# THE SUPREME COURT OF SWAZILAND

**APPEAL CASE NO. 10/2007**

**In the matter between:**

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| **ROBERT M. MNG OMEZULU** | **APPELLANT** |
| **Vs** | |
| **MDUMO FARMERS LTD** | **1ST RESPONDENT** |
| **REGISTRAR OF COMPANIES NO.** | **2nd RESPONDENT** |
| **ATTORNEY GENERAL** | **3rdRESPONDENT** |
| **ROSTER SHONGWE** | **4thRESPONDENT** |
| **MTHUNZIM NGOMETULU** | **5thRESPONDENT** |
| **MAZWI MNGOMETULU** | **6thRESPONDENT** |
| **ALPHA MSUTFU** | **7thRESPONDENT** |
| **VUMA MNGOMETULU** | **8thRESPONDENT** |
| **GCINUMUZI MNGOMETULU** | **9thRESPONDENT** |

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| **CORAM** | **BANDA CJ** |
| | **STEYN JA** |
| | **ZIETSMAN JA** |

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| **FOR THE APPELLANT** | **MR. T. MLANGENI** |
| **FOR THE RESPONDENT** | **MR. L MAZIYA** |

**HEARD ON THE 6th of NOVEMBER 2007**

**DELIVERED ON THE 15/11/2007**

**JUDGMENT**

**SUMMARY**

**Application for a declaratory order and for an order that the Registrar of Companies should expunge from the Registrar of Companies all entries that were made to incorporate the 1st Respondent (the Company) as a public company - the company was in fact registered as a private company and any challenges to the validity of the registration based on the premise that it was a public company was abandoned - the only remaining issue whether the fact that the founding documents may not have been signed in the presence of the attesting attorney and if so, the effect it had on the validity of the registration - appeal against dismissal of application - Held that evidence of attestation in the absence of witness unsatisfactory — even if acceptable incorporation valid as between the parties - invalidity not a necessary or inevitable consequence of irregularity - appeal dismissed - costs of counsel not allowed because of late filing of the heads of argument.**

**STEYN JA**

1. The appellant applied to the High Court for an order declaring that the 1st Respondent (the company) "has no legal existence and/or was not properly incorporated" and for certain consequential relief. This application was dismissed, hence this appeal.

2. The appellant originally relied on several grounds. He did so because of the mistaken belief that the company was incorporated as a public company. It is quite clear from the founding documents that it was in fact registered with a memorandum and articles of association that established it as a private company. All the limitations and provisions required by the Companies Act (the Act) for a private company were incorporated at registration. All the contentions raised in this regard were quite rightly abandoned at the hearing of the appeal.

1. The only question that remains to be answered is whether the allegation that the memorandum of association was flawed by an irregularity; inasmuch, although signed by both parties, the signature of the appellant was not affixed in the presence of the attorney who attended to the registration of the company.

2. The respondent denied this allegation. He says that he and the appellant consulted a para-legal working in an attorney's office who attended to the matter and prepared all the necessary documentation. No allegation was made at that time that the respondent's signature was not properly attested and, clearly, it is not possible for the respondent to testify as to the veracity and reliability of the allegation in so far as it relates to how and when the appellant's signature was recorded.

3. In addition to this fact, the appellant has made several reckless allegations which are clearly inaccurate. Thus, for example, he alleges that the company was registered and incorporated as a public company, that it failed to issue a prospectus, that no annual meetings were held and that there were numerous other irregularities committed in the process of the registration of the company. All these allegations were unfounded. Thus e.g. the articles of association which the appellant himself annexes to his founding affidavit, records that the company "shall be a private company". It also records that: "Any invitation to the public to subscribe for any shares or debentures

stock of the company is hereby prohibited. Appellant also said that the fact that the company is a "limited" company is evidence that it is a public company. Section 6 of the Act prescribes that the memorandum of all limited liability companies shall have the word "limited" as the last word in its name. There were also factual inaccuracies in appellant's affidavit.

4. In these circumstances it could well be unwise to rely on the ***ipse dixit*** of the appellant that the attorney in question acted in the irregular and unprofessional manner alleged by the him. However, assuming that he did, the question arises whether the only remaining irregularity relied on, i.e. that the attestation of the signature was irregular, would invalidate the incorporation of the company as between the parties who contracted to establish it.

5. Section 8 of the Act provides that ***"The memorandum shall be signed by each subscriber in the presence of at least one witness who shall attest the signature*** The provisions are cast in a peremptory mode. Nevertheless it appears to me that there are considerations which militate against the conclusion that invalidity of the founding contract has to follow the perpetration of the irregularity. It should be noted that the validity of the signature is not challenged, neither is it contended that the parties who were subscribers to the contract and the establishment of the company did not intend to do so. ***Inter partes*** therefore it would appear to me to be clear that the signatories are bound by the agreement. Moreover, there is authority for the proposition that even provisions couched in positive language (and lacking a sanction clause for non-compliance) are taken to be directory. See in this regard - **THE INTERPRETATION OF STATUTES,** by **Lourens M du Plessis** at p. **144 - 145** at paras **52.1 - 52.3.** At **52.2** and **52.3** the learned author says:

*"52.2 The addition of a sanction and especially a penal clause, gives rise to the general assumption that the penalized act will be null and void unless a contrary intention appears. In deciding whether a generally assumed nullity must give way to an intended validity, the general scope and purpose of the enactment, public policy and equity considerations seem to carry considerable weight.*

He continues by saying the following in para 52.3:

*52.3 Purpose and purport as such - apart from the presence or absence of sanction clauses - often guide our courts in deciding whether a provision is peremptory or directory. Accordingly, should insistence on the strict compliance with the terms of a provision cause great inconvenience or result in greater improprieties (such as injustices, injuries to third persons or even fraud) than non-or defective compliance, then in the absence of a sanction clause or an explicit statement to the effect that an act will be void if the provisions are not complied with - validity is accepted. Furthermore, the extent to which the purpose of a provision can be achieved effectively (without allowing for evasions etc), is also considered for validity purposes. It has therefore been held that if substantial compliance with a provision will not frustrate its object, such lesser compliance will as a rule suffice. It may perhaps not even be necessary to decide whether the said provision is peremptory or directory. It has, however, also*

***been held that defective or lesser compliance ought not to be condoned if it is likely to result in prejudice or injustice to persons affected by the provision, and the concepts of "prejudice" and "injustice" are sometimes also couched in public policy terms".***

See also the decisions cited by him under note 42; particularly EASTERN TRANSVAAL GARAGE V. HARLAND **1950 (2)** S.A **778** *CD* **at 780** AND POTTIE V. KOTZE **1954 (3)** S.A. **719** (A) **at p. 727.**

***In casu*** it has been established - indeed admitted - that the appellant did sign the document and intended to participate in the establishment of the company. The "lesser compliance" concerning the attestation of his signature does not, in my view, invalidate the incorporation of the company.

8. For these reasons I am of the view that, certainly as between the contracting parties, the incorporation of the company is not invalidated by the alleged irregularity referred to above, i.e. that the appellant did not sign a founding document in the presence of the attesting witness.

9. The appeal is dismissed with costs. In view of the unexplained delay in filing his heads of argument by counsel, the costs occasioned by his appearance are not included in the costs to be paid by the appellant.

J.H. STEYN

Judge of Appeal

I agree

R.A. BANDA

Chief Justice

I agree

N. W. ZIETSMAN

Judge of Appeal