

IN THE HIGH COURT OF SWAZILAND

Civil case No. 1914/2004

ROBERT M. MNGOMEZULU

Applicant

And

ROSTER SHONGWE MTHUNZI

1st Respondent 2nd

MNGOMEZULU MAZWI

Respondent 3rd

MNGOMEZULU ALPHA MSUTFU

Respondent 4th

YUMA MNGOMEZULU GCINUMUZI

Respondent 5th

MNGOMEZULU MDUMO FARMERS

Respondent 6th

SWAZILAND DEVELOPMENT AND

Respondent 7th

SAVINGS BANK

Respondent 8th

Respondent

Coram

For the Applicant For

the Respondents

S.B. MAPHALALA - J

MR T. MLANGENI

MR. D. VLZIBUKO

JUDGMENT

1st June 2007

[1] The Applicant has by notice of motion in the long form made an application before this court in the following terms:

1. Declaring that the 1st Respondent has no legal existence and/or was not properly incorporated.
2. Directing the 2nd Respondent to expunge from the Registrar of Companies and from all other related records, all entries that were made to incorporate the 2nd Respondent as a public company;
3. Directing the 4th to 9th Respondents to surrender to the Registrar of Companies the original certificate of incorporation No. 450 of 2002 dated 23rd April 2002 and the original memorandum and Articles of Association in respect of Mdumo Farmers Limited.
4. Directing that costs of this application be payable from the business account and/or the loan account in the name of the 1st Respondent at Swaziland Development and Savings Bank, Matata Branch;
5. Granting such further and/or alternative relief as the Honourable court may deem fit.

[2] The application is founded on the affidavit of the Applicant who has also annexed pertinent documents namely, the Memorandum of Association marked "RM3", a letter from Madlenya Royal Kraal dated 26th October, 1996 marked as "RM1". A judgment of this court of the 9th September 2005 regarding the same parties and the same subject-matter.

[3] The Respondents oppose the granting of the above-cited order except the 2nd and 3rd Respondents who have not filed any opposing affidavits. The Swaziland Development and Savings Bank (Swazi Rank) features prominently as one of the creditors of the 1st Respondent (Mry) intimated to be joined in these proceedings but later withdrew its interest in the litigation. I must also mention that the Respondents in their opposing affidavits also filed of record pertinent annexures being annexure "A" an annual return of a company having a share capital, and forms in terms of Section 26 (2) of Act No. 7 of 1912 and annexure "B" being a water permit renewal.

[4] The facts of the matter are that 7th Respondent is a family business where the Applicant played a very important role in its formation together with his sons and other relatives being 4th to 6th Respondents. The business is centred around the cultivation of sugar cane in the Lubombo region and the Swazi Bank has also played a very important role in this family enterprise as the main financier. However, as time went by things started to go wrong when Applicant launched these proceedings.

[5] The bone of contention is that the 1st Respondent has no legal existence and/or was not properly incorporated and therefore it should be expunged from the Registrar of Companies and from all other related records and all entries that were made to incorporate the 2nd* Respondent as a public company. Further directing the 4th to 6th Respondents to surrender to the Registrar of Companies the original certificate of incorporation No. 450 of 2002 dated 23rd April 2002 and the original Memorandum and Articles of Association in respect of Mdumo Farmers Limited. Furthermore , directing that costs of this application be payable from the business account and/or the loan account in the name of the 1st Respondent at Swaziland Development and Savings Bank, Matata Branch.

[6] On the other hand the Respondents have filed their opposition to the Applicant's claims. The main feature of the defence is about the land in which the sugar cane is grown.

[7] It is further contended for the Respondent that the Registrar of Companies is the only person with the power and authority to register a company. The Registrar is the only person who can withdraw his registration process. In this regard the court was referred to Section 17, 18 and 19 of the Companies Act No. 7 of 1912. Any person aggrieved by a company or its members is entitled to apply for its winding up in accordance with the Companies Act. A company promoter, director, major shareholder and Chairman of the Board who represents to others that his company was lawful and entices potential shareholders to acquire shares in the company cannot later turn around and challenge or deny the legality of the existence of that company or its operation to the detriment of innocent shareholders. The Applicant is estopped from challenging or denying the legality of the existence or operation of his company. In this regard the court was referred to what is stated by the learned authors *L.H. Hoffman and D. T. Zeffert, The South African Law of Evidence, 4th Edition 1988, Butterworths at page 354.*

[8] The Respondents further contends that a party who spotted an error in his company document may apply for an amendment, alteration or rectification of his error. For this legal proposition the court was referred to the legal writers *A.S. Celliers et al, Corporate Law, 2nd Edition, 1992 Butterworths at page 71.*

[9] It appears to me that the Respondents are correct on the two legal authorities cited above that of *Hoffman (supra)* and that of *Celliers (supra)*. On the authority of *Hoffman (supra)* the Applicant is estopped from challenging or denying the legality of the existence or operation of his company. I agree further with the Respondents arguments that a party who spotted an error in his company document may apply for an amendment, alteration or rectification of this error, (see *Celliers (supra)* at page 71). Furthermore, it would appear to me that any person aggrieved by a company or its members is entitled to apply for its winding up in accordance with the provisions of the Companies Act.



S.B. MAPHALALA

[9] In the result, for the afore-
going reasons the application
is dismissed

with costs. —

JUDGE