



IN THE HIGH COURT OF SWAZILAND

RULING

Case No. 394/2014

In the matter between

**ART SIGNS (PTY) LIMITED
NOMATHEMBA SIMELANE**

**1st Applicant
2nd Applicant**

and

**NKOSINATHI SIMELANE
THE MASTER OF THE HIGH COURT
THE ATTORNEY GENERAL**

**1st Respondent
2nd Respondent
3rd Respondent**

Neutral citation: *Art Signs (Pty) Limited & Another v Nkosinathi Simelane & 2 Others* (394/2014) [2014] SZHC 91 (23 April 2014)

Coram: MAMBA J

Heard: 27th March, 2014

Delivered: 23rd April, 2014

[1] Company Law – Legal persona of a Company – Company exists independent of its shareholders and directors. Directors are the rightful persons to manage and direct the operations of a Company unless such Company is under liquidation or judicial management.

[2] Civil Law and Procedure – Upon the death of one of the directors and shareholders – Master of the High Court authorizing withdrawals of monies from Company Account by family

members of the deceased director to the exclusion of the surviving director and shareholder. This is prima facie irregular.

[3] Civil Law and Procedure – Applicants failing to cite and join persons who made request for withdrawals of monies from Company Account. This is a matter of non-joinder. The Court has a judicial discretion to order the joinder of such persons or dismiss the application for lack of joinder. Court exercising its discretion and ordering the joinder of the parties not joined.

[1] Simon Mandlenkhosi Simelane died on 23 January 2014. He is survived *inter alia*, by two of his wives, namely Sibongile Simelane and Ncamsile Simelane and several of his children. Amongst his children are the second applicant and first respondent herein.

[2] At the time of his death, the deceased was a director and shareholder of the first applicant, which is a company duly registered with limited liabilities in terms of the company laws of Swaziland. The first applicant (hereinafter referred to as the Company) was incorporated in 1978. Whilst there have over the years been changes in the directorship and shareholding of the first applicant, there has never been a time when the deceased was not a director and shareholder of the company. It is common cause that he has always been the mind, brains, soul and face of the company.

- [3] The company operates a bank account in its own name with Nedbank, Matsapha branch, where it has its principal place of business. The deceased was the sole signatory to that bank account.
- [4] The second applicant is employed by the Swaziland Civil Aviation Authority and is based at the newly opened KMIII International Airport at Sikhuphe. Although she claims to be a director and shareholder of the company, she readily admits that she was not involved in the day to day operations of the company. The deceased was together with several employees of the company.
- [5] The first respondent is employed by the Swaziland Government as a school teacher at the Swazi National High School in Matsapha and was never at anytime a shareholder, employee or director of the company.
- [6] After the death of the deceased, his widows approached the office of the second respondent with a request that that office should authorize the bank aforesaid to release certain specified sums of monies from the company's

bank account to them. These included money for the burial of the deceased, wages and salaries of employees of the company, payment of debts of the company, purchasing of working material for the company and general household necessities or maintenance for the widows. There were at least two of such requests made and these were approved in writing by the second respondent.

[7] On each of the said approvals, the second respondent sent written instructions to the bank to release the required money to the first respondent who was in turn expected to account to the second respondent in this regard. It is common cause that part of these withdrawals in the sum of E6000.00 was at one stage given to the second applicant by the first respondent.

[8] Following these withdrawals, the applicants successfully approached this Court *ex parte* and on an urgent basis on 14 March 2014 for an order in the following terms:

‘1. That a *rule nisi* is hereby issued calling upon the Respondents to show cause, on the 28th day of March, 2014, why the following order should not be made final:

- 1.1 Interdicting and restraining the 1st Respondent from exercising any directorship and/or managerial authority over the 1st Applicant on and off, the Applicant's place of business situate on Plot 800, First Street, Matsapha Industrial Sites, in the Manzini District, Kingdom of Swaziland;
- 1.2 Interdicting and restraining the 1st Respondent from transacting and/or holding out himself to be a member of the 1st Applicant;
- 1.3 Interdicting and restraining the 1st Respondent or anyone who acts on his authority from engaging in any dealings for and on behalf of the 1st Applicant;
- 1.4 Interdicting and restraining the 1st Respondent from making withdrawals of monies held by the 1st Applicant at Nedbank Swaziland Limited, Manzini Branch;
- 1.5 Directing the 1st Respondent to disclose the authority under which he acts when withdrawing monies from the 1st Applicant's bank account and making payments on behalf of the 1st Applicant;
- 1.6 Directing the 1st Respondent to forthwith remit an estimated amount of E72,627.72 (**seventy two thousand six hundred and twenty seven Emalangenis and seventy two cents**) to the 2nd Applicant;

1.7 Directing the 1st Respondent to forthwith handover all the documents and car keys belonging to the 1st Applicant taken unlawfully from the 1st Applicant's place of business on Plot 800, First Street, Matsapha Industrial Sites, in the Manzini District, Kingdom of Swaziland.

Make:	Peugeot 207
Year of Manufacture:	2007
Engine No.	10FKAC0051307
Chassis No.	VF3WM5FYC33871884
Registration No.	DSD 502 AM

1.8 Directing the 1st Respondent to account on the expenditure of the amount of E166,000.00 (one hundred and sixty six thousand emalangen) withdrawn from the 1st Applicants bank account in February, 2014;

1.9 Directing that a Notice to the Public be place in the local newspaper circulating within the Kingdom of Swaziland advising the public that the 1st Respondent has not authority to act for and on behalf of the 1st Applicant.'

[9] The application has been supported by the affidavit of the second applicant in her own right as a shareholder and in her capacity as the only surviving director of the company, she says. The second applicant avers that she has

been sidelined, pushed aside or ignored as a director or shareholder of the company in all the transactions involving the company since the death of the deceased. She argues that the first respondent has unlawfully appointed himself as the caretaker of the company to its prejudice. She fears that all the actions of the first respondent are prejudicial to the solvency or business or economic welfare of the company and her own interest as a shareholder. She also makes the point that she has also bound herself, together with the deceased as surety in respect of some of the obligations undertaken by the company.

- [10] One notes from the prayers or orders sought and obtained by the applicants that there is no order being sought against either the second respondent or the widows of the deceased. All the orders are targeted at the first respondent who, it is alleged, has unlawfully appointed himself as the caretaker of the company. From the outset I find this strange, incongruous and illogical to say the least. The available evidence on the papers before me show, abundantly enough, that the request for the bank withdrawals was made to the second respondent by the widows of the deceased and it was the second respondent who instructed the bank to permit the first respondent to make the said withdrawals. Further, the first respondent is, as per the

instructions of the second respondent, expected to account to the second respondent for such bank withdrawals. The bottom line is that the first respondent is acting on the authority of the second respondent and at the very least, at the behest of the said widows. These people clearly have an interest in the outcome of these proceedings or orders that this court may issue eventually. This interest is both direct and substantial in my judgment. It is not merely a financial or economic interest. It is a legal one. Vide *Meshack Dlamini v Sandile Thwala and 8 others Case No. 3210/2010*, judgment delivered on 30th September 2013 where this court referring with approval to the judgment in the case of *United Watch and Diamond Co. Pty Ltd and others v Disa Hotels Ltd and Another 1972 (4) SA 409 at 415* where Corbett J said:

‘Intervention is closely linked with the matter of joinder, in fact it is often treated as a particular facet of joinder. As was pointed out by Wessels J (as he then was), in *Marais and others v Pongola Sugar Milling Co. and Others 1961 (2) SA 698 (N) at page 702*:

“...Certain principles seem to have become established which govern the matter of joinder, and different principles would seem to apply to different circumstances, depending on whether the court is concerned with the plaintiff’s right to join the parties as defendants, a

defendant's right to demand that parties be joined as co-defendants, the rights of third parties to join either as plaintiffs or defendants, or the court's duty to order the joinder of some other party (as was done in the case of *Home Sites (Pty) Ltd v Senekal 1948 (3) SA 514 (AD)*), or to stay the action until proof is forthcoming that such party has waived his right to be joined as a party, e.g. by filing a consent to be bound by the judgment of the Court (as was done in the case of *Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (AD)*)."

It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is a waiver of the right to be joined (and this right and this duty appeared to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make... .'

[11] The first respondent has challenged or disputed the locus standi of the second applicant to bring this application. First, it is argued that she is not a

director of the company and secondly that even if she is a director, she is not the only surviving director. It is alleged that one Dumsani Simelane is a director of the company. Thirdly, it is submitted by the first respondent that even assuming that the second applicant appears as a director and shareholder of the company, this is only on paper and is in fact a sham. Her apparent involvement in the company was only 'for convenience'. She was never ever involved in the actual decision making of the company and was not salaried.

[12] On the papers before me, the last Form J – which was filed by the deceased in 2009 lists the second applicant as a director of the company. Her first appointment as a director appears to have been made in 2003 from which year the name of Dumsani Simelane does not appear as a director. Prima facie, this establishes her capacity as such director. As to what is meant as a director of convenience, has not been explained to me save that the first respondent says the deceased did it as a tactical ploy to win tenders. This does not say much to me. On the contrary, over and above the information on Form J, the second applicant's name and signature appears in the lease and suretyship agreements signed by the company on 13 January, 2014. For

these reasons, this objection fails. As the only surviving director, she has the capacity or authority to bring this application on behalf of the company.

[13] As a legal persona or entity, it is trite that the company exists independently and separately from its shareholders or directors. Its directors have a fiduciary duty to act in its best interests at all times. It is this fiduciary duty, the second applicant submits, that has prompted her to file this application which application is aimed solely at preserving the assets of the company.

[14] The Company is not under liquidation or management. Because of this fact, the second respondent has, prima facie, no authority to supervise or manage it or give directions on how its finances should be governed or regulated. That role is the preserve of its directors.

[15] The bank withdrawals that have been authorized by the second respondent have not been authorized by the second applicant. These debits, although they may ultimately turn out to have been justified, have not been authorized by the second applicant in her capacity as a director of the Company.

[16] The activities complained of by the applicants are continuing inasmuch as they involve not just the said bank withdrawals but the general operations of the company.

[17] I have already referred to the involvement or direct and substantial interests of the widows in the whole equation herein. They have, however, not been cited in these proceedings. This is a case of non-joinder. The second applicant was fully aware of the involvement of the widows and the second respondent in this case. The applicants were fully aware that the first respondent was acting on the instructions of the widows and the second respondent, but they inexplicably failed to cite the widows or seek any order against the second respondent.

[18] I do not believe, however, that this application should be dismissed for the non-joinder or the lack of any substantive prayer against the second respondent. The nature of the case, moreso because it is substantially a family dispute, demands that all the interested parties herein should be given sufficient time and opportunity to put their side of the story to the Court.

This Court of course has a judicial discretion to either dismiss the application or order that the parties who have not been joined should be joined accordingly. I think that the justice of the case demands the latter course.

[19] For the foregoing reasons, I order that all the papers herein must be served on the widows who are ordered to file their opposing papers, if any, within three days of the service of these papers and this order upon them. The costs of this ruling shall be the costs in the application.

MAMBA J

For Applicants : Ms. Msibi

For first Respondent : Mr. M. Simelane

For second & 3rd Respondents

(abiding the decision of Court) : Attorney General's Office