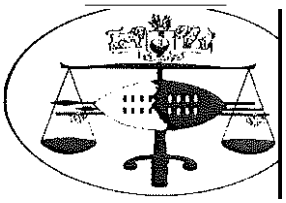


IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO's: 843 & 832/2022

In the matter between:

MFOKOLOZI MAZIYA	FIRST INTERVENING PARTY
MPHO MAZIYA	SECOND INTERVENING PARTY

And

TIYAMIKE MAZIYA	FIRST RESPONDENT
BEKETELE MAZIYA	SECOND RESPONDENT
PREMIUM CORPORATE CONSULTING GROUP	·. THIRD RESPONDENT
LIONI-IEART PROPERTIES (PTY) LTD	FOURTH RESPONDENT
AMANDLA FINANCIAL SERVICES	FIFTH RESPONDENT
TI-IE REGISTRAR OF COMPANIES	SIXTH RESPONDENT
THE ATTORNEY GENERAL	SEVENTH RESPONDENT
C..J LITTLER & COMPANY	EIGHT RESPONDENT

Neutral citation	*Affi1kolozi /\1/aziya & Another v Tiyamike Maziya & Others* (842&832/2022) */2022/ SZHC (103)* (26/05/2022)
CORAM:	**B.S. DLAMINI J**
DATE HEARD:	18 May 2022
DATE DELIVERED	27 May 2022

.",'umma111: *An application lo intervene asfi1rther Respondents in the main application. Application lo intervene followed by another application seeking dl'claratorv rdil'/' Respondents contesting both applications on the ha.l'is that Applicants have 110 direct and substantial interest in the main application hy virtue of' them having resigned as directors of' the company.*

Held; In the application to intervene, the Applicants have estahlished that they have a direct and suhstantial interest in the main matter by virtue of' them disputing that they resigned as directors of'the Fourth Respondent. As regards the

separate application Ji1r declaratory relief; the finding of the C'our! is that the disputed issues can. he resolved not 011 the pleadings but hy way of oral evidence. It is accordingly directed that the question of whether or 110I the Applicants volu111arily resigned fi·om directorship of the Fourth Respondent must he determined through oral evidence.

JIJDGMENT

INTRODUCTION

[I] On the 0[1] I h May 2022, the Fourth Respondent (Lionheart Properties (Pty) Ltd) brought an urgent application to the High Court in which it sought to compel the Fifth Respondent (Amandla Financial Services) to pay to it a sum of **E 770,000.00 (Seven Hundred and Seventy Thousand Emalangeni)** in respect of services rendered by the former to the latter pursuant to an agency agree111ent between the parties.

[2] On the date set for the hearing of the urgent application, the Applicants (hereinafter referred to as "Intervening Parties"), brought an application to intervene as Respondents in the urgent application. The Applicants indicated in their Foundi!1g Affidavit that they wished to intervene in the urgent application ("The main matter" or "main application") in or er to oppose the relief sought therein pending detennination of the dispute between the directors of the Applicant.

[3] The Applicants or "Intervening Parties" simultaneously filed a separate application in which ptimarily, they sought a declaratory order to the effect that they are still directors of the Applicant in the main matter and that the purpo1ted resignations by them came about in a fraudulent manner. The Applicants also sought an order stopping the payment due to the Applicant in the main matter pending finalization of the two applications brought by them as Intervening Patties.

[4] The First to Fourth Respondents, namely Tiyamike Maziya, Beketele Maziya,. Premium Corporate Consulting Group and Lionheart Properties (Pty) Ltd (hereinafter referred to as "The Respondents") are

opposing the application to intervene as well as the application for

declaratory orders. In opposmg the applications brought by the Intervening Paities, the Respondents are alleging that;

(a) The Intervening Paities have no direct or substantial interest in the main matter in that they voluntarily resigned as directors of the Fourth Respondent and that their letters of resignation, duly signed by them, constitute *prima .facie* proof of such resignation.

(b) The Fou1th Respondent is an independent company and is separate from its directors. The Intervening Paities have no 1ight in law to act against the company, and that if they have any claim, they are at liberty to file such claim at any given time as opposed to stopping payment legally due to the company.

(c) The Intervening parties have failed to establish the requirements of an interdict as they have been removed as directors of the Fou1th Respondent. This, according to the Respondents, also means that the Intervening Pa1ties have no *locus standi* to bring the two applications in opposition to the main matter.

(d) The matter, namely the application for a declaratory order is *res judica/a* as it has already been determined by this Court under High Cou1t Case No: 738/2022.

(e) There has been a misjoinder of the Third and Eighth Respondents in the applications brought by the Intervening Parties as there is no relief sought against these Respondents.

(J) The applications brought by the Intervening Parties are fraught with se1ious disputes of fact which cannot be resolved on the papers.

(g) The applications by the Intervening Parties are lacking in urgency for the reasons outlined in the Respondents' answering papers.

BRIEF FACTS

[5] The Applicants or Intervening Parties dispute that they have resigned as directors of the Fou1th Respondent. In the application for declarat01y orders, One Mr. Mfolozi Maziya (the First Intervening Party) states that, around October 2021, the Fourth Respondent, through his personal eff01t, acquired a tender with the Public Service Pension Fund to facilitate the sale and purchase of immovable prope1ty situate in the District ofShiselweni.

[6] It is alleged in the Founding Affidavit that it was a tenn of the agency agreement that the Fou1ih Resp'ondent, after transfer of the immovable prope1iy, would be paid a commission of **E 2,500,000.00 (Two Million Five Hundred Thousand Emalangeni),** This commission was to be paid by the Eight Respondent who was handling the transaction on behalf of the seller and buyer,

[7] The allegation by the Intervening Pmiies is that around February 2022, the directors of the Fourth Respondent held a meeting and took a resolution allowing the Fou1ih Respondent to seek an advance commission in the fonn of a loan from the Sixth Respondent [Fifth Respondent], This resolution, according. to the Intervening Parties, was endorsed by all the four directors of the Fowih Respondent,

[8] It is stated by the Intervening Parties that after about a month of applying for the advance payment or loan from the Fifth Respondent, an enqui,y was made by the First Intervening Pmiy to the Fifth Respondent about the status of the loan application, The infomiation that the First Intervening Party got from the Fifth Respondent was that the loan had been approved and already paid to the Third Respondent, The Third Respondent is a company that is used by the parties to

receive payments for all work clone by the Fowih Respondent. The Court was not informed as to who the directors of the Third Respondent are and the signato1ies to the bank accounts held by the Third Respondent. The Court can only assume that the Intervening Parties are not signatories nor do they have access to the bank account held by the Third Respondent as they would have known about the loan payment of E 200,000.00 made by the Fifth Respondent to the Fourth Respondent via the Third Respondent.

[9] On the issue of the alleged resignations by the Intefvening Patties from the Fourth Respondent_ it is alleged by the Intervening Paiiies that;

"2-1. I was made aware of' the docume/1/s that purport to be resignations ancl cessions signed hy the Applicant.1· and a le/fer directed to Jnhlonh!a Financial Serl'ices, suhsidiary of' the F1fih Respondent .fi·om the First and Second Respondent '.1· A1/orneys that Applicants (Intervening l'arties) had in .fctcl rl'signed as director.1 of'the -l,1[1] Respondent 011 the 2[1111] Fehruary 2022.

25. The documents I was presented with showed minutes of' an apparent meeting that was held on 2 Fehruary 2022 /stating that/;

25. J The Applicants resigned as directors and shareholders of' the ***.f'''*** *Nespondent.*

25.2 J cede my 2./% shareholding tu the }'' Respondent and the 2nd Applicant cedes her 2./% shareholding to the 2[11]d Respondent.

26. J suhmit that this came as a surprise to App/icant.1· as we did not at any point tender our resignations as Directors of the ***.f'''*** *Respondent; neither did we cede of' our shares to the I'' and 2nd Respondents. In.fact, we had nei•er had s< ht nor advised of'the resignation epistle, the cession of' our shares and the Er:tra Ordinary A1eeting of'the 2'1<i February 2022."*

[10] In paragraph 32 of the Founding Affidavit, the Intervening Parties further allege that;

"The Applicants have never signed any le11er.1· resigning as directors or an)! documents transferring and ceding our shares. I am of' the helief'that my signature was ohtainedfi·m1dulently to remove mefi·om the directorship and the shareholding of' the ***.f'''*** *Respondent. This*

action would allow the /-" and 2nd Re.1pondent to make decisions that pertain to th,e 1st Responde111 without having to consult me and the 2nd Applicant. "

[11] The Respondents on the other hand, in addition to raising preliminaiy points of law, are opposing the applications brought by the Intervening Parties.

[12] The Respondents in their Answering Aflldavit allege that;

"22. " *The Applica111s became aware of their resignation and cessation of shares when they signed them at a meeting of the -I'" Re.1ponden1 011 the 2nd Fehrumy 2022,*

23. Their resignation and cession of shares was v11il(fi,i/ and they are not fi<ctudulent. In fact, the oral agreement leading lo their resignation was in the year 2020. 'lhis was during a meeting between the four directors and the .f'" Respondent ',1· Chairman Rudolph A' faziva who is our hiologicalfi:1ther. There had heen a number of complaints raised by myself and the other director to the effect that the operations of thl.' .f'" Respondent were being hindered hy the presence of the Applicants.

2./. The Applicants were in the liahit of creating dehts and the 4th Respondent's fi111ds would he used to set/le those dehts. The Applicants were also 1101 involving themselves in the company undertakings hut when time fiJr sharing c f dividends arrived {l'ic/, they claimed to he entitled lo the extent of the shares they held in the company, this worked to our detrime/1/ as we were the ones doing the actual work. "

[I 3] The Respondents further state that;

"25. '/1/1e Applica111s never hothered themselves when the company was facing dtfficulties which came about with the advent of ('ovid-19 and husiness was non-existent. A1yse(f and the other remaining director ran around seeking fimds to gel the company out of the perilous situation.

26. This led to us approaching our pare/1/s for mediation. The resolution was that the Applicants 1rould resign and leave me and Beketele /v/aziya to co/1/inue heing the directors of the company. For almost two years the Applicants.failed to sign the resi?,notion letters 111111 the 111eeti11g uftlie 2"<iFehruary 2022."

ANALYSIS AND CONCLUSION

URGENCY

[14] The Respondents, through their Attorney, argued that the application to intervene and the application for declaratory orders are not urgent in that, amongst other things *"rnatters pertaining to directorship status are not urgent and cun hr dralr H'ilh in due course."* The Respondents also complain that the Certificate of Urgency filed by the Intervening Parties is wanting in respect of essential ave1111ents in matters of urgency.

[15] The point on urgency as raised on behalf of the Respondents is misconceived. If the main matter has been brought by way of urgency by the Respondents, paradoxically and, by the same standard, the applications brought by the Intervening Parties must be treated on the same level of urgency. This is because the dispute brought by the Applicants or Intervening Parties in the two applications has a direct bearing on the outcome of the main matter. The three matters are linked and intertwined and should be treated as such. If the main matter which has been brought by the Respondents is indeed urgent, then by the same standnrd. the Court is inclined to treat the

interlocut01y niatters as being urgent. The point of law on lack of urgency in the two applications brought by the Intervening Parties is therefore misplaced and is dismissed.

MISJOINDER

[16] The Respondents have also argued that the interlocuto1y application for declarat01y orders brought by the Applicants contains a misjoinder in that the Third and Eighth Respondents have no interest whatsoever in the outcome of the matter. It is alleged that the citation of these parties is only meant to cloud the issues with iITelevant material. The argument goes on to state that the citation of the Eighth Respondent in particular, is objectionable as the latter has no interest since the property has already been sold and transfer has been effected to the purchaser.

[l 7] The point of law on misjoinder is equally misplaced. The Third Respondent is a company used by the respective parties to receive and make payments on behalf of the Fourth Respondent. The Respondents have admitted this fact in paragraph I 7 of their Answering Affidavit.

It is stated by the Respondents itself in paragraph 17 of the Answering Affidavit that;

"17. Furthermore !he Applicanls have never complained that !he 4'" Re.1ponde11t 's payme111 inward or ou111,ard are made through the J,.d Respondent. "

[18] As regards the Eighth Respondent, the avennent made by the Intervening Parties is that the advance payment **of E 200,000.00 (Two Hundred Thousand Emalangeni)** has already been paid to the Eighth Respondent's trust account. This allegation has not been denied by the Respondents. These parties. namely Third and Eighth Respondents, are absolutely necessary pa1ties and had to be joined in the proceedings. There is therefore no question of misjoinder and this pa1iicular point of law is dismissed.

FAILURE TO ESTABLISH THE REQUIREMENTS OF AN INTERDICT

[19] The point of law on alleged failure to establish the requirements ofan interdict is said to be founded on the very issue that the parties are in dispute over. The Respondents have alleged that the Intervening

Pa1iies have been removed as directors of the Fourth Respondent and as such they have no *locus .1·ta11di* to bring the application for declaratory orders.

(20] The argument made on behalf of the Respondents was that the Intervening Parties do have a legal remedy in that they can always file a claim against the Fomih Respondent in a nonnal suit and in due course.

[21] In the case of **Mandia Matsenjwa v Sipho Zwane** & **Another (744/2014) 120181 SZHC 45 (15 March 2018),** it was held as follows by the High Cou11 of Eswatini as regards the requirements of a final interdict;

" **1141 Concerning the issue at hand, the question should be whether the applicant meets all the legal requirements of a final interdict which in law are spelt out as follows in *Hebstein und Vun l<Vi11se11 's The Civil Practice of the ,\'upreme Court of South Afi·ica, 4th Edition, Juta and Company at page /064-1065:***

"In order to succeed in obtaining a final interdict, whethe,· it be prnhibitory m· mandatory an applicant must establish:

(a)A clear right;

(b) An injury actually committed or reasonably app,·ehended; and

(c)The absence or similar protection by any otller ol'<linary remedy.

See also: *Setlogelo "Set/oge/o 1914 AD 221 at 227."*

[22] The Intervening Parties have established a clear right to have their dispute detennined piior to the payment of the sum of money claimed by the Fourth Respondent in the main matter. In the Answering Affidavit, the First Respondent deposed to an affidavit under oath and stated in paragraph 8 thereof that;

"*... Annexure A1M R shows that the Applicants <u>have heen removed as directors</u> <u>of the Applicant</u> (Fourth Respo11de111) and this therefore means that they ha,·e no locus stand! to hring the application or at least in the manner they did* "

[23] Following the avem1ents in paragraph 8 of the Answe1ing Affidavit, the Cowi is grabbling with the question of whether the Intervening Parties voluntarily resigned from the Fourth Respondent, or whether they **<u>were</u> <u>removed</u> <u>as</u> <u>directors</u>** of the Fourth Respondent as expressly stated by the deponent to the Answe1ing Affidavit.

[24] The Cow1 also observes that the sum of E 200,000.00 already paid to the Third Respondent by the Fifth Respondent was supposedly not declared to the Intervening Paities by the other directors of the company. This specific avem1ent was not disputed by the Respondents.

[25] The Applicants or Intervening Pai1ies have therefore successfully demonstrated a clear tight as well as an injury actually committed or reasonably apprehended in the event that the sum of E 770,000.00 is paid to the Fowih Respondent without their involvement in the company. The application to intervene in the main matter and the application for declaratoty orders are competent applications and should be determined p1ior to the finalization of the main matter. The conclusion of the Court is that this point of law ought to be rejected given the circumstances of the matter.

RES JlJDICATA

[26] The Respondents have further alleged in argwrn;nt that the matter (application for declarato1y orders) is *res judica/a* in that same has

been deliberated and dismissed by the High Court 111 case no: 738/2022.

. [27] At the hearing of the matter, the pmiies furnished the Court with the Order issued by the Court 111 High Court Case No: 738/2022. The Court Order records that;

"1. 7he application is dismissed.

2. 111e rule nisi granted hy the court 011 the 22nd day of April 2022 is discharged

3. Applicants may institute the proceeding.1· onfi-esh papers.

-l. Cost tofhl/011· the event."

[28] The mere fact that the Court pennitted the Applicants or Intervening Paiiies to institute fresh proceedings can only mean one thing and that is, the matter was not dealt with on the me1its. In **Malaza v Swaziland Royal Insurance Corporation (169/1999) [2007] SZHC 76 (22 June 2007),** it was held by the Court as follows;·

"[**15] It is trite law that *resjudicatu* may be raised by way of a plea in abatement. A Defendant may plead *res judicata* as a defence to a claim that raises an issue disposed of by a judgement *in rem.* The defence may also be based u1>on a**

judgment *in per,rn1111111* delivered in a prior action between the same parties, concerning the same matter and founded on the same cause of action *(see Hebstein et al, The Civil Practice < l the Supreme Court of South A.fi·ica, 4th Edition at page 478* and the cases cited thereat).

[29] It is clear therefore that in order for the plea of *res judicata* to find application in any given matter, there must be a judgement *in rem* or put differently, a judgment on the merits of the matter. In the present dispute between the parties, the main issue, namely whether or not the Intervening Parties voluntarily resigned as directors of the Fourth Respondent has not yet been decided by any Cowi of law. There is no tangible evidence placed before Court which shows that this particular dispute has been heard and decided by the Cowi in a prior case, The conclusion of the Court is that this point of law stands to fail and is accordingly dismissed.

DISPUTES OF FACT

[30] The Respondents also argued that the applications brought by the Intervening Parties is fraught with disputes of fact which cannot be

resolved by way of motion proceedings. In support of this point of law, the deponent to the Answering Affidavit states that;

"4 7'l1is matter is riddled with disputes of.fact as will be shown hereunder;

4.1 It is disputed that the Applicants are members of the 5'" /4'"] Respondent.

-I. 2 It is disputed that the signature.1· annexed lo the Applicant '.1· *resignation letters and cession of shares were obtained fi·audulently.*

-1.3 Ii is di.1puted that the 6'" /?espondenl issued the 5'" /4'"! Responclenl the new.fhrm Jin error.

-I. -I l t is di.1puted that the mandate which culminated in the 4'" Respondent earning commission was procured hy the Applicants. "

[31] The Respondents have alleged that the Intervening Pmiies resigned and transferred their shares held with the Foutih Respondent on the " Februmy 2022. This, according to the Respondents, came about as a result of an oral agreement reached between the parties during the year 2020. This meeting, according to the Respondents, was chaired

by one Mr. Rudolph Maziya who is the biological father of the Maziya brothers (First Intervening Party and Firsf Respondent) in the present conflict. As already mentioned above, the Intervening Pmiies deny that they attended such meeting or that such meeting ever took place.

[32] It is provided in Section 163 (I) of the Companies Act of 2009 that all invitations for either a general, or special or annual meeting must be in writing. The notice inviting the members to any meeting should logically and legally spell out the agenda for such meeting. The Cowi was not shown any notice calling the members to any meeting during the year 2020.

[33] In Section 168 of the Companies Act, 2009, it is provided that;

"Unless the articles of a company otherwise provide, any meeting of the company <u>may elect any member</u> to be the chairman of the meeting."

[34] In all the documents presented to Court, there is not even a single document which purpo1is to show that Mr. Rudolph Maziya is a member of the Fourth Respondent. Mr. Rudolph Maziya could have

presided over a meeting between his children as a concerned parent but such a meeting could not have been a fonnal and legal meeting as envisaged m the Companies Act, 2009. In order for a meeting envisaged 111 Section 163 of the Act to have legal and binding consequences, it rnus't be held in accordance with the four comers of the enabling legislation. Whatever decision is taken in a meeting convened under Section 163 of the Act must be expressed through 'voting rights' as envisaged in Section 170 of the Act. Clearly the meeting alleged to have taken place between the parties in 2020 could not have been a meeting falling within the scope of Sections 163 to 170 of the Act.

[35] Section 180 of the Companies Act, 2009 deals with the issue of "written resolutions". In the absence of a meeting in tenns of Section 163 of the Act, a decision may be taken by the 'requisite number' of directors or members of the company which decision must be communicated through a 'written resolution'. The meeting alleged to have taken place between the parties in the year 2020 also does not fall in this class as the written resolution availed to the Court does not

meet the requirements of Section 180 (I) (b) of the Companies Act, 2009. In tenns of this provision;

"(I) **Anything which in the case of a private company may be done-**

(a) **……**

(b) **by resolution of a meeting of any class of members of the com1rnny may be done, without a meeting and without any previous notice being required, <u>by resolution</u> <u>in writing</u> <u>signed</u> <u>by or on behalf of all the members of the company who at the date of the resolution would be entitled to attend and vote at such meeting."</u>**

(36] The resolution furnished to the Collli was signed only by the First and Second Respondents, these being the directors who are in contestation with the First and Second Intervening Parties. This means that the resolution was not signed by all the directors or members of the company who at the date of the resolution would be entitled to attend and vote at the meeting. The cession agreement or alleged cession of the shares held by the Intervening Parties is also not signed by the Intervening Parties but signed by the First and Second Respondents only.

(37] The position of the patties as regards the alleged resignation and cession of shares·differs significantly and not reconcilable on the pleadings serving before Comt. The question of whether or not the Intervening Parties voluntarily resigned and ceded their shares held with the Fou1th Respondent is a key and fundamental issue that must be detennined prior to the main matter being heard. It is stated by **Erasmus, H.J *et 11/* <u>Superior</u> <u>Court</u> <u>Practice</u> (1994) Juta** & **Company, at page B1-52** that;

"The Court will refer a matter to trial if the dispute of fact is incapable of resolution on the papers and too-wide ranging for resolution by way of referral to oral evidence. It **is an alternative procedure to dismissal of the application in such circumstances, and is appro1>riate where the applicant when launching his or her application could not reasonably have foreseen that a serious dispute of fact:, incapable of resolution on the papers, was bound to develop."**

[38] The Respondents have argued that the directors and shareholders of a company are distinct from the company itself The trust of the argument by the Respondents is that whatever disputes or conflictthat the directors or shareholders may have between or amongst themselves, this should not affect payment due to the company as this may prejudice the operations of the company.

[39] The gist of the matter however is, that the First and Second Respondents have professed themselves to be the only remammg directors of the Fourth Respondent to the exclusion of the Intervening Parties. This effectively means that if the payment of the sum of E 770,000.00 is made to the Fourth Respondent as prayed for in the main matter, then the First and Second Respondents will have total control of how those funds are utilized such that the Intervening Parties may be left out in the cold in so far as those funds are concerned. This would certainly not be proper and not in the interest ofjustice and fairness.

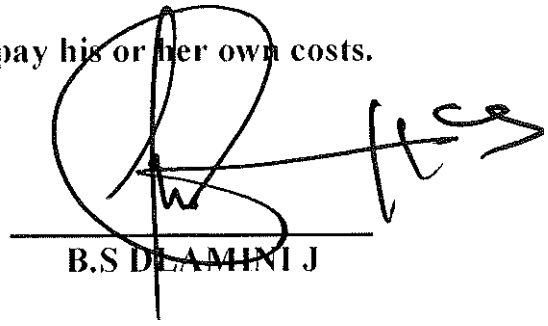
[40] The parties were in agreement that the three applications should be consolidated and dealt with as one. In the circumstances, the Court hereby grants orders as follows;

(a) The three ap1>lications under the High Court Case No's: 843/2022 and 832/2022 are consolidated.

(b) The Fifth Respondent is ordered to pay the sum of E 770,000.00 (Seven Hundred and Seventy Thousand Emalangeni) due to the Fourth Respondent to the trust account of the Eighth Respondent pending finalization of the dispute between the directors of the Fourth Respondent.

(c) The matter is referred to oral evidence for determination of the status of the Intervening Parties with the Fourth Respondent.

(d) Each party to pay his or her own costs.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Applica/1/s:	*1\4/ss R. Nkonyane (/\4agagula & Hlophe Attorney.1)*
For Respondents:	*/\/Jr. S. .Je/e (S.M.Jele Attorneys)*