IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.774/16

In the matter between:

THEMBINKOSI NGCAMPHALALA	**1st**	**Applicant**
FRANCE MATHE	**2nd**	**Applicant**
MORINA NDWANDWE	**3rd**	**Applicant**
LUNGILE SKHOSANA	**4th**	**Applicant**
SIPHO MATSE	**5th**	**Applicant**
BAKHANYILE SHABNGU	**6th**	**Applicant**
THABSILE NTJAKALA	**7th**	**Applicant**
LUNGELO MATSE	**8th**	**Applicant**
vs		
LOMDASHI LIMITED	**1st**	**Respondent**
CLEMENT NGCAMPHALALA	**2nd**	**Respondent**
AMOS SKHOSANA	**3rd**	**Respondent**
NONHLANHLA GAMEDZE	**4th**	**Respondent**
LUNGELO NGCAMPHALALA	**5th**	**Respondent**
ANGELINA SIKHOSANA	**6th**	**Respondent**
BONIFACE SIKHOSANA	**7th**	**Respondent**
VUSI NGCAMPHALALA	**8th**	**Respondent**
SIYABONGA SHABANGU	**9th**	**Respondent**
THULANI NGCAMPHALALA	**10th**	**Respondent**
JOHANNES TSABEDZE	**11th**	**Respondent**
UBOMBO SWAZILAND SUGAR FACILITY	**12th**	**Respondent**
SWAZILAND WATER AND AGRICULTURAL DEVELOPMENT ENTERPRISE (SWADE)	**13th**	**Respondent**

SWAZILANDDEVELOPMENT FINANCE CORPORATION
(FINCORP) 14th Respondent

Neutral citation: ***Thembinkosi Ngcamphalala & 7 Others v Lomdashi Limited & 13 Others (774/16 [2016] SZHC109(1st July 2016)***

Coram: **M. Dlamini J**

Heard: **13th May,2016**

Delivered: **5th July, 2016**

- *Since the days of Adam, no man should be penalised without a hearing*.

Summary: The applicants are challenging their removal from the office of the managing director. The respondents attest that the applicants were removed following a vote of no confidence.

Causa

[1] The applicants aver that five associations dealing in farming of mainly vegetables and sugar cane farming decided to form a company in the name of first respondent. Each association maintained its status but for purposes of business, all rights and duties were ceded to the company (first respondent). First respondent is managed by a board of directors which is in terms of the memorandum of association as the managing director. Applicants aver that each association elects two members who would in turn occupy the office of the managing director in 1st respondent. The applicants, together with 10th respondent who was the Chair, were all

members of the managing director, having been elected by their respective associations.

[2] The managing director decided to suspend the 10th respondent for actions which are not relevant to the case *in casu*. This was the beginning of woes for applicants which culminated to a vote of no confidence and a new managing director in the likes of 2nd to 8threspondents appointed.

Issue

[3] Both Counsel for the parties in the matter have asked that I decide whether the election into office of the current managing director was lawful in terms of first respondent's memorandum of association.

Adjudication

[4] It is common cause that the board convened a meeting of shareholders on the 28th February 2016. The agenda was to table a progress report. From the two sets of affidavits serving before me, it is common cause that the progress report was not adopted. Applicants aver that the reason was due to second respondent destructing the meeting by raising a motion for a vote of no confidence against the board. Respondents on the other hand deposed that the progress report was not adopted because the members present did not form a quorum. What is of significance though from all the parties is that a quorum was not formed on the 28th February 2016. One wonders therefore how any business agenda be it a discussion of a progress report or a motion of no confidence in the absence of a quorum could be carried out. The very first meeting did not justify the parties to engage in any business by reason that shareholders present did not form a quorum. It was irregular therefore to discuss the report with the intention of having it adopted and

also to move a motion for a vote of no confidence when an adequate number of applicant members were in absentia.

[5] Applicants and respondents aver that it is at the meeting of the 28th February, 2016 that a motion to take a vote of no confidence was raised. This meeting of 28th February 2016 was postponed for purposes of voting on a motion that was approved on the 28th of February 2016. As I have already indicated that by reason that a quorum could not be formed in that meeting, no business whatsoever was to take place. It follows therefore that the vote of no confidence which was taken at the last meeting was in law bad by reason that the motion for a vote of no confidence was moved at a wrong forum (28th February, 2016) as there was no quorum formed then. An irregular procedure remains irregular until once specifically attended to.

[6] The memorandum highlights with regards to disqualification of a director:

> *"65. The office of director shall be vacated if the director:-*
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> *(a) ceases to be a director or becomes prohibited from being a director by virtue of any provision of the Act; or*
>
> *(b) without the consent of the company in general meeting holds any other office or profit under the company except that of managing director or manager; or*
>
> *(c) resigns his office by notice in writing to the company and Registrar; or*
>
> *(d) for more than six months is absent without permission of the directors form meetings of directors held during that period; or*
>
> *(e) is directly or indirectly interested in any contract or proposed contract with the company and fails to declare his interest and the nature thereof in the manner required by the Act."*

[7] *In casu*, no reasons were advanced for the removal of the managing directors from office. The memorandum has clearly laid out the circumstances under which a director or managing director may be

removed. As correctly pointed out by Counsel for the applicants, the applicants were ousted without any hearing or charges against them. No report on maladministration was tabled which warranted the meeting of 3rd April 2016 to a vote them out of office. The step taken on 3rd April 2016 to vote applicants out of office is archaic as it has no room in our modern democratic society. Since the days of Adam, no man should be penalised without a hearing. The *ratio* in **President of Bophuthatswana and Another v Segulard 1994 (4) SA 96** at 98 is apposite:

> *"The audi alteram partem rule is a principle of natural justice which promotes fairness by requiring persons exercising statutory powers which affect the rights or property of others to be afforded a hearing before the exercise of such powers. It has existed from antiquity and is today cornerstone of the administrative laws of all civilized countries."*
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> *"The laws of God and man both give the party an opportunity to make his defence if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God Himself did not pass sentence upon Adam before he was called upon to make his defence."*

[8] It follows therefore that as supported by article 65, the applicants ought to have been informed of their charges and the due process of the law followed on disciplinary hearing. Once found guilty, then the matter could be taken up for a vote of on confidence. **Byles J**[1] took the position to the right of hearing further by stating, *"Although there are no positive words in a statute requiring that the party shall be heard yet the justice common law will supply the omission of the legislature."* I see no reason why I should differ from this view in the case at hand.

[9] It is common cause from the papers serving before me that in the appointment of the managing directors each association elects two representatives whose names are submitted to first respondent. As there are five associations, there ought to be ten members with two coming from each association who, together form the managing directors. Respondents

[1] **Cooper v The Board of Works for the Wandsworth District (1863) 143 ER** 414

confirm that in the meeting of 3rd April 2016, where the applicants were voted out of office as managing directors, the meeting continued to vote into office the present interim managing directors with each association voting. I do not think that is what is envisaged by the memorandum.

[10] The spirit of the memorandum is that each association would hold its own meeting for purposes of voting for two members who would become managing directors. It could not have been intended that in a general meeting of all the shareholders voting for the managing directors should take place. The meeting of the 3rd April, 2016 was, if anything, called for a vote of no confidence. It was irregular to add to its agenda that respondents be voted into office. What ought to have happened was that after the vote of no confidence, the meeting ought to have adjourned and each association either directly or through its representative, depending on its constitution, be advised to hold a meeting in their respective places and time for purposes of submitting names to first respondent of the managing director. What transpired on the 3rd April 2016 was bound to result in confusion. It is not surprising therefore that Mzilankatha association found itself without representation. First respondent acted *ultra vires* its mandate by allowing shareholders to elect managing directors in a general meeting on the 3rd April, 2016.

[11] In the totality of the above, I enter the following orders:

1. The elections of 3rd April 2016 are hereby declared null and void.

2. The elections of 3rd April 2016 which led to second, third, fourth, fifth, sixth, seventh, eighth and ninth respondents into office is hereby declared *null and void* and set aside.

3. The applicants managing director's board is hereby declared lawful.

4. Second, third, fourth, fifth sixth, seventh, eighth and ninth are hereby directed to hand over all the books, records, minutes, and all other items belonging to the first respondent back to the applicants.

5. Second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents or anyone acting on their behalf are hereby interdicted and restrained from threatening, harassing and interfering with contractors of first respondent or applicants in their performance of their duties as first respondent managing directors.

6. Second to eleventh respondents are all and severally hereby ordered to pay costs of suit, one paying other to be absolved.

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M. DLAMINI
JUDGE

For Applicants: **N E Ginidzaof N. E. Ginindza Attorneys**
For respondents: **S Madzinaneof Madzinane Attorneys**