RESPONDENT:	Mr J Diedericks Instructed by Diedericks Incorporated