IN THE HIGH COURT OF ESWATINI

Held at Mbabane Case No.:953/2017

In the matter between

BUSISIWE NANDI FUPHE N.O. **1ST APPLICANT**

NATASHA SIPHIWE TSHABALALA **2ND APPLICANT**

AND

DR BUTARE RUKUNDO **1ST RESPONDENT**

SIYANAKA CARE HOSPITAL (PTY) LTD **2ND RESPONDENT**

Neutral Citation: *Busisiwe Nandi Fuphe & Another* Vs *Dr Butare Rukundo and Another (953/2017) [2020] SZHC 19 (14th February 2020)*

Coram: Hlophe J.

For the Applicants: Mr M. B. Magagula

For the Respondents: Advocate M.J. Van Der Walt instructed by Henwood and Company

Date Heard: 13th December 2019

Date Judgement Delivered: 14th February 2020

Summary

Application to execute a judgement pending an appeal – When such application is allowed – Whether a case has been made for the reliefs sought.

JUDGMENT

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[1] This judgement is a result of an application moved by the Applicants seeking an order allowing them to execute a judgement issued by this court on the 11th September 2019 notwithstanding that it had been appealed against.

[2] The application has been necessitated by the position of our law to the effect that an appeal against a judgement automatically suspends its execution. The long term effect of this position is that where certain requirements are met, leave of court may be obtained to allow the execution of the Judgement

notwithstanding the noted appeal. See in this regard **South Cape Corporation (PTY) LTD Vs Engineering Management Services (PTY) LTD 1977 (3) SA 534 (A)** as well as **Mthandazo Berning Ntlemenza V Hellen Suzman Foundation and Another Case No. 402 of 2017 (a South African case)**.

[3] The judgement handed down by this court on the 11th September 2019 had among others, the following orders which the applicant seeks to have executed notwithstanding the appeal:-

3.1. The appointment of the 1st Applicant as Director of the 2nd Respondent and of the 2nd Applicant as the alternate Director, by the requisitioned General Meeting of the 24th September 2015 be and is hereby confirmed;

3.2. An order declaring that the Estate of the late Thembeka Ruth Tshabalala , Master's Reference No. EH 65/2013, as holder of 50% of the shares in the 2nd Respondent, is entitled to equal control of the management of the 2nd Respondent including the right to appoint an equal number of Directors into the 2nd Respondent's Board;

3.3. An order declaring that the applicants as shareholder representatives of the estate of the late Dr Tshabalala are entitled to participate equally in the management of the affairs of the 2nd Respondent,

3.4. The Applicants be and are hereby empowered to appoint a Forensic Auditor to conduct a forensic investigation, examine the 2nd Respondent's books of accounts, financial statements and management affairs of the 2nd Respondent for the period covering 2013, 2014, 2015, 2016, 2017, 2018 and 2019 financial years of the 2nd Respondent;

3.5. The 1st Respondent be and is hereby directed to deliver and facilitate the delivery to the Applicants or the forensic auditor of all management, accounting records and information of the 2nd Respondent as may be requested by the Applicants or the forensic auditor for purposes of conducting the forensic investigation, examining the books of accounts and the financial and management affairs of the 2nd Respondent.

3.6. The 2nd Respondent and its employees be and are hereby directed to deliver and facilitate the delivery to the Applicants or any consultant engaged by them of all management, accounting records and information of the 2nd Respondent as may be requested by the Applicant or their consultant for purposes of examining the books of accounts and conducting an audit into the financial and management affairs of the 2nd Respondent;

3.7. The Respondents be and are hereby directed to cooperate with the Applicants and the forensic auditor and to grant them full access to all records, information and documents as may be required whilst conducting the forensic investigation, examining the books of accounts and the financial and management of the 2nd Respondent.

4. Costs of suit in the event the application is opposed.

[4] Although there was also an order sounding in money in the said judgement, the applicant has decided not to ask for the execution of same pending the

appeal. I want to believe that the main consideration in this regard is the fact that the applicant would have been required to put up security de restituendo which would have necessitated that the equivalent of the judgement debt be kept in a trust account elsewhere pending the finalization of the noted appeal.

[5] The legal position is that a court of similar status or standing as the one that handed down the judgement being appealed against, has a discretion to allow execution of the judgement irrespective of the noted appeal. In **South Cape Corporation (PTY) LTD V Engineering Management Services (PTY) LTD 1977 (3) SA 534 (A) at 545 C – D**, it was stated that where the court that granted the order decided to allow execution notwithstanding the appeal, it also had a wide discretion to determine the conditions upon which the right to execute the judgement shall be predicated upon. This discretion on the part of the court, it was said, is part and parcel of the inherent jurisdiction which the court has to control its own judgements or processes.

[6] In the same **South Cape Corporation (PTY) LTD V Engineering Management Services (PTY) LTD (Supra)** as well as the **Mthandazo Berning Ntlemeza V Hellen Suzman Foundation and Another Case No. 402/2017** (A Supreme Court of Appeal of South Africa's Judgement), it was stated that the considerations on whether or not to allow execution pending appeal, are the following:-

6.1. The potentiality of irreparable harm or prejudice being sustained by the Appellant on appeal (the respondent in the application) if leave to execute were to be granted;

6.2. The potentiality of irreparable harm or prejudice being sustained by the Respondent on appeal (applicant in the application) if leave to execute were to be refused;

6.2. The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has not been noted with the bona fide intention of seeking to reverse the judgement but for some indirect

purpose, e.g. to gain time or harass the other party; and

6.4. Where there is potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.

[7] The background to the application is briefly that the applicants are daughters to the late Dr Thembeka Ruth Tshabalala who during her lifetime was, together with the 1st Respondent, a Director and shareholder in the 2nd Respondent company where they each held 50% shares. Following the death of the said Dr Tshabalala, the applicants (her daughters) were appointed Executrices of her estate by the Master of the High Court. Although the 1st Respondent had initially accepted and dealt with them as the shareholder representatives and directors in the company for sometime after their appointment, he later reneged and revoked their membership and Directorship in the 2nd Respondent.

[8] Following that decision the 1st Respondent became the only shareholder and director of the company and became answerable to no one notwithstanding that he only held 50% of the shares of the company with the other similar number of shares having to be under the control of the other shareholder namely the estate of the late Doctor Tshabalala which at that instance was represented by the applicants as Executrices.

[9] The applicants, claiming to have acted in terms of section 158 of the Companies Act of 2009, requisitioned a general meeting of the Second Respondent to appoint a director and alternate director in the Second Respondent. In the absence of the First Respondent who failed to attend the meeting despite having been notified of same, the Applicant themselves as a Directors and alternative Director respectively in the 2nd Respondent company.

[10] Still being sidelined in the affairs of the company which were at that stage a preserve of the 1st Respondent, the Applicants instituted proceedings in terms of which they sought inter alia the orders referred to above which included their having to be confirmed in their assumed positions as well as

being allowed to play a part in the management of the affairs of the 2nd Respondent Company as holders of the other half of the shares in the company. For the reasons set out in the Judgement handed down by this court on the 11th September 2019, I found for the applicants and granted among others the orders referred to above.

[11] Given that the Respondents noted an appeal against the judgement in question, the applicants moved the current application where they sought an order granting them leave to execute the specific orders referred to above notwithstanding the noted appeal which as indicated above had in law the effect of suspending execution of the judgement until after the Supreme Court of appeal would have pronounced itself in the matter.

[12] The question is whether or not a case has been made for an order executing the judgement notwithstanding the appeal. In seeking the reliefs in question, the Applicants contend that if they do not obtain the orders sought, they are bound to suffer irreparable harm. This they say is because unlike the First Respondent, who is in charge of the Second Respondent and who is unilaterally taking all the decisions that favour him, some of which have a

huge potential of being prejudicial to Applicants; they are forever exposed to losses and prejudicial decisions being taken by the First Respondent. They contend that their position is complicated by the fact that they are actually in the dark on what is happening in the said company given that they have no information despite their entitlement to same. In this regard they use the example of a current suit against the company which is pending in court amounting to millions of Emalangeni which they know nothing about, including whether it is genuine or not and whether or not it is being defended.

[13] The applicants contend that there is thus potentiality of irreparable harm on them which is not the same thing on the part of the Respondents who stand to suffer no harm by the orders being executed given that if they are allowed to participate in the affairs of the company pending the outcome of the appeal, the interests of both parties would be secured as both parties will be involved in its management. They further submit that the prospects of success favour them given that it is very unlikely that an appeal court would favour the position adopted by the appellants to the effect that they would in law be allowed to unilaterally manage and do as they please with the affairs

of a company where both parties are equal shareholders, each holding 50% of the shares.

[14] The Applicants contend as well that the position adopted by the Respondents is compounded by the fact that First Respondent justifies his stance by claiming that the applicants can only become members of the company once they are registered but that they however can only be registered if he allowed them to be, a position he unabashedly stated he was not allowing. Clearly he is in that sense perpetuating the apparent prejudicial position the other shareholder's representatives complained of. He is thus, in the eyes of the applicants, enhancing his position through his own unlawful means given that he does not and cannot deny that they hold the other half of the company's shares. The argument by the Applicants is therefore that no one can be allowed in law to enhance his position through his own unlawful means.

[15] The argument goes further that the position by the Respondents cannot hold because they had already allowed them to act as shareholders or shareholder representatives and directors in the Second Respondent or that they had

already recognized them as such before the First Respondent decided to revoke their said position in the company. As at that stage, it was argued, there had been unanimous assent which the Respondents had no right to unilaterally resile from.

[16] I am of the view that the position adopted by the current Respondents is untenable and that they stand to suffer no prejudice were the judgement to be carried into effect on the orders sought to be effected whilst the appeal is awaited. I agree that unlike the applicants, there is no potentiality of irreparable harm likely to be suffered by the Respondents. The same thing cannot be said of the applicants in my view. The potentiality of irreparable harm is a reality against applicants on each day that passes given that the Respondents can continue unhindered to take decisions or even carry out certain acts which may be prejudicial to the interests of the other shareholder or even the company itself.

[17] I am bolstered in the decision I have come to by the fact that the Respondents' position is against the express provision of article 64 of the Articles of Association of the 2nd Respondent. That article does not allow a

situation of a single Director in that company. It is in fact couched in the following terms:-

> *" There shall not be less than two nor more than fifty directors of the company; and that the company may from time to time in general meetings, increase or reduce the number of directors and may by ordinary resolution remove any director from his appointment. Any vacancies howsoever created may be filled by the appointment of another director by the shareholders of the company,"*

[18] In **Paul Friedlander and Others Vs Swaziland Industrial Development Corporation Appeal Case No.35 of 2006 (**also known as the **Kirsch Holdings V SIDC** case) a similar clause to Article 64 was interpreted to be a mechanism of ensuring that there was joint control of a company by each one of its two 50% shareholders. It was further elucidated that the need for the appointment of directors of a company at a general meeting by its shareholders was a clear indication that the two shareholders intended to operate on a consensus basis in taking decisions in the company.

[19] Clearly the position adopted by the Respondents in this matter stands contrary to the meaning of Article 64 of the 2nd Respondent Company as clarified in the **Paul Friedlander And Other Vs Swaziland Industrial Development Company Judgement** referred to above. It is inconceivable therefore that the Respondents can contend that a position that goes against this clear provision of the articles of the company can be allowed to stand even on appeal. The meaning given to an article similar to Article 64 of the Second Respondent was expressed in the following words in the said **Paul Friedlander and Others V Swaziland Industrial Development Corporation Appeal Case No 35 of 2006 judgement**:-

> *"an underlying assumption shared by the parties; i.e. that by virtue of their equal shareholding the governance of the company would be based on the principle of equality or joint control and that no "partner" would be empowered to force decisions on the other with which it did not agree. The fact that shareholders had to appoint directors as provided in article 65 (an equivalent of article 64 herein) was a key mechanism directed at*

ensuring joint control over the company by its two 50% shareholders."

[20] In an endeavor to show that their appeal has merit, the First Respondent suggests that it is he, as the sole director of the company who will be entitled at any time and in his absolute and uncontrolled discretion, and without assigning any reason therefore, to decline to register any proposed transfer of shares and that this alleged right of his to decline or suspend registration as a shareholder shall apply in the case of a person becoming entitled to a share in the company as a consequence of the death or insolvency of a member, as is the case with the Applicants.

[21] The fallity of the foregoing argument of the first Respondent is that it ignores the fact that the discretion referred to by him to allow or not to allow the transfer of shares vests in "Directors" in a particular company and not a single 'director' particularly in a case like the present, where a single director is expressly prohibited by article 64. The First Respondent seems to have happily arrogated to himself as a single director, the power preserved for "directors" in a company where the whole aim behind the crafting of the

article was to ensure that there was an equilibrim of power with everything being done by consensus as is the case in a company like the Second Respondent. I therefore have a difficulty accepting the First Respondent's arguent that he was entitled to take the decisions he said he took or was taking as a single Director in a case where such is not allowed. Clearly such decisions are void and are a nullity.

[22] I have for these reasons come to the conclusion that the applicant's application should succeed and I accordingly grant applicants the reliefs as prayed for in the Notice of Motion together with costs at the ordinary scale.