



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 553/16

In the matter between:

MDUDUZI TFUSI

APPLICANT

and

NTISHENI FARMERS ASSOCIATION

RESPONDENTS

Neutral Citation : Mduduzi Tfusi vs Ntisheni Farmers Association (553/16)
[2017] SZHC 191 (19 SEPTEMBER 2017)

Coram : MABUZA – PJ

Heard : 14 AUGUST 2017

Delivered : 19 SEPTEMBER 2017

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SUMMARY

Civil Procedure – Applicant seeks moneys from the Respondent which he alleges are due to him because of his membership of the Respondent – He also seeks arrear moneys he says are due to him - Applicant has failed to prove membership, has failed to prove amounts due to him – Has failed to prove arrears moneys due to him – Application refused and dismissed with costs.

JUDGMENT

MABUZA -PJ

- [1] The Applicant is an adult Swazi male of Sihhoye in the Hhohho District.
- [2] The Respondent is Ntisheni Farmers Association, an association of farmers growing sugar cane and whose principal place of business is at Tshaneni.
- [3] The Applicant seeks an order in the following terms:
1. Directing the Respondent to pay all monies due to the Applicant by virtue of his membership with the Respondent from the next payment of shares;

2. Directing the Respondent to pay arrear monies due to the Applicant by virtue of his membership, including arrear monies.
3. Granting the Applicant and/or any other interested party leave to issue summons for payment of the arrear monies.
4. Costs of this Application.

[4] The application is opposed by the Respondent which has to that end raised certain points of law which I address below.

[5] The Applicant states that he is a member of the Respondent association by virtue of clause 3.2.1 of the Respondent's Constitution after taking over membership from his father who was a member and who is since deceased. A copy of the relevant part of the Respondent's Constitution was annexed to the founding affidavit. The Applicant relies on clause 3.2.1 which states how membership is acquired through:

- (a) Being a resident of Sihhoye;
- (b) Donation of land/fields to the association; and
- (c) Payment of a sum of E200.00 (Two hundred Emalangeni).

[6] The Respondent denies that the Applicant is a member of the association or that his father was a member. The Respondent says that:

(a) It suffices to point out from the very onset that, in terms of the constitution of the Association, which the Applicant has annexed, membership is granted to a member of the community of *Timbondvweni* who has actually contributed his/her fields or land towards the project.

(b) I submit that Applicant's father did not contribute any land towards the project. There is no land belonging to the Applicant's family even now. His father could not contribute his land as a result of a land dispute with regards to certain fields that stand in between the association's fields and Applicant's fields. He was only allowed to take part in the business of the Respondent association as an employee, with the hope that once the dispute is resolved, he will be able to gain membership, which did not happen until he passed on.

(c) Therefore, because Applicant's father was never a member of the Association in terms of the constitution, he could not pass on membership to any member of his family.

[7] **Clearly the issues herein above raise disputes of fact.**

[8] The Applicant further states that although his father had not registered him as the person to take over membership, he was the person appointed to take over membership by his family. A letter from the family is annexed and marked “LFC”. Further that *Indlunkhulu* has been informed of his membership. A letter from the *Indlunkhulu* is annexed and marked “LU”.

[9] It denies that the Applicant was recognized by the Association as a member. He was only accepted into the Association in the same position as his father. I wish to state that at first, the Association refused Applicant permission to attend its meetings, but after the advice by the *Indlunkhulu*, it was willing to accept him and was therefore allowed to attend. I reiterate however that he did not attend as a member per se.

[10] **Equally hereinabove disputes of fact are raised.**

[11] The Applicant has further stated that he attends meetings and does what is necessary as a member. He believes that he is recognized as a member. Although the respondent first refused to recognize him as a member, the *Indlunkhulu* discussed this matter with the Respondent and they accepted him as a member as annexure “LU” more fully shows.

[12] **Equally a dispute of fact herein.**

[13] The Applicant says that the Respondent regularly makes equal payments to its members but when making these payments, the Respondent fails, omits and/or refuses to pay the money due to him. That the Respondent required him to open a bank account in order to enable them to pay his share of the proceeds. He opened the account and submitted it to the Respondent, but no money is being paid into his account.

[14] The Respondent does not deny that it advised the Applicant to open a bank account but pleads that the opening of a bank account does not necessarily mean that the Respondent is accepted as a member as the same thing is done for employees of the Association of the same capacity. The Association was willing to engage Applicant, but for his ridiculous demands. It says that the Applicant is not therefore entitled to share in the profits of the Association as suggested.

[15] **Disputes of fact are clearly apparent herein.**

Prayers 1 and 2

[16] I am unable to grant these prayers as I have no idea of the amounts involved.

At paragraph 5 of his replying affidavit the Applicant says:

“The amount claimed is not fixed. I am not in a position to calculate the amount which is yet to be calculated by the Respondent. Also, there is no due date for payment, and there are many amounts paid to the members for different reasons. I am not in a position to know what amounts are paid and when they were paid to the members. **I am advised and advised and state that to do that I would require an order compelling the Respondent to discover their statements of account**” (My emphasis).

[17] Had the Applicant come by way of action, he would have invoked certain provisions in the Rules of this Court which would have compelled the Respondents to discover their statements of account. By coming by way of motion he is the author of his own misfortune and has effectively closed the door to his success.

[18] In view of the above, I have to agree with the Respondent that by their very nature application/motion proceedings were never designed to determine probabilities. In **National Director of Public Prosecutions v Jacob**

Gedleyhleleka Zuma Supreme Court of Appeal of the Republic of South Africa Case No. 573/08 Harms DP, at paragraph 26 page 9 states as follows:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities”.

[19] As indicated above the present application would be better resolved and finally settled by hearing oral evidence and this be done by approaching the Court by way of action proceedings which allows for a broader scope in exchange of pleadings and clearly defining the issues involved. The Rules open a list of procedures for the Applicant to adopt and follow and he should do that.

[20] I must therefore refuse prayers 1 and 2 which I hereby do.

Prayer 3

[21] This prayer is inappropriate in these proceedings. The Applicant always had a choice to proceed by way of action proceedings and this prayer also fails, and I so order.

[22] In view of the foregoing the application is refused and is dismissed with costs.

Q.M. MABUZA
PRINCIPAL JUDGE

For the Applicant : Mr. B.M. Dlamini

For the Respondents : Mr. J.M. Mzizi