

IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 1805/2023

HELD AT MBABANE

In the matter between:

LINDO DIAMOND

1st Applicant

DIAMOND INVESTMENTS (PTY) LTD

2nd Applicant

And

HERTZAL DIAMOND

1st Respondent

SIBONGISENI XABA

2nd Respondent

GLORY KHIPHI HLOPHE

3rd Respondent

MBHEKISENI HLOPHE

4th Respondent

MASTER OF THE HIGH COURT

5th Respondent

THE ATTORNEY GENERAL

6th Respondent

Neutral Citation: *Lindo Diamond and Another vs Hertzal Diamond and Others (1805/2023) [2023] SZHC 285 (12/10/2023)*

Coram: **J. M. MAVUSO J**

Heard: 30/07/23; 01/08/23; 02/08/23; 08/08/23 and 17/08/23.

Delivered: 12/10/2023

SUMMARY: *Civil law and procedure – (“the patient”) Rudolf Diamond who holds half share of the issued share capital in the second Applicant, due to incapacitation has not been able to run the business of the 2nd Respondent, resulting in this Court appointing, 1st Respondent (Hertzal Diamond) and his son Lucky Diamond as his curator bonis and ad litem, an office they hold jointly – The reason why the matter is before Court is that Applicants are of the view that the 2nd Respondent is being mismanaged and thus seek to have order in the conduct of 2nd Applicant – To this effect, they have sought under a certificate of urgency, to interdict the conduct complained of – Respondents have raised points of law on the application – The points of law are as follows; that the application is not urgent; that the non-joinder of Lucky Diamond as curator is fatal; that 1st Applicant lacks authority to institute the application on behalf of 2nd Applicant.*

RULING

J.M. MAVUSO – J

[1] Having provided a somewhat detailed summary of the facts in the summary part of this Judgment, the Court will not restate the facts but will immediately proceed to deal with the points of law raised by the 1st Respondent.

[2] At paragraph 6 of the 1st Respondent's concise heads of argument they are listed as follows:

“6.1 the absence of urgency.

6.2 the non-joinder of Lucky Diamond as co-curator.

6.3 the lack of authority to institute the application on behalf of the Second Applicant.

6.4 the absence of a recognised legal basis for the relief, which will also focus on:

6.4.1 the role of the First Respondent as the duly appointed curator bonis and curator ad litem of the patient.

6.4.2 the opportunistic attempt of the First Applicant, no doubt alive to the difficulties in bringing this application without authority allegedly on behalf of the Second Applicant, to now seek to rely on section 228 of the

companies Act of 2009 in her head of argument for the first time in circumstances where this was not her pleaded case while the requirements of the section have not been met.”

- [3] (i) Dealing with the point of law on urgency, it suffices to state that the application was enrolled as a matter of urgency and scheduled to be heard for the first time, on the 1st day of August 2023 at 9:30 a.m. or so soon thereafter. The orders sought were as follows:

- “1. Dispensing, and condoning the Applicants’ non-compliance, with the Rules of this Honourable Court as relate to procedure, time limits and manner of service and hearing this matter as one of urgency.*
- 2. An interim order, operating effectively with immediate effect and returnable on a date to be determined by this Honourable Court where the cited Respondents will have to show cause why the interim order should not be made final, hereby issue in the following terms:*

- 2.1 Interdicting the 1st, 2nd, 3rd and 4th Respondents or anyone acting at their behest from dealing with, or participating in, with the management or executive business of the 2nd Applicant;*
- 2.2 Interdicting the 1st, 2nd, 3rd and 4th Respondents or anyone acting at their behest from logging into the internet banking profile to access the funds of the 2nd Applicant for any purpose whatsoever.*
- 2.3 interdicting the 1st and 5th Respondents from proceeding with any attempt to register the 1st Respondent as the 2nd Applicant's Director without the consent of the 1st Applicant.*
- 2.4 Interdicting the 1st, 2nd, 3rd and 4th Respondents or anyone acting at their behest from utilising the 2nd Applicant's Cashbuild credit account.*

2.5 interdicting the 1st, 2nd, 3rd and 4th Respondents or anyone acting at their behest from disposing of any of the herd of cattle in the 2nd Applicant's farm at Makhwelela in the Shiselweni District.

2.6 Interdicting the 1st, 2nd, 3rd and 4th Respondents or anyone acting at their behest from utilising the 2nd Applicant's motor vehicle described as Ford Ranger 2.2 with Registration number HRF 062 MP.

3. Directing the 1st, 2nd, 3rd and 4th Respondents to furnish the 1st Applicant with the 2nd Applicant's audited financial statements for the period ended 30 June 2023.

3.1 Alternatively and in the event that the financial statements referred to in prayer 3 above are still in the process of audit, that the 1st, 2nd, 3rd and 4th Respondents produce and furnish the 1st Applicant with monthly income and expenditure

of the 2nd Applicant for the financial year ended 30 June 2023 as well as for the month of July 2023 or any further period for which they remain in control of the 2nd Applicant.

- 4. Directing the 1st, 2nd, 3rd and 4th Respondents to disclose in detail, including surrender of pertinent documents, to the 1st Applicant all the business operations of the 2nd Applicant which they have controlled or pursued since Mr. Rudolph Diamond was incapacitated on or about the last week of November 2022.*
- 5. Directing the 1st, 2nd, 3rd and 4th Respondents to surrender to the 1st Applicant all documents, including bank statements and registration papers of the 2nd Applicant's assets.*
- 6. Directing the 1st, 2nd, 3rd and 4th Respondents to disclose to the 1st Applicant the conduct and status of the 2nd Applicant's Cashbuild credit account since Mr.*

Rudolph Diamond was incapacitated on or about November 2022.

7. *Declaring the 1st Applicant as a principal of the 2nd Applicant who is entitled to control and manage the business affairs of the 2nd Applicant.*
8. *Directing the 1st, 2nd, 3rd and 4th Respondents to surrender to the 1st Applicant the motor vehicle described as a Ford Ranger 2.2 with Registration number HRF 062 MP together with its registration papers.*
9. *Directing the 1st, 2nd, 3rd and 4th Respondents to pay the Applicants' costs of suite at attorney-and-client scale.*
10. *In the event of opposition hereto, the 5th Respondent be directed to pay the Applicants' costs of suit.*

11. Granting the Applicant any further or alternative relief.”

These appear in Applicants Notice of Motion dated the 28th July 2023.

- (ii) When the matter first appeared before Court all the parties were legally represented. The point on urgency was not raised resulting in the Court issuing a *rule nisi* with interim effect after which the matter was postponed to the 7th of August 2023 for argument. Prior to the 7th of August 2023, Respondents were concerned with the release of a motor vehicle required to assist the patient (Mr. Rudolf Diamond) attend medical care.

- (iii) When the *rule nisi* was issued the Court also gave a directive as to the filing of process, by the parties. It is only when the matter came up for argument, that it was argued on behalf of the 1st Respondent that when the *rule nisi* was granted, there was no formal argument on urgency in as much as there was no definitive ruling on urgency. As a result of the foregoing it was argued that the issue of urgency remained alive and

triable. It was argued on behalf of the Applicants that, by implication the Court considered the matter urgent.

(iv) Regard being had of the time at which the issue of urgency is being raised and argued, with all the process necessary for the determination of this matter having been filed, the Court is of the considered view that, the point raised on urgency at this stage, is unmeritorious.

[4] The Court will deal simultaneously with the point of non-joinder of Lucky Diamond as a Curator and the point on lack of authority to institute the application, on behalf of the second Applicant. The reason for this is because whilst not having been joined in the proceedings, as a curator, it is also disputed that he signed the resolution, authorising the instituting the present proceedings. The resolution in issue is **annexure “LD 15”** found at page 255 of the book of pleadings bearing the Registrar stamp of the High Court dated 7th August 2023.

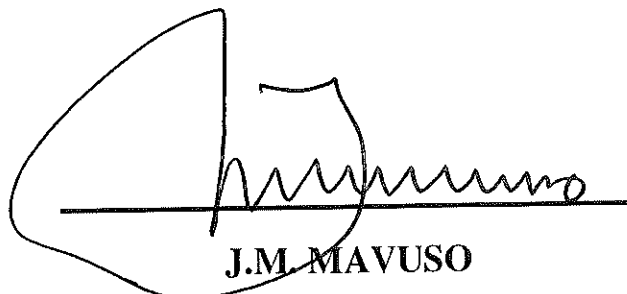
[5] The Court notes that there is a dispute on the authenticity of Lindo Diamond’s signature which appears in **annexure “LD 2”** permitting the company to:

“Institute legal proceedings to recover its assets from any party and placed in the control of the current competent Directors who can institute legal proceedings to achieve this.”

[6] In order to resolve this, material dispute which goes to the root of this case, the Court is of the view that oral evidence be led, on this aspect of the case.

[7] Accordingly, the Court orders that:

- (i) Oral evidence be led on the authenticity of otherwise and/or appropriateness of Lindo Diamond’s signature appearing on **annexure ‘LD 2’**.
- (ii) Costs to be costs in the cause.

A handwritten signature in black ink, appearing to read 'J.M. MAVUSO', is written over a horizontal line. The signature is stylized and somewhat cursive.

J.M. MAVUSO
JUDGE OF THE HIGH COURT OF
THE KINGDOM OF ESWATINI

For the Applicants: MAGAGULA & HLOPHE ATTORNEYS

For the 1st Respondent: C.J. LITTLER & COMPANY

For the 2nd – 4th Respondents: DYNASTY INC. ATTORNEYS