



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

**Not Reportable**

**Case no's: 805/2024 & 1577/2024**

In the matter between:

**ANNA MARTHA NIEMAN**

Applicant

and

**JOHANNES JACOBUS NIEMAN**

First

Respondent

**NELLIE OOSTHUIZEN**

Second

Respondent

**ANNAMART NIEMAN**

Third

Respondent

**FLORA PETREA BREYTENBACH**

Fourth

Respondent

**JOHANNA MAGDALENA SMITH**

Fifth

Respondent

**GERHARD JACOBUS OLIVIER N.O.**

Sixth Respondent

**MASTER OF THE HIGH COURT, MAHIKENG**

Seventh

Respondent

**Estate Late WILLEM ADRIAAN NIEMAN**

(Identity Number: 4[...])

Master's Reference: 7170/2022

**Coram:** Petersen ADJP

**Date heard:** 11 November 2025

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for handing down the judgment are deemed to be 14h00 on 16 February 2026.

**Summary:** Consolidated applications concerning administration of deceased estate – application for rescission of ex parte order authorizing sale of undivided shares in agricultural land – applicant sought to bypass Master's authority and heirs' consent to secure personal commercial advantage and avoid capital gains tax – non-disclosure of material facts and existence of deadlock in ex parte proceedings deemed egregious abuse of process – violation of peremptory provisions of Section 47 of Administration of Estates Act 66 of 1965 – statutory authority of Master to resolve sales disputes cannot be usurped by court of first instance – common law *actio communi dividundo* inapplicable where specific statutory procedures exist – ex parte order set aside as nullity – punitive costs on scale C awarded against applicant personally for procedurally unfair conduct.

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**JUDGMENT**

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## **PETERSEN ADJP**

### **Introduction**

[1] This matter came before me as a consolidated hearing of two interrelated applications impacting the administration of the estate of the late Willem Adriaan Nieman. The applications under case numbers 805/2024 and 1577/2024 have been consolidated for this hearing due to the interrelated factual matrix and overlapping relief sought.

[2] In the ex parte application brought under case number 805/2024, Mrs. Anna Martha Nieman, the surviving spouse of the deceased, brought the application in her capacity as the Interim Executrix of the estate and in her personal capacity. It is this order that the first, second, and sixth respondents seek to have rescinded.

[3] The first to fifth respondents are heirs and interested parties in the estate, while the sixth respondent is an independent attorney with an interest in the administration. The seventh respondent is the Master of the High Court, Mahikeng.

### **Background**

[4] On 28 November 2022, under case number UM 228/2022, Reid J granted an order in favour of Mrs. Nieman, appointing her as an Interim Executrix of the Estate with specific powers and ordering the Master to issue Letters of Executorship to her officially.

[5] In terms of this order, Mrs. Nieman was authorized to rent out any immovable property registered in the deceased's name or registered jointly in both their names. Mrs. Nieman was also allowed to sell farming implements, equipment, and livestock, provided they were no longer needed for the estate's farming operations; and she was empowered to exercise the deceased's rights/members' interests in four Close Corporations (WA Nieman Boerdery BK, Ademschoop Boerdery BK, Geluksdeel Boerdery BK, and Niemansland BK).

[6] The present dispute lies in an ex parte application instituted by Mrs. Nieman under case number 805/2024. In that application, Mrs. Nieman approached this Court on an unopposed basis, seeking wide-ranging declaratory and directive relief regarding the sale of undivided shares in lucrative agricultural land, which is co-owned in equal shares by the applicant and the deceased estate.

[7] On 27 February 2024, I granted an order in the ex parte application directing, inter alia, that the estate's undivided share be placed on public auction alongside the applicant's undivided share. The order provided that the auction would be subject to a reserve price and confirmation by the applicant herself. The order further provided a safety net that, should she not confirm the sale to the highest bidder, the estate's undivided share would automatically be deemed sold to her at a prorated amount equal to the highest bid price.

[8] The relationship between Mrs. Nieman and the remaining heirs has irrevocably broken down, resulting in a complete deadlock regarding the liquidation and distribution of the estate's assets. The immovable properties cannot be transferred in undivided shares to the numerous heirs due to the practical and financial impossibilities of such divided co-ownership. This is compounded by the strict limitations on subdivision imposed by the Subdivision

of Agricultural Land Act 70 of 1970. The only practical solution appears to be a realisation of the immovable property to finalise the heavily contested liquidation and distribution account.

[9] It appears, in hindsight, that Mrs. Nieman launched the impugned ex parte application in an attempt to break this deadlock and realise the assets on her own terms.

[10] The respondents, who are direct beneficiaries, became aware of the ex parte order only after it had been granted. When the order came to the attention of the first and second respondents, they filed an urgent interlocutory application to intervene and rescind the order. The sixth respondent supports the rescission application. This interlocutory application was granted by this court (per Morgan AJ). The order suspended the operation of the order granted on 27 February 2024, which preserved the status quo pending the final determination of the rescission application, presently before this Court.

### **The central issues**

[11] The central issue in this matter is whether the order of 27 February 2024 should be rescinded. The rescission application centres on whether the order was ‘erroneously granted’ within the ambit of Rule 42(1)(a). Aligned thereto is whether Mrs. Nieman complied with s 47 of the Administration of Estates Act 66 of 1965.

[12] I turn to Counsel’s submissions. The arguments are extensive and at times conflate several issues, which in my view fall outside the ambit of the relief sought for rescission of the ex parte order of 27 February 2024. I have therefore endeavoured as best possible to cut through the prolixity of argument, to focus

on the essence of the relief sought. For reasons extrapolated in this judgment, it should be clear why I focus mainly on the rescission application and not the veracity of the relief which Mrs. Nieman sought on an ex parte basis, if the order is rescinded.

### **Submissions on behalf of Mrs. Nieman**

[13] In my understanding of the arguments advanced by Adv Peter SC for Mrs. Nieman, more focus was placed on why the suspension of the ex parte order of 27 February 2024 ought to be uplifted, rather than the rescission of the order. The thrust of his argument is that the respondents' application for rescission is legally and factually meritless, as they rely on disputes that are either contrived or demonstrably false.

[14] Adv Peter SC, correctly in my view, identified on the factual grounds raised by the respondents, that the allegation that the deceased and Mrs. Nieman were married out of community of property is refuted by the objective evidence. He referred the Court to the marriage register, which is annotated 'no' regarding an antenuptial contract. Further, there was no registered antenuptial contract. He further pointed out that the submission that the relevant properties were inherited subject to an exclusion from the joint estate was baseless, as no such condition appears in the Title Deeds.

[15] I further agree that the applicants unnecessarily obfuscate the issue of rescission of the ex parte order by raising the paternity of the third respondent,

which was conclusively settled by DNA evidence, which is ‘scandalous’. It adds nothing to the question of whether the order should be rescinded.

[16] On the issue of locus standi raised by the sixth respondent, Adv Peter argued that the sixth respondent’s challenge to Mrs. Nieman’s authority, based on her status as an ‘interim’ rather than ‘substantive’ executor, is legally unsound. He submitted that the Administration of Estates Act does not distinguish between the powers of these appointments, thereby excluding the relief sought. In the alternative, he argued that Mrs. Nieman has the necessary standing in her personal capacity as a co-owner of the property and is entitled to approach the Court to sever the co-ownership.

[17] In opposing the rescission application, Adv Peter SC submitted that the sale of Mrs. Nieman’s half share is a compelled realisation brought about by her husband’s death and statutory requirements, rather than a voluntary commercial enterprise. The Subdivision of Agricultural Land Act essentially compels the relief. It was submitted that, because the Act prohibits the transfer of undivided shares in agricultural land to multiple beneficiaries, the executor is duty-bound to realize the asset.

[18] He emphasized that selling Mrs. Nieman’s undivided half share to a third party at auction would trigger severe and punitive capital gains tax consequences for her personally, which could be entirely avoided if she were permitted to purchase the estate’s undivided half share herself. The argument is predicated on the commercial premise that the only true interest of the deceased estate is to achieve the highest possible monetary value for the property, rendering it irrelevant whether the purchase price is paid by an independent third party or by the surviving co-owner.

[19] Adv Peter SC relied on the *actio communi dividundo*, arguing that where division of the property is impossible, a sale is the only available remedy to dissolve the co-ownership. Regarding the ‘right of first refusal’ granted to Mrs. Nieman in the initial order, he argued that this provision is neither prejudicial nor inequitable. In particular, and relying heavily on the established common law principles governing the termination of co-ownership, citing Grotius (3.28.4-5), he submitted that there is nothing inequitable about giving an existing co-owner a preference to purchase the remaining undivided share, provided the co-owner is prepared to match the best market price offered by a bona fide third party.

[20] On these grounds, it was contended that the suspension of the ex parte order should be lifted rather than rescinding the order.

### **Submissions on behalf of Mr. Nieman and Mrs. Oosthuizen**

[21] Adv Lüderitz SC for Mr. Nieman and Mrs. Oosthuizen vehemently opposed Mrs. Nieman’s submissions, characterising her conduct as an egregious abuse of the judicial process. They seek the rescission of the ex parte order granted by this Court on 27 February 2024 primarily on the provisions of Uniform Rule 42(1)(a), and in the alternative, on the common law grounds of fraud or *iustus error*.

[22] Adv Lüderitz SC submitted that the impugned order was ‘erroneously sought and erroneously granted’ within the ambit of Rule 42(1)(a) because of three fatal defects, which include the breach of the duty of utmost good faith (*uberrima fides*), the lack of notice to interested parties, and the legal incompetence of the relief granted.

[23] In advancing his argument, Adv Lüderitz SC emphasized the manner in which the order was obtained by Mrs. Nieman, on an ex parte basis, without observance of the trite principle of our law that in such applications, an applicant must strictly observe the *uberrima fides* rule. It is argued that Mrs. Nieman failed to disclose material facts which, had they been placed before me, would have precluded the granting of the order. Relying on *Schlesinger v Schlesinger*,<sup>1</sup> Adv Lüderitz SC highlighted that the non-disclosure need not be wilful or mala fide to warrant rescission and that the mere suppression of material facts is sufficient.

[24] As to the rescission of the ex parte order, reliance was placed on the principle in *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*<sup>2</sup> that the order was erroneously granted since the Court, at the time of its issue, was not made aware of facts that existed, which would have precluded the granting of the order.

[25] Adv Lüderitz SC essentially identifies what are purportedly three overarching material non-disclosures. Firstly, the existence of a bona fide dispute regarding the matrimonial property regime of the deceased and the second respondent, specifically, whether they were married in or out of community of property. Secondly, the incorrect classification of certain immovable properties as jointly owned, whereas they were inherited by the deceased and registered solely in his name. Finally, the fact that a meeting had already been scheduled between the parties to negotiate a redistribution agreement, which would have rendered the sale of estate assets unnecessary.

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<sup>1</sup> *Schlesinger v Schlesinger* 1979 (4) SA 342 (W).

<sup>2</sup> *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* (128/06) [2007] ZASCA 85; [2007] SCA 85 (RSA); 2007 (6) SA 87 (SCA) (1 June 2007).

[26] The nub of the complaint, in seeking rescission, is that as heirs and interested parties in the deceased estate, they had a direct and substantial interest in the relief sought. The failure to serve the application on them constitutes a procedural irregularity that renders the order erroneously granted.

[27] In the alternative, the common law is invoked as a basis for rescission. While the requirements for common law rescission generally require a showing of ‘sufficient cause’, reliance is placed on the specific ground of fraud or reckless disregard for the truth.

[28] Adv Lüderitz SC argues that Mrs. Nieman and her legal representatives acted with a ‘reckless disregard for the full and true facts’ in an effort to obtain a tactical advantage over the heirs. This conduct, characterised by the withholding of material facts in ex parte proceedings, he submitted, is tantamount to constructive fraud.

[29] In the final analysis, the submission is that this Court must frown upon the order obtained ex parte where material facts were withheld, and that unless cogent practical reasons exist to preserve such an order, it should be rescinded to prevent an abuse of the Court’s process.

[30] In a further, distinct argument, Adv Lüderitz SC argues that the order constitutes a legal nullity. He contends that the order purported to confer powers of administration and sale upon an Interim Executrix in a manner that usurped the statutory functions of the Master of the High Court. Relying on the principle that a judge has no authority to effect appointments or confer powers reserved for the Master by the Administration of Estates Act 66 of 1965, he argued that the Court lacked the jurisdiction to grant such relief. Consequently, so the submission goes, the order is void ab initio and must be set aside as a nullity.

[31] In expounding on the aforesaid submission, Adv Lüderitz SC argued, in particular, that the Master's explicit consent to sell the immovable properties was required, and the Master declined on the basis that the court order only clothed Mrs. Nieman with limited interim powers. The Master declined because s 47 of the Administration of Estates Act required the heirs to consent.

[32] It was further argued that selling an 'undivided half-share' of a farm is commercially nonsensical in that no independent third party would bid a market-related price for a half-share that entails co-ownership with a surviving spouse. This mechanism, it was argued, is designed to allow Mrs. Nieman to acquire the estate's share at a depressed value.

### **Submissions on behalf of Mr. Olivier**

[33] Adv Pistor SC for the now appointed substantive Executor, Mr Olivier, aligned himself with the aforesaid sentiments in seeking the rescission of the ex parte order. In furtherance of the submissions of Adv Lüderitz SC, it was submitted that Mrs. Nieman approached the Court ex parte and surreptitiously, without giving notice to the Master or the beneficiaries of the deceased estate, despite the order materially affecting their rights. Mrs. Nieman, he submits, was not procedurally entitled to the order, and had the Court been aware of the failure to join numerous affected parties, the relief would not have been granted.

[34] Adv Pistor SC further expounded that the order was erroneously granted because of, inter alia, the failure by Mrs. Nieman to disclose that her appointment as Interim Executrix was expressly limited to letting, not selling, immovable property. Furthermore, Mrs. Nieman misrepresented that the Master had appointed her under s 14 of the Administration of Estates Act with the authority to conclude sale agreements. It was further pointed out that Mrs.

Nieman failed to properly explain the nature of the imminent litigation under case number UM228/2022, where the appointment of the substantive Executor was to be determined.

[35] Under the common law, Adv Pistor SC argued that rescission was justified because, whilst the default was not wilful, it was occasioned by Mrs. Nieman's deliberate failure to serve the application on Mr. Olivier, or the Master. As to the requirement of a bona fide defence, it was argued that Mr Olivier has a strong prospect of success on the merits.

[36] Adv Pistor SC under this rubric, weaves Mrs. Nieman's attempt to secure a Court order dictating the sale of estate property, as constituting an impermissible usurpation of the Master's statutory discretion under s 47 of the Administration of Estates Act, as a basis for rescission under the common law. He emphasizes that where beneficiaries cannot agree on the manner and conditions of a sale, the Master, not the Court, is the statutorily appointed functionary to determine those conditions.

[37] Adv Pistor SC therefore concludes that the ex parte order stands to be rescinded either as a procedural nullity under Rule 42(1)(a) or based on sufficient cause under the common law. In emphasizing the failure to observe the utmost good faith (*uberrima fides*) in ex parte proceedings as a fatal ground justifying rescission, he urged this Court to mark its profound disapproval by ordering the applicant to pay costs in her personal capacity on scale C.

### **The applicable legal principles**

#### **Rule 42(1)(a) and Section 47 of the Administration of Estates Act**

[38] Rule 42(1)(a) empowers the Court to rescind an order erroneously sought or granted in the absence of any party affected thereby. It is trite that an order is ‘erroneously granted’ if there was a procedural irregularity or if the Judge was unaware of facts that, if known, would have prevented the order.

[39] The administration of deceased estates is strictly regulated by the Administration of Estates Act 66 of 1965. Section 47 expressly dictates the specific manner in which an executor is legally permitted to sell property belonging to a deceased estate. It requires that an executor shall sell property in the manner and subject to the conditions which the heirs approve in writing.

[40] The Act provides for deadlocks, in situations where the heirs are unable to agree on the manner and conditions of the sale, by providing that the executor shall sell the property in such manner and subject to such conditions as the Master may approve.

[41] This statutory scheme firmly places the authority to resolve disputes regarding the sale of estate property squarely in the hands of the Master, and not the High Court as a court of first instance.

[42] In *M.K N.O v J.H.P.T and Others*<sup>3</sup> the applicant sought the authority of the High Court to, inter alia, enable her as the executor to sell the immovable property, subject to s 47 and any other relevant provision of the Administration of Estates Act; to terminate the joint ownership of the property, subject to conditions determined by the court, including the manner in which the property was to be sold and further providing for the respondent to have the right of first refusal; and further subject to the conditions imposed by the Master.

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<sup>3</sup> *M.K N.O v J.H.P.T and Others* [2025] ZAGPPHC 555.

[43] Bam J had to decide whether, under s 47 of the Administration of Estates Act, the court could grant the relief sought by the applicant. The court dealt with the issue as follows:

‘24. Section 47 deals with Sales by the Executor, and it reads:

‘Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stock-broker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: Provided that-

(a) in the case where an absentee, a minor, or a person under curatorship is heir to the property; or

(b) If the said heirs are unable to agree on the manner and conditions of the sale, the executor shall sell the property in such manner and subject to such conditions as the Master may approve.’

25. The applicant asks this court to authorize the termination of joint ownership in the property, subject to the court placing various conditions, which include the manner in which the property is to be realized. At this point, the court has no information on whether the executrix had identified or even consulted any heirs; whether there are any minor children or persons represented by a curator who have an interest in the property; what their views are, whether there were any disagreement between the heirs, and the nature of those disagreements. Certainly, the applicant is silent on these critical issues. The applicant does not claim to have ever approached the Master for consent but contents herself with inviting the Master to issue those conditions in line with Section 47.

26. But there is something more perplexing about the applicant’s decision to come to court directly, without approaching the Master, it is that the court is asked to step into the role of an administrator by setting conditions with no relevant information whatsoever. In *Bester N.O v Master of the High Court and Another*, a matter concerned with an administrative review of the Master’s failure to issue their consent, in

circumstances where the applicant had sought such consent prior to coming to court, the court after surveying relevant authorities, was of the view that it was not in as good a position as the Master would be to make the decision on the manner and conditions of sale. It noted:

“[48] [E]ven in a case where there is a single heir, as opposed to a number of heirs, if the single heir did not consent to the manner and conditions proposed for the sale by the executor, the executor would be required to approach the Master for approval.”

27. It must be noted, as the provision of Section 47 make plain, that the executor is vested with the authority to sell the property. The court made the point in *Jackson v Stanford Cawood and Others* (3945/2016) [2017] ZALMPPHC 20 (18 August 2017), paragraph 29, that Section 47 relates to the manner and conditions of sale of estate property by the executor, and not to the decision as to whether or not to sell.

28. It seems to me that stepping into the Master’s shoes and setting the conditions and the manner in which the sale is to be carried out, even where, as in the present case, the applicant still intends to seek the Master’s consent, is not what was intended by the lawmakers. Besides being a recipe for chaos, in the event the Master were to issue conditions contrary to those issued by this court after considering the circumstances of this case, I am persuaded that, acceding to the applicant’s request would offend the separation of powers rule. The application must thus be refused.’

[44] I align myself with the reasoning in *M.K N.O v J.H.P.T and Others*, that an executor is absolutely obliged to seek the Master’s directive approval when co-owners or heirs cannot agree on the termination of joint ownership. This fits snugly with the de facto position that the statutory power to do so is vested in the Master and not in the court. The record reflects that the Master specifically refused consent because the dispute between the heirs regarding the method of sale, that is auction of a half-share versus a whole, remained unresolved.

[45] In the present matter, Mrs. Nieman clearly sought to completely circumvent the peremptory provisions of s 47 by obtaining an ex parte court order. The ineluctable deduction is that Mrs. Nieman, in approaching the court on an ex parte basis, deprived the heirs of their fundamental statutory right to opine on the conditions of the sale.

[46] In using the Court as a conduit, Mrs. Nieman succeeded in usurping the Master's statutory prerogative to determine the manner of sale. The ex parte application was therefore materially defective for failing to join the heirs in circumstances where Mrs. Nieman was acutely aware of the acrimony surrounding the Estate.

[47] Adv Peter SC's application of Grotius and common law co-ownership principles, though well-reasoned, is distinguishable from the present matter. The common law right to *actio communi dividundo* cannot override the specific, peremptory statutory procedures ordained by the Administration of Estates Act.

[48] Notably, in *Robson v Theron*, the Appellate Division stated that the *actio communi dividundo* governs the termination of co-ownership, and that while a court has a wide discretion, it will rarely order a method of partition that is manifestly prejudicial to one party.

[49] By structuring the auction to exclude third-party competition effectively, the applicant ensures she is the only logical buyer. Even as Interim Executor, Mrs. Nieman occupied a fiduciary position and had to act in the best interests of all the beneficiaries.

[50] The sale structure proposed by Mrs. Nieman, which has the outcome of depressing the value of the estate's assets to her own personal benefit, places her

in a position of conflict. This Court cannot countenance an order that facilitates such a result under the guise of ‘estate administration’.

[51] The arguments advanced by Adv Lüderitz SC and Adv Pistor SC that the order is a nullity due to non-compliance with s 47 are legally sound. This Court cannot invoke its inherent jurisdiction to disregard statutory preconditions for the sale of estate assets. The Master has been vested with supervisory powers by the Legislature to sanction sales where heirs disagree. When the Master refused to accede to her request, Mrs. Nieman’s recourse should probably have been to review the Master’s decision, and not to seek the acquiescence of the Court on an ex parte basis.

## **Conclusion**

[52] As the Supreme Court of Appeal confirmed in *Menqa and Another v Markom and Others*<sup>4</sup>, albeit in a different context, that actions taken pursuant to a legally invalid judicial process are themselves susceptible to being set aside. The clandestine nature of the ex parte application constitutes a serious abuse of court processes.

[53] It is fundamentally unacceptable for a litigant to approach a court ex parte to resolve a highly contested estate dispute where the identities and opposition of the other parties are well known.

[54] In the final analysis, I am satisfied that the ex parte order was erroneously sought and granted. The order was granted in the absence of the respondents, in

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<sup>4</sup> *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA) at para 45.

circumstances where the Master's statutory approval was absent, and based on a method of sale that is prejudicial to the estate heirs.

## **Costs**

[55] The submissions that a punitive cost order is warranted to protect the estate resonate with this Court. The deceased estate should not be burdened with the costs of defending a procedurally unfair application brought by Mrs. Nieman to secure a personal commercial advantage.

[56] Mrs. Nieman should bear the costs of these proceedings in her personal capacity on scale C to reflect this Court's displeasure.

## **Order**

[57] In the result, the following order is made:

1. The order granted ex parte on 27 February 2024 is hereby rescinded and set aside.
2. The applicant, Anna Martha Nieman, is ordered to pay the costs of the applications under case numbers 805/2024 and 1577/2024 in her personal capacity on scale C, including the costs consequent upon the employment of two counsel where so employed.

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**A H PETERSEN**

**ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT  
NORTH WEST DIVISION, MAHIKENG**

**Appearances**

For the Applicants: Adv K.W. Lüderitz SC with Adv. K. Fitzroy  
Instructed by: Japie Van Zyl Attorneys  
c/o CJP Oelofse Attorneys  
Mahikeng

For the First and  
Second Respondents: Adv. John Peter SC  
Instructed by: Loubser-Ellis and Associates Inc.  
Mmabatho

For the Sixth  
Respondent: Adv. J F Pistor SC with Adv M G Hitge  
Instructed by: De Kock & Duffey Attorneys  
c/o Van Rooyen Tlhapi Wessels Inc.

Mahikeng