IN THE HIGH COURT OF ESWATINI

JUDGMENT

Held at Mbabane Case No. 3089/21

In the matter between:

SABELO MANQOBA MAMBA AND **APPLICANTS**

ANOTHER

AND

MAKWENZE INVESTMENTS (Pty) Ltd

AND 26 OTHERS **RESPONDENTS**

Neutral citation: *Sabelo Manqoba Mamba & Another vs Makwenze Investments & 26 Others [3089/21] [2022] SZHC 31 (4th March, 2022)*

Coram: FAKUDZE, J

Heard: 30/11/2021; 3/12/2021; 7/12/2021; 10/12/2021; 27/01/2022; 31/01/2022; 11/02/2022

Delivered: 4th March, 2022

JUDGMENT

INTRODUCTION

[1] On the 30th November, 2021, the Applicants filed a Notice of Motion on an exparte urgent basis seeking the following:

1. *That the above Honourable Court dispenses with the normal and usual requirements of the Rules of the above Honourable Court relating to service of process, time limits and notice and that this matter be heard on an exparte and urgent basis.*

2. *That an order be and is hereby issued freezing the 1st Respondent's bank account member 119941441 held at the 25th Respondents at its Matsapha Branch pending finalisation of these proceedings.*

3. *That an Order be and is hereby further issued restraining and/or interdicting the 2nd, 3rd and 4th Respondents respectively from conducting any business or transcation purportedly on behalf of the 1st Respondent pending finalisation of these proceedings.*

4. *That an Order be and is hereby, further issued declaring that the meeting of the 30th October, 2021 was unlawful or any other date wherein the Interim Board of Directors of the 1st Respondent was elected unlawfully.*

5. *That an Order be and is hereby further issued setting aside the Interim Board of Directors of the 1st Respondent as elected on the 30th October, 2021 or on any other date.*

6. That an Order be and is hereby further issued directing the 26th Respondent to revoke, withdraw and/or set aside the Form J that was lodged and/or submitted by the 2nd, 3rd, and 4th Respondents respectively to the 24th Respondent's Matsapha Branch in the process enabling such Respondents to be signatories in the 1st Respondent's bank account.

7. That a Rule Nisi operating with immediate and interim effect in terms of prayers 1, 2, 3, 4, 5 and 6 be and is hereby issued returnable on a date to be determined by the above Honourable Court, calling upon the Respondents to show cause why

(i) Prayers 1, 2, 3, 4, 5 and 6 should not be made final; and

(ii) The 2nd to 24th Respondents should not be ordered to pay costs of this application, the one paying the other to be absolved.

8. Granting Applicants any further and/or alternative relief.

[2] On the 30th November, 2021 the Court granted the Application on an interim basis after which the Application together with the Interim Order was served upon the Respondents. Upon service of the Application and Interim Order, the Respondents, particularly the 2nd Respondent initially opposed same and was later on joined by the 4th Respondent. Both the 2nd and 4th Respondent filed but failed to have the Rule *Nisi* discharged hence the matter was postponed to the 11th February, 2022 for arguments.

THE PARTIES' CASE

The Applicant

[3] The Applicants' contention is that they assumed office of the 1st Respondent's Board of Directors during the year 2011 until they were unlawfully removed from office on the 30th October, 2021.

[4] The Applicants contend that to date the Board is still in office in 26th Respondent's records notwithstanding the unlawful removal. The gist of the Applicants' case is that the election of the Interim Board of the 30th October, 2021 was unlawful because the meeting which resulted in the election was not sanctioned by the 1st Respondent's Board of Directors.

[5] The Respondents wrote one letter requesting for an urgent meeting scheduled for the 10th October, 2021, the agenda being an election. It is attached to the Founding Affidavit and marked as "Annexure M 1." The Applicants contend that upon receiving an unfavourable response to their request to hold the urgent meeting, the Respondents opted to convene a meeting on the 30th October, 2021 without the knowledge and approval of the legitimate Board of Directors which resulted in the election of the Interim Board.

[6] Applicants contend that the conduct of the Respondents of electing the Interim Board in contravention of Section 158 (3) of the Companies Act, 2009 should be declared unlawful hence the Board should be set aside. An unlawful Board of Directors, can never advance the interests of the company and its members due to its illegality and is bound to cause anarchy in the administration of the company's affairs and should be set side.

The Respondents

[7] The Respondents being the 2nd and 4th Respondents, did not file any Answering Affidavit. All that they did was to file a Notice to raise points of law. The first point the Respondents raised is that the Notice of Motion appears as an application for an interim order yet the effect thereof is final and definitive. It is not the name that matters but its nature and effect. Therefore orders which have a final and definitive effect define the rights of parties. They cannot be said to be interlocutory.

[8] The other point is that there was no compliance with Section 214 of the Companies Act, 2009. The Applicant have failed to allege the basis upon which they are moving the present application because they have failed to point out a particular act or omission which is prejudicial, unjust or equitable to him which is inclusive of the conducting of the affairs of the company. The Applicants merely alleged that the meeting was called by people who were not authorised to do so yet on the other hand admitting that they refused to convene a meeting. The Applicants cannot therefore complain about the convening of the meeting when they themselves admit that they refused to convene the same.

[9] It is the Respondents' contention that Section 158 of the Companies Act, 2009 enjoins Directors of the company to convene a meeting whenever so required, failing which the members, constituting more than half of the total of voting rights of all of them may themselves convene such a meeting. The Applicants are therefore approaching the court with dirty hands.

[10] The third point relates to Section 176 as read together with Section 185 of the Companies Act, 2009, in that the Respondents are alleged to have

conducted a vote at an unspecified meeting and passed a special resolution removing the erstwhile directors of the company and replacing them with the new ones.

[11] The last point is that the Respondents were removed from office because funds of the 1st Respondent were fraudulently taken from the 1st Respondent's coffers. The Respondents admitted that they had fraudulently stolen the funds and further undertook to re-imburse 1st Respondent.

[12] In reply the Applicants state that Section 214 (2) (a) to (d) clearly states the circumstances under which it can be invoked. The Applicant's case does not fall under this category. All that the Applicants are arguing is that they were unlawfully remove from office. They further argue that they can approach the court based on common law, which is what they did in this case.

[13] On the issue of not invoking Section 158 of the Companies Act, 2009, the Applicants aver that upon receiving the letter refusing that the meeting of the 10th October, 2021 be held, the Respondents should have invoked Section 158 (3) of the Act which provides for the procedure to be followed in the event a Board of Directors refuses to hold a meeting. Such procedure was not followed in the instant case. No notices indicating compliance with this Section have been attached by the Respondents in their papers. Although they allege that in September, 2021 they did issue notices, nothing has been attached in proof thereof.

[14] On the issue of non-compliance with Section 176 (as read with Section 185) of the Act, the Respondents conducted a vote at the meeting (not specified) constituted over seventy five percent (75%) of its membership and passed a special resolution in accordance with Section 186 (5) of the Act, removing

the erstwhile directors of the company and replacing them with the new ones. The Applicants contend that since the Respondents failed to comply with Section 158 (3) they cannot therefore claim that they complied with Section 176 since no notice has been attached to establish the compliance.

[15] On the issue of the admission by the Respondents the theft of the company monies, and their offer to resign as Directors, the Respondents did not attach any minutes in proof thereof. "Annexure ER 1" does not show any fraudulent transactions by the Applicants.

[16] On the allegation that the requirements of an interdict have not been met, the Applicants state that a clear right has been established; that an injury actually committed or reasonably apprehended has been established and that there is absence of similar protection by any other remedy has also been established.

THE APPLICABLE LAW

[17] In **Hlanganyelani Harvesting and Business Group (Pty) Ltd V Standard Bank Ltd – Vehicle and Asset Finance (173/13) [2014] SZHC 262**, the court stated as follows:

> *"It is trite law that where a party is served with an order nisi and instead of filing papers in response thereto to contest it on the facts, chooses to raise an objection in limine that party has a duty to indicate to the court that should the objection fail, he still desires to contest the merits of the case. Where he does not indicate it means that he intends to rely on his objection without more."*

[18] In **Herbstein and Van Winsen, Civil Practice of the Superior Courts in South Africa, Volume 5**, the requirements for an interim interdict were stated as follows in page 1455:

> *"An interdict can be final if the order is based on a final determination of the rights of the parties to the litigation or interim, pending the outcome of proceedings between them. Normally the purpose of an interim interdict (also referred to as an interlocutory or temporary interdict or an interdict pendente lite) is the preservation or the restoring of the status quo pending the determination of the rights of the parties. It does not affect or involve the final determination of such rights."*

[19] In **Bambanani Balimi Farmers Ltd V Richard Dumisa Ngwenya (69/2020) [2021] SZSC** at paragraph 13:

> *"[13] When all is said and done and, as I have already tried to explain, rules must be followed and decisions must be reached fairly in light of the rights of persons affected. Obeying the rules may appear to some persons as a challenge to their authority. However, that should not be so. It is for the good of all since everyone concerned wants to see progress. In the present matter, whatever the respondent did or did not do the appellant could not show that the claim of the respondent is baseless. <u>The respondent cannot lose his shareholding in the Appellant without the rules of the Appellant and relevant common law procedures being followed. So long as the membership of the respondent in the</u>*

Appellant has not been legally terminated respondent must be paid his dividends."

COURTS' ANALYSIS AND CONCLUSION

[20] The Respondents have raised the issue that the prayers by the Applicants are final and definitive in nature. This pertains to prayers 4, 5 and 6. This is so because the Applicants have not used the words "pending finalisation of these proceedings." The Applicants respond by saying that paragraph 7 of the prayers covers the scenario the Respondents are complaining about. It states as follows:

> *"7 That a Rule Nisi operating with immediate and interim effect in terms of prayers 1, 2, 3, 4, 5 and 6 be and is hereby issued returnable on a date to be determined by the above court, calling upon the Respondents to show cause why*
>
> *(i) Prayers 1, 2, 3, 4, 5 and 6 should not be made final; and*
>
> *(ii) ……."*

[21] The court is inclined to agree with the Applicants. The attack by the Respondents is more to do with the Applicants' drafting style as opposed to substance. Paragraph 7 addressed the concerns raised by the Respondents. On the issue of non-compliance with different Sections of the Companies Act, 2009, the court wishes to observe that this is not the main consideration in this Application. The main consideration is that there was a removal of a lawfully elected through unlawful means. The Applicants assumed office of the 1st Respondent Board of Directors during the year

2011 until they were removed unlawfully by the election of the 1st Respondent's Interim Board of Directors during a meeting held by the 1st Respondent's members on the 30th October, 2021. The meeting leading to the election was not sanctioned by the 1st Respondent's Board of Directors. The 1st Respondents members wrote a letter ("Annexure M1 which was attached to the Founding Affidavit) requesting that an urgent meeting be held whose purpose was to hold an election. This request was turned down by the Applicants resulting in the Respondents holding the meeting of the 30th October, 2021. The remedy available to the Respondents was to use the provisions of Section 158 (3) of the Companies Act 2009.

[22] It is this court's view that the Respondent did not file any Answering Affidavit to contest the allegations by the Applicants. They only raised points of law. In **Hlanganyelani Harvesting and Business Group (Pty) Ltd V Standard Bank Ltd (Supra)**, it was stated that a party to proceedings who raises points of law should indicate that in the event the points are dismissed, it must be given an opportunity to file an answer. In this case, the Respondents did not do so. It was also observed in **Bambanani Balimi Farmers Ltd V Richard Dumsani Ngwenya** that:

> *"When all is said and done, as I have already tried to explain, rules must be followed and decisions must be reached fairly in light of the right of persons affected."*

[23] The court therefore comes to the conclusion that the 1st Respondent's members have not followed the laid down procedure in electing the Interim Board of Directors. The Rule Nisi that was issued on the 30th November, 2021 is hereby confirmed with costs.

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FAKUDZE J.

JUDGE OF THE HIGH COURT

For Application: B. Xaba

2nd and 4th Respondents: Adv. M. Mabila on the instruction of L. Dlamini