



IN THE SUPREME COURT OF SWAZILAND

Civil case No: 43/2013

In the matter between:

**ZODWA TSHABALALA
ZANDILE TSHABALALA
PHUMZILE ECKERD**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT**

AND

SWAZILAND THEATER CLUB

RESPONDENT

Neutral citation:

Zodwa Tshabalala & Two Others v Swaziland Theatre Club (43/2013) [2013] SZCA46 (2013)

Coram:

**RAMODIBEDI CJ
M.C.B. MAPHALALA JA
DLAMINI AJA**

Heard:

5 September 2013

Delivered:

16 September 2013

Summary

Civil Appeal – Final interdict – appeal against the judgment of the Court *a quo* on the basis that the requisites of the final interdict have not been satisfied – the essential requirements of the relief discussed – appeal dismissed with costs.

JUDGMENT

THE COURT

[1] The appellants have filed a Notice of Appeal against the judgment of the Court *a quo* delivered on the 8th August 2013 on the following grounds of appeal: Firstly, that the Court *a quo* erred both in fact and in law by finding and holding that the Extraordinary General Meeting of the 10th July 2013 was properly convened and/or constituted. Secondly, that the Court *a quo* erred both in fact and in law by finding and holding that the purported resolution of the 10th July 2013 was valid and enforceable. Thirdly, that the Court *a quo* erred both in fact and in law by finding and holding that the appellants had been correctly removed from the management of the Swaziland Theater Club.

[2] The following facts are common cause between the parties. The appellants were members of the Executive committee of the respondent until the 10th July 2013. On the 5th April 2013, the appellants, acting as members of the Executive Committee of the respondent, terminated the Lease Agreement between Pro-Tech Holdings and the respondent. Thereafter, the appellants took over the running of the respondent's kitchen. The Trustees of the respondent, in a letter dated 26th April 2013, advised the appellants that their conduct of terminating the Lease Agreement of Pro-Tech Holdings was both invalid and illegal; and, they further advised the

appellants to reinstate Pro-Tech Holdings as the lawful tenant of the respondent, whose Lease was still valid and enforceable.

- [3] The appellants did not respond to the concerns raised by the Trustees in their letter of the 26th April 2013. By letter dated 26th May 2013, the Trustees requested a meeting with the appellants scheduled for the 4th June 2013 with a view to discuss the termination of the Lease Agreement involving the respondent and Pro-Tech Holdings. Similarly, the appellants did not respond to the request for a meeting; in addition, they did not attend the meeting. Pursuant thereto the Trustees purported to dissolve the Executive Committee by letter dated 29th June 2013; in the said letter, the Trustees advised the Executive Committee that it was being dissolved with immediate effect, and, that all operations of the respondent would be run by the Trustees pending the election of an Interim Committee. In addition the Trustees advised Pro-Tech Holdings, by letter dated 29th June 2013, to resume operations in terms of the Lease Agreement; however, Pro-Tech Holdings could not resume operations as advised on the basis that the appellants had already assumed occupation of the kitchen premises and were running the Food Catering business for themselves.

- [4] On the 10th July 2013, an Extraordinary General Meeting was called and convened at the instance of the Trustees for the general membership of the

respondent. The agenda of the meeting was to deal with the disagreement between the Executive Committee and the Trustees on the terminated Lease Agreement of Pro-Tech Holdings as well as the subsequent dissolution of the Executive Committee. At the meeting the membership endorsed the decision of the Trustees to dissolve the Executive Committee comprising the three appellants. The membership further elected an Interim Committee to take over and manage all the affairs of the respondent and further promote its aims and objectives. The membership also endorsed the decision of the Trustees to reinstate Pro-Tech Holdings as the lawful tenant of the respondent to operate the Food Catering business at the premises.

- [5] An Extract of the Minutes of the Extraordinary General Meeting held on the 10th July 2013 resolved the following: Firstly, that the Executive Committee was forthwith dissolved and replaced with an Interim Committee in the persons of Khethabahle Mthethwa, Nancy Mavuso and Dave Bennett respectively. Secondly, that the Trustees were authorised to institute legal action for and on behalf of the respondent for relief against the appellants. Thirdly, that the authority given to the Trustees, was to ensure that the appellants, their agent and anyone who held title through them were: (a) evicted, restrained and interdicted from using the respondent's kitchen and other property (b) restrained and interdicted from

interfering with tenants of the respondent and (c) ordered to surrender the respondent's keys, kitchen and all other property belonging to the respondent in their possession. Fourthly, that the Trustees acting in their given authority were to ensure that as a matter of urgency, the lawful tenant of the respondent, Pro-Tech Holdings, was reinstated back to its position as tenant.

[6] The Minutes of the Extraordinary General Meeting were signed by the Interim Chairman Khethabahle Mthethwa as well as the Interim Secretary Nancy Mavuso. It is common cause that Vusi Sibisi, a member of the Executive Committee, who was also the Chairperson, resigned prior to the Extra-Ordinary General Meeting.

[7] The appellants contend that the Extraordinary General Meeting of the 10th July 2013 was not properly convened and constituted; hence, the resolution made was invalid and unenforceable at law. Similarly, they argue that the removal of the Executive Committee by the general membership of the respondent was improper and consequently invalid: in their heads of argument, the appellants contend that in so far as the meeting was not held in terms of Clause 22.11 of the respondent's Constitution, it was invalid and the subsequent resolution legally invalid and unenforceable.

[8] Clause 22.11 provides the following:

“22.11. An Extraordinary General Meeting may also be called by members by submission of a memorandum under the following conditions:

22.11.1 The memorandum shall be submitted to the Committee in writing and shall be signed by not less than twenty (20) members of the Club.

22.11.2 The memorandum shall be submitted not less than three (3) weeks before it is desired to hold an Extraordinary General Meeting.

22.11.3 The memorandum shall state the precise purpose of the Extraordinary General Meeting and the proposers may be called upon to appear before the Committee to elaborate on the memorandum.

22.11.4 On receipt of such a memorandum presented in accordance with this clause, the Committee shall forthwith notify the members of an Extraordinary General Meeting to be held upon the date stipulated in the memorandum, which notice shall enclose a copy of the memorandum,

and include such other matters as the Committee may consider appropriate.”

[9] It is apparent from Clause 22.11 that it provides for the calling of an Extraordinary General Meeting by ordinary members of the respondent. It further sets out the procedure for calling the meeting. The Constitution further provides for the calling of the Extraordinary General Meeting by the Executive Committee by adopting the procedure outlined in Sub-Clauses 22.2, 22.3 and 22.4. The Executive Committee, comprising the Chairperson, Vice-Chairperson, Secretary, Treasurer, Subscriptions Secretary and not more than three members are elected at the Annual General Meeting of the respondent. They hold office for one year. The duties of the Committee are outlined in Clause 18 of the Constitution as follows: Firstly, to manage the affairs of the respondent, and promote its aims and objectives. Secondly, to draft, maintain and amend regulations for the conduct of the respondent’s business. Thirdly, to print and circulate copies of the Constitution and Regulations to members; and fourthly, to comply with the provisions of the respondent’s Constitution.

[10] Clause 20 of the Constitution further provides for the powers of the Executive Committee:

“20. Powers of the Committee

The committee shall have the powers to do anything which is calculated to enable it to exercise and perform its functions or which is incidental or conducive thereto, including in particular, but without derogating from the generality of this provision, powers which shall include power on behalf of the Club to:

20.1 Open and operate a bank account.

20.2 Acquire by purchase, lease, exchange or grant, or otherwise movable or immovable, corporeal or incorporeal property of whatsoever nature or any interest therein or rights thereof.

20.3 Construct, erect, maintain, alter or improve premises or buildings.

20.4 Appoint and employ such persons as it thinks fit, pay them such remuneration and allowance as it thinks fit, grant them such leave as it thinks fit, and dismiss them, subject however to the provisions of the Laws of Swaziland and in particular the Employment Act.

20.5 Borrow temporarily, by way of bank overdraft or

otherwise, sums as it may require for meeting its obligations or exercising or performing its function, subject to the provisions of Clause 23.

20.6 From time to time for such purposes and on such conditions as a 75% (seventy five) majority of members present and voting at a General Meeting as defined in Clause 22 shall agree, raise money by way of loans, acting in accordance with the special provision in Clause 23.

20.7 Receive and disburse monies, and invest or otherwise dispose by way of gift, grant or scholarship, monies at its disposal.

20.8 Establish reserve funds from monies at its disposal.

20.9 To institute and defend any legal actions, processes or applications in any Court of competent jurisdiction.

20.10 Consider applications for membership of the Club and accept or reject such applications at its discretion.

20.11 Make regulations in respect of the affairs of the following:

- (a) The administration of the affairs of the Club.**
- (b) The conduct of meetings of Committees and Sub-Committees.**
- (c) The staging of productions or other Club events**

as the Committee shall determine.

- (d) The control of expenditure.**
- (e) The receipt of and accounting for the revenues of the Club.**
- (f) The preparation of financial statements and balance sheets for submission to each Annual General Meeting or other General Meeting.**
- (g) The procedure for admission to membership, or transfer from one class of membership to another and the privileges of members.**
- (h) The conduct of any person on the Club premises.**
- (i) The disciplinary action to be taken in the event of misconduct by any person or wilful breach of the provisions of this Constitution or of any regulations made by the Committee.**
- (j) The Committee shall have the right to close membership from time to time.”**

[11] In Clause 27 the Constitution further provides for the office of Trustees who shall be elected by the general membership at an Annual General Meeting or at an Extraordinary General Meeting. The Trustees shall have the right to attend meetings of the Executive Committee without voting powers; and, each Trustee shall be given timeous notice of each meeting of

the Committee. They have the right to call an Extraordinary General Meeting in the same manner as may be called by the Executive Committee. Similarly, they have the right to demand and obtain full details of the respondent's financial position from the Executive Committee at any time. They are empowered to hold and regulate their meetings as they think fit, and, every Resolution passed by all three Trustees is binding upon them and is effective for all purposes.

[12] The Constitution further provides that all assets of the respondent vest in the Trustees for and on behalf of the respondent, and, they have the powers to apply and dispose of the assets for the benefit of the respondent in such manner as the Executive Committee directs pursuant to the Constitution. All Deeds of Transfer are passed to or by the Trustees; and, none of the Trustees is answerable for or liable to make good any loss sustained by the respondent unless it is due to the personal wilful act of dishonesty or gross negligence committed by the Trustees in the course of their duties. Similarly, the respondent bears *bona fide* expenses incurred by the Trustees: see clauses 27.11 to 27.15.

[13] Notwithstanding the powers of the Executive Committee outlined above, the Trustees have the power to call an Extraordinary General Meeting in the event of a disagreement with the Executive Committee in a matter affecting

the rights and obligations of the respondent as happened here. The decision of the general membership is final and binding upon the Trustees, the Executive Committee as well as the membership of the respondent.

[14] Clause 27.11 provides the following:

“27.11 In the event of the Trustees being unable to agree on any matter affecting the assets and/or liabilities of the Club, or in the event of the Trustees refusing to carry out any direction or recommendation of the Committee, or should the Committee refuse to approve of any decision or recommendation of the Trustees, then the matter shall, within thirty (30) days of any such disagreement or refusal, be referred to a General Meeting and the decision of such meeting shall be final and shall be binding upon the Trustees, the Committee and all concerned, until the decision of such Extraordinary General Meeting has been given, nothing shall be done or carried out in respect of the matter or matters referred to such meeting for its decision.”

[15] It is common cause that pursuant to the disagreement between the Trustees and the Executive Committee on the Lease Agreement between Pro-Tech Holdings and the respondent, the matter was accordingly referred to the Extraordinary General Meeting by the Trustees. The meeting was held on the 10th July 2013. Accordingly, the general membership passed a resolution to reinstate Pro-Tech Holdings as well as to dissolve the

Executive Committee and elect an Interim Committee. This resolution is final and binding upon the appellants, the Trustees as well as the general membership of the respondent.

[16] The contention by the appellants that the Extraordinary General Meeting was invalid because it was not convened in terms of Clause 22 (11) is misconceived on the basis that Clause 22 (11) is only applicable to a meeting called by the general membership by submission of a memorandum to the Executive Committee. This clause is not competent and has no application where the meeting is convened at the instance of the Trustees pursuant to a disagreement between them and the Executive Committee. The only procedural requirement in terms of Clause 27.11 is that the meeting should be convened within thirty (30) of such disagreement between the Executive Committee and the Trustees. The appellants do not contend or dispute that this procedural requirement was complied with; and, there is no evidence that it was not complied with. Accordingly, the meeting of the 10th July 2013 was properly convened, and, the resolution taken was valid and enforceable. Similarly, the general membership acted within their constitutional right to dissolve the Executive Committee, and, to further reinstate Pro-Tech Holdings.

[17] Having arrived at this decision, it is apparent that the court *a quo* did not misdirect itself in anyway by granting a final interdict as prayed for. We agree with the court *a quo* that the leading case in this regard is that of *Innes JA* in *Setlogelo v. Setlogelo* 1914 AD 221 at 227. This case has been followed and approved by the Supreme Court of Swaziland in several cases. In the case of *Maziya Ntombi v. Ndzimandze Thembinkosi* Civil Appeal Case No. 2/2012 at paras 41 and 43 *M.C.B. Maphalala JA* had occasion to say the following:

“41. From the foregoing, it is clear that the Court *a quo* was correct in finding that the respondent was entitled to a final interdict against the appellant. The leading case in this regard is the case of *Setlogelo v. Setlogelo* 1914 AD 221 at 227 where *Innes JA* stated the following:

‘The requisites for the right to claim an interdict are well-known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.’

....

43. I agree with the Court *a quo* that the requirement of a clear right is the most important of the three requirements of a final interdict, and that the other two requirements are predicated on the presence of a clear right to the subject-matter of the dispute.”

[18] The Court *a quo* correctly referred to the case of *Minister of Law and Order v. Committee of the Church Summit of Bophuthatswana and Others* 1994 (3) SA 89 (BGD) at 98 where *Friedman AJP* said the following:

“Whether the applicant has a right is a matter of substantive law. The onus is on the applicant applying for a final interdict to establish on a balance of probability the facts and evidence which prove that he has a clear or definite right in terms of substantive law The right which the applicant must prove is also a right which can be protected. This is a right which exists only in law, be it at Common law or Statutory law.”

[19] The respondent is the owner of the property where the appellants conduct their business. Hence, the respondent has a clear right to institute the present legal proceedings in order to protect its property. The fact that the appellants in their capacity as the Executive Committee were empowered to manage the affairs of the respondent does not deprive the respondent of its inherent powers to protect its assets in the event that the Executive Committee acts *ultra-vires* its constitutional mandate. In an endeavour to protect the assets of the respondent against an unscrupulous Executive Committee, the Constitution has vested all assets of the respondent in the Trustees in order to safeguard them. In the event of any disagreement between the Trustees and the Executive Committee on the rights and obligations of the respondent, Clause 27.11 gives the Trustees the power to

call an Extraordinary General Meeting of the membership to discuss the dispute and issue a final and binding resolution on the Trustees, the Executive Committee as well as upon the general membership of the respondent.

[20] It is not in dispute that the appellants terminated the lease between the respondent and Pro-Tech Holdings much against the advice of the Trustees in whom the assets of the respondent vest. It is further not in dispute that the appellants proceeded to run the business for themselves as beneficiaries. This created a conflict of interest with their role as the Executive Committee of the respondent. The Executive Committee had assumed the status of a tenant of the respondent without the requisite sanction by the respondent. Furthermore, they had relinquished their mandate of managing the affairs of the respondent. Clearly, the conduct of the appellants was prejudicial to the interests of the respondent on the basis that they were acting in breach of the Constitution by evicting Pro-Tech Holdings unlawfully before the expiry of the lease and taking over the Food Catering business of the respondent for their personal gain. The respondent had no alternative remedy other than to institute the present proceedings, evict the appellants from the premises and further reinstate Pro-Tech Holdings as the lawful tenant of the respondent. It is apparent from the evidence that the

appellants were not prepared to abide by the resolution of the respondent passed at the Extraordinary General Meeting held on the 10th July 2013.

[21] Accordingly, the appeal is dismissed with costs.

M.M. RAMODIBEDI
CHIEF JUSTICE

M.C.B. MAPHALALA
JUSTICE OF APPEAL

M. DLAMINI
ACTING JUSTICE OF APPEAL

For Appellants
For the Respondent

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