IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 786/2013

In the matter between

MONICA MATHEWS N. O.	**1st**	**Plaintiff**
PIUS HENWOOD N. O.	**2nd**	**Plaintiff**
and		
EFFIE SONYA HENWOOD N. O.	**1st**	**Defendant**
ESTATE LATE ISRAEL CLEARANCE HENWOOD	**2nd**	**Defendant**
THE MASTER OF THE HIGH COURT	**3rd**	**Defendant**
THE ATTORNEY GENERAL	**4th**	**Defendant**

Neutral Citation: ***Monica Mathews N.O. & Another*** v ***Effie Sonya Henwood N. O. & 3 others (786/2013) [2015] SZSC43 (20th March 2015)***

Coram: **Dlamini J**

Heard: **13th March 2015**

Delivered: **20th March 2015**

Sale agreement – "…requisite intention agree…" – liquidation and distribution account must be considered as actually what took place - Letters of Administration do not bear appointment but attest same

– to expect 3rd defendant to apply for removal in the face of deregistration would have been superfluous and therefore serve no purpose – at any rate mishaps of 3rd defendant cannot be laid at doorstep of any litigant in the absence of evidence of collusion by any of them.

Summary: By means of action proceedings, the plaintiff seeks for orders setting aside a deed of sale, Power of Attorney and Substitution and declaring any sale and transfer thereto of no force and effect pertaining to Portion 2 Farm 926 situate at Siphofaneni.

Preliminary issue

[1] When the matter first appeared before me, Counsel on behalf of plaintiff pointed out that the matter was first enrolled under case No. 3167/01 as motion proceedings. Owing to a dispute of fact that arose, it was agreed between the parties that summons be instituted and that the motion proceedings be withdrawn. The question of costs was, however, not agreed upon. Defendants' Counsel had *in contra,* informed the court that the summons were issued after an order of this court to that effect.

Viva Voce evidence

[2] The plaintiffs led four witnesses in proof of their claim. PW1 was Pius Clarence Henwood. On oath, he informed the court that his father was Richard Clarence Henwood. He died intestate on 18th January 1975. Mr. Eric Carlston was then appointed as the executor of his father's estate. However, later the beneficiaries of the estate of his father were invited through correspondence by 3rddefendant, to attend a meeting of the next of kin scheduled for 20th December 2000. They complied. The meeting was

chaired by the then Master of the High Court, Mr. Isaac Dlamini, who advised them that since Mr. Eric Carlston had left the country, the executor's office was vacant. He advised them to nominate a new executor. The family duly nominated him and his sister, the 1st plaintiff. Subsequently 3rddefendant issued letters of administration and these were handed to court and marked exhibit A. In that meeting, after their nomination, 3rddefendant informed the executor to collate the estate, pay creditors and distribute the remainder among the heirs and the beneficiaries. Both plaintiffs provided a bond of sureties after 3rddefendant demanded the same**.** PW1 then handed copy of the minutes of the meeting of 20th December 2000. This was recorded as exhibit C.

[3] They embarked on their work as executors. They discovered that Mr. Carlston had disposed of the farms at Insalitje, Hluthi and Nhlonya**.** However, there was a dispute in relation to the farm at Siphofaneni (the farm).

[4] It was PW1's further evidence that his father had twenty eight children during his lifetime. One of his brothers was Israel Clarence Henwood. He had however, during his lifetime informed PW1that Mr. Carlston had sold the farm to him. Israel later died. He together with 1st plaintiff took over the office of executor, through his lawyer, requested for the title deed from the estate of the late Israel. They could not be furnished with any except for a one page document. He handed the same to court and it was identified as exhibit D1. Through a number of corespondences, he requested to be furnished with the complete title deed to no avail.

[5] It was PW1's evidence that he cautiously studied exhibit D1 and observed that there were no full signatures thereto of the buyer and seller or

witnesses. The date and place of signatures were not reflected. There were however handwritten inscriptions on the bottom which read: "*This sale is still effective 1987*" and he could not be sure whether it read 1987. PW1 also referred the court to another similar document with similar inscription at the bottom. This was marked exhibit D2. He spotted a difference between D1and D2. D1 hand the inscription referred herein in two lines. The word "*effective*" was, in respect of D1, fell on the next line while in D2 it was on the same line as the other words.

[6] It was his further evidence that in terms of D1and D2 the purchase price was E46,000. E7,000 was to be paid by way of improvements. The balance was then E39,000. This deed further demanded a deposit of E30, 000. However, there was never a lump sum of E30 000 paid. The receipts received from the estate pointed out that there was a balance outstanding. He then wrote a letter [exhibit F] to the estate late Israel advising them of the balance outstanding, and that transfer could not be effected. He was given five copies of receipts reflecting a total sum of payment of E29,000. There were no other receipts which he received. A response to exhibit F was that 1st plaintiff was paid E10,000 and this sum was in respect of the farm. PW1submitted as exhibit G the said response.

[7] It was his evidence that he did not consider exhibit G as sufficient proof of the balance outstanding. He, together with 1st plaintiff, then through their erstwhile attorney Mr. Magagula, communicated cancellation of the sale agreement. He handed a correspondence to that effect and it was marked, exhibit J. It was PW1's evidence that they were surprised to see a Power of Attorney signed by Mr. Carlston passing transfer of the farm to the estate late Israel Clarence Henwood, as by then, they were executors of their father's estate. He informed the court that when Mr. Carlston signed the

Power of Attorney to pass transfer, he was already replaced by them. He had no authority to do so. It was his evidence that Mr. Carlston did not cause a meeting of the next of kin to deliberate on the offer by his brother Richard to purchase the farm.

[8] He pointed to a document signed by some of his siblings and stated that he did not sign the same and that his attention was not drawn to this document when the others signed it. He pointed out that neither Mr. Carlston nor 3rddefendant called a next of kin meeting to deliberate on the sale of the farm.

[9] PW1 was vigorously cross examined by both Counsel for the 1st and 2nd defendants. I shall revert to his cross examination later in this judgment.

[10] PW2, Valerie Clarence Henwood identified herself as a daughter of late Richard Henwood and a sister in law of 1stdefendant by virtue of 1st defendant having been married to late Israel Clarence Henwood. She was aware that the plaintiffs were the present executors of her fathers estate and that they were contesting registration of the farm against the 2nd defendant. She was fully briefed on the grounds for contesting the transfer.

[11] She disputed that the outstanding balance of E10 000 was paid directly into her late father's estate. She informed the court that she was present when the sum of E10 000 exchanged hands. It was her evidence that her late brother Israel approached her brother in law Sonny Mathews and requested to be lent a sum of E10 000 in order to purchase a piece of land. At that time her sister, who was married to Sonny Mathews, Monica, was in Germany. Sonny then telephoned Monica and informed her about Israel's

request. Monica advised Sonny to give him money from the business account. She stated that she did not know what Israel did with the money.

[12] It was her further evidence that subsequently, Sonny and Monica had to institute action proceedings against Israel demanding payment of the E10 000 sum. She stated that she appended her signature on a form circulated by her sister Oliver on the basis that Oliver informed her that if she failed doing so, the government will seize all her father's farms. She never received any feed back on the result of her signing the form.

[13] She was quizzed on why she was adamant that the sum of E10,000 was not given to Mr. Eric Carlston direct. She maintained her ground that she was present at Highlands Inn, place of Sonny and Monica's business when Israel came to borrow the money and it was given to him directly. She also maintain that when Israel approached Sonny, no one else was present except her, Sonny, Israel and herself. She further disputed that 1st defendant was in that meeting. She was at the business because her sister Monica had travelled to Germany and was asked to assist Sonny while Monica was away. She further explained that she is actually the one who dialed Monica's number in order for Sonny to speak to her about the advance by Israel. At that time she was responsible for the business account and a cheque was drawn. When put to her that the cheque was drawn in the name of Eric Carlston, she flatly refuted the same. A direct question was posed to her as to in whose favour the cheque was drawn. She responded that it was drawn in the name of Israel Clarence Henwood. She revealed under cross examination that she never received the sum of E8,000 reflected in the liquidation and distribution account. She only received a sum of E3 000.

[14] PW3 was Felix Clarence Henwood. She identified PW1 and PW2 as her siblings and 1st defendant as her sister in law by reason that she was a wife of her late brother Israel. She testified that Mr. Eric Carlston was the first executor of her father's estate. Her father had four farms *viz*. Hluti, Salitje, Siphofaneni and Hloya. Only the farm at Siphofaneni still remains in the name of late Richard Clarence Henwood, her father. She was not aware of the sale of the farm although she saw a page of a deed of sale in respect of it. She told the court that they, as beneficiaries, agreed to sell all four farms to the government. She appended her signature to a document consenting to such sale. It was her evidence that her late sister Oliver came circulating the document and informed her that whether she signs or not, it was immaterial as the majority had signed and government would seize the farms if they do not sign. They were never called to any meeting in respect of this issue. When shown the liquidation and distribution account, she pointed out that although her name appears in it, she never received the money therein.

[15] Under cross examination, she revealed that there was never any meeting where the circular was discussed and she was never aware that the late Israel purchased one of her father's farms. She believed that in terms of paragraph C of the circular, Mr. Carlston was to call a meeting and discuss the sale of her father's farms. She would not have signed the circular had it read otherwise. She was quizzed on why she never objected to the Final liquidation and distribution account. She replied that she became aware of it for the first time when Mr. Carlston had left the country. They then left the matter to the new executors to deal with the said liquidation and distribution account.

[16] She was asked whether she ever borrowed any money from Mr. Carlston in anticipation of the distribution account and she replied in the affirmative.

She pointed out that they were three of them and were given a sum of E7,000 and this was the only sum they received other than the E3,000.

[17] The fourth witness on behalf of the plaintiffs was Marina Clarence Henwood. She informed the court that the late Richard Clarence Henwood was her father, while 1st defendant was her sister-in-law.

[18] Her sister Myer Oliver circulated a circular calling upon her to sign for the sale of the four farms belonging to her father. She was given the circular when she was twenty two years of age and Myer, who was older than her, urged her to sign. She had to oblige because she believed in her older sister. She could not question her older sister's instructions. There was never any meeting of the beneficiaries where they discussed the sale of the four farms. It was her evidence that she received the sum of E3,000 from the money left by her father at the bank just after his demise. After she signed the circular and the farms were sold, she never received any cent.

[19] She was asked by Counsel for defendant as to where she was when she received the circular and she stated that she was at Nhlangano. She maintained that she could not question her sister Myer when she asked her to sign the circular as she was older than her and she trusted her. She revealed that there was never any meeting with Mr. Carlston in respect of the sale of the farms. She also expected a valuation report on the farms and there was never any. When referred to the liquidation and distribution account, she stated that she never received the sum reflected therein except for E3,000. She was asked whether she did approach Mr. Carlston for an advance, she answered in the affirmative. She explained that she did not borrow this money based on the fact that Mr. Carlston was an executor of her father's estate as she did not know how much she would get from the

estate. She borrowed it on the basis that she knew Mr. Carlston from the casino. She first saw the liquidation and distribution account after Mr. Carlston's demise and when plaintiffs took over as executors. The plaintiff's then closed their case.

[20] The defendants' attorneys who conducted cross examination in conjunction, indicated that they would lead three witnesses. However, they closed their case after the evidence of their first witness.

[21] 1st Defendant gave evidence on oath. She stated that she was aware that her husband, the late Israel Clarence Henwood purchased the farm around 1983 or 1984. There was a complete set of deed of sale in respect of this transaction. Upon purchase, they cleared the farm and constructed about three houses. They moved to occupy the farm and resided there until the demise of Israel four years later. During their stay at the farm, PW1 and other relatives of Israel used to visit them and spend some few days in the farm.

[22] It was her evidence that Mr. Carlston, as an executor of the late Richard Clarence Henwood, directed Israel to pay a deposit of E10,000. This sum was to be paid within a few days. They were given up to Monday to pay. Israel and herself went to Sonny to be advanced the said E10,000. It was her evidence that when she went with Israel to Highlands Inn, they found Sonny who informed them that his wife was on holiday but upon her return, he will report that he has lent them the sum of E10,000 to pay for the farm. At that time, Mr. Carlston had drawn up a deed of sale in favour of George Portgieter and Israel had to pay the said sum of E10,000 in order to stop the sale to Mr. Portgieter.

[23] On Monday, Israel, two of his brothers and herself went to Mr. Carlston and waited by the reception. Mr. Portgieter came out and they were called in. It is at that point that Mr. Carlston informed them that Sonny had already paid the sum of E10,000 and that is how Mr. Portgieter lost the farm. It was her evidence that there was a receipt issued in respect of the sum of E10,000 by Mr. Carlston.

[24] She was referred to a summons, she stated that the summons were instituted after Israel failed to pay back Sonny the sum of E10,000. Israel died some few weeks thereafter. She had to pay Sonny after the demise of Israel by selling some cattle from the farm. The money was given to Monica Mathews. She disputed the presence of PW2 at the Highlands Inn when the E10,000 was borrowed. She was in the company of her son. It was her further evidence that after the death of her husband, she proceeded to Mr. Carlston and enquired how much was owing. She was advised of E29,000. It was her evidence further that she paid the total sum of E29,000 and thereafter the farm was fully paid for. She then referred to the liquidation and distribution account of late Israel Henwood where she pointed out that she prepared it assisted by Mr. Dlamini from 3rd respondent's office as Mr. Carlston had left Swaziland by this time. It was her further evidence that when Mr. Carlston signed the Power of Attorney, he was still the executor.

[25] After the demise of her husband, her sister found her a job in Manzini. They had to pack and move from the farm to Manzini. This was at night. It could be that the receipt and other documents for her husband were lost during that time.

[26] This witness was cross examined at length. I will refer to her cross examination later in this judgment under adjudication.

Issue

[27] The question for determination from the evidence and cross examination presented is, firstly, whether there was a deed of sale between the late Israel Clarence Henwood and the estate late Richard Clarence Henwood. Secondly, was the purchase price paid in full to warrant an order of transfer?

Legal principle

[28] **AJ Kerr** in **The Law of Sale and Lease 3rd Ed.** (**Lexis and Nexis Butterworth Durban 2004**) at page 3 defined a contract of sale as follows:

> *"When parties who have the requisite intention agree together that the one will make something available to the other in return for the payment of a price the contract is a sale."*

Adjudication

The sale agreement

[29] PW1 gave evidence to the effect that as soon as they took over the office of executorship, they wrote a number of correspondences to 1st defendant as executor requesting for the deed of sale in respect of the farm. They later received a one page document, exhibit D1 from 1st and 2nd defendants' attorney. PW1 also revealed another similar document which was marked Exhibit D2 found in defendant's bundle of documents submitted for this matter. This document was worded similarly to D1 except that the handwritten notes "*This sale is still effective*" were not in two lines as in D1. Explaining the difference in D1 and D2 in cross examination of PW1, Mr. Nkosi, learned Counsel on behalf of 1st and 2nd defendants questioned:

Mr. Nkosi: *"In D1 and D2 you said the words "this sale is still effective" are on different format?"*

PW1: *"Yes"*

Mr. Nkosi: *"But written by same person on different documents?"*

PW1: *"Yes"*

Mr. Nkosi: *"In your knowledge when a deed of sale is drawn up, how many copies are made?"*

PW1: *"At least two, one for the buyer and one for the seller."*

Mr. Nkosi: *"Photocopies are also made for the Attorney?"*

PW1: *"Yes"*

[30] From this line of cross examination one can infer that the explanation tendered on behalf of 1st and 2nd defendants is that Mr. Carlston had two documents before him and inscribed the words *"This sale is still effective"*, in each document. This explanation however, was not advanced by DW1 when she took the witness stand. This was so despite the lengthy cross examination of DW1 on why she failed to obtain a full copy of the deed of sale from Mr. Carlston because as in the early months of 2001, she was made aware by the plaintiffs that they were contesting the sale of the farm. DW1 opted to inform the court that she lost some of the documents belonging to her husband Israel when she moved from the farm to Manzini. However, it is common knowledge that in September, 2001 she approached Mr. Carlston who was in Durban by then in order to secure a deed of transfer of the same farm which was under query by plaintiffs following their nomination in December 2000 as executors. Mr. Nkosi in cross examination of PW1 put it to him that he has never contested the deed of sale but only the purchase price. PW1, however, was adamant that he had from the onset contested both. The court has no reason to doubt his

response as it was never disputed that through both his erstwhile and present attorneys, a number of correspondences were written to Mr. Lukhele, 2nd defendant's attorney to provide copies of the deed of sale to no a avail. The summons and the application under Case 3167/2001 also attest to this contestation.

[31] Further, from Mr. Nkosi's cross examination, it is correct that in such instances, a number of copies are produced *viz.* for the seller, buyer and attorney. It is not clear why a copy could not be secured from the other sources if the buyer misplaced his copy. What is worse in this case is that Mr. Carlston is demonstrated through the inscription, "*This sale is still effective"*, to have had more than one copy of this document in his custody. One wonders as to why one of the copies was not retrieved from him in September, 2001 when 1st defendant approached him for the transfer as the controversy around this farm was already at fore. These are questions which ought to be attended by the defence in the circumstances. However, the defence failed to do so. This court was not privy to 1st and 2nd defendants' submissions despite an extended period from 14th November 2014 to 13th March 2015 to do so by this court.

[32] 1st defendant gave evidence and pointed to Exhibit D1 and D2 as evidence of the deed of sale. She testified that from Exhibit D1 and D2 she could recognise her husband's initial. She assumed the other initials were for Mr. Eric Carlston, the executor of estate late Richard Clarence Henwood and witnesses thereto. Suppose for a moment the court accepts this evidence. This deed reads:

"<u>DEED OF SALE</u>"
MEMORANDUM OF AGREEMENT made and entered into by and between:
<u>ESTATE LATE RICHARD CLARENCE HENWOOD</u>
(hereinafter referred to as "the SELLER") of the one Part;

And

ISRAEL HENWOOD
(hereinafter referred to as "the PURCHASE") of the other Part.

WITNESSETH:

THAT the SELLER hereby sells to the PURCHASER who hereby buys the undermentioned property (hereinafter called the "the PROPERTY") upon the following terms and conditions:

1. *The PROPERTY hereby sold is described as:*
   CERTAIN : Portion 2 of Farm No.926 Lubombo District.

2. *The PURCHASE PRICE is the sum of E46,000-00 (FOURTY SIX THOUSAND EMALANGENI) of which E7000 shall be deemed to have been paid by way of improvements. The remainder shall be payable as to a deposit of E30,000-00 on signing hereof and the balance on registration of transfer such amount to be secured by Bond Guarantee to be delivered to the SELLERS Conveyancers upon request as and when they are in a position to effectively lodge the transfer document for registration."*

[33] Firstly, from the evidence of 1st defendant, her husband died on 31st August 1989. The receipts presented before court reflect:

Date	Amount	Account credited
31/7/90	E10,000	Estate late Richard C. Henwood
4/10/90	E5,000	Estate late Richard C. Henwood
1/02/91	E7,000	Estate late Israel C. Henwood
26/6/91	E5,000	Estate late Israel C. Henwood
28/11/91	E2,000	Estate late Israel C. Henwood
	E29,000	

[34] 1st defendant gave evidence that the sum of E10 000 was paid before her husband's demise. What is glaringly irregular in this piece of evidence is that if indeed, exhibit D1 or D2 is part of the deed of sale in respect of the farm, this deed of sale which bears initials, and if we were to take the initials as signatures, was signed prematurely or contrary to its terms. The reason is that clause 2 stipulates:

"The PURCHASE PRICE is the sum of E46,000-00 (FOURTY SIX THOUSAND EMALANGENI) of which E7000 shall be deemed to have been paid by way of

improvements. The remainder shall be payable as to a deposit of E30,000-00 on signing hereof and the balance on registration of transfer such amount to be secured by Bond Guarantee to the SELLER…".

[35] From the evidence of 1st defendant as corroborated by the receipts presented before court, there was no such payment of the sum of E30,000 as deposit as per Exhibit D1 or D2 upon signature thereof. Further, the balance thereof was never secured by bond guarantee as per the dictates of exhibit D1 or D2. If therefore the sum of E10 000 was ever paid, it was not in compliance with exhibit D1 or D2 following the evidence that the initials at the bottom page of each exhibit is indicative of signatures. This alone is a ground for having Exhibit D1 and D2 set aside.

[36] It is therefore unnecessary to determine whether the sum of E10,000 was paid or not paid. The reason is that even if it was paid, it could not form a deposit under Exhibit D1 or D2 as it fell far short of the terms of D1 and D2 which called for signature of it upon payment of the sum of E30,000. It is common cause that there was no such payment and therefore Exhibit D1 and D2 ought not to have been signed. There was further no bond guarantee of the balance. On the contrary, what we see are piece meal payments, some of which are under suspect as I will fully demonstrate hereinunder.

[37] Secondly, from the above, the sum of E29,000 was paid after Israel Clarence Henwood's demise. From the receipts, only the first two receipts reflect payment into the account of the late estate Richard Clarence Henwood. These two receipts sum up to E15,000. The balance of the receipts reflect that the sums received were credited to the account of late estate Israel Henwood. The total amount was E14,000. During cross examination of DW1, it was pointed out that there were two files in the

office of Mr. Carlston in regard to the client Israel Henwood. One was in respect of the purchase of the farm while the other for his estate. 1st defendant admitted this as correct. In other words, what is in contention is not just the sum of E10,000 that is without any receipt but that after the demise, the sum of E15,000 was paid into the estate late Richard Clarence Henwood while the balance was paid into estate late Israel Clarence Henwood. This position is not inconceivable because as admitted by 1st defendant, two files were running in the offices of Mr. Carlston, one in respect of estate late Richard Clarence Henwood and the other estate late Israel Clarence Henwood. Mr. Nkosi, in cross examination of PW1, pointed out that the two out of three receipts point out that the payment was in respect of payment for purchase of farm. However, when 1st defendant took the witness stand, she informed the court that her husband, during his lifetime, had purchased another piece of land in Manzini. Therefore, after Israel Clarence Henwood's demise she had to raise payments in respect of two pieces of land, including the one in issue.

[38] Thirdly, 1st defendant deposed to about three answering affidavits in respect of the deed of sale between Israel Clarence Henwood and estate late Richard Clarence Henwood. This was under Case No. 3167/2001, 3965/2008 and 786/2013. In all these applications, she attached the one page document as the deed of sale. She did not reveal that this deed of sale was incomplete. She gave the impression that what she had attached in her three sets of answering affidavits was a full complement of the deed of sale. For this reason, she did not disclose the circumstances or explain the reasons for attaching a one page document as the deed of sale. As correctly cross examined by learned Counsel on behalf of plaintiff, she conceded that it was only in her *viva voce* evidence that she explained about the missing portion of the document.

[39] It is not clear as to why a full complement of the deed of sale was not attached. However, the chronological background of this farm might shed some light.

[40] It appears from the previous applications which all Counsel urged the court to look at in totality when dealing with the present action that in 1983, Mr. Israel Clarence Henwood together with one Mr. John Sikhondze jointly entered into an agreement to purchase the farm. A deed of sale was drawn to that effect. A perusal of this deed of sale reflects that Mr. Sikhondze signed for the same together with his witnesses. It is not clear as to why Mr. Israel Clarence Henwood did not sign the same. 1st defendant explained in three of the affidavits referred herein *supra* that Mr. Sikhondze failed to realize his portion of the purchase price. However, Mr. Sikhondze in a sworn statement in reply disputed this. In court 1st defendant, under cross examination, informed the court that the deed of sale could not be concluded because Mr. Sikhondze declined to occupy the Mhlatuze portion which was infested by squatters. Pressed by learned Counsel Mr. Masuku to explain the disparity between her sworn statements and her *viva voce* evidence, 1st defendant could not give a reasonable response.

[41] Further, 1st defendant submitted exhibit D1 and later exhibit D2 as evidence of a deed of sale between Israel Clarence Henwood and estate late Richard Clarence Henwood. This document reflects "*This sale is still effective1987*". Now in the year 20th December 2000 the plaintiffs were appointed to take over the executorship. It was PW1's undisputed evidence that as soon as they were directed by the Master to liquidate and distribute the estate of late Richard Clarence Henwood, he, together with 1st plaintiff wrote a number of correspondences to 2nd defendant requesting for a copy of the deed of sale. They were only given exhibit D1. They did write again

requesting a full set of the deed but in vain. They were not even honoured with a response explaining the mystery over this deed.

[42] There is further undisputed evidence of 1st defendant that in September 2001 she approached Mr. Carlston, who was in Durban by then, to sign a Power of Attorney for the transfer of the farm. When 1st defendant, through learned Counsel Mr. Lukhele, attempted to effect transfer, plaintiffs moved the application under case number 3167/2001. The question which begs for an answer is, why did 1st defendant fail to request from Mr. Carlston for the copy of the deed of sale when she approached him for the Power of Attorney and Substitution to pass transfer? This is moreso in the face of cross examination of PW1 by learned Counsel Mr. Nkosi to the effect that D1 and D2 are merely indication that there were a number of copies at the disposal of Mr. Eric Carlston, 2nd defendant's attorney at that time.

[43] What further compounds the version that a complete set of exhibit D1 and D2 did exist at one point in time as advanced by 1st defendant is that Mr. Carlston lodged with the 3rd defendant (Master of the High Court) his "*First and Final Liquidation and Distribution Account*" of the estate late Richard Clarence Henwood. A close scrutiny of this account points out to two startling revelations:

One: Although it lists the farm under issue, it reveals that it was sold to Israel Clarence Henwood and John Sikhondze for the sum of E46,000.

Two: This liquidation and distribution account was signed by Mr. Carlston in March 1988.

[44] The question that remains is, why, if at all, a deed of sale between Israel Clarence Henwood and estate late Richard Clarence Henwood was said to exist in1987 as D1 and D2 reads: "*this sale is still effective 1987*", did Mr. Carlston sign his executor's certificate and file a final liquidation and distribution account reflecting that the farm was purchased by Israel Clarence Henwood and John Sikhondze when, as per 1st defendant's evidence, that this deed had been cancelled by 1987. In fact 1st defendant in her evidence in chief testified that the sale by her husband Israel and estate late Richard Clarence Henwood was entered into in 1983 or 1984. The only reasonable conclusion that the court can draw in the face of this circumstance is that there was never any deed of sale between Israel Clarence Henwood alone and estate late Richard Clarence Henwood. If it did exist, Mr. Carlston would have indicated so in his First and Final Liquidation and Distribution Account which he certified as correct in March 1988 a year or some four years later as the case may be. My conclusion in this manner is influenced by the observation taken by my **Lord Chief Justice Ramodibedi** in **Monica Matthews and Another v Amos Velem Kunene and Another, Civil Appeal No. 31/05** at paragraph 12. I must hasten to point out that this very same First and Final Liquidation and Distribution Account by Mr. Eric Carlston was part of the subject matter in that Appeal. The honourable Chief Justice wisely determined:

> "*The liquidation account, annexure "AVK3", admittedly prepared by the Executor shows that the property was indeed sold to the respondents for the sum of E16 500.00 The distribution account in turns shows that the appellants and the other beneficiaries were awarded their respective shares of the sum of E8 503.22 each. It is not disputed for that matter that the liquidation and distribution account in question was open for inspection prior to its approval by the Master of the High Court in terms of section 51 of the Administration of Estates Act, No. 28 of 1902 (the Act). No objection was forthcoming from the appellants and the other beneficiaries*."

[45] Similarly, *in casu* this same liquidation and distribution account which was found to be valid under Civil case no. 31/05 *supra* by a superior court whose decisions are binding in this court must be considered as evidence of what actually took place with regards to the late Richard Clarence Henwood's estate.

[46] It stands to follow that there was no basis for Mr. Eric Carlston's subsequent action over two decades later, that is, September 2001 of signing the Power of Attorney and Substitution to pass transfer to 2nd defendant alone at the exclusion of Mr. John Sikhondze, if at all Mr. Israel Clarence Henwood did later append his signature to the complete deed of sale attached in these proceeding (bundle 2 page 146). After all, as soon as Mr. Eric Carlson filed his First and Final Liquidation and Distribution Account with the 3rd defendant, he became *fuctus officio* in so far as the estate late Richard Clarence Henwood was concerned as correctly pointed out by learned Counsel S. Masuku for the plaintiffs under cross examination of 1st defendant. Let alone that by September, 2001 he had been deregistered as an attorney in Swaziland. This must have been appreciated by Mr. Carlston as demonstrated in his First and Final Liquidation and Distribution Account signed in March, 1988 that the farm was purchased by 1st defendant's husband and Mr. Sikhondze.

Plaintiffs' mandate

[47] Defendant contended that although the next of kin meeting was on 20th December 2000 which saw the nomination of plaintiffs, the actual appointment of plaintiffs was on 10th September 2002. This is the date of the Letters of Administration. Therefore, any acts by Mr. Eric Carlston

before 10th September 2002 could not be questioned in the absence of a court order removing him as executor, so proceeded the contentions.

[48] I must point out from the onset that this line of thinking is fallacious for a number of reasons. It is trite and the records of the Law Society of Swaziland where Mr. Nkosi and Mr. Lukhele, learned Counsel for 1st defendant and 2nd defendants respectively occupied high executive positions then bears out that during this period, Mr. Eric Carlston had left Swaziland *nicodemuously*. By this time the Law Society of Swaziland had deregistered him and his clients handed over to Mr. Welile Mabuza. It follows therefore that when 3rd defendant on 20th December 2000 announced to the next of kin meeting that the office of executorship was vacant, he was correct. Mr. Eric Carlston's business as a lawyer and executor in the country ceased when the Law Society announced his deregistration. He must have appreciated this position as he did not pass transfer but opted to grant Power of Attorney and Substitution to pass transfer to Mr. A Lukhele, 2nd defendant's attorney herein. Why he did so without holding a prior meeting with the next of kin for the estate late Richard Clarence Henwood to obtain their approval. The answer is simple. He was no longer fit to hold practice in the country as is common cause.

[49] It is not in issue between the parties hereof that the plaintiffs were nominated on 20th December 2000. The letters of Administration reads:

> "*THESE ARE TO CERTIFY THAT*
>
> *MONICA MATHEWS*
> *AND*
> *PIUS HENWOOD*
>
> **have/has been duly**
>
> ***appointed*** *the Executor (s) Executrix (ies) Testamentary/Dative and are/is hereby authorised as such to administer the Estate of the late*
>
> *RICHARD CLARENCE HENWOOD*
>
> *who died on the*
>
> *14th FEBRUARY 1975*
>
> *At*

HLATHIKHULU GOVERNMENT HOSPITAL, SHISELWENI

LUCIA LUKHELE
ASSISTANT Master of the High Court of Swaziland
Office of the Master of the High Court
*Mbabane this …10th .. day of Sept. 2002"(*my emphasis*)*

[50] It must be noted that this document (exhibit A) does not read: "*These are to appoint…*" but reflects "*These are to certify….*" From the face of Exhibit A, the words must be given their literal meaning, i.e. the Letters of Administration do not bear an appointment but attest the same.

[51] Further, the words "*have been duly appointed*" prompts one to ask, "*when have they been duly appointed?*" The answer lies in the uncontroverted evidence of PW1 *viz*. "*on 20th December 2000*". It is for this reason that we hear the undisputed evidence by PW1 that the 3rd defendant on this very date (20th December, 2000) defined to them their duties as executors. Exhibit C corroborates this position.

[52] For the above reasons, it was lawful for the plaintiffs to embark on their assignment mandated by the 3rd defendant as soon as they could fulfill the conditions of their office. I note from the replying affidavit that they were desirous to pay security but were frustrated by the 3rd defendant who failed to inform them of the amount of security. That they did not furnish security earliest was not due to their own making and therefore all actions taken before were valid in law. This must have been appreciated by the defence as they did not take it as an issue.

[53] Lastly, to expect 3rd defendant to apply for Mr. Eric Carlston's removal in the face of his deregistration by a body mandated by Parliament to monitor his work would have been superfluous and therefore served no purpose at all. At any rate, the mishaps of 3rd defendant, if any, cannot be laid at the

doorsteps of any of the litigants herein in the absence of any evidence of collusion by any of them.

[54] In the final analysis, it is my considered view that the following orders should follow:

1) The purported deed of sale between Israel Clarence Henwood and estate late Richard Clarence Henwood is hereby set aside;

2) The Power of Attorney and Substitution purportedly signed by Mr. Eric Carlston to pass transfer of Portion 2 Farm 929 to estate late Israel Clarence Henwood is hereby set aside;

3) The sale and possible transfer of Portion 2 Farm 929 between estate late Israel Clarence Henwood and estate late Richard Clarence Henwood is hereby declared *null and void ab initio*;

4) 1st and 2nd defendants are ordered to pay costs of suit including cost under Case No. 3167/2001.

M. DLAMINI
JUDGE

For Plaintiffs: **S. Masuku of Howe Masuku Sibandze Attorneys**
1st Respondent: **A. Lukhele of Dunseith Attorneys**
2nd Defendant: **S. A. Nkosi of S. A. Nkosi & Company**