



REPORTABLE

CASE NO: SA 63/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JORAM JANINGAPARA TJAMUAHA

1st Appellant

MAANDERO MARKUS TJAMUAHA

2nd Appellant

and

MASTER OF THE HIGH COURT

1st Respondent

CONSTANTIA TJAMUAHA

2nd Respondent

ABSA TRUST LIMITED: TRUST SERVICES

3rd Respondent

AGRICULTURAL BANK OF NAMIBIA

4th Respondent

AUGUSTINUS KUHANGA

5th Respondent

HANNCHEN SCHNEIDER N.O.

6th Respondent

Coram: MAINGA JA, SMUTS JA AND FRANK AJA

Heard: 11 October 2017

Delivered: 26 October 2017

Summary: The deceased Mr. Kambire Tjamauha passed away on 15 May 1989 and was at the time married to the second respondent in community of property. He mistakenly took the marital regime to be out of community of property and as such, in his will bequeathed all “his properties” to a trust, subject to certain conditions.

The Administrator and the Executor upon realizing the late Kambire Tjamauha's mistake entered into a redistribution agreement with the second respondent, in terms of which she gave up her share in the farm to the trust in return for various movable properties.

The Administrator/Trustee resigned during 2007. The appellants (as applicants) launched an application to be appointed as trustees. The second respondent opposed the appointing of the appellants as trustees. She launched a counter-application for the setting aside the redistribution agreement on the basis that she was misled into signing same. The appellants opposed the second respondent's counter-application, raising the issue of prescription, amongst others.

The court thus had to determine whether the right the second respondent is asserting in her counter-application is vindicatory in nature, and a real right or a mere personal claim. Depending on what the court finds, the relevant other issues including the issue of whether the claim had become prescribed pursuant to the provisions of the Prescription Act 68 of 1969 would have to be considered.

Held – that the deceased and the respondent were co-owners or joint owners of the farm and the other properties in question. As such the claim against a co-owner is a personal claim for division and only upon transfer, delivery or payment of their share, a real right in identifiable property received as a result of the division is acquired.

Held further - the process of administration of a deceased estate which by law sees to the division of the joint estate in a marriage in community of property does not have the

effect of changing a personal right of a joint owners *inter se* into a real right for the surviving spouse.

Held – the respondent is and was always asserting a personal right as against the co-owner, and such a claim is subject to the provisions of the Prescription Act.

Held – further that based on the respondent’s conduct and advice she obtained from her various lawyers, she must have known and appreciated the content of the deceased’s will and her rights therein.

Held that – on all probabilities, the respondent knew from 1998/1999 that she was not the registered owner of the farm, that same was registered in a trust and that this was in accordance with the redistribution agreement she signed. In conclusion, the court held that the respondent from the onset knew who the debtors were and the facts that gave rise to the claim (debt), as such her claim prescribed.

The appeal succeeds with costs.

APPEAL JUDGMENT

FRANK AJA (MAINGA JA and SMUTS JA concurring):

Introduction

[1] Mr Kambire Tjamauha (the deceased) passed away on 15 May 1989. At the time of his death he was married to the second respondent Constantia Tjamuaha in community of property. No children were born from the marriage but the spouses each had children of their own and the two appellants are the sons of the deceased. As the respondents

other than the second respondent do not oppose the appeal reference to the respondent in this judgment is a reference to the second respondent only.

[2] The deceased died testate and the provisions of his will relevant to this judgment read as follows:

- '1. My immovable farm property, farming vehicles, farming equipment, farming implements, livestock , any shares that has a nexus with my farming activities and all other movable assets that are associated with my farming business, are to be transferred in a trust, to my Administrator to whom I shall confer the powers and bestow the following obligations:
 - 1.1
 - 1.2 ...
 - 1.3 ...
 - 1.4 To pay the net income from the trust to my spouse, **CONSTANTCIA TJAMUAHA** (born **KAVEZEPA**), until her demise. After the demise of my spouse the income should be paid to my two sons **JORAM** and **MARKUS** until the death of the last dying.
 - 1.5 At the termination of the trust or at the death of my mentioned spouse and my mentioned sons, the trust capital as it existed, together with any accumulated income be paid to my mentioned sons children or their lawful descendants by substitution or, by lack of any descendants to commit it or pay it over to my sisters child, **AUGUSTINUS KUHANGA**, or his lawful descendants *per strippes*.'

[3] Prior to the finalization of the estate the executor, the administrator and the respondent entered into a redistribution agreement in terms whereof the respondent agreed that the farm be transferred to the trust per the stipulations of the will in return for her receiving all the farm implements and the livestock. As appears from the redistribution agreement what she received at the time in value was N\$50,000 less than her half share

of the joint estate. This amount would be payable to her estate on her death. The relevant portion of the redistribution agreement reads as follows:

'WHEREAS the deceased was under the impression that his marriage was one out of community of property.

WHEREAS the deceased was however married in community of property and consequently only had disposal over one-half of the joint estate which was practically non-executable for the reasons that:

- (i) The farm property cannot be subdivided.
- (ii) The trust that was created only dissolve at the death of the minor children of the deceased, and that it was practically impossible to maintain half of the movable goods that has regard to the farming and livestock.
- (iii) That it is more practical and to the benefit of the various legatees, in that the legatees wish that a redistribution of the assets takes place.

WHEREAS the parties as stated in a, b, and c have decided to deviate from the provisions of the testament as far as it deals with the bequeathment of the farm property and farming vehicles, equipment, implements and livestock is concerned.

NOW THEREFORE AND CONSEQUENTLY THE PARTIES AGREED AS FOLLOWS:

- (a) The farm as stated above is in entirely awarded to the administrator in trust subject to the conditions as stated in the testament and the surviving spouse does away with her half interest therein.
The value amounts to R200000,00 (Two hundred thousand Rand).
- (b) All farming vehicles, equipment, implements, livestock as mentioned, are awarded to the surviving spouse – C TJAMUAHA. The value amounts to R99 070,00 (Ninety nine thousand and seventy Rand).
- (c) That the difference of half the value of the farm property, namely R200 000,00 and half of the value of the farming vehicles, equipment, implements, and livestock, namely R99 070,00, that is an acknowledgement of debt to the amount of R50 465,00 handed to C TJAMUAHA by the administrator of trust. The amount shall become repayable at the death of the said C TJAMUAHA, the surviving spouse.'

[4] Fairly soon after the finalisation of the estate the respondent resigned from her employment and moved to the farm where she farms to this day. Mr Minaar, representing the trustee, visited the farm on an annual basis and she paid the administration fees until the trustee resigned during 2007. The resignation of the trustee was communicated to the respondent and her erstwhile lawyers in letters dated 10 October 2007 and 6 December 2007 respectively. Subsequent to this the respondent simply continued with her farming operations on the farm for her own account. I should mention in passing that the appellants also lived and conducted farming operations on the farm subsequent to the death of the deceased but left after the respondent did not want them to carry on in this manner.

[5] During February 2012 the appellants (as applicants) launched an application seeking their appointment as co-trustees seeing that a trustee or trustees had to be appointed subsequent to the resignation of the trustee referred to above. As far as this application was concerned the respondent did not object to the appointment of a trustee or trustees but opposed the appointment of the applicants to this position. She sought to be appointed as trustee herself, and alternatively prayed that the President of the Law Society of Namibia be authorised to appoint a trustee.

[6] Together with her answering affidavit to the above application the respondent also launched a counter application in which she sought the setting aside of the redistribution agreement as she was allegedly misled into signing it thus rendering it void and sought orders to basically resurrect the estate so that it could be finalised afresh on the basis that she would then insist on a normal distribution as if no redistribution agreement was entered into and take her half share of the joint estate.

[7] The appellants opposed the counter application on the basis that her claim had become prescribed and even if it had not, they challenged her assertions that she was misled to sign the redistribution agreement and that she did not appreciate what she was signing especially in view of the movable assets she received in return and her conduct subsequent to signing the agreement.

[8] The court a quo granted an order in line with the relief sought by the parties in respect of the appointment of a new administrator / trustee save that it declined to appoint any one of the parties mentioned herein and ordered that the President of the Law Society of Namibia appoint an administrator. Presumably because of the common ground between the parties as to the relief relating to the appointment of an administrator the court a quo simply ordered that there shall be no order as to costs in respect of the application. There is no appeal against these orders relating to the appointment of an administrator and the costs in respect of the application. The appeal is thus limited to the issues raised in the counter-application.

[9] The issues on appeal are as follows:

- (a) Is the respondent's claim a vindicatory claim, i.e. is she asserting a real right or is it a personal claim, i.e. is she asserting a personal right.
- (b) If it is found that she is asserting a real right, does this qualify as a debt that

can prescribe pursuant to section 11 of the Prescription Act (“the Act”).¹

- (c) If it is found that she is asserting a personal right or if a real right qualifies as a debt did her claim become prescribed?

- (d) If her claim has not become prescribed; did she make out a case to set aside the redistribution agreement as being void and for the other relief she claims?

It is apparent from the issues set out above that the answers as one goes down the list may obviate the need to deal with some of the issues. Thus if it is held that she is asserting a real right, which is not a debt, then the question of prescription falls away. However if it is found that she is asserting a personal right which has become prescribed, then the other issues fall away.

[10] The court a quo held that the respondent’s claim was a vindicatory one and therefore that the provisions of the the Act did not apply. It then dismissed the defence raised by the appellants based on prescription. As far as the merits are concerned the court a quo then referred to the fact that the referral to oral evidence was not sought by either of the parties and hence that the *Stellenvale*² rule applied but as many of the allegations of the respondent were disputed based on bare denials, the version of the respondent could be accepted and the matter be adjudicated on this version together with the facts of the appellants which were not really in dispute. On this basis the court accepted

¹ Act 68 of 1969.

² *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G.

the version of the respondent that she was misled and her ignorance of her rights at the time of her signing of the redistribution agreement and held that the redistribution was indeed void and granted the relief sought in the counter application.

[11] The approach to the evidence was however flawed. This was so because whereas it is correct that there were facts that the appellants could not deal with as they were solely within the knowledge of the respondent and the denials thereof were explained with reference to the surrounding events and subsequent conduct of the respondent. These events and conduct are such that they bolster the denial of the appellants. This was thus a case where the appellants in fact said they had no knowledge of allegations but nevertheless denied them because the other evidence pointed to a contrary version to the one asserted by the respondent. In these circumstances the denials thus were not bald denials and the appellants' version could not simply be ignored. I deal with some of the surrounding events and subsequent conduct of the appellants relevant to this matter below.

[12] I now turn to deal with the above issues insofar as it may become necessary.

Claim a vindicatory or personal one

[13] As pointed out above the court a quo found that the claim by the respondent was a vindicatory one and the question of prescription thus did not arise. It is to this issue that I now turn.

[14] As a result of the marriage in community of property the deceased and the respondent were co-owners or joint owners of the assets in the estate. Co-ownership is

simply the fact of two or more persons owning a thing in undivided shares which shares need not be equal. This factual situation comes about through agreement (free co-ownership) or through other relationships such as a marriage or partnership (bound or restricted co-ownership). Because the share of co-owner is indivisible no co-owner has a right to a specific physical part or portion of the thing that is the subject matter of the co-ownership. Whereas a joint owner in a free co-ownership relationship can dispose of his undivided share without consent of his co-owners the joint owners in a restricted co-ownership relationship cannot do this. When it comes to the restricted co-ownership this is simply one of the consequences of the relationship between the parties, whereas in cases of free ownership it is the only relationship between the co-owners. It thus follows that the undivided share in restricted co-ownership relationships does not play as great a role during such relationships as the true value of such undivided share is only realised upon termination of the co-owner relationship. In general a co-owner in a free co-owner relationship can insist on a partitioning or division of the joint property at any time. This, a co-owner by virtue of a marriage in community of property cannot do. This will by law only happen when there is a divorce or upon the death of a spouse. Barring an agreement between the co-owners, each co-owner is liable for his share of the expenses and losses involved in the running and upkeep of the joint property.³

[15] It follows from what is stated above that upon partitioning or division, each co-owner is entitled to his/her share of the property after the settling of the expenses or debts in connection with the property. Where the co-owners cannot agree on the division a court can order the sale of the property and the division of the money or order one co-owner to

³ See on co-ownership in general *Siberberg & Schoeman: The Law of Property*, 5th ed 133-136 and *Van der Merwe: Sakereg* Ch 9.

buy out the other or generally make such order as it deems fit to effect the division or partitioning. As also pointed out above, no co-owner can, as of right, insist on a particular physical portion of the property. This being so, no real right is created in respect of the common property as between the co-owners thereof. This is so because a real right is a claim to a thing (specific property) as against others. The right to division is a right against the co-owner to compel him to partake in this process without a right by any of the co-owners to a specific physical portion of the property or where the common property consists of various types of property to any specific type or portion thereof. Thus, whereas a co-owner can have a vindicatory action against third parties in respect of the joint property, he cannot have such claim against a co-owner. The latter is already an owner and he/she can only be compelled to act within the constraints placed upon him or her by virtue of his or her co-ownership or he or she can be compelled to accept partitioning or division of the property. The claim against the co-owner is a personal claim for division and upon transfer, delivery or payment of his or her share a real right in identifiable property received as a result of the division is acquired which property can be protected by a *rei vindicatio*.⁴

[16] The next question that arises, is whether the process of administration of a deceased estate which by law will see to the division of the joint estate in a marriage in community of property has the effect of changing what is a personal right of a joint owners *inter se* into a real right for the surviving spouse. The answer is in the negative. Firstly, if the surviving spouse is not an heir or repudiates any inheritance, then she is simply a claimant for a division so that her undivided half share can be paid or on division transferred

⁴ *Sakereg* above at 261 and 267 and LAWSA 2nd ed, Vol 27, Rys para's 267 and 271.

to her. The executor simply takes over the role that the court has in the division of free joint ownership relationships. Secondly, even if the surviving spouse's position can be stated to be similar to that of an heir (which I cannot see to be conceptionally sound), it makes no difference.

'An heir does not automatically upon the death of the testator acquire ownership of his share of the residue. He merely requires a vested right (*dies cedit*) as against the executor for payment, delivery or transfer of the property comprising the inheritance. The right is enforceable (*dies venit*) only when the executor has drawn his liquidation and distribution account and when section 35 of the Administration of Estates Act, 66 of 1965 has been complied with. The heir, therefore, acquires the ownership (or other real right) in his share of the residue upon payment to him of money or delivery of movable property or transfer of immovable property. Similarly a legatee does not acquire ownership in the legacy bequeathed to him immediately upon the death of the testator: He requires a vested right (*dies cedit*) to claim from the executor at a future date (*dies venit*) deliver it to him of his legacy.'⁵

[17] Counsel for the respondent relies on the South African case of *Klerk NO v Registrar of Deeds*⁶ in which it was stated that an heir has a real right to the property in the deceased's estate, hence a surviving spouse in a marriage in community of property has a real right to her share of the property in the deceased's estate. As pointed out the surviving spouse (as joint owner) is not an heir in respect of her share in the joint estate. This spouse has a vested right to claim division and receive half of whatever the result of such division is, i.e. half of the net estate. Prior to the division the spouse cannot lay any claim to any specific property. Insofar as the court in this matter found to the contrary it is not correct. It is clear from what is stated above in respect of co-ownership and deceased's estates that in principle, the persons entitled to the property either as co-owners or heirs

⁵ Lee and Honore *Family Things and Succession* 2nd ed p 516 and cases there cited.

⁶ 1950 (1) SA 81 (T) at 85-86.

are not vested with real rights prior to the division or receipt of the property. Furthermore this case is contrary to the decisions of the South African Appellate Division and has not been followed on this point.⁷ The current position in South Africa is as set out in the portion quoted above from Lee and Honore. In my view the *Klerk NO* case is clearly wrong in this assertion and should not be followed in this country. The position set out by Lee and Honore is supported by Corbett:⁸

‘ . . . where a man or woman who was married to his or her spouse in community of property dies, the heirs of the predeceased spouse do not acquire co-ownership in individual assets of the joint estate, but merely the right to claim from the executor half of the net balance of the joint estate. Nor is the survivor, despite the fact that he was during the lifetime of the predeceased spouse co-owner of half of the joint estate, vested with *dominium* of half of the assets. Like the heirs of the predeceased spouse, he is restricted to a right against the executor to half of the net balance.’

[18] It follows from what is stated above in the context of the administration of estates that this process does not in any manner change the claim of the co-owner (surviving spouse) from a claim in *personam* to a claim in *rem*. It maintains the general principles relating to co-ownership when it comes to a division or partition in such cases.

[19] It follows from what is stated above that the claim for division (partition) that underpins the relief sought by the respondent is and always was the assertion of a personal right as against the co-owner and never a real right to vindicate identifiable property in the possession of a third party. This being so the court a quo was wrong to hold that it was a vindicatory claim which could not prescribe in terms of the provisions of the Prescription Act.

⁷ *Estate Smith v Estate Follet* 1942 AD 364, *CIR v Estate Crewe* 1943 AD 656; *Greenberg v Estate Greenberg* 1955 (3) SA 361 (A) and *SIR v Estate Roadknight* 1974 (1) SA 253 (A).

⁸ Corbett: *The Law of Succession in South Africa* 2nd ed at 15.

[20] Because of the conclusion that the respondent is indeed asserting a personal right in the counter application which is subject to the Act, it is not necessary to decide whether the court a quo was correct in its finding that vindicatory claims (assertion of real rights) are not dealt with in the provisions relating to extinctive prescription in the Act.

[21] There is one further aspect that needs to be mentioned but which was not addressed in the Heads of Argument by either of the parties in this court and I thus do not deal with it. For the respondent to assert her claim she must get rid of the redistribution agreement she signed and which was fully implemented – thus her claim to declare this agreement void. With the redistribution agreement out of the way (being allegedly void instead of voidable) she then asserts the status quo ante the redistribution agreement is to be restored. As the agreement has been given effect to, the question arises whether the declarator in this regard, in itself, is not subject to prescription.

Prescription

[22] As the provisions relating to extinctive prescription contained in the Prescription Act are applicable to the relief sought in the counter application it is to this aspect that I now turn. It is common cause between the parties that the relevant prescriptive period is 3 years.

[23] Prescription extinguishes debts:

‘Section 10 (3) as pointed out by Mr Berman does seem to contain an anomaly by regarding payment of a debt after it has been extinguished by prescription as payment of the debt. As

far as anomalies are concerned however I find myself in respectful agreement with what MILNE JP said on good authority in *Manjra v Desai and Another* 1968 (2) SA 249 (N) at 254:

"Where the words of a statute are plain, mere anomalies would not justify a departure from their literal meaning unless they are such as to demonstrate that their literal meaning is not the meaning which the Legislature intended them to have."

To my mind the said anomaly does not detract from the clearly expressed wording of s 10 (1) that, once the period provided for has lapsed, barring any delays or interruption, the debt is extinguished. When this has occurred, any subsidiary debt which arose from such debt is also extinguished (s 10 (2)) and it would appear moreover that, once extinguished, the debtor can no longer by acknowledgment revive such debt (s 14) unless of course it is in the form of an undertaking amounting to a new contract. Section 10 (3) may well have been inserted by the Legislature in order to remove any doubt occasioned by differences of opinion which existed amongst Roman-Dutch authorities, and to settle the law, as to whether a debtor who has paid a prescribed debt may reclaim his money or not. See in this regard the authorities reviewed in *Pentecost & Co v Cape Meat Supply Co*⁹ 1933 CPD 472 at 475 - 476 and *Standard Bank of SA Ltd v Neethling* NO 1958 (2) SA 25 (C) at 28.

The fact that the Court may not *mero motu* take notice of prescription does not alter the position as to whether a debt has become extinguished or not. Section 17 (1) seems to be a procedural provision. A court would obviously in the nature of things not be in a position to know whether prescription has in any given case been interrupted or delayed. The provisions of this sub-section accordingly do not show that after prescription has taken place there is any vestige of a debt in existence; they merely ensure that the person who wishes to rely on prescription must do so explicitly.¹⁰

[24] Prescription begins to run as soon as the debt is due. Where the debt does not arise from contract as is asserted in this case as the alleged misrepresentations inducing the signature of the respondent to the redistribution agreement would amount to a delict,

⁹ 1933 CPD 472 at p 475–476.

¹⁰ *Lipschitz v Dechamps Textile Gmbh* 1978 (4) SA 427 (C) at p 430-431.

the position is that the 'debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'.¹¹

[25] The respondent initially states that the deceased's will was read to the family and that this caused dissatisfaction in the deceased's family. However in reply she concedes it was read to the family three times. The second time in the presence of the chief of her community and the third time in the boardroom of the then Herero Administration. The will was in the Afrikaans language which is a language she understood, although according to her not fully. There was dissatisfaction on the part of the deceased's family so the logical inference is that the terms of the will must have been discussed between those present. This was probably the reason for it being read in the presence of the chief and then again in the boardroom. Thus whereas the respondent might have been too struck with grief at the first reading – as she asserts – her version that she, after attending all three readings did not know what the will entailed must be taken with a pinch of salt.

[26] She in any event shortly thereafter and during 1997/1998 was informed, on her own version, by an official at Agribank when she wanted to borrow money that the farm was 'registered in a trust'. Faced with this information she approached several lawyers to seek the transfer of the farm in her name (I interpose here to mention that she does not state on what basis she believed that she had inherited the whole farm as this is not provided for in the will of the deceased). She says 'some of them took more than a year to come back to

¹¹ Section 12(3) of the Prescription Act, 69 of 1969.

me but with no results'. She does not disclose the reasons why the approach to the lawyers came to nought and, in fact, one of the lawyers who was approached as she was charged 'an administration fee' on a regular basis advised her that she had to pay these fees. She, again, is very coy about the advice that she received. It is very unlikely that the lawyer would not have informed her that the administrative fee was due because of the existence of the trust. In fact it beggars belief that none of the lawyers would have advised her that the crux of the problem was the signing of the redistribution agreement, acceptance of its terms by taking possession of the movables stipulated therein and hence that the transfer of the farm to her – in view of the fact that it was joint property – made her case problematic.

[27] Respondent brought eviction proceedings against first appellant during February 2000. In his plea in this action filed during April 2000 the first appellant expressly referred to the redistribution agreement the respondent entered into and the resulting consequences. The respondent was represented by a lawyer during these proceedings and he surely would have explained to her what this plea entailed.

[28] Furthermore during October 2007 she received a letter informing her that a Mr Kruger had resigned as trustee of the K Tjamuaha Trust. In fact a letter of resignation was also forwarded to the lawyers representing her during December 2007. Once again the respondent is not forthcoming in her response as to the role of these lawyers. She simply admits that the letter was sent to them without explaining why this happened. In the letter to the lawyers it is clearly stated that the respondent was informed as 'the beneficiary of the trust' of the resignation. This letter was confirmation of what she already knew which fact was probably confirmed by her earlier lawyers and it is also likely that the lawyers who received the letter informed her thereof. Despite this the court is not taken into confidence

as to the mandate of the lawyers who were informed of the trustee's resignation.

[29] The respondent 'eventually' approached a person at the Legal Assistance Centre (LAC) for advice who 'sometime during 2009' showed her a document styled 'Transportbesorgersertifikaart'¹² which was to the effect that the farm was transferred to her in terms of an endorsement on the title deed. It was explained to her that the document indicated that she was the owner of the farm. This apparently satisfied her that the farm was hers and she only sought the advice of her current legal practitioners when she received a letter during March 2011 from the lawyers of the appellants informing her that she had no right to pledge the farm as security. It is on her current lawyer's advice that she founded her counter application during June 2012.

[30] It is submitted that the respondent only became fully aware of the facts from which the debt arose when she consulted her current lawyers during June 2012. Further, the fact that she was informed 'somewhere during 2009' about the 'Transportbesorgersertifikaart' indicating her to be the owner of the property led her to believe she was indeed the owner. This submission is that this certificate and the explanation of what it stated by the person at the Legal Assistance Centre is also dispositive of any argument the respondent could have asserted her claim earlier had she exercised reasonable care.¹³ In these circumstances it is submitted that the prescriptive period only commenced to run subsequent to her being advised by her current lawyers during 2012 and it is thus cannot be said that her claim has become prescribed.

¹² 'A conveyancer's certificate' (my translation).

¹³ Section 12(2) of the Prescription Act.

[31] I am of the view that these submissions are flawed. Firstly, the respondent knew from 1998/1999 already that she was not the registered owner of the farm. On the probabilities all of the various lawyers she engaged must have informed her of this. Her lawyers must have advised her. What they advised her she declined to share with the court except for the one lawyer who advised her to pay the annual administration fee indicating that he too advised her of the existence of the trust. Her lawyers' advice or lack thereof should have prompted her to act if she wanted to. Even assuming she only discovered that the farm was registered in a trust during December 1999 or subsequent to the eviction action in 2000 referred to above her claim prescribed in November 2002, alternatively sometime during 2003. As is evident from the quotation from the *Lipschitz* case¹⁴ above, her claim was extinguished through prescription and whatever happened thereafter could not resurrect it. There is certainly no basis for a novation on the facts pleaded. Here it must be borne in mind that the respondent avers she believed that she was the owner of the farm. It is not plausible at all that in these circumstances she never enquired how it then happened that the farm ended up being registered in a trust and had not been informed that this was in terms of the redistribution agreement.

[32] Secondly, the attempt to pin the reasonableness of her actions on the advice she received from the Legal Assistance Centre is to no avail as by then the claim had already prescribed as pointed out above. No submissions were made that she could not through the exercise of reasonable care institute her claim prior to the receipt of the advice from the LAC and correctly so. Her attempt to make the giving of the said advice the starting point to the running or prescription cannot be accepted. By the time the respondent

¹⁴ Supra note 12.

received the advice from the LAC she knew that it ran counter to the previous advice that the farm was not registered in her name. Why she thought the farm had to be registered in her name pursuant to the will of the deceased she never explains as pointed out above. This would be contrary to all the documentation she signed as well as the will that was read out three times on her own version. She should not have blithely accepted the correctness of the certificate but should have insisted on the position being verified. Once again she is very coy in this regard. Can it really be accepted that the advice was that this certificate was conclusive and there was no need to compare it with the title deed seeing the contrary advice from her other lawyers and the Agribank? According to her the advice was to the extent of the explanation of what was inscribed on the certificate. It is not explained why this advisor did not explain to her that in view of the advice and information she previously received the certificate had to be checked against the title deed which is the authoritative document when it comes to title in immovable property. Nor why the certificate was not cleared up with the conveyancer who prepared it and who now in this application apparently concedes it was wrong. In short it is hard to believe that the advice was limited to an explanation of the certificate in isolation. After all, the advisor of the LAC stumbled onto the certificate while investigating the respondent's case. He thus possessed knowledge of the full context of the case.

[33] The manner in which the respondent presents her case and the lack of details as to what emanated between her and her lawyers in her pursuit from at least 1999/2000 to clarify her position in relation to the farm belies her assertion that she is in essence a unilingual (Otjiherero) person with limited knowledge of Afrikaans, a modicum of English and a total ignoramus as to the effect of the deceased's will. She farmed commercially since shortly after the death of her husband and still so farming. This is an environment

where the Afrikaans language is prevalent. In addition she had dealings with Agribank and must have acted commercially to conduct her farming business where transactions which were documented would have been in English. In addition some of the lawyers she consulted would have been able to assist and explain to her the position in Herero. In fact what appears from the papers is an astute farmer/businesswoman who clearly omits evidence she knows would be against her case and emphasises facts that she thinks that would count in her favour. What stands out is her lack of candour when it comes to her dealings with all the lawyers she consulted over the years.

[34] In the foregoing circumstances I am satisfied that the respondent's claim has become prescribed as 3 years have elapsed from it arising and the debt becoming due. She knew from the outset who the debtor(s) was (were) and of the facts that gave rise to the claim (debt). Nothing prevented her from instituting a claim timeously. The assertion that the certificate shown to her in 2009 that the farm was transferred to her is irrelevant as her claim had by then become prescribed and in any event it was not reasonable for her to act on it as if she had no knowledge of the facts contrasting therewith.

Conclusion

[35] As the appellants are the successful parties on appeal I can see no reason why they should not be entitled to their costs in this court.

[36] It follows that the judgment of the court a quo must be set aside. In the result the following order is made:

1. The appeal succeeds with costs including the costs of one instructing legal practitioner and one instructed legal practitioner.

2. The judgment and orders of the High Court is set aside and substituted with the following order (For completeness I include those parts of the order not appealed against):
 - 2.1. An independent administrator shall be appointed to the estate late: Kaimbire Tjamuaha Testamentary Trust No. 173/1989 by the President of the Law Society of Namibia.

 - 2.2. The aforesaid administrator appointed by the President of the Law Society of Namibia is exempted from the duty of providing security to the Master of the High Court for his or her duties as administrator and shall be entitled to compensation in terms of the last will and testament of the late Kaimbire Tjamuaha.

 - 2.3. There shall be no order as to costs in respect of the appellants' application.

 - 2.4. Save for the relief sought in the counter application as set out in 2.1 and 2.2 above, the counter application is dismissed.

- 2.5. The costs of the counter application are to be borne by the respondent and such costs to include the costs of the instructing legal practitioner and one instructed legal practitioner.

FRANK AJA

MAINGA JA

SMUTS JA

APPEARANCES:

APPELLANTS:

Andrew Corbett SC

Instructed by Tjitemisa & Associates

2ND RESPONDENT:

Natasha Bassingthwaighe

Instructed by Ellis Shilengudwa Inc.

(ESI)