

IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 75/2022

HELD AT MBABANE

In the matter between:

MANGALISO SIFUNDZA

1st Applicant

BONGANI SHIBA

2nd Applicant

MBUSO DLADLA

3rd Applicant

SIKHUMBUZO VILANE

4th Applicant

MAGARET MAGAGULA

5th Applicant

SAMSON TFUMBATSI

6th Applicant

MFANZILE DERRICK DLADLA

7th Applicant

ELIAS NHLEBELA

8th Applicant

JOHANE MASEKO

9th Applicant

NKHOSINATHI VILANE

10th Applicant

SIMON DLADLA

11th Applicant

BHEKINKHOSI DLAMINI

12th Applicant

And

MNYANGOMBILI FARMERS COMPANY LIMITED

Respondent

Neutral Citation: *Mangaliso Sifundza and 11 Others vs Mnyangombili Farmers Company Limited* (75/2022) [2023] SZHC 284 (12/10/2023)

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

Heard: 13th June, 2022

Delivered: 12th October, 2023

SUMMARY: *Civil law – Declaration of non-payment of a dividend to a member to be unlawful – Respondent directed to make payment of declared dividends to Applicants and also ordered to pay the costs of this application on party scale.*

JUDGMENT

J.M. MAVUSO – J

[1] Applicants before Court have introduced themselves as members of Mnyangombili Farmers Company Limited, the Respondent herein.

[2] (a) The bone of contention in this matter is the non-payment of declared dividends to the Applicants, by the Respondent notwithstanding the fact that Applicants are its members, in terms of section 97 of the Companies Act and their names duly appear in **annexure “B”**, it being the list of shareholders of the company.

(b) To qualify for the shareholding, Applicants aver that they paid contributions to purchase shares in the company, Respondent denies this assertion by the Applicants and goes on to state at paragraph 7.4.1 of its answering affidavit that, in order to qualify for membership in the Respondent company, the Respondent must inter alia:

“(i) Be a resident of the Mnyangombili (paying allegiance to the traditional authority and/or subjects of the Chief, Chief Mbandzamane Sifundza.)

(ii) That the prospective member must donate a field for the project (which becomes the primary basis and validates membership.)

(iii) And that all information and/or rights and obligations of operations must be through the authority of the Chief (per section 6 (1) of the constitution.”

[3] At paragraph 7.5 of its answering affidavit, Respondent goes on to state as follows:

“7.5 The present Applicants before Court do (sic) not meet the criteria as stated by the Respondent’s constitution. This Court is invited to note that the land we are talking about is Swazi Nation Land (SNL) which is regulated by Swazi law and custom, hence the decision to first report the dispute involving the Applicants before Court and others to the Inner Council that direct the Mnyangombili residents who after deliberations referred the matter to the Chief’s Council, and King’s Liaison Officer – Ndabazabantu at Siteki....

7.6 To date the matter is pending before the King’s Liaison Officer at Siteki as the Respondent is completely based and controlled by the Shewula Royal Kraal as the overseers of the land on behalf of the King as Ingwenyama.”

[4] At paragraph 6 and 7 of their replying affidavit, Applicants state as follows:

“6. To the extent that I do not deal specifically with any contention of fact or argument advanced in the Answering Affidavit which

is, at variance with this affidavit, these are denied as if specifically set out and traversed.”

At paragraph 7 they advise as follows:

“7. In this reply, I deal with the following issues in turn:

7.1 Nature of the relief sought;

7.2 Summary Respondent’s defence to the relief;

7.3 Applicants’ entitlement to the relief.”

- [5] Creativity in drawing up pleadings is well come, if such be within the strict confines of practice and procedure. If in the mist of such creativity certain specific allegations made by a party, Respondent in this case, are not addressed, it could prove costly to one’s case. *In casu*, Applicants argue that they are members of the Respondent, by virtue of payment of subscriptions. Respondent denies this and states that membership is acquired through, being a resident of the area, who has donated a field for the project and accepts the authority of the Chief. Applicants, in the way they have fashioned out their reply have not responded to this allegation.

[6] At paragraph 25 of the Applicants founding affidavit, Applicants alleged that they have previously, received payment of declared dividends, though they do not state the period in which they received same and the amount involved. Respondent seems to agree with this assertion but qualifies it by stating that, Applicants were paid their dividends during the tenure of the erstwhile Chairperson Albert Vilane a Chief runner. It is said that the Chief runner of Mafucula/Mnyangombili community deliberated with the Inner Council, thus leading to 32 individuals inclusive of Applicants, forming part of Applicants' membership. In 2017, Respondent avers that through clandestine means its membership exceeded 168 individuals. This number subsequently increased to 200.

[7] (i) Applicants have approached this Court for a remedy on the basis of section 214 of the Companies Act of 2009 which states as follows:

“214 (1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or some part of the members of the company, may, subject to the provisions of

subsection (2) make an application to the court for an order under this section.”

- (ii) Respondent’s case is ably set out in paragraph 6 of the answering affidavit where they submit that section 214 of the Companies Act of 2009 does not apply to Applicants. They go on to reason that this is because there is currently a dispute on their membership and further to the dispute, the matter is pending before the King’s Liaison Officer-Ndabazabantu in Siteki in the Lubombo Region. The matter was reported to him on or about 2021. The 32 individuals whose membership is disputed by Respondent, the submission goes; have been summoned to appear before him and the matter has been deliberated upon at length though still pending.

- [8] At paragraph 4 of the Respondent’s answering affidavit, Respondent has raised points *in limine (lis pendens)* couched in the following terms:

“4.1 It is submitted that the Applicants have dismally failed to inform the Court that this matter was reported to; first the Inner Council (Libandla Lendvuna - Indvuna Mfan’wendlela

Maseko), and that was on or about 2017. The Inner Council duly summoned the Applicants with others.

4.1.1 The Applicants and others duly attended the meeting, and the dispute was tabled before the Inner Council, and there were deliberations. It is unfortunate that the matter could not be resolved, mainly because the Inner Council was compromised in that; the Indvuna's secretary, Mr Simon Dladla had in collusion with the erstwhile Chairperson, Mr Albert Vilane, unlawfully caused to be joined the Applicants and others, even though they knew that they did not meet the threshold of being members of the Respondent. The Applicants and the others were not from Mnyangombili and had/did not donate any land or field for the establishment of the Respondent (per the Respondent's Constitution dictates). See annexure marked "MM1" being the Respondent's Constitution, specifically Section 6(1). It is further submitted that the Applicants and the others were related to the Inner Council (being relatives and associates of the Inner Council).

4.2 *The Applicants failed to be candid with this Honourable Court, as they did not inform the Court that they are actually thirty two (32) in number not the twelve (12) who appear in the papers.*

4.2.1 *The Applicants and the others, after appearing before the Inner Council also called the Respondent before the Inner Council aggrieved by the allegations that they were not members. The Respondent was ordered to pay the thirty two (32) members their dividends such order from the Inner Council was carried out to the benefit of the Applicants and the others. That is they consented to the forum that which this Honourable Court is implored to remember.*

4.3 *As a result of the issue with the Inner Council, the matter was then reported to the Chief's Council (also known in vernacular, Libandla Lebantfwabenkhosi), under the Shewula Royal Kraal (Umphakatsi) led by Mr Majongosi Sifundza – acting Chief, Mr Themba Sifundza – Secretary, and Bennet Sifundza – Royal Kraal Stamp Keeper, and such Council called all the*

members and the alleged members of the Respondent to a meeting. It became clear from the meeting that the thirty two (32) alleged members (inclusive of the Applicants) were not members of the Respondent. The Council requested time to deliberate on the dispute and promised to return with a ruling, which saw the lapse of two (2) years without the promised verdict. This was caused mainly by the fact that the alleged members when called to a meeting will not show up, but duly show up in the Annual General Meeting (AGM) because that would be the period of the payment of dividends.

4.3.1 Seeing that there was no redemption from the impasse, as the Chief's council was not about to engage the Respondent's members with the promised ruling, the Respondent's members then opted for a neutral party. It was then that the matter was reported to the King's Liaison Officer – Ndabazabantu of Siteki in the Lubombo Region on or about 2021. The thirty two (32) alleged members were then summoned to appear before the King's Liaison Officer, and which matter was deliberated at length and to date, same is pending.”

[9] In a similar case to the present, Justice M.J. Dlamini JA sitting with Justice R.J. Cloete JA and Justice N.J. Hlophe JA in the Supreme Court of Eswatini case between, Bambanani Balimi Farmers Ltd vs Richard Dumisani Ngwenya (69/2020) [2021] SZSC 06 (04 June, 2021) at paragraph 8 of the Court's Judgment, Justice J.M. Dlamini who wrote the Judgment, opined as follows:

“[8] In fairness to the appellant the deponent tried to explain that although the appellant is a company it is not managed entirely as a company. This is due to the fact that as a farming entity it operates on Swazi Nation Land controlled by traditional (Royal) structures such as Chiefs and their Councils. In the result, the traditional Councils tend to exercise supervisory authority over the companies so situated because of their control over the means of production (the land). The unfortunate aspect of this symbiotic relationship is that adherence to corporate management is relaxed to the prejudice of members (shareholders) and the company in the long run. The end result are perpetual squabbles between members and management....”

[10] At paragraph 12 of the Judgment in the Bambanani Balimi Farmers Ltd matter, on the role of traditional councils, the Court observed as follows:-

“[12]The traditional councils who make the land available for the farming enterprises are important stakeholders. They cannot just avail the land and then disappear from site. But it is important that they understand just like the members and their executives, that every serious enterprise involving more than one person must have rules to guide it in whatever it seeks to achieve; and importantly in how it will resolve disputes and differences within the membership. The importance of having and abiding to the rules for operating the business (the Constitution) is to assist, among other things, in ensuring that disputes are resolved earliest....”

At paragraph 13 of the Judgment the Court went on to state that:

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

[11] Before Court Applicants have filed **annexure “MM1”**. **Annexure “MM1”** is part of the Respondent’s constitution. It starts from Article 1 and ends at Article 12. There is no explanation given for photocopying and providing the Court with just part of the constitution. The predicament the Court faces from the foregoing is that it is unable to ascertain from the Constitution whether or not it has any inbuilt dispute solving mechanisms. This therefore means that the Court has to consider statutory provisions which may be applicable in the circumstances as well as common law principles. Before doing that, it is apposite to state that the Court has not been furnished with a copy of the Respondent’s Articles and Memorandum of Association. All that is attached of and concerning the Respondent is **form “J”** which is marked **annexure “A”** as well as **form “C”**, a list of shareholders which is marked **annexure “A1”**.

- [12] (i) Applicants have approached this Court to have the Respondent’s act of not paying them their declared dividends declared to be unfairly prejudicial within the meaning of section 214(1) of the Companies Act.
- (ii) They also seek payment of their dividends on the basis that:

(a) before Respondent, terminated payment of their dividends, they were not afforded an opportunity to be heard. This comes out clearly in paragraph 23.4 of the Applicants' founding affidavit.

(b) having previously received payment, of declared dividends Applicants argue that they had a legitimate expectation that as usual, they would be paid their dividends (see paragraph 30 of the Applicants' founding affidavit.

(c) Respondent's act of withholding payment of their declared dividends is unlawful.

[13] Section 214(1) of the Companies and Associations Act 8 of 2009 has to be read together with subsection (2) of the same provision. Subsection (2) lists the conduct deemed to be unfairly prejudicial and stipulates that it must relate to:

“(a) any alteration of the Memorandum of the company under section 46 or 47;

(b) any reduction of the capital of the company under section 69;

(c) *any variation of rights in respect of shares of a company under section 86; or*

(d) *a conversion of a private company into a public company or of a public company into a private company under section 19.”*

An application to the Court under subsection (1) shall be made within six weeks after the date of the passing of the relevant special resolution required in connection with the particular act concerned.

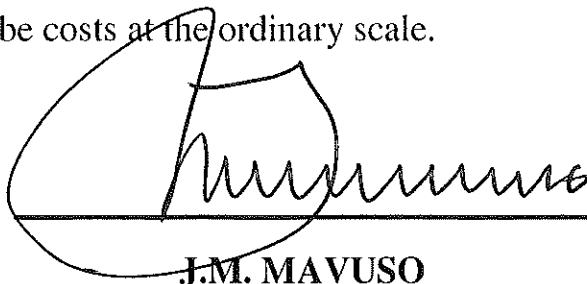
- [14] (i) *In casu*, Applicants’ complaint, clearly, does not fall under the provisions of section 214(2) of the Act. It is not premised on the reduction of capital nor does it involve a variation of rights. On the contrary and if anything, it involves a termination of rights. It also does not involve the conversion of a public company into a private company or vice versa.
- (ii) Turning to the common law principles of *audi alteram partem* and legitimate expectation, the Court finds that the Respondent acted unlawfully in stopping payment of the declared dividend without prior

having heard, Applicants' side of the story. It also finds that having been previously paid their share of the declared dividend, and a legitimate expectation of future payments anticipated, Respondent, in withholding payment of Applicants share of the declared dividend is unlawful.

- [15] Borrowing from the Learned Justice M.J. Dlamini JA's words at paragraph 14 of the Judgment in the Bambanani case;

"None of the points of law and argument raised by the Respondent persuades me to see sense in Applicants (sic) not being paid dividends."

- [16] Accordingly, the application is granted in terms of prayers 1, 3 and 4 of the Notice of Motion dated the 20th day of January 2022, the award for costs in prayer 4, shall be costs at the ordinary scale.



J.M. MAVUSO

**JUDGE OF THE HIGH COURT OF
THE KINGDOM OF ESWATINI**

For the Applicants:

MAGAGULA & HLOPHE ATTORNEYS

For the Respondent:

S. DLAMINI AND ASSOCIATES
(C/O MASILELA ATTORNEYS)