IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIVIL CASE**

NO.1078/07

In the matter between:

AMOS BUTHELEZI AND **APPLICANTS**

THREE OTHERS
AND

NGWANE PUMPS & IRRIGATION **RESPONDENTS**

(PTY) LTD AND FOUR OTHERS

CORAM **:** **ANNANDALE J**

FOR THE APPLICANTS **MR. O. NZIMA**
[OF NZIMA & ASSOCIATES]

FOR THE 1ST & 3RD **ADV. P. FLYNN**
[INSTRUCTED BY MAPHALALA & COMPANY]

JUDGMENT

24TH JANUARY 2008

[1] This application flows from a dispute about shareholdings in a company that was intended to further the interests of various former employees of Swaziland Railways, following their becoming redundant during a scaling down exercise. The company was to contract with the Railways to perform certain tasks that used to be done by the former employees but their inability to resolve their differences has caused all of them to forfeit the green pastures which they initially envisaged.

[2] The four applicants came to court and obtained an *ex parte* interim order along the lines of their application, save for a costs order. The interim relief remains in existence pending the outcome of this judgment. The order reads:

> " (a) That a rule nisi operating with immediate effect be and is hereby issued returnable on the 20*th April 2007 for the First,*

Second, Third, Fourth and Fifth Respondents to show cause why a final order should not be granted as follows:

(i) That the Fifth Respondent be and is hereby ordered and directed to freeze all accounts belonging to Ngwane Pumps and Irrigation (Pty) Ltd, and especially Current Account Number 207091622.

(ii) That the Second and Third Respondents be and are hereby interdicted and restrained from making withdrawals from accounts belonging to Ngwane Pumps and Irrigation (Pty) Ltd pending finalization of this matter.

(iii) That the assets belonging to Ngwane Pumps and Irrigation (Pty) Ltd be and are hereby attached and an inventory presented before this Honourable Court pending finalization of this matter.

(iv) That the Second and Third Respondents be and are hereby compelled to issue equal shareholding of all directors of the First Respondent company back dated to July 2003, Applicants inclusive.

(v) That prayers (i), (ii), (iii) and (iv) above operates as an interim relief pending finalization of this matter."

[3] The first three Respondents oppose the application whereas the Fourth Respondent, Swaziland Railways (Pty) Ltd has no more interest in the matter than being a former employee of the litigants. The Fifth Respondent, which also has not responded to the matter, holds a banking account of the First Respondent, which account was ordered to be *"frozen"*, or interdicted from being operated.

[4] The issue to decide is whether the interim order should be confirmed or set aside.

[5] Initially, at the hearing of argument on the extended return date, the question of whether the matter would best be decided only after oral evidence was heard by the court, was canvassed with the legal representatives of both parties. The Applicant's attorney was in favour of such a proposition, even though it was the

Applicants which chose to litigate by way of the application procedure. Mr. Nzima stated that there is a factual dispute which should benefit from the hearing of oral evidence in order to decide whether the Applicants are entitled to hold equal shares in the first Respondent's company, or whether each of the Applicants are only entitled to a fourth of 34% of the shares.

[6] Advocate Flynn held an opposite view, not based on the procedure which the Applicants adopted but on the papers on which they rely to support their case. This entails the Memorandum and Articles of Association of Ngwane Pumps and Irrigation (Pty) Ltd (hereafter referred to Ngwane Pumps) as well as the affidavits before court.

[7] An *ex tempore* ruling was made in court to the effect that the matter should be decided on the papers before

court without reverting to the hearing of oral evidence. In hindsight, this was the proper course to deal with the matter. It is trite that Applicants shall stand or fall by their founding affidavits, which in this matter is sufficiently amplified by the Memorandum and Articles of Association, the manifesto of the company involved in the matter, further supplemented by the various affidavits before court.

[8] The Memorandum and Articles before court was filed by the Respondents and not the Applicants, admitted as exhibit "A" by agreement. The original was produced and substituted by a copy thereof.

[9] If only for the sake of recording it, it is noted that despite the interim order which the Applicants obtained *ex parte* without notice to the Respondents, no papers were filed of record to indicate that the banking account of Ngwane Pumps was indeed *"frozen"* by Swazibank.

It remains unknown whether they are indeed aware about the interim order. It also remains unknown whether any assets of Ngwane Pumps were attached. No inventory of such assets was presented to this court, as was ordered.

[10] These aspects were ordered at the behest of the Applicants. If they did not deem it prudent to make the court aware of non-execution of the orders in their favour, it lies with them. No indications exist which point towards any difficulties in this regard, nor of any allegations of depletion of company monies or assets by the Second and Third Respondents.

[11] The remaining issue, which has the result of also determining the interim relief already referred to above, is the question of shareholding.

[12] The Applicants seek to have the Second and Third

Respondents *"compelled to issue equal shareholding of all directors of (Ngwane Pumps), backdated to July 2003, Applicants inclusive."*

[13] The brief background of the matter, which leads to the dispute at hand, is that the four Applicants as well as the Second and Third Respondents were former employees of Swaziland Railways (Pty) Ltd (the Fourth Respondent). All six were retrenched in 2003. Retrenched employees were advised by the Railways that work would be outsourced to companies and that former employees would be empowered if they formed such entities which could be contracted to perform the work which they used to do, through companies which they set up and owned. Such a company, Ngwane Pumps & Irrigation, was already in existence at the time of retrenchment. It was owned by the Second and Third Respondents as well as one Dvuba, the latter not being a former employee.

[14] The aspect of outsourcing work to companies owned by former employees is confirmed in a letter by Swaziland Railway dated the 29th January 2007 (annexure "F", page 25 of the record). Contrary to a statement by the First Applicant (paragraph 12) that *only* former employees were to own such companies, the Railways have it that such companies should be *representative* of former employees.

[15] Whether this aspect was at the forefront at the time that Dvuba stepped out of Ngwane Pumps & Irrigation is academic. Fact is that the company had its capital divided into 100 shares (paragraph 5 of its Memorandum of Association, exhibit "A"). Of the 100 shares, 33 each were subscribed to by the three initial shareholders and directors, being Dvuba and the Second and Third Respondents. This was in March 2002. (See annexure *"MV1"* at page 60 of the record

and the Certificate of Collation in exhibit “A”).

[16] It is common cause that Dvuba was paid out for his 33 shares. It is the further disposal of his shares, as well as the remaining one share which was not taken up initially, which caused the present dispute.

[17] The Applicants state that they bought shares in the company for E11 000 each. Neither payment nor their intention to be shareholders is contested. The Applicants further contend that they would have become directors of the company as well whereas the Respondents state that the shareholders would appoint directors *“as usual”* and in accordance with the company’s articles and the Act.

[18] Prayer (e) of the application seek an order to compel *“…to issue equal shareholding of all directors.”* They do not specifically aver themselves to be directors of

the company, save to refer to it in passing. They also do not ask to be issued with a specific number of shares, jointly or individually, save to say that it must be issued equally, themselves included.

[19] In my view, it requires a reading between the lines to ascertain what is really meant by their prayer for relief, which was granted in the same terms, in addition to a reading of the supporting papers. The inaccuracy and ambiguity of the imprecise pleading does not form the basis of opposition thereto and ultimately it does not determine the outcome of the matter either.

[20] The more important and determinative issue is the consequence of the purchase of shares in the company. The case of the Applicants is that each of the four must be placed on an equal footing, together with the original two shareholders (the Second and Third Respondents), following their purchase of shares after

Dvuba opted out.

[21] In effect, the Applicants want the 100 capitalised and issued shares to be divided between all six shareholders, equally so. The effect of that will be that the Second and Third Respondents must relinquish some of their shares. They disagree with this contention and rely on the absence of such an agreement by themselves, bolstered by the result of Dvuba's departure, which left only his 33 shares as well as the single remaining share to have been available for purchase by the Applicants. The Respondents thus contend that instead of the Applicants each be entitled one sixth of the 100 shares, the four of them paid for and have an entitlement to one quarter of 34 shares.

[22] The Applicants make a bald allegation (paragraph 11 of the founding affidavit) that in July 2003, they held a meeting with the second and third respondents where *"it was actually agreed that all the Applicants herein were going to be Directors and shareholders of the First Respondent."* No claim is laid to a specific number or percentage of shares. The documentation relied upon by the Applicants (i.e. proof of payment and an attorney's letter on behalf of the company) also does not lend support to sustain the claim by the Applicants to shareholding on par with the Second and Third

Respondents.

[23] Instead, the Respondents flatly deny the distribution of shares as claimed. They state (in paragraphs 6.4 and 6.2 of the opposing affidavit):

> " The only shares available for purchase were the 34% shares not held by myself and the Second Respondent. The Second Respondent and myself have never agreed to sell the 66% shares which we took as subscribers." "Each of the subscribers who were issued 33% shares had paid an amount of E10 000. On the 7*th* *July 2003, the Applicants bought a total of 34% shares which was a percentage of shares available for purchase. Each of the four Applicants paid an amount of E11 000. The Second and Third Respondents also made a further contribution to the company of E11 000 each. The Second and Third Respondents have therefore paid an amount of E21 000 each towards the capital of the*

company."

[24] The Respondents went further than this and filed extracts of the minutes of the meeting of shareholders of the company held on the 9th November 2006.

[25] Therein (annexure "MV2", page 61 of the record) it is reflected that the four Applicants be admitted as shareholders (not as directors as well) of the company. Payment for their shares is acknowledged (belatedly so as this was done in 2003). More importantly, it is recorded *"that all the four new shareholders share the 34 unpaid capital of the company."*

[26] Perhaps the Applicants realized the reality of their situation when they state (in paragraph 15 of the founding affidavit) that they each paid E11 000 *"... with the hope that by so paying we became directors and shareholders of the company"* (my emphasis). Their

hope has not yet materialized to the extent that they also have become directors. They blame the Second and Third Respondents of *"fraudulently"* using them *"because we were never put as directors and shareholders of the company"* (paragraph 18), also that they worked *"tirelessly"* but only received salaries but no dividends or shares.

[27] Having regard to the above and also noting that the Applicants have each received letters of redundancy from Ngwane Pumps & Irrigation, it is clear that their purchase of and payment for shares was not diligently expedited. They made payment in 2003 but only received formal confirmation of their accepted shareholding in 2005, with a company resolution taken only in 2006 to admit them as shareholders.

[28] The Applicants are entitled to be issued with the share certificates forthwith, but not also to be declared

directors. Nor do they convince this court to order that the number of shares to each applicant must be on equal footing as with the Second and Third Respondents. On all of the available evidence, and having heard and carefully considered the argument of their attorney, the position is that the four Applicants are jointly entitled to 34% of the shares in the company.

[29] The Applicants also did not show good cause to confirm the restraint on the company's account with Swazibank. There is no evidence of any misuse or abuse of company assets and monies, perpetrated by its directors, that could persuade to hold otherwise. There is also no basis to find impropriety at company meetings, certainly not to sustain an allegation that there is fraudulent intent against the Applicants.

[30] It is for the aforegoing reasons that it be ordered that

the interim relief which was granted on the 29th March 2007 be set aside and that the rule *nisi* thus be discharged.

[31] Concerning costs, it was the initial prayer of the Applicants that costs be awarded on the punitive scale of attorney and own client. I do not deem it proper or justified ordering costs on that basis, even though the shoe is now on the other foot. Costs are ordered against the Applicants on the ordinary gazette scale as per the High Court Rules, which costs shall include costs of counsel for the Respondents, to be taxed under the provisions of Rule 58(6).

J.P. ANNANDALE

Judge