THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 330/2011
Reportable

In the matter between:

MOHAMMED AZEEM GAFFOOR NO	**First Appellant**
AYESHA-BI PARKER NO	
(In their capacities as Executors of the Deceased Estate late Cassiem Ebrahim Gaffoor)	**Second Appellant**

and

VANGATES INVESTMENTS (PTY) LTD	**First Respondent**
ABDUL AZIZ BANDERKER	**Second Respondent**
GOOLAM MUSTAPHA BREY	**Third Respondent**
MOHAMMED ALLIE DHANSAY	**Fourth Respondent**
ABDULLAH ESHACK GANGRAKER	**Fifth Respondent**
ABDUL WAHAB BARDAY NO (in his capacity as Executor together with Eighteenth and Nineteenth Respondents in the same capacity)	**Sixth Respondent**
MOHAMED YOUSIF MOHAMED	**Seventh Respondent**
NISHAAD MURUDKER	**Eighth Respondent**
LAIKAT ALI SONDAY	**Ninth Respondent**
MAHMOOD KHATIB NO	**Tenth Respondent**
UTHMAN BREY NO	**Eleventh Respondent**
MOHAMED ALLIE DHANSAY NO	**Twelfth Respondent**
AMINA DHANSAY NO	**Thirteenth Respondent**
AZGARI BEGUM HOOSAIN NO	**Fourteenth Respondent**
ABDULLAH ESHACK GANGRAKER NO	**Fifteenth Respondent**
FATIMA GANGRAKER NO	**Sixteenth Respondent**
RAUF KHAN NO	**Seventeenth Respondent**
HASEENA BEGUM KHAN NO	**Eighteenth Respondent**
AKBAR ALLIE LOGDAY NO (Eighteenth and Nineteenth Respondents also NO in their capacities as Trustees of the Deceased Estate late Rauf Khan)	**Nineteenth Respondent**
MOHAMED YOUSIF MOHAMED NO	**Twentieth Respondent**
ZOHRA MOHAMED NO	**Twenty First Respondent**
MOOSA MOHAMED NO	**Twenty Second Respondent**
NAZEEM MOHAMED NO	**Twenty Third Respondent**

EBRAHIM ALLIE ENOS MURUDKER NO **Twenty Fourth Respondent**
GOOLAM MUSTAPHA BREY NO **Twenty Fifth Respondent**
UTHMAN BREY NO **Twenty Sixth Respondent**
MAHMOOD KHATIB NO **Twenty Seventh Respondent**
VANGATE PROPERTY (PTY) LTD **Twenty Eighth Respondent**
ONE VISION INVESTMENTS 52 (PTY) LTD **Twenty Ninth Respondent**

MAHMOOD KHATIB **Thirtieth Respondent**

Neutral Citation: *Gaffoor NO v Vangates Investments (Pty) Ltd* (330/2011) [2012] ZASCA 52 (30 March 2012)

Coram: Mthiyane DP, Van Heerden, Leach and Tshiqi JJA and Ndita AJA

Heard: 9 March 2012

Delivered: 30 March 2012

Summary*:* Section 115 of Companies Act 61 of 1973 – rectification of register of members – purported transfers of shares unlawful and invalid – court's discretion in terms of s 115 a discretion in the broad sense – exercise of discretion to order rectification.

ORDER

On appeal from: Western Cape High Court, Cape Town (Koen AJ sitting as court of first instance):

1. The appeal succeeds with costs, including the costs of two counsel.
2. The order of the high court is set aside and substituted with the following:

'(a) The first respondent is directed to rectify its register of members –

(i) by deleting the transfers of shares registered on 16 August 2004 from Cassiem Ebrahim Gaffoor to the second to fifth respondents, the seventh to ninth respondents and Mr Rauf Khan, and all subsequent transfers of those shares to other persons or entities; and

(ii) by registering the deceased estate of the late Cassiem Ebrahim Gaffoor, as represented by the applicants in their capacity as executors, as shareholder in respect of 444 and one-ninth of four shares in the first respondent with effect from 16 August 2004.

(b) The first to fifth respondents, the seventh to ninth respondents, the sixth, eighteenth and nineteenth respondents in their capacity as executors of the estate late Rauf Khan and the thirtieth respondent are ordered to pay the costs of the application, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.'

JUDGMENT

VAN HEERDEN JA (MTHIYANE DP, LEACH & TSHIQI JJA & NDITA AJA concurring):

1] 2]4

Introduction

[1] The question in this appeal is whether, in the circumstances of this case, an alteration to the register of members[1] by the shareholders of a company, appropriating the shares of a deceased co-shareholder, without notice to his deceased estate and without an approach to court, should be allowed to stand in the company's register of members. The Western Cape High Court (Koen AJ) refused an application by the executors of the deceased estate for rectification of the register of members so as to record the shareholding of the deceased estate. The present appeal by the executors against that decision comes before us with the leave of the high court.

Background

2]It is necessary to set out the facts, which are largely common cause, in some detail. During the 1990s a group of persons, consisting of the second to fifth, the seventh to ninth respondents, Mr Rauf Khan[2] and the deceased, identified the potential for the development of a shopping mall on what was then the Athlone Golf Course. This group came to be known as the Athlone Business Syndicate (the ABS). Some while after this idea was conceived by the ABS, the City of Cape Town invited proposals for the development of the land. The closing date for submissions was 25 February 2000. The successful bidder would have to purchase the land and then develop it according to its development scheme.

3]The ABS decided to submit a proposal and to form a company for this purpose. The nine members of the ABS were the founding members of the company which was initially incorporated as a public company under the name Vangates Investments Limited. However, as the City of Cape Town made it clear that it wished to deal with a private company, the public company was converted to a private company, Vangates Investments (Pty) Ltd (the company), the first respondent in this appeal. The total share capital of the company was R4000, divided into 4000 ordinary par value shares of R1 each. Each of the nine founding members held 444 shares and one-ninth of four shares, the latter four shares being held by the ninth respondent as nominee.

1 Followed by a shareholders' and then by a directors' resolution.

2 Mr Khan is now deceased and his estate is represented in these proceedings by the sixth, eighteenth and nineteenth respondents.

4]The preparation of the bid by the ABS involved the expenditure of fairly large sums of money. The process leading to the acquisition of the land was a long and expensive one. Members of the company invested R1,4 million in the preparation of the bid. For some reason, unexplained on the papers and by counsel, the deceased's financial contribution at that time appears to have been a smallish one, which was after his death calculated by the company's auditors to be only R18 990.

5]The bid was successful. In terms of the bid proposal, the company was required to purchase the land from the City of Cape Town for a purchase price of R6,7 million. The company had to pay an initial deposit of R670 000 and the members of the company had to finance that amount which was paid on 21 May 2002. The respondents allege that, together with the technical team (later becoming a shareholder and represented by the twenty-ninth respondent), a contribution of R67 000 was required from each member towards the payment of the deposit. Despite being called upon to do so, the deceased did not make any contribution.

6]From the outset, problems beset the proposed development. The technical team had put together a defective scheme which had to be discarded and, by the second half of 2002, the company was technically insolvent. By the time the deceased passed away on 21 October 2002, the project appeared to be 'dead in the water'.

7]The first set of executors of the deceased estate (the wife and brother of the deceased) was appointed on 14 February 2003. The winding-up of the estate did not progress smoothly. There were problems between the executors and the other family members of the deceased, eventually giving rise to what the attorneys for the executors described as 'warfare'. The scale of these difficulties is evident from various letters addressed by the attorneys to the executors and to the Master of the High Court in late 2003 and early 2004, the relevant attorney describing himself as being 'completely at [his] wits end in connection with this estate'.

8]In the meantime, the company had not abandoned its plans to pursue the development and soldiered on. It employed new people to devise a new

scheme and a new technical team was put together to execute it. The new scheme finally came to fruition at the end of July 2004, when the company found a financier in the Zenprop group which had expertise in property development and management.

9]On 7 April 2004, a meeting was held between Mr Mustapha Murudker (the father of the eighth respondent) and the ninth respondent (Mr Sonday), on the one hand, and one of the executors of the deceased estate and the second appellant (Ms Parker), on the other. The respondents knew that the second appellant was at that time not an executor of the estate, although she allegedly held herself out as representing the estate.[3] The purpose of the meeting was to discuss the involvement of the estate in the new project and to invite further contributions from the estate relating to the development, particularly towards payment of the purchase price of the land.

10]On 6 May 2004, before the financier became involved, Ms Parker received a letter from ABS requesting urgent payment of an amount of R760 000 for the purchase of the land, as well as 'the loan account deficit of R216 000 . . . due by your late father'. How the amount of R760 000 was made up, or why a deficit of R216 000 existed, is not explained. In fact, the letter went on to say that, if these amounts were not paid by 11 May 2004, ABS would 'immediately refund the loan account of R19 000 . . . due to the estate by Vangates Investments (Pty) Ltd'. As Koen AJ in the high court pointed out, why there should be a loan account credit balance of R19 000, and at the same time a deficit of R216 000, was not explained and is difficult to understand.

11]On 2 June 2004, the Master removed the first set of executors of the deceased estate from office. Later that month, on 23 June 2004, the attorneys acting for the company[4] addressed a further letter to Ms Parker who at this point – to the knowledge of the respondents – definitely had no authority to make any decisions on behalf of the deceased estate. In terms of this letter, Ms Parker was given until 29 June 2004 to indicate whether the estate would retain its shareholding in the company, in which event it was expected to contribute 'its portion of the purchase price and other amounts due and owing', or whether it

3 The appellants in fact alleged in their replying affidavit that Ms Parker had been specifically authorised by the executors to represent them in meeting with Messrs Murudker and Sonday.

4 MK Attorneys, the sole proprietor of which is the thirtieth respondent.

wished to be 'paid out its share' in the company. The clear implication of this letter was that, in the latter event, the deceased estate would forgo any claim to the shares. By means of a further letter dated 25 June 2004, the deadline by which a decision was to be taken by Ms Parker was extended to 2 July 2004. There was no response from Ms Parker to either of the two letters.

12]As stated earlier, at the end of July 2004, Zenprop became involved in providing bridging finance for the development. However, the final financing of the entire development project, *including* the payment of the purchase price of the land, was done by Barclays Bank at the end of 2004. All the members of the company were then required to bind themselves in favour of Barclays Bank as sureties, each for an amount of R2 million. It would therefore appear that the other members of the company did *not* in fact make monetary contributions towards the payment of the balance of the purchase price of the land, as had earlier been envisaged. Unlike the other members of the company, the deceased estate was never called upon to stand surety in favour of Barclays Bank, the ultimate financier of the development.

13]According to the respondents, however, Zenprop had insisted that every member of the company be involved in the payment of the purchase price – 'we had to sign suretyships in favour of Barclays Bank for the ultimate loan and Zenprop was unwilling to carry a deceased estate as a member, especially with the family members at war with one another'. Meanwhile, the Master had not yet appointed a second set of executors. The company received legal advice to the effect that the impasse created by the non-participation of the deceased estate could be resolved by recourse to a draft (unsigned) shareholders' agreement which had earlier been agreed to by the members of the company, including the deceased, and which (according to the respondents) allowed members to 'take up' the shares of a deceased member. It appears from the register of members that, on 16 August 2004, the deceased's shares were transferred out of his name and into the names of the second to fifth respondents, the seventh to ninth respondents, and Mr Rauf Khan.[5] The thirtieth respondent, in his capacity as company secretary, signed the share transfer forms on behalf of the deceased estate. It was this purported transfer of shares

5 According to the respondents, the date of the transfers was incorrectly reflected in the register of members and that the transfers actually took place only on 20 September 2004. As will be seen below, the relevant directors' resolution was only taken on 20 September.

which the appellants contend was invalid and in respect of which they seek rectification of the register of members. On the same day, there were further transfers of these shares to the family trusts of the second to fifth, the seventh to ninth respondents and Mr Khan and to the thirtieth respondent 'in trust'. Finally, the thirtieth respondent transferred the shares held by him in trust to two family trusts.[6]

14]On 16 September 2004, ostensibly after the register of members had already been altered, the shareholders of the company passed a resolution purporting to 'take up' the deceased's shares in terms of clause 18.4 of the abovementioned shareholders' agreement at a total valuation of R19 434,[7] as determined by the auditors of the company with reference to the date of death of the deceased. This was followed by a directors' resolution on 20 September 2004, 'approving' and confirming' the transfers of shares set out in the preceding paragraph and authorising the thirtieth respondent to sign all the share transfer forms on behalf of the deceased estate.

15]Also on 20 September 2004, the company's attorneys wrote to the attorneys representing Ms Parker who, as stated earlier, had no authority to represent the estate. The attorneys confirmed that they 'held in trust' the sum of R19 434 in respect of the loan account owing to the deceased and the value of his shares. They asked whether an executor had been appointed and for details of the estate banking account so that this amount could be paid to the estate.

16]About a week later, on 28 September 2004, a second set of executors was appointed by the Master. The new executors were Messrs Holt and Kajee. On the same day, Mr Holt wrote to the attorneys acting for the company, advising them of this appointment and requesting that a meeting be held. Sometime before 20 October 2004, a meeting was held between Mr Holt and members of the company, at which Mr Holt was advised of the content of the shareholders' resolution taken on 16 September and of the directors' resolution taken on 20 September. Mr Holt was informed that the deceased estate had been divested of its shareholding in the company and that those shares had been transferred to the other shareholders. According to the respondents, it was explained to him

6 There is some uncertainty as to the date on which the last-mentioned transfers took place, but this is not relevant for the purposes of this appeal.

7 R18 990 in respect of the deceased's loan account and R444 in respect of his shares.

that the reasons for the resolutions were the failure of the deceased estate to make a contribution to the purchase price of the land and to 'up its loan account above the meagre outlay of just more than R19 000'. Holt's reaction was that the executors would convey this to the heirs and take instructions from them.

17]On 20 October 2004, Mr Holt wrote to the attorneys acting for the company, stating that 'the heirs want to retain the shares in' the company and asking to be provided with copies of the deceased's share certificates. The response to Mr Holt's letter, dated 25 October 2004, was that the deceased was not a shareholder of the company.

18]Despite this initial flurry of activity on the part of Mr Holt, the second set of executors did little more to pursue the issue of the deceased's shareholding, despite the fact that the heirs, including Ms Parker, had apparently instructed them to take steps in this regard. A bank guaranteed cheque in respect of the deceased's loan account and the value of his shares, with interest, was sent to the second set of executors on 4 March 2005. It was returned on 22 April 2005 under cover of a letter stating that the executors had received 'instructions to pursue this matter'.

19]In the meantime, the property development was completed and the Vangate Mall shopping centre was opened on 29 September 2005. According to the respondents, Vangate Mall operated at a loss for the years 2005 to 2008.

20]Messrs Holt and Kajee submitted a liquidation and distribution account in the deceased estate in July 2007. This account did not reflect the deceased's shares in the company. On 22 January 2008, the deceased's heirs, including the present appellants in their personal capacities, wrote to the Master objecting to the account, inter alia, because of the lack of progress made by the executors in recovering the shares. The letter records that the heirs had 'been advised that the estate's claim for the shares in [the company] may have prescribed' and that '[t]his may represent a loss of millions of rands to the estate'. According to the heirs, the executors had failed in their duty to administer the estate properly.

21]Mr Holt and Mr Kajee then resigned as executors in June 2008 and

November 2008, respectively. On 12 December 2008, the appellants were appointed as executors. On 18 December 2008, they addressed a letter to the company's auditors relying on s 113 of the Act and requesting inspection and copying of the register of members of the company and the transfer register. A similar letter dated 22 January 2009 was addressed by the appellants to the thirtieth respondent in his capacity as company secretary. There was no reply to these letters and, on 28 January, yet another letter was addressed to the thirtieth respondent by the appellants' attorneys, referring to the previous requests and reiterating that the appellants wanted to inspect and copy the company's register of members and transfer register as a matter of urgency. This letter evoked a response from the thirtieth respondent to the effect that he did not have the share register and was trying to locate it.

22]In the meantime, on 22 January 2009, the appellants wrote to the attorneys acting for the company and the remaining shareholders, stating that –

'It has become apparent that the deceased was a shareholder in Vangate Investments (Pty) Ltd ("Vangate") and that such shareholding is listed as a claim in favour of the Estate. Our instructions from the heirs of the Estate are to pursue this matter of the Late Mr Gaffoor's shareholding so that we may finalise the Estate accordingly. We have further become aware that Vangate was in the process of selling its investments to a third party and have been advised that your goodselves are acting on behalf of the seller herein. Should this sale have already been finalised we remind your goodselves of the Estate's shareholding in Vangate and trust that the Estate, as shareholder of the company, will also benefit accordingly from this sale.'

The sale referred to by the appellants was a sale concluded by the company in February 2009, in terms of which the company sold Vangate Mall to the Public Investment Corporation. Transfer took place in June 2009 and 50 per cent of the profit was shared among the members of the company. In the words of the respondents, '[t]his sale saw the fruition of the investment which the members of the ABS [had] made over a decade and a half'.

23]In July 2009, the appellants' present attorneys were instructed in this matter and, on 6 October 2009, they addressed a letter to the company and its shareholders, demanding that the shares previously registered in the deceased's name be forthwith registered in the name of the deceased estate;

that all dividends and amounts paid in terms of resolutions taken by the company through its board or its members in general meeting be accounted for, and that the company and its members pay to the deceased estate all sums to which the deceased became entitled 'during the period from when the shares were invalidly transferred (on the 18th [sic: 16th] August 2004) to date hereof'. The respondents' attorneys replied on 29 October 2009, 'confirming receipt . . . and . . . that our client's instructions are that it notes the contents thereof'.

24]On 11 November 2009, the appellants launched an application in which they claimed, inter alia, the following relief –

'2. That the Applicants are declared to be entitled to be registered as the shareholders of 444 shares in the First Respondent [the company] and one-ninth of 4 shares in the First Respondent and are the shareholders of the First Respondent in respect of one-ninth of the issued share capital of the First Respondent . . . .

3. That the First to Ninth and Thirtieth Respondents are directed to rectify the First Respondent's register of shares by deleting the transfer of shares previously registered in the name of Cassiem Ebrahim Gaffoor [the deceased] to the Second to Ninth Respondents reflected in the Register of Members' Share Transfers to have been transferred on the 16th of August 2004 and reinstating the deceased estate as represented by the Applicants, as members in their capacity as Executors of the estate late C E Gaffoor, in respect of 444 and one-ninth of 4 shares with effect from 16 August 2004.

4. That the First to Ninth and Thirtieth Respondents are ordered to account to the Applicants herein and to furnish the Applicants herein with all documentation and source documents relating to the transactions so accounted in respect of:

4.1 The loan accounts of all members and directors during the period February 2004 until date of furnishing such account herein and payments and repayments made in respect of such loan accounts.

4.2 The declaration of all and any dividends made between February 2004 and date hereof and the payment of any such dividends effected whether in species or in cash or otherwise and the identity of each payee in each instance or recipients of such dividend.

4.3 All payments including, but not limited to any distribution in kind made by or on behalf of the First Respondent to each shareholder and each director during the period February 2004 to date whether made by First Respondent or on its behalf and whether out of any bank account or the trust account of attorneys or otherwise.

5. That the First to Fifth, Seventh to Ninth and Thirtieth Respondents are ordered and

directed to furnish the documentation referred to above and account as aforesaid within 30 days of the order of the above Honourable Court in terms of paragraphs 1 to 3 above, whereupon the Respondents who have received dividends, payments or distribution of whatever nature are ordered to effect payment or restoration of one-ninth of dividends, payments or distribution of whatever nature paid to Respondents (be it the value of all dividends paid in specie to members or cash) to the Applicants herein forthwith.

6. First Respondent is ordered to pay the proceeds of 5 above to the Applicants. Applicants are given leave to apply for further relief consequent upon the accounting referred to in 5 above.

7. That the First Respondent be ordered to pay the costs of the application, including the costs of two counsel and that any other Respondents opposing the application be ordered to pay the cost of the application jointly and severally with First Respondent.'

25]No relief was sought against the various family trusts, cited through their trustees as the tenth to the twenty-seventh respondents, nor against the twenty-eighth and the twenty-ninth respondents. All these respondents abided the decision of the high court.

The judgment in the high court

26]The respondents opposed the application on two grounds: first, they contended that the applicant's right to claim rectification of the register in terms of s 115 of the Act had prescribed, and second (and in any event) that the delay in bringing the application was such that, in the exercise of the discretion vested in it by s 115, the court would be justified in refusing the relief sought.

27]The relevant part of s 115 of the Act provides as follows –

'**Rectification of register of members** – (1) If –

> *(a)* the name of any person is, without sufficient cause, entered into or omitted from the register of members of a company . . .

the person concerned or the company or any member of the company, may apply to the Court for rectification of the register.

(2) The application may be made in accordance with the rules of Court or in such other manner as the Court may direct, and the Court may either refuse it or may order rectification of the register and payment by the company, or by any director or officer of the company, of any damages sustained by any person concerned.

(3) On any application under this section the Court may decide any question relating to

the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for the rectification of the register.'

28]In response to the prescription point, the high court expressed the view that s 115 of the Act creates a statutory right which is not a 'debt' within the meaning of that expression in Chapter III of the Prescription Act 68 of 1969 and that there can be no extinction of such right by prescription.[8] As regards s 115, the high court held that this section vested in the court a wide discretion which is to be exercised according to the circumstances of each case. It followed that the illegality of the share transfers in this case did not automatically lead to an order in terms of s 115 in the appellants' favour. Undue delay is one of the factors which a court will take into account in the exercise of its discretion under s 115. In this case, before the removal of the first set of executors, there had been discussions with other members of the company about the role the estate would play in the development. While it was so that the papers do not make it clear why they were requested to make the financial contribution required of them at that stage, there is no evidence that any active steps were taken to obtain clarity in this regard.

29]The high court pointed out that the second set of executors knew, by 20 October 2004 at the latest, that the deceased's shares in the company had been transferred to the remaining shareholders and how this had come to pass. However, after an initial flurry of activity in October 2004, the second set of executors did nothing until April 2005 when, in response to the tender of a cheque in respect of the deceased's loan account and shares, they indicated that they intended to 'pursue the matter'. This was not done: no effective steps were taken by the executors to seek rectification of the register of members, nor to obtain advice about this for approximately four years. In fact, it was only after the appointment of the third set of executors in December 2008 that requests were made to inspect and copy the company's register of members and transfer register. These requests coincided with the sale (at a profit) of the property to

8 J A Kunst, P Delport & Q Vorster (eds) *Henochsberg on the Companies Act* 5ed (1994, with loose-leaf updates) Volume 1 Service Issue 25 at 222-222(1). As the high court did not regard this issue as being decisive of the matter, it did not deal with it any further.

the Public Investment Corporation in early 2009. Even then, it took a further nine months for the application to be launched in November 2009.

30]In dismissing the application with costs, including the costs of two counsel, the high court stated that –

'During this time the remaining members conceived a new development, obtained a financier, incurred liabilities on behalf of the company, entered into suretyships and brought the development to fruition. They did so without any contribution, financial or otherwise, from the deceased's estate. They had invited the estate to participate without receiving any answer; they had disclosed to the executors what they had done with the deceased's shares; and had been threatened that matters would be pursued.

More than five years passed without any steps being taken to alter the membership of the company by the deceased estate. The development was initially not a financial success, and only after the sale to the Public Interest Corporation, when a return on their investment had been obtained, were the members of the company faced with this claim.

. . . In exercising the discretion vested in the Court I do not think that fairness and justice demand that I should grant the order sought by the applicants.'

Conclusions

31]During the course of the hearing before this court, counsel for the appellants informed us that he was moving for only para 3 of the relief claimed in the notice of motion.[9] In other words, the only relief claimed was the rectification of the company's register in terms of s 115 of the Act.[10] Counsel for the respondents, on the other hand, contended that the appellants' 'right to recover the shares' is a 'debt' as envisaged in Chapter III of the Prescription Act; that the three year period of prescription in respect of this right[11] had commenced running before or on 20 October 2004,[12] and that the right had been extinguished by prescription long before the application was launched in the court below. This being so, it was contended that, as the appellants cannot establish that they are 'entitled' to the shares, there is no basis on which they can claim rectification of the register

9 See para 24 above.

10 The full text of which is set out in para 27 above.

11 Section 11*(d)* of the Prescription Act.

12 By which date, at the latest, the appellants had knowledge of the identity of the debtor and the facts from which the debt arose, or could have acquired such knowledge by the exercise of reasonable care, as required by s 12(3) of the Prescription Act.

of members.

32]In argument before the high court, the respondents conceded that the transfer of shares from the deceased estate to the remaining shareholders of the company was unlawful and invalid, despite their earlier position in their answering affidavit, where they had relied on the provisions of the draft shareholders' agreement to defend the validity of the share transfers. The court below recorded that it was common cause that the disputed shares were invalidly transferred from the name of the deceased into the names of the other shareholders 'at least on the basis that the share transfer documents were not signed in the manner prescribed in the articles of the company'.

33]In my view, the reason for the invalidity of the purported share transfers goes much further than this. A share is a collection of personal rights which is transferred by cession. In the words of Howie JA in *Botha v Fick* in respect of the transfer of shares: [13]

'1. Blote *consensus* is voldoende om sessie daar te stel.
2. Sessie geskied deur middel van 'n oordragsooreenskoms wat sal saamval met, of voorafgegaan word deur, 'n *justa causa*. Die *justa causa* kan 'n verbintenisskeppende ooreenkoms wees.'[14]

In this case, the purported transfer of the shares did not comply with either of these requirements. There was no contractual or other basis (*justa causa*) for the purported transfer. Neither was there any intention on the part of the executors of the deceased estate to relinquish or pass title to the disputed shares to the remaining shareholders or to anyone else.

34]In terms of the Articles of Association of the company, '[t]he executor of the estate of a deceased sole holder of a share shall be the only person recognised by the company as having any title to the share'. As justification for the purported share transfers, the respondents initially relied on the shareholders' resolution dated 16 September 2004 and the subsequent resolution adopted by the company's board of directors on 20 October 2004. However, at the time of both resolutions, and to the knowledge of the remaining shareholders, the

13 *Botha v Fick* 1995 (2) SA 750 (A) at 778G-779B.

14 '1. Mere consensus is sufficient to constitute cession. 2. Cession takes place by mean of a transfer agreement which will coincide with, or be preceded by, a *justa causa*. The *justa causa* can be an obligationary agreement.' (My translation.) See also *Jeffrey v Pollak and Freemantle* 1938 AD 1 at 22.

deceased estate was unrepresented as the position of executor was temporarily vacant.[15] In fact and in law, no notice was given to the deceased estate. The only other basis on which a transfer of shares could have been compelled by the respondents would have been by an approach to court on a basis recognised in law. This is a further reason why the two resolutions were invalid. Thus, although the purported share transfers had been registered in the company's register of members, the court is 'entitled to go behind the register to ascertain the identity of the true owner'.[16]

35]This puts paid to the respondents' submission to the effect that the appellants' 'right to recover the shares' had prescribed. The deceased estate (or, rather, its executors) had never ceased to be the owner of the disputed shares. As dominium remained vested in them, there was no need for them to claim 'recovery' of these shares. All that they needed was to have that ownership reflected in the company's register of members.

36]This brings me to the appellants' claim, under s 115 of the Act, for the rectification of the company's register of members so as to reflect the executors of the deceased estate as the holders of 444 shares and one-ninth of four shares in the company. I agree with the view of the high court[17] that s 115 creates a statutory right to apply to the court for the exercise by it of a statutory power; such right is not a 'debt' within the meaning of that expression in Chapter III of the Prescription Act and there can be no extinction of such right by prescription.

37]Section 115 is set out in para 27 above. It has been said that 'the Court's jurisdiction under this section is unlimited; it has a discretion in the circumstances of each case'.[18] The court is not, however, obliged to rectify the register whenever it is shown that the name of a person has, without sufficient cause, been omitted from the register or entered therein:

'The power given to the Court under the section is a discretionary one: Section 115 provides that the Court may either refuse the application or may order rectification of

15 As indicated above, the first set of executors was removed from office on 2 June 2004 and the second set of executors only appointed on 28 September 2004.

16 See *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 970H-971A.

17 Based on the views expressed in *Henochsberg on the Companies Act* above fn 8 at 222-222(1).

18 *Henochsberg on the Companies Act* above fn 8 Service Issue 33 at 220(1).

the register . . . .

"When the Court entertains the application it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition.'' *Halsbury* [*Laws of England* 4 ed vol 7 art 308].'[19]

38]On behalf of the respondents, it was contended that the discretion vested in the court by s 115 is a 'discretion in the narrow or strict sense' and that an appellate court can only interfere in the exercise of such discretion in limited circumstances; for example, if it is shown that the court a quo has misdirected itself by taking irrelevant considerations into account; that it has exercised its discretion for no substantial reason; that the discretion was not exercised judicially or was exercised based on a wrong appreciation of the facts or wrong principles of law.[20] Counsel for the appellants disagreed, submitting that the discretion is one in 'the broad sense' and that this court's powers of interference are not limited in this way.

39]The distinction between the two categories of discretionary power was drawn by EM Grosskopf JA in *Media Workers Association of South Africa & others v Press Corporation of South Africa ('Perskor')*[21] and *Knox D'Arcy Ltd & others v Jamieson & others.*[22] The essence of 'a discretion in the narrow or strict sense' involves a choice between two or more different, but equally permissible alternatives, while 'a discretion in the broad sense' means no more than a power to have regard to a number of disparate and incommensurable features in arriving at a conclusion. It is only when the court exercises a discretion in the narrow or strict sense that an appeal court's powers of interference are said to be limited. With regard to the exercise of a discretion in the broad sense, there is no reason why the powers of an appeal court should be so restricted. Since these matters can be determined equally appropriately by an appeal court, the latter may substitute its own discretion for that of the trial court if it differs from such court on the merits and may make the order which it deems just.[23]

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19 *Bauermeister v CC Bauermeister (Pty) Ltd* 1981 (1) SA 274 (W) at 277F-H.

20 *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) para 19; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) paras 9-10. See also *Ex Parte Neethling & others* 1951 (4) SA 331 (A) at 335D-E.

21 *Media Workers Association of South Africa & others v Press Corporation of South Africa ('Perskor')* 1992 (4) SA 791 (A) at 796H-I and 800C-J.

22 *Knox D'Arcy Ltd & others v Jamieson & others* 1996 (4) SA 348 (A) at 361G-I.

23 See also *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) paras 16-17.

40]As indicated above,[24] the court's jurisdiction under s 115 of the Act has been described as unlimited and the exercise of its discretion based on what equity requires. So too, in *Botha v Fick,*[25] Howie JA stated that –

'Die Hof het 'n wye diskresie by 'n aansoek ingevolge hierdie artikel [s 115] om toe te sien dat billikheid en geregtigheid geskied. [26] En dit is "to make it reflect the state of affairs which the appellant is entitled to claim that it ought to reflect" (*Orr NO and Others v Hill* 1929 TPD 885 te 892) en, soos dit in die saak van *In re The Contributories of the Rosemount Gold Mining Syndicate in Liquidation* 1905 TH 169 te 188 gestel is,

"to fix with the obligations of membership those persons and those persons only upon whom such obligations should justly and equitably rest".'

41]In determining whether to grant or refuse an application for rectification, the court makes a judgment in the light of all the relevant considerations. As with s 344*(h)* of the Act, which provides that '[a] company may be wound up by the Court if – *(h)* it appears to the Court that it is just and equitable that the company should be wound up', there is nothing about the power conferred by s 115 of the Act which results in the court of first instance having any special advantage that would enable it to exercise the power any more appropriately than a court of appeal. The power is one that the court of appeal is in as good a position as the court of first instance to exercise.[27] That being so, and bearing in mind the equitable nature of the court's discretion in terms of s 115, this discretion can rightfully be described as a discretion in the broad sense. This court is therefore empowered to re-examine all the relevant material and, if satisfied that the discretion has not been appropriately exercised, to substitute its own opinion for that of the court of first instance. It is not necessary to show that the exercise of its discretion by the court below was flawed in one of the respects mentioned in para 38 above.

42]In declining to rectify the company's register of members, Koen AJ relied almost exclusively on what he perceived to be the undue delay by the

24 Para 37.

25 Footnote 13, at 780C-D.

26 'The Court has a wide discretion in an application in terms of this section to ensure that fairness and justice prevail.' (My translation.)

27 *Mahomed v Kazi's Agencies (Pty) Ltd & others* 1949 (1) SA 1162 (N) at 1167-1169; *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd* 1989 (4) SA 31 (T) at 40A-41B and 44D-45B. See also *mv Achilleus v Thai United Insurance Co Ltd & others* 1992 (1) SA 324 (N) at 335C-D.

appellants in bringing the application in terms of s 115.[28] He relied in this regard on *Verrin Trust & Finance Corporation (Pty) Ltd v Zeeland House (Pty) Ltd & others,*[29] in which Corbett J stated the following –

'The jurisdiction which the court exercises under sec 36 [the equivalent of s 115] is a discretionary one and an applicant under the section is not entitled to an order *ex debito justitiae* . . . [T]he English Courts have held that an application for rectification must be made promptly and that undue delay may deprive an applicant of his remedy . . . This rule was adopted by Vieyra, J in *Pretorius and Another v Natal South Sea Investment Trust Ltd (under judicial management)*, 1965 (3) SA 410 (W) at pp. 420-2).'

43]While delay is of course one of the factors to be taken into consideration, there are other aspects of this case that bear emphasis. The respondents' complaint was that the remaining shareholders had carried the risk of total failure of the Vangate Mall project whilst neither the deceased nor the executors of his estate carried any risk by making a contribution towards the deposit which was payable by the company to the Cape Town City Council for the acquisition of the development land, or to the later amounts required to be raised from the shareholders. It is clear from the 'auditor's valuation' that the deposit was indeed funded by shareholders' loans. Although it is common cause that the deceased did not contribute towards this deposit, there was nothing in the papers to indicate what had been done to call for this deposit (eg a shareholders' resolution or the like). Nor was there any clarity about the basis of calculation of each shareholder's initial monetary contribution, more particularly why the deceased's asserted contribution appeared to be significantly smaller than that of the other shareholders.

44]As regards the later amounts called for from the deceased estate, it has already been stated[30] that, because of the intervention of Zenprop and thereafter Barclays Bank, it would appear that the other shareholders did *not* in fact make monetary contributions towards the payment of the balance of the purchase price of the land. And, while the other shareholders apparently stood surety in favour of Barclays Bank to the tune of R2 million each, there is nothing to show that the deceased estate (even if it *was* represented by executors at the

28 See paras 28-29 above.

29 *Verrin Trust & Finance Corporation (Pty) Ltd v Zeeland House (Pty) Ltd & others* 1973 (4) SA 1 (C) at 10C-H.

30 See para 12 above.

relevant time) was ever called upon to furnish a suretyship. This notwithstanding, in an attempt to justify the 'taking up' of the deceased's shares by the remaining shareholders (and the two resolutions passed in this regard),[31] the respondents alleged that –

'It was necessary to take these steps to give effect to the terms of the deed of sale which the first respondent had with the City of Cape Town. The estate could not co-operate because there was at that time no executor . . . at any rate the estate was not in a position to make any contribution at all; and the beneficiaries in terms of the will of the deceased could not make the required contribution to the purchase price of the land which had to be paid to the City of Cape Town at that time. As shown previously, they were in a state of war with one another. The fact that the deceased estate could not co-operate to keep the project on track, surely also meant that it would and could not stand surety in favour of Barclays Bank which financed the development. It was therefore crucial that the remaining members had to take up the shares of the deceased in terms of the shareholders' agreement.'

45]It was never the respondents' case that some form of sanction existed whereby a shareholder could be forced to forfeit his shares or involuntarily transfer them if he or she failed to contribute loan account capital or was unable to stand surety for the company. In any event, self-help is not countenanced in our law. As pointed out above, the reliance on the draft shareholders' agreement as a valid and binding document was later abandoned by the respondents. In view hereof, both the shareholders' resolution of 16 September 2004, which relied on the shareholders' agreement, and the directors' resolution of 20 September 2004, which purportedly gave effect to the shareholders' resolution, were invalid and ineffective.

46]Another important point is that the 'valuation' at which the remaining shareholders purported to acquire the disputed shares was (even on the basis of the unsigned shareholders' agreement) not a proper valuation. Although dated 10 September 2004, it valued the shares at the date of death of the deceased (21 October 2002), viz at a time when the company was technically insolvent and the development project 'was to all intents and purposes dead in the water'. Because the cheque in respect of the deceased's loan account and the value of his shares, with interest, was returned to the company's attorneys,

31 See para 14 above.

the 'expropriation' of the deceased shares took place without any compensation.

47]The deceased was one of the founding members of the company and was described as the 'pioneer' of the development at the 'turning of the soil' ceremony in 2004. Apart from the letters to Ms Parker dated 6 May 2004 and 23 June 2004,[32] the deceased estate was not given any prior notice of the purported transfer of shares from the deceased estate to the remaining shareholders. In fact, at the time of passing of the two resolutions in September 2004, the deceased estate was unrepresented as the position of executor was vacant, and hence no notice of the relevant meetings *could* have been given to the deceased estate.

48]The remaining shareholders thereafter received various indications that the executors of the deceased estate wished to retain the estate's shareholding in the company. When Messrs Holt and Kajee were appointed as executors on 28 September 2004, they were confronted with a *fait accompli*, namely the deprivation of the shareholding of the estate. However, on 20 October 2004, Mr Holt wrote to the attorneys acting for the company, stating that 'the heirs want to retain their shares in' the company. Instead of this alerting the remaining shareholders to potential problems with the purported share transfer, their attorney responded by stating simply that the deceased was not a shareholder in the company. The same applies to the return of the abovementioned cheque by the executors to the company's attorneys.[33] If the remaining members had taken the trouble to properly investigate the position of the second set of executors, they would have had ample opportunity to reverse the 2004 decisions, taken in the absence of representation on the part of the estate, before the end of 2004. This was when the balance of the purchase price was apparently due, some three months after the appointment of the second set of executors.

49]It is true that the executors of the deceased estate took no further action in respect of the share transfers until the appointment of the third set of executors on 12 December 2008. This delay was the main reason why the high court

32 See paras 10-11 above.

33 See paras 18 and 46 above.

refused the application for rectification. However, when weighed up against the manner in which the remaining shareholders purported to transfer the deceased's shares to themselves and the other considerations set out above, I am of the view that justice and equity demand that the register of members be rectified in the manner required by the appellants. What the deceased's true entitlement is in respect of his restored shareholding is not a matter which we have to decide. So too, we do not have to deal with questions such as whether there were other company liabilities that had been borne by shareholders and the effect of accumulated losses over a sustained period vis-à-vis final profits.

50]The relief claimed in para 3 of the notice of motion seeks to direct the 'First to Ninth and Thirtieth Respondents' to rectify the company's register of members with effect from 16 August 2004. Even though the respondents indicated that this date was a mistake as the relevant directors' resolution was taken only on 20 September 2004, the date of the transfers as reflected in the register of members is 16 August 2004 and it is these and subsequent entries which need to be rectified. It is therefore the latter date which should appear in the order made by this court. Moreover, it should be the company (the first respondent) that is directed to rectify the register, not also the second to ninth and thirtieth respondents who, it would seem, are themselves no longer registered as members.

51]As regards costs, counsel for the respondents contended that, as the appellants had limited the relief sought by them only during the hearing before this court, this should, were the appellants to succeed, have an effect on the costs order. Counsel pointed out that the relief originally sought was very far-reaching and also involved the question of title to the disputed shares as well as comprehensive consequential relief. This may well be so, but the respondents' arguments were based on the premise that 'ownership' of the shares passed when the deceased's shares were 'taken up' by the remaining shareholders and that the appellants' right to recover the shares had prescribed. Counsel for the respondents submitted in their heads of argument that the question of title to the shares is interlinked with the question of whether the register should be rectified and that this court should find that the claim for rectification had fallen away as the claim for the shares had clearly prescribed. Both these aspects have been dealt with in this judgment. This being so, I see no virtue in making only a partial

costs order in favour of the appellants.

52]The following order is therefore made:

1. The appeal succeeds with costs, including the costs of two counsel.
2. The order of the high court is set aside and substituted with the following:

'(a) The first respondent is directed to rectify its register of members –

(i) by deleting the transfers of shares registered on 16 August 2004 from Cassiem Ebrahim Gaffoor to the second to fifth respondents, the seventh to ninth respondents and Mr Rauf Khan, and all subsequent transfers of those shares to other persons or entities; and

(ii) by registering the deceased estate of the late Cassiem Ebrahim Gaffoor, as represented by the applicants in their capacity as executors, as shareholder in respect of 444 and one-ninth of four shares in the first respondent with effect from 16 August 2004.

(b) The first to fifth respondents, the seventh to ninth respondents, the sixth, eighteenth and nineteenth respondents in their capacity as executors of the estate late Rauf Khan and the thirtieth respondent are ordered to pay the costs of the application, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.'

B J VAN HEERDEN
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	L KUSCHKE SC Instructed by Shepstone & Wylie Attorneys, Cape Town Honey and Partners Inc, Bloemfontein
RESPONDENTS:	Z F JOUBERT SC (with him M VERSTER) Instructed by M Z Barday & Associates, Athlone Hill McHardy & Herbst Inc, Bloemfontein