

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO 2712/2006

In the matter between:

SWAZI COMMERCIAL AMADODA

APPLICANT

AND

PHILEMON MKHALIPHI

1st RESPONDENT 2^{ro}

ALBERT MBUYISA KENNETH

RESPONDENT 3rd

NHLEBEYA CELIWE

RESPONDENT 4th

MKHABEJI A YOVI MOTSA

RESPONDENT 5th

RESPONDENT

CORAM

MAMBA J MR

FOR APPLICANT FOR

MASINA MR

RESPONDENTS

NKAMBULE

JUDGEMENT 16th

March, 2007

■ 1;The applicant is the Swazi Commercial Amadoda a voluntary association of commercial persons.

'2 "The respondents are all members of the applicant and are said to be members of an interim Committee of the applicant that was pu: in authority to *inter alia*, call for and oversee the election of new members of

the National Executive Committee which would in turn elect the president, treasurer and secretary to run the day to day operations of the organization. This triumvirate is referred to as the Top Executive Committee.

[3]Elijah Dlamini, who has filed this application on behalf of the applicant is the President of the last Top Executive Committee to have been elected into office and I shall refer to this Committee as the Committee.

[4]The Committee was elected into office in November 2001 and its term of 3 years expired in November 2004. It is common cause that the Committee's term of office was then extended by the National Executive Committee for a period of seven months "in order for them to *inter alia* facilitate the election of new office bearers". It is common cause further that there are no new office bearers to date.

[5]The Respondents have called for a meeting to hold the elections of new office bearers and the applicant, in the form of the Committee has filed this application *inter alia* for an order;

"that the respondents, individually or collectively be restrained from calling and holding a meeting ... for the purposes of holding elections for the Top Executive Committee of the applicant."

[6]The committee alleges that it has the authority to conduct the said elections and states that :

"11.1 The applicant's Top Committee, conscious that the time for electing a new Top Executive Committee had come, and being conscious of the misunderstandings that exist within the organization, reported the misunderstanding and the need for

fresh elections to His Majesty, King Mswati III in His Capacity as patron of the Applicant.

11.2 The King ordered that the applicant should first resolve the misunderstanding which is mainly between the two divisions of shop owners on one hand and the transport owners on the other hand.

11.3 Once unity between the two divisions has been achieved, then the fresh elections for the new Top Executive Committee should be held, so commanded His Majesty, the King.

12. The National executive Committee is currently engaged into the resolution, of the dispute within Applicant's divisions, while it is also preparing for the election for a new Top Execudve Committee."

Tilt is apparent from the above that the Committee contends that it was put into office, indefinitely, by the King, who is the organization's patron, and given the responsibility to unite the applicant with the Swaziland Commercial Amadoda Road Transport Association (SCARTA). The Committee says that it took this instruction from the patron as an mstrucdon to it and not just any other Committee within the "rganization.

S'In terms of the Constitution of the applicant, the King has a right to appoint a person into the National Execudve Committee and currently mere is no such person and the unification of the two bodies has not been achieved.

9 It is further common cause that the members of the applicant, including the Committee and the respondents attended a meeting called

by the applicant's patron in the form of the Swazi National Council. Although it is not clear from the papers filed herein when this meeting took place, it would appear that it was in September 2006 and the Swazi National Council advised "that the applicant could go ahead with its elections as provided for in its Constitution". (Refer to page 59 of Book of Pleadings and also paragraph 15.2 of Elijah Dlamini's replying affidavit).

[10] Each of the two factions, namely the Committee on the one hand and the Respondents on the other, believe that each has, to the exclusion of the other, the right to call for and conduct the elections.

[11] The respondents aver that they are the interim Committee mandated to call and hold such elections. It is not clear how this interim Committee came about and what powers it has within the structure of the applicant. A very faint suggestion on how it came about is contained in paragraph 5 of the 1st respondent's opposing affidavit where he states that the Committee was given time "to put [its] house in order and then facilitate the election of new office bearers ...[but] that never transpired, hence current interim Committee of office bearers."⁷¹

[12] The Committee avers that there is no provision for an interim Committee in the applicant's constitution and the respondents have no mandate or power to call for the elections of office bearers.

[13] There is absolutely no allegation on the papers as to who appointed, elected or installed the respondents into office as an interim Committee to call for and conduct the elections of office bearers. In the absence of a mandate to perform such functions, they may not do so and they are accordingly interdicted and restrained from doing so.

[14]The Committee's term of office was extended till June 2005, with the mandate to facilitate for holding of elections. The Committee has not done so, and their extended period of 7 months in office has lapsed. The Committee is therefore technically not mandated to be in office. By the same token, the organization (applicant) is technically without its Top Executive Committee - the body entrusted with the day to day operations of the applicant. This court has not been asked, in this application to declare who should run the operations of the applicant pending the elections of new office bearers. I shall withhold my opinion on this, more so because the court did not have the benefit of Counsel's submissions on such.

[15]However, article 22 of the applicants Constitution points the way in such matters where there has been a non observance of the provisions of the constitution which non observance may render the applicant "unable to function constimtionally"" The said article provides that ;

"22. Whenever it appears that through inadvertence, negligence or due to any other cause, any of the terms of the constitution have not been observed by the members, officials, and office-bearers or employees of the council and, as a result of such non-observance, the council is unable to function constitutionally in any respect, either wholly or partly, by reason of:-

11.4 The non-existence of its Executive Committee through lapse of time and the failure to elect the successor of the said Executive Committee as required by the constitution.

11.5 Any vacancy in any office which the council is unable at any time to fill by reason of the requirements of this constitution or,

11.6 Any other set of circumstance arising by reason of such non-observance, any office-bearer, official, or member of the council may report the circumstance to the King-in-Council who may, if


he is satisfied that the council but for such non-observance would be capable of functioning and that the majority of members thereof are debtors that it should continue to function.

Issue such directions as to the procedure to be observed in order to enable the council to function, as he may deem desirable, provided that in so doing the King-in-Council shall devise a procedure which shall as nearly as possible, having regard to the circumstances, conform to the provision of this constitution and provided further that any action taken by the King-in-Council in terms hereof shall not prejudice any claim of creditor of the council.

[16]From the above, it is clear that the members of the applicant, collectively or individually have the right and perhaps an obligation to report this non observance of the provisions of the constitution, to the King-in-Council, as this non observance has rendered the organization, through its council, unable to function constitutionally. The parties are advised to take this course.

[17]In summary, the respondents have no mandate to call for and conduct the elections of office bearers of the applicant and they are interdicted and restrained from doing so.

[18]Because of the status of the Committee as office bearers to which I have referred above, I think it would be just and fair that I should, in the exercise of my discretion order that each party should bear its own costs andThat is the order I make.


MAMBA J