IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 870/12

In the matter between

ASSEMBLIES OF GOD APPLICANT

and

MILDRED CARMICHAEL 1st Respondent
SAKHEPHI MABUZA 2nd Respondent
TREVOR CARMICHAEL 3rd Respondent
AJALIMANE DLAMINI 4th Respondent
CHESTER KHOZA . 5th Respondent

Neutral citation: **Assemblies of God V Mildred Carmichael and others (965/12) [2012] SZHC 114**

Coram: DLAMINI J.

Heard: 22 May 2012

Delivered 4 June 2012

Urgent application – locus *standi in judicio* - directors of a company substituting deceased – procedure determined from the articles of association.

Summary: Pending before this court is an application brought under a certificate of urgency seeking for a restraint order against the 1st Respondent who continues to defy a suspension by conducting church services and running the affairs of the Applicant. 2nd, 3rd, 4th and 5th Respondents are cited by virtue of being in the same committee as 1st Respondent.

[1] The respondent challenged the application by raising a number of issues *viz.* that the matter is not urgent; applicant has no *locus standi;* the application is attended by foreseeable dispute of facts; and that the applicant has dismally failed to establish its case.

[2] Before adjudging the contentions herein, the chronicles of the dispute between the Applicant and the Respondents can be described in the manner set herein. The Applicant and Respondents are members of the same church, Assemblies of God, situate at Siteki. It would appear that since its inception, the church conducted its business as generally expected by the ordinary citizen of this country. The church enjoyed peaceful and undisturbed *possesion* of Applicant under the leadership of one Pastor William Creamer. On the death of Pastor William Creamer, 1st Respondent was ordained to take over the pastoral leadership of Applicant. It is alleged that 1st Respondent however, ''*started usurping authority and did as she pleased without regard to protocol and procedures of the church*'' at paragraph 13 of Applicant's founding affidavit, the consequence of which 1st Respondent and members of her committee were visited with suspension. 1st Respondent, avers Applicant, totally disregards the suspension and continues to conduct herself as the substantive pastor. This has resulted in the present application.

[3] It is of paramount that I adjudicate on the question of *locus standi* as a matter of priority. This is because a finding on *locus standi* will direct the court on whether to proceed on the other issues reflected above as raised by Respondents.

[4] Two factors are attend by the question whether Applicant has the necessary *locus standi in judicio to* institute these proceedings.

[5] Applicant as adduced at paragraph 2 of its founding affidavit is described as;

> ‘‘*the Assemblies of God (PTY)Ltd, a non – profit making company registered in accordance with the company laws of Swaziland*’’

[6] The attached memorandum and articles of association reflect Mr. Anders Berge and Mr. P. R. Munro as directors and shareholders of the applicant as initial directors. It is common cause between the parties in this application that these two directors died long ago. At their time of death there was no resolution to substitute them nor is substitution or cession of their rights to both directorship and shareholder is by virtue of a will is averred.

[7] In their answering affidavit, respondents challenged the applicant on *locus standi.* In addressing this point, applicant filed in their replying affidavit annexure ‘Y’ which is a form J. From J. is in the ordinary cause of events filed with the Registrar of Companies pursuant to a resolution of a company reflecting either a withdrawal, additional or substitution of directors. In *casu,* the Form J application was filed with the Registrar of companies on 23rd April 2012 having signed by the directors on 19th April 2012. Respondents’ counsel submitted that as there was no

resolution taken by the initial directors to be substituted by the new directors, the action of the new directors was *void ab initio*. It was respondents' further contention that the correct procedure to be followed was to approach this court for a *rule nisi* application calling upon any member of the public who may object to file its objection within a reasonable time as determined by the court failing which the new directors will be entitled to register with the Register of companies as applicant's directors. In the absence of such an application and order by this court, the purported new directors cannot in law be held directors of Applicant and therefore, whatever action they take as directors of applicant is of no force and effect.

[8] Similarly, the respondents continue to postulate, the deponent in the applicant's founding affidavit has no authority to depose to the founding affidavit as he can not be held to be the director of applicant.

[9] Applicant's counsel on the other hand advance to the court that as can be deduced from annexure 'X' which was filed on a yearly basis with the Registrar of Companies, the deponent and the new directors as the members of applicant had a right to take resolution on behalf of applicant and subsequently lodge Form J.

[10] It is common cause between the parties herein that applicant is a company registered in term of section 21 of the repealed Company act of 1912 the effect of which it was incorporated not for commercial purpose but for the lawful promotion of religion. This assertion finds support in the applicant's articles of association which reads;

> *'2. The payment of dividends to members be and is hereby prohibited and the company shall apply its profits, if any or either income in promoting its object.''*

[11] The objects of the applicant are highlighted in the memorandum of association viz:

> *(a) 1. To promulgate the gospel of Jesus Christ by scriptural means, recognizing the Word of God as our all sufficient rule and guide.*
>
> *2. To recognize the sovereignty of local Assemblies, the General Conference convenes to promote fellowship and to assist the Assemblies, but not to exercise control over them;*
>
> *3. To collect, solicit and accept funds or subscription which may be required for the Assemblies of God.*

[12] Having ascertained that the applicant is a company, I am inclined to briefly mention just a few attributes of a company which are relevant *in casu.*

[13] It is trite that a company is a *legal persona*, with rights and duties distinctly separate from its members. **Their Lordship's** in **De Beers Consolidated Mines Ltd v Howe 1906 AC 455** wisely informs:

> ''A *company cannot eat or sleep, but it can keep house and do business.''*

[14] It is a further a characteristic of a company to have perpetual succession. Unlike in a partnership, association, firm or trust where death of a member results in the termination of the partnership or member as the case may be, a company continues to exist despite change of directors either by resignation, death or physical incapacity

as it was outline in ***Webb and Co. Ltd v Northern Rifles 1908 TS 462*** *at 465*

''The main characteristics of an universitas, therefore, are the capacity to acquire certain rights as apart from the rights of the individuals forming it, and perpetual succession.''

[15] The next point to be determined is weather the present directors were lawfully appointed into office. ***Ciliers Benade et al, Corporate Law, 2nd ed,*** *at page 115* state as follows:

''A ***director*** *must be appointed to the office by those having the authority to do so. To determine who actual holds this power, it is necessary to turn to the Act and the articles, read with the provisions of any contract relating to the appointment of directors.''*

[16] The article of association as annexed in the Founding Affidavit reflects as follows;

1. The regulation contained in Table A of the Third Schedule of the Swaziland Companies Proclamation (Chapter 178 of the Laws of Swaziland) shall apply to the company except regulation 113-121 inclusive which be and are hereby excluded, and except in so far the regulation in Table A are in any way inconsistent with the provisions of the proclamation in far as associations not for profit are concerned.'

[17] It is trite that the Swaziland Companies Proclamation (Chapter 178 of the Laws of Swaziland) refers to the repealed Companies Act of 1912.

[18] Section 386 of the Companies Act Notice 2009 reads:

> *''Notwithstanding the repeal rules of regulation issued under the repealed Act, shall, to the extent with this Act, continue to be valid unless otherwise revoked under this Act.''*

[19] The rules and the regulations under the repealed Act were incorporated into the 2009 Act. They read as Scheduled 1 Table A..

[20] Rule 8 calls for the company to maintain a register of its members while Rule 33 is to the effect that other general meetings may be held at anytime.

[21] Rule 35 refers to the right of majority of its members to attend and vote whereas Rule 36 attest that the general meeting shall deal *inter alia* with election of directors and with any other business laid before it. We can infer from Rule 37 that general meeting consists of members of Company.

At paragraph 7 of applicant replying affidavit it is averred:

> *''I deny that the applicant was in no position to appoint new directors. It must be mentioned that since the company was incorporated it was run through an executive committee. The list of the committee members would be submitted to the registrar of companies yearly with financial reports. The last such list submitted to the Registrar of Companies is annexed a marked of 'X'.''*

[22] The applicant continues to traverse that the only surviving spouse of the executive committee is one Jessie Creamer who due to her age

(91) caused the members of the *'church'* to hold a meeting wherein new directors were appointed .

[23] At *para 11* hereof it is clear from the memorandum of association that members of the '*church'* refers to members of the applicant. In that regard it is clear that the members of the applicant elected the present directors in to office as per the articles of association as regulated by the Schedule of the Companies Act 2009.

[24] From the foregoing, I hold that the present directors were lawfully elected into office and therefore hold office *de jure* and *fortiori* have *locus standi in judicio.*

[25] Suppose I misdirect myself on this finding, **Caney J in R v Mall and others 1954 (4) SA 607** at page 624 held that where a person occupying the office of a director was irregularly appointed or his appointment was defective, such person does not lose the directorship but becomes a *de facto* director and his acts while in that office are binding.

[26] In the circumstances, I hold that the deponent and the other directors have *locus standi in judicio* by reason of their either *de factor* or *de jure* directorship.

[27] The submission therefore that the applicant has no *locus standi* must fail in the circumstance.

[28] The Respondent submitted that the matter was not urgent. **Coetzee J.** in **Luna Meubel Bervaardigers v Makin & Another 1977 (4) S.A 135** at 136 states on urgency as follows:

''*urgency involves mainly the abridgement of times prescribed by the Rules and, secondarily, the departure from established filing and sitting times of the Court.*''

[29] At page 137 the learned judge in his wisdom proceeds:

''*Practitioners should carefully analyse the facts of each case to determine, for purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements ...will not do and an applicant must make out a case from the founding affidavit to justify the particular extent to the departure from the norm....*''

[30] In support of urgency, the applicant asserts at its paragraph 31 of the founding affidavit as follows.

''*I submit this matter is urgent by reason that the Respondents are on suspension and yet they continue to forcefully take charge of the administration of the affairs of Applicant. Secondly, a section of the members of the church are no longer able to worship freely and safely due to her violent conduct to those who support the decision of the Assemblies of Gods Association to put her on suspension. Some have actually stopped attending church services. It is urgent that she be interdicted from doing what she does since it is unlawful and can be best described as self-help which is not allowed in law. If she was not happy with her suspension, she should have followed the*

lawful means of reviewing or appealing her suspension instead of resorting to violence.''

[31] It is common cause between the parties that 1st Respondent locked out the dependent and others, changing the locks. 1st Respondent justifies her action however in her answering affidavit. This own its own is a clear recipe for violence and the courts must attend to it as a matter of urgency in order to avert any loss of life whose resultant is not only irreparable but irreversible harm. In this regard, I hold that the matter is urgent.

[32] Respondents further inform the court that Applicant's application is attended by serious disputes of facts, which ought to have been foreseeable. I agree with Respondents in this regard. For instance Respondents denies ever hijacking the pulpit. For the reason however that the application should be treated with urgency, I order the parties hereto fix a trial date which is not so distant.

[33] The question of cost is reserved.

M. DLAMINI

JUDGE OF THE HIGH COURT

For the Applicant	**:**	**Mr S. Khoza**
For Respondent	**:**	**Mr. M .Sibandze**