



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 820/15

In the matter between:

LUZALUZILE FARMERS ASSOCIATION LTD

Applicant

And

THE REGISTRAR OF COMPANIES

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

THE SWAZILAND DEVELOPMENT AND

SAVING BANK

3rd Respondent

Neutral citation: *Luzaluzile Farmers Association Ltd vs The Registrar of Companies and Two Others (820/15) [SZH 09] 5th February 2016)*

Coram: MAPHALALA PJ

Heard: 12th October 2015

Delivered: 5th February 2016

For Applicant: Mr. M. Simelane
(of Mbuso Simelane's Associates)

For Respondents Mr Thulasizwe Dlamini
Attorney General's Chambers

Summary: Civil Procedure – Application for review of Registrar of Companies – that the Registrar **inter alia** acted **ultra vires** his powers – in terms of the Company Act - in particular sections 159 and 215 – this court finds against the Applicant – dismisses the Application with costs.

JUDGMENT

The Application

[1] On the 3 June, 2015 the Applicant Luzaluzile Farmers Association duly registered in terms of the Company Laws of Swaziland having its principal place of business at Impala Ranch within the Lubombo district filed an Application under a Certificate of Urgency against the Respondents, particularly the 1st Respondent being the Registrar of Companies for orders in the following terms:

1. **Dispensing and condoning the Applicants non-compliance with the rules relating to form, time limits and service and hearing this matter under a certificate of urgency.**
2. **that an interim rule be granted in terms of prayer 3 to 9 with immediate effect returnable on a date to be set by the Honourable**

Court calling upon the Respondent to show cause why it should be made final.

- 3. The 1st Respondent's decision to appoint or cause an interim committee to be elected in favour of applicant on the 29th of May at Vuvulane Inkhundla be reviewed and set aside.**
- 4. The 1st Respondent be interdicted from assuming the role of director, shareholder or member of Applicant by demanding and or imposing himself in the internal affairs of Applicant outside the ambit of the Company Act of 2009.**
- 5. That the 3rd Respondent be interdicted from changing the signatories of the current executive committee unless a minute depicting elections held in an annual general meeting are presented to it in line with applicant's Articles of Association.**
- 6. Compelling the 3rd Respondent to file to court a list of the surety holders of Applicant registered in its favour.**
- 7. Interdicting anyone from calling any meeting of Applicant without the mandate of the legitimately elected National Executive of applicant in terms of the Articles of Association.**
- 8. That any member of the Royal Swaziland Police be authorised to assist in carrying out into execution prayer 7 hereto.**
- 9. Costs**
- 10. Further or alternative relief.**

[2] The Application is founded on the affidavit of Sipho Nyambi, who is the Chairman of the Applicant and has related at some length the background of the matter. In the said affidavit he has filed pertinent annexures being annexure A the Memorandum and Articles of Association of the Applicant; annexure B being extracts from the Minutes of a meeting of the National Executive of the

Applicant held at Vuvulane on the 29th May, 2015; various court orders pertinent to the dispute between the parties.

The opposition

- [3] The Respondents oppose the granting of the orders and has filed a Answering Affidavit of the 1st Respondent Mr. Msebe Malinga who is the Registrar of Companies where he raised a point **in limine** that the Chairman of the Applicant has no **locus standi** to make this Application and also on the merits of the Application. On the merits of the Application the Registrar answered to the averments of the Applicant in the Founding Affidavit. The essence of the defence on the merits of the case is that the 1st Respondent acted the way he did in terms of the provisions of section 159 and 214 of the Companies Act.
- [4] It appears to me that the case between the parties centred around the operations of the said sections of the Companies Act whether or not the 1st Respondent acted **ultra vires** the said section of the Act.
- [5] The 1st Respondent further filed a number of pertinent Minutes of various meetings that took place between the parties. I shall consider in detail some of these Minutes to understand the dispute between the parties.
- [6] The applicant then filed a Replying Affidavit in accordance with the Rules of this court.

The background

[7] The essential facts of the dispute are outlined in Heads of Arguments of the Respondents at paragraph 2.1 to 2.7 to the following:

- 2.1 **The Deponent Mr Siphon Nyambi states that he is the chairman of the Applicant and duly authorised to depose the affidavit and that by virtue of the resolution of the National Executive Committee listed in paragraph 9 of the found Affidavit.**
- 2.2 **The Deponent states in his papers that the 1st Respondent called him to a meeting at the Ministry of Commerce Mbabane where they were told that Government has received complaints from people alleging to be members of the Applicant and they were made to join by one of the founding members who once served as a Chairman of the Applicant Mr Meshack Magagula yet they were not children under jurisdiction of Chief Mbandzamani Sifundza. The Deponent further states that the disgruntled members were led by one Space Lotata Dlamini of Mbelebeleni.**
- 2.3 **The Deponent further state that 1st Respondent advised them that he will secure a venue at Vuvulane in order to teach the members of the association about company law and try to mediate in the matter to the many court applications that crop up during the harvesting season and that the Swaziland Government was to organize the venue.**
- 2.4 **The Deponent state further that much against the tenants of corporate governance the 1st Respondent instructed the aggrieved people to secure a venue for him at Vuvulane inkhundla yet he should asked them as the rightful people to organize the venue.**
- 2.5 **The Deponents further states that the despite complaint and the producing of a court order the meeting should be conducted with the authorisation of the current executive committee the 1st Respondent act *mala fide* and took sides.**

2.6 The Deponent states further that the 1st Respondent tricked them to attending the meeting organised by the aggrieved parties who were campaigning for seats at the executive yet he had said the meeting was to teach company law.

2.7 The Deponent further states that the elections were conducted in a haphazard manner and the whole exercise of electing interim committee is not provided for in the articles of association therefore irregular and thus the 1st Respondent acted ultra vires the provisions of the Company Act of 2009 and the he disregarded them as an existing committee by electing an interim committee.

[8] This court heard arguments of the parties on where I reserved my judgment to a future date. The attorneys of the parties filed comprehensive Heads of Arguments for which I am grateful. I shall in brief outline the salient features of such arguments for one to understand the dispute between the parties.

The Applicant's arguments

[9] The attorney to the Applicant Mr. M. Simelane filed his Heads of Arguments contending in the main that the 1st Respondent has grossly, irregularly and wrongfully applied the provisions of the Companies Act of 2009 in this matter. That the Registrar has no power to intervene in Applicant's business in terms of section 214 citing the section in full at paragraph 4 of his Heads of Arguments. That this section requires members of the company to approach the High Court. The Registrar is not a court as referred in section 2 of the Company Act.

[10] Further arguments are advanced in paragraph 7, 8 and 9 on section 159 of the Act. Furthermore in the subsequent paragraphs arguments are advanced to the general proposition that the Registrar misconstrued the provisions of section 215 to find a reason to intervene in the present case. Various arguments are addressed in paragraphs 10, 11, 12, 13, 14, 15, 18, 19, 20, to 29, 30, 31, 32, 33 and at paragraph 24 contends that the Applicant is an incorporated association not public company.

[11] The attorney for the Applicant then cited a plethora of decided cases to support the above arguments being the case of **Estate Geekie vs Union Government and Another 1948 (2) 494 CN at 502**, the case of **Johannesburg Consolidated Investments vs Johannesburg Town Council 1903 TS 111 at 115**, in the case **Troake vs Salisbury Bookmakers Licensing Committee & Another 1972 (2) SA 40 RAD at 43** and the Legal text book by **G.M. Cockram , Administrative Law** to the following :

“It would appear that the Court will on review declare an administrative decision to be ultra-vires if there has been a fundamental misinterpretation by the administrative body of the enabling statute itself. Such a misinterpretation of its powers by an administrative authority may occur in the following manner; where the procedure, if laid down either expressly or by necessary “implication in the enabling statute has not been followed”. Since such procedural requirements are contained in the enabling statute, they cannot be waived by an effected person.”

[12] Finally, the attorney for the Applicant applied that the Applications be upheld with costs.

(ii) The Respondent's Arguments

- [13] The attorney for the 1st Respondent advanced arguments for his clients and filed Heads of Arguments where paragraph [6] of this judgment has been extracted being the background of the case.
- [14] In paragraph 3 thereof gave a brief background of the Application in subparagraph 3.1, 3.2, 3.3, and 3.4.
- [15] In paragraph 4 dealt with the 1st Respondent's involvement and in paragraph 4.2 an outline how the dispute between the parties arose. That a group led by Nhlanhla Mngometulu approached the Prime Minister's office with their grievances that the company has been run recklessly and that there are being excluded from the benefits of the company and that it has been split into two camps and there were appropriately directed to the Registrar of Companies because it was the officer responsible for such entities.
- [16] That after the group registered their complaint the Registrar of Companies found it proper to convene a meeting which was held on the 8th May, 2015 at the Ministry of Commence and this meeting was attended by both factions in the dispute. That the aim of the meeting was to reunite the members of the company and all the members work in harmony for the best interest of the company. It was also aimed at solving the prejudice against some members of the company because they were not subjects of Chief Mbadzamane Sifundza as stated in the Founding Affidavit.
- [17] The Registrar of Companies identified the following problems:
- (i) The recruitment exercise was informal and did not have a clear process.

- (ii) All members of Luzaluzile were not aware that it was a public company.
- (iii) Both factions did not understand how a company is supposed to function.
- (iv) The company was being run reckless without consideration of the business judgment rule.

[18] It is contended for the 1st Respondent that the Applicant is contradicting itself in the Founding Affidavit in the submission at paragraph 4.6 and 4.7 of the Respondent's Heads of Arguments.

[19] It is also contended for the 1st Respondent that it was agreed in the meeting of the 8th May 2015 that:

- **All those who believed they are legitimate members of the Association are to be called.**
- **The interim committee should be set up to sort the issue of the membership and also bring the books of the company in order.**
- **The company shall not issue out dividends until its issues are sorted out.**
- **The 230 membership be retained until the company is back on its feet.**
- **The office of the Registrar of companies shall visit Swazi Bank and check on the Status of the company.**

[20] It is also contended for by the attorney for the 1st Respondent that his client never conducted elections, however, the members did as per the agreement made on the meeting held on the 8 May 2015 and he deemed this a good exercise in finding a way forward in order to solve the impasse that engulfed the Applicant.

[21] Finally, the attorney for the 1st Respondent then dealt with the sections 159 and 215 cited by the Applicant as the cause of all these problems. That the arguments of the Applicant that he acted **ultra vires** and outside the ambit of the Companies Act hold no water. First, that there was a call by a group of members of the company that the Registrar intervene in terms of section 159 of the Act and secondly, the Registrar has a right to enquire on the issues of membership and shares of company in accordance with the provisions of section 215 of the Act.

[22] That in the final analysis the Application be dismissed with costs and the interim rule granted on the 8 June, 2015 be discharged forthwith.

The Court's analysis and conclusions thereto

[23] Having considered all the averments of the parties and the arguments of the attorneys of the parties it would appear to me that the crux of the dispute between the parties is on the two sections of the Company Law Act being 159 and section 215 whether the 1st Respondent acted **ultra vires** the said sections of the Act.

[24] It is my considered view that the background of the dispute is what transpired on the 8 May 2015 where the parties meet and the following was agreed in that meeting:

- **All those who believed they are legitimate members of the Association are to be called.**
- **The interim committee should be set up to sort the issue of the membership and also bring the books of the company in order..**

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- **The company shall not issue out dividends until its issues are sorted out.**
- **The 230 membership be retained until the company is back on its feet.**
- **The office of the Registrar of companies shall visit Swazi Bank and check on the Status of the company.**

[25] Further more on this point the various Minutes of the meetings of the parties make it clear that the parties were **ad idem** that the above points be addressed in order to bring peace to what was happening in the affairs of the Applicant. Therefore whatever meaning to be given to the sections of the Act be on the basis of these facts.

[26] It is clear on these facts that the 1st Respondent never conducted elections, however the members did according to the agreement made on the meeting on the 8th May, 2015 as he deemed this a good exercise in forgoing a way forward in order to solve the impasse that engulfs the Applicant.

[27] It would further appeared to me that the 1st Respondent was entitled to convene such a meeting as part of his duties in accordance with the provisions of section 159 of the Company Act of 2009 to the following:

“Where all directors of a company have become incapacitated or have ceased to be directors, the Registrar may unless the articles of a company make other provisions in that respect, on the application of any member of the company or legal representative, call or direct the calling of a general meeting of the company and may give such ancillary or consequential directions as he may deem expedient, including direction modifying or supplementing, in relation to the calling, holding and

conduct of the meetings, the operations of the companies articles, and directions calling for one member or the legal representative of a by proxy to be deemed to be constitute a meeting, held or conducted in any such directions, shall for all purposes be deemed to be a general meeting of the company duly called, held and conducted.”

[28] Furthermore, I agree with the contentions of the 1st Respondent that he was empowered in terms of section 215 of the Company Act which provides the following:

The Registrar may from time to time by notice in writing require a company or external company to transmit to him within fourteen days after the date of such notice particulars of the transfer of any share or shares and a list of persons for the time being members of the company and of all persons who ceased to be members as from a particular date.

[29] Further what to add in my assessment of the arguments of the parties that the Applicant is a duly registered company and as such the arguments by the Applicant that it is an association fall away. This further dispels the notion that Applicant is only registered members who are Chief Mbadzamane Sifundza's subjects. In this regard I agree with the 1st Respondent submission that he might have an idea at the initiation of the association that it will be beneficial to subject falling under the jurisdiction of Chief Mbadzamane but by nature of it being a public company it allowed anyone who has subscribed to membership as a shareholder. The duties of association of the Applicant on Part Two section 3 (a) reads as follows: **“membership shall be open to every individual dissenting membership of the association regardless of race colour or creed .”**

[30] I agree with the 1st Respondent contentions at paragraph 4.16 of the Heads of Arguments of the attorney for the 1st Respondent. That the arguments by the

Applicant that 1st Respondent acted **ultra vires** and outside the ambit of the Companies Act of 2009 hold no water. It is without question that there was a call by a group of members of the company that the Registrar intervene in terms of section 159 of the Act and further the Registrar has a right to enquire on issues of memberships and shares of a company in accordance with the provisions of section 215 of the Act.

[31] I wish to comment **en passant** it is very strange for attorney for the Applicant to contend the way he did because he was in attendance in the meeting of the 8 May, 2015 mentioned at paragraph [24] supra. Therefore the **bona fides** of this Application are questionable on these facts.

[33] In the result, for the foregoing reasons this court dismisses the Application with costs and the interim rule granted on the 8 June 2015 is discharged forthwith.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE