



**IN THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

**HELD AT MBABANE**

**CASE NO. 1165/2017**

In the matter between:

**SERAPHY SIBONGILE SIPHIWE RESTING**

**APPLICANT**

**And**

**SIDUMO LAWRENCE DLAMINI**

**1<sup>st</sup> RESPONDENT**

**RAY DUMISANI DLAMINI**

**2<sup>nd</sup> RESPONDENT**

**KNOX NXUMALO N.O.**

**3<sup>rd</sup> RESPONDENT**

**BICON CONSULTING ENGINEERS  
(SWAZILAND) (PTY) LTD**

**4<sup>th</sup> RESPONDENT**

**Neutral Citation:** *Seraphy Sibongile Siphwe Resting vs Sidumo Lawrence*

*Dlamini & 3 Others [1165/2017] [2021] SZHC 48 (7  
April 2021)*

**Coram:** **LANGWENYA J**

**Heard:** 8 April 2019

**Delivered:** 7 April 202

**Summary:** *Civil Procedure-applicant shareholder of fourth respondent-applicant through motion proceedings asks for declaratory orders nullifying certain shareholders' meetings of fourth respondent-application opposed by respondents*

*Company law-applicant's contention is that meetings were held at short notice without her consent to waiver of short notice period contrary to Articles of Association and Companies Act 2009.*

*Held, a general meeting may be called at short notice if a majority in number of members having and together holding not less than 95% in nominal value of the shares conferring a right to attend and vote at the meeting consent.*

*Held, the requirement is for consent by not less than 95% of the members entitled to vote and not of the members holding 95% of the share capital.*

## **JUDGMENT**

[1] The applicant Seraphy Sibongile Siphwe Resting, a 7% shareholder of the fourth respondent, approached this Court by way of notice of motion seeking an order in the following terms:

1. Declaring the purported notice of a shareholders' meeting to be held on 29 November 2018 all proceedings pursuant thereto and any and

all resolutions taken thereat, in particular the resolution to the effect that the amount claimed by the applicant not be paid, to be invalid, null and void and of no legal force or effect.

2. Declaring the purported shareholders' meeting of the fourth respondent held on 15 June 2018 and any and all resolutions taken thereat to be invalid, null and void and of no legal force or effect.
3. Declaring the purported shareholders' meeting of the fourth respondent held on 27 June 2018 and any and all resolutions taken thereat to be invalid, null and void and of no legal force or effect.
4. Declaring the first respondent's offer pertaining to first respondent's shares in the fourth respondent dated 5 June 2018 to be invalid, null and void and of no legal force or effect.
5. Costs including the costs of Counsel as certified in accordance with High Court Rule 68(2).
6. Such further and/or alternative relief as the above honourable Court may deem fit.

### **Relevant Background Facts**

[2] The applicant, first, second and third respondents are shareholders of the fourth respondent. The fourth respondent is a company duly registered and incorporated in accordance with the Company laws of eSwatini and has its registered office situate at plot 321, Samora Machel Street, Mbabane.

[3] During the month of February 2017 and in October 2017, the first respondent moved applications seeking to place the fourth respondent under judicial management and to place fourth respondent under liquidation respectively. The applicant successfully brought an urgent application to

discharge the interim order which was granted in the judicial management proceedings<sup>1</sup>. Contrary to the view held by the respondents, applicant averred that the application seeking to place fourth respondent under judicial management was subsequently withdrawn by the first respondent<sup>2</sup>. There are no court papers vouching for either position in the court file. Although respondents and applicant's versions of the status of the judicial management proceedings differ, the net effect is that those proceedings are no longer pending before this Court. The application for the liquidation of the fourth respondent however is still pending in Court.

- [4] In the proceedings before me (Case 1165/2017) the applicant seeks an order nullifying the shareholders' meetings and the resolutions taken during the meetings of 15 June 2018, 27 June 2018 and of 29 November 2017. She seeks also that first respondent's offer of his shares in the meeting of 5 June 2018 be declared a nullity.
- [5] According to the first respondent's answering affidavit and applicant's replying affidavit<sup>3</sup>, the meeting of 15 June 2018 did not take place, prayer 2 of the Notice of Motion was therefore abandoned.
- [6] The meeting of 27 June 2018 was attended by three shareholders absent the applicant. The meeting of 27 June 2018 was called at short notice and the applicant's objection to the short notice was noted. The majority of shareholders attended the meeting and agreed to waive the short notice of the meeting. Also, discussed in the meeting of 27 June 2018 was the subject of the purchase of the first respondent's shares. It was concluded that the

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<sup>1</sup> See Second and Fourth Respondents' answering affidavit in case 1165/2018.

<sup>2</sup> See paragraph 9 of applicant's founding affidavit at page 7 of the Book of Pleadings.

<sup>3</sup> See paragraph 32 of applicant's replying affidavit at page 108 of the Book.

first respondent should submit a formal notice of his intention to dispose of the shares in line with the shareholders' agreement.

- [7] Subsequently, the first respondent in this matter moved an urgent ex parte application on 27 October 2017 under High Court case number 1656/2017 inter alia seeking the winding-up of the fourth respondent and for an interdict of the second respondent and the applicant from paying estate S. Resting a certain amount of money from the fourth respondent's assets as anticipated in a notice of a special meeting that was to be held on 31 October 2017.
- [8] The meeting of 31 October 2017 went ahead and a resolution was made that S Resting be paid an amount of E 4 774 946.66 being her claim against her late husband's death benefits. In the meeting held on 31 October 2017, the applicant voted in her capacity as a shareholder as well as in her capacity as a proxy for the third respondent in favour of the resolution to pay the applicant her claim against her late husband's death benefits.
- [9] Annexure 'SRS2' is a notice of an extra ordinary meeting of the shareholders of the fourth respondent inviting them to a meeting on 29 November 2017. The notice specifies what business was to be transacted. The meeting of 29 November 2017 was attended by the applicant, the second respondent, Siphiso Dlamini (proxy for the first respondent) and the third respondent.
- [10] The Articles of Association of the fourth respondent specify that a general meeting or extra ordinary meeting cannot be called on less than fourteen (14) days' notice unless all members present at the meeting agree to waive

the requirement in respect of the notice period. According to the minutes of the meeting of 29 November 2017, there was passed a unanimous resolution for the waiver of the notice period.

- [11] The meeting of 29 November 2017 deliberated on the effect of the payment of applicant's claim on the financial health of the fourth respondent; the issue of conflict of interest of applicant concerning the claim she had filed against the fourth respondent as well as the need to review the conduct of proxies when viewed in the context of protecting fourth respondent's interests.

### **Applicant's Case**

- [12] The applicant contends that she did not consent to the waiver of the notice period prior to the holding of the meeting of 29 November 2017 and that the minutes of the said meeting are inaccurate in stating everyone in the meeting consented to the holding of same at short notice. The applicant argues further that the meeting of 29 November 2017 was invalid because the shareholders who allegedly agreed to the meeting at short notice hold an aggregate of 93% instead of the statutory 95% of the total voting rights of all the members<sup>4</sup>.
- [13] The applicant's objection of holding the meeting of 29 November 2017 at short notice is captured in her email of 12 December 2017 and not in the minutes of 29 November 2017. In her email of 12 December 2017 applicant states that she attended the meeting of 29 November 2017. All the

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<sup>4</sup> Article 49(b) provides that a company meeting shall be called by shorter notice...by a majority of members who have a right to attend and vote at the meeting and holding not less than ninety-five percent in nominal value of the shares giving that right. See 'SRS 4' at page 29 of the Book of Pleadings.

shareholders of fourth respondent attended the meeting in person or by proxy.

- [14] After draft minutes of the meeting of 29 November 2017 were forwarded to her, she contends that she reiterated the absence of her consent to shorter notice through an email of 12 December 2017 in which she intimated that resolution taken thereat were invalid. It is her contention further that her objections were given short shrift and ignored as the minutes of the meeting signed on 14 December 2017 make no mention of her objections.
- [15] Applicant argues further that she objected to the convening of the meeting of 26 June 2017 at short notice. She did not attend the meeting of 27 June 2017 and was never given a copy of the minutes of the said meeting. The minutes of the meeting of 27 June 2017 reflect that applicant objected to the calling of the meeting at short notice contrary to Article 49 of the Company's Articles of Association. The meeting of 27 June 2017 discussed the issue of purchase of first respondent's shares. There were three shareholders present in the meeting of 27 June 2017 and only the applicant was absent.

### **Respondents' Case**

- [16] Respondents argue that the shareholders present at the meeting 29 November 2017 unanimously agreed to the waiver of the notice for the meeting. This was recorded in the minutes of the meeting. Respondents contend that it is incorrect that applicant did not consent to having the meeting called on short notice. It is second and fourth respondents' submission that the applicant attended the meeting participated and therefore acquiesced to the meeting being held at short notice. Respondents complain

that applicant attended and participated in the meeting and only became aggrieved when the majority of the shareholders present at the meeting resolved to rescind the resolution authorizing payment of E4.7 million to the applicant. The resolution which was rescinded was passed at the meeting held on 31 October 2021.

### **The Meeting of 29 November 2017**

[17] Present in the meeting of 29 November 2017 were the applicant, the first, second and third respondents in person and represented by proxy. According to applicant's averment the meeting of 29 November was not properly constituted because the shareholders who consented to the waiver of short notice held shares whose nominal value is 93% instead of the required nominal value of 95% shares.

### **Relevant Statutory Framework**

[18] In order to determine the validity of the meetings of 29 November 2017 and 27 June 2017 it is necessary to consider the statutory framework which has a bearing on the question.

[19] The fourth respondent (Bicon Consulting Engineers (Swaziland) (Pty) Ltd is a company duly registered and incorporated in accordance with the company laws of eSwatini. It is therefore established pursuant to the Companies Act (the Act). The Memorandum and Articles of Association were registered in terms of the Companies Act-these are binding on the company in terms of section 54(2) of the Act.



- [20] Section 157 of the Act provides that general meetings of a company may, subject to its Articles be held from time to time. The Articles<sup>5</sup> provide that the notice of a general meeting shall be given on less than fourteen (14) days and notice must be given to such persons who are in accordance with the provisions of the Articles entitled to receive notice of all meetings. The notice shall specify the venue, date and time of the meeting and if it is special business the nature of such business. Special business is not defined.
- [21] The Articles provide further that a general meeting can be called on short notice if a majority in number of members having, and together holding, not less than 95% in nominal value of the shares conferring a right to attend and vote at the meeting consent. The requirement is for consent by not less than 95% of the members entitled to vote and not of the members holding 95% of the share capital. For instance, if a company has 100 members entitled to vote consent should be obtained from 95 members irrespective of the shareholding of these members. Applying this principle to the facts at hand- the shareholding in the company is as follows: applicant-7%; first respondent-38%; second respondent-26% and third respondent-29%. Since the company has four members who are entitled to vote, consent should be obtained from at least three members irrespective of the shareholding of these members. It is the applicant's approach that the shareholders who consented to the waiver of notice period hold an aggregate of 93% and not 95% of the nominal shares; for this reason their consent to a shorter notice is invalid-so the argument goes. In my view, it is not so much that members consenting to waiver of notice period hold 95% of the share capital, as it is

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<sup>5</sup> Article 49 of the Articles of Association.

that not less than 95% of the members entitled to vote have consented to the waiver of notice period before a meeting is held at short notice.

[22] The respondents contend that the applicant agreed to the waiver of notice, attended and participated in the meeting of 29 November 2017. The applicant's attendance and participation at the meeting is common cause. On 13 December 2017, applicant made extensive comments on the minutes of the meeting of 29 November 2017. In her comments, she makes no mention of her objection that the meeting was held at short notice. I am of the view that the applicant cannot rely on absence of consent or waiver of notice on her part to defeat the proceedings because by attending and participating in it, she overlooked or sanitized what she views as a defective notice<sup>6</sup>. She did, however through her email to the second respondent raise 'serious concerns' that the meeting was invalid and resolutions taken thereat were of no force and effect for non-compliance with the company's Articles of Association in this regard.

[23] In the email of 12 December 2017, applicant states that the agenda item for the meeting of 29 November concerned payment of her husband's death insurance proceeds in accordance with a resolution taken in the meeting of 31 October 2017. To her utter dismay, she states, the meeting resolved not to pay the claim she had lodged and had been agreed upon by shareholders in a meeting on 31 October 2017. Tellingly, in the same email, applicant states that she attended the meeting of 29 November 2017 because she was concerned that in her absence, unilateral decisions may be taken.

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<sup>6</sup> *Herald Investments Share Block (Pty) Ltd v Meer & Others, Meer v The Body Corporate of Belmont Arcade & Another* 2011 (2) All SA 103.

- [24] It is not in dispute that the meeting of 29 November 2017 was convened at short notice. What is disputed is whether or not, a majority of the people who were entitled to attend and vote at the meeting consented to the short notice. For reasons stated in the above paragraphs, the answer to the question must be in the affirmative.
- [25] The applicant contends that she objected to the short notice but attended the meeting nevertheless. Respondents argue that the applicant consented to the short notice of the meeting. An applicant in motion proceedings, where there are disputes of facts in the affidavits may only be granted final relief in the circumstances outlined in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*<sup>7</sup>. On the question of whether or not the meeting was lawful and decisions taken thereat valid, I accept the version of the respondents as a most probable version. That the applicant did not act promptly in seeking to challenge the validity of the short notice; that she did not seek to interdict the meeting instead acquiesced by actively participating in the meeting, voting and contributing during the meeting is telling. Her conduct in this regard gives credence to second respondent's allegation that the applicant's conduct of participating in the meeting and later challenging the validity of same once a resolution that was not to her liking was passed is improper<sup>8</sup>. Applicant says so much about the reason she attended the meeting in her email of 12 December 2017-the agenda item raised her hopes that she would be paid her claim against fourth respondents. When that did not happen, she was crestfallen.

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<sup>7</sup> 1984(3) SA 623(A) at 634D-635C.

<sup>8</sup> See paragraph 29.2 of second and fourth respondents' answering affidavit at page 123 of the Book.

[26] A company meeting convened with a majority of the shareholders consenting to the waiver of short notice and forming a quorum cannot be said to be unlawful and invalid.

### **Acquiescence**

[27] In so far as the respondents rely on the acquiescence of the applicant in attending and participating in the meeting she alleges is invalid, the respondents have, in my view discharged the *onus*. Acquiescence is akin to waiver. The dictum of Innes, C.J. about waiver is apposite as set out in *Laws v Rutherford*<sup>9</sup> in the following terms:

**The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.'**

[28] The conduct of the applicant to attend, participate and vote in a meeting which she alleges she was opposed to is inconsistent with an intention to enforce her right to object to waiver of notice to hold the meeting. For this reason I find that applicant acquiesced .

### **The Meeting of 26 June 2017**

[29] Applicant avers that on 15 June 2017 and on 27 June 2017 extraordinary general meetings were held to deal with the issue of disposal by first respondent of his shares. The meetings in question are said to have taken place on the same date as the notices of the meetings.

[30] It is applicant's lamentation that the notices for the meetings referred to herein did not accord with Article 49 of the company's Articles of

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<sup>9</sup> 1924 AD 261 at 263.

Association and that the applicant did not consent to or waive the prescribed notice period.

[31] It is common cause however that the meeting of 15 June 2017 did not take place.

[32] Present at the meeting of 27 June 2017 was the second respondent, Sipiwo Dlamini (proxy for the first respondent) and the third respondent. The applicant did not attend the meeting but sent an apology. For the meeting of 27 June 2017 there were two agenda items namely: waiver of notice period of the meeting and the purchase of the first respondent's shares.

[33] The applicant's objection to the notice for the meeting was noted and the majority of members present voted to continue with the deliberations on the acquisition of the first respondent's shares in the fourth respondent.

[34] The meeting resolved that the first respondent should submit a formal notice of his intention to dispose of the shares in accordance with the shareholders' agreement<sup>10</sup>. It is common cause that at the time this matter was argued, the issue relating to the disposal of first respondent's shares was no longer being pursued and is therefore academic.

[35] Even though applicant prays in her pleadings in case 1165/17 that this matter be heard contemporaneously with case 1656/17, it was subsequently agreed by all concerned that arguments in case 1656/17 be made at a future date because parties were still negotiating and wanted to settle the matter out of court.

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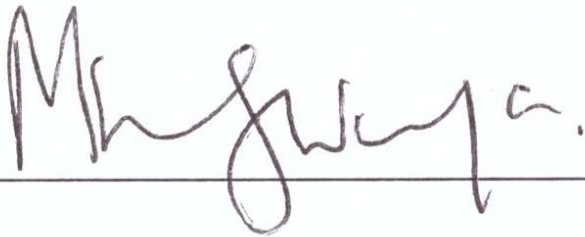
<sup>10</sup> See 'RD2' Minutes of extraordinary general meeting of 27 June 2017 at page 130 of the Book.

[36] I am of the view that the meeting of 27 June 2017 was validly constituted by a majority of the shareholders present who consented to having the meeting at short notice. It is on the basis of the principle of majority decision that a meeting called on shorter notice than that which is prescribed in the Articles of Association was lawfully convened.

### **Order**

[37] In the result,

1. The application is dismissed.
2. Costs follow the event.



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**M. LANGWENYA J.**

For Applicant:

Advocate M. J. Van der Walt

Instructed by Henwood & Company

For First Respondent:

Mr. S. V. Mdladla

For 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents:

Mr. Z. D. Jeje