IN THE HIGH COURT OF ESWATINI

CIVIL CASE NO: 748/17

In the matter between:

ROBERT CRABTREE	**1ST APPLICANT**
KRISTOPHER ASHWORTH CRABTREE	**2ND APPLICANT**
EMILY ANNE CRABTREE	**3RD APPLICANT**
KATIE JANE CRABTREE	**4TH APPLICANT**

And

ALAN ALEXANDER McGREGOR N.O	**1ST RESPONDENT**
SONIA LYNDELL McGREGOR	**2ND RESPONDENT**
ROSEMARIE KARIN McEWEN	**3RD RESPONDENT**
INEZE KATHERINE McGREGOR	**4TH RESPONDENT**
RINA DU TOIT	**5TH RESPONDENT**
ALEXANDRE LYNDALL McGREGOR	**6TH RESPONDENT**
ROBERT WILLIAM ASHWORTH McGREGOR	**7TH RESPONDENT**
ALASDAIR ALARIC ASHWORTH McGREGOR	**8TH RESPONDENT**
WALTER BENETT	**9TH RESPONDENT**
NEDBANK SWAZILAND LIMITED	**10TH RESPONDENT**
MASTER OF THE HIGH COURT	**11TH RESPONDENT**
ATTORNEY GENERAL	**12TH RESPONDENT**

Neutral Citation:	*Robert Crabtree and Others vs Alan Alexander McGregor N.O and Others (748/2017) [2023] (179) 7th July 2023.*
Coram:	**MLANGENI J.**
Heard:	**14th June 2023.**
Order made:	**14th June 2023.**
Reasons handed down:	**7th July 2023.**

Summary

Law of succession – application for the removal of an executor in terms of Section 84 of The Administration of Estates Act 1902.

Onus upon the applicant to show that the interests of the estate would be furthered by the removal of the executor.

Executor, like a trustee, is in a fiduciary relationship with the estate and, by extension, the heirs, and must not place himself or herself in a position of conflict of interest.

Held: *First Respondent acted in breach of his fiduciary duty towards the estate, and therefore liable to be removed as executor.*

REASONS FOR JUDGMENT

[1] On the 14th June 2023 I heard legal arguments on this matter and thereafter made orders in the following terms:-

1.1 The First Respondent be and is hereby removed, forthwith, as executor in the deceased Estate Late Solveig Crabtree.

1.2 The First Respondent is directed to return to The Master, forthwith, the Letters of Administration in terms of which he was appointed executor in the said Estate whose Master's reference is EH 125/2012.

1.3 The First Respondent is hereby declared unfit to act as executor in the said Estate.

1.4 The First Respondent shall not be entitled to claim or be paid any executor's fees in respect of work he has done in the said Estate.

1.5 The Second Respondent is declared incompetent and/or unfit or incapable of being appointed as executrix to the estate of the late Solveig Crabtree.

1.6 The First Respondent, in his personal capacity, and the Second Respondent are jointly and severally liable to pay the costs of the application, the one paying the other one to be absolved.

[2] I undertook to hand down my reasons in due course and I hereby do so hereinbelow.

PRELIMINARY MATTERS

[3] Some matters which have nothing to do with the merits of this matter are worth touching upon. The purpose is to give a broader picture of how the matter unfolded in this court on the 14th June 2023. In doing so I am fortified by the chequered history of this matter and the real possibility that the jinx will not end anytime soon.[1]

[4] This matter was before me on the 20th April 2023 for legal arguments. It became common cause that the voluminous papers were not in order, in particular the court did not have proper books of pleadings and heads of argument. In the presence of all legal representatives including counsel from Johannesburg I then re-allocated the 14th June 2023 for hearing. This allowed the parties about 53 days to get their houses in order.

[5] In the morning of the date for hearing legal arguments, the 14th June 2023, I became aware of an application that had been delivered to my chambers on the previous day. This application is under a different case number and it purports, on behalf of the 1st

[1] I have become aware through the print media that on the same day that I made orders an appeal was lodged, at the speed of sound, on grounds that are speculative and perhaps amusing as well. One gets the impression that they were informed by emotions rather than reason.

and 2nd Respondents, to challenge the manner in which the date of legal arguments was allocated. It raises issues in terms of Section 135(1) of The Constitution and posits that the 1st and 2nd Respondents will not get a fair hearing in the present matter. Prior to the hearing I was informed by my clerk that she had been informed by those that brought the application to chambers that it was brought to my attention "**for information only**", that there was no need for me to do anything about it at that stage.

[6] Upon perusing the application I perceived it for what it is – a ruse whose sole purpose was to further delay progress in finalising an estate that has been suffering for more than ten (10) years. On the 20th April 2023 Mr M. Magagula for the 1st and 2nd Respondents was present in my chambers when a new date was assigned to the matter, and so was his Professional Assistant who had his diary with her and there was nothing that made Mr Magagula unavailable on the 14th, and yet he did grumble about the date, mainly because he prefers another related matter to be heard and finalised before the present one. The reasons for this preference are best known to him; to me they can only be a matter of surmisation. Mr Magagula has a fervent wish to have civil case No. 2006/2016 dealt with first, and on the 14th June 2023 he harped upon this point so many times that I was constrained to protest.

[7] Now this is how the stratagem was intended to work. The new application under case No. 1272/23 is in the long form, and by its nature likely to take months, even years, to complete, just like the present one which is into its fifth year, and yet it came to court on an urgent basis! Because it involves a constitutional issue, the judge who hears it would be expected to routinely refer it to the Registrar for a Full Bench to be constituted. In the meantime the months and the years would be coming and going. I am yet to be convinced why in this jurisdiction we do not draw a dichotomy between a matter that is based on a constitutional provision and one that raises a constitutional challenge to a statutory provision or provisions. It appears to me – and this is the position in other jurisdictions – the former category should be dealt with by a single Judge and this would bring about speedy conclusion of such matters; and the latter category by a Full Bench of the High Court.

[8] Back to the application that was placed before me "**for information only**". I noticed that there was no prayer for stay of the application that was to be heard on this date; in any event it was not even placed in my roll on that day. It was therefore my view that there was no legal or rational basis to not proceed with this matter which has dragged and dragged, and in which there is Counsel who has travelled from South Africa. When the court convened I invited Mr Bester for the applicants to motivate his clients' case and he rose to do so. Just then Mr Magagula indicated that he was not prepared to

deal with the merits of the matter because he had raised a constitutional issue about the allocation of the date for legal arguments. If this is what litigation has degenerated into in this jurisdiction, then we are on a very sad trajectory. Shell Oil Swaziland v Motor World (Pty) Ltd t/a Sir Motors[2] is being jettisoned with equanimity by attorneys who thrive and revel at delaying litigating.

[9] I informed Mr Magagula that I was proceeding with the matter. At that stage he asked to be excused to consult with his clients who are in Cape Town. His professional assistant took his seat and the matter proceeded. Some minutes later Mr Magagula came back in and immediately informed the court that he was under instructions to seek my recusal from the matter. This he did in open court, and I have no real issue with that. My response was that he may proceed with his recusal application, but as there was no formal application before me I was proceeding with the matter. I cannot pretend to be oblivious of this familiar gimmick in this jurisdiction. In the case of BENNETT AND ANOTHER v S In re S v PORRIT AND ANOTHER[3] His Lordship Spilg J. made the following apposite, terse and poignant remarks:-

[2] Shell Oil Swaziland v Motor World (Pty) Ltd t/a Sir Motors ...
[3] [2021] 1 ALL S.A. 165 (G J)

"The concern, as expressed earlier, is that more and more recusal applications are being initiated as a strategic tool."[4]

[10] I have no right to fully pre-empt Mr Magagula's clients' reasons for requesting my recusal, but it did seem so obvious that the request was not bona fide; it was precipitated by my insistence to proceed with the matter, in my view for good reasons. An extrapolation from this is that if a judge does not agree with you, you seek their recusal. It is a most repugnant and opprobrious approach to litigation. Mr Magagula then confirmed to the court that he was not going to deal with the merits of the matter. This was hardly surprising because in this matter that commands thousands of pages of pleadings and annexures, he had not filed his clients heads of argument and opted to use valuable time in preparing a voluminous application in the extent of 137 pages, including annexures, to challenge the allocation of a date for legal arguments. To my mind this energy could have been put to better use.

[11] I have ventured into the preceding issues with great reluctance and diffidence, but I have no doubt that it places a higher court in a better position to understand the momentous events of that day.

[4] At para 115 of the judgment.

THE APPLICANTS' CASE

[12] The matter for determination is canvassed in Part B of the Notice of Motion dated 30th May 2017[5]. The applicants seek the removal of the 1st Respondent as executor of Estate Late Solveig Crabtree with reference EH 125/2012, together with ancillary relief, as well as a declaration that the 2nd Respondent is incompetent and/or unfit and/or incapable of being appointed as executrix in the estate.

[13] The applicants case is canvassed in the lengthy founding affidavit[6] of the 1st applicant Robert Crabtree. It is common cause that the late Solveig Crabtree died in Cape Town, South Africa, on the 6th May 2012. She spent most of her adult life in this country where she, together with her husband, acquired various immovable properties some of which were registered in her name at the time of her death and others in corporate entities known as T1 and T2. As will become apparent in the course of this judgment the total value of the immovable properties is quite substantial by the standards of this country. The deceased had valuable movable assets as well, some of which were in South Africa but these are of no direct concern in these proceedings.

[5] At pages 3-4 of Book 1 of the Book of Pleadings (BoP)
[6] Some 37 pages and a further 112 pages of annexures.

[14] The deceased left a valid will[7], and in terms of this will the 1st Respondent was nominated as executor and was duly appointed by The Master of the High Court, by Letters of Administration dated 5th September 2012[8]. The will also provided that in the event the 1st Respondent could not be appointed for whatever reason, then the 2nd Respondent was to be appointed as such. This is the basis for the applicants' prayer that the 2nd Respondent be declared ineligible for appointment in the place of the 1st Respondent, in the event that the 1st Respondent is removed as executor.

[15] The case against the 1st and 2nd Respondents is canvassed mainly in the founding affidavit and the replying affidavit of Robert Crabtree who was initially the only applicant but was later joined by his children who had, in the meantime, attained the age of majority, and who then became 2nd, 3rd and 4th applicants in the matter.

ALLEGATIONS AGAINST THE 1ST RESPONDENT

[16] In support of the prayer for the removal of the 1st Respondent as executor the founding affidavit raises a myriad of concerns, some of them quite grave. The applicants allege misconduct against the 1st Respondent in winding up the estate, that such conduct is material and substantial, and that it has caused "**very substantial loss to the estate and has caused the beneficiaries and heirs to suffer**

[7] At pages 65-70 of Book 1
[8] Annexure RCB5 at page 62 of Book 1.

serious financial prejudice. It is alleged that his conduct is gross and egregious and that he is unfit to hold the office of executor."[9] In support of this, the applicants allege that he caused the immovable assets in the estate to be "**undervalued for an ulterior motive**" and that there is an inference that he acted "**in collusion with the second respondent to deplete the estate of valuable assets.**"[10] It is further alleged that he has not complied with the applicable laws in respect of filing a proper inventory, the recording of assets,[11] etc, and that he did not list some movable properties and shares[12], in breach of Section 37 of the Administration of Estates Act 1912.

[17] The applicants zero in on the eventual sale of four immovable properties – two of which were registered in the name of the deceased and the other two in the name of corporate entities known as T1 and T2. These properties were effectively sold in one package for an amount of E28 Million to an entity known as Dups Holdings Limited. It is common cause that within a few months Dups Holdings then sold these properties to the Public Service Pensions Fund for E74 Million, thereby raking in a profit of E46 Million in a matter of a few months.

---

[9] At pages 18 – 19, para 11.2 of Book 1.
[10] At page 20, para 17 of Book 1.
[11] At page 20 – 21, para 18 of Book 1.
[12] At page 23, para 27 of Book 1.

[18] The case of the applicants is that this sale was intended and designed to suit the personal interests of the 1st respondent, at the expense of the estate and beneficiaries and in stark breach of his fiduciary duties to the estate. This argument is predicated upon a series of valuations of the immovable properties at different times and at the instance of different interested parties. I deal with the different valuations below.

18.1 VALUATION BY SWAZILAND REALTY CONSULTANTS (SRC) – E103 MILLION

(i) This valuation was at the instance of The Public Service Pension Fund and was done on or about May 2016. Clearly, for the PSPF to commission such valuation it had an interest to acquire the property. The applicants' case is that the 1st Respondent knew about this valuation project because he asked the lessee of the properties "**to assist the aforesaid valuer when they conducted site visits for the purposes of inspecting and valuing the properties, which they then did,**" [13]and further that the 1st and 2nd respondents became aware of the valuation report and the valuation amount of E103 Million.

(ii) The 1st Respondent does not deny that he became aware of the valuation report and the valuation amount. At paragraph 58 of

[13] At page 25, para 30 of Book 1.

his answering affidavit what he avers boils down to denying knowledge that the valuation was at the instance of PSPF, and that as far as he was aware the valuation was at the instance of Swazibank "**for purposes of financing the transaction.**"[14]

(iii) The valuation report, annexure RCB9,[15] specifically states that it was at the request of "**The Management, Public Service Pensions Fund, P.O. Box 744, Mbabane.**" In the absence of a specific denial that he became aware of the valuation report, I am entitled to conclude that he was indeed aware that it was at the instance of the PSPF.

18.2 VALUATION BY JEFF LOWE AND ASSOCIATES – E28 MILLION

(i) About one year before the SRC valuation, on or about May 2015, the 1st Respondent commissioned an evaluation by Jeff Lowe and Associates, who made a report annexure RCB11[16]. It is apparent from the report that the valuer was instructed to exclude the mill and the plantation, and he get to a value of E28 Million. The applicants submit that the 1st Respondent did so "**in order to ensure that the properties were substantially**

[14] At page 188, Book 1.
[15] At page 76 of Book 1.
[16] At page 79 of Book 1.

undervalued in Lowe's report."[17] It is worth - noting that the four farms were valued as one "**as requested**"[18] by the 1st Respondent.

(ii) According to the applicants, if the 1st respondent had wanted an objectively fair reflection of the market value of the four farms, with separate title deeds, it was incumbent to have them valued individually and separately.[19]

(iii) According to the applicants this restrive and selective valuation which excluded the mill and the plantation had the effect, in part, of excluding rental income of about E240,000-00 per annum. It also excluded several residential buildings on the property, some of which are very close to Mbabane urban area and therefore perceived as being of considerable value.

(iv) It is also worth-noting that the farms were collectively valued at E28 Million, nothing more and nothing less, and it is for this exact amount that the properties were eventually sold to Dups Holdings Limited. The applicants submit that the overall picture shows that the properties were undervalued deliberately, which leads to "**the**

[17] Paragraph 32 at page 25 of Book 1.
[18] Para 31 at page 25 of Book 1.
[19] Para 34 at page 26 of Book 1.

inescapable conclusion that the first respondent acted with the ulterior motive and for personal gain and enrichment."[20]

18.3 VALUATION BY CONSORTIUM PROJECTS – E47 MILLION (E68 MILLION)

(i) This valuation was undertaken in July 2014, in respect of the immovable properties, at E47 Million. According to the applicants there was also a separate valuation of timber at E21 Million. This makes a total of E68 Million.[21]

[19] The 3rd Respondent filed together with the 1st applicant's reply an affidavit in support of the application for removal. She avers that she pestered the 1st Respondent to advertise the immovable properties comprehensively, in the country and elsewhere.[22] The idea was obviously to try and get a competitive price, but the 1st respondent was reticent – he was not interested. His refusal to advertise the properties became the subject of a complaint by this deponent to The Master of the High Court.[23] The 3rd respondent concludes that the 1st respondent masterminded "**the elaborate scheme to sell the estate properties to Dups Holdings ... .**"[24]

[20] Para 35 at page 26 of Book 1.
[21] Para 36 at page 27 of Book 1.
[22] Annexure "00" at page 470 of Book 1.
[23] Page 298, para e.
[24] At para 82, page 270 of Book 1.

[20] In response to the allegation of refusal to advertise the properties comprehensively the 1st respondent asserts that the properties were not likely to attract buyers. But what is most incomprehensible is that he actually discouraged potential buyers. In his own words he advised them that the forestry business "**would require a substantial recapitalisation to become viable. Obviously, this reduced the attractiveness of the property ... .**"[25] So here is a seller who tells a potential customer that "**this will cost you too much money going forward, it's a bad deal!**" This should have been left to the buyers' due diligence. It can't get worse than this.

[21] Against the aforegoing there looms, like a collossus, the pervasive allegation that The Master never gave approval for the specific transaction that disposed off the property in the manner that was done. The applicants aver that the only consent that The Master gave is at page 104 of Book 1. Indeed the 1st respondent has not disclosed or provided any other consent. In terms of the only consent that is on record the 1st respondent was authorised to sell and transfer only two pieces of land (out of the 4) to T1 Property Proprietary Limited, for a sum of E28 Million. Nowhere does The Master give approval for the sale of shares in T1 and T2 to Dups Holdings in the manner in which the properties were disposed of.

[25] At page 526, at para 15.2 of Book 2.

[22] The 1st respondent avers that Dups Holdings offered E28 Million "**after a lengthy negotiation**". Look at it in this manner – Jeff Lowe is instructed by 1st Respondent to evaluate some assets in the estate and leave out others; he is informed that the value is E28 Million; after "**lengthy negotiations**" the property is sold for E28 Million exactly. So much for lengthy negotiations – they result in no give and take whatsoever!

[23] And then there is an illogicality of enormous proportions. The Public Service Pensions Fund had previously offered an amount of E35 Million for the entire immovable estate. The deceased, Solveig Crabtree, was still alive, and the 1st Respondent advised her to decline the offer.[26] Some years later, he sold it for much less – E28 Million.

[24] According to the applicants, the puzzle is completed by the fact that there is a triangular relationship among the 1st Respondent, Dups Holdings and the Public Service Pensions Fund, the common thread being that the 1st respondent is employed by Allan Gray[27] as an investment manager, Dups Holdings and the Public Service

[26] Para 49 at page 539 of Book 2.

[27] Allan Gray is a reputable investment company in Cape Town, with its head office at the V&A Waterfront. The allegation is at paragraph 35, p306 of Book 1.

Pensions Fund being clients of Allan Gray. It is debatable how much weight to attach to this, but what it does show if it is indeed true is that the 1st respondent had easy access to both of these entities and it is improbable that he would not know the Fund's interest in the property if he truly wanted to know. At paragraph 48, page 539 of Book 2, he admits business connection with the Public Service Pensions Fund but equivocally denies links with Dups Holdings, saying that as far as he knows Dups is not a client of Allan Gray.

THE LAW

[25] In our law the position of an executor is equated with that of a trustee. An executor is in a fiduciary relationship with the estate that he or she administers, and by extention with the heirs. He or she must always act in utmost good faith and with due care and diligence.[28] He or she must at all times act in the best interests of the estate and/or heirs and this entails that he or she must avoid conflict of interest at all times.

[26] In this jurisdiction the removal of an executor is sanctioned by Section 84 of The Administration of Estates Act 1902. Four grounds are listed –

(i) Absence from Swaziland;

[28] Clarkson v Gelb 1981 (1) SA 288 at 293

(ii) Other avocations

(iii) Failing health

(iv) Other sufficient cause

(v) Interests of the estate would be furthered by his suspension or removal.

[27] The present case falls squarely within the last two categories. In the case of WILLEMSE v RENS[29] it was held that the requirement under the last – quoted category is nothing more than evidence to the effect that the removal of the estate from the care of the executor would further the interests of the estate. The only test therefore is "**whether the interests of the estate would be advanced by the removal of the executor.**"[30] The recent case of NANDI MANYATSI N.O. and ANOTHER v ZACHARIA MSONGELWA NHLEKO and THREE OTHERS[31] is a stark example of conflict of interest on the part of an executor. In the said case His Lordship Maphanga J. describes the test as "**benign in light of the objective character of the criteria but moreso in the context of Mngometulu's robust and strident opposition that is inimical to the estate ...**" Indeed, the test is not stringent. All that the applicant needs to prove is that the removal of the executor would further the interests of the estate.

---

[29] 2004 SZHC 15

[30] Applicants' supplementary Heads of Argument at para 36.

[31] (1174 – 22A) SZHC 73 (3rd April 2023)

CONCLUSION

[28] The manner in which the 1st respondent has handled the disposal of the immovable assets of the estate is negligent at best and most probably reckless. It is certainly inimical to the interests of the estate to dispose of the most valuable assets of an estate for the least possible price in the market, and most probably a contrived one. The applicants submit that as early as 7th December 2017 the 1st respondent conceded in his affidavit that the estate has a claim to purse against Dups Holdings but now, almost six years later, he remains supine. And of course he cannot do anything about this, for the simple reason that potentially he is a co-defendant in such matter, possibly the main defendant.

[29] I must decry the new trend in litigation in this jurisdiction whereby litigants, believing that pleadings and legal submissions can turn white into black, doggedly defend the indefensible right to the death. Inevitably, delay becomes the best form of defence. The present case is a good example of this disconcerting scenario.

[30] The removal of the 1st respondent was, in my view, ineluctable in the circumstances that have been canvassed above. But as if that was not enough, there is a litany of other allegations against the 1st respondent. But because of the conclusion that I have stated above

I only make a fleeting reference to these, if only for the 1st respondent to realise the hopelessness of the case against him.

30.1 he was ordered by this court to avail certain relevant documents and has failed to do so, and is effectively in contempt of this court.

30.2 he made a direct payment of estate funds to his wife, the 2nd respondent, prior to a proper distribution.

30.3 he pursued a claim of E1.25 Million against the estate, thereby placing himself in a position of conflict of interest.

30.4 he made the estate pay transfer duty in excess of E800,000-00 in a situation where it is axiomatic that such duty is paid by the purchaser.

30.5 he took decisions without consulting the heirs.

30.6 the sale was consumated despite that some conditions precedent were not fulfilled.

30.7 he departed from some provisions of the will without the approval of the heirs.

[31] An attempt has been made, naturally, by the 1st respondent to either deny or justify the issues mentioned in paragraph 30 above. In my view the denials are in keeping with the 1st respondent's 'Stalingrad defence', and if I were to analyse them in detail it would become even more apparent how untenable the 1st respondent's position is in relation to matters of the estate.

THE APPLICANTS' CASE AGAINST THE 2ND RESPONDENT

[32] The case against the 2nd respondent is so simple as to bear no elaboration. It is common cause that the 2nd respondent is lawfully married to the 1st respondent. Logically, this makes for an intimate environment where the estate affairs are discussed and directed. Clearly, she is conflicted in respect of the estate and no useful purpose would be served in appointing her as an executrix in terms of the will and upon the removal of her husband. Her affinity to the 1st respondent would constitute an enormous impairment to her objectivity. It is therefore hardly surprising that she is the only beneficiary who does not support the removal of the 1st Respondent.

[33] She received payment from estate funds without authority from The Master and prior to distribution. Ex facie, she owes this money to the estate, and it is unlikely that she would voluntarily refund this money, in which case she may be sued.

[34] The collossal challenges facing the estate require a fresh, neutral and objective mind. The 1st and 2nd respondents are potential defendants in a quest in future to redeem what is redeemable.

[35] The conclusion that I arrived at in respect of the 2nd respondent was also as unavoidable as the one in respect of the 1st.

LEGAL COSTS

[36] It is usual for legal costs in such matters to be borne by the estate. But what has unfolded in this estate is so deplorable that I find no reason to further burden the estate with legal costs. Where all things are equal, this matter would have been settled initio litis – right at the beginning. Hence the 1st respondent must personally pay the price for putting the beneficiaries and the estate in this situation, together with the 2nd respondent.

MLANGENI J.

For the applicants: **Adv. C. Bester, instructed by attorney Boxshall-Smith**

For 1st and 2nd Respondents: **attorney M. Magagula**

For 3rd and 4th Respondents: **attorney M. Dlamini**

For 9th Respondent: **attorney N. Manzini**