



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No. 900/14

In the matter between:

ANNAROSE NGCAMPHALALA AND 9 OTHERS

Appellant

And

TIKANE INVESTMENTS (PTY) LTD AND 9 OTHERS Respondent

Neutral citation: *Annarose Ngcamphalala & 9 Others vs Tikane Investments (PTY) LTD & 9 Others (315/15) 2015 SZHC24 (16th February 2016)*

Coram: Hlophe J

For Applicant: Mr. B. Xaba

For Respondent: Mr. S. Madzinane

Date Heard: 18/09/14, 23/09/14, 08/10/14, 09/10/14, 24/11/14 & 25/11/14

Date Handed Down: 16th February 2016

Summary

Application proceedings – Whether Constitution meant to govern the affairs of first Respondent ever adopted – Whether Constitution if ever adopted was violated – If Constitution adopted, what is its effect on elections conducted in violation of it.

Membership of the company – Oral evidence led to determine who are members – Effect of interference by the Chief’s kraal on the membership – Membership can only be determined in accord with the Constitution.

JUDGMENT

[1] The Applicants instituted these proceedings seeking a rule nisi to operate with immediate effect inter alia freezing the accounts of the first Respondent held with the Swaziland Development and Savings Bank, preventing the 2nd to 6th Respondents from performing any duties on behalf of the first respondent (the company) as well as from operating the Company’s Bank accounts, held with the Swaziland Development and Savings bank (Swazi Bank).

- [2] There was further sought substantive orders in the merits such as that declaring the 1st Respondent's Annual General meeting and its results as held on the 27th June, 2014 null and void as well as a declarator declaring the Annual General meeting concerned null and void.
- [3] The Applicants further sought an order disbanding the Executive Committee of the company as elected from the Annual General meeting in question. The other order sought was to compel the 2nd Respondent call or convene a meeting for the election of a new Executive committee within 14 days of the grant of the order sought by this court.
- [4] It is not in dispute that the applicants together with 2nd to 9th Respondents are all members of the first respondent, which is a company duly registered in accordance with the Company Laws of Swaziland. It is common cause that the company in question started off as a Farmer's Association formed by its members for purposes of growing and selling sugar cane to the millers. It was later decided that the said association be converted into a private company.
- [5] Perhaps owing to its initial identity, the members of the company eventually agreed that it creates a Constitution to govern and regulate its affairs. This followed advice they allegedly obtained from the entities

they dealt with whose mandate entailed giving them technical advice on how best they could conduct or organize their affairs. The Constitution was eventually created by the members and was written in the Siswati language. No issue on the legal propriety of the first Respondent having to be governed by a Constitution outside of the Memorandum and Articles of Association was taken. This aspect of the matter was taken or treated by the parties as raising no legal issue at all but as being legally compliant and the matter was dealt with on that understanding; that is to say, on the understanding it was legally proper for a company to be governed by a formal Constitution prepared by all its members and to be run by what is called an executive committee elected by the members. The matter was therefore proceeded with on the understanding that these issues were normal.

[6] As a basis for the relief sought; the Applicants averred that on the 27th June 2014, the second Applicant, who hitherto was the Chairman of the Executive Committee of the first Respondent called an Annual general meeting of the first Respondents' members, whereupon a new Executive Committee comprising the 2nd to 8th Respondent was elected. According to the Applicant the said meeting was irregular because it was attended by non-members who went on to take part in the voting for and election of

the Executive Committee. Although numerous instances of non-adherence to the constitution are mentioned by the Applicants, it is contended that the orders sought should be granted on the grounds that non-members were allowed to take part in voting for and electing the Executive Council or Committee of the first Respondent.

[7] The non-members of the first Respondent allegedly allowed to take part in the elections of the first Respondent's Executive Committee were allegedly; Martha Dlamini, Johannes Dlamini, Stan Dlamini, Nkosinathi Ngcamphalala, John Ndlovu, Nonhlanhla Ndlovu, Maswazi Ndlovu, Wonder Ndlovu, Bhekithemba Ngcamphalala, Sifiso Nhleko and Philisiwe Ndlovu.

[8] The alleged instances of non-compliance with the first respondent Constitution were in summary, inter alia, that on the day the new executive was elected, there was interference, and undue pressure being put to bear upon the first Respondent's members to allow the non-members to vote failing which they were threatened, they were to be dealt with by the Umphakatsi or the Chief's kraal through one Mgerman Ngcamphalala. This being dealt with was understood to entail being fined beasts, which is an event that had occurred previously. It was contended further that the sixth Respondent was elected as Treasurer contrary to

clause 4.3.2.6 of the Constitution in that she did not meet the required qualifications spelt out in the Constitution to the effect that such a person should be one at least reached Form III which is the Junior School Certificate level at school.

[9] It was a further contention that some of the people allowed to join the company as new members, did not qualify to do so in terms of the Constitution as they were members of other companies such as Maphobeni Youth (PTY) LTD and Lomdash (PTY) LTD. Those singled out in this regard were one Johannes Dlamini and Stan Dlamini respectively. It was contended that the Constitution specifically prohibited this.

[10] In the meeting at which the non-members referred to above were allowed to partake when they were not entitled to do so, it is alleged that the 2nd Respondent derelicted his duties by standing by and watching as non-members were allowed to violate the Constitution yet he was the one as Chairman, required in law to protect the Constitution of the first Respondent.

[11] The new members it was further argued were allowed to join the company notwithstanding that in terms of the Constitution such members would only be allowed to join after the lapse of 5 years of the Company having commenced operations. This would allegedly be after the debt incurred in commencing the operations would have been repaid. As the operations of the first Respondent had commenced in October 2010, then new members would realistically have been allowed to join in October 2015.

[12] The Applicants also sought to clarify that the issue of the new members eventually allowed to vote on the 27th June 2014 had initially not been settled on or about the 11th June 2014, when a meeting aimed at electing a new Executive Committee of the first Respondent, could not be proceeded with despite that an outside Electoral Officer one Vusie Dlamini, had been secured because some non-members had insisted on being allowed to vote, leading to the abandonment of the entire exercise as their wish could not then be granted.

[13] Because of the alleged failure to adhere to the Constitution by the Respondents or the second Respondent leading to the election of the

current Executive Committee, it was a contention of the Applicants that the orders prayed for as recorded or paraphrased above be allowed.

[14] The Applicant's application was opposed by the Respondents led by the 2nd Respondent. The Respondents opposition to the application is two pronged, namely that the Constitution had not been violated as the alleged non-members, were entitled to take part and vote at the meeting in question because they had already joined the first Respondent through a unanimous decision of the first Respondent's members taken or reached on the 4th April 2014.

[15] For this reason, it was contended; no non-members were allowed to take part and vote in the meeting of the 27th June 2014. Furthermore, it was contended that the Constitution sought to be relied upon by the Applicants had never been adopted at the first Respondents undertaking and that same was not operational there.

[16] According to the second Respondent, the so called non-members had to be allowed to be joined as members of the first Respondent because their land had been taken for use by the first Respondent and its members.

Furthermore, their being allowed to join was influenced by the Umphakatsi or the Chief's kraal which had threatened to fine the first Respondent and its Executive Members for failure to allow the non-members to join as members yet their land had been taken over by the first Respondent and its members.

[17] The second Respondent averred further that following the failure to allow the so called non-members to join, the Umphakatsi allegedly dealt with the dispute and decided in favour of the new members hence their allegedly being allowed to join on the 4th April 2014.

[18] Furthermore, it was contended by the 2nd Respondent that the Umphakatsi had ordered the members of the first Respondent to choose whether they were to leave the land belonging to the new members or were to accept them as new members. The members of 1st Respondent allegedly chose to accept the non-members as new members on the 4th April 2014.

[19] I make the observation that in paragraphs 8, 8.1 and 8.2 of the Answering Affidavit; the 2nd Respondent seems to be confirming that the new members were allowed to join the first Respondent's membership not so

much in line with what the Constitution said than that they had to act so as to preserve the land to be farmed by the first Respondent and its members. I must clarify that the Constitution is the backbone of any organization, and has to be complied with at all times such what it said about the bringing in of new members had to be complied with at all times whatever the intentions of having new members join are. An unconstitutional act, cannot be allowed to stand whatever benefits it brought with it. Instead it is opened to the members to amend a constitutional provision that no longer serves their interests one way or the other. Then assertions referred to and relied upon by the Respondents do not seem to be alive to these basic Constitutional principles, which I have no doubt should have a telling effect on the Constitutionality or otherwise on the joining in or otherwise of the so called new members in the first Respondent's membership.

[20] Having noted the crucial role to be played by the adoption or otherwise of the Constitution including that of whether or not the so called new members were ever allowed to join the company, which were both disputed aspects in the matter, this court directed these issues be referred to oral evidence. The parties Counsel having agreed with the court observation, conceded that the matter would only be resolved if indeed these issues were referred to oral evidence.

[21] It had been brought to the attention of this court that according to the copy of the Constitution annexed to the Founding Affidavit, at page 60 of the Book of Pleadings, it had been signed by the 2nd Respondent as Chairperson and Sisana Fakudze as the Secretary General at the time, among others on 13 November 2013. Seeing that, and in determining who had the duty to begin leading evidence between the parties, I ordered that the Respondents, for which the second Respondent had signed the said Constitution confirming on the face of it that it was effectively becoming operational, had the duty to begin to clarify why they had had to sign the Constitution and what that meant.

[22] I must mention that the Respondents had raised certain points in limine, which they sought to address in their Heads of Argument. Having considered the nature of the points in limine concerned and having been convinced there was no prejudice to be occasioned any of the parties if the said points in limine were being dealt with, together with the merits thereof after the oral evidence would have been led and in an attempt to avoid a piecemeal adjudication of the matter; I directed that indeed the points in limine be dealt with together with the submissions after the leading of oral evidence.

[23] The Respondent led two witnesses namely the second Respondent himself, Mr. Nkosinathi Thwala and one Nonhlanhla Tobhi Ngcamphalala. In summary the 2nd Respondent put the position as follows:- They as the Executive Committee of their Company, were advised by Swade Management, who were their technical advisors on the growth and/or business of sugar cane growing, to prepare a Constitution for their company in order for their affairs to be regulated and to be dealt with in terms thereof. After this was discussed and found acceptable to the ordinary membership, it was agreed that a Constitution be drafted for adoption in line with the advice mentioned above. After a committee had been put in place to conduct the exercise it went ahead and prepared such a document. Although it was taken to the general membership twice for approval, the said general membership ordered that it be taken back for certain corrections on each such occasion. He alleges the last such corrections to be made were not made for reasons which are however not made clear in my trying to understand him.

[24] There was by now a dispute on the membership of the organization as there were people who insisted on being allowed to join as members contrary to the position taken by the general membership and the executive, who were against such joining in. The Umphakatsi entered the

fray and ordered that they allow those non-members because their land had been taken by the company. Otherwise the first Respondent and its members were given a chance to either allow the non-members to join in or to release their land. It was whilst this issue was quite alive, and after a meeting called by the Executive of the First Respondent, that the then Secretary to the Executive Committee of the organization, Sisana (Gumbi) Fakudze, allegedly produced a copy of the draft Constitution and told him to sign it as the Umphakatsi and the Chief had said they wanted the signed Constitution. Before this incident, he said he had been visited by one Madlembe Maziya, a nephew of the Chief and as a member of the Council advised him not to defy the Umphakatsi by continuing to refuse to sign a certain Constitution and hand it over to the Chief's kraal. He had according to him, agreed to sign the draft Constitution on the day in question. He clarified this he did, not as proof or indicator that same was now operational and had formally been adopted. Instead he had, he said, signed it because of the pressure being put onto him by the Umphakatsi as well as a fear of being fined a beast as it had happened earlier on when they were fined as the Executive Committee, ordered them to pay a fine in the form of a beast for not heading the Umphakatsi's instructions to allow the non-members to join the company.

[25] It is a fact that the Constitution was on its page 19 signed by three people who held the positions of Chairman; Secretary General and Treasurer in the Executive Committee of the company and two others who were said to be witness from the general Membership of the company. The names of the people who signed were respectively, Nkosinathi Thwala who was, at the time, the Chairman and is now the Second Respondent; Sisana Gumbi (Fakudze) who was then the Secretary and is the 5th respondent herein; Glory Ndlovu, the then Treasurer; the 6th Applicant herein, together with Annarose Ngcamphalala, then a member of the General membership and now the First Applicant as well as Simo Dlamini another General member of the First Respondent who is the 5th Applicant herein. Although the person u refer to as Annarose Ngcamphalala had only signed by inserting initials, I reached a finding it was the said Annarose Ngcamphalala following the case put forward by the Applicant as juxtaposed against by the red initial in question which although alleged by the Respondent's witness to be on "N", even to the naked eye.

[26] The signatures appear under a heading marked oaths written in Siswati (Tifungo). As for Nkosinathi Thwala, after the insertion of his name by hand on the gaps left in the oath, he states, "I Nkosinathi Thwala, (Chairman) do hereby swear that I will do all within my power, to follow

this Constitution and Procedural Document, and I will always comply with this Constitution and the procedures stated therein and I will further avoid and/or prevent the misuse of all funds belonging to this organization.” Thereafter he signed next to a date entered by hand as the 13/11/2013. T

[27] he next signatory stated as follows: - “I Sisana Fakudze (Secretary) do solemnly swear that I will do all within my power to follow this Constitution and procedure of this work.” The Treasurer’s oath is couched as follows:- “I Glory S. Ndlovu (Treasurer) do solemnly swear that I will do all within my power, to follow this constitution and procedural document, and I will keep properly and prevent abuse of all the moneys of this company.” Both Sisana Fakudze and Glory Ndlovu signed the document on the 13th November 2015. The other two members who signed it on the same day is provided just above their signatures that they are signing as witnesses from the General Membership.

[28] Mr. Thwala went on to clarify that with the Constitution having been signed in compliance with the demand by the Umphakatsi and in reality without meaning that same had already been adopted, there was held a

meeting of the membership of the first Respondent on the 4th April 2014. At this meeting, he says, it was agreed unanimously that the said non-members were now being accepted into the company membership or were allowed to join as such. It is noteworthy though that neither minutes nor any form of proof of this resolution was placed before court in this regard:-

[29] Digressing from what the 2nd Respondent said in his oral evidence, it is important to note what he had said in his Answering Affidavit when explaining how they allowed non-members to join the company unconstitutionally including how they allowed people who did not qualify to occupy positions for which they did not so qualify, the 2nd Respondent said the following at paragraph 8 of the said Affidavit:

“8 Ad Paragraph 29-30”

“Contents herein are denied and the deponent is put to strict proof thereof.

I submit that there are no basis in law and infact for the 1st respondent’s members to have been allowed to farm on the land to the total exclusion of its owners.

- 8.1 Secondly the issue of discontent emanates from the fact that the Applicants wanted to exclude the new members. The Royal Kraal dealt with the land dispute and ruled in favour of the new members hence the resolution of the 4th April 2014.**
- 8.2 The Royal Kraal gave the members of the first Respondent to choose whether to leave farming the land of the new members and/or accepting them as members as this was their land. The members of the first Respondent all opted to accept them as members on the 4th April 2014.**
- 8.3 Accordingly after that special resolution of the 4th April 2014, all the said new members paid up to the bank account of the first Respondent their membership to the company the joining fee of E1, 200.00 (One Thousand Two Hundred Emalangen)**”.

[30] At paragraph 9.1 of the Answering Affidavit the second Respondent as chairman of the company's Executive Committee, said the following, which in my view also needs to be mentioned verbatim:

“9.1. I submit that the said Constitution has not yet been adopted as a document of the 1st Respondent. Accordingly, Applicant cannot rely on it.

9.2. Secondly the election of the said 6th Respondent and any other member of the directors of the 1st Respondent is an exclusive choice of the members of the 1st Respondent in a meeting of the 1st Respondent like on the 27th June 2014.

9.3. Finally, it is worth mentioning that the denigration of the academic status of the members of the 1st Respondent is not in the interests of the 1st Respondent”.

[31] I shall revert to these excerpts later on in this judgment. It suffices that there is in a way an overt, even if unintended, indication by the 2nd Respondent that he does not understand the principles and effect of there

being a Constitution governing their affairs including his own duties in terms of it.

[32] The 2nd Respondent was cross-examined at length, it being put to him that the Constitution was adopted in a formal meeting for the said purpose on the 13th November 2013 and also that the non-members who were allowed by him to vote during the elections, were never allowed or accepted as such and further that, in terms of the Constitution they were not supposed to join as at that stage. It was also put to the second Respondent, a matter he could not realistically deny, that the Constitution he alleged was not applicable was actually being used in in number of instances to regulate the affairs of the company which he could not deny.

[33] Nonhlanhla Ngcamphalala was called as the second witness for the Respondents. She testified that she was currently the Treasurer of the company and initially the vice chairman in the previous Board of Directors. She testified that to her knowledge the Constitution of the company was never adopted as a document of the company. As she was involved in its drafting she can recall that after its completion it was taken twice to the general membership and was on each occasion returned to

the drafting committee to fix the issues raised. She said although it should have been brought to them as the drafting team to effect the Amendments sought by the membership this was not done. She confirmed however she could see that it was signed by certain members including the initial Chairman, Secretary General and the Treasurer of the time, she did not know how that had come about because she had not signed it although she was at the time a member of the Board, where she held the position of vice chairman.

[34] Even though the constitution had never been adopted, according to her, she confirmed that same was actually used in the regulation of the company's affairs. An incident when it was used, she said, was at the time when elections were once meant to be held, but could not be proceeded with.

[35] She testified that although the Constitution provided that in the face of a dispute over the membership of Tikane Investments (PTY) LTD the issue should first be referred to the Chief's kraal before it could be referred to court, this had not been done, which meant that internal remedies had not been exhausted. She also confirmed that on the question of the joining by

those whose membership was being disputed, such people were allowed to join. She however did not go into detail on when or how those people were allowed join the membership of the company.

[36] Under cross-examination she maintained that the Constitution was used on a certain date meant to be for the conduct of elections. She also added that date was the 6th June 2014. She could not dispute that the constitution was signed on the 13th November 2013 but contented herself with saying she could not recall. The elections in question, she said were meant to be conducted on behalf of the first Respondent by one Vusi Dlamini. She could not dispute that the signature appearing in the Constitution where someone signed as a witness from the main membership, belonged to Annarose Ngcamphalala when that was put to her. She acknowledged further that, although she said the initial appearing on the signature concerned was unclear whether it was an “A” or an “N” it could not be hers as Nonhlanhla Ngcamphalala because that was meant for members of the General members yet at the time she was a part of the Executive Committee or the Board of Directors of the Applicant. This was notwithstanding what had been put to the 2nd respondent that the signature in question was hers.

[37] Although she had confirmed that the people with disputed membership had eventually been admitted as members, she could not recall when this had happened. In fact as of the 6th June 2014, when there was meant to be elections of the new Executive Committee, there was still a dispute on whether those people were members or not. In actual fact, she testified that the elections were abandoned after there was a fierce dispute on whether those people were members or not. She could however confirm these people were new members because they paid some joining fee in the sum of E1200.00. Otherwise she confirmed that the Constitution was used in that meeting to give guidance on how the elections were to be conducted on the same date.

[38] What stands out in the testimony of this witness is that although she avers the Constitution was not adopted, in her knowledge it was used in several meetings including the meeting held on 27th June 2014 when the current board of the company was elected. She does not know why the Constitution was signed by the Chairman, the Secretary General and the Treasurer on the 13th November 2013. Although the new members did attain membership according to her they attained same on the day they paid their membership fees. She does not confirm their membership having been accepted formally in a meeting of the 4th April 2014 yet she

was a member of the Executive at the time. She is only aware that as of the 6th June 2014, there was a dispute over the so called new members or non-members of the company and that this dispute had resulted in the meeting meant for the elections on the 12th June 2014 being abandoned.

[39] When the Applicant's turn to lead evidence in support of its case and in rebuttal to that of the Respondents came, they led two witnesses namely Vusi Dlamini and Thembi Ndlovu.

[40] In his testimony Vusi Dlamini told the court that he was employed by the Swaziland Government as a Community Development Officer or facilitator and was based at the Siphofaneni Inkhundla. Often in the performance of their duties as development officers under the Siphofaneni Inkhundla, they worked hand in hand with an organization called SWADE, which was involved with farmers in the growth of sugarcane in the same constituency. In reality he said SWADE often asked him to assist with the sugarcane growing companies. This often concerned presiding over the conduct of elections by the said companies. This they would do after having trained the employees on good governance and leadership skills.

[41] He was asked to conduct elections for the first Respondent's company meant for the 12th June 2014, where it was allegedly intended to elect a new board. It was normal that when SWADE engaged him to hold elections for such companies he would obtain that particular company's Constitution from Swade. This particular engagement was not different as he obtained the Constitution and studied same in preparation, particularly on the part relating to elections and how they were to be conducted. Before conducting elections, he said that he first conducted training on good Governance and on good leadership. When the course was about to be finalized for the elections to commence, he was asked what was going to happen during the elections as there were people there who were not members. In other words were they going to excuse them when elections commenced or were they going to participate. A response was that only members were allowed to vote in terms of the Constitution.

[42] In light of the allegations that there were non-members in there, it was agreed that a list of the members be read out, with each such member responding in confirmation. It transpired that there were people present there but whose names could not be found on the list. When asked to leave the meeting or the place where the meeting was held they refused to do so. The Chairman (the second Respondent herein) asked Vusi

Dlamini and the Swade representative to excuse the meeting which they headed. Otherwise all the other attendees of the meeting remained discussing the matter. The witness and the SWADE officer were later informed by the second Respondent that the dispute on who was a member or not could not be resolved and that the elections were unlikely to be proceeded with.

[43] Mr. Dlamini further testified that it was after this that him and the SWADE officer there, proceeded to where the meeting was held and once there, they considered the provisions of the Constitution in the presence of the members. It is there that the witness says he enquired from all those present if they knew the Constitution and the answer thereto was in the affirmative, with no one giving a contrary answer. Those in attendance claimed to have prepared the Constitution themselves. Mr. Dlamini testified that due to this response he had taken the opportunity to congratulate the members of the company for their achievement in putting together such a document which was unique as other similar companies often had theirs in English.

[44] The Constitution was thereafter read to give guidance on who was entitled to be there. The requirements in this regard were read and confirmed inter alia that a member of Tikane would be a person who met requirement that included the following ones; he was one from the area, situate next to a certain road including one who had paid a joining fee as well as a yearly agreed fee.

[45] It was discovered that those whose membership was being disputed, did not meet all the requirements of a member. When they refused to leave the meeting after having been asked once again to do so, it transpired that their membership was a matter to be resolved at the Chief's Kraal the following Tuesday from that date and day. Although the requirements per the Constitution were read out, the second Respondent made it clear that he had been ordered by the Umphakatsi to treat those whose membership was disputed as members. He allegedly however never clarified or alleged that the membership of those people had already been accepted by the membership as opposed to him being ordered to accept them as members.

[46] AW1 Vusi Dlamini, was cross-examined at length but he maintained his position that all those in attendance of the meeting were agreed that the first Respondent's Constitution was operational and to support or confirm this, it was from time to time used to regulate the proceedings in the said meeting. He also maintained that it was never contended that those whose membership was disputed in that meeting were actually members approved by the entire membership on a certain date, the 4th April 2014. Instead he mentioned that they were found not to satisfy all the requirements of a member in terms of the Constitution. In fact the second Respondent ended up confessing that he had accepted them as members because of the pressure put to bear upon him by the Umphakatsi.

[47] The Applicants further called AW2, Thembi Agreeneth Ndlovu who testified that, she was a member of the first Respondent Company. The affairs of this company, she testified, were regulated by means of a Constitution. This Constitution, she contends, was adopted on the 13th November 2013, when it was signed by those forming the Executive Committee of it at the time as well as two of its general members as witnesses.

[48] When the Constitution was adopted there had been called a meeting for the said purpose, which was addressed by the Chairman. After presenting the Constitution, the Chairman allegedly stated that it was going to bite those who contravened it. No members of the company objected to the adoption of the Constitution.

[49] She testified that since the day of its adoption, the Constitution was used on various occasions before the day meant to hold the elections. Live examples she could recall on which the Constitution was used included the meeting of the 4th April 2014 as well as that of the 18th May 2015. The meeting of the 4th April 2014, was aimed at sacking the sugarcane haulage contractor. Those in attendance were advised by an Illovo manager, in attendance one Mr. Ntuli that it was only the members who were entitled to take that decision in accordance with the Constitution. As this Ntuli said this, he was reading the Constitution of the first Respondent. There was no objection from anyone to say it was inapplicable because it had not been adopted as it is now alleged.

[50] In the instance of the 18th May 2014, she testified, members intended to fire or sack the Executive Committee. The Constitution was referred to

or used even at that meeting and again there was no contention by anyone that it was not to be used because it had not been adopted. They were still looking at the appropriate clauses of it when they were allegedly ordered to stop the meeting by allegedly the Chief's order. The entire Executive Committee was called to the Chief's kraal that same day. The Agenda there was to enquire if they had already paid the Chief's beast or cow, which was a fine for the organization's failure to join in certain non-members.

[51] She testified further that if anyone wanted to join the first Respondent, that person had to meet the requirements as set out in the Constitution. Although they had tried to explain what the requirements were for one to join as a member they found that they were not given an opportunity to state them. She said they were just ordered to pay the fine and leave. To her knowledge, although the chief had been given a copy of the Constitution, he was not aware of the requirements for one to join as a member.

[52] She confirmed that at the meeting of the 12th June 2014, the Constitution was once again used. This was the day they meant to hold elections for

the Executive Committee or Board of the first Respondent. She reiterated what was stated by Vusi Dlamini as having happened on the day in question. Even when the elections were eventually held on the 27th June 2014, the Constitution was utilized in determining how they were to be conducted.

[53] The non-members who whose insistence on being allowed to take part in the meeting of the 12th June 2014 had resulted in the postponement of that meeting were there in the meeting of the 27th June 2014. Their objection at those people being allowed to partake in the elections was allegedly not entertained. They were allegedly told that those people had already paid their membership fees. The member of Bandlancane present amongst them intimidated them by telling them not to persist in their objection as he told them to look at the Umphakatsi and understand where they were as he would take them there to be fined if they persisted. This resulted in the non-members being allowed to note and to take part in the affairs of the first Respondent. She denied any meeting where the non-members were, by a resolution of the company members, allowed to vote.

[54] It was put to her under cross-examination that the people she referred to as non-members had actually been accepted as new members on the 4th April 2014. She denied this assertion and clarified that the only person brought to the meeting of the 4th April 2014 was one John Ndlovu who was brought there at the instance of the chief and imposed as a member. Although he was brought they as membership kept quiet but did not accept him as a member. She denied that the said John Ndlovu was accepted when 9 others, as appear on the list set out at page 102-103 of the Book of Pleadings, which bore the Chiefs stamp dated 25th June 2014, were accepted.

[55] I can quickly comment at this stage that the list in question raises more questions than answers considering that it bears the Chief's stamp of the 25th June 2014, just be the elections where after the so called non-members were allowed to participate on the 27th June 2014. The only reasonable conclusion to draw from this is that it was created to buttress the so-called non-members as new members who had been sanctioned by the Chief, who unfortunately has no such role to play in terms of the Constitution, to force the company members to accept imposed members. Their acceptance or otherwise should be dealt with according to the Constitution with its amendment being made when it had to be.

[56] On a contention that she had actually not attended the meeting of the 4th April 2014, she maintained her position that she had and that she had signed the attendance list of that day. On the contention that the list of that date was that found on page 93 of the Book of Pleadings in which her name and that of Sisana Fakudze appeared without signatures next to them, she stated in reference to the said list that “When I see this, I conclude it is some game” that was being played.

[57] When insistence was made about the non-members having been accepted as members by means of a resolution on the 4th April 2014, she wondered why the said non-members would have been kicked out of the meetings of the 17th April 2014 and that of the 18th May 2014 and 12th June 2014 if they had been accepted as members on the 4th May 2014 including why they had to be fined a beast for not allowing them to join on the 18th May 2014.

[58] She explained that the general membership knew nothing about the letters allegedly written to the non-members accepting them as members and emphasized that this must have been done by the Chairman acting alone or with his fellow Board members without the sanction of the general

membership. By way of recap this latter assertion is very probable when one considers what the 2nd Respondent said in his evidence, that he was put under extreme pressure by the Umphakatsi to accept the non-members.

[59] As the foregoing comprises, the summary of the evidence led before me, I am now required to determine what I find from the evidence as concerns the three central issues to the inquiry namely whether or not the Constitution of the first Respondent was ever adopted; whether the so called non-members or new members were ever accepted to join as members of the company and lastly if their purported acceptance or allowed can be said to have complied with the Constitution.

[60] The first issue is whether the Constitution was ever adopted. It is common cause that sometime after the company had been formed, there was an agreement that the Constitution be drafted to be used to regulate and even govern the affairs of the First Respondent Company. It is also not in dispute that the Constitution was eventually drafted and is complete, with the appropriate page to indicate its adoption on the face of it having been signed. The only question really is whether it was

thereafter adopted. From the two versions there seems to be overwhelming evidence that it was adopted. This is because it was as a fact signed into operation by the executive posts holders of the first Respondent in the Chairman, the Secretary General and the Treasurer. Of significance is that as they did so they swore or took oaths to protect and uphold the Constitution and the financial assets of the organization. It is not realistic in my view to say it was signed because the Chief, had without any clear explanation why, he would be so interested in it wanted it to be signed.

[61] Secondly, it is common cause that the Constitution was used for guidance and or for regulating the proceedings in several subsequent meetings after the date on which it was signed such as those of the 4th April 2014, the 18th May 2014, the 12th June 2014 and the 27th of June 2014. In fact it is again common cause it was so used. Clearly if it was used, it is because it had been accepted on a certain day.

[62] When in all the said instances the Constitution was for reliance purposes used, there was no objection from anyone of the parties that it was not supposed to be used because it had allegedly never been adopted which

would have naturally come to the fore if ever there was any credit in the contention that same had not been used.

[63] For the foregoing reasons and the fact that I find the evidence of the Applicant's witnesses more credible and prohibit as opposed to that of the Respondents witnesses. I find as a fact that the Constitution of the first Respondent was adopted on the 13th November 2013, which is the date on which it took effect and on which it was signed. If the Constitution took effect in the manner I have found, it then means that any act performed outside of it would be unconstitutional and therefore a nullity. In fact I am convinced that the Respondents want to contend that the Constitution was never adopted in an attempt to avoid the extra Constitutional actions they embarked upon being declared a nullity which I do not think is possible to avoid in the face of the overwhelming evidence, before me.

[64] On the question whether or not the non-members were accepted or allowed to join as members of the company, it is clear that the general principle of law, that he who asserts must prove becomes of paramount importance. It is the Respondents who assert that at some stage the non-members were allowed by the members to join. They say this was done

in a meeting of the 4th April 2014. Not only do they fail to produce proof of the said resolution their evidence is riddled with inconsistencies on this score.

[65] Although the Respondents wants to say that the minutes of the meeting together with the resolution to that effect were with the former Secretary to produce, it becomes clear that their version cannot possibly be true. It cannot possibly be true because they themselves produce a certain list of attendees of that meeting when they cannot produce the minutes yet those two would under normal circumstances be inseparable – that is the list of the attendees and the minutes. Even more fundamental is the fact that they said the said members were accepted voluntarily by resolution on the 4th April 2014 yet in the subsequent meetings of the 17th April 2014, 18th May 2014 and 12th June 2014 the said members were being refused entry with no assertion being made that they should be allowed in to participate as by then they were members. Not even the Respondents themselves could then assert that the so-called non-members had already been accepted as such in the meeting of the 4th April 2014.

[66] The fact that as of the 18th May 2014, the Board of the first Respondent, including the second Respondent were fined a beast for failing to accept the so called non-members or new members is an indicator these new members were never accepted or allowed to join on the 4th April 2014. It can only confirm this was the case that the Umphakatsi was always interfering without understanding the constitutional dictates of the Constitution the members had prepared to govern their affairs. The versions told by the Respondent's own witnesses before me on how the so-called new members were allowed to join is inconsistent and contradictory. Whereas the 2nd Respondent said that happened on the 4th April 2014, according to the second witness for the Respondent, such happened when the so-called new-members paid a joining fee. This was clearly just before the elections sate of the 27th June 2014.

[67] I am therefore convinced that the issuance of letters inviting the so called non-members or new members to join as members should be seen in this light that same was merely a gimmick by the Executive Board to enable these new members see themselves as members because of the letters inviting them to do so. There is clearly no doubt that if this act was outside the Constitution, it then could not stand.

[68] This brings me to the averments attributed to the 2nd Respondent at paragraphs 8, 8.1 and 8.2 as well as 9, 9.1, 9.2 and 9.3 of the Answering Affidavit. It is clear from these paragraphs that the 2nd Respondent does not seem to understand or appreciate the effect of the Constitution once it is adopted. In a nutshell it means that everything in the organization should henceforth be done in line with it. This means that if there were any restrictions on the acceptance of new membership, then such should be accepted and adhered to. If for whatever reason it was not being adhered to, the Constitution then had to be amended in line with it in order to now reflect the new aspirations of the membership.

[69] Having said this, there is clearly a duty on the Chairman to protect the Constitution, if any unconstitutional act threatens it. It is for this reason I found it strange for him to have said he could do nothing if people wanted to elect people who did not qualify for positions as set out in the Constitution, as was the case in the election of the Treasurer who it is common cause did not qualify when considering the fact that she did not meet the academic qualifications set out in the Constitution as a Junior Certificate or Form Three.

[70] The position is now settled that the Constitution is the Supreme Law such is the back born of any organization and that any act contrary to it or inconsistent with it, is to the extent of such inconsistency declared a nullity.

[71] For the foregoing reasons I have come to the conclusion that the Constitution of the 2nd Respondent was lawfully adopted in the said entity on the 13th November 2013 and became effective from that date onwards. The so called non-members were not accepted or allowed to join the company in accordance with the Constitution necessitating that their membership be and is to be declared a nullity such that they will have to be accepted or allowed membership as provided by the Constitution or upon it having been amended or altered to allow for their joining. This amendment should be in line with its own provisions on how it should be amended.

[72] In the circumstances, the Applicant's application succeeds and this court issues the following order:-

1. The elections held by the first Respondents at the meeting held on the 27th June 2014, be and are hereby declared a nullity.
2. The Executive Committee elected from the said meeting and elections shall remain in office for a period of 30 days after service of this order upon them, solely for purposes of organizing a fresh meeting and elections in order to elect new office bearers of the company's Executive Committee. Otherwise all its other functions such as operating the company's bank accounts during this period are forthwith interdicted.
3. The current Chairman and his Executive Committee shall call the meeting for the said elections within 7 court days of service of this court order upon them for the elections process to be finalized within the period mentioned in order 2 above.
4. The costs shall follow the event and are to be paid by the first and second Respondents jointly and severally, with one paying the other to be absolved.

N. J. HLOPHE
JUDGE - HIGH COURT