

THE HIGH COURT OF SWAZILAND

SWAZILAND MEAT INDUSTRIES LIMITED

1st Applicant

TWK AGRICULTURE LIMITED

2nd Applicant

And

REGISTRAR OF COMPANIES

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

Civil Case No. 904/2003

Coram

S.B. MAPHALALA - J

For the Applicants

Advocate P. Flynn

(Instructed by Robinson Bertram

For the Respondent

Miss J.L. Tsabedze

(Attached to the Attorney

General's Chambers)

JUDGMENT

(20/11/2003)

The relief sought

Serving before court is an application on motion by long form for an order as follows:

1. That the Registrar of Companies be and is hereby ordered to sign the memorandum and articles of association and certificate of incorporation with

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respect to Simunye Cattle Company Limited registration number 349/2001 (Registrar of Companies reference R7/17675) within seven (7) days of the grant of this order.

2. In the event of the Registrar of Companies failing to comply with prayer 1 above, the Registrar of High Court be and is hereby empowered to sign any and all documentation, memorandum and articles of association and/or certificate of incorporation to give effect to this order.

3. That Simunye Cattle Company Limited be and is hereby deemed to have been registered on the 27th of March 2001 and that any and all agreements and/or transactions entered into by the said Simunye Cattle Company Limited from that date are ratified and confirmed effective as at that date.

4. That Simunye Cattle Company Limited (registration number 139/2003) Registrar of Companies reference R7/20335 which registered on 12 February 2003 be and is hereby struck off the roll and its registration cancelled.

5. That the Petitioner pays the costs of this application only in the event of non-opposition thereto.

6. Further and/or alternative relief.

The founding affidavit of one Jonathan Charles Williams who is a Managing Director of the Applicant is filed in support thereto. Various annexures pertinent to the Applicant's case are filed of record. A confirmatory affidavit of one Petrus Jacob Dupooy who is the General Manager of the Applicant is also filed. A further confirmatory affidavit of one Jabulile L. Tsabedze is filed.

The Respondent opposes the application and an answering affidavit of one Gibson Dingane Ndlovu is filed where six points of law are raised in limine. I must hasten to state that these points were argued together with the merits of the case. Therefore this judgment will address the points of law in limine as well as the merits.

In turn the Applicant filed a replying affidavit and thus completing the pleadings in this matter.
The Parties

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The 1st Applicant is Swaziland Meat Industries Limited, a company registered and incorporated with limited liability according to the company laws of the Kingdom of Swaziland which has its principal place of business at 1st Avenue Industrial Sites, Matsapha, district of Manzini, Swaziland.

The 2nd Applicant is TWK Agriculture Limited, a company registered and incorporated in accordance with the company laws of the Republic of South Africa which has its principal place of business at Piet Retief, Mpumalanga, South Africa.

The 1st Respondent is the Registrar of Companies a statutory office set up in terms of the provisions of the Companies Act No. 7 of 1912 being an entity responsible for registration of companies in Swaziland.

The 2nd Respondent is the Attorney General of the Kingdom of Swaziland, in his capacity as legal representative of the 1st Respondent, care of the Ministry of Justice Building, Usuthu Link Road, Mbabane, district of Hhohho, Swaziland.

The Applicants' case

During or about January 2001, the 1st and 2nd Applicants both of whom are extensively involved in the marketing and sale of livestock, entered into negotiations which culminated in a proposal that a company be formed in Swaziland for inter alia, the commercial rearing of cattle in feedlots which cattle, after having been reared by SCCL (Simunye Cattle Company Limited) be sold to the Applicants.

It was proposed that the subscribers to this company would be 1st and 2nd Applicants'. Instructions were duly given to attorneys Robinson Bertram to form the company and the Memorandum and Articles of Associations were duly prepared.

The proposed company was to be called the "Simunye Cattle Company Limited".

The said Robinson Bertram presented the Memorandum and Articles of Association to the Registrar of

Companies in accordance with Section 17 of the Act who then examined the said Memorandum and Articles of Association, issued a certificate of

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incorporation and allocated the company a registration number 349/2001. A copy of the certificate of incorporation is annexed marked "JCW3".

According to the Applicant upon receipt of the Memorandum and Articles of Association, the subscribers thereto duly held the requisite meetings, agreed amongst themselves with regard to the transfer of shares, and appointed the first directors and public officer of the said company.

In pursuance thereof, and on the assumption that SCCL had in fact been lawfully registered, an application was made for a trading licence.

According to the Applicant on the further assumption that SCCL had been lawfully registered the company entered into a number of business transactions with other parties. These are detailed in paragraphs 9.8.1, 9.8.2, 9.8.3, 9.8.4, 9.8.5, 9.8.6 and 9.8.7 of the founding affidavit.

During or about November 2002, the SCCL's auditors noticed that the Memorandum and Articles of Association of SCCL and also the certificate of incorporation of SCCL had not been signed for by the Registrar. The auditors pointed this anomaly out to SCCL's attorneys Robinson Bertram and requested them to obtain the signature thereof.

The person duly mandated to carry out this task by SCCL's attorneys Robinson Bertram was a certain Jabulile Tsabedze who approached the Registrar of Companies to seek to explain the anomaly and also to obtain his signature on the documents. Unbeknown to either the Applicants the Registrar of Companies refused to sign the Memorandum and Articles of Association of SCCL. The Registrar indicated that he required that afresh company altogether be formed and that the main object, which is SCCL's number of submission was one of the major's objects thereof, namely:

"to hold investment of all forms in Swaziland and elsewhere and conduct any other activity to investment holding".

Be deleted all together.

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The deponent avers that he is advised and verily believed that the Registrar of Companies took the view that because the word "investment company" did not appear in the name of SCCL, it was not an investment company and as such this object would, in his view, need to be deleted.

The Applicant avers at paragraph 9.14 that thereafter, the said Jabulile Tsabedze, without seeking a specific mandate from SCCL, and bona fide believing that she was attending to SCCL's concerns, carried out the instruction of the Registrar of Companies by forming a fresh company altogether. That company which although bore the same name of SCCL, was allocated a fresh number namely 139/2003 (Registrar's file 127/2003) but most importantly was only registered on the 12th February 2003. Furthermore, the main object thereof had been deleted.

Upon delivery of the newly registered SCCL no. 2, to the company's auditors it was only at that stage and during or about March 2003 that the Applicant became aware that another company by the name of Simunye Cattle Company Limited had been registered. The Applicants had no knowledge of this fact prior to that.

SCCL has been carrying on business for approximately two (2) years, has entered into various binding commercial agreements both nationally and internationally and has sought finance from SIDC and the

2nd Applicant. SCCL has for the past two (2) years, carried on operations and business on the assumption that it has been regularly and properly registered.

The Applicants contend that the actions of the Registrar of Companies in refusing to sign, alternatively to register the original Memorandum and Articles of Association of SCCL are not only unreasonable but unlawful and ultra vires his powers in terms of the Act in that the object with which he has taken issue is neither unlawful nor does it offend against any of the provisions of the Act. Section 6 of the Act provides that the Memorandum of a limited company shall state inter alia:

- 13.1. The name of the company with "limited" as the last word in its name;
- 13.2. The place in Swaziland in which the registered office of the company is to be situate;
- 13.3. The object of company;
- 13.4. That the liability of the members is limited;
- 13.5. That the amount of share capital with which the company proposes to be registered and division thereof into shares of fixed amount.

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At paragraph 17 the Applicants contended that the balance of convenience favours them in this matter in that the company SCCL has entered into valid and lawful binding commercial agreements with third parties and has strictly complied therewith. On the other hand, to refuse the Applicants relief which they seek would be disastrous and would prejudice third parties who dealt with and contracted with SCCL in the bona fide belief that it has been registered.

The Respondent's case.

The answering affidavit of the 1st Respondent is filed in opposition. The Respondent raises points of law in limine and also addressed the matter on the merits.

The points of law in limine are couched in strange language which I found not only improper but intemperate. I will proceed to reproduce the points in extenso, thus:

"2.3. AD POINTS IN LAW IN LIMINE.

I would like to raise and to rely on the following points of law in limine before the hearing of this application on the merits thereof.

2.3.1. I submit and I am verily advised that the relief sought by Applicants in the notice of motion under prayer 1 is incompetent in law in that the Registrar of Companies has a discretion to exercise in relation to the Registration of Companies. He cannot act on dictation of another in the exercise of his duties and this is wide enough to include a court of law. I submit that a public officer, in my position, would be failing to exercise his discretion independently if he acts on what somebody else or institution says he must do and I am advised that this is an irregularity which is sufficient to be a ground of setting aside any exercise of power and to support a finding of failure to exercise his discretion according to law on review. Applicant is attempting to make this Honourable Court to usurp the functions of my office by indirectly

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making it Registrar of Companies. I submit that I am the only Registrar of Companies in this Kingdom and my functions cannot be delegated to this court.

2.3.2. I submit further, that the argument raised under the above mentioned paragraph 2.3.1 are also reiterated as fully applicable with regards to the alternative prayer number 2 of the Notice of Motion. The

same alternative prayer 2 is also incompetent and is even worse than prayer 1 in that it asks this court to make an order it has no legal competence to make because the functions of the Registrar of Deeds are well outlined under Section 5 of the Deeds Registry Act of 1968 and there is nowhere therein where the function of being an alternative Registrar of Companies is mentioned. His duties are confined to registration of immovable property and such other real rights which emanate from transactions involving immovable property. This has nothing to do with my office and I am advised that express mention of those duties mentioned under Section 5 thereof mean the automatic exclusion of my duties. This Honourable Court has no jurisdiction to extend the functions of the office of the Registrar of Deeds office and further arguments in support of this point shall be strongly advanced on my behalf in court during the hearing of this application.

2.3.3. I submit further that prayer number 3 is also incompetent in law because there is no legal basis of a retrospective registration of a company. This will, prejudice members who were dealing with it before Registration in that its liability will be unduly limited yet at the time of a possible transaction they were not aware of the limited liability of the person they were dealing with at the time. I submit further that I do not have such power in law, to register a company retrospectively, and that the further arguments in support of this point will be advanced in court on my behalf.

2.3.4. Prayer number 4 is also incompetent because the company sought to be deregistered has not been cited nor served with the court papers. I had expected that this court be approached by the company itself seeking deregistration and that before this court is approached on application of this nature that Applicant should have exhausted the statutory remedies for deregistration. I am advised therefore that my office has not refused to deregister the company, the fact is that it has not been approached by any one with such an application. I submit and I am verily advised that this application is a gross abuse of court process and ought to be thrown out as such with costs.

2.3.5. I submit that prayer 5 is also irregular because this is not a petition but is an application on notice presumably in terms of Rule 6 of the High Court rules and as such there is no petitioner who can be ordered to pay costs. I am advised that instead the best thing in the circumstances is that the Applicant be ordered to pay costs if the points in limine are upheld". (my emphasis).

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On the merits the Respondents deny that the Registrar of Companies issued a certificate of incorporation. The 1st Respondent refused to sign the Memorandum and Articles of Association because they have an object which he found undesirable, viz object 3 (a) (1).

The Respondents deny that there would be no prejudice to any party by the granting of this order in particular the Registrar of Companies because the effect of that order would be stripping off the Registrar of Companies of his discretionary powers to scrutinize the Memorandum and Articles of Association of a company to determine if it has "lawful" objects or not and then sign them if they are in order and reject them if they are not in order. The Registrar of Companies exercised his discretionary powers in terms of Section 212 of the Companies Act.

Arguments for and against the application.

As I have already mentioned the points of law in limine were argued together with the merits of the matter.

Mr. Flynn for the Applicant filed very comprehensive Heads of Arguments, for which I am grateful. Miss Tsabedze on the other hand argued from the bar in an incoherent address which was in line with the language used in the Respondents' answering affidavits. I must say Miss Tsabedze was not helpful to the court at all. The court was subjected to an emotional tirade not befitting of counsel. In the main the arguments advanced on behalf of the Respondents centred around the averments contained in the answering affidavit.

The applicable law

In terms of Section 17 (1) of the Companies Act, 1912, the Memorandum and Articles together with a copy thereof certified by a notary public shall be transmitted or delivered to the Registrar. The Registrar is required, in terms of Section 17 (2) to deliver, the Memorandum and Articles, if they are in accordance with the Act, by filing the certified copy. The

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Registrar is further required to return to the company the original Memorandum and Articles with the date of registration endorsed thereon.

Section 17 (2) therefore clearly provides that the act of registration is constituted by the filing of the certified copy. The date of this registration is endorsed on the original.

Section 18 has the heading "effect of registration ".

In terms of Section 18(1) the Registrar shall certify under his hand that the company is incorporated. He is required to do this upon the registration of the Memorandum which registration has been effected in terms of Section 17 (2).

The purpose of a certificate of incorporation is set out in Section 19 of the Act. The Section provides that the certificate of incorporation given by the Registrar shall be conclusive evidence that all the requirements of the Act in respect of registration have been complied with.

The act of registration comes about by the filing of the certified copy of the Memorandum and Articles. The certificate under the Registrar's hand merely certifies that the registration has taken place in accordance with the Act.

The law applied to the facts in casu.

It is evident in the papers filed of record that the Memorandum and Articles of Simunye Cattle Company were duly prepared by attorneys Robinson Bertram. The Memorandum and Articles were presented to the Registrar in terms of Section 17 of the Act.

The Registrar endorsed a date of registration on the 27th March 2001, on the Memorandum and Articles and returned them. The endorsement also has a registration number and the Registrar's file number viz 349/2001.

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The Registrar issued a certificate of incorporation dated the 27th March 2001, which also has the file number 349/2001 on it. The Registrar failed to sign the certificate".

During November 2003, the company's auditors noted that the Memorandum and certificate had not been signed.

I agree with Mr. Flynn for the Applicants that in terms of Section 17 (2) it is not a legal requirement that the Memorandum and Articles be signed by the Registrar. The Registrar is merely required to endorse the date of registration thereon which has been done. Section 17 (2) was complied with and the company was therefore registered as provided for by that Section.

The Registrar had not raised any objection to the Memorandum and Articles as he was entitled to when the company was registered and the documents were returned thus satisfying all the requirements of Section 17 (2). The Registrar is obliged to sign the certificate in terms of Section 18 of the Act as the company had been registered in compliance with Section 17 (2).

I agree in toto with the Applicants' contention that the Registrar's refusal to sign the certificate is unlawful and that his demand that a new company be registered is ultra vires his powers in terms of the Act.

As to the complaint advanced by the 1st Respondent at paragraph 2.3.1 of the points of law in limine, I find that it is without basis. The complaint is that "Applicant is attempting to make this Honourable Court to usurp the functions of my office by indirectly making it Registrar of Companies in this Kingdom and my functions cannot be delegated to this court".

Clearly the sentiments expressed by the 1st Respondent are misplaced. The present application is a mandamus. A mandatory order is one requiring the performance of an act or duty, i.e ad factum praestandum, and is commonly sought to enforce the discharge of a statutory duty. (see Minister of Finance vs Barberton Municipal Council, 1914 A.D. 355 - 6, Aziz vs Vryburg Municipality, 1954 (1) S.A. 427 (GW) and Classen, Dictionary of Legal Words and Phrases (Vol. 2) at page 385).

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The mention of the Registrar of Deeds by the Applicants in prayer 2 in my view was clearly a misnomer and therefore nothing much turns on this point of law in limine taken by the 1st Respondent at paragraph 2.3.2.

As regards point 2.3.4 of the points in limine that prayer number 4 is incompetent because the company sought to be deregistered has not been cited nor served with the court papers, the short answer to this is that there was no need for that as the same company is involved in this case.

Furthermore, point 2.3.5 of the points in limine do not take this matter any further either way and therefore is of no consequence.

In the result, an order is granted in terms of prayers 3 and 4 of the notice of motion.
Costs to follow the event including costs of counsel in terms of Rule 68 (2) of the High Court rules.

S.B. MAPHALALA

JUDGE