IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **Case No. 1274/18**

In the matter between:

John Lukhuleni	**1st Applicant**
Johannes Ndzabandzaba	**2nd Applicant**
Simon Sithole	**3rd Applicant**
Zachariah Sithole	**4th Applicant**
Celucolo Sithole	**5th Applicant**
France Mahlalela	**6th Applicant**
Samuel Mahlalela	**7th Applicant**
Constance Lukhuleni	**8th Applicant**
Nomsa Magagula	**9th Applicant**

AND

Mangweni Tingonini Farmers Association **Respondent**

Neutral Citation: **John Lukhuleni & Others v. Mangweni Tingonini Farmers Association (1274/2018) [2018] SZHC 32 (14 December 2018)**

Coram: **J.S Magagula**

Date Heard: **14 December 2018**

Date Delivered: **14 December 2018**

[1] In this matter which came as an urgent application I heard arguments on the 14th December 2018 and delivered an ex – tempore judgment on the same day. I have now been requested to give written reasons for my judgment as I proceed to do hereunder.

[2] In their notice of motion the applicants sought substantive relief as follows:

> ***" 3. That a Rule Nisi operating with immediate effect do hereby issue returnable on a date to be determined by this Honourable Court calling upon the Respondent to appear and show cause why a final order in the following terms should not be made final.***
>
> ***3.1 Pending finalisation of this application that the Respondent be forthwith interdicted and restrained from paying out dividends due to the due to the Farmers after the harvesting period.***

3.2 alternatively ordering and directing that payment of dividends be paid according to agreements and terms initially agreed by the parties or members of the Respondent.

3.3 That the payment of dividends be made out pro –rata in terms of contributions per phases.

4. Granting costs of suit."

[3] In support of the orders sought 1st applicant deposed to a founding affidavit which was supported by all the other applicants.

In paragraphs 6.1 to 6.1.2 of the founding affidavit the 1st applicant states:

"6.1 I humbly submit that on or about the 28th July 2000, a group of community members conjured up an association and an agreement was reached for the formation of a company to be knowns as Mangweni Tingonini Farmers Association.

6.1.1 The reason for the agreement to form the company was the concern about the background of the members in that they were farmers and such farmers had formed the association using their land (land that was for their subsistence livelihood), and they came to be known and referred to as phase 1 and phase 2. The farmers in actual fact were divided into two groups known as Phase 1 and phase 2".

It is paramount to mention that phase 1 came into board or to the company with 79.4…….hectares of land while phase 2

contributed 85…….hectares of land. This land was donated to the company to be used for purposes of farming by the community members.

6.1.2 Subsequently, the chief of the area came with another group of people, some of whom were not from our community and we were requested to allow this group to join our company. We allowed the group to our company and they became known as Phase 3. Phase 3 joined the company and the chief of the area gave them 30 ……..hectares.

It is further submitted that at this time, phase 1 and 2 had already solicited a financial loan from a micro based financial institution called FINCORP for a sum of E 3 000 000-00."

[4] From paragraphs 6.2 to 6.2.2 of the founding affidavit applicants allege that since the members in phase 3 had been given land by the chief for purposes of joining the company they still retained land which they had always had for subsistence farming and they used this land for such purpose. On the other hand the members in phase 1 and 2 had contributed all their land to the company and did not have any for subsistence farming. It was agreed therefore that the members in phase 3 should forfeit 10% of their share of dividends to the members of phase 1 and phase 2.

[5] In paragraphs 6.3.3 of the founding affidavit applicants further state:

" It was further agreed that when the debt with FINCORP was finally and fully paid up, the joint venture would revert back to benefit in terms of their contributions. This therefore meant that

phase 1 were to benefit from their 79.4…… hectares, whereas phase 2 was to benefit from their 85 …….hectares as well as phase 3 to benefit from the 30 hectares contribution. The 10% compensation to phase 1 and phase 2 from phase 3 was to stop operating because the loan would have been paid in full."

[6] It is actually the agreement to benefit in terms of contributions that forms the basis of this application. Applicants claim that when the three groups came together to form the company in the year 2000 there was agreement to share dividends in accordance with the land contributed. However, apart from what is alleged in Applicant's founding affidavit there is no proof of such agreement having been entered into. Applicants have failed to state whether such agreement was written or verbal. Applicant's attorney purported to submit from the bar that the agreement was verbal. I rejected this submission since it was calculated to be evidence from the bar a thing which cannot be countenanced.

[7] In its answering affidavit the respondent denied the existence of any such agreement.

In paragraph 9 to 10.3.1 of the opposing affidavit the respondent states;

" 9. There was a need to debate membership in the Respondent. There were some people whose fields had been incorporated into Respondent and there were those people who were not members, but had been given a piece of land by the umphakatsi for development purposes.

10. Those who had been given land wanted to join the Respondent. There was a proposal that those members who had contributed fields be allowed to also include their children as members.

10.1 This proposal was shot down by the officials from S.K.I.P.E because it would swell the membership to more than 200 members yet we only had about 180 hectares of land.

10.2 Eventually the matter was resolved by allowing those who came with umphakatsi Development land to contribute 10% of their dividends to those who had contributed fields.

10.3 This state of affairs was to endure until after the Respondent had repaid the loan it obtained as capital.

10.3.1 The purpose of this was to ameriorate the fact that they did not have fields to grow subsistence crops but this would be adequately compensated for once the loan was repaid and the dividends would improve."

[8] There remains therefore a very sharp and material dispute of fact regarding whether or not there was any agreement to participate in dividends pro – rata the land contributed by each of the three groups. This dispute clearly cannot be resolved on the papers and in my view the applicants must have foreseen that this dispute will arise even before they instituted these proceedings since this is not the first time the matter is adjudicated upon. The matter has been previously deliberated upon by the Ebuhleni Royal Kraal and the Piggs Peak Liaison Officer (see annexures "A" and "B" of founding affidavit).

[9] The Respondent also denies that phase 1, 2 and 3 referred to the three groups. It maintains that these were phases of cultivation of the land. The farmers would not cultivate all the about 194.4 hectares at once according to the respondent. They therefore cultivated the land in three phases starting with phase 1. This is another material dispute of fact as it destroys the notion that the farmers were divided into three permanent and designated groups. If there was no such permanent division and designation of the groups, then there is a dispute regarding whether there ever was an agreement to participate in dividends pro-rata the size of land contributed by each group.

[10] Even when applying the Plascon Evans rule (see PLASCON –EVANS PAINTS LTD V. VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623) by considering the facts stated by the respondent, together with the facts admitted in the applicants affidavit, I am unable to come to the conclusion that the order sought by the Applicants is justified. There is no consensus that there ever was an agreement to participate in dividends pro – rata the size of the land contributed. On the other hand there is consensus that the group that was given development land by the chief was to give 10% of their dividends to the other two groups. The respondent states clearly that the purpose of this contribution was to compensate the other two groups since they were left with no land for subsistence farming. The applicants do not state what this contribution was for if participation in dividends was to be pro-rata the size of land contributed.

[11] Further the parties are in agreement that the 10% contribution was to cease once the loan had been fully paid. Respondent states that the reason for such contribution to stop was that dividends would improve and there would then be no need for the group contributing such 10% to continue with such contribution.

In the circumstances I was not satisfied that the applicants had made out a case for the relief sought.

[12] For the foregoing reasons I issued an order as I still do, that:

12.1 The application be and is hereby dismissed.

12.2 The applicants are to bear the costs of this application.

For the Applicants: **Mr O. Nzima**

For the Respondent: **Mr Z. Magagula**