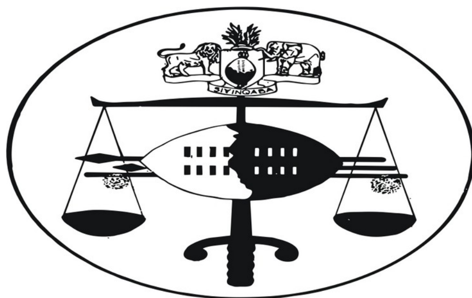

IN THE HIGH COURT OF SWAZILAND

Civil Case No. 258/2006

OKH FARMS (PTY) LTD	Applicant
And	
CECIL JOHN LITTLER N.O.	1st Respondent
GIDEON TRUTER WILLEMSE	2nd Respondent
THE MASTER OF THE HIGH COURT	3rd Respondent
THE REGISTRAR OF DEEDS	4th Respondent
THE ATTORNEY GENERAL	5th Respondent

In Re:

Civil Case No. 2741/2004

GIDEON TRUTER WILLEMSE	Plaintiff
And	
CECIL JOHN LITTLER	Defendant

Coram	S.B. MAPHALALA - J
For the Applicant	Advocate Robert Wise SC (Instructed by Robinson

Bertrams.

For the 1st Respondent. Advocate O. Ebersohn (Instructed by Littler & Company).

For 2nd Respondent Advocate M. van der Walt (Instructed by Shilubane and Maseko & Associates).

JUDGMENT

31st October 2008

The application

[1] The application before court is for the removal of the 1st Respondent who is the executor in the estate of the late Petrus Jourbert Van der Walt (the deceased) and the appointment of another person in his stead. Further a rescission of the consent judgment under Case Number 2741/2004, in terms of which judgment was awarded against the estate in favour of the 2nd Respondent. The instant application has been preceded by other applications and

appeals, as set out more fully in the papers. The order sought reads *ippsissima verba* as follows:

1. That the first Respondent be removed from the office of executor in the estate of the late Petrus Joubert Van der Walt, Estate Number EH 183/98;

2. That subject to due compliance with the provisions of the Administration of the Estates Act the third Respondent is directed to issue letters of administration to and in favour of Richard John Stanley Perry ("Perry") in Estate Number EH 183/98;

3.

3.1. That the judgment and order granted by the above Honourable Court on the 7th October 2005 under Case Number 2741/2004 be rescinded and set aside;

3.2. That the action in Case Number 2741/2004 be stayed from the granting of this order until 60 court days after letters of administration have been issued to Perry by the third Respondent, and that second Respondent be precluded from taking any steps in that action during the afore-mentioned period;

3.3. That the bar in Case Number 2741/2004 be lifted, and that the Defendant (including any substitution of the present Defendant) be allowed to deliver a plea in that action;

4. Alternatively to prayer 3

4.1 That if the Perry considers it fit and proper to bring proceedings for the rescission and setting aside of the said default judgment granted by consent, he do so within 40 court days of letters of administration having been issued to him, or such longer period as this Honourable Court may allow on good cause shown;

5. That the costs of the application under Case Number 4386/2005 be paid by the second Respondent and the first Respondent *de bonis propiis*, jointly and severally, the one paying the other to be absolved and that such costs be payable on the scale between attorney and own client and that they include the certified costs of Counsel.

6. That the costs of this application be paid by the second Respondent and the first Respondent *de bonis propriis*, jointly and severally, the one paying the other to be absolved, and that such costs be payable on the scale between attorney and own client and that they include the certified costs of Counsel;

7. Ordering that the third, fourth and fifth Respondents pay the costs of this application only in the event of their opposing it, and then only such costs as occasioned by such opposition.

8. Further and/or alternative relief.

[2] The Respondents oppose the above prayers and have raised points *in limine* and addressed the merits of the dispute. If I find in favour of the Respondents on the preliminary points I ought to dismiss the application there and there and not canvass the merits of the dispute.

[3] In paragraph 4 of the first Respondent's Answering Affidavit the Respondents have advanced a number of points of law *in limine*. The first point is that the Applicant has no *locus standi* to bring this application because it is a creditor of the deceased estate in respect of certain costs orders; and secondly, that on the basis that the Applicant has an enrichment claim for expenditure for **"necessary or useful improvements to the property brought about by the Applicant. In the nature of things the last mentioned claim is not qualified".**

[4] The second point *in limine* is that the Applicant, in any event, has no *locus standi* to, and cannot at law, apply for the rescission of the final judgment which was granted by agreement between the first Respondent in his capacity as executor of the estate and the second Respondent.

[5] The third point *in limine* is that the deponent Cameron-Dow has no knowledge of the facts, and on his own

admission, is no expert in any field, and merely stated that he looked at certain documents and what is to be found in the Founding papers, in his comment about these papers, intersperse with scandalous and argumentative matter and which comment is absolutely irrelevant.

[6] In paragraph 6 of the second Respondent’s Answering Affidavit a point is also made that the Founding Affidavit of Cameron-Dow consist of inadmissible hearsay matter, irrelevant and argumentative speculation and should be struck out and the application dismissed with costs.

[7] Before proceeding with the determination of this matter I wish to apologize profusely to the parties for the delay in issuing this judgment and state that this has been caused by other urgent matters which clamoured for my attention.

The parties

[8] The Applicant is **OKH Farms (Pty) Ltd,** a company having a share capital and which is duly incorporated and registered in terms of Companies Act No. 7 of 1912 with its registered address at care of Ernest Young, Gwamile Street, Mbabane (I shall refer to it herein either as **"the Applicant"** or as **"OKH Farms"**, as convenience dictates).

[9] The first Respondent is **Cecil John Littler N.O.** an adult male attorney who is sued herein in his capacity as the executor of the deceased estate of the late Petrus Jourbert Van der Walt who died in Swaziland at the age of 93 on the 24th January 1988. The 1st Respondent carries on practice as an attorney and on administration of deceased estates under the name and style of C.J. Littler and Company at Ground Floor, Embassy House, Gwamile Street, Mbabane. Letters of Administration in favour of the first Respondent to administer and wind up the deceased estate were issued by the 3rd Respondent on the 7th July 2005. The first

Respondent is the successor in title to one Fikile Mthembu as the executor of the estate of the deceased, she having being the executrix of the said deceased estate from 9th June 2004, until removed from office by order of this court on the 24th June 2005. By Notice dated 19th September 2005, the first Respondent caused himself to be substituted for the said Fikile Mthembu as the Defendant in Case Number 2741/2004. I shall refer to the first Respondent either as such or as **"Littler"** as convenience or expedience dictates.

[10] The second Respondent is **Gideon Truter Willemse** an adult male farmer whose residential and business addresses are unknown to the Applicant but who, to the best of Applicant's knowledge and belief ordinary place of residence is in the Republic of South Africa. In the action before court second Respondent has nominated the address of P.M. Shilubane and Associates, Ground Floor, Lilunga House, Somhlolo Road, Mbabane.

[11] The third Respondent who is the Master of the High Court is cited as having offices at Miller's Mansion Building, Mbabane, district of Hhohho, Swaziland. The person currently occupying the post of Acting Master is Isaac Malamlele Fitkin Dlamini. The third Respondent is cited herein by virtue of the interest and responsibility he has in ensuring the due and proper administration of all deceased estates in Swaziland and which are registered with his office, as is the case of the deceased estate of the said late Petrus Jourbert Van der Walt. The only relief sought against the third Respondent is on of an administrative nature. No order for costs is sought against the third Respondent.

[12] The fourth Respondent is the **Registrar of Deeds of Swaziland**, of the Deeds office next to Hospital Hill, Mbabane, district of Hhohho, an adult male who is cited in his official capacity. The person currently occupying the post of Registrar of Deeds is Samuel Juba Dlamini. The

fourth Respondent is joined as an interim interdict has been granted against it in Case Number 4386/2005 pending finalization of this application. No order for costs is sought against the fourth Respondent.

[13] The fifth Respondent is the **Attorney General of Swaziland** who is cited by virtue of the fact that interim interdicts (pending this application) have been granted against two officials in the administration of Swaziland, namely the third and fourth Respondents and certain final relief is sought against the third Respondent.

The factual background.

[14] In order to fully understand the issues in this case it is important to sketch the historical background of this matter. The dispute revolves around a farm described as certain Portion H of the Farm Kubuta Estate 222. During his lifetime the deceased was the registered owner of the said property

situated in the Shiselweni district measuring 214,1330 hectares which he held under and by virtue of Deed of Transfer No. 158/1992 dated 3rd April 1992. This property will hereinafter be referred to as **"the property"** or **'the farm".** This farm has for some years been referred to as the **"Roc Farm"** or **"the Roc Trust Farm".** The property has not yet been transferred out of the deceased estate and is accordingly still registered in the name of the deceased. This property shares a boundary with Mellowwood of which Ashley Malcolm Cameron-Dow since 2003 has been the Farm Manager.

[15] The deceased left a last Will and Testament and a codicil thereto (being annexure "ACD-15" and annexure "ACD-16" respectively. As the codicil is in the Afrikaans language a translation thereof for the convenience of the court is attached as annexure "ACD-17" made by a professional translator one Linda Maria Botha.

[16] The following provisions of the Will are relevant for present purposes:

(i) The deceased nominated two persons as executors of his estate. These were Jeremiah De La Rouviere **("Rens")** and Beukes Willemse **("Beukes").**

The deceased purported to create a trust by the name of the **Roc Fund Trust**.
The deceased bequeathed the property to the **Roc Fund Trust**.

[17] The deceased in Clause 6 thereof directed that the farm be let to the 2nd Respondent for a period of five (5) years at a nominal rental. The 2nd Respondent seems to be of the view that Clause 6 of itself gave him the right to occupy the farm as a tenant, a contention which the Applicant disputes. Prior to March 1999, it is plain that the basis of the 2nd Respondent's occupation thereafter was governed by a written agreement of lease dated 29th July 1999, between

himself and **Rens** as a trustee of the **Roc Fund Trust**. (A copy of that lease is attached as annexure "ACD-20").

[18] The above stated lease provides, *inter alia*, that in terms of the codicil of the deceased the farm **"was to be leased by G.T. Willemse for a period of five years at the nominal value"**. It further records that the 2nd Respondent and **Rens** acknowledges and agree that the provisions of paragraph 6 of the codicil were not clear as to the terms and conditions and that [accordingly] the parties now agreed [as set out therein].

[19] It provides that what is let to and hired by the second Respondent is not the whole farm but a defined portion thereof. The period of the lease is three years commencing 1st March 1999 and terminating on 28 February 2002. It provides that the rental consideration payable will be 5% of the gross farming income derived from farming operations

conducted on the property which rental consideration was to be payable annually in arrears not later than 31st March, of each year, being 31 days after the end of every lease year.

[20] It provides further that any improvements effected by the [second Respondent] on the property became property of the lessor, i.e **Roc Fund Trust**, which of course, was to become the owner of the property in terms of the will of the deceased.

[21] In paragraphs 30, 31, 32 and 33 of the Applicant's Founding Affidavit the tenure of the second Respondent as a tenant in the farm is described in great detail even the income received by the second Respondent from farming operations (see annexure "ACD - 21, "ACD - 23. "ACD - 25").

[22] On or about 22 July 2003 the Applicant, duly represented by one Peter Barry Forbes ("Barry Forbes") concluded a written agreement of lease after the lease

between **Roc Fund Trust** and second Respondent expired by effuxion of time on 28 February 2002. The said lease with Barry Forbes was for a period of three years from 1 July 2002 to 1 July 2005. (Annexure ACD - 26). The said Barry Forbes is now deceased having died on 15th January 2005. Certain discussions and negotiations between Barry Forbes on behalf of the Applicant and second Respondent were reached which were reduced to writing. The two agreements in writing, both of which are dated the 29th July 2002 (copies of these are attached in the Applicant's affidavits as annexure "ACD – 27 and ACD – 28" respectively. Also attached are the cheques drawn by the Nisela Farms (Pty) Ltd in payment of the price/compensation due in terms of the said agreements.

[23] On or about the 13th August 2003 Beukes caused two applications on Notice of Motion to be launched out of the High Court of Swaziland. These had Case Numbers

1973/2003 and 1974/2003 respectively. The first of these (that is to say Case Number 1973/2003) sought an order that **Rens** be removed as executor of the deceased estate. This application was duly granted on the 6th February 2004. However, the order of court also directed Beukes to resign as executor which he thereafter duly did. Subsequently thereto, on 9th June 2004 one Fikile Mthembu was appointed executive **dative** of the deceased estate and Letters of Administration were issued to her.

[24] The second application on Notice of Motion launched by Beukes on the 13th August 2003, which had a Case Number 1974/2003 sought an order declaring the purported creation of the **Roc Trust Fund** to be invalid in law. This application was duly granted by Annandale ACJ on the 6th February 2004. The order was thereafter taken on appeal and was confirmed by the Swaziland Court of Appeal. This judgment

is dated 17th March 2005. The Court of Appeal Case Number was 15/2004.

[25] In consequence of the judgment setting aside the **Roc Trust** and certain *dicta* in both the judgment of Annandale ACJ and that of the Court of Appeal it became apparent that the purported agreement of lease of property dated 22nd July 2002 between **Rens** and the Applicant represented by Barry Forbes was probably invalid in law. Accordingly and in order to remedy the situation a lease was purportedly concluded between the deceased estate represented by Fikile Mthembu as *executrix dative* and the Applicant represented by the said Barry Forbes. (See annexure ACD - 31).

[26] The Applicant was in occupation of the property at the time that lease was concluded and was actively farming it and has remained in occupation ever since.

[27] The above is the essential history of the matter relating to the farm and certain snippets of other events in this matter will emerge as I proceed with the judgment.

The Applicant's case.

[28] The first issue I need to outline before the other issues raised by the Applicant is the issue of wrongful conduct of the 1st Respondent in agreeing to the settlement. In this regard Applicant avers that the 1st Respondent committed a material and most serious breach of his duties as an executor and of his fiduciary obligations. This submission is based on the following propositions and facts:

77.1 Executors of deceased estates are bound in law to admit all lawful claims against the estate and to reject all unlawful, spurious or specious claims.

77.2 For any executor to admit an invalid or spurious or deceitful claim against the estate is unlawful. A fortiori it is unlawful for an executor to

consent to judgment against the estate in respect of a claim that is unlawful or invalid or specious or contrived.

77.3 It is equally unlawful for an executor to admit a claim or consent to a judgment in an amount that is exaggerated and inflated, albeit that there might be some legal validity to some amount.

77.4 It follows that an executor has a duty – and, it is submitted, an onerous duty because of the fiduciary relationship – to scrutinize any and all claims submitted with the utmost diligence and care, and to ensure that there is sufficient credible evidence to substantiate such claims and their amounts.

77.5 The failure by an executor to take all reasonable steps to diligently investigate and verify into the veracity and bona fides of claims against a deceased estate when, as here, he could and should have done so, is culpable.

78.

78.1 In the light of the facts and reasons I have set out above it is plain that the second Respondent does not have and never has had a valid claim against the deceased estate. Put conversely, it is plain that the claim advanced and asserted by him in his particulars of claim is spurious and without foundation. At the very best for the second Respondent it is beyond doubt that even if there should be some component of a claim that has validity, the amount thereof would be very, very much less than that consented to by the first Respondent.

[29] Further averments are made by the Applicant regarding the above subject-matter in the subsequent paragraphs from 78.2 to 79.

[30] The Applicant further addresses the issue of the

conduct of the 1st Respondent in the administration of the deceased estate and breaches of his fiduciary duties in paragraphs 80 to 82 of the Founding Affidavit at pages 60 to 61 of Vol. 1 of the Book of Pleadings. In paragraphs 83 and 84 the Applicant deals with the inappropriate use of Mr. P. Shilubane as his attorney.

[31] Furthermore, in paragraphs 85 to 87 of the Founding Affidavit the Applicant deals with the issue of entering upon the administration of the deceased estate before having furnished a security bond to the Master. In paragraphs 88 the Applicant deals with the 1st Respondent’s conduct prior and during the *ex parte* application. In paragraphs 89 to 90.4 of the Founding Affidavit mention is made of the bringing of the *ex parte* and so-called Urgent Application by Littler on 7th July 2005.

[32] Furthermore in paragraphs 91 to 92 of the Founding

Affidavit mention is made of attending property before service of order. In paragraphs 93 to 94.3 averments are made by the Applicant of 1st Respondent agreeing to the settlement and the consent order. In paragraphs 95 to 95.11 averments are made on the conduct calculated to mislead the Applicant's South African attorney Jurgens Bekker. In paragraphs 96 to 110 of the Founding Affidavit allegations are made of the writ of execution and attachment of property being unlawful and also that the Notice of Sale and the condition of sale were unlawful.

[33] The last paragraphs in the Founding Affidavit concerns the issue of the rescission of judgment and directions as to further conduct of case Number 2741/2004 in paragraphs 112 to 116 of the Founding Affidavit.

[34] The above are the essential averments for the Applicant and when the matter came for argument Counsel for the Applicant furnished very thorough Heads of Argument as he

usually does before this court. I am grateful to Counsel for his high professional standards. I wish to point out an issue I might have omitted above in the outline of the Applicant's case pertaining to the *locus standi* as creditor where the court was referred to a number of legal authorities to the general proposition that a creditor has *locus standi* to bring an application for the removal of an executor of a deceased estate. (see *Mthembu vs Willemse, Court of Appeal Case No. 8/2005*).

[35] Further, he mentions the issue of *locus standi* in respect of rescission of the judgment against the deceased estate by consent in Case No. 2741/2004. In paragraphs 56 to 60.6 Counsel dealt with the issues of the removal of 1st Respondent as executor.

[36] On costs, it is the Applicant's contention that 1st Respondent's handling of the affairs of the estate, and his

conduct in concluding a settlement agreement and consent order was unlawful, culpable, unreasonable and denied that the Applicant has a direct or substantial interest in the winding up of the estate to entitle him to bring the present application. The Applicant's only interest herein is that of a prospective creditor. The Applicant is yet to establish the estate's liability for his claim as well as the *quantum* thereof in a pending action before this court.

[37] The Applicant further contends that an heir or creditor would have *locus standi* to apply for the removal of an executor. What is to follow is based on the assumption that an heir cessionary would also have such a right to apply. The Applicant relies, firstly, on sales and cessions to it by the heirs of their right, interest and title in the estate. Cession is complete when consensus is reached and all formal and other substantive requirements have been fulfilled. (see *Jourbert et al The Law of South Africa Vol.* 4 paragraphs *26* and *27.* Cession in writing is not required but *in casu* the

Applicant elected to rely on written Memorandum of Sale and Cession. In this regard paragraph 6.1 to 7.3 of the Heads of Argument are referred.

The Respondent's case.

[38] In argument before court Counsel for the first Respondent abandoned the argument on rescission as stated in paragraph 8 to 12 of the first Respondent's Heads of Arguments. The first Respondent further abandoned his argument in respect of stay of action and lifting of bar being prayers 3.1 and 3.2 found in paragraphs 13 to 15 of the Heads of Arguments.

[39] On the merits of the case the first Respondent advanced thorough arguments on various aspects of the case including removal and substitution of executor; prayers 1 and 2. This aspect of the matter is addressed in paragraph 17 to 19 of the first Respondent's Heads of

Arguments. In paragraph 19 to 19.1.3 the issue of the use of attorney Shilubane is addressed. In paragraph 19.2 to 19.2.3 the issue concerning the entering upon administration before furnishing security bond is outlined. In paragraph 19.3, 19.4 and 19,5 the issues of the conduct prior and during *ex parte* application, the bringing of the urgent *ex parte* application and attending property before service of order are respectively addressed in the Heads of Arguments.

[40] In paragraph 19.6 to 19.6.4 the issue concerning the agreement to settlement and consent order is addressed. Further on in paragraphs 19.7 to 19.7.2 conduct calculated to mislead Applicant's South African attorney Bekker is outlined. Further on in paragraph 19.8 to 19.9 the issues of the writ of execution and attachment of property unlawful and that of Notice of sale and conditions of sale were unlawful are addressed.

[41] In paragraph 21 to 26 of the Heads of Arguments the

issues concerning rescission in prayer 3.1 and alternative prayer to prayer 3 are addressed. In this regard the court was referred to the South African case of *Minister of Local Government and Land Tenure and Another vs Sizwe Development and others: In re: Sizwe Development vs Flagstaff Municipality 1991 (1) S.A. 677 (TK*) quoted with approval in *K.R. Sibanyoni Transport Services CC and Others vs Sheriff, Transvaal High Court and Another 2006 (4) S.A. 429 (T).*

[42] In paragraph 27 to 30 of the Heads of Arguments on the issue of Case No. 2741/2004 (consent order sought to be rescinded), staying action and lifting bar being prayers 3.1 and 3.2.

[43] On costs 1st Respondents advanced arguments in the Heads of Arguments in paragraphs 31 to 37 thereof to the general argument that the application stands to be dismissed in its entirety in view of the scurrilous and founded

allegations of fraud and impropriety, and the fact that the Applicant would refer to previous court applications but not attach copies, causing the Respondents the expense and inconvenience of copying and attaching same, and the Applicant insisting on costs *de bonis propris* on the attorney and client scale including certified costs of counsel, the Applicant has invited a punitive costs order against it.

[44] The 1st Respondent further addressed his arguments on his counter application in paragraphs 38 to 43 of the Heads of Arguments. In this respect the case for the 1st Respondent is that the Applicant is in unlawful possession and occupation of the farm, the said farm which is an asset of the estate, vests in the 2nd Respondent, and that the Applicant has so been in unlawful possession and occupation since the unlawful spoliation and ejectment of the 2nd Respondent. In this regard the court was referred to the case of *Major's Estate vs De Jager 1944 T.P.D. 96* as cited in

Henderson vs Barlett and Another 1950 (3) S.A. 109 (W) at *114* where the following is stated:

> "There is no doubt that generally speaking it is not the function of an executor to purchase or hire property or to enter into fresh contracts in relation to estate property; at any rate, he acts at his peril in doing so, unless he has adopted the salutary precaution of obtaining the court's sanction for his proposed action … Though advisable in such matters to obtain the sanction of the court in advance, the executor has the authority to bind the estate in transactions concerning the estate assets which are not manifestly unreasonable and unnecessary for the liquidation, i.e. the reduction into possession of the estate" and in the Henderson case it was further stated that: "As against the general discussion of the power of executors the right of an executor to make specific contracts in regard to estate assets is dealt with in a number of cases. To grant long leases of estate property has been held to be beyond the executor's power – *Amod's Executor v Registrar of Deeds (1906, T.S. 90* at p*. 93); Ex parte Lotzof (1944 OPD 281).* In *Ex parte Kuelz, N.O. (1934, S.W.A. 111),* Van Den Heever J says "the duty of the executor is to liquidate the estate and distribute the assets in accordance with the will of the deceased. It is no part of his duty to speculate with the assets to the advantage of the heirs even if the prospects of gain are, humanly speaking, great".

[45] The court was further referred to the judgment of the Supreme Court in *Mthembu (supra) (Bundle CJL1 (Vol. 2)* at page *457:*

> "The validity of the lease entered into with OKH Farms is, as indicated above, a matter that will have to be dealt with by the executor appointed by the court a quo. However, the failure of the Appellant [Mthembu] to be candid with the court concerning her motive for concluding a lease with the parties involved and for the period reflected therein, is either attributable to poor judgment at best or mala fides at worst. On either footing her conduct of negotiating and concluding the lease without the authorization of either of the court or the Master and without consulting the Respondent [second Respondent *in casu*] before doing so, is in my view conduct that calls for her removal from office".

[46] It is contended for the 1st Respondent that the weight of legal authorities, taken in conjunction with the remarks of the Supreme Court, justifies the finding that Mthembu was not empowered to enter into any lease agreement with the Applicant or any other person. It is self-evident that a lease, with reference to **huur ggat voor koop** will have an adverse impact on the purchase price of immovable

property, to the prejudice of the estate.

[47] The first Respondent furthermore filed supplementary Heads of Argument touching on the terms of settlement agreement and I shall revert to some of the arguments as I progress with this judgment.

[48] The second Respondent represented by the learned *Advocate Eberhson* also filed before this court very useful Heads of Arguments. I shall proceed to sketch the case for the second Respondent on the arguments by Counsel.

[49] These points are firstly that the Applicant has no *locus standi* to bring this application. The arguments in respect of this point are reflected in paragraph 4.1 to 4.6 of the second Respondent's Heads of Arguments. Further on at paragraph 4.6 the second Respondent contends that heirs and *ab interstatio* heirs in any case have no *locus standi* to interfere in the administration of an estate and to bring actions

pertaining to the administration of an estate as that is the sole function of the executor of the estate. In this respect the court was referred to the South African case of *Asmal vs Asmal 1991 (4) S.A. 262 (NPD).*

[50] The second point *in limine* is that the Applicant, in any event, has no *locus standi* to, and cannot at law, apply for the rescission of the final judgment which was granted by agreement between the 1st and 2nd Respondents. In this regard the court was referred to *Erasmus, Superior Court Practice B1 – 306/308*.

[51] The third point *in limine* is that the deponent to the Applicant's Founding affidavit, one Cameron-Dow, has no knowledge of the full facts, and on his own admission, is no expert in any field and he thus was not a competent deponent to the Founding affidavit. In support of this argument the court was referred to the case of *Coopers (SA) Ltd vs Deutsche Shadlingebekampfung MBh 1976 (3) S.A.*

352 (A).

[52] The fourth point *in limine* is that the Applicant does not have *locus standi* to ask for the relief set out in prayers 3 and 4 namely to apply on behalf of the executor of their choice for relief in Case No. 2741/2004, even for the upliftment of a Notice of Bar properly served.

[53] On the removal of the first Respondent as executor the second Respondent contends that he has no interest in this. On the issue of setting aside of the court judgment the second Respondent contends that the Applicant made out no *locus standi* to attack the consent judgment and also made out no case why it should not be set aside.

[54] On the counter-claim application by first Respondent the second Respondent states that he has no interest in this.

[55] In the supplementary Heads the second Respondent

addressed an argument around paragraph 6 of the codicil that it was queried in argument under what right the second Respondent occupied the farm.

[56] On costs the second Respondent argued that the Applicant should thus not be awarded any costs of this application against the second Respondent.

[57] The second Respondent has given a useful summary at paragraph 9 of page 14 of his Heads of Argument that **"there are in effect two main goals of the application,, on paper, tries to achieve with this application, namely firstly, the removal of the first Respondent as executor and to have an executor of its choice appointed, secondly, to have the consent judgment set aside".** I must further add that before the court addresses the merits of the matter to have to address the points *in limine* raised by the Respondents.

[58] In summary therefore the Respondents have raised the following points *in limine* and I must say that some of these topics have been raised by each Respondents but common to both as follows:

a) Applicant has no *locus standi* to remove an executor;

Applicant has no *locus standi* to apply on behalf of the executor their choice for relief in Case No. 2741/2004.

b) Disputes of fact

Inadmissible hearsay.

[59] I shall address points (a) and (b) together as they relate to the same subject-matter as follows:

(a) ***Locus standi* to remove the executor: prayer 1**

[60] The Respondents contended under this head that an heir or creditor would have *locus standi* to apply for the

removal of an executor. What is to follow is based on the assumption (for argument's sake) that an heir's cessionary would also have such a right to apply. The Applicant relies, firstly, on sales and cessions to it by the heirs of all their right, interest and title in the estate. Cession is complete when consensus is reached and all formal and other substantive requirements have been fulfilled. In this regard the court was referred to *Jourbert, et al The Law of South Africa Vol. 4* paragraphs *26* and *27*.

[61] Cession in writing is not required but *in casu* the Applicant elected to rely on written memorandum of agreement of sale and cession (being annexures ACD5 to ACD9 at page 95 of the Book of Pleadings).

[62] The Applicant on the other hand has taken the position that the cessionary of the rights of an heir does have *locus standi* to bring an application for the removal of an executor. For this proposition the court was referred to the South

African case of *Segal vs Segal 1977 (3) S.A. 247 (c).* The Applicant has taken cession of the rights, title and interest of the interstate heirs. That on of the interstate heirs and cedents, Johannes Hendrik van der Walt, has an affidavit setting out the family relations.

[63] Having considered the arguments of the parties regarding this aspect of the matter I am inclined to agree with the Respondents' arguments that the Applicant has failed to establish *locus standi* on the basis of purported cession. I say so because firstly, the agreement of cession relied upon was not duly stamped in terms of Section 9 (e) of the Stamp Duties Act No. 37 of 1976 and as such, in terms of Section 13 of the said Act, are inadmissible and irrelevant.

[64] Secondly, consensus on the part of both cedent and cessionary are required.

[65] The deponent to the Founding affidavit is neither a

director, officer or employee of the Applicant, but is working as a Farm Manager for Nisela Farms, a related company to the Applicant at Shiselweni, Swaziland. Notably, neither this deponent not the Applicant's attorney Bekker who signed as a witness, disclosed to the court who purportedly signed the sale and cession agreements on behalf of the Applicant as cessionary in Bedfordview, South Africa (the memoranda were signed by the cedents in Randburg, Jeffrey's Bay, Nelspruit and Pretoria).

[66] It appears that this spectral signature (the signature is illegible) whose identity remains a secret, is the only person who can confirm that the sale and cession was signed or agreed to on behalf of the Applicant. In this regard I agree with the Respondents argument that it then follows, even if the agreements had been properly before court, that there is no reliable evidence of consensus on the part of the Applicant. Any allegation in this respect by the deponent to the Founding Affidavit, or deponents to confirmatory

affidavits would constitute inadmissible hearsay and therefore irrelevant evidence.

[67] Thirdly, the cessions are conditional upon payment. There is no allegation, in the Founding Affidavit or the supporting affidavit (of the only cedent who made an affidavit) (see annexure “ACD10” pages 120 – 125 of the Book of Pleadings) that this condition has been fulfilled.

[68] The averments by the deponent, who does not and cannot have any personal knowledge of the cessions, consensus on the part of the cessionary, and/or the fulfillment or non fulfillment of the conditions of payment, and who discloses no source for his allegations that the Applicant entered into these agreements, therefore constitutes hearsay evidence and as such the purported cessions are irrelevant.

[69] In the premises, the Applicant has failed to establish

locus standi on the basis of the purported cession. Further, it would appear to me that the Respondent is correct that the deponent further relied on an allegation that the Applicant is a creditor of the estate. This too cannot be sustained because the Applicant never filed a claim against the estate, as is required by Section 42 of the Estate Act No. 28 of 1902, nor has it quantified its alleged damages (in so far as it may be permitted to sue the estate for damages resulting from its unlawful occupation of the farm). The Applicant, at the time when it instituted the proceedings, therefore had no *locus standi*.

[70] I must mention at this stage that Respondent in argument abandoned their argument that Applicant is seeking rescission of the order which issued pursuant to the settlement agreement between the 1st and 2nd Respondents, in essence averring that the agreement giving rise to the judgment is open to attack. The argument in this regard was that only an executive can litigate on behalf of an

estate, i.e. institute or defend/oppose proceedings on behalf of an estate (see Section 22 of the Administration of Estates Act No. 28 of 1902) an heir cannot institute proceedings on behalf of an estate unless he has letters of administration granted to him. (see *Asmal vs Asmal and Others 1991 (4) S.A. 262 (N*).

[71] I wish to further record that the argument on stay of action and lifting of bar in prayer 3.1 and3.2 was also abandoned by the Respondents.

(b) ***Locus standi* in respect of rescission of the judgment against the deceased estate by consent in Case No. 2741/2004.**

[73] The second point *in limine* is that the Applicant, has no *locus standi* to, and cannot in law, apply for the rescission of the final judgment which was granted by agreement between the 1st and 2nd Respondents. In this regard the

Respondents have cited what is stated by the learned author *Erasmus, Superior Court Practice page B1 – 306/308* that as the Applicant was not a party to the matter and in any case is not the executor of the estate and the Applicant cannot interfere in the administration of the estate.

[74] It is contended by the Respondents further that the Applicant in any case did not state the precise grounds which it is relying upon, but merely burdened the papers with many annexures and made vague allegations that it is entitled to apply for the rescission of the judgment. When the Applicant's attorney Bekker was challenged he went "overseas" and did not revert back to the first Respondent. The Respondents contend that according to *Erasmus (supra)* where the author deals with Rule 42, the Applicant should have with regard to its allegation of fraud alleged and proved:

5.3.2 that the evidence was in fact incorrect

5.3.3 that it was made fraudulently and with an intent to mislead; and

5.3.4 that diverged to such an extent from the truth that the court would, if the true facts had been placed before it, have given judgment other than which it was induced by the incorrect evidence to give. (see *Rowe vs Rowe 1997 (4) S.A. 160 (SCA)* at *1661*).

[75] The second point *in limine* is that the Applicant, in any event has no *locus standi* to and cannot, at law, apply for rescission of the final judgment which is granted by agreement between the first and second Respondents. The proposition in this regard is that as the Applicant was not a party to that matter and in any case is not the executor of the estate and the Applicant cannot interfere with the administration of the estate. In this regard the court was referred to the legal authority of *Erasmus, (supra)* at page *B1 – 306/308.*

[76] The Applicant on the other hand contends that it has *locus standi* to bring an application to rescind the consent order (prayer 3 in the Notice of Motion).

[77] According to the Applicant the law recognizes court proceedings involving deceased estates to be of two kinds. A distinction between actions brought on behalf of an estate, on the other hand, and actions brought by beneficiaries or heirs in their own right against the executor for example maladministration. The former known as "representative actions" and the latter as "direct actions".

[78] An example of a direct action would be a claim by a beneficiary for transfer to him of what is due to him from the estate. The general rule is that the proper person to act in legal proceedings on behalf of the estate is the executor and only the executor. There is, however, an exception to this general rule which allows a beneficiary to bring

representative proceedings on behalf of a deceased estate. This is the so-called *Benningfield exception* which was recognized in South African law by the Appellate Division in the *Gross* case. This exception takes its name from the decision of the Privy Council which came before it on appeal from the Supreme Court of Natal. (see *Benningfield vs Baxter (1886) 12 AC 167 PC*).

[79] The Applicant contends that the circumstances giving rise to the need and validity for such an exception to be recognized and for a beneficiary to be accorded *locus standi* was the impossibility of a diliquent executor suing himself.

[80] The Applicant further contends in this regard that accepting that the application for rescission of the consent judgment could not be brought by a beneficiary as a “direct action”, and constitutes a “representative action”, it is submitted that the *Benninfield exception* applies, and that under that exception the Applicant standing as it does in the

shoes of estate heirs has *locus standi*.

[81] After weighing the arguments of the parties it would appear to me that the arguments of the Respondents are correct that the Applicant in any case did not state the precise grounds which it is relying upon, but merely burdened the papers with many annexures and made vague allegations that it is entitled to apply for rescission of the judgment.

[82] I agree with the Respondents when they cite *Erasmus (supra)*, where the author deals with Rule 42, the Applicant should have with regard to its allegation of fraud alleged and proved:

i) That the 2nd Respondent being the successful litigant was a party to the (see *Groenewald vs Gracia (Edms) Bpk 1985 (3) S.A. 968 (T)* at *971*);

ii) That the evidence was in fact incorrect;

That it was made fraudulently and with intent to mislead; and

iii) That it diverged to such an extent from the truth that the court would, if the true facts had been placed before it, has given a judgment other than that which it was induced by the incorrect evidence to give. (see *Rowe vs Rowe 1997 (4) S.A. 160 (SCA) at 161*).

[83] In the instant case the Applicant neither made the said allegations nor proved them. The 1st and 2nd Respondents completely rebutted the allegations of fraud and impropriety against them in their Answering Affidavits and annexures thereto. For these reasons I find that the principles of law enuaciated in the *Benningfield case (supra)* do not apply to the facts of this case. Therefore the point of law *in limine* by the Respondents in this regard succeeds.

(c) The disputes of fact.

[84] The third point *in limine* is that there is at least a vast disputes of fact which the Applicant must and clearly did foresee but merely blundered on incurring a large amount of costs. The Applicant with an alterior motive launched these proceedings namely to drag out the case as long as possible so as to remain in occupation of the farm as long as possible.

[85] The Applicant on the other hand contended that there are no disputes of facts in this matter the court can grant an application on the papers.

[86] Having weighed the pros and cons of the arguments of the parties I have come to the considered view that in this regard the Respondents are correct in their contentious that *in casu* there are disputes of facts which should have been foreseen by the Applicants. I say so because on his own admission Cameron-Dow does not have personal knowledge

of the facts deposed to in the Founding Affidavit and his affidavit consists of inadmissible hearsay matter, irrelevant and argumentative speculation. Therefore the points *in limine* also succeed.

[87] Further on the totality of the arguments I find that the Applicant does not have *locus standi* to ask for the relief set out in prayer 3 and 4 namely to apply on behalf of the executor of their choice for relief in Case Number 2741/2004, even for the upliftment of a Notice of Bar properly served. No valid allegations as to what may be the basis for asking for upliftment of the Notice of Bar are made. Therefore the point of law *in limine* in this regard is sustained.

(d) The affidavit of Cameron-Dow

[88] The last point *in limine* is that the deponent to the Applicant's Founding Affidavit, one Cameron-Dow, has no knowledge of the full facts, and, on his own admission, is no

expert in any field and he thus was not a competent deponent to the Founding Affidavit. In this regard the court was referred to the dictum by Wessels JA in *Coopers (SA) Ltd vs Deutsche Shadlingebekampfung MBH 1976 (3) S.A. 352 (A)* wherein it stated:

> "As I see it, an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness except possibly where it is controverted; an expert's bald statement of his opinion is not of any real assistance proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert".

[89] On my assessment of the said affidavit of Cameron-Dow I have come to the considered view that his comments about the documents is not admissible and did not entitle him to intersperse his comments with argumentative and irrelevant matter (see per 6 of the 1st Respondent's Answering Affidavit at page 275).

[90] *Van Winsen, Cillier's Loots, The Civil Practice of the Superior Courts of South Africa, 4th Edition* at page *624* refer to the following two essential requirements a deponent must comply with in order to be regarded as an expert:

(a) The evidence must be in the nature of an opinion, and;

(b) It must be given by a person who is an expert (quoting *Uni-erections vs Continental Engineering Co. Ltd 1981 (1) S.A. 240 (W)* at *250 E – F* as authority.

[91] The learned authors also refer to other requirements at pages 369/371 of the same text.

[92] For these reasons I find that this point *in limine* is sustained. I now have to address the first Respondent's

counter application. I must mention that the second Respondent has no interest in this aspect of the matter as it only concerns the first Respondent.

[93] The first Respondent states at para 81.2 of his Answering Affidavit in support of the counter application that the following facts are common cause:

81.2.1 It is clear that the (first) lease agreement annexure ACD 26 (pages 181-184) is invalid and the Applicant is not entitled to occupation of the farm of the estate in terms thereof;

81.2.2 The (second) lease in terms whereof the Applicant is presently purporting to occupy the farm of the deceased having been entered into invalidity by the previous executrix of the estate namely one Ms Mthembu and the Applicant, and is not valid and not binding upon the estate of the deceased.

[94] Therefore this court should issue a declaration to that effect and order the Applicant to vacate the farm within 14

days of the order, with costs and that the costs of Counsel be certified in terms of Rule 68 (2).

[95] Having considered the arguments of the parties in the whole matter I have come to the view that the points of law *in limine* raised by the Respondent succeed and the application is dismissed with costs including costs of Counsel under Rule 68 (2). Furthermore that prayers 1, 2, and 3 of the first Respondent's counter application are granted forthwith.

S.B. MAPHALALA

PRINCIPAL JUDGE