

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(PROBATE JURISDICTION)**



2021/HPF/538

**IN THE MATTER OF: THE ESTATE OF THE LATE AIRFORCE
MAPHENDUKA MOYO**

AND

**IN THE MATTER OF: SECTION 51(2) OF THE WILLS AND
ADMINISTRATION OF TESTATE ESTATES
ACT, CHAPTER 60 OF THE LAWS OF
ZAMBIA**

AND

**IN THE MATTER OF: ORDER 30 RULE 12(C) OF THE HIGH
COURT RULES, CHAPTER 27 OF THE LAWS
OF ZAMBIA**

BETWEEN:

BEKI TEMBA MOYO

*(Suing on his behalf as Beneficiary of
the Estate of the Late AIRFORCE MAPHENDUKA MOYO)*

1ST APPLICANT

REX KONZAOKWAKO MOYO

*(Suing on his behalf as Beneficiary of
the Estate of the Late AIRFORCE MAPHENDUKA MOYO)*

2ND APPLICANT

AND

MPULUMELELO MOYO

*(Sued as Executor of the Estate of the
LATE AIRFORCE MAPHENDUKA MOYO)*

1ST RESPONDENT

RITA MOYO

*(Sued in her capacity as Executrix of the Estate
of the LATE AIRFORCE MAPHENDUKA MOYO)*

2ND RESPONDENT

BEFORE THE HONOURABLE MR. JUSTICE W.S MWEEMBA AT LUSAKA

For the Applicants: Mr C. Sokoni & F. Jere – Messrs Mak Partners.

For the 1st Respondent: Mr T. Chikonde: Messrs Ferd Jere & Co.

For the 2nd Respondent: Mrs F. Muchiya & Ms I. Muzumali – Mesdame Florence
Muchiya & Associates

J U D G M E N T

LEGISLATION & WORKS REFERRED TO:

1. **Order 30 Rule 12 (C) of the High Court Rules, Cap 27 of the laws of Zambia.**
2. **Section 65 of the Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia.**
3. **The Companies Act, Act Number 10 of 2017.**
4. **The Intestate Succession Act Chapter 59 of the Laws of Zambia.**

CASES REFERRED TO:

1. **Mirriam Mbolela v Adam Bota SCZ Judgment No. 26 of 2017.**
2. **Boniface Kafula and Others v Billings Choonga Mudenda SCZ Appeal No 202 of 2003.**
3. **Isaac Tantameni C. Chali (Executor of the Will of the Late Mwalla Mwalla) v Liseli Mwala (Single Woman) (1997) S.J. 22 (S.C.)**
4. **The Goods of William Loveday [1900].**
5. **Arthur Lubinda Wina and Others v The Attorney General (1990-92) ZR 95**
6. **Wilson Masauso Zulu v Avondale Housing Projects Limited (1982) Z.R.194.**
7. **Salomon v Salomon & Another (1897) AC 22.**
8. **Macaura v Northern Assurance Co. Ltd (1925) AC 619.**
9. **Foss v Harbottle (1843)(2 HARE 461).**
10. **Sianga Namenda the Electoral Commission of Zambia 2021/Hp/0577.**
11. **Madison Investment and another V Peter Kanjinji Appeal No 010/2016.**
12. **Borland's Trustee v Steel (1901) 1 Ch 279 at 288.**
13. **Chinika Service Station Limited v Amanita Premier Oils Limited Diego-Gan Maria Casilli, Gillian Lee Casilli Appeal No. 74/2016.**
14. **Boxtel v Kearney 1987 ZR 63.**
15. **John Kasengele and others v Zanaco 2000 ZR 72.**

AUTHORITATIVE BOOKS REFERRED TO:

1. **Gates on Understanding Company Law, A Conceptual and Functional Approach, 2018.**
2. **LC Gower in The Principles of Modern Company Law 10th Edition (Sweet and Maxwell) at page 227.**
3. **Mayson, French & Ryan on Company Law, 1988-89 Edition (London. Blackstone Press Limited, 1982) at 127.**

By Originating Summons taken out on 30th November, 2021, the Applicant is claiming the following: -

That the Respondents show cause why the grant of probate granted to Rita Moyo and Mpumulelo Moyo dated 16th August, 1999 should not be revoked and in default thereof the Applicants seek the following reliefs:

1. *An order that the Grant of Probate issued to the Respondents herein be revoked forthwith.*

2. An order that the Respondents give an account and inventory of the estate of the late Deceased.
3. An order that the Respondents be removed as Executors of the estate of the late **AIRFORCE MAPHENDUKA MOYO**.
4. A declaration that the purported subdivision of property No. 718, also known as Motaxis and Victoria falls Ltd now Amandla Ethu Trading Ltd, Kalundwe and Chachacha Roads, Lusaka and Mortgage to thereof is null and void.
5. A declaration order to annul the sale of the property known as property No. 718, also known as Motaxis and Victoria falls Ltd now Amandla Ethu Trading Ltd, Kalundwe and Chachacha Roads or any part or subdivision thereof by the said Respondents as the same was illegal and unlawful.
6. An order of eviction be made against the purported purchasers and tenants of subdivisions of LUS/718/CL/0/2, LU S/71 8/CL/0/3, LUS/71 8/CL/0/4, LUS/718/CL/0/5, LUS/718/CL/0/6, LUS/71 8/CL/0/7, LUS/71 8/CL/0/8, LUS/71 8/CL/0/1 2, LUS/71 8/CUM 3, LUS/71 8/CUM 5, to the lawful beneficiaries of the estate of the deceased.
7. An order that the purported purchasers and mortgagees or tenants of the said submissions of property pay the estate all the money the beneficiaries would have received as rentals from the time the Respondents took illegal and unlawful occupation up to the time they will give vacant possession.
8. A declaration order to annul the subdivision of property No F/110a and the subsequent deed of gift.
9. Cancellation of the certificates of Title issued in respect of property No. 718, also known as Motaxis and Victoria falls Ltd now Amandla Ethu Trading Ltd, Kalundwe and Chachacha Roads as they were obtained by deceit and in disregard of prior equitable interests.
10. An order that the Respondents deliver up all documents obtained from the Deceased's home including title deeds, keys and receipts. That the Applicants be granted probate of the will of the Deceased dated 22nd September, 1998.
11. That the Applicants be granted probate of the will of the late Deceased dated 22nd September, 1998.
12. That the Respondents bear the costs of this application.

There was also an Affidavit filed in support of the application filed into Court on 30th November, 2021 and it was sworn by **BEKI TEMBA MOYO** and **REX KONZAOKWAKO MOYO**, the Applicants and priority beneficiaries herein.

The Duo deposed that the Deceased died testate on 5th January 1999 at University Teaching Hospital, (UTH) in the Lusaka Province of the Republic of Zambia. They produced copies of the Burial Permit, the Deceased's Passport and NRC respectively marked as "**BTRKM1**", "**BTRKM2**" and "**BTRKM3**."

That at the time of his death, the Deceased was survived by Fifty – Four (54) children and a wife who were the beneficiaries of his estate the list of which was annexed to the Will that was dated 22nd September, 1998.

That at the time of his death, the Deceased was residing at Plot No. 110/9, Villa Elizabeth, Lusaka District in the Lusaka Province and he left behind the following estates as listed in the Will:

- I. Property No 110/9 Kutwa Road, Villa Elizabeth
- II. Lot 121, Kasenga Farm, Lusaka
- III. Property No 718, also formerly known as Motaxis and Victoria falls Ltd, now Amandla Ethu Trading Ltd, Kalundwe and Chachacha Roads, Lusaka
- IV. Cottages of Property No 110/9 Kutwa Road, Villa Elizabetha, Lusaka
- V. Property No 11 Orange Grove, Bulawayo, Zimbabwe
- VI. Property No. 114 Kutwa Road, Villa Elizabeth, Lusaka
- VII. Grinding Mill

The Deponents produced a copy of the Will marked "**BTRKM4**" and stated that by the said Will, the Deceased appointed his wife Rita Moyo as Executrix.

That on 16th August 1999, this Court granted Probate to Rita Moyo and Mpumelelo Moyo the Respondents. The deponents produced a copy of the said probate marked "**BTRKM5**."

Subsequently, the Respondents assented to the vesting in Rita Moyo of Plot 110/9 Kutwa Road, Villa Elizabetha. A copy of the Deed of Assent was produced and marked as "**BTRKM6**."

That after the said Property No. 110/9 was vested in Rita Moyo, the 2nd Respondent proceeded to subdivide and gift one subdivision to the Seventh Day Adventist Association in Zambia Registered Trustees. They produced a copy of the Lands Print out marked "**BTRKM7**."

That they had been advised by their Advocate and verily believed that the subdivision and subsequent gift were contrary to the wishes of the Deceased and therefore null and void. That the Respondents changed the name of the company known as Motaxis Holdings Ltd under which property No Lus/718 was held with certificate of title No 46486 to Amandla Ethu Trading. They produced a copy of the Lands Print out marked "**BTRKM8**" showing the said changes.

That further to the above, the Respondents had subdivided property No. 718, also known as Motaxis and Victoria Falls Ltd now Amandla Ethu Trading Ltd, Kalundwe and Chachacha Road and sold and mortgaged some subdivisions. The deponents produced copies of the subdivisions and mortgage collectively marked "**BTRKM9**."

That further to the above, the 1st Respondent mortgaged subdivision LUS/718/CL/0/8 in 2009 and the lender had been collecting money from the tenants contrary to the court's order dated 11th November 2011 which directed that the mortgaged subdivision be sold and render an account to the 1st Respondent. They produced a copy of the Memorandum of Deposit of Certificate of Title and Court's ruling collectively marked "**BTRKM10**."

It was lastly deposed that they had been advised by their Advocates and believed the same to be true that the said subdivisions, sale and mortgage were illegal and unlawful as they were done without the consent of other beneficiaries and without the Court Order.

There was also a further affidavit filed in support of the Originating Summons that was filed into Court on 11th February, 2022. It was deposed by **BEKI TEMBA MOYO** and **REX KONZOKWAKO MOYO** aforesaid.

The duo deposed that on 6th July 2007 the 1st Respondent and one Nkhosilathi Airforce Moyo, acting as directors of Amandla Ethu Trading Ltd resolved to subdivide and sell Property No. L718 to the tenants and

subsequently offered a portion to Ride Sikaona of 165.48 square meters of Property No.718 at the consideration of K400,000,000 (unrebased). They produced copies of the Board Resolution and Letter of Offer to the said Ride Sikaona that collectively marked as "**BTRKM 11.**"

That by the Mortgage Deed, the 1st Respondent secured the loan that he obtained from Intermarket Banking Corporation (Z) Ltd by Subdivision 718/CL/1/9 situate in Lusaka as a beneficial owner. The duo produced copies of the Mortgage and of the Lands Print out showing the registration of the Mortgage by the Bank collectively marked "**BTRKM 12.**"

That the said property was the subdivision of property No. 718 Chachacha Road and formed part of the estates of the late Airforce Maphenduka Moyo.

That in 2018, the 1st Respondent, acting as director of Amandla Ethu Trading, created a third-party mortgage in favor of DDFS Zambia Ltd which was secured by property Number 718/CL/1/9 purporting to be the asset of Amandla Ethu Trading Ltd. They produced copies of the Third-Party loan/mortgage and FINCA'S Statement collectively marked "**BTRKM 13.**"

That on 7th February 2022, the Zambia Revenue Authority (ZRA), in response to the police query, wrote to the Zambia Police that there had been no record of Property Transfer Tax (PTT) Clearance Certificate or PTT return for the conveyance of the Property No. LUS/718 referred to above from Motaxis Holdings Ltd to Amandla Ethu Trading Ltd. They produced copies of the ZRA letter marked "**BTRKM 14.**"

It was further deposed that to date the said loan amount with FINCA remained unliquidated. That on 21st May 2018, the said DDFS Z Ltd Company issued instructions to FINCA Zambia Ltd to pay Intermarket Bank Corporation the sum of K21,000.00 to liquidate the outstanding balance of the loan obtained by Amandla Ethu Trading Ltd. They produced a copy of the Letter marked "**BTRKM 15.**"

That on 21st May 2018, Peter Chipobe Mwamba and one Mazuba Sialumba instructed FINCA Zambia Ltd to transfer the sum of K277,500.00 into Mpumelelo's and Mazuba Sialumba s account number 017-1571588 held at

Barclays Bank, Southern Sun branch. The Deponents produced a copy of the instruction marked "**BTRKM16.**"

That further to the above, on 21st May 2018, the said Peter Chipobe Nalwamba and one Mazuba Sialumba issued instructions to FINCA Zambia to pay DDFS Zambia Ltd. However, this money bounced back and instead cash withdrawals were made. They produced copies of the instruction and bank statement that were collectively marked as "**BTRKM 17.**"

Moreover, that on 18th of May 2018 DDFS Zambia Ltd signed and lodged an Assignment Agreement with FINCA purporting that Mopani Copper Mines PLC was indebted to DDFS Zambia Ltd in terms of receivables by the purchase orders No. R35172, 551164 and R34581. They produced copies of the Assignment Agreement and the Facility Letter that were collectively marked as "**BTRKM 18.**"

It was lastly deposed that by the letter dated 2nd February 2022 Mopani Copper Mines PLC and addressed to the officer in Charge of Fraud and Financial Investigations Unit denied entering into any Assignment Agreement with DDFS Zambia Ltd and FINCA Zambia Ltd. The duo produced a copy of the response from Mopani marked "**BTRKM19.**"

There was also an affidavit filed in opposition that was filed into Court on the 17th day of February, 2022. It was deposed by **MPULUMELELO MOYO**, the 1st Respondent who deposed that despite assenting to vesting of stand No. 9 of Farm 110a Villa Elizabeth situated in the Lusaka province of Zambia in the 2nd Respondent, he did not participate in the subdivision or giving out of any subdivision to the Seventh Day of Adventist Association of Zambia Registered Trustees.

Moreover, that he had carefully perused through the will and wished to state that the actions by the 2nd Respondent were contrary to the wishes of the Deceased. That he subdivided property No. 718 which was under certificate of title number 46486 due to undue influence by the tenants who occupied the shops on the property as he owed them money.

That one of the said tenants, Ride Sikaona, pressured him to subdivide the property even though he advised him that it was a family property, so he was

left with no option but to subdivide the property as he owed the tenant Ride Sikaona money. He produced an exhibit marked "MM1" a copy where he acknowledged receipt of money from the said tenant.

That he also borrowed K250 000.00 from Mehbub Dasu to try and offset some of the tenants he owed money and other creditors and that the said money borrowed kept on accumulating.

That at the time he was borrowing money from the tenants, he had given them the certificates of title as security and when he wanted to pay back their money they all refused and indicated that he sold them the property as he had defaulted on the repayment terms.

After this refusal, he decided to invest his money into the business but the said investment did not materialise as anticipated and due to this, he defaulted on the repayment of money owed to Mehbub Dasu who proceeded to issue court process and judgment was entered in his favour.

That he made proposals to Mehbub Dasu to liquidate the Judgment sum as he started making arrangements to obtain a loan from Credit and Corporate Banking International Corporation. However, the loan was only ready after the period the court had given him to pay had lapsed. He produced copies of correspondence regarding the repayment of the money owed to Mehbub Dasu and the order of the Court that were marked as 'MM2.'

That when he engaged his lawyers to inform Mehbub Dasu that funds were available, the latter rejected the same and started collecting rentals from the 13 shops that were on the property from 2009 to January 2022.

That on the 1st of August, 2008 a caveat was registered on property number LUS 718 by Moyo Bafana a beneficiary. However, the application for subdivisions by the same tenants were fraudulently done as the caveat was in full effect and therefore still recognised. He produced copies of print out forms from Ministry of Lands that were marked "**MM3.**"

He lastly deposed that he tried to administer the Estate of the late AIRFORCE MAPHENDUKA MOYO in accordance with his wishes although some decisions

he made were affected by undue influence from the people he owed as indicated above.

There was also an affidavit filed in opposition on 16th February, 2022 sworn by **RITA MOYO**, the 2nd Respondent herein. She deposed that the late Airforce Maphenduka Moyo was her husband and they were lawfully married in 1966 under English Law and she exhibited a copy of their Marriage Certificate which was marked as "**RM1.**"

That at the time of their marriage, the late Mr. Airforce Maphenduka Moyo was employed as a driver whereas, she was employed by the Government of the Republic of Zambia as a Filing Clerk and they had no assets other than personal chattels in the form of household goods which they acquired together.

That through their joint effort, they acquired a business and eventually incorporated a Company known as Motaxis Holdings Limited in which she and the Deceased, were the ONLY shareholders, whereas they were also Directors with their son, the 1st Respondent herein. The deponent produced marked Collectively and Respectively "**RM2a**" to "**RM2e**" being Certificate of incorporation, Certificate of Compliance, Articles of Association, annual returns print out and letters evidencing the Directors of Motaxis.

That their son Mpumelelo Moyo the 1st Respondent herein was managing the business with his father who was the Managing Director. However, he was not a Shareholder thus, the property was solely owned jointly with her husband.

That in furtherance to the above, she was never involved in the day-to-day management of the Company as she had a Grocery shop at home which she was managing. Thus, even after the death of the Deceased she entrusted her son to continue managing the business given that the Will of the Deceased dictated that he should continue managing the business and develop it from where the father had left it.

That during the course of their marriage they acquired several properties, some of which her Husband disposed of and assigned to various people which include his children born outside wedlock and some of his mistresses. The

deponent produced a copy of a letter disposing the property to one of the children born outside wedlock which was exhibited as "**RM3**."

That in furtherance to the above, they also acquired Plot Number 110/9 Kutwa Road, Villa Ellizabetta which was their matrimonial property until the death of her husband who died at University Teaching Hospital on 5th January, 1999.

That her late husband was survived by a wife (myself) and six children born between them and the seventh one born outside wedlock before their marriage.

That in furtherance to the above, at his death a Will written by the Deceased was presented to her by his lawyers and that is when she learnt of his other 47 children bringing the total number of Children to 54. She produced a copy of the said Will dated 22nd September, 1998 marked "**RM4**."

That in the said Will she was appointed as Executor or if she should pass on then her son the 1st Respondent herein was to be Executor and Trustee. That she took up her position as Executor and proved the Will of the late Airforce Maphenduka Moyo in the High Court of Zambia probate Registry where she was granted probate on 16th August, 1999.

However, she was unable to manage the estate alone due to many factors which among them included her difficulty in interactions with the 47 Children whom she did not know or ever see. Therefore, the family of her late husband requested that her son the 1st Respondent apply jointly with her for a probate as he was named in the Will as the next Executor and he was aware of most of the dealings of the father.

That further to the foregoing and based on the fact that her son was given the majority of the estate, the Court deemed it fit to grant him a joint probate with her. In furtherance to this, the elder brothers to her late husband insisted that they would guide the 1st Respondent in the management of the Estate in accordance with paragraph 15 of the Will where the said brothers namely, Jack, Mark and Cain Moyo were directed to look after and guide his children. She exhibited a copy of the said probate dated 16th August, 1999 which was marked as "**RM5**."

That upon assuming office as personal representatives of the estate of the late Airforce Maphenduka Moyo, she proceeded to administer and distribute the estate to the named beneficiaries in accordance with the Will.

That as per clause 2 of the said Will, she proceeded to pay all the funeral, testamentary and other debts of the Deceased from the residue of his funds and as per clause 3 of the said Will, she and her son proceeded to Assent the property to her to the exclusion of her son as had been requested by the Deceased. She produced a copy of the Deed of Assent marked "**RM6**."

That in line with Clause 4 of the said Will, the Seventh Day Adventist Church was given the said property and to date continued to occupy the same. That in line with clause 5 of the said Will, the cottages on property number 110/9 Kutwa Road Villa Elizabetha had been used for her benefit as her son instructed her to retain the benefits there to his exclusion.

That in line with Clauses 6, 7, 8, 9, 10 and 11 of the Will, she proceeded to acquire the assets given to her and the children and excluded the farm which she gave the named beneficiaries who were already in occupation of the same even prior to the demise of the Deceased which fact was never known to her.

That in line with Clause 12 of the Will, she left the management of the business to her son but remained as Director in the Company, although she was merely an inactive co - Director. This was on account of many reasons well known to the 1st Respondent that prevented her active participation in the Company. As a result, she left the full management of the Company to the 1st Respondent.

That she was reliably informed by the 1st Respondent that he managed the business in accordance with the law and that from the 11 shops that were left by the Deceased, he had managed to add some shops and increase the market value of the property by extending it to 42 shops, although she was informed that some shops had been sold to meet financial obligations.

That she was further informed by the 1st Respondent that he changed the name of the business from Motaxis and Victoria Falls Limited to Amandla Ethu on account that this was the name that her late husband had wished to trade with, a position that she was fully aware of. The name Amandla Ethu

which means what we have worked for was to signify what they had acquired as a couple overtime and was a name that was being used by the Deceased prior to his death.

That in line with clause 12 of the Will, he paid the educational fees of his siblings and shared some money to all of his siblings who presented their needs to him.

That in line with clause 13 of the Will, the properties namely; Number 11 Orange Grove Bulawayo in Zimbabwe and Stand number 114 Tutwa Road Villa Elizabetta were given to the 1st Respondent as sole beneficiary.

Thus she stated that the claims of the Applicants in their affidavit in support were not factual or an accurate representation of the Testators Wishes.

She lastly deposed that in furtherance to the above, the testator in his Will negated the application of all rules of Customary Law of Succession or any other system of Succession by directing that his estate be distributed and administered in accordance with his Will.

There was also an affidavit filed in reply that was sworn by **BEKI TEMBA MOYO** and **REX KONZOKWAKO MOYO** aforesaid and filed into Court on 4th March, 2022.

The duo deposed that Amandla Ethu Trading Ltd was a distinct company from Motaxis Holdings Ltd as shown by the copies of the letters and Printout Outs from PACRA marked "**BTRKM20**" which they exhibited.

That further to the above, Amandla Ethu Trading was initially registered as a business name on 14th October 1998 before the demise of the late Airforce Maphenduka Moyo. They produced a copy of the Business Name with business ownership in the names of Mphumelelo Moyo, Mandla Moyo and Nkosi Moyo and Gugulethu Moyo as captured on Form ii marked "**BTRKM21**."

It was further deposed that the 1st Respondent transferred the asset being property no. LUS/718 Chachacha Road/Kalundwe road from Motaxis Holdings Ltd to Amandla Ethu Trading Ltd. They produced copies of the letter and Lands Printout from the Chief Registrar of lands addressed to the Police Victims Unit marked "**BTRKM22**."

That further to the above the search at Ministry of Lands showed that there was no supporting documentation such as board resolutions by the directors of Motaxis Holdings Ltd, Deed of Transfer, property transfer tax paid to ZRA or indeed any other document to convey the property as aforesaid. They produced a copy of the letter from ZRA marked " **BTRKM23.**"

That they had been advised by their advocates and believed that the said transfer of property No LUS 718 from Motaxis Holdings Ltd to Amandla Ethu was irregular and fraudulent in nature as it lacked any legal backing and was intended to defraud the company, its creditors, shareholders and the beneficiaries of the late Airforce Mophedunka Moyo.

That the said property LUS/718 and all its subdivisions had been seized by the Police for the fraudulent activities committed by the Respondents. They produced letters from Police and Ministry of Lands collectively marked " **BTRKM24.**"

That they were further advised by their Advocates that the 1st Respondent did not qualify to get the grant of probate and administer the estates of the Deceased as the instructions in the Will stated, under paragraph one, that the said Mphumelelo Moyo was only to be the executor and trustee in the event that the Executrix one Rita Moyo did not survive Mphumelelo Moyo which condition was not satisfied before the grant of probate. Thus, the said Probate was irregularly granted and should be revoked forthwith.

Moreover, that the Deceased, was already married to Gladys Sithabile Nzobo and had a first-born child with her by the name of Sipho Moyo appearing as number 2 in the Will.

That the Deceased owned 95% of shares in Motaxis Holdings Ltd and further, that the shares owned by the late were personal estate and objects of property which could be bought, sold, bequeathed in a will, mortgaged and transferrable.

That the 1st Respondent herein was running his business being Mkings, a printing company. Further, Nthombizodwa Moyo, Emily Moyo and Siphon Mayo worked closely with the Deceased in the management of the business.

That Property number 110/9 Kutwa Road, Villa Elizabeth was owned by the Deceased and gifted in the Will to the 2nd respondent and all children as shown on paragraphs 3 of the Will. They produced the Lands Print out regarding the said property marked "**BTRKM25**"

That the Deceased was survived by 54 children as listed in the Will who include the Applicants herein and that the children of the Deceased worked closely with him and that Bafana Moyo and Ndaminya Hastings Moyo, appearing in the Will, did reside at the house in Villa Elizabeth with the 2nd Respondent herein.

That the Deceased only appointed the 2nd Respondent to be the sole Executrix and that the 1st Respondent would only be the Executor of the Will when the 2nd Respondent died.

That the Joint probate was obtained irregularly and illegally by the 1st and 2nd Respondents as it was contrary to the intention of the Testator. That the 2nd Respondent renounced her role as executrix of the estates of the late Airforce Maphenduka Moyo. They produced documents evidencing the same collectively marked "**BTRKM26.**"

That the intention of the Deceased was not to distribute his assets to the beneficiaries but to manage them in trust for the family and that the beneficiaries had not benefited from the estates of the late as the Respondents herein had sold, mortgaged and gifted the estates contrary to the wishes of the Deceased.

It was further deposed that on or about 5th January 1999, the late Airforce Maphenduka Moyo left a will dated 22nd September 1998 wherein he appointed the 2nd Respondent as an Executrix of his Will.

That in the said will, clause 3 and 4 of the Will specifically provide that Property Number 110/9 Kutwa Road, Villa Elizabeth is gifted to the 2nd Respondent herein and that it shall remain the property for the family and never to be sold, transferred or subdivided.

That it was provided in the Will that the Church built on the property shall remain for the use of the Church known as Seventh Day Adventist. That

contrary to the stipulations in the Will, the Respondents caused a subdivision of the property Number 110/9 Kutwa Road, Villa Elizabeth to be done and a Deed of gift in favour of the Seventh Day Association in Zambia Registered Trustees.

That the Deed of Gift in favour of the Seventh Day Association in Zambia Registered Trustees was registered on the property on 24th September 2013 transferring 0.1728 Hectares and the property was numbered as F/110a/9/CL/1 as shown by the exhibit marked "**BTRKM7.**"

That they had been advised that the said Deed of gift was tainted with irregularities and was therefore null and void and devoid of any legal effect whatsoever as the same was procured by fraud or mistake and the beneficiaries of the estates of the late were not consulted.

That they had been advised that the subdivision and the Deed of Gift was done in disregard of the stipulations in the Will of the late restricting any subdivision or transfer of the property. That they were further advised that the actions of the 2nd Respondent were irregular and illegal.

That the said action of the 2nd Respondent had caused the beneficiaries to lose their rightful inheritance in light of the fact that the 1st Respondent had mismanaged, subdivided, sold the said property and the Police had since seized it and the said Motaxis Holdings Ltd had since been deregistered by PACRA for noncompliance and therefore did not exist as a registered company. They produced a copy of the letter from PACRA as evidence marked "**BTRKM27.**"

That they had been advised by Counsel that after it was struck out of the register, Motaxis Holdings Ltd had lost its significance of incorporation and that Amandla Ethu Trading Ltd was a distinct company from Motaxis Holdings Ltd.

The Applicants filed their skeleton arguments into Court on 30th November, 2021. Counsel for the Applicants began by stating that this Court granted probate to the Respondents on 16th August 1999.

Upon receipt of the same however, the Respondents illegally and unlawfully subdivided, sold and mortgaged some real property without the consent of the beneficiaries and without the order of this Court.

Counsel relied on **Order 30 rule 12(c) of the High Court Rules Chapter 27 of the laws of Zambia** which states as follows:

“ The executors or administrators of a Deceased person or any of them and the trustees under any deed or instrument or any of them, and any person claiming to be interested under the trust of any deed or instrument in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law of a Deceased person or as cestui que trust or as claiming by assignment or otherwise under any such creditor or other person as aforesaid may take out an originating summons for such relief of the nature or kind following, as may be specified in the summons and as the circumstances may require, that is to say, the determination, without an administration by the Court of the estate or trust, of any of the following questions or matters so far as the same arise in the course of the administration or performance of such estate or trust:

(c) the furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts; ”

It was contended that **Order 30 Rule 12(C) of the High Court Rules** clothed this Court with authority to determine any question arising out of the administration of an estate of the Deceased person. Further, that this Court was empowered to order the executors to render accounts of estates and to produce full inventories on oath.

A further argument was that the Respondents' conduct was specifically prohibited under **Section 65 of the Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia**. The Act enacts thus:

(1). When a person dies, within or outside Zambia leaving property within Zambia, any person who without being duly authorized by law, takes possession of, causes to be moved or otherwise

intermeddles with any such property shall be guilty of an offence...."

(2). Any person who-

(a). unlawfully deprives any person of the use of any part of the property of the Deceased to which that person is entitled under this Act; or

(b). otherwise unlawfully interferes with the use by any person of any property referred to in paragraph (a);

Shall be guilty of an offence...."

Further, that the purported subdividing, sale and mortgaging by the Respondents of the property 718, Chachacha Road and Property No 110/9, Kutwa Road was ineffectual as it was not approved by the Court and there was no consent by the beneficiaries. It was argued that the **Intestate Succession Act Chapter 59 of the Laws of Zambia** was instructive in this regard in **Section 19(2)** as follows:

"Where an administrator considers that a sale of any of the property forming part of the estate of a Deceased person is necessary or desirable in order to carry out his duties, the administrator may, with the authority of the court, sell the property in such manner as appears to him likely to secure receipt of the best price available for the property".

Moreover Counsel argued that the Supreme Court had had occasion to pronounce itself in this provision of the law in the case of **MIRRIAM MBOLELA V ADAM BOTA SCZ [1]** where the court opined that:

"The import of Section 19(2) of the Act is very clear. It proscribes the sale of property (including real property) forming part of the estate of the Deceased person without prior authority of the court. In the mind of the legislature, this statutory provision was intended to prevent administrators of estates of Deceased persons from abusing their fiduciary responsibilities by selling property forming part of such estate, without due regard to the interests of such beneficiaries. No doubt the court can only grant such authority when it is satisfied that the sale would be interest of the beneficiaries."

Counsel went on to cite the case of **BONIFACE KAFULA AND OTHERS V BILLINGS CHOONGA MUDENDA [2]** the Supreme Court held that even if the contract of sale in that case had been executed and completed by the administrator, the purchaser could not enforce it because the administrator had not obtained leave of Court prior to the sale.

It was argued that the Respondents did not obtain consent from the beneficiaries and leave of Court before selling any property. In the circumstances, it was Counsel's prayer that the purported subdivisions, sale and gifts be cancelled forthwith.

Further, that the grant of probate granted given to the Respondents be revoked forthwith and that it be ordered that the Respondents give an account and inventory of the estate of the late the Deceased, that the purported sale of the subdivisions be cancelled forthwith and that the Applicants herein be granted Probate.

The 1st Respondent filed Skeleton Arguments into Court to oppose the application on 17th February, 2022. Counsel began by relying on Section 51 of the Wills and Administration of Testate Estates Act which provides circumstances under which the court may revoke or annul a grant of probate and shown below:

- (a) that the proceedings to obtain them were Defective in substance;**
 - (b) that the grant was obtained fraudulently by making a false statement, or by concealing from the court something material to the case;**
 - (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently;**
 - (d) that the grant has become useless and inoperative; or**
 - (e) that the person to whom the grant was made has, without reasonable cause, omitted to furnish an account of his administration after having been lawfully called upon to do so or has prepared an account which is untrue in a material respect.**
- (2) Where it is satisfied that the due and proper administration of the estate and the interests of the persons beneficially entitled to it so require, the court may suspend or remove an executor or**

administrator and provide for the succession of another person to the office of that executor or administrator who may cease to hold office, and for the vesting in that person of any property belonging to the estate.

Based on this law it was argued that the above circumstances were the only grounds under which this court may revoke the grant of probate and as such the applicants herein ought to prove that the allegations against the 1st Respondent were falling within the realm of the above grounds.

Moreover, that the 1st Respondent had in the affidavit in opposition indicated that he had administered the estate according to the wishes of the Deceased until he received undue influence from the tenants and other creditors who left him with no option but to proceed as demanded.

The 2nd Respondent also filed skeleton arguments into Court on the 16th of February, 2022. It was argued firstly that if a person died Testate as was the case herein, the contents of the Will of the testator provided how the estate was to be administered. Additionally, the Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia (hereinafter referred to as the Wills Act) also provided for the law governing the Will. It was stated that the Applicants claims were being opposed based on the following reasons;

a. *The Late Airforce Moyo Died Testate thus the Contents of His Will must prevail*

It was contended that heavy reliance had been placed on the Intestate Succession Act by the Applicants in their submissions. **Section 4 of the Intestate Succession Act** was very clear on estates that should be administered according to the Act. Therefore, the arguments by the Applicants centred on **Section 19 (2) of the Intestate Succession Act** were not legally tenable before this Court in relation to this matter as the estate was that which was subject of a Will.

It was further stated that the law provides unfettered rights of disposition of estates to a testator and the Courts were obliged to uphold the said right. However, departure from the Will must only be made judicially and under exceptional circumstances. To support their arguments, they relied on the

case of **ISAAC TANTAMENI C. CHALI (EXECUTOR OF THE WILL OF THE LATE MWALLA MWALLA) VS. LISELI MWALA (SINGLE WOMAN)** [3]. In the said case, the Court held inter alia;

Section 20 Act No. 6 of 1989 is a departure from the long-standing recognition of unfettered right of disposition by the testator of his property. This departure is a limited one as it only confers on the court a jurisdiction to depart from the dispositions of a testator by providing reasonable provision for certain of his dependents it is of the opinion that he had not done so himself.

Moreover, an outline of the testator's Will in part was quoted as follows;

- a. I appoint my wife Rita Moyo of 1 10/9 Kutwa Road Villa Elizabetta to be my executrix and Trustee of this Will. If at the time of my death she shall cease to exist, I then appoint my son Mpumelelo Moyo to be my executor and Trustee...*
- b. I devise and bequeath my property number 110/9 Kutwa Road, Villa Elizabetta to my wife Rita Moyo and My son Mpumelelo Moyo. The Church built on the property must remain...*
- c. I bequeath the cottages at the same premises of property number 1 10/9 Villa Elizabetta to my wife and my son Mpumelelo and that the proceeds from them shall be used for paying electricity, water and telephone bills and general maintenance for the whole property.*
- d. I give all my household effects including furniture and grinding Mill to my wife Rita Moyo.*

It was argued that the 2nd Respondent was appointed Executrix and given the said properties whilst the Applicants were before Court claiming for inter alia revocation of the grants obtained by the Respondents. Section 51 of the Wills Act provided for the following circumstances that should arise in order for a grant to be revoked;

- 51. (1) A grant of probate or letters of administration may be revoked or annulled for any of the following reasons;**
- a) That the proceedings to obtain them were defective in substance.*
 - b) that the grant was obtained fraudulently by making a false statement, or by concealing from the court something material to the case.*

- c) *that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently.*
- d) *that the grant has become useless and inoperative.*
- e) *that the person to whom the grant was made has, without reasonable cause, omitted to furnish an account of his administration after having been lawfully called upon to do so or has prepared an account which is untrue in a material respect*
- Based on the foregoing, the Applicants application herein is irregular on account that none of the grounds stated above have been advanced by the Applicants. The Applicants main application ought to have been an application requesting the Court to compel the Respondents to render an account on how the estate has been administered. If the Court upon rendering such an account is satisfied that the estate is wasted, it would then annul the grant of probate and grant it to those that qualify under the law to obtain it.*

It was further stated that it was clear from the reliefs being sought that the Applicants were seeking an Order to be appointed as Personal Representatives of the Estate. However, this Court had no jurisdiction to grant the relief on account that only a named executor in the Will could be granted probate unlike an Administrator under Intestate Succession who needs to meet the qualifications.

Counsel was fortified by section 29 of the Wills Act which provides thus;

(1) Except as provided by the Administrator-General's Act, probate may be granted by a court only to an executor appointed by a will, and shall not be granted to a minor or person of unsound mind.

Based on this law cited, Counsel stated that the word **only** in the foregoing paragraph clearly denied this Court the jurisdiction to grant the relief being sought by the Applicant namely; that the Applicants be granted probate of the Will of the late Airforce Maphenduka Moyo. This position was further strengthened by section 36 of the Wills Act which provides for a list of priority persons who can qualify to apply for a grant of probate in the event that the

named Executor is unable to administer the estate. The said section provides as follows;

36. (1) Where;

- (a) no executor is appointed by a will;**
- (b) the executor or all the executors appointed by a will have renounced, or are persons to whom probate may not be granted;**
- (c) no executor survives the testator;**
- (d) all the executors die before obtaining probate or before having administered all the estate of the Deceased; or**
- (e) the executors appointed by a will do not appear and take out probate; letters of administration may be granted of the whole estate or so much of it as may be administered to such person or persons as the court considers the most suitable to administer the estate: Provided that a prior right to such grant shall belong to the following persons in the following order:**
 - (i) a universal or residuary legatee;**
 - (ii) a personal representative of a Deceased universal or residuary legatee;**
 - (iii) Such person, being beneficiary under the will, as would have been entitled to a grant of letters of administration if the Deceased had died intestate;**
 - (iv) a legatee having a beneficial interest;**
 - (v) a creditor of the Deceased.**

2. Subject to section forty-eight a court shall not grant letters of administration in respect of a will by which an executor is appointed, if the executor-

- (a) (b) (c) is living and his whereabouts are known; is a person to whom probate may be granted; and has not renounced his office; unless and until a citation has been issued calling upon the executor to accept or renounce his office and the executor has renounced or has been deemed to have renounced his office in accordance with section twenty-six or twenty-seven.**

It was contended that in the event that this Court found that the named Executors were not fit to administer the estate, the next person to whom probate maybe granted was the universal or residuary legatee meaning the person to whom the bulk of the estate had been given. If that one was unable

to take up the responsibility, their personal representative would do so and the list would go on as provided in the said section.

In the case at hand, the persons to whom the bulk of the estate had been given were the Respondents. The second in line were other Children of the Testator mentioned in paragraph 11 of the Will which clearly does not include the Applicants herein. In Light of the foregoing, it was submitted that this Court had no jurisdiction to grant the reliefs sought by the Applicants.

Counsel went on to submit that the 2nd Respondent was not qualified under any of the circumstances to warrant her removal as executrix. That although the Applicants alleged that the 2nd Respondent gifted Seventh Day Adventist Association in Zambia Registered Trustees land contrary to the wishes of the testator. It was argued that the Court would note from clause 4 of the Will that the testator expressly provided that the church built on the property must remain on the property. In order to actualize this wish, it was inevitable to execute a Deed of Gift free of any consideration.

Counsel went on to contend that the revocation of a grant by Courts must only be made under serious breach of duty as was stated in the goods of William Loveday case (4).

It was argued that the Applicants in the Will were only to benefit from the rentals of the property on Stand Number 718 Kalundwe if they demonstrated a need. It was argued that this Court could not revoke the grant of probate based on the claims of Applicants who were not direct or priority beneficiaries of the estate as the Court would note from the Will which had bequeathed almost all the assets to the Respondents herein.

The next point Counsel for the 2nd Respondent argued on was that the ***Applicants did not have the Locus Standing Before This Court to Bring Out their Claims***

It was argued that it was settled law that a party must demonstrate sufficient interest in a matter before they could be parties to a proceeding and let alone have any claims. Thus, it was Counsel's submission that the Applicants had no locus standing to sue the Respondents herein. This position was strengthened by the fact the Applicants names did not appear anywhere in

the Will subject to this matter as beneficiaries. Save to say that they would only benefit from Stand 718 Kalundwe Road if they demonstrated a need which appeared under paragraph 12 of the Will and reads as follows;

And all the proceeds as by way of rentals shall be used for educational fees and maintenance of the building. However, after all business operational expenses including ZRA taxes, the profits if any should be shared to all other children in need.

It was stated that it was clear from the wording of the Will that the intention of the testator was that all other children except the 1st Respondent who was given the properties where to benefit upon satisfaction of the conditions therein. The said condition was that the profits were available and the Children demonstrated a need. However, the Applicants herein have not demonstrated that;

- a) they were profits made from the business***
- b) that they are in need and***
- c) that they have been denied a benefit by the Respondents herein. To the contrary, it is clear that the Applicants desired to rewrite the wishes of the testator over the business and all assets that were bequeathed to the Respondents.***

Counsel then placed reliance on the case of **ARTHUR LUBINDA WINA AND OTHERS V THE ATTORNEY GENERAL (5)** where it was held as follows with regards to having a locus standing;

"to be "legally aggrieved" a person must be not merely dissatisfied with or even prejudiced by an action or decision. He must also have been deprived of or refused something to which he was legally entitled. He must be able to point to some 'encroachment or vested rights." From the foregoing, it is very clear that the Applicants have not been deprived of any benefit of the estate. Contrary to Intestate Succession which provides for automatic benefit by virtue of being a Child, the law of testate strictly confines to only the named beneficiaries.

Moreover, that the Applicants had not shown this Court what they were entitled to in the Will and what they had been deprived of by the Respondents which was an error given that in civil matters, it was trite law that he who

alleges must prove his case as was held in the case of **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECTS LIMITED (6)**.

The next question that was canvassed was *whether the Applicants could be granted Possession and Control of Company Assets* in which they were not members.

It was argued that some of the reliefs being sought by the Applicants bordered on assets of the Company and as such a discussion on the law governing the same was inevitable. For example the relief of a declaration that the purported subdivision of property Number 718 relating to Motaxis and Victoria Falls Limited now Amandla Ethu Limited be declared null and void and that the Respondents deliver up all the documents obtained from the Deceased's home including title deeds, Keys and receipts.

It was argued that at law, a Company once duly incorporated became a distinct person separate from its members. Further, that it became capable of suing and being sued as was stipulated in the celebrated case of **SALOMON V SALOMON & ANOTHER (7)**.

It was submitted that by virtue of being duly incorporated, Motaxis, Victoria Falls Limited and Amandla Ethu Trading Limited became persons at Law. Therefore, certain characteristics, operation, rights and liabilities became attached to the said entities. This meant that even decision making became subject to the law regulating Companies. This position was also supported by Section 16 of the Companies Act which provides as follows;

"A company registered in accordance with this Act, acquires a separate legal status, with the name by which it is registered, and shall continue to exist as a corporate until it is removed from the Register of Companies."

Further it was argued that the corporate character of a company enabled it to own property independent of the shareholders. In **MACAURA V NORTHERN ASSURANCE CO. LTD (8)** the said principle was upheld. Therefore, there was no way that the Applicants could take control and possession of assets in a Company in which they were neither Directors nor Members. Further that in cases that had to do with any loss or breach done on the Company, the

Company itself was a proper Plaintiff to bring out the action which principle was upheld in the case of **FOSS V HARBOTTLE (9)**.

Further, that the Companies Act, under Section 331 provides as follows;

- (1) Except as provided in this section, a director or an entitled person shall not bring or intervene in any proceedings in the name of, or on behalf of, a company or its subsidiary.***
- (2) Subject to subsection (4), the Court may, on the application of a director or an entitled person, grant leave to—***
 - (a) Bring proceedings in the name and on behalf of the company or any subsidiary; or***
 - (b) intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or subsidiary, as the case may be.***

Based on this law it was contended that this Court had no jurisdiction to grant the Applicants all the reliefs being sought as they are aimed at interfering with the operations of the Companies to which they were not members and the Will of the estate did not grant them these reliefs.

In conclusion, the 2nd Respondent's Counsel asked this Court to dismiss this application with costs. That the Will expressly appointed the 2nd Respondent as an Executrix and also bequeathed certain properties to her. Therefore, the Court was obliged to uphold the said appointment and assets granted. The Applicants had not demonstrated sufficient reasons to compel the Court to uphold their claims.

The Applicants filed skeleton arguments in reply which were filed into Court on 4th March, 2022. Counsel first addressed the issue raised by the Applicant that the 1st Respondent did not qualify to receive a grant of Probate.

Counsel cited Section 29. (1) as well as section 51 (1) of the Wills and Administration of Testate Estates Act, Cap 60 of the Laws of Zambia which enacts that:

- 29.(1) "Except as provided by the Administrator-Generals Act, probate may be granted by a court only to an executor appointed by a***

will, and shall not be granted to a minor or person of unsound mind.

51. (1) A grant of probate or letters of administration may be revoked or annulled for any of the following reasons:

- (a) that the proceedings to obtain them were defective in substance;*
- (b) that the grant was obtained fraudulently by a false statement, or by concealing from the court something material to the case;*
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently;*
- (d) that the grant has become useless and inoperative; or*
- (e) that the person to whom the grant was made has without reasonable cause, omitted to furnish an account of his administration after having been lawfully called upon to do so or has prepared an account which is untrue in a material respect.*

It was further stated that the Will of the Deceased under clause 1 provides that:

"I appoint my wife Rita Mayo of 110/9 Kutwa Road, Villa Elizabetta, Lusaka to be my Executrix and Trustee of this my will or if she shall cease to exist at the time of my death then I appoint my son Mphumulelo to be my Executor and Trustee."

Counsel then contended that the grant of probate to the Respondents was irregular and illegal as it offended the wishes of the testator. The said Rita Moyo was still alive and the condition precedent in the Will for the 1st Respondent to be granted Probate was not met. In the circumstance, the Respondents concealed from the court something material to the case and therefore it should be revoked forthwith.

It was further submitted that Counsel for the 1st Respondent was giving evidence from the bar when he argued that the Applicants lacked the locus standi to sue the Respondents or indeed on behalf of the company. That this

argument was not grounded on any affidavit evidence and therefore amounted to evidence from the bar.

Counsel was fortified by the case of **SIANGA NAMENDA V THE ELECTORAL COMMISSION OF ZAMBIA [10]** where the Court guided that a submission of skeleton arguments which were not grounded on the affidavit amounted to giving evidence from the bar.

In the circumstances, this Court was urged to expunge from the record the arguments regarding the locus of the Applicants as they were not based on any affidavit evidence.

On the issue of the Legal Status of a Registered Company Counsel argued that **Section 16 of the Companies Act**, enacted that a company registered according to the Companies act acquires separate legal personality.

It was contended that the basis of this provision was the common law principle founded on the case of **SALOMON V SALOMON AND CO LTD [7]**. Further that the consequences of incorporation included the fact that, as provided for in Section 22, a company shall have perpetual succession and a common seal, capable of suing and being sued in its corporate name and shall subject to the Act, have power to do all such acts and things as the corporate may by law, do or perform; and

(b) subject to the Act and to such limitations as are inherent in its corporate nature, capacity, rights powers and privileges of an individual;

On the issue of the Right of a Shareholder to Commence the Action it was argued that the principle in **FOSS V HARBOTTLE [9]** was that since the company was a separate legal entity and with an existence independent of its members, the rightful plaintiff in redressing a wrong against the company was itself and not any of its members.

However, **Section 138(1) of the Companies Act No 10 of 2017** enacts that:

“138. (1) A shareholder may commence an action against the company or a director for (a) breach of a duty owed by the company or director to the shareholder; or (b) an illegal act done by the company or a

director. (2) An action may not be commenced as specified in subsection (1) (a), to recover any loss arising from a reduction in the value of shares of a company or failure of the shares to increase in value, by reason only of a loss suffered, or gain forgone, by the company.”

Counsel also cited the learned author Gates in his Book **Gates on Understanding Company Law, A Conceptual and Functional Approach, 2018 at Page 187** who opined as follows:

“It enables a shareholder to pursue an action in specific instances arising out of those mentioned and provided for under Section 138. The rationale seems to be that as in the case of a director who has or directors who have committed a wrong, it is difficulty for the company to bring its wrong doing to the attention of the Court of its own volition or to correct course once the wrong has been brought to its attention.”

However, it was further argued that the general rule in **FOSS V HARBOTTLE [9]** had exceptions:

Section 335. (1) of the Companies Act No 10 of 2017 of the laws of Zambia enacts that:

“A member or former member of a company may bring an action against a director for breach of a duty owed to the member or former member. (2) An action may not be brought as specified in subsection (1), to recover any loss in the form of a reduction in the value of shares in a company or a failure of the shares to increase in value by reason only of a loss suffered, or a gain forgone, by the company.”

Further, Section 336 Provides that:

“A member may bring an action against the company for breach of a duty owed by the company to the member.”

It was argued that there were other exceptions to the general rule espoused in the case of **FOSS V HARBOTTLE [9]** which are acts which are ultra vires or illegal, acts requiring a resolution, where there was a fraud on the company and where the wrongdoers were in control of the company.

Based on these exceptions, it was argued that this was a good case for this Court to depart from the proper Plaintiff rule as espoused in the case of **FOSS V HARBOTTLE [9]**.

Counsel also raised an alternative argument on lifting the veil of Incorporation when he argued that should this Court find that Motaxis Holdings Ltd still enjoyed separate personality, then the same should have its veil pierced for fraudulent activities and illegalities which had been specifically pleaded in the Affidavits before this Court in form of subdividing, mortgaging and selling the property belonging to the company.

Counsel was fortified in this regard by the Supreme Court's decision in **MADISON INVESTMENT AND ANOTHER V PETER KANJINJI [11]** wherein the Court opined that:

"Although the veil of incorporation of limited liability companies offers enormous commercial and legal benefits to the corporate entities, it also gives even bigger worries to those dealing with those corporate entities when the veil of incorporation is used fraudulently or improperly to shield wrong doing."

Further, it was argued that the learned author, LC Gower in *The Principles of Modern Company Law 10th Edition* (Sweet and Maxwell) at page 227 gave some situations when it would be justified for a court to pierce the corporate veil as follows. *Where the veil of incorporation is being used for some fraudulent or improper purpose. An example of far greater practical importance has long been afforded by the provisions on fraudulent trading. These provisions recognize that the separate entity and limited liability doctrines generate an incentive for company controllers to defraud creditors, knowing that the creditors' claims are limited to the company's assets....*

It was argued that in the case before this Court, there appeared to be a considerable involvement by the Respondents to fraudulently sell the assets of the company to deprive the shareholders, creditors, and beneficiaries of the late Airforce Maphenduka Moyo.

On the issue of share ownership in Motaxis Holdings Ltd and what a share is it was stated that the late Airforce Mapenduka Moyo owned 95 % shares in the said company.

Counsel relied on the definition of a share by Farewell J in **BORLAND'S TRUSTEE V STEEL [12]** as follows:

'A share is the interest of the 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.. The contract contained in the articles of association is one of the original incidents of the share. 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.'

Counsel also cited the learned Author Reagan Blankfein **Gates in Gates Company Law and Practice in Zambia 1st Edition 2017 at page 133** who commented thus:

"In the foregoing definition of what a share is, is the fact that its ownership is conclusive in the interest of a shareholder in the company. This interest is what enables a shareholder to enjoy a bundle of rights predicted on share ownership including voting, dividends, meeting attendance and a share in a surplus assets at winding up or when there is capital reduction in the company but not in its property. In essence, as result of owning a shares in a company, the shareholder enjoys rights in the company and against it."

The author adds at page 134 that:

"Shares are objects of property which can be bought, sold, bequeathed in a will, mortgaged and transferrable. They are personal estate. In this regard, shares are no different from real, tangible or movable property. They are an intangible an intangible property right recognized and protected by the law. "

From the foregoing, it was argued that the value of the share could only be measured by the assets of the company. Thus, the Testator could gift either the share or the asset value of those shares.

On the issue of the Deregistration of Motaxis Holdings it was stated that the said company was deregistered on 19th February 2019 and therefore did not enjoy any separate legal personality at law. It therefore could not be sued in its name. Counsel further relied on the case of **CHINIKA SERVICE STATION LIMITED V AMANITA PREMIER OILS LIMITED, DIEGO-GAN MARIA CASILLI, GILLIAN LEE CASILLI [13]**, where the Supreme Court observed the following:

"The Company was struck off the register of companies, meaning it was deregistered and ceased to exist as a registered company. An action could not, therefore, be maintained or be continued against the company. At the beginning of this judgment we stated that we were not surprised that the first respondent company was not represented. The reason is not far to seek. It was deregistered as a company and effectively ceased to exist. It therefore lost one of the significant incidences of incorporation as given in Section 22(l) of the Companies Act namely, "the capacity, rights, powers and privileges of a natural person of full age including the right to sue or be sued in its own name."

In the circumstance, it was contended that the assets of the company had become the assets of the individual shareholders. In casu, the Testator gifted the assets of the company to all the family members to be held in trust by the Executor and Trustee who had, however, breached a fiduciary duty.

It was argued that the Company had lost its separate legal personality and therefore the successors in title who were the children of the Deceased had the locus standi to claim the equivalent of the 95% of the shares that their father held in the company.

Thus, Counsel prayed that this Court revokes the grant of probate from the Respondents and grant the probate to the children who were the Applicants and beneficiaries of the estates of the Deceased.

Counsel also made submissions on the overriding powers of Airforce Maphenduka Moyo as a shareholder. It was argued that the Deceased owned 95% of the shares in Motaxis Holdings Ltd. Counsel cited the case of **BOXTEL V KEARNEY [14]** where the Supreme Court of Zambia observed that Shareholders enjoy, as a matter of right, overriding authority over the company's affairs. This was affirmed in the case of **JOHN KASENGELE AND OTHERS V ZANACO [15]**.

It was contended that in view of the authorities cited, the Applicants had demonstrated that the Respondents did not only get the grant of probate illegally and irregularly but also fraudulently mismanaged the estates of the late some of which were the assets of the company where the late was the majority shareholder but also other assets. This has deprived the beneficiaries of their inheritance.

Counsel's final prayer was that this Court revokes the probate that was granted to the Respondents, and order them to account for every asset of the Deceased and grant the same to the Applicants for the management of the same and pay the creditors of the deregistered company.

On the date of hearing on 14th March, 2022, both Counsel for the Applicants and Counsel for the Respondents were before Court and they each relied on their respective Affidavits and Skeleton Arguments in support of the application which I have considered extensively.

This is an application by the Applicants for revocation of the Probate dated 16th August, 1999 that was granted to the Respondents herein following the demise of the late Airforce Maphenduka Moyo who died testate on 5th January, 1999.

On one hand and in summary, the Applicants are seeking an order of Court to revoke the Probate that was granted to the Respondents by this Court. It was stated that the Deceased left behind a number of assets upon his demise and in his Will he only appointed the 2nd Respondent as his Executrix and the 1st Respondent would only be an Executor in the event that the 2nd Respondent died before the Deceased. That after being granted probate, the Respondents proceeded to vest the property No. 110/9 Kutwa Road, Villa

Elizabeth to the 2nd Respondent who made a subdivision which she gifted to the Seventh Day Adventist Church (SDA) contrary to the wishes of the deceased.

That they changed the name of the company known as Motaxis Holdings Limited to Amandla Ethu Trading and subdivided property No. 718 also known as Motaxis and Victoria Falls Ltd and sold and mortgaged other subdivisions such as Subdivision LUS/718/CL/0/8 in 2009.

That further subdivisions were made to Property No, L718 in 2007 to the tenants and a portion offered to one Ride Sikaona. That by a mortgage deed, the 1st Respondent secured a loan from Intermarket Banking Corporation on the same property. In 2018, the 1st Respondent created a third party mortgage in favor of DDFS Zambia that was secured by property No. 718/CL/1/9 purporting to be the property of Amandla Ethu Trading Ltd. That the ZRA in response to a query by the Zambia Police wrote and stated that they had no record of Property Transfer Tax (PTT) clearance certificate or PTT return for the conveyance of property No. LUS/718 from Motaxis Holdings Ltd to Amandla Ethu Trading Ltd and to date the FINCA loan was unliquidated. That the 1st Respondent with others went on to make other transactions that were not legal.

On the other hand, the case of the Respondents was as follows. The 1st Respondent stated that the Applicants had not shown this Court any grounds under **Section 51 of the Wills Act, Cap 60 of the Laws of Zambia** upon which this Court should revoke the probate that had been granted.

Whilst the 2nd Respondent apart from echoing what the 1st Respondent stated, added that this Court had no jurisdiction to appoint the Applicants as personal representatives of the Estate herein given that only a named Executor in a will can be granted probate unlike an Administrator under Intestate Succession. It was contended that this position was in accordance with **Section 29(1) of the Wills Act**, which clearly and categorically stated that probate may be granted by a Court **only** to an executor appointed by a will. It was also argued that the Applicants did not have the requisite locus standi to bring this action before this Court.

The only relevant issues for this Court's determination are:

1. *Whether or not to revoke the Probate that had been granted to the Respondents on account of irregularity.*
2. *Whether the Respondents would be ordered to give an account and inventory of the estate of the late deceased.*

Although Counsel for the Applicants relied on the provisions of **Section 19(2) of the Intestate Succession Act, Cap 59 of the Laws of Zambia** to contend that the sale of property forming part of the estate of a deceased person was proscribed, my considered view is that, one cannot apply or relate the provisions of the Intestate Succession Act to the estate of a person that dies Testate leaving behind a will. This is clear from the intention of Parliament in matters of probate.

It is clear that the **Intestate Succession Act, Cap 59 of the Laws of Zambia** applies to all estates that have been left behind by deceased persons that died intestate, that is without leaving a will. Whilst all estates left behind by deceased persons that write down valid wills prior to their demise are to be administered by the **Wills and Administration of Testate Estates, Cap 60 of the Laws of Zambia**.

The intention of Parliament in each of these statutes is clear from their preambles. **The Intestate Succession Act, Cap 59 of the Laws of Zambia** provides as follows:

“An Act to provide a uniform intestate succession law that will be applicable throughout the country; to make adequate financial and other provisions for the surviving spouse, children, dependants and other relatives of an intestate to provide for the administration of the estates of persons dying not having made a will; and to provide for matters connected with or incidental to the foregoing.”

Whilst that of the **Wills and Administration of Testate Estates, Cap 60 of the Laws of Zambia** provides as follows:

“An Act to simplify the law governing the making of wills; to provide for adequate financial and other provisions to be made for dependants in a will; to provide for the administration of estates of persons dying

having made a valid will; and to provide for matters connected with or incidental to the foregoing.”

On this basis, I therefore find that **Section 19 (2) of the Intestate Succession Act** cannot be applicable to a testate estate such as the *one in casu*.

I will now consider the first issue of whether or not the Probate that was granted to the 1st Respondent should be revoked.

Section 51 of the Wills Act, states as follows:

51. (1) A grant of probate or letters of administration may be revoked or annulled for any of the following reasons:

- (a) that the proceedings to obtain them were defective in substance;**
- (b) that the grant was obtained fraudulently by making a false statement, or by concealing from the court something material to the case;**
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently;**
- (d) that the grant has become useless and inoperative; or**
- (e) that the person to whom the grant was made has, without reasonable cause, omitted to furnish an account of his administration after having been lawfully called upon to do so or has prepared an account which is untrue in a material respect.**

(2) Where it is satisfied that the due and proper administration of the estate and the interests of the persons beneficially entitled to it so require, the court may suspend or remove an executor or administrator and provide for the succession of another person to the office of that executor or administrator who may cease to hold office, and for the vesting in that person of any property belonging to the estate.

Although Counsel for the Applicants contends that the grant of Probate to the Respondents was irregular and illegal and it offended the wishes of the

Testator, I find that this was not the case. This is because of the following facts that are clear from the record. Firstly, at the time that she was granted Probate the 2nd Respondent was 53 years old, and only found out that the Deceased had 47 other children at the time he died which the 2nd Respondent herself stated would have created challenges for her sole administration of the estate. Moreover, the size of the estate which not only included houses, but a farm, commercial properties and a grinding mill, also necessitated that the only other person that had been mentioned in the will who had been running the business of the deceased alongside him be deemed to be another Executor.

Based on these factors it is my considered view that the probate that was granted to the Respondents was valid and done in full consideration of the factors identified above. Further, upon consideration of all the evidence adduced before me, I find no ground upon which I can revoke this grant of probate.

It was also argued that the 1st Respondent fraudulently mismanaged the estates of the late some of which were the assets of the company where the late was the majority shareholder but also other assets. While this argument has been presented by the Applicants, it has not been supported by any corresponding evidence showing that the 1st Respondent had the criminal intention to commit fraudulent mismanagement of the estate with the intent to deprive the other beneficiaries of the Deceased's estate.

Moreover, I accept the argument of Counsel for the 2nd Respondent that it was clear from the wording of the Will that the intention of the testator was that all other children except the 1st Respondent who was given the properties were to benefit upon satisfaction of the conditions therein. The said condition was that the profits were available and the Children demonstrated a need. However, the Applicants herein had not demonstrated that;

- a) they were profits made from the business;**
- b) that they are in need and**
- c) that they have been denied a benefit by the Respondents herein.**

To the contrary, it is clear that the Applicants desired to rewrite the wishes of the testator over the business and all assets that were bequeathed to the Respondents.

On the aspect of a lack of locus standi by the Applicants, Counsel relied on the case of **ARTHUR LUBINDA WINA AND OTHERS VS. THE ATTORNEY GENERAL (5)** where it was held as follows:

"To be "legally aggrieved" a person must be not merely dissatisfied with or even prejudiced by an action or decision. He must also have been deprived of or refused something to which he was legally entitled. He must be able to point to some 'encroachment or vested rights."

It was contended that from the foregoing, it was very clear that the Applicants had not been deprived of any benefit of the estate. Contrary to Intestate Succession which provided for automatic benefit by virtue of being a Child, the law of testate was strictly confined to only the named beneficiaries.

However, turning to the second issue, it is my considered view that rendering an account of the administration of the Deceased's estate is in actual fact one of the duties of a personal representative as provided under **Section 45 (1)(c)(ii) of the Wills and Administration of Testate Estates Act, Cap 60 of the Laws of Zambia.**

It provides as follows:

"45. (1) The duties and powers of a personal representative shall include-
(c) when required to do so by the court, either on the application of an interested party or on its own motion-
...
(ii) the rendering to the court of an account of the administration of the estate."

On this premise, I hereby Order that the Respondents herein render an account of the manner in which they have administered the estate of the Deceased from the time of the Deceased's death to date.

In the circumstances I hereby dismiss the Applicants application for revocation of the grant of probate to the Respondents herein.

Although the Applicants' application that the Grant of Probate issued to the Respondents be revoked is unsuccessful, each party shall bear their own costs.

Leave to appeal is granted.

DELIVERED IN CHAMBERS AT LUSAKA THIS 28TH DAY OF NOVEMBER, 2023.



**WILLIAM S. MWEEMBA
HIGH COURT JUDGE**