

SWAZILAND HIGH COURT

SHABANGU STHEMBILE DORAH

Plaintiff

Vs

MDLULI PHATHAPHATHA

1st Respondent

THE REGISTRAR OF COMPANIES

2nd Respondent

NEDBANK OF SWAZILAND

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Civ. Trial No. 10/2002

Coram SAPIRE, CJ

For Plaintiff Mr. B. Magagula

For Defendant Mr. Magongo

JUDGMENT

(13/05/2002)

The applicant has made this application utilising the urgency provisions of the rules and she seeks an order that the first respondent be interdicted from effecting any

2

withdrawals on a certain account conducted by a company Active Distributors (Pty) Limited with Nedbank Mbabane. She also wishes for interdict as far as the third respondent is concerned from allowing any withdrawals on the same account pending finalisation of the action. She also requires an order declaring the Form J filed in respect of Active Distributors (Pty) Limited with the Registrar of Companies who is the 3rd Respondent as null and void and irregular and directing the 3rd respondent to cancel the same in its records. The applicant also seeks the costs against the 1st respondent only.

The applicant together with the first respondent who is, I understand, a Government employee, entered into a business relationship with the intention to trade inter alia with Government Departments. For this purpose they became the co-formers of the company Active Distributors (Pty) Limited. As appears from the Memorandum and Articles of the Company they were the first directors and they were signatories to the founding papers.

The application has become necessary because the first respondent has caused to be filed a document reflecting the resignation of the applicant as a director. The applicant denies that she has ever resigned.

1st Respondent's object was according to the founding papers to enable the 1st respondent and a person nominated by him as a new director to open and operate on a bank account in the company's name. 1st Respondent would then to the exclusion of the applicant operate on this account in order to clear a cheque of which the company was the payee, which had been received from a Government Department.

The actions of the first respondent, as so alleged appear, to be highly irregular.

In his answering affidavit apart from taking technical points, he has very little to say to repudiate or contradict the Applicant's very serious allegations.

His denial that he and the applicant were the founders of the company and its first directors is futile and contradicted by the very founding documents of the company themselves.

He has been able to produce no record of a meeting of directors or other documentary evidence to substantiate his allegation of the applicant's resignation.

3

It is perhaps inappropriate to give relief in a form of a declaration that Form J is null and void. This could require greater powers than this or any other court has. The form J exists but clearly it is not a document to which effect should be given.

A point taken by the respondent is that the account that is sought to be frozen belongs to the company, a legal person distinct from its members comprise it. A company is a distinct person from its members. That does not stop one director from interdicting another director from performing what are in fact irregular acts designed to deprive another shareholder or director from participating in the operations of the company. There is no reason to cite the company itself. The interdict is only sought against the respondent from to prevent him persisting in his irregular conduct. The company is still free to operate on its account through a properly constituted Board of the company, instructing the bank accordingly.

Another point taken by the 1st respondent is that argument would be advanced that the company had not yet issued shares to anyone to enable the applicant to be a shareholder. That would apply with equal force to him. He also would not be a shareholder if there were any substance to this contention. If they have not issued shares, why haven't they? But the issue of a certificate is not necessary to constitute the person as shareholder. I already found that in documents of the company that the applicant is a member of the company and is entitled to the rights and other duties thereof.

The respondent also says that the mere fact the applicant's name appears on the Memorandum and Articles of Association does constitute her a director. This is quite incorrect and when one looks at the founding documents especially the Articles of the company one sees that the applicant is in fact one of the first directors.

The submission that she has no locus standi to approach this court is in view of her obvious interest, without basis in fact or law.

Other technical points were taken but they were even of less ground or foundation than those I have already mentioned.

The order I therefore make is that the first respondent is interdicted from affecting any withdrawals on account number 0240161207 held by Acting Distributors (Pty) Ltd with the 3rd Respondent at the Mbabane Swazi Plaza Branch. I

4

make it quite clear that this does not prevent the company from operating on its account provided that the operation is on the signature of both directors who are the applicant and the first respondent.

I also declare that the applicant is a director of the company, and is to remain registered as such in the records of the 2nd respondent and the person mentioned or substituted for her is declared not to be a director.

The first respondent to pay the costs of this application and as a mark of disapproval of this court of his conduct such costs are to be paid on an attorney and client basis.

I also refer these papers to the relevant head of department so that he may consider whether the 1st respondent's participation in commercial transactions with the Government is in accordance with Rules and Regulations applying to public servants

SAPIRE, CJ