



**THE SUPREME COURT OF APPEAL  
REPUBLIC OF SOUTH AFRICA**

**MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

**FROM** The Registrar, Supreme Court of Appeal  
**DATE** 30 March 2012  
**STATUS** Immediate

***Please note that the media summary is for the benefit of the media and does not form part of the judgment.***

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

**Media Statement**

Today the Supreme Court of Appeal (SCA) delivered judgment upholding the appeal against an order of the Western Cape High Court, Cape Town, refusing an application by the executors of a deceased estate (the appellants) for rectification of the register of members so as to reinstate the shareholding of the deceased estate.

The question on appeal was whether, in the given circumstances, an alteration to the register of members 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, is effective.

The facts and history of this matter can be summarised as follows:

During the 1990s a group of nine people, including the deceased, identified the potential for the development of what was then the Athlone Golf Course. They became known as the Athlone Business Syndicate (ABS). They decided to submit a proposal and formed a company, Vangates Investments (Pty) Ltd (the first respondent), in order to bid for a tender from the City of Cape Town for the development of the land. Each of the nine founding members held 444 shares and one-ninth of four shares held by the ninth respondent as nominee. Their bid was successful but, despite having been called upon to do so, the deceased did not contribute his share of the deposit due on the purchase of the land from the City of Cape Town. From the outset, the proposed development was beset with problems and, by the time the deceased passed away, the project appeared to be dead in the water. The company however decided not to abandon its plans to pursue the development and ultimately found a financier, Zenprop, which had expertise in property development and management.

The first set of executors of the deceased estate was appointed but the winding up did not progress smoothly. Numerous problems arose between the family members of the deceased and the executors. The Master ultimately removed the first set of executors. Despite

discussions, the deceased estate did not contribute its share of the balance of the purchase price of the land.

The Master had in the meanwhile not appointed a new 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. As a result it would appear that the deceased's shares were transferred out of his name and into the names of the eight other shareholders of the company. It was this purported transfer of shares which the appellants contend was invalid and in respect of which they seek rectification of the register of members. This was followed by a shareholders' resolution and a director's resolution to the same effect.

A second set of executors then was appointed by the Master. At a meeting with members of the company, the executors were 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. The executors wrote to the attorneys acting for the company, stating that the heirs wished to retain the shares in the company and asking to be provided with copies of the deceased's share certificates. The response to the letter was that the deceased was not a shareholder of the company.

The second set of executors then resigned as executors and the appellants were appointed as executors. They addressed a letter to the company's auditors requesting inspection and copying of the register of members of the company and the transfer register. They also wrote to the attorneys acting for the company and the remaining shareholders, stating that the deceased was a shareholder in the company and that they were going to pursue this matter of the deceased estate's shareholding.

The SCA held that as, at the time of both resolutions, and to the knowledge of the remaining shareholders, the deceased estate was unrepresented as the position of executor was temporarily vacant. In fact and in law, no notice was given to the deceased estate of the transfer of shares. 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. The decisions to transfer the shares were thus invalid. Thus, although the purported share transfers had been registered in the company's register of members, the court was entitled to go behind the register to ascertain the identity of the true owner.

The SCA found that the deceased estate 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. The court held that its jurisdiction under s 115 of the Companies Act 61 of 1973 to grant an application for rectification of the shareholders' register was unlimited and the exercise of its discretion based on what equity required.

In determining whether to grant or refuse an application for rectification, the court has to make a judgment in the light of all the relevant considerations. 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 was 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.

The SCA was of the view that it had never been 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. Reliance on the draft shareholders' agreement as a valid and binding

document was abandoned by the respondents. In view thereof, the SCA held that the decisions to transfer the shares were invalid and ineffective.

The appeal was subsequently upheld, the order of the court below set aside and replaced with an order directing that the register of members be rectified by deleting the transfers of shares and by registering the deceased estate as shareholder in respect of 444 and one-ninth of four shares in the Company.

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