IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 54/2018**

In the matter between:

PETER GEORGE **1st Appellant**

SUSAN HESKETH **2nd Appellant**

and

MBUSO SIMELANE N.O. **Respondent**

Neutral citation: *Peter George, Susan Hesketh vs Mbuso Simelane N.O.* (54/2018) [2018] *SZSC* 31 (13/08/2019)

Coram: **M.C.B. MAPHALALA CJ, M.J. DLAMINI JA AND J.M. CURRIE AJA.**

Heard: **8th May 2019**

Delivered: **13th August 2019**

SUMMARY: ***Deceased estate – Deceased holding a half share in a company which is the registered owner of a land concession – Executor testamentary settled claims against estate by transfer of shares and land – Subsequent executor dative "repudiating" transfer of shares and claiming transfer of shares illegal – Held that transfer of shares in settlement of claims against estate lawful and claim by executor for their return to the estate and his appointment as director/executor refused – Appeal upheld – Respondent to pay costs.***

JUDGMENT

J.M. CURRIE AJA

INTRODUCTION

[1] This appeal arises as a result of an application brought by the Executor of the estate Late George Edwin Craddock ("Craddock") in the Court *a quo*.

[2] During his life time, on the 15th August 1990, Craddock bought 200 shares from the first appellant Peter George ("George") for the sum of E 124 000 in a company, Elangeni Estates (Pty) Ltd ("the Company"), which is the holder of a concession in respect of Lot A of Portion 1 of

1 of Land Concession No. 30P. The Company has a share capital of E400 representing 400 shares all of which are issued.

[3] On the same date the parties concluded a Shareholders' Agreement as well as a Use Agreement. In terms of the Shareholders' Agreement, *inter alia,* George and his wife, Thandi George, as the "First Shareholders," shall be entitled to remain as directors of the company as long as they jointly hold fifty per cent of the issued shareholding and Craddock, so long as he holds fifty percent of the issued shareholding, he and a person nominated by him shall be entitled to appointment as directors of the company. As a result George, Thandi George and Craddock were shareholders/joint-shareholders and directors of the Company.

[4] The Use Agreement governed the use and enjoyment of the shareholders of the land and demarcated the occupation of the parties on the land. Craddock occupied the bottom half, or south part of the farm and George occupied the top end, or north part of the farm. Craddock would have the right to exclusive use and enjoyment of the land share for as long as he held the shares and complied with the agreement.

[5] On the 1st September 1998 George and Craddock ("the parties") entered into a further agreement called "Agreement of Area Ownership" which defined, *inter alia,* the area to be occupied by the parties and how the timber situated on the land was to be dealt with. This agreement reversed the previous occupation of the land by the

parties and George then occupied the south side of the farm and Craddock the north end of the farm save for the area where George's house is situated. After the death of Craddock a certain Cynthia Nzima ("Nzima") occupied the home of Craddock, as she is a fiduciary beneficiary in terms of his will.

[6] Craddock died on the 19th August 2001 and Mr. Jan Borrell ("Borrell") was nominated as executor testamentary in the will. George filed various claims against the estate and a settlement was reached with the executor. As a result on the 18th October 2002, a further agreement was entered into between Borrell, George and Thandi George. In terms of this agreement the parties agreed to transfer 130 of the estate's shares in the Company, together with the estate's linked right to the exclusive use and enjoyment of 29,03 hectares of the land to George in settlement of this claim against the estate. The further material terms of the agreement provided that the estate would retain 70 shares and use of 9.47 hectares of land and, further, that the use agreements would be amended in terms of the agreement. This agreement therefore amended the Use Agreement

[7] On the 19th March 2004 an agreement was concluded between George and Nzima and signed before a notary public. The material terms of this agreement were that George would take only approximately 8 (eight) hectares of land. Nzima would retain 30 (thirty) hectares in place of the 9 (nine) hectares which was unacceptable to her. George would transfer an extra 70 (seventy) shares to himself in place of the

land that was not being transferred, which meant he now holds 344 shares in the Company.

[8] Borrell filed a Liquidation and Distribution Account in 2007 and thereafter resigned. The respondent was appointed executor of the estate on the 10th July 2013.

[9] On the 11th February 2015, some two years later, the respondent in his capacity as executor filed application proceedings in the Court *a quo claiming, inter alia, that*:

(a) George be ejected from the portion allocated to Craddock in terms of the Use Agreement;

(b) George be compelled to transfer back 200 shares of the estate late George Craddock held by him and same to be registered in the name of the respondent;

(c) The appellants be removed as directors of the Company;

(d) The respondent be registered as a director of the Company;

(e) The respondent be authorized to file the relevant forms C & J to give effect to the orders sought in (c) and (d) above;

(f) The Registrar of Companies be ordered to endorse the changes in (b), (c), (d) and (e) above.

[10] The respondent was successful in the application and the court *a quo* granted the orders sought in (a), (b, (c), (d) & (f).

[11] The appellants have noted an appeal as follows:

1. *The Court a quo erred in law and in fact in its definition and understanding of the issues for determination in the application.*

2. *The Court a quo erred in law and fact in finding that the validity of the 2002 and 2004 agreements depended on the contents of the will and the interpretation thereof.*

3. *The Court a quo erred in law and fact in finding that Cynthia Nzima had disposed of the estate under the 2002 and 2004 agreements and that this vitiated the intention of the testator and could not stand.*

4. *The Court a quo erred in is findings in paragraph [29], [43], [44] and [45] of the judgment with regard to the file of the Master of the High Court. The file was not submitted by either party. The Court a quo directed the Master to produce it and thereafter relied in its contents in the absence of admissible evidence and cross examination thereon.*

5. *The Court a quo further erred in respect of the conclusions it reached based on the correspondence in the Master's file. it*

erred, in particular, in its findings on the sale of timber and in respect of the transfer of shares.

6. *The Court a quo erred in its perception that the issues involved the freedom of testation.*

7. *The Court a quo erred in its interpretation of the Use Agreement and its finding in respect if the First Appellant's rights thereunder.*

8. *The Court a quo erred in finding that the 1998 agreement was of no force and effect.*

9. *The Court a quo erred in finding that the First Appellant considered the 5th Respondent as synonymous with him.*

10. *The Court a quo erred in its interpretation of clause 6. .61 and 6.2 of the Shareholders Agreement and therefore erred in finding that the First Appellant is disqualified from being a director. The Court a quo erred in respect of the First and Second Appellant's shareholding.*

11. *The Court a quo erred in its findings in respect of share transactions and transfers of shares.*

12. *The Court a quo erred in ordering the First Appellant to be ejected from the property referred to in Order (2) which order*

disregards the agreements and the fact that the Respondent did not persist in such prayer.

13. *The Court a quo erred in ordering the First Appellant to transfer back 200 shares and that such share be registered in the name of the respondent as executor.*

14. *The Court a quo erred in ordering that the appellants be removed as directors of the fifth Respondent and that and that Respondent be granted the right to register as a director.*

APPELLANTS' ARGUMENT

Ejectment of Appellants

[12] During the proceedings in the Court *a quo* the respondent abandoned his prayer for ejectment. The appellants pressed for costs of the abandonment as the affidavits filed in the proceedings included much detail in respect of the right of the first appellant to his house and constituted the most substantial issue before the court. Despite the abandonment of the prayer for ejectment during argument, the court *a quo* ordered the first appellant's ejectment. This order for ejectment was then abandoned after judgment by notice in terms of the High Court Rules. When appellants sought costs of that abandonment in terms of the Rules the respondent purported to abandon the abandonment order. The issue of costs is still pending before the court *a quo*. It was therefore necessary for appellants to persist in an appeal against the ejectment order.

[13] During argument in the Court *a quo* the learned Judge confirmed with applicant's counsel that the prayer for ejectment had been abandoned, yet, surprisingly, it nevertheless went on to grant an order on it, notwithstanding confirmation that the prayer had been abandoned. The appellants pressed for costs of the abandonment emphasizing that the affidavits filed of record included much detail in respect of the right of the first appellant to his house. The respondent then abandoned the abandonment order. It is for this reason that the Notice of Appeal includes an appeal against the order of ejectment in view of the respondent's belated intention to now support the Court *a quo's* ejectment order.

AGREEMENTS IN RESPECT OF LAND USE

[14] The appellants' Counsel submitted that the agreements in respect of land use referred to above should be read collectively and together with the colour diagrams and it is clear that the 1998 agreement swapped the land use areas that already clearly existed under the 1990 agreement. The Court *a quo* therefore erred in finding that the first appellant had no rights over the property, which included the finding that the 1990 Use Agreement did not grant the first appellant the right to use the demarcated area of the land as there was no reference to him in the agreement.

FINDINGS IN RESPECT OF DIRECTORS OF THE COMPANY

[15] In terms of the shareholders' agreement the first shareholders are first appellant and Thandi George. The second shareholder is Craddock. In terms of the agreement the shareholders have the right to remain as

directors if they jointly hold 50% of the shareholding. They cannot be removed if they hold 50%. The second shareholder has a similar right. The contention of the respondent that the first appellant would not be entitled to be a director if he holds less than 200 shares is incorrect. It is also an incorrect interpretation that he is disqualified from the office of directorship in the Company if he holds less than 200 shares.

THE 2002 AND 2004 AGREEMENTS, RETURN OF SHARES TO DECEASED ESTATE AND REMOVAL OF APPELLANTS AS DIRECTORS

[16] Grounds 2 & 3 of the Notice of Appeal deal with the Court *a quo's* findings in respect of agreements entered into in 2002 and 2004 between Cynthia Nzima (Nzima) and the first appellant and, Cynthia Nzima and the testamentary executor, Borrell. The Court *a quo* held that the agreements alienating the asset of the deceased during the lifetime of Nzima cannot stand. The finding ignores the question of how legitimate claims against such an estate are dealt with. There is no reason why such a claim is invalid in that it settles a monetary claim against the estate which entitled the first appellant to payment by the estate. Claims were proved and accepted by the executor Borrell and the respondent had no legal authority to reject such claims.

[17] Having regard to the agreements there was no merit in the claim of the respondent to have 200 shares transferred back to the estate and no basis for respondent to be appointed as a director. There was also no

legal basis for the removal of first and second appellants as directors of the Company. The Court *a quo* had proceeded from the premises that the shares from the deceased were transferred to the 1st appellant in the 2002 and 2004 agreements with the assistance of the sole heiress, Nzima, who, in terms of the will only had a usufructuary interest. Borrell was a party to those agreements.

[18] The second appellant was appointed as a director after the death of Craddock. The Court *a quo* held that it was not clear how second appellant was appointed as a director and it proceeded to remove her as a director although there was no legal basis for her removal.

THE MASTER'S FILE

[19] Appellants submitted that the learned Judge in the Court *a quo* erred in relying on the contents of the Master's file in his findings. The file was sought by the Court *a quo mero motu* and did not form part of the papers in the application. The learned judge appears to have relied on a comment by the Deputy Master recorded in the Minutes to the effect that the first appellant "*...tricked Ms. Nzima into signing the 2004 agreement and is now bragging that he holds 200 shares*".

[20] The agreements of 2002 and 2004 were never cancelled and no duress was exerted on Nzima and there is therefore no basis for the return of the 200 shares to the deceased estate.

THE RESPONDENT'S ARGUMENT

[21] The respondent contends that the Master rejected all the agreements because the claim of the first appellant had not been properly investigated and the agreements were void *ab initio.* The ruling of the Master has not been challenged by the appellants and the respondent is therefore bound by the aforesaid ruling.

[22] Whilst the respondent abandoned the claim for ejectment of the appellants from their home in the proceedings in the Court *a quo, the* learned judge, nevertheless granted an order for the ejectment of the appellants from their home. The respondent then abandoned the order for ejectment by notice in terms of the High Court Rules. When appellants sought costs of that abandonment in terms of the Rules the respondent then abandoned the abandonment order.

[23] The respondent contends that the appeal should be dismissed on the basis that the Company is not a party to this appeal and the appellants are claiming a stake in the assets of the Company as if the assets were owned by the shareholders. The respondent further contends that the shares of the late Craddock ought to be transferred into the name of the respondent as the executor of the deceased's estate and the executor should be appointed a director of the Company in order to protect the interests of the estate. The Company, only, has *locus standi* to claim any losses of the Company and ought to have been joined as party.

[24] Respondent further submitted that Borrell never prepared a Distribution Account in terms of Section 51 of the Administration of Estate Act of 1902 in that the Liquidation and Distribution Account did not take into account the testator's will that created a *fideicommisum* in favour of his children after the demise of Nzima. Nzima only had the right to the enjoyment of the property and shares until her death whereupon the property and shares would pass to the sons of the late Craddock. Therefore the agreements which the first appellant concluded with Nzima are unlawful, void *ab initio* and cannot bind the estate of the late Craddock. The former executor therefore failed to exercise the degree of care required of him when he endorsed the agreements between Nzima and first appellant. As the Liquidation and Distribution Account of Borrell was not approved by the Master, the respondent is entitled not to consider it.

[25] He further contended that the first appellant is not entitled to be a director as he has transferred his shares to others and he currently owns less than 200 shares and thus had no right to appoint second appellant as a director.

FINDINGS

[26] The crisp issues for determination in this appeal are the ejectment of first and second appellants from their home, the return and transfer back to the estate of the late George Craddock of the 200 shares now held by first appellant, the removal of first and second appellants as directors and the appointment of respondent as a director.

[27] The respondent has opted to choose on which agreement he relies whereas the agreements should be read collectively and the respondent is bound by the agreements of his predecessor and the sole beneficiary.

[28] The question of the ownership of concession land is not an issue before this court. The Company is the registered holder of a concession being Concession No. 30P, Motshane District, Eswatini and the issues before this court are not concerned with the right of the Company to hold such concession and only concern the occupation and use of the land held in terms of the concession and the shareholding and directorship in the Company. Therefore it is not a question of the Company being involved in these proceedings because the land is a "*company asset*". The respondent's contention that the Company should have been joined, as a party is not understood, more so since the respondent is the party who was the applicant *a quo* and the respondent did not cite the Company as a party. In my view, in the absence of anything contrary in the articles of the company, there is no need for the company to be involved where a shareholder sells or transfers his shares in the company.

[29] The agreements that were signed between first appellant and Craddock with the assistance of the then attorney, Mr. P. R. Dunseith should be read collectively. The 1998 agreement signed at the request of Craddock reversed the 1990 agreement. In terms of this agreement it was agreed to swap the land areas for occupation. The 1998 agreement provides, *inter alia:*

"From the date of signing of this document the area of land known as the 'Bottom area' which is equal to half of the total land area of the farm, less the area occupied by Mr. George's house shall be considered to be for the sole use of Mr. P. George and is measured..... " (my underlining)

[30] In my view it is clear from this agreement read with the detailed diagrams in colour which demarcated the occupation of the land, that the first appellant retained the right to occupy the house in which he resides and that he or anyone else permitted by him to be in occupation, cannot be evicted therefrom. The less said about the respondent's approbation and reprobation of the abandoned order for eviction, the better.

[31] The agreement signed on 18 October 2002 was between Borrell and the first appellant. The first appellant had filed a claim against the estate for the value of timber owned by him, which Craddock had felled during his lifetime and sold without the consent of George. The monetary claim was settled by the transfer of 130 shares equivalent to 29,03 hectares of land from the deceased estate to the first appellant. As a result the deceased held 8,47 hectares. It was the duty of the executor to administer the estate for the benefit of the beneficiaries and creditors and to pay the deceased estate's debts and to distribute the residue to the heirs; the terms of a will cannot exclude or prevent payment or settlement of legitimate claims against an estate, or else creditors would be left remediless.

[32] The first testamentary executor, Mr. Borrell performed the above functions required of him and approved the agreements which satisfied first appellant's claim against the estate. The approval of the transfer of shares to satisfy the claims does not violate the rights of heirs who can only inherit the residue in accordance with the laws governing the administration of an estate.

[33] In 2004 Nzima indicated that she wished to repudiate the 2002 agreement. As a result a further agreement was concluded on the 19th March 2004 in terms of which the 2002 agreement was amended to reflect that first appellant would take a further 8 hectares of land, Nzima would retain 30 hectares and the first appellant would transfer a further 70 shares to himself bringing the total to 200 shares.

[34] In 2005 Borrel recorded that the 2004 agreement constituted an acceptable settlement of the first appellant's claim against the estate.

[35] The Court *a quo* held that the 2002 and 2004 agreements were invalid based on Craddock's will. This finding ignores the fact that the agreements reached were to settle substantial claims against the estate and that the heirs only become owners of the bequeathed assets after delivery to them by the executor and not on the death of the testator – **Greenberg vs. Greenberg's estate 1955 (3) 361 (A)** - the learned Judge held:

"The position under our modern system of administering deceased estates is that when a testator bequeaths property to a legatee the latter does not acquire the dominium in the property immediately on

the death of the testator but what he does acquire is a vested right to claim from the testator's executors at some future date delivery of the legacy, i.e. after confirmation of the liquidation and distribution account in the estate of the testator."

[36] As regards any comments by the Master, the Master was never cited as a party, the contents of the Master's file had not been properly placed before Court by way of affidavit and the appellants, who did not have the opportunity to respond thereto in their affidavit, were essentially ambushed by its introduction into the record. In the circumstances, not much weight can be attached to any comments by the Master which were not properly ventilated in the Court *a quo*.

[37] Having regard to the agreements, there is no merit in the claims of the respondent to have 200 shares transferred back to the estate of the Craddock. The respondent as the applicant *a quo* bore the onus and failed to show that the relevant agreements are invalid or void or otherwise of no or limited legal force or effect.

[38] As regards appointment of the respondent as a director, the respondent was never nominated as a director by Craddock and we have not been referred to any legal authority to the effect that an executor *ex lege* steps into the shoes of a deceased director; an executor merely acquires certain rights in respect of a deceased shareholder's shares. I therefore find that there is no legal basis for the respondent to be appointed as a director.

[39] As regards removal of the second appellant as a director, the Court *a quo* ordered her removal as a director whereas the relevant clause in the Shareholders' Agreement does not prohibit the appointment of a further director/s. The second appellant, according to the relevant Form C, was appointed thus in 2011, before the respondent assumed office as executor in 2013. I therefore am of the view that no legal basis for the removal of the second appellant has been shown,

COSTS

[40] The appellants have incurred considerable costs in defending the application in the Court *a quo* and this appeal as the issues are complex, Counsel was briefed and lengthy affidavits were filed in the Court *a quo,* in particular dealing with the right of persons holding a valid right to occupation, to not be evicted from their home.

ORDER

[41] For all the above reasons I am of the opinion that the appeal must succeed and I accordingly make the following order:

1. The second order of the Court *a quo* ordering the ejectment of the first respondent from the portion allocated to the late George Craddock as defined in the Use Agreement within 6 months from the date of this judgment is set aside.

2. The third order of the Court *a quo ordering* the return and transfer back to the estate late George Craddock of the 200 shares held by the first appellant is set aside.

3. The fourth order of the Court *a quo* ordering that first and second appellants should be removed as directors is set aside.

4. The fifth order of the Court *a quo* granting the executor dative the right to register as director of fifth respondent is set aside.

5. The sixth order of the Court *a quo* authorizing the applicant to file Forms C and J with the fourth respondent is set aside.

6. The seventh order of the Court *a quo* ordering the fourth respondent to endorse the amendments described in the order of the Court *a quo* is set aside.
7. The eighth order of the Court *a quo* authorizing the Royal eSwatini Police to give effect to the orders of the Court *a quo* is set aside.

8. Costs are awarded to the first and second appellants including the costs of counsel analogous to High Court Rule 68 (2).

For the Appellants: Adv. P. Flynn
Henwood & Company Attorneys

For the Respondent: Mbuso. E. Simelane
Mbuso E. Simelane Attorneys

J.M. CURRIE

ACTING JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA

CHIEF JUSTICE

MINORITY JUDGMENT

JUSTICE M. J. DLAMINI JA

SUMMARY: *Deceased died holding half the issued shares of a company which was the registered owner of a land concession (perpetual) – Executor testamentary before resigning approved a debt payment by transfer of all deceased's shares to First appellant – Executor dative repudiated the transfer of the shares as illegal and prayed for their return to deceased estate so that the executor qualified to be director of the company as was the deceased – The Court a quo agreed with the executor – On the shares being returned the First appellant would lose co-directorship of the company and control of half the land concession.*

INTRODUCTION

[1] The appellants have come before this Court on fourteen grounds of appeal. The question that immediately arises is what is the issue for determination. So many grounds of appeal can easily be construed as a fishing expedition, where a large net is cast out to the sea to catch one or a couple of small fish. I find it unnecessary to set out all these grounds of appeal or even answer each and every one of them. Appellants having set out several grounds of appeal should be considerate enough from the outset at the hearing clearly to indicate

grounds to be pursued and those that have been abandoned. It would even still be more helpful to notify the Court and the other side ahead of the date of hearing of the grounds proposed to be abandoned.

ISSUES FOR DETERMINATION – Prayers 1,2.3 and 9

[2] On the "issues for determination" the appellants argue that the Judge *a quo* erred in para [5] where the judgment reads: *"Prayers 1 and 2 were dealt with amicably between the parties. What is left for my determination is the rest of the prayers"*. Excluding the prayer for costs, there were ten prayers on the notice of motion. By the third prayer, the respondent (the applicant below) had prayed for the ejectment of the First appellant *"from the portion allocated to the late George Craddock as defined in the Use Agreement dated 15th August 1990 entered into by the deceased with the 1st [appellant]"*. It is the appellants' argument that the learned Judge *a quo* erred in dealing with prayer 3 and the issue of ejectment [ground of appeal 12] as one of the issues that remained for determination.

[3] It is appellants' argument that prayers 1, 2 and 3 had been abandoned by the respondent during the hearing *a quo* and were therefore not 'issues for determination' by this Court and the Court *a quo*. To this end, in para 3 of their heads of argument First appellant asserts: ". . . *On the 28 March 2018 during argument of the matter in the High Court, the respondent had abandoned the prayer for ejectment. Respondent's counsel abandoned prayers 1, 2, 3 and 9 of the Notice*

of Motion and indicated that he would only deal with prayers 4,5,6,7,8 and 10". Appellants then refer to page 15 of their **"Record of Arguments".** This record of arguments, besides being objected to as not properly before Court as part of the Record on Appeal, had not been certified by the Registrar of the High Court even though it purports to contain transcript of what transpired at the hearing in the High Court. Instead the said record is certified by its transcriber one Inalda Marilda Jorge-Antonio. This record of arguments only has the stamp of the Registrar of this Court.

[4] In terms of the said record of arguments, it is clear on page 15 that counsel for the respondent had abandoned prayers 1, 2 and 3. In the result the issue of ejectment of First appellant was abandoned and the order of ejectment made by the learned Judge *a quo* was accordingly wrong and should be set aside. But because of the uncertain status of the record of arguments, and out of abundance of caution, I will deal with prayer 3 as one of the issues for determination as appellants had argued it and respondent did not indicate that the prayer had indeed been abandoned. And if prayer 3 had indeed been abandoned, I do not understand how that prayer could have been resurrected and argued during the hearing and made part of the judgment *a quo.* But appellants aver in para 7.3 of their heads of argument: "... *The respondent purported to support the order of ejectment by 'abandoning the abandonment'"* and reaffirmed by "*respondent's belated intention to now support the court's a quo ejectment order".* Hence the appeal against ejectment as per ground of appeal 12.

GENERAL

[5] At the turn of the last century, Farwell J stated:

> *"A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders* inter se *in accordance with section [20 of the Companies Act 1948] ... A share is not a sum of money. . . but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount".*[1]

[6] It is then said that shares in a company entitle the holder to an equitable interest in the assets of the company because so long as the company remains a going concern, the share represents value that the holder 'invests' in the company. However, Gower[2] points out that the word 'share' has *"become something of a misnomer, for shareholders no longer share any property in common; at the most they share certain rights in respect of dividends, return of capital on a winding up, voting and the like"*. It is trite however that 'member' of a company and 'shareholder' usually refer to the same person. According to our law, a company, private or public is essentially an association of persons. A company therefore cannot exist without natural persons who are members of the company. This is true of a company with a share capital. It is the company that issues the shares

[1] **Borland's Trustee v Steel Brothers and Co.** [1901] 1 Ch. 279,288
[2] LCB Gower, **Gower's Principles of Modern Company Law,** 4th edition 398

with the result that the shareholders are bound by agreement with the company set out in the Memorandum and Articles of Association of the company.

BACKGROUND – The 1998 and 1990 agreements

[7] On the 15 August 1990 the parties, that is, Peter W. George and George Craddock, entered into an agreement in terms of which George sold to Craddock 200 shares in the company, Elangeni Estates (Pty) Ltd, for the price of E124, 000-00. These shares qualified Mr. Craddock as a 50% shareholder in the property registered in the name of the company, that is, Portion A of Portion 1 of Land Concession No.30P. The company had a share capital of E400 representing 400 shares, all issued. On the same date as above the parties entered into a Shareholders Agreement in terms of which, *inter alia,* the First appellant and his wife, Thandi, together holding 200 shares or 50% of the shareholding were to *remain as directors of the company,* while Craddock and a nominee of his were entitled also to be directors so long as Craddock retained the 200 shares. In the result the First appellant and Craddock were shareholders and directors of Elangeni Estates company. It appears that the 200 shares sold by George were transferred to and registered in the name of Craddock and on his death, would devolve to his estate.

[8] On the same date, 15th August, 1990 George and Craddock entered into yet another agreement, called the Use Agreement. In this

Agreement 1st appellant is described as representing Elangeni Estates company. On its face this means that the Use Agreement was between the Company and Craddock. By this agreement George and Craddock agreed to artificially divide the Elangeni Estate in such a way that Craddock as a member of the company was entitled and permitted to use, develop, enjoy, do farming and related activities to half of the farm and there *"generally to have all powers and authority... to use the land share as if he were the legal owner thereof"*. It is worth noting that the Shareholders Agreement foreshadowed the Use Agreement by providing as follows under Clause 5: *"The Shareholders shall enter into the Use Agreement with the Company, and be bound by the terms and conditions of such agreement"*. It is further worth noting that the Shareholders Agreement and the Use Agreement were witnessed by Attorney Mr. P.R. Dunseith who must be assumed to have prepared both agreements. It seems to me that the intention of the parties was that First appellant should also be party to the Use Agreement and be bound by it. Since the Use Agreement dealt only with half of the farm it makes better sense to assume that as First appellant already had the other half of the farm in terms of his shareholding, he too was accordingly bound by the Use Agreement. Otherwise the Use Agreement would be incomplete in its coverage. The 1998 Agreement of Area Ownership would seem to confirm the foregoing thinking.

[9] On 1st September 1998, George and Craddock, meeting under the auspices of the Elangeni Estates company signed another agreement

called "Agreement of Area Ownership". In effect this was an amendment of the 1990 Use Agreement. Under this 1998 agreement "*the area of land known as the 'Bottom Area' which is equal to half of the total land area of the farm... shall be considered to be for the sole use of Mr. P. George not to exceed 38.5 hectares or half the total area of the farm being 77 hectares including the house area*". It follows that the remaining half was to be for the sole use of Mr. Craddock. The contours of the respective areas were duly identified in the agreement.

[10] The 1998 agreement rectified the earlier, 1990, agreement between the First appellant and the deceased in terms of occupation and use of the farm, Portion A of Portion 1 of Land Concession No. 30P, Motshane District, eSwatini. The parties were 50% - 50% owners of the shares in the company Elangeni Estates (Pty) Ltd, which was the registered owner of the Land Concession. The parties were therefore the shareholders of the company. The Court *a quo* took the view that the 1998 area agreement was invalid in that the parties used an 'asset' of the company without the company being involved as was the case with the Use Agreement in 1990. The fact however is that the 'asset' of the company was in no way compromised by the exchange of area occupation in question. At the top of the 1998 agreement is the name of the company in bold letters; the paragraphs or clauses are not numbered; the first two pages of the agreement are not initialled and the agreement is signed by the parties and their witnesses. It does not appear that a lawyer was involved in the drawing and signing of the

agreement. In the circumstances and in light of the other agreements, I would not consider this agreement invalid without any show of prejudice.

[11] In ground 8 of their notice of appeal, the First appellant pleads that the Court *a quo* erred in finding the 1998 Agreement to be of no force or effect. In paragraphs 15 and 16 of his heads of argument the First appellant argued that even though there was no reference to the First appellant under the 1990 Use Agreement, it did not mean that *"first appellant had no rights over the property"* in terms of that agreement: *"The agreements in respect of the land use and attacked diagrams must be read collectively and it is clear that the subsequent 1998 agreement... swapped the land use areas that already clearly existed under the 1990 agreement. The court a quo therefore erred in finding that the first appellant had no rights over the property"*.

[12] With respect, the argument of the Court *a quo* that First appellant was excluded by the 1990 Use Agreement since he was not a 'member' in terms of that agreement is not watertight. The First appellant and Mr. Craddock were the shareholders and directors of the company by virtue of their 50% shareholding per member. When Mr. Craddock was inducted as a director the First appellant was already a director and continued in that capacity. The Use Agreement deals only with half of the property as being assigned to the exclusive occupation and use of Mr. Craddock as the incoming member. The other half without

regard to where the dividing line was must have remained for the exclusive use of the First appellant and his wife. This other half did not remain unoccupied and unused as the Court *a quo* would seem to imply. The First appellant was already the possessor of all rights necessary to manage and develop the other half area. I agree that the agreements must be read collectively as a package.

[13] Mr. Craddock did not have any rights over the other half of the farm. It could be argued that once Mr. Craddock had his land use rights defined, there was no real need for any further specific definition of the rights of First appellant. The shares that First appellant held to the half of the property entitled him in the absence of any other competitor to use, enjoy and develop that half as he deemed appropriate, without interfering with the occupation or use rights of Mr. Craddock. The property remained under the ownership of the company and the land share arrangement between the First appellant and Mr. Craddock did not confer any ownership rights over the land as such. The members were entitled *inter se* and in the absence of anything to the contrary under the articles of the company to arrange how they would occupy and use the land area. The company did not have to be part of the arrangements. The company was only an investment holding company.

EJECTMENT OF FIRST APPELLANT FROM OWN HOUSE

[14] If First appellant had no rights to the enjoyment of the property defined as 'Portion A of Portion 1 of Land Concession Farm No 30P, Motshane District, Swaziland' under the Use Agreement and Mr. Craddock only had rights over half of the area, who then had the rights over the other half and what was the benefit of the 200 shares First appellant held in the company? In any event. First appellant did not claim rights over the whole of the farm. If ejectment was based on the findings that the house of First appellant was located on the portion of the farm allocated to the deceased, that could not be a valid basis for ejectment. All it needed was a proper redrawing of the boundaries of the areas respectively occupied by the appellants and the deceased. This is so because the First appellant is said to have unlawfully encroached on the area belonging to deceased. It would seem that, when the division was affected, the house in question was already on that part of the farm. Accordingly, in my opinion, there was no lawful basis for the ejectment of the First appellant.

[15] As stated above, the 1998 Agreement reversed the occupation of the farm areas as had been agreed in 1990 in that the area formerly occupied by First appellant was to be occupied by the deceased. In 1990 the deceased occupied the Bottom Area or south part and the First appellant occupied the Top End or north part of the farm. In 1998 the occupation changed. The third clause of the 1998 Agreement is set out above and it is clear that in terms of the new agreement First appellant was to occupy the Bottom Area then occupied by the

deceased. But First appellant's occupation was to be "less the area occupied by Mr. P. George's house". In the process, the deceased would take over the Top End area but less the area on which the house of First appellant was situated so that First appellant continued after the swap to stay in his house as before. To this end, para 13.4 of the answering affidavit states that in 1998 the 1990 arrangement was reversed so that First appellant took the south part and the deceased took the north part and that "*such exchange did not affect the land on which our houses were built on*". And in para 13.5 First appellant "vehemently denies" that his house was situated on the portion of the farm belonging to the deceased. I think that the explanation regarding the occupation and swapping of occupation is acceptable. In my opinion, even if the 1990 and 1998 agreements are nullified, the pre-1990 *status quo* on the farm would then be reactivated and the person to be negatively affected would be the deceased who would be without a place on the farm.

[16] For the avoidance of doubt, the property being the land concession Portion A of Portion 1 of LC No. 30P remained the property of the company notwithstanding the artificial division as agreed to by the parties. The respective occupation assigned to the parties did not affect the legal ownership of the farm. In the result throughout the division and consequent occupation in 1990 and 1998 the land itself was not affected and no legal ownership of any part vested in any of the parties. I do not understand what the learned Judge *a quo* means in para [39] where the judgment reads: "... *Now a company being a*

legal ***persona,*** *distinct from its shareholders and directors, it is clear that for the shareholders to deal with the property of the 5th respondent without the 5th respondent was a legal misnomer. If the parties wanted to use the property of the 5th respondent, 5th respondent ought to have been a party to the contract. They could not conclude a contract which involved the asset of the 5th respondent among themselves to the exclusion of the 5th respondent".* Whilst the principle propounded is acceptable, we have already explained that throughout the artificial division and occupation of the farm, the company suffered no prejudice since no part of the land was *legally* committed, such as, by a formal subdivision or mortgage. There was therefore nothing really unlawful in the manner the parties were dealing with farm, the property of the company.

[17] We have explained above that a company with a share capital must have shareholders for it to remain a going concern. It is true that the shareholders could be natural and or artificial persons. But ultimately, behind the corporate façade are natural persons who must carry out the objects of the company. If, as the learned Judge *a quo* says, "a company is not an agent of its shareholders, directors and members" – which is correct – why should the company be involved or concerned where a member sells and transfers his shares in the company, in the absence of anything contrary in the Articles of Association. It is not the company that sells the shares; the money or consideration to be obtained by the sale will not accrue to the company but to the individual seller as must have happened when First appellant sold his

shares to the deceased. Once the transfer is done, following the agreement to sell, what remains is updating the register of the company's shareholders to reflect the change. A shareholder sells shares: a company allots or issues shares.

[18] It should be noted that on 15 August 1990 three agreements were entered into essentially between First appellant and deceased. One of those agreements was the Use Agreement. The learned Judge *a quo* found that the 1998 Agreement was of "no force and effect" and "not binding upon the parties by virtue of its illegality". The reason for the Judge coming to this conclusion seems to be what is stated in paragraph [38] of the judgment *viz* "*What is glaring from the 1998 agreement is that the parties hereto (sic) were the 1st respondent and the deceased. It is common cause that the property... is the asset of the 5th respondent*". By 'asset' is meant Portion A of Portion 1 of Land Concession No. 30P. The problem in connection with the validity or otherwise of the 1998 Agreement and 1990 Use Agreement seems to begin under para [32] where the learned Judge stated: "*The Use Agreement provides that the 5th respondent as a company entered into a contractual relationship with the deceased*". This refers to the agreement by which the company purported to define the deceased's right of occupation and use of half of the farm so long as he held the 200 shares. Even then First appellant is reflected as representing the company. The learned Judge then observed that in the 1998 (Area Ownership) Agreement the company was not represented as it was in the 1990 Use Agreement. In my view this apparent discrepancy

should not result in the invalidity of the later agreement or in the disqualification of First appellant from enjoying exclusive rights to the remaining half of the farm in terms of the 1990 Use Agreement in which First appellant was not expressly mentioned. The short answer to the foregoing poser is that it was not really necessary for the holding company to involve itself in the management of the farm and how any area of it was used by a member so long as no part of the farm was alienated. In fact, it would appear that at the time the Use Agreement was entered into First appellant was already enjoying the uninterrupted use over the whole farm. In allocating to the deceased the exclusive use of half of the farm left the other half to First appellant. There was no need to provide for what was already implicitly provided.

[19] What should be restated in the effort for greater clarity is that in 1990 First appellant sold some of his own shares to the deceased. Yes, those shares were shares in the company, but First appellant had paid for them; the company received value – however nominal – for the shares. The 200 shares were therefore not sold by the company because the company did not own them. The shares were sold by the owner, 1st appellant, and that is the person who received the E124,000.00. To this end, HS Cilliers *et al*[3] write: "*Where shares are transferred to a person there is a separate agreement between purchaser and seller, . . .*". And Gower[4] agrees: "*Prima facie,*

[3] **Corporate Law,** 2nd Ed p 234
[4] Op. cit. (supra) at p 445

companies' shares are freely transferable; as we have seen, it is this feature which constitutes one of the great advantages of the incorporated company. Unless the company's regulations provide otherwise, the shareholder is entitled to transfer to whom he will". To further support this principle of free transferability of shares Cilliers *et al* state: "*15.24 A person can acquire title to shares in a company in one of two ways. He can acquire the share transferred into his name or he may acquire them directly from the company, usually by applying to the company which can then allot and issue shares to him".* Further, Gibson[5] says: "*Shares are transferable in the manner provided by the Act and articles of the company (s91). Tale A (art 10) provides, for example, that the instrument must be executed both by the transferor and transferee...*" Thus, the company is not usually involved when a shareholder sells any of his shares.

RETURN OF THE 200 SHARES TO DECEASED ESTATE

[20] The judgement of the Court *a quo* concludes that the 200 shares alleged by First appellant to have been acquired by him from estate of deceased in about 2002 and 2004 were in fact wrongly acquired and improperly transferred. The Court *a quo* had proceeded from the premise that the shares from the deceased were transferred to First appellant in the 2002 and 2004 agreements with the assistance of the sole heiress Ms. Cynthia Nzima who, in terms of the deceased's will, only had an usufructuary interest in the deceased estate. It is noted, however, that the executor, Mr. Borrel, was party to those agreements.

[5] **South African Mercantile and Company Law,** 8th Ed p 306, by Visser *et al*

I agree that the transfer be set aside and these shares be returned to the estate of the deceased. But First appellant should be given time to regularize his position if he wants to continue as a director in the company. This indulgence is based on the consideration that First appellant may have been misled to believe that he lawfully held the 200 shares from the deceased estate. In the result he may have sold some of his genuine shares to others like Malvern Mwiya. But since he was mistaken in this 1st appellant should be allowed time to be possessed of 200 shares (him alone or with his wife) to qualify as director(s). Otherwise 1st appellant's loss of directorship in the Elangeni Estate company is confirmed. Interestingly, it has not been revealed if Second appellant holds any shares in the company and if so, how many.

[21] The appellants in their heads of argument in connection with the 2002 and 2004 agreements question if the Court *a quo* properly considered the legitimacy of the claims proved against the deceased's estate. In my reading of the record on appeal and the documents filed before this Court, and how First appellant had strenuously sought to establish the very legitimacy of his claims, it is clear that the claims cannot be presumed to have been lawfully established. For instance, First appellant says that the changes that occurred at the farm between 1990 and 1998 in terms of the occupation were at the instance of the deceased and none by himself; that around 1990 the deceased following a loan from the then Union Bank, lost and forfeited all of his shares, which however continued to be in the name of the

deceased until his death; that soon after the death of the deceased First appellant claimed to have been owed by the deceased thousands of emalangeni when none of these claims is anywhere shown to have been acknowledged by the deceased; that the deceased sold some of his shares to one Pheli Shabangu but still deceased had 200 shares when he died and how deceased stole and sold timber belonging to First appellant. To me, all this translates to First appellant being consumed by a strong desire to take over and own the Elangeni Estates all by himself. I leave aside the effectiveness or otherwise of Mr. Jan Borrel, the erstwhile executor testamentary, under whose administration First appellant's claims were apparently approved.

[22] I agree that the shares must be returned to deceased estate. The deceased died on 19th August 2001, possessed of 200 shares he had purchased from First appellant in 1990. In October 2002, First appellant claimed, as a result of being owed, to have lawfully acquired 130 of the deceased's shares plus 29,03 hectares of deceased land share. How did it all happen? Why did it not happen while deceased was still alive? The First appellant in para 31.2 of his answering affidavit says: "*However, against warnings Mr. Craddock stole my timber one (1) years (sic) before he died, . . .*" How could First appellant suddenly be so indebted by the deceased? I do not believe the explanation tendered by First appellant as to how he became entitled to the shares which he transferred to himself as the purported secretary of the Elangeni Estates (Pty) Ltd. That the former executor, Mr. Borrel, approved the transfer of the shares is no full answer to the

question of how in so short a time after deceased's death First appellant could acquire the entire shareholding of the deceased which made First appellant effectively the sole owner of the whole Elangeni Estates. Mr. Borrel could have made a mistake in accepting the transfer or he could have failed to diligently exercise his fiduciary responsibilities as executor of deceased estate.

[23] If the acquisition of the shares of the deceased by First appellant was genuine then First appellant should fear nothing: he should be ready to prove his claim once more before the present executor or in a court of law. First appellant should not get away so easily with those shares in circumstances clearly calling for re-examination and due diligence. It cannot be that so soon after his death deceased had become a thief who stole First appellant's timber even though First appellant had made no such claim while deceased was alive. The story of how First appellant became entitled to the 200 shares seriously challenges our sense of trust in human nature. First appellant's affidavit is replete with defamatory allegations against the deceased who is nowhere to answer for himself. This is most unfair on the part of First appellant.

[24] It is unbelievable that between August 2001 and 18 October 2002, a period of fourteen months, the First appellant was able to raise a claim of almost E100,000.00 against the deceased. Why was none of this claim not raised in the lifetime of the deceased? If First appellant was sleeping all that time and not looking after his trees he cannot

suddenly wake up and raise posthumous claims of such magnitude. I would dismiss the appeal against the return of the 200 shares to the deceased estate. In the circumstances of the case and the totality of the evidence I do not think that the 2002 and 2004 agreements are anything to stand by. Mr. Borrel did not do a good job of his office as executor. It is the magnitude of the claim over so short a period that worries me most. First appellant admits having submitted a 'litany of claims', not against the deceased but, against the deceased estate and that he was the lawful holder of all the shares of the deceased. He had submitted these claims first to former executor testamentary, Mr. Borrel, who had approved most of the claims; he had also submitted other claims to the respondent as current dative executor after Mr. Borrel resigned; but the respondent did not accept the claims.

[25] In his answering affidavit, First appellant accused the deceased, the respondent and one Cynthia Nzima, the fideicommissary heir, (who unfortunately died whilst this judgment was pending) of having stolen his trees to the value of E30,000.00 in one instance. First appellant avers: "*26.1 . . . I wish to submit that the whole shares were ceded to me on or about the year 2002 and 2004 in terms of duly signed agreements as settlements of my claims for my timber that was stolen by Mr. Craddock. These agreements were signed by myself, 6th respondent [Ms. Cynthia Nzima] as well as the then executor Mr. Borrel. It is on those basis (sic) that I proceeded to transfer the shares that were held by the deceased back to me in terms of the said agreements*".

[26] Ultimately, it is to be noted that the deceased estate was left without any shares thereby losing its entitlement to the directorship of the company, but more importantly, losing its 50% area control of the farm, Portion A of Portion 1 of Land Concessions 30P. In short, First appellant grabbed all of the deceased's shares from the deceased's grave. None of these alleged claims by First appellant had been acknowledged by the deceased in his lifetime and no sooner did he die than a litany of claims cropped up at the instance of deceased's long-time neighbour and fellow shareholder in the Elangeni Estates company – the very person who had sold him the 200 shares now involved in a tug of war. In the circumstances, any astute executor would want to scrutinize and question the legitimacy of these claims.

[27] The document, annexure PG12, purporting to authorize the transfer of the 200 shares from the estate of the deceased to First appellant is on its face disputable. No wonder the beneficiary Ms. Nzima successfully challenged its first version leading to a purported amendment in 2004. Taken alone the entire document is a bare, unexplained transfer of the shares from estate of deceased to First appellant. It is signed by the executor testamentary, Mr. Borrel. The document has two short clauses; it reads

"ESTATE OF THE LATE F CRADDOCK. (sic)

"I, J. Borrel, being the executor of the above estate, agree to the transfer of shares in Elangeni Estate Pty Ltd from the estate of the late G Craddock to PW George as follows:

130 (One Hundred and Thirty) shares according to an agreement dated 18.10.2002

(Note that Ms. C Nzima as beneficiary of the above estate, objected to part of this agreement, namely the amount of land to be transferred. As a result of this disagreement a second agreement has been concluded between C Nzima and PW George, whereby):

"2. 70 (Seventy) extra shares are to be transferred to P George, making a total of 200 (Two Hundred) shares in all.

"Copies of both the above agreements are here attached and have been read by me.

Signed. (Apparently by Mr. Borrel).

J. Borrel

Dated 17.5.04"

[28] The agreement of 18 October 2002 was between Mr. Borrel the executor and P George as claimant. By way of preamble it records: "*George has a claim against the Estate for the value of timber owned by George which the Late George Craddock during his lifetime caused to be felled and sold without the consent of George; the parties have reached agreement as to the amount of George's claim and the manner of settlement and wish to record such agreement*". The

agreement then records a claim of E96,890.60 against the Estate of the deceased. This amount was to be settled fully and finally by the transfer of 130 shares equivalent to 29,03 hectares of land from the deceased estate to First appellant. By this agreement the deceased estate would remain with 70 shares and the exclusive use of 8,47 hectares. Evidently, this agreement was heavily in favour of the First appellant. Transferring 130 shares plus 29 hectares of the deceased estate was not a fair exchange. Using the value of the share as in 1990, first appellant gave himself more than was equivalent to his claim of E96,890.60. In 1990 First appellant had sold 200 shares to deceased for E124,000.00. In 2004 First appellant gets 200 shares for the amount of E96,890.60 plus about 8 hectares of land. How the value of the share in the Elangeni Estates company remained static for over ten years also calls for an explanation. That is why the transfer of the shares must be reversed. In fact, the 2004 so-called agreement which gave First appellant the entire 200 shares, was worse than the 2002 arrangement. The 2004 Agreement must have left the deceased estate virtually bankrupt. The parties must begin on a clean slate as far as the use of the shares for the payment of First appellant's claim is concerned.

[29] First appellant further argued, probably in the alternative, that deceased "*forfeited his shares in terms of the agreement of 1990 as he committed fraudulent acts by surrendering or assigning the property of the company to the Union Bank without my consent and knowledge whilst I was in the United Kingdom. Mr. Craddock went on to commit*

several acts of theft and fraud and in terms of the 1990 agreement such conduct resulted to a forfeiture of the shares. . .". In light of the foregoing narrative one wonders why deceased was not deemed to be bankrupt in 1998 when the occupation of the farm was reorganized. Why raise the issue of forfeiture now after the death of Mr. Craddock?

[30] In the foregoing assertion of forfeiture of shares, First appellant is apparently referring to a document purporting to be a Resolution of the Company by its board of directors at a meeting of 2nd November 1990 approving a first mortgage bond in favour of the Union Bank of Swaziland Ltd in the sum of E80,000.00 (Eighty thousand Emalangeni) and an additional E20,000.00 (Twenty thousand Emalangeni) granted over the company's property following overdraft facilities granted by the said Bank to George Craddock. The document has parts of it deliberately overwritten and rendered illegible. In my view the authenticity of this document is not beyond doubt. Seemingly nothing had been done about this alleged forfeiture of shares while Mr. Craddock was alive save for an unrecorded warning by Mr. PR Dunseith. The deceased retained the so-called forfeited shares until he died a decade later. Then in 2002 and 2004 the entire 200 shares were purportedly transferred not to the company but to First appellant as payment for debts accrued by the deceased in favour of First appellant. Quite anomalous. There is also no document purporting to originate from the Union Bank in support of the alleged overdraft facility alleged extended to the deceased. Further and more importantly, one must doubt if the Union Bank would accept a land

concession for a mortgage bond. Mr. Craddock was not even the registered owner of such concession; it is hard to understand how the bank could have accepted land for a security even if it were not a land concession. In my opinion, this alternative ground for depriving deceased estate of its shares must also be rejected as devoid of merit.

DOES RESPONDENT QUALIFY TO BE DIRECTOR?

[31] The respondent wishes the returned shares to be vested in him as executor so he could be a shareholder and qualify to be director in the company as deceased was. In para 22 of his founding affidavit, respondent (as the applicant) asserts: "*As a person in whom the estate of the George Craddock vests, I am entitled to be registered as a Director and Shareholder in lieu of the deceased's interests*". It is of course true that the assets of the deceased estate and the administration of the deceased estate vest in the respondent as executor. It is trite that the executor must apply the law in good faith and use his discretion in administrating the estate. The Master and the courts will not interfere.

[32] First appellant denies that respondent as executor in the deceased estate is entitled to a directorship of the Elangeni Estate company. The reason relied upon by the First appellant for his argument is that the deceased estate is bereft of any shares as per the agreement of 17 April 2004. On the assumption that the shares do revert to the deceased estate and vest in the respondent, Mayerowitz, however,

states that "*the executor does not succeed to the **persona** of the deceased; the executor and the deceased are separate and distinct **personae**...*"[6] The executor acts in a representative and fiduciary capacity which is not the case with the deceased. In my opinion it does not follow that if the deceased was a director by virtue of his shareholding, the executor as successor to the deceased estate must also be a director. The executor's entitlement to directorship depends on the law and the Memorandum and Articles of Association of the company in question. Respondent did not refer the Court to any law or the Articles of the company which so qualify him to be director by virtue of his executorship. The respondent accordingly has not made a case for the order he prays in this regard.

CONCLUSION

[33] Before I conclude, something needs to be said about the entity called Elangeni Estate (Pty) Ltd as the registered owner of Portion A of Portion 1 of Land Concession No. 30P, Motshane District, eSwatini. In the Sale of Shares Agreement, the Seller and Purchaser give their *domicilia* as *"Elangeni Estates of Portion A of Portion B of Land Concession No. 30P"*. I have understood the First appellant and the deceased to have been staying within the area of the land registered in the name of the company. How this Portion B comes into the picture I have no clear explanation.

[6] D. Mayerowitz, **The Law and Practice of Administration of Estates,** 5th Ed, p 123

[34] We first come into contact with this company when First appellant sells 200 of his shares to the late Mr. George Craddock for the price of E124,000.00 in August, 1990. Since then, other than the appellants and some time the late Mr. Craddock and a Ms. C Nzima, we do not hear of any other persons being associated with this company or land concession other than labourers. The few other persons like Mpheli Shabangu and the Mwiyas and a couple others named as shareholders, there is virtually nothing known about them and their status as shareholders is even doubtful having regard to the main thrust of these proceedings. It is clear who the concessionaire is. The company is said to be a holding entity and the registered owner of the land concession. Is the company then the concessionaire? Even then, one would still like to know who the original grantee was or the successor thereto. All we hear is of First appellant and his wife as "first directors" of the company. When First appellant held 350 shares in the company, who held the other 50 shares. Presumably his wife the Second appellant. This would then make First appellant the concessionaire or successor to the concessionaire. But this is all speculation. There is need for certainty. Whether concession or not, it is land that is at the heart of these proceedings.

[35] We were told and it appears that the company was incorporated in about 1975. To the question regarding the concessionaire, no clear answer was forthcoming other than that the concession was sold by the Government to the First appellant about that time. How Government could sell a land concession even if perpetual, is not

clear. All land concessions vest in the King since April 1973. The First appellant, in para 30.1 of his answering affidavit avers"... *I submit that I was duly appointed as Secretary of [the company] by the late His Majesty King Sobhuza's lawyer when the [company] was formed."* Who was the 'lawyer' and how the appointment happened need to be explained?

[36] In the result, the Attorney General is urged to investigate and establish the true status of the Land Concession number 30P; identify the concessionaire, if any; consider the effect of the will of the deceased, and advise His Majesty accordingly, within the six months from the date hereof. All land concessions are by law now held at the will and pleasure of His Majesty. The Attorney General is also urged to inform the appellants and Ms Cynthia Nzima of his findings and his likely advice to His Majesty before tendering his advice.

ORDERS OF THE COURT

[37] In the result and in light of the totality of the submissions, I make the following orders:

1. The appeal is partly upheld;

2. The ejectment of the First Appellant from the land on which his house is located is set aside;

3. The return and transfer back to the Estate Late George Craddock of 200 shares held by First Appellant is upheld;

4. The fourth order of the court *a quo* is substituted as follows-
"first Appellant (alone or with Second Appellant) is hereby granted six months from date hereof to regularize his (their) shareholding status to continue as director(s) of the Elangeni Estates (Pty) Ltd, failing which to cease being director(s) of the said company";

5. The fifth order of the court *a quo* is substituted as follows-
"The Respondent as Executor dative is granted the right to register as director of the Elangeni Estates (Pty) Ltd on condition the Companies Act, 2009 and the Articles of Association of the said company permit such registration";

6. No order as to costs.

M.J. DLAMINI
JUSTICE OF APPEAL