IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 53/2011

In the matter between

THE SWAZILAND TOBACCO CO-OPERATIVE COMPANY LIMITED **Appellant**

and

BERTRAM HENWOOD **1st Respondent**
LAZARUS MABHENGU HLOPHE **2nd Respondent**
NONHLANHLA HLOPHE **3rd Respondent**

Neutral citation: *The Swaziland Tobacco Co-operative Company Limited v Bertram Henwood and 2 Others* (53/2011) [2012] SZSC 75 (30 November 2012)

Coram: RAMODIBEDI CJ, DR. TWUM JA and OTA JA

Heard: **12 November 2012**

Delivered: **30 November 2012**

Summary: Scheme to convert Co-operative Society to public company – Respondent members of Co-operative Co. Ltd objecting to conversion – proposal by Appellant to acquire and pay for shares of Respondent members – proposal said to have been agreed to by Appellant through their former counsel. Authority of counsel denied – Evidence of agreement in principle for Respondents to be paid value of their shares in Co-operative. Held appellant bound by agreement – order for new valuation and payment for shares – costs sol/client basis.

DR TWUM J.A.

[1] This is an appeal from the judgment of M.C.B. Maphalala J. (as he then was) given on 5th December 2011 whereupon he upheld the claim by the 2nd respondent for payment of E139 000 against the appellant under Case No. 121/08 and further ordered that the parties appoint a new valuer to value the shares of the 3 respondents in a Co-operative Society.

[2] The facts are quite simple. The appellant and the respondents were members of The Swaziland Tobacco Co-operative Company Ltd, a Co-operative Society established under the Co-operative Societies Act 1964. At all times material to the action it was governed by the Cooperative Societies Act 2003.

[3] On or about 27 January 2009 the applicants in Case No. 258/09 brought an application against the then respondent, (appellant herein) to pay to each of the applicants as follows:-

(1) Bertram Henwood – E424,700.00 value of his shares

(2) Lazarus Mabhengu Hlophe (a) E532,175.00 being the value of his shares in the Co-operative Society. (b) E139 000.00 being settlement of a claim against the respondent under case No. 121/08.

(3) Nonhlanhla Fakudze E234 157 – value of his shares;

interest on this sum at 9% per annum from date of application to date of conclusion.

[4] It would seem that the other members of the Co-operative (the proponents of the scheme to convert the Co-operative into a public company) were anxious to convert the Co-operative into a public company. There was bad blood between the proponents and the dissentients. The dissentients complained that the proponents were anxious to complete the conversion in order to cover up the loss of some E500,000 from the funds of the Co-operative as well as another E31 000.00 lost from the Piet Retief Account. When the Commissioner of Co-operatives tried to resolve the impasse and commissioned a forensic audit to investigate the allegations of impropriety and financial malfeasance, the appellant applied for an interdict to stop the Commissioner's proposed action.

[5] In due course, it appeared that the matter was amicably resolved. At a meeting held on 21st August 2008 at the Respondents' Attorneys Offices between the attorneys for the parties it is said that it was agreed, inter alia, that the 2nd respondent be paid the sum of E139,000.00 in respect of a claim under case NO. 121/08. In that case the appellant was represented by Mlangeni and Company. The holding of the meeting as well as the

settlement was confirmed by a letter dated 11th September 2008 written by the appellant's former attorneys – Vilakazi and Company. This letter was construed to be an offer which was said to have been accepted by respondents' attorney on 7th October, 2008.

[6] Unfortunately, the settlement unravelled because the appellant denied that it had approved the settlement of the entire dispute between the parties. In particular, it protested that attorneys, Vilakazi and Company, exceeded their authority when they approved the settlement on its behalf.

[7] By any affidavit sworn to by Bernard Nxumalo who claimed to be a director of the appellant Co-operative Company, and filed in the court a quo on 24th April 2012 he admitted in paragraph 9.0 as follows:-

> "I agree that in principle it was agreed that the Applicants were to be paid out in respect of their shares in the former Co-operative Society. However, I deny that agreement was reached on actual figures."

[8] Issue was also taken against the valuation of the respondents' shares in the Co-perative by KQ Consulting (Pty) Ltd instead of "Ndallahwa and Company". It appeared from a resolution of the Board of the appellant that KQ Consulting (Pty) Ltd had not been appointed to value the shares.

[9] On 5th December 2011 Maphalala M.C.B. J (as he then was) gave judgment in the application filed by the present respondents as follows:-

> **"(a) The Respondent is directed to pay to the Second Applicant E139,000-00 (One hundred and thirty nine thousand emalangeni) in respect of his claim under Civil Case No. 121/2008 as agreed between the parties at an interest of 9% per annum a tempore morae.**
> **(b) The parties are directed to convene a meeting with the assistance of their Attorneys within seven days of this Order and agree on a firm of Auditors duly registered in Swaziland to determine the value of each share held by the Applicants at the time of concluding the Agreement in October 2008.**
> **(c) The Firm of Auditors referred to in paragraph (b) above shall file their Report with the Registrar of the High Court on the 30th January 2012 which shall be made an order of court on the 3.2.2012.**
> **(d) The Respondent is directed to pay interest of 9% per annum on each of the amounts determined and fixed by the Firm of Auditors referred to in paragraph (b) from the date of this Order.**
> **(e) The Respondent is directed to pay costs of suit at a scale between Attorney and client."**

[10] On 19th December, 2011, the appellant appealed to this Court against orders (a) and (e) made by Maphalala M.C.B. J.

[11] At the hearing of the appeal, counsel for the appellant admitted that in view of the deposition in paragraph 9 of the affidavit of Bernard Nxumalo, he could not support his client's contention that there was no agreement come to between the parties. However, he argued that the court a quo erred in

awarding costs on the punitive scale against the appellant, particularly as these were not prayed for by the respondents.

[12] In the circumstances the judgment of this Court is as follows:-

(a) The appeal is dismissed.

(b) Orders (a) and (e) of the court a quo stated in the judgment of M.C.B. Maphalala J. are hereby confirmed except that the 7 days period fixed by the court a quo for the parties to appoint a new firm of Auditors to value the shares of the respondents, is extended. In its place I substitute "within a reasonable time from the date of this judgment" if the appointment has not already been done.

(c) The order for costs made in the court a quo is confirmed. In my view that litigation was needlessly provoked by the appellants.

(d) The respondents will have their costs in this appeal on the solicitor/client scale.

Ordered accordingly.

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DR. SETH TWUM
JUSTICE OF APPEAL

I agree.

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M.M. RAMODIBEDI
CHIEF JUSTICE

I also agree.

E.A. OTA
JUSTICE OF APPEAL

COUNSEL:

For Appellant:	**Mr. T. Mlangeni**
For Respondents:	**Mr. B. Mndzebele**