

IN THE HIGH COURT OF SWAZILAND

C. CASE NO.2720/03

In the matter between:

SITHEMBILE DORAH SHABANGU

PLAINTIFF

AND

PHATHAPHATHA MDLULI

1ST DEFENDANT

ACTIVE DISTRIBUTORS (PT) LTD

2nd DEFENDANT

CORAM

K.P. NKAMBULE

FOR PLAINTIFF

B.W. MAGAGULA

FOR DEFENDANTS

PHATHAPHATHA MDLULI

JUDGEMENT 24/6/04

This is an opposed application for summary judgement. The summons commencing action is a claim for an amount of E23,910- being half share of a sum of E47,820- made by second defendant from the sale of lapels (aids awareness pins) to various business and government and non profit organisations.

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It is common cause from the papers filed of record that an agreement was entered into between the parties on or about October 2000 in terms of which it was agreed inter alia, that:

- (i) The plaintiff and defendant embark on a business venture whereby they would supply lapels (aids awareness pins) to various business government and non-profit organisations,
- (ii) The lapels would be acquired at a basic cost of E2-56.
- (iii) The lapels would be sold at a cost of E18.50.
- (iv) The profit made on the lapels would be an amount of E15-94.
- (v) The plaintiff and defendant would share the profits made through the supply of pins on an equal basis.

It was further agreed between the parties that they form a company, the second defendant, of which the plaintiff and the defendant would be directors and 50% subscribers to the memorandum. A banking account was opened in the name of second defendant at the Swaziland Building Society of which both the plaintiff and the defendant were signatories.

According to the plaintiff's particulars of claim on the 28th of August 2001 the first defendant, unilaterally and contrary to the provisions of the Companies Act 7 of 1912, and without notice to the plaintiff, caused the plaintiff's name to be removed from the register of the Registrar of Companies by way of Form J (Annex "SDSZ").

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On the same day (28th August 2001) the first defendant, without notice to plaintiff, caused a certain Theminkosi Mdluli to be appointed as director of the second defendant. The very same Form J was used in opening another account of second defendant at Nedbank. This account excluded the plaintiff as the authorised signatory. This was on the basis of plaintiff's purported resignation as evidence by the fraudulent Form J.

Before this set of events, an order was received from the Aids Crisis Committee in Manzini, which is a government department for 3000 lapels - (as per Annex "SDC4". The value of the order amounted to

E55,500-, which at a profit of E15-94 per lapel would have resulted in a profit of E47,820-. The plaintiff and the defendant as 50% shareholders in second defendant would be entitled to an amount of E23,910- each.

The amount of E55,500- was paid to first defendant by the Aids Crisis Committee. Defendant paid same into the fraudulent bank account held in the name of second defendant at Nedbank.

The first defendant avers that he has a valid defence. He denies the verbal agreement as stated by the plaintiff in the particulars of claim. He alleges that they had entered into an agreement regarding a company known as Phathela Properties (Pty) Ltd.

The first defendant further alleges that the plaintiff is entitled only to certain proceeds where she contributed in finding business. This submission by the first defendant is strange. Attached to the combined summons is the memorandum wherein the plaintiff is clearly reflected as a 50% shareholder.

First defendant does not deny that the amount of E55,000- relating to this transaction was deposited in defendant No.2's account at Nedbank.

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He is however, very economical with the details of this amount - as to how it was deposited in this account instead of the Swaziland Building Society Account.

The question of determination in the instant case is whether by entering in the verbal, agreement as stated above and further confirming the agreement by forming a company, the obligations of 1st defendant, towards plaintiff were discharged.

It is now clear that the applicant with the first respondent entered into a business relationship with the intention of sharing profits at 50% basis. For this purpose they were the founders of the second defendant. This is clear from the Memorandum and the Articles of the company.

In an effort to defraud the plaintiff the first respondent, when he received payment of E55,000- as proceeds from the order on annexure "PM1" decided to file Form J saying plaintiff had resigned and replacing him with a Mr. Mdluli and around those days depositing this cheque of E55,000-. 1st defendant has dismally failed to contradict these serious allegations leveled by the plaintiff against him.

For the foregoing I agree with the plaintiff's representative. I am satisfied that the defendant has no bona-fide defence to the applicant's claim and that the notice of intention to defend was given merely to procrastinate. The judgement will therefore be given against the 1st defendant for payment of the sum of E23,910-00 together with interest thereon a 9% from the date of summons to the date of payment.

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I also order that the applicant be reinstated as a director of the company and is to be reinstated as such in the Registrar of Companies register until lawfully removed through a company resolution.

K.P. NKAMBULE

JUDGE

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