REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

Case no: A 206/2011

In the matter between:

RUTH VAANDA KANGUATJIVI (born BLACK)	**FIRST APPLICANT**
NATASHA LETICHIA KANGUATJIVI	**SECOND APPLICANT**
EUGENE IVAN KANGUATJIVI	**THIRD APPLICANT**

and

SHIVORO BUSINESS AND ESTATE CONSULTANCY	**FIRST RESPONDENT**
MARY CALINE KANGUATJIVI	**SECOND RESPONDENT**
EDWIN KAMBURONA (IHEKA) KANGUATJIVI	**THIRD RESPONDENT**
GERSON MARENGA	**FOURTH RESPONDENT**
MBATJIUA KANGUATJIVI	**FIFTH RESPONDENT**
KAPENA KANGUATJIVI	**SIXTH RESPONDENT**
PAHEE KANGUATJIVI	**SEVENTH RESPONDENT**
HIMEE KANGUATJIVI	**EIGHTH RESPONDENT**
THE MASTER OF THE HIGH COURT	**NINTH RESPONDENT**
ANNASTACIA KANTANAURA BLACK	**TENTH RESPONDENT**

Neutral citation: *Kanguatjivi v Shivoro Business and Estate Consultancy* (A 206-2011) [2012] NAHCMD 95 (16 October 2012)

Coram: VAN NIEKERK J
Heard: 23 August 2012
Delivered: 16 October 2012
Reasons: 3 December 2012

Flynote: **Administration of estates** – Section 35(4) of the Administration of Estates Act, 66 of 1965 – Provision that liquidation and distribution account lies open for inspection for a period of not less than 21 days – Such provision does not require exact compliance – Substantial compliance suffices

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REASONS FOR JUDGMENT

VAN NIEKERK J:

[1] I made an order on 16 October 2012 dismissing the application with costs, indicating that the reasons will follow, as they now do. The first applicant alleges that she was married to the late Ewald Tjoutuku Kanguativi ('the deceased') in community of property on 1 August 1993. During his lifetime, the deceased adopted the second and third applicants, the biological children of the first applicant, as his children. On 10 November 2008 the deceased passed away without leaving a will.

[2] The applicants instituted these proceedings in which they seek the following relief:

> "1. Ordering the first, third and ninth respondents to comply with the provisions of section 35(4) of the Administration of Estate's (*sic*) Act, Act No. 66 of 1965 (as amended) by allowing the Liquidation and Distribution Account in the estate of the Late (*sic*) Ewald Tjoutuku Kanguatjivi, filed by the first respondent with the

ninth respondent, to lie open for inspection for a period of not less than twenty-one days.

2. Directing the first respondent to give notice contemplated in section 35(5)(a) of the Administration of Estates Act, Act 66 of 1965.
3. Granting leave to the applicants to file objections to the liquidation and distribution account, as contemplated in section 35(7) of the Administration of Estates Act.
4. Directing the ninth respondent to deal with the objection as contemplated in section 35(9) of the Administration of Estates Act, Act No. 66 of 1965.
5. Granting the applicants further and/or alternative relief as to the Court may seem meet.
6. An order of costs, jointly and severally only against those respondents who oppose the relief claimed in the notice of motion.'

[3] The first respondent is the duly authorized agent of the third respondent, who is a son of the deceased and who was appointed the executor of the deceased's estate. The first respondent is authorized to assist the third respondent in the administration of the deceased estate in accordance with the laws of intestate succession.

[4] The second respondent, who lives in the United States of America, is mentioned in the estate's first liquidation and distribution account as being the surviving spouse from a marriage with the deceased in community of property and as being a beneficiary. The first applicant disputes that the second respondent is the surviving spouse. The third, fourth, fifth, sixth, seventh and eighth respondents are mentioned in the account as children and beneficiaries of the deceased. The ninth respondent is the Master of the High Court of Namibia ("the Master"), who is the only party opposing the application. The tenth respondent is cited in her capacity as guardian of a minor child mentioned in the liquidation and distribution account as a child of the deceased and a beneficiary. None of the applicants are mentioned in the liquidation and distribution account.

[5] In their founding affidavit the applicants state that when the liquidation and distribution account was advertised there was non-compliance with the provisions of section 35(4) and 35(5) of the Administration of Estates Act, 1965 (Act 66 of 1965). (It is actually section

35(5)(a) which is relevant in this matter). Section 35 deals with liquidation and distribution accounts and section 35(4) provides as follows:

> "Every executor's account shall, after the Master has examined it, lie open at the office of the Master, and if the deceased was ordinarily resident in any district other than that in which the office of the Master is situate, a duplicate thereof shall lie open at the office of the magistrate of such other district for not less than twenty-one days, for inspection by any person interested in the estate."

[6] Section 35(5)(a) reads as follows:

> "The executor shall give notice that the account will be so open for inspection by advertisement in the *Gazette* and in one or more newspapers circulating in the district in which the deceased was ordinarily resident at the time of his death and, if at any time within the period of twelve months immediately preceding the date of his death he was so resident in any other district, also in one or more newspapers circulating in that other district, and shall state in the notice the period during which and the place at which the account will lie open for inspection."

[7] The first liquidation and distribution account in the deceased estate was advertised in the "New Era" newspaper of 3 May 2011 and in Government Gazette No 4703 of 29 April 2011.

[8] On 27 May 2011 the first applicant via her legal practitioners of record drew up three objections in terms of section 35(7) of the Act and lodged same with the Master on 30 May 2011. The objections are addressed at issues relating to (i) the alleged marriage in community of property between the deceased and the second respondent; (ii) an alleged failure to include the minor child of the tenth respondent in the liquidation and distribution account; and (iii) the failure to include the second and third applicants, being the deceased's adopted children, in the account.

[9] On 21 June 2011 the Master replied in writing that the account had laid open for inspection during the period 3 May 2011 until 23 May 2011. She refused to entertain the objection as it was received outside the period advertised. She stated that it was received on

31 May, but the date stamp acknowledging receipt indicates 30 May 2011. Nothing turns on this. In an apparent reference to section 35(10) of the Act she stated that the applicant may approach the Court for the relief sought. However, the applicant did not use the remedy under section 35(10), which is to apply within 30 days to this Court for the Master's decision to be set aside. In fact, Mr *Kauta* on behalf of the applicants made it clear that this application is not brought in terms of section 35(10) and is not aimed at the Master's decision.

[10] In the founding affidavit it is alleged that as the account did not lay open for 21 days and as there was non-compliance with section 35(4), no further steps were allowed to be taken. It is specifically alleged that in such a case no distribution may take place in terms of the liquidation and distribution account. It is further alleged that any distribution that has taken place is null and void and that those who have received any benefits in accordance with the distribution account must be ordered to return such benefits to the estate. However, the relief claimed in the notice of motion does not go so far as to claim a return of the benefits.

[11] The specific instances of non-compliance on which the applicants rely are set out in paragraph 19 of the founding affidavit as follows:

> "19.1 The advertisement in the "New Era" appeared only on 03 May 2011;
>
> 19.2 There is no indication in the advertisement in the New Era newspaper that the account laid open for inspection;
>
> 19.3 and the period during which and the place where the account may be inspected as required by section 35(5)(a) of the Act, are not indicated in the advertisements;
>
> 19.4 There was thus non-compliance with the provisions of section 35(4) and 35(5) of the Act."

[12] In her answering affidavit the Master refers to the fact that the objection was filed late and that any section 35(10) application must be brought in time. She further states that she is opposing the application because she already on 27 May 2011 gave permission that the assets may be distributed to the heirs and that the creditors may be paid. She states that, should there be a re-advertisement of the account, the true state of affairs would not be

reflected. She invites the applicants to object to the Second Liquidation and Distribution account still to be lodged. I pause to note here that her counsel conceded during the hearing, correctly so, that the second and third applicants, being the deceased's adopted children, should be included in that account as beneficiaries. The Master does not respond pertinently to the allegations of non-compliance with sections 35(4) and 35(5)(a), except to state that the first and third respondents gave notice in terms of section 35(5), stating that the First Liquidation and Distribution Account will lay open for inspection for 21 days at the Masters' office. She attaches a copy of the advertisement in the Government Gazette, but does not refer to the advertisement in the "New Era" at all. Further she mentions in passing that the First Liquidation and Distribution Account "duly laid open for inspection" (see paragraph 5).

[13] In her replying affidavit the first applicant makes it plain that the basis of her application is not section 35(10), but rather that there was non-compliance with the provisions of sections 35(4), 35(5)(a) and, for the first time, she also mentions section 35(9). She states that, by not dealing with the allegations regarding the advertisement in the New Era, the Master must be taken to have conceded that there was non-compliance in respect of this advertisement as alleged. The second and third applicants did not file replying papers.

[14] I shall now examine the advertisements themselves to assess the objections raised against them. The advertisement in the "New Era" reads as follows (the underlining and italics are mine):

> "**LIQUIDATION AND DISTRIBUTION ACCOUNTS IN DECEASED ESTATES LYING FOR INSPECTION**
>
> In terms of section 35(5) of Act 66 of 1965 notice is hereby given that <u>copies of the Liquidation and Distribution accounts (First and Final unless wise (*sic*) stated) in the estate specified below will be open for the inspection of all persons interested therein</u> *for the period of 21 days* (or longer if specifically stated) *from the date specified or from the date of publication hereof, Which ever (sic) may be the later*, and at the office of Masters (*sic*) and Magistrates as stated.
>
> Should no objection thereto be lodged with the Masters (*sic*) concerned during the period, the executors will proceed to make payment in accordance with the accounts.
>
> ……[reference is made to another estate]

5. **Registered number of Estate:** 1776/09
Master's Office: WINDHOEK

Surname: Kanguatjivi
Christian name: Ewald, Tjoutuku
Date of death: 10/11/2008
Identity Number: 380526008 1
Last Address: Windhoek
Surviving spouse: Mary, C, Kanguatjivi
Identity number: 451210

…….[details of the first respondent]"

[15] The advertisement in the *Government Gazette* begins with the same two paragraphs but without the spelling errors. When the particulars of the estate are given, the words printed in bold in the "New Era" advertisement do not appear.

[16] It is convenient to deal with the objection set out in paragraph 19.2 of the founding affidavit first. It is that there is no indication in the "New Era" advertisement that the account lay open for inspection. However, the words underlined above in the advertisement clearly state that the account will be open for inspection. The objection has no merit.

[17] The second objection raised against the advertisement in the "New Era", read in context with paragraph 20 of the applicants' founding affidavit is really that, as the Master had stated in her reply on 21 June 2011 that the account had laid open for inspection during the period 3 May 2011 until 23 May 2011, and as the "New Era" was only published on 3 May 2011, the account in fact lay open for inspection fewer than 21 days. My view is as follows. Although the Master regarded the 21 day period to have run from 3 May to 23 May, the advertisement does not give these dates as the starting point and ending point of this period. The italicized words clearly indicate that if no date is specified for the starting point of the 21 day period, the period will run from the date of publication, whichever is the later. As there is no specific date mentioned in the advertisement from which the 21 day period begins to run, the period begins to run from the date of publication. In *Meyerowitz, The Law and Practice of Administration of Estates and their Taxation* (2010 Edition) §12.12, page 12 – 13 the learned author states that 'care should be taken where the period is advertised to run from the date of

publication that the notices are published the same day, otherwise the period of inspection will only end on the last day allowed in the latest notice.'

[18] Act 66 of 1965 does not specify how any number of days should be computed. Therefore it should be done in accordance with section 4 of the Interpretation of Laws Proclamation, 1920 (Proclamation 37 of 1920), i.e. 'exclusively of the first and inclusively of the last day, unless the last day shall happen to fall on a Sunday or on any other day appointed by or under the authority of a law as a public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday'. (See *Meyerowitz op. cit.*). Applying this method of computation, it means that the 21 day period ended on Tuesday, 24 May 2011. I think I must accept in favour of the applicants that, as the Master states that the account lay open for the period 3 May to 23 May 2011, it did not lay open for such inspection on 24 May 2011. I shall deal with the legal effect, if any, of this fact at a later stage.

[19] The third objection raised by the applicants is that the period during which and the place where the account may be inspected are not indicated in the advertisements. Both advertisements state that the account will be open for inspection for a period of 21 days or longer, depending on the circumstances as set out in the advertisements. This part of the applicants' complaint clearly has no basis.

[20] As far as the place is concerned, both advertisements state that the account will be open for inspection at the office of the Master and the magistrate "as stated". In the case of the "New Era" the Master's office in Windhoek is clearly mentioned. In the *Government Gazette* the Master's office is not expressly mentioned. In my view it could be said that the advertisement should be expressed in clearer terms, but all references to any place in the advertisement are always to "Windhoek". I do not think that any person could reasonably come to any conclusion other than that the Master's office meant in the advertisement is the Master's office in Windhoek.

[21] The only question that arises from the above analysis is whether the fact that the account did not lie open for inspection on 24 May 2011 means that all steps that took place

afterwards as regards the estate are nullities, as counsel for the applicants submitted. Mr *Kauta* referred to the use of the word “shall” in section 35(4) and submitted that this is a clear indication that the provision is mandatory, which requires that there must be absolute compliance with the time period specified in the subsection and that there can be no question of substantial compliance being sufficient or of the condonation of any non-compliance.

[22] In *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) at 513F-514A the Supreme Court contrasted (and disapproved of) the earlier inflexible approach on statutory time limits as expressed in *Hercules Town Council v Dalla* 1936 TPD 229 at 240 (‘…..the provisions with respect to time are always obligatory, unless a power of extending the time is given to the Court’) with ‘….later, more moderated approaches adopted or endorsed by the courts (including the High Court which held that the modern approach manifests a tendency to incline towards flexibility)’ (*DTA of Namibia and Another v Swapo Party of Namibia and Others* 2005 NR 1 (HC) at 11C). In this regard the Supreme Court approved of the following extract from *Volschenk v Volschenk* 1946 TPD 486 at 490:

> 'I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislature should in all cases be enquired into and the reasons ascertained why the Legislature should have wished to create a nullity.'

See also: *Suidwes-Afrikaanse Munisipale Personeelvereniging v Minister of Labour and Another* 1978 (1) SA 1027 (SWA) at 1038A – B.

[23] In considering the question raised it is not helpful to focus merely on whether the requirements of section 35 are peremptory or directory. Although these are useful labels to use as part of the discussion (*Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H), the true enquiry is whether the Legislature intended the distribution of any assets in terms of the liquidation and distribution account to be valid or invalid where the period for inspection is shorter than 21 days. (*Cf. Ex parte Oosthuysen* 1995 (2) SA 694 (T) at 695I). It should be remembered that -

> ‘It is well established that the Legislature's intention in this regard is to be ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (*Nkisimane* (*supra* at 434A); *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A)).’
>
> (*Oosthuysen* (*supra* at 696A)).

[24] This principle was expanded in *Swart v Smuts* 1971 (1) SA 819 (A), when Corbett AJA (as he then was) said the following at 829E-F:

> ‘In general an act which is performed contrary to a statutory provision is regarded as a nullity, but this is not a fixed or inflexible rule. Thorough consideration of the wording of the statute and of its purpose and meaning can lead to the conclusion that the Legislature had no intention of nullity.’ [my translation from the Afrikaans]

[25] In *JEM Motors Ltd v Boutle and Another* 1961(2) SA 320 (NPD) at 328A-B the court expressed the issue in this helpful way:

> ‘ …..what must first be ascertained are the objects of the relative provisions. Imperative provisions, merely because they are imperative will not, by implication, be held to require exact compliance with them where substantial compliance with them will achieve all the objects aimed at.’

[26] In *Johannesburg City Council v Arumugan & Others* 1961 (3) SA 748 WLD the court considered several authorities on the issue of non-compliance with statutory time limits and concluded that in each of the cases cited the basis upon which the decision in the case was founded was ‘the determination of the intention of the Legislature coupled with the possibility of prejudice’ (at 757E-F).

[27] In *DTA of Namibia and Another v Swapo Party of Namibia and Others, supra,* at 9H-10D the Full Bench noted with approval the following stated in *Pio v Franklin, NO and Another* 1949 (3) SA 442 (C) when Herbstein J summarised what the Full Bench considered “certain useful, though not exhaustive, guidelines” when he said at 451:

> ‘In *Sutter v Scheepers* (1932 AD 165 at 173-4), Wessels JA suggested "certain tests, not as comprehensive but as useful guides" to enable a Court to arrive at that "real intention". I would summarise them as follows:

(1) The word "shall" when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.
(2) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.
(3) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.
(4) If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.
(5) The history of the legislation also will afford a clue in some cases.'

[28] In *Sayers v Khan* 2002 (5) SA 688(C) the following was stated at 692A-G (the passage at 6792A-D was recently applied in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others supra* at 516I):

> 'The jurisprudential guidelines relevant to the present case as articulated by the South African Courts (particularly in cases such as *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) and *Sutter v Scheepers* 1932 AD 165 at 173 and 174) are usefully summarised by *Devenish* (*op cit* at 231 - 4) as follows:
>
> '(i) If, on weighing up the ambit and aims of a provision, nullity would lead to injustice, fraud, inconvenience, ineffectiveness or immorality and provided there is no express statement that the act would be void if the relevant prohibition or prescription is not complied with, there is a presumption in favour of validity. . . . Also where "greater inconvenience would result from the invalidation of the illegal act than would flow from the doing of the act which the law forbids", the courts will invariably be reluctant - unless there is some other more compelling argument - to invalidate the act. Effectiveness and morality are inter alia also considerations that the courts could use in the process of evaluation, in order to decide whether to invalidate an act in conflict with statutory prescription.
> (ii) The history and background of the legislation may provide some indication of legislative intent in this regard.
> (iii) The presence of a penal sanction may, under certain circumstances, be supportive of a peremptory interpretation, since it can be reasoned that the penalty indicates the importance attached by the legislature to compliance. However, the courts act with circumspection in these circumstances. Therefore, in *Eland Boerdery (Edms) Bpk v Anderson* 1966 (4) SA 400 (T) at 405D - E, the Court made the observation that "(t)rouens, die toevoeging van so 'n sanksie is dikwels 'n aanduiding dat die wetgewer die straf, waarvoor voorsiening gemaak word in die Wet,

as genoegsame sanksie beskou en dat hy nie bedoel het, as 'n bykomende sanksie, dat die handeling self nietig sou wees nie". . . .

(iv) Where the validity of the act, despite disregard of the prescription, would frustrate or seriously inhibit the object of the legislation, there is obviously a presumption in favour of nullity. *This is a fundamental jurisprudential consideration and therefore it outweighs contrary semantic indications.'*

(My emphasis.)'

[28] I shall now proceed to an application of the approach and guidelines as set out in the various cases above. The use of the word 'shall' in section 35(4) is an indication that the provision is peremptory rather than directory. The fact that it is couched in positive terms and that no sanction is provided for non-compliance tend to show that the provision is directory. There is no provision expressly prohibiting, or visiting nullity upon, a distribution of the estate made after any failure to let the account lie open for inspection for the period required by section 35(4). This, again, is an indication that the provision is directory. The only relevant provision is that contained in section 50, which reads as follows:

'**50 Executor making wrong distribution**

Any executor who makes a distribution otherwise than in accordance with the provisions of section thirty-four or thirty five, as the case may be, shall-

(a) be personally liable to make good to any heir and to any claimant whose claim was lodged within the period specified in the notice referred to in section twenty-nine, any loss sustained by such heir in respect of the benefit to which he is entitled or by such claimant in respect of his claim, as a result of his failure to make a distribution in accordance with the said provisions; and

(b) be entitled to recover from any person any amount paid or any property delivered or transferred to him in the course of the distribution which would not have been paid, delivered or transferred to him if a distribution in accordance with the said provisions had been made: Provided that no costs incurred under this paragraph shall be paid out of the estate.'

[29] To my mind the fact that section 50 exists is rather an indication that the Legislature did not intend that anything less than exact compliance would lead to a nullity.

[30] The Court should enquire whether in the circumstances of this case the objects of the Legislature in enacting the relevant provisions have been stultified by reason of the fact that the account did not lay open for inspection on 24 May. (*Cf. Ex Parte Bosch and Another* 1959

(2) SA 163 (C) at 165). '[I]f a substantial compliance as distinct from a strict compliance with the provision of an enactment will achieve the objects aimed at by the Legislature, without at the same time resulting in any or any possible prejudice or injustice to persons affected by such enactment, a strict compliance with the provisions of such enactment is not required and ….. substantial compliance therewith will not result in the invalidity of what follows upon such substantial compliance.' (*Johannesburg City Council v Arumugan and Others, supra,* 757H).

[31] The purpose of the provisions of section 35(4) is 'to afford an opportunity to any person having an interest in the estate, whether as creditor or beneficiary, to object to the account if he considers that it is not correct' (*Meyerowitz supra* § 12.12, page 12 – 13). In *Götz v The Master of the High Court and Others NNO* 1986 (1) SA 499 (N) at 502J-503C the court said in regard to the purpose of section 35:

> 'The provisions clearly have a two-fold purpose, viz to achieve finalisation of the winding up of the estates of deceased persons, but subject to interested persons being afforded an opportunity of contesting the proposed distribution of the estate assets as set out in the accounts framed. The first purpose is achieved by the provision of a closing date for the lodging of objections, a deadline as it were, viz the last day on which the account lies open for inspection, whereafter objections cannot be entertained. *Grunberg's* case *supra*. The second purpose is achieved by the provisions for the publication of the account and for the lodging of objections thereto. The intention of the Legislature in requiring that the account be advertised and lie open for inspection was, in my judgment, primarily to provide a means whereby interested persons could acquaint themselves with the contents of the account framed by the executors to enable them, if so advised, to object thereto …..'

[32] Any interested person would therefore be entitled during the 21 day period to attend upon the Master's office to inspect the account. It is reasonable to assume that any person reading the advertisement and wanting to inspect the account would bear in mind when the 21 day period would expire in order to make inspection in time. Should such a person arrive at the Master's office and find that the account is no longer open for inspection on any day on which it ought to be so open, such a person would presumably in the ordinary course indicate by reference to the advertisement and its date of publication that he or she is entitled to inspect the account, whereupon it would become quite clear to the staff at the Master's office

that the period for inspection has not yet passed. It seems to me that prejudice to any interested person is at most potential. It is difficult to see how any actual prejudice could arise.

[33] *In casu* the first applicant deals with the issue of prejudice by stating in her founding affidavit that because the account did not lie open for inspection for 21 days and because the month of May has the most holidays in Namibia she did not have adequate opportunity to object to the account. Significantly the first applicant does not state how or when it first came to her notice that the account was lying open for inspection. She does not state when she inspected the account or, for that matter, that she indeed inspected the account. Most significantly, she does not state that she wanted to inspect the account on 24 May but that it was not open for inspection. Furthermore, in her objection to the Master she did not complain that she did not have enough time to lodge an objection as she alleges. In any event, the objection was lodged on 30 May when the period for inspection and objection had already expired several days before. She would only have had a valid complaint if the Master had refused to entertain an objection received on 24 May. The second and third applicant do not allege any facts to explain in what way they were prejudiced by the failure to comply with section 35(4)and 35(5)(a) of the Act. They merely state that they intend lodging an objection to the account once there has been compliance with section 35. In my view there clearly was no prejudice caused by any failure to let the account lie open on 24 May. In fact, my impression of the applicants' case is that, rather than being prejudiced by any non-compliance with section 35, they are seeking a way to get around the fact that the objection to the account was lodged too late and the fact that distribution has already taken place in accordance with the account.

[34] On the above analysis it seems to me that the provision is such that the objects of the Legislature would not be defeated if there is substantial compliance therewith. I hold that in this case there was indeed substantial compliance with section 35(4).

[35] The first applicant in reply mentioned for the first time that there was non-compliance with section 35(9) of the Act. In oral argument before me counsel for the applicants added yet another instance of non-compliance which is that the advertisements did not state that the

first liquidation and distribution account would lie open at the magistrate's office of the district in which the deceased was ordinarily resident, namely Gobabis. If I understood him correctly, he also stated that in fact the account did not lie open for inspection at the Gobabis magistrate's office. It was pointed out to counsel that this aspect was not squarely raised on the papers, which he appeared to concede. However, he did attempt to make out an argument that this aspect is covered by the allegations in paragraphs 19.3 and 19.4 of the founding affidavit. However, this is clearly not the case. Mr *Asino* on behalf of the Master also objected to this point being taken.

[36] It is trite that the applicants are required to make their case in the founding papers so that the respondents may know what case they are required to meet. (*Matador Enterprises (Pty) Ltd t/a National Cold Storage v Chairman of the Namibian Agronomic Board* 2010 (1) NR 212 (HC) 221C-222A; 223H-J; *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC)). This was not done in regard to the two points mentioned in paragraph [ ] *supra*. I therefore hold that the applicants may not rely on these points and I shall consider them no further.

[37] In conclusion, for the above reasons the application was dismissed with costs.

[38] As the Master is an officer of the Court and, in cases like this, a party in her official capacity, I do not think it inappropriate to make a few remarks about the manner that the answering affidavit is drawn up so that same may be avoided in future cases. The answering affidavit in this case does not answer to the individual paragraphs of the founding affidavit. This method may in certain cases be adequate, but usually it is not, as the detail of allegations made in the founding affidavit is invariably overlooked. Whilst an answering affidavit may, as is often the case, commence with background information or an overview of the respondent's case, it is wise to later respond to the specific allegations in the founding affidavit paragraph by paragraph as this focuses the deponent's attention on the specific details of the allegations so that a proper response may be given. After all, it is a general requirement of pleading that the point of substance of allegations be answered.

K van Niekerk

Judge

APPEARANCE

For the applicants: Mr P Kauta,
of Dr Weder, Kauta & Hoveka

For the ninth respondent: Mr M Asino,
Office of the Government-Attorney