IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 1236/12

In the matter between

BANJWAYINI SHONGWE	APPLICANT

And

ABRAHAM SHONGWE	1ST RESPONDENT
BHEKISISA CHILLIS SHONGWE	2ND RESPONDENT
REXY'S INVESTMENT (PTY) LTD	3RD RESPONDENT
THE MASTER OF HIGH COURT	4TH RESPONDENT
THE ATTORNEY GENERAL	5TH RESPONDENT
LUNGILE SHONGWE	6TH RESPONDENT
MAVIS SHONGWE	7TH RESPONDENT
BONGANE SHONGWE	8TH RESPONDENT
LOMKHOSI SHONGWE	9TH RESPONDENT
SIHLE SHONGWE	10TH RESPONDENT
TENDUMA SHONGWE	11TH RESPONDENT
MANGALISO SHONGWE	12TH RESPONDENT

Neutral citation: *Banjwayini Shongwe v Abraham Shongwe and 11 Others (556/12)* [2012] SZHC 170

Coram: OTA J.

Heard: **19th July 2012**

Delivered: **10th August 2012**

Summary:-

Ota J,

[1] This is a family fued!

[2] An unfortunate one for that matter. I say unfortunate because it is a fued that has the potentials of tearing the Shongwe family apart. As so often happens when a man dies intestate leaving many wives and assets, such assets as we have seen it in the courts from time immemorial, more often than not, become the subject of litigation between the wives and their respective families.

[3] So it happened in this case, that when **Chief Sipho Shongwe** passed away on the 5th of December 2011, he left behind three wives, several children and some assets which include four motor vehicles, eleven heads of cattle and two immovable properties. It is one of the four motor vehicles left

behind by the deceased, a Toyota Fortuner with registration number CSD 555 AH, that has generated the acrimony, which has dragged the deceased estate and beneficiaries into court. The crux of the furoe in this application is whether the said motor vehicle should be sold by public auction or private treaty.

[4] **Mr Mbuso Simelane** who appeared for the Applicant, has commended to me the Biblical story of the wise King Solomon, as appears in the Holy Book in 1st Kings Chapter 3 verses 16 to 28. The bone of contention between the two women in that story was the ownership of an infant child. King Solomon was approached to settle the dispute. The King in his divine wisdom asked that a knife be brought and the infant child be shared in two, each of the halves be given to each of the women. The non biological mother of the infant child readily agreed to this solution. But the real mother refused and pleaded that rather, the child be given to the other woman. That settled the matter. **Mr Simelane** thus contended, that the attitude of the 6th and 7th Respondents, the other 2 wives of the deceased in insisting on a public auction sale of the said motor vehicle, was reminiscent of the attitude of the biblical woman, who agreed to the sharing of the infant child, and ought to be deprecated.

[5] I wish I had the wisdom of Solomon. I would have asked the parties to produce the said vehicle and I would employ a knife to cut same in two and then give one part to the Applicant and the other part to the Respondents and end this matter. I am not however possessed of such divine and infinite wisdom. Therefore, decide this matter I must.

[6] Now, it is apposite for me at this juncture to note that the Applicant commenced this application on the premises of urgency contending for the following reliefs:-

> ‘‘ *2.1 Reviewing and setting aside the 4th Respondents decision contained in a letter dated 10th July 2012 allowing the 1st and 2nd Respondents to sell the assets of the late CHIEF SIPHO SHONGWE on the 14th of July 2012 or any other day without due process of the law as enshrined in the ADMINISTRATION OF ESTATES ACT 28/1902 or its amendment thereof.*

*2.2 Interdicting and restraining the 3rd Respondent from conducting the auction sale of the assets belonging to the **late Chief Sipho Shongwe** on the 14th of July 2012.*

2.3 Alternatively interdicting and restraining the 3rd Respondent from selling by auction the 2009 TOYOTA FORTUNER registered CSD 555 AH (the correct registration being QSD 555 AH) belonging to the late CHIEF SIPHO SHONGWE on the 14th of July 2012 or any other day.

2.4 Interdicting and restraining the 1st and 2nd Respondents from conducting the affairs of the estate of the late CHIEF SIPHO SHONGWE until they are possessed of LETTERS OF ADMINISTRATION.

3. Costs

4. Further or alternative relief.''

[7] The Applicant premised this application on an affidavit of 43 paragraphs to which is exhibited annexures A to K respectively. The Applicant also swore to a Replying Affidavit of 46 paragraphs.

[8] The Respondents are opposed to this application. To this end they filed an Answering Affidavit of 26 paragraphs sworn to by 1st Respondent **Abraham Shongwe,** to which is exhibited annexure SS1, as well as the confirmatory affidavits of the 2nd, 6th and 7th Respondents. The Respondents also filed a preliminary answering affidavit. Since the Respondents raised points *in limine* in their preliminary answering affidavit, it is convenient for me to consider these points *in limine* at this juncture, before proceeding to the merits of this matter, if necessary.

Urgency

[9] **Mr Ngcamphalala** has argued strenuously that the mere fact that the court had granted an interim order, ordered the parties to file papers and set this matter down for argument, does not defeat the question as to whether this application can be properly enrolled on the premises of urgency. His take is

that the question of urgency still has to pass muster irrespective of these developments. **Mr Ngcamphalala** urged the decision in the case of **Yonge Nawe Environment Action Group v Nedbank (Swaziland) limited and 4 others (unreported) Civil Case 4165/07** in support of his posture. On the other hand, **Mr Simelane** for the Applicant, holds the view that having granted an interim relief, ordering parties herein to file papers and having set down this matter for argument, that the point taken on urgency is in these circumstances overtaken by events, as effectively, the case has been enrolled on the premises of urgency. He relied on the case on **Hellenic Football Club v National Football Association of Swaziland and Others High Court Case 1751/10 [2010] SZHC 202,** in contending this issue.

[10] I must say that the High Court is divided on whether once the court has granted interim reliefs. ordered papers to be filed and set down a matter for hearing, where a case is launched on the premises of urgency, automatically renders the point of law taken on urgency otiose. While **Yonge Nawe (supra),** holds the view that the fact that an interim order was issued in a matter will not bar the court from making a determination in respect of urgency, **Hellenic Football (supra),** is of the position, that where the court issues an order in a case, including one for filling of papers, the court should

not after papers have been filed, allow the issue of urgency to be reopened, except the court made it plain to the parties that the question of urgency remains open notwithstanding the court having granted some interim reliefs.

[11] I am persuaded by **Hellenic Football (supra),** that the question of urgency will remain open in these circumstances, only where the court has demonstrated that it still has to pass muster, before granting interim orders or ordering processes to be filed.

[12] In casu, the Respondents had made it categorically clear in their preliminary answering affidavit, that they were not afforded adequate time to urge all processes requisite to their case upon the court. Even though the Respondents were notwithstanding, angling to be heard on their points in limine on urgency, I however thought it expedient, in consideration of the fact that this is a family matter that must be dealt with cautiously, to allow the parties to urge all necessary processes before the issues arising can be ventilated. I therefore granted an interim relief to preserve things in status quo and ordered both sides to file processes. I do not think that the steps I took in these circumstances foreclosed the question of urgency, since I had made no pronouncements to that effect.

[13] Now, the question of urgency is governed by Rule 6 (25) (a) and (b) of the High Court rules which states as follows

‘‘ *6 (25) (a) In urgent applications, the court or a judge may dispense with the forms and service provided for in these Rules and may dispense of such matter at such time and place in such a manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to the court or judge as the case may be, seems fit.*

(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub rule, the Applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims he would not be afforded substantial redress at a hearing in due course.

[14] The import of Rule 6 (25) (b) ante, has be judicially interpreted and settled in this jurisdiction. Thus in the case of **Megalith Holdings v RMS Tibiyo (Pty) Ltd and Another Case No. 199/2000**, the court per **Masuku J**, interpreted that legislation as follows:-

> ‘‘ *The provision of Rule 6 (25) (b) above exact two obligations on any Applicant in an urgent action. Firstly, the Applicant shall in the affidavit or petition set forth explicitly the circumstances which he avers render the matter urgent. Secondly, the Applicant is enjoined, in the same affidavit or petition to state the reasons why he claims he would not be afforded substantial redress at a hearing in due course. These must appear exfacie the papers and may not be gleaned from surrounding circumstances brought to the court’s attention from the bar in an embellishing address by the Applicant’s counsel’’*

[15] Similarly, in **Plastic International Limited** t/a **Swazi Plastics Industries v Morkus Zbinden and four others civil application No. 4364/10**, the court declared as follow:-

‘‘ *I should state in particular that in relation to (b) of the sub-Rule the word ‘‘explicityly’’ bears particular reasons as it sets out the tone of the extent of the disclosure required of an Applicant seeking to have the urgency procedure invoked. According to Collin’s concise Dictionary 4th ed, 2000, the word indicates ‘‘precisely and clearly expressed, leaving nothing to implication, fully stated, leaving little to imagination, graphically detailed, openly expressed without reservation, unreserved---’’. The founding affidavit or petition must therefore disclose fully and without reservation leaving nothing to implication regarding the reasons why he claims he cannot be afforded substantial redress at a hearing in due course. An Applicant can choose to be chary in this regard to his detriment’’.*

[16] It remains for me to add here that the reasons advanced in the Applicant’s affidavit must be weighty, and not self contrived or whimsical.

[17] Let us now proceed to the Applicant's founding affidavit to ascertain whether there is any substance in **Mr Ngcamphalala's** vociferous contentions that this application ought to be defeated on the premises of urgency.

[18] **Mr Ngcamphalala** has referred me to paragraphs 39 and 40 of the founding affidavit as the grounds upon which the Applicant premised the issue of urgency. Those paragraphs state as follows:-

'' URGENCY

39

I submit that the matter is urgent because the auction sale will be conducted on the 14th of June 2011 per annexure ''A'' hereto and the 4th Respondent has only dealt with my offer to purchase on the 10th of July 2012. Had I not gone to her office I would have not been aware of the later

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There is no alternative remedy available to me because once the car is sold in the auction sale I would not be able to buy it back yet it has got a sentimental value attached to it. A damages suit would not satisfy the remedy I seek in the matter. Going ahead with the auction sale would cause me irreparable harm.

[19] Now, **Mr Ngcamphalala** contends that the Applicant has failed woefully to meet the requirements of Rule 6 (25) (b). His take is that the reasons advanced by the Applicant in paragraphs 39 and 40 of the founding affidavit for launching this matter on the premises of urgency, have fallen short of the standards required by Rule 6 (25) (b), in that sentimental attachments cannot be any reason for the court to dispense with the normal forms and time limits to enroll a matter on the premises of urgency.

[20] **Mr Ngcamphalala** further contended, that in any case, the Applicant became aware that the motor vehicle would be sold by public auction on the 5th of June 2012 when she signed the declaration contained in annexure H. Therefore, she has no justification for waiting for a full month to launch the application on the 12th of July 2012, seeking to interdict the sale billed for

the 14th of July 2012. Learned counsel further submitted that there is absolutely no basis for the urgent application because if the sale were to proceed and it is subsequently found to be null and void, the sale can still be reversed.

[21] In reply, **Mr Simelane** contended, that Applicant has demonstrated sufficient reasons to be entitled to this matter being enrolled on the premises of urgency. That the Applicant did not become aware that the motor vehicle will be sold by public auction on the 5th of June 2012 when she signed the declaration, because as she has alledged she did not read the content of the declaration. That the only family meeting recorded in these transactions was the one held on the 22nd March 2012, where it was resolved to dispose of the assets of the family for cash not by public auction sale.

[22] That the Applicant became aware of the impending auction sale on the 12th of July, instructed counsel on the 12th of July when the application was launched. **Mr Simelane** further contended that the question of Applicant's sentimental attachment to the said motor vehicle should bear weight on this application when one considers the circumstances, it being a family matter and the deceased having passed away. Counsel implored the court not to

extinguish this action on the grounds of urgency in line with the decision in **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors Appeal Case No. 23/2006 [2006] SZSC 11,** as this will only incur more costs for the estate.

[23] Now, the question of urgency is not a technical one. It is one of substance to be gathered from the totality of facts in the relevant affidavits serving before court. I will thus not limit myself to paragraphs 39 to 40 of the founding affidavit, but will consider the totality of the facts contained in the said founding affidavit in deciding this issue.

[24] It is obvious to me from the facts stated herein that there is some force in the Applicants reasons for commencing this application on the premises of urgency. This is because, she says she did not see the advertisement for the auction sale which issued on 9th July 2012. The advert she saw was the one that was published on the 12th of July 2012. And that before these advertisements were published, she had written a letter to the Master on the 10th of May 2012, requesting that she keeps the said motor vehicle and since she had also lodged a claim against the deceased estate, she kept the issue of payment open. However, the Master did not respond to her letter until the

10th of July 2012, wherein the Master referred her to the 1st and 2nd Respondents, whom the Master had also on the same date, granted consent to sell the said vehicle by auction sale on the 14th July 2012.

[25] I hold the firm view that from any angle this matter is approached, the application which was commenced by the Applicant in these circumstances was indeed urgent.

[26] The contention of the Respondent that the Applicant became aware of the impending action sale on the 5th of June 2012, when she commissioned the declaration, is one that is vehemently disputed in this application. With the Applicant contending that the 1st Respondent tricked her by sneaking the words *''public auction sale''* into this subsequent declaration which she commissioned on trust and on the strength of 1st Respondents word, without reading same. This declaration superceded the earlier one which she commissioned on the 11th of May 2012, which had no auction sale stipulated therein.

[27] I hold the view that the dispute arising from the declaration of the 5th of June 2012, is not one to be ventilated at this preliminary stage, but one that should

lie, if necessary, when considering the propriety or otherwise of the interdicts sought.

[28] Similarly, the question as to whether or not the auction sale could properly be reversed, if it was later found to be a nullity, is also one that I should reserve for the merits of the application when considering the question of balance of convenience and irreparable harm, if necessary.

[29] The point taken on urgency therefore fails and is dismissed accordingly.

[30] The Respondents also contend in limine that the Applicant has failed to demonstrate the requisites that would entitle her to a grant of the interdicts sought. I have no wish to trouble myself with this issue at this preliminary stage as it is the crux of the merits of the interdicts sought. This is to avoid unnecessary repetitions.

[31] Now, I wish to proceed to the merits of this application by first considering the reliefs sought by the Applicant, which I find a necessity to reproduce at this juncture.

‘‘ *2.1 Reviewing and setting aside the 4th Respondent’s decision contained in a letter dated 10th July 2012 allowing the 1st and 2nd Respondents to sell the assets of the late* ***CHIEF SIPHO SHONGWE*** *on the 14th July 2012 or any other day without due process of the law as enshrined in the ADMINISTRATION OF ESTATES ACT 28/1902 or its amendment thereof.*

2.2 Interdicting and restraining the 3rd Respondent from conducting the auction sale of the assets belonging to the late ***CHIEF SIPHO SHONGWE*** *on the 14th of July 2012.*

2.3 Alternatively interdicting and restraining the 3rd Respondent from selling by auction the 2009 TOYOTA FURTUNER registered CSD 555AH (the correct registration being QSD 555 AH) belonging to the late ***CHIEF SIPHO SHONGWE*** *on the 14th of July 2012 or any other day.*

*2.4 Interdicting and restraining the 1st and 2nd Respondents from conducting the affairs of the estate of the late **CHIEF SIPHO SHONGW**E until they are possessed of LETTERS OF ADMINS TRATION''.*

(underline mine)

[32] **Mr Ngcamphalala** contended that the Applicant by the tenor of her application seeks a final or perpetual interdict. I will agree with **Mr Ngcamphalala's** contention in so far as it relates to prayers 2.1 and 2.3. The presence of the words *''or any other day''* in those paragraphs make the interdicts sought therein final. It was in apparent recognition of this fact that **Mr Simelane** prayed the court to strike out the words *''or any other day''* from those paragraphs. This application was not opposed by Mr. Ngcamphalala. These words are accordingly struck out.

[33] Having struck out those words what enures in paragraphs 2.1, 2.2 and 2.3 are prayers for an interdict restraining the Master (4th Respondent) from authorizing as well as the 3rd Respondent from conducting the auction sale of the said motor vehicle which was slated for the 14th of July 2012.

[34] I should at this juncture detail a brief history of this case. After the demise of **Chief Sipho Shongwe**, an estate file was opened by the 4th Respondent and the 1st and 2nd Respondents were nominated by the family on the 22nd of March 2012, as executors dative of the deceased estate.

[35] It appears that the nominated executors immediately swung into action, summoned a meeting held at the family home on the 22nd March 2012 which was attended by the 6th , 7th, 8th Respondents and the Applicant. At the meeting it was agreed that the movable properties of the estate be disposed of for cash. It was this meeting that birthed the declarations of 11th May 2012 and 5th of June 2012, respectively, signed by the Applicant.

[36] Now, it is obvious from the record that in the midst of the executors administering the estate, that the Applicant had requested that she retains the Toyota Fortuner which is in issue. This fact is not denied by the Respondents. The Applicant followed this request up, with a formal request to the Master contained in the letter of 10th of May 2012. The executors for their own part requested consent from the Master to dispose of the said motor vehicle and the cattle by auction sale, which consent was granted by the Master in a letter dated the 10th July 2012. It appears that prior to the

consent being granted, that the executors had caused the auction sale of the said vehicle and cattle, slated for the 14th July 2012, to be advertised in the Times of Swaziland on the 9th of July 2012. The executors followed up the advertisement of the 9th of July 2012, with another advertisement published on the 12th of July 2012. It was the foregoing facts that propelled the Applicant to launch this application on the 12th of July 2012, seeking to interdict the auction sale slated for the 14th of July 2012.

[37] It is common cause in this application that when the executors purportedly embarked upon the administration of the estate of the intestate , they had not been granted letters of administration. They had also not furnished security for the due administration of the estate. The question here is, could the executors properly act on behalf of the estate without the letters of administration or security?

[38] I must say that I agree entirely with the Applicant that the steps taken by the executors in administering the estate prior to being issued with letters of administration and providing security for the due administration of the estate, are not permitted in law and thus null and void. I say this because, it is the letters of administration that clothes the executors with the authority to

act in relation to the estate. That is why section 22 of the Administration of Estates Act 1902, provides that

> ‘‘ *The estates of all persons dying either testate or intestate shall be administered and distributed according to law* <u>*under letters of administration*</u> *to be granted in the form contained in schedule‘‘B’’ by the Master to the testamentary executors duly appointed by such deceased persons, or to such persons who are in default of testamentary executors appointed executors dative in terms of this Act’’*. (underline mine).

[39] The words ‘‘under letters of administration’’ in the legislation ante, connote that the estate can only be administered by the executors when issued with such letters of administration.

[40] **Mr Simelane** has availed me of the text **Administration of Estates and Estate Duty 2007 edition paragraph 8.1,** where the learned author **Meyerowitz** laid down this position of the law in the following terms:-

‘‘ *Except for the limited authority given to the person in charge of a deceased’s estate and to an interim curator pending the appointment of an executor, the estate of a deceased person cannot be dealt with or liquidated and the assets are ‘‘frozen’’ until such time as an executor to the estate is appointed by the Master.*

Executors are of two kinds, testamentary and dative, the former, as the name implies, being nominated by the testator in his will, and the latter being appointed in default of any executor. In both cases the executor derives his authority to act by receiving a grant of letters of executorship from the Master. An executor testamentary has no locus standi to act on behalf of the estate until such grant. The fact of nomination in the will does not confer any authority upon the nominee to deal or intermeddle with the estate or constitute him the representative e.g to receive notices.

While there are different procedures and different requirements by the Master for the appointment of executor testamentary and

executor dative, their functions, rights and duties are generally the same, except in so far as the will gives the executor testamentary powers which an executor does not have unless given by the will e.g the power of assumption or the right to incur liabilities on behalf of the estate---''.

[41] The foot note to the foregoing paragraph reads

'' *Section 13 (1) provides that no person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed or endorsed or in pursuance of a direction by the Master. The words ''liquidate'' and ''distribute'' mean to put the estate in order by, or example paying the debts, etc and thereby putting it into a state in which the assets can be separated into parts and divided among the heirs, and the actual dividing up thereof see* ***Cillers v Kuhn 1975 (3) SA 881 (WCD)****.* ***Kempman v Law Union and Rock Insurance Co Ltd 1957 (1) SA 506 (W).*** *In that case it was held that the appointment with authority e.g. to receive notices of*

cancellation of a policy, must be taken to exist as from the time of receipt of letters of executorship and not from the date when the Master's signature happened to be placed on the letters of executorship. It is considered that this goes too far and that the executor's authority commences from the issue of letters of executorship by the Master, which, if the letters are posted, will be the time of posting, and not the actual receipt by the executors of his letters see also ***Brand v Volkskas 1959 (1) SA 494 (T)****''.*

[42] Similarly, Section 30 of the Administration of Estate Act states in clear and unambigous language, that an executor will not be permitted to enter upon the administration of an estate without providing security for the due administration of the estate. For the avoidance of doubts that legislation is couched in the following terms:-

'' *Security for due administration.*

Every executor dative, assumed executor or curator bonis shall, before being permitted to enter upon the

administration of an estate, find security to the satisfaction of the Master for the due and faithful administration of the estate to which he has been appointed in such amount as in the circumstances are reasonable''.

[43] It is inexorably apparent from the totality of the foregoing, that an executor would only act on behalf of an estate where he has been granted letters of administration. It is the letters of administration that clothes the executor with the requisite authority to act on behalf of the estate. The executor having obtained the letters of administration is required by law to furnish security for the due administration of the estate.

[44] In casu, it would thus appears to me that the activities of the executors in embarking upon the sale of the assets of the estate, prior to being granted letters of administration and furnishing security, were clearly unlawful, therefore null and void. It also appears to me that the consent given by the Master of the High Court for the executors to proceed with the said sale, prior to their being granted letters of administration and furnishing security is also null and void and liable to be set aside. It is beyond dispute from the

totality of the foregoing that the sale which was scheduled for the 14th of July 2012, was therefore illegal.

[45] **Mr Ngcamphalala** has contended that Applicant is estopped from raising the issues herein, because she consented to the executors administering the estate without the requisite letters of administration and bond of security.

[46] In my respectful view, I do not think that **Mr Ngcamphalala** can properly raise the legal defence of estoppel in these circumstances. I say this because the legal effect of an act which is null and void, is as if the act never existed. If it never existed, it follows that any act or activity predicated upon the void act also never existed. The dictum of **Lord Denning M.R** in the case of **Macfoy v UAC (1961) 3 ALL E.R 1169**, are germaine to these circumstances. He observed as follows:-

> ‘‘ *If an act is void, then it is in law, a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it*

is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse''.

[47] It follows therefore, that the Applicants aquiesence or consent to the illegal activities of the executors, does not vindicate the illegality of their activities or validate it.

[48] See **Solomon Malwane v True Reality Company (Pty) Ltd and Others Case No. 2217/2010** (unreported) judgment of the High Court rendered on the 3rd of June 2011, **Nokuthula Mdluli v Stanley Mnisi and Others Civil Appeal No. 431/11 (unreported**) judgment delivered on 3rd March 2011.

[49] Now, it is on record that when this matter first served before me on the 13th of July 2012, I granted an interim order interdicting the sale of the said motor vehicle slated for the 14th of July 2012, and postponed this matter to the 19th of July 2012 for argument. This was to enable the parties file comprehensive processes so that the issues arising can be properly ventilated. The sale of the 14th of July 2012, did not therefore proceed due to the existence of the interim interdict.

[50] Now, the remaining part of the Applicant's prayers as contained in paragraph 2.4, is predicated on the said lack of letters of administration and bond of security. It is on record that before the return date of this matter on the 19th of July 2012, that the executors were granted letters of administration by the Master as is evidenced by annexure SS1. exhibited to their answering affidavit. The Respondents also aver in paragraph 9.2 of their answering affidavit, that they have duly presented security according to law. I notice that these facts are not denied by the Applicant in her replying affidavit, they are thus taken in law to be established.

[51] It appears to me that this state of affairs has rendered this whole case academic. I say this because the sale of the 14th of July was interdicted, albeit with an interim order and never took place. Having been granted letters of administration and having duly furnished security, the executors are now clothed with the authority to embark upon the administration of the estate of the intestate. In coming to this conclusion, I am mindful of the fact that the letters of administration was issued when the suit was already pending. However, the court cannot shut its eyes to the effect of such letters of administration which is that it clothes the executors with the authority to administer the estate.

[52] Furthermore, it is the position of the law that once letters of administration are granted, that all property or assets of the deceased estate automatically vest in the executors. I apprehend that that is why Section 41 of the **Administration of Estates Act,** requires all persons in possession of any assets belonging to the estate of the deceased to deliver up same to the executor or the Master of the High Court in the absence of an executor. That statute states as follow:-

> *''41 Every person who is not the executor of the estate of a deceased person duly appointed in Swaziland who---has or comes into possession or custody of any property or asset belonging to such estate, shall forthwith either deliver such property or asset to the duly appointed executor (if any)--------, or report the particulars thereof to the Master ''.*

[53] Now, the parties *in casu*, are ad idem that the motor vehicle in issue was bought by the deceased. Even though the Applicant alleges that the motor vehicle was bought for the use of herself and her children and was consequently parked in her garage. This fact does not derogate from the fact

that the motor vehicle was bought by the deceased and registered in the name of the deceased, therefore it forms a part of the estate of the deceased. Nor does the fact that the other wives and their children rarely used the motor vehicle, make the motor vehicle that of the Applicant removing it from the deceased estate. To my mind what Applicants allegation simply connotes is that the deceased bought and owned the motor vehicle though it was at the disposal of the Applicant and her children. These facts do not remove the said motor vehicle from the assets of the deceased estate. This is because the determinate factor here is the title to the property not its usage. Since there is no allegation that the deceased bought the motor vehicle in the name of the Applicant or that there was ever a transfer of the motor vehicle into the name of the Applicant, it follows that title to the motor vehicle remained with the deceased up until his demise. The said motor vehicle therefore forms a part and parcel of the assets of the deceased estate and vests in the executors, together with all the other assets of the deceased estate.

[54] See **Cebsile Matsebula (born Hlophe) v Elijah Matsebula and Others, Civil Case No. 348/2010** (unreported), decision of the 3rd of June 2011.

[55] Now, the Applicant contends that at the meeting of the 22nd of March 2012 called by the executrors that though it was agreed that the movable assets be disposed for cash, it was not however agreed that they be disposed by public auction. Therefore, so goes the argument, the executors cannot embark on a sale of the said motor vehicle by public auction, more so as the Applicant had already demonstrated an intention to purchase same by private treaty.

[56] The position of the law as I understand it, is that where an executor has been properly appointed, the power to administer the estate vests in him to administer legally, with due care and diligence, in the interest of the estate and is not subject to the beneficiaries. In coming to this conclusion, I lean for support on the text **Administration of Estates 6th edition by Meyerowitz paragraph 12.20** under the heading **Legal Position of Executor**, where the following is demonstrated:-

> *''An executor is not a mere procurator or agent for the heirs but is legally vested with the administration of the estate. A deceased estate is an aggregate of assets and liabilities and the totality of the rights and obligations and powers of dealing therewith, vests in the executor, so that he alone can deal with them.*

He has no principal and represents neither the heirs or the creditors. The executor acts upon his own responsibility, but he is not free to deal with the assets of the estate in any manner he pleases. His position is a fiduciary one and therefore he must act not only in good faith but also legally. He must act in terms of the law, which prescribes his duties and the method of his administration and makes him subject to the supervision of the Master in regard to a number of matters

But where the executor acts legally the court will be very slow to interfere with the exercise of his discretion unless improper conduct is clearly established, the court is in no sense an ‘‘upper executor’’.

Where the executor’s maladministration or failure to exercise the degree of care required of him has caused loss to the estate, the beneficiaries have an action against him for damages, but he cannot be sued until the liquidation and distribution account has been lain for inspection, for it is only then that the beneficiaries have a right of action to claim whatever is due to them. If the beneficiaries are aware of the executors maladministration or negligence before the

account has lain for inspection, they could request the Master or apply to court to have him removed''.

See **Malkomess v Kuhn 1915 CPD 852, Brink's Curator v Brinki's Trustee 5.5 329 Fisher v Liquidators Union Bank 8SC46**

[57] Therefore, *in casu*, the power of the executors to administer the assets of the deceased estate is not subject to the wishes and sentimental desires of the Applicant to retain the said motor vehicle. All the assets of the estate vest in the executors to administer legally in the interest of the estate and the beneficiaries. All that the executors owe the beneficiaries is the duty to account to them, as well as to the Master of the High Court. Therefore, whether the parties agreed to sell the movable assets of the estate by public auction or not, in the meeting of the 22nd March 2012, is immaterial in these circumstances. Besides, if the beneficiaries were permitted to interject in the administration of the estate with their desires and sentiments, then the administration of the estate will never be finalized. I do not also think that the question of whether or not the said motor vehicle should be sold by public auction constitutes maladministration or illegality on the part of the executors to entitle this court to interfere.

[58] In any case, I do not think that it lies with the Applicant to place reliance on the said meeting of the 22nd of March 2012, in contending this issue. This is because by so doing the Applicant is clearly approbating and reprobating,. I say this because by Applicant's own showing, the executors had no authority to act on behalf of the estate without the requisite letters of administration and bond of security as at the time the meeting of the 22nd of March was held. It follows that the meeting of the 22nd of March 2012, summoned by the executors, when they had no letters of administration and bond of security, in which meeting they took the decision to sell the movable assets of the estate, was null and void. The Applicant cannot now be allowed to shift goal posts by placing reliance on the decision taken at that meeting, at her own convenience.

[59] Since the sale of the 14th of July 2012 did not take place, the matter ends here naturally.

[60] Cost of this action shall be costs in the administration of the estate.

For the Applicant: M. Simelane

For the Respondents: B. Ngcamphalala

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE ……..…. DAY OF ……2012

OTA J

JUDGE OF THE HIGH COURT