



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No. 1440/14

In the matter between:

DUMISA NDZIMANDZE N. O. AND OTHERS

Applicants

and

BOY HLOPHE N. O. AND 6 OTHERS

Respondents

In re:

ELPHUS MDAKA N. O. & 3 OTHERS

Applicants

and

PAUL NKENJANE AND 5 OTHERS

Respondents

Neutral citation: *Dumisa Ndzimande N. O. & Others Vs Boy Hlophe N. O. & 6 Others In re: Elphus Mdaka N. O. & 3 Others and Paul Nkenjane & 5 Others (1440/14) 2015 SZHC139 (21/08/2015)*

Coram: Hlophe J

For Applicants: Mr. D. N. Jele

For Respondents: Mr. M. Sithole

Date Heard: 28 July 2015

Date Handed Down: 21 August 2015

JUDGMENT

- [1] On the 6th March 2015, members of a company called Takhamuti Farmer's Investments (PTY) LTD, who had taken each other to court as a result of certain disputes between them decided to settle the matter jointly by means of a consent order prepared and signed by their counsel which was eventually made an order of this court.
- [2] The material terms of the consent order were inter alia, that the Takhamuti Farmers Investments (PTY) LTD account held with the Swaziland Development and Savings bank which had hitherto been frozen or interdicted was to be henceforth unfrozen which is to say it was to have the interdict uplifted. A certain select committee, whose composition was agreed upon between the parties, was established. It was given powers to generally run the affairs of the company on an interim basis. It was to do so until such time that elections for a new executive committee were to be held. The Elections in question were to consist of the General Membership and were to be held on the 28th March 2015. The elected Executive was required to the company's Bank, as soon as possible after the elections, file all the necessary documents to among other entities, to enable it effectively run the affairs of the

company. The parties were to submit their reports in court on the day they were required to report there in particular on the outcome of the elections. It is noted though that the consent order did not specifically identify the person to conduct the elections nor the one who was to file the elections report in court.

[3] It is not in dispute that purporting to act in terms of the court order, the parties to the consent order had the elections held on the 28th march 2015 resulting in the first to seventh Respondent being elected as the new members of the Executive Committee for the company in question.

[4] The elections and their results were however not acceptable to all the members of the company in question. The cause for non-acceptance of the elections was the fact that not all the people who regarded themselves as members of the company were allowed to vote. The non-acceptance of the said elections and their results culminated in these proceedings. The Applicants, among other the reliefs sought asked for an order of this court, *inter alia* setting aside the elections and their results. There was also sought a an order directing that the elections be re-conducted within two weeks from the grant of the order sought as well as an order clarifying who qualified to be a member as well as clarity on who was to

be allowed to vote. There was sought as well an order on who was to conduct or be responsible for the elections.

[5] The Applicants asked for a further order freezing or interdicting the operating on the company's account held with Swazi Bank-Simunye Branch as a means to safeguard the finances of the organization pending the finalization of the matter by this court together with the costs of suit.

[6] In light of the view I have taken of the matter, the only live issues to be decided by this court are whether the elections ought to be re- conducted as well as who should take part in the elections in question together with the question of costs. It will be apparent as elaborated in this judgment why the other prayers do not warrant a decision by this court.

[7] Upon reading the papers filed of record it soon became clear that the main issues for decision were whether the elections conducted so as to result in the current Executive Committee were properly conducted as well as whether all those entitled to take part in the elections – either by voting or by being voted for had been allowed to do so. These issues were however, shrouded in disputes of fact which necessitated that oral evidence be led. For instance, whereas the Applicants contended that some members of the company were prevented from taking part in the

elections with the elections themselves not being properly conducted, the Respondent denied these allegations and argued the elections were handled properly and that all members entitled to vote did take part in the elections.

[8] Considering that the issue for determination in the matter was a narrow one, I directed that the person who conducted the elections be called as a witness at the instance of the court with each one of the parties retaining their entitlement to cross examine him as well to call whichever witnesses they choose to advance their side provided such witness remain within the specific issues for inquiry as these were application proceedings being referred to oral evidence on the specific issue of the proper conduct of the elections or otherwise.

[9] After some initial hesitation between the parties on who conducted the elections, it was eventually agreed, that one Ntokozo Mkhonta, an employee of the Royal Swaziland Sugar Corporation (RSSC), had conducted the elections and that he was more a neutral person in the disputes between the two factions. It transpired though that as he did so, Mr. Mkhonta worked closely with one Mr. Boy Mdluli who had been tasked by the council of Hlane, which is said to be a council appointed by

His Majesty the King to oversee the operations of company concerned on the basis that land it was farming had been donated to it by the King.

[10] Having been called to testify on how the elections had been conducted including what had transpired during the exercise the said Ntokozo Mkhonta confirmed that elections for the Executive Committee of the company, Takhamuti Farmers Investments (PTY) LTD, were held on the 28th march 2015 and that he had been asked to conduct the said elections. His being requested to do so might have been triggered by the fact that his department at RSSC worked closely with the sugar cane growing associations or companies which included the Applicant, as they were from time to time required to give assistance and support to the said companies or associations. It merits mention that the company in question started off as a company which graduated into a company. It may as well be that some structures which are associated with associations are now found in this company. These are structures such as the Executive Committee.

[11] Many people attended at the place where the elections were meant to be held which was described as a fenced area around the company's premises according to Mr. Mkhonta. After the consent court order was read on the conduct of the elections, which included a clause that said the

elections were to by the general membership, all the people in attendance were asked to vacate the fenced area. Once they were all outside that area, a certain list of names was read with those whose names were read out being required to re-enter the fenced area. The list of names read according to this witness had been prepared by the office of the Attorney-General, or were an annexure to a letter prepared by the Attorney-General's office to advise who were the real members among all the people who claimed to be such. The so-called real members are the only people who were to be allowed to either vote or be voted for. It was clarified these were that category of the members called Banumzane, who were, by way of clarity, those members of the company, whose fields were surrendered to the association and later the company, to grow sugar cane for the benefit of the company. It was testified these were the only people allowed to vote.

[12] Although they had been registered as members of the company, those who were not Banumzane or initial field owners were not allowed to take part in the elections, be it as voters or as those being voted for. These people are said to have expressed dissatisfaction on the entire exercise, and complained of being prevented from voting yet the consent order which formed the basis of the elections had provided that the General membership of the company was entitled to vote. Those left outside the

voting area are however said to have been less than a half of those who took part-in the said elections. According to Mr. Mkhonta, the problem on who were members or not members had been there for some time. It would appear that sometime in the past (around 2011 or so), there was sought a loan from European Union. The latter is said to have indicated that it could advance the loan, or whatever other funds to the company, if it could be shown that there were included among its membership such vulnerable members of society as widows, orphans, the disabled and the like. In order to access such loans which were eventually granted, these groupings, who were outside the so called Banumzane or initial field owners were as a result allowed membership in the company. These are the people who when the time to vote came by were left outside the elections arena notwithstanding that they were as members. It was in fact confirmed these people had previously been treated so much as members that they had been allowed to share in the dividends whenever same were declared.

[13] It transpired under cross-examination that there were actually two different lists each comprising members of the company. There were those called Banumzane and their children, who were 73 in number or thereabout and the all-inclusive list which had in all about 120 people except that it was inclusive of all those already mentioned in the list of 73

referred to above. These lists were all annexed to the Respondent's answering or opposing affidavit. The first Respondent in his own words referred to these two lists as those of the members of the company. These lists appear as annexures "TF1" and "TF2" to the answering affidavit.

[14] Otherwise, the cross-examination on behalf of the Applicants could not dispute the fact that not all those appearing on the lists and who regarded themselves as members were in fact allowed to take part in the elections. In other words, it could not realistically be disputed that some members of the company were not allowed to vote or be voted for contrary to the consent court order which formed the basis of the elections. Whereas in reality only those called Banumzane were allowed to vote, there does not seem to have been a legal basis for that and such was not contained in the establishing documents.

[15] It having been established beyond doubt that not all members were allowed to vote, it becomes clear that there was no need to lead further evidence or witnesses on this point. In fact it was only the Applicant who led a witness over and above the one who conducted the elections. The said witness's evidence was not so different from that of the one called by the court, Ntokozo Mkhonta on the conduct of the elections in issue. With this court having expressed its concern that it did not look like any

witness would bring contrary evidence to the fact that not all members were allowed to vote when the current executive committee was elected, Applicant's attorney clarified he was not going to call any further witnesses. The Respondent's counsel also stated that he was not going to lead any evidence on the central issue for determination. He indicated he was leaving the matter in the hands of the court but invited it to bear in mind that there was a certain Committee called "Libandla Lase Hlane" Royal Kraal which had been established by the authorities to deal with disputes over land. It was this Libandla, he submitted that had decided that only the Banumzane should be allowed to vote and not all the members as known.

[16] It however could not be established that the said Libandla had been established in terms of any Legislation, giving it power to supersede the Companies Act which establishes companies, including their regulation to the point of who its members are. It could not be disputed that in terms of the founding documents of the company, membership was not limited to the initial field owners only or Banumzane; which was confirmed by the list of members as disclosed by the current Chairman of the Company, Boy Hlophe. In law it therefore means that however good the intentions of the establishment of the said Libandla it cannot supersede

the position as provided in the Companies Act which is the law in terms of which companies are run and regulated in the country.

[17] The entire membership had to be allowed to vote in my view. Evidence was led to the effect that at the time of establishment of the company, and precisely when funding to facilitate its establishment and operations was sourced, it was granted by the European Union on condition that the company was going to comprise or to include such other categories of people as orphans, disabled people, widows, and other vulnerable people and the likes. Evidence led showed it was as a result of this condition the grant of the funds to operationalize the company was approved. The membership of the company thus ended up being opened to a much wider category than only the land or field owners.

[18] This being the case, I have no hesitation, it cannot in law avail a certain faction of the company members as supported by the Council referred to above to have a membership in the organization that changes from time to time depending on what was to be achieved at a given point. For instance, it cannot be that the wider membership would only be required if it was to present a certain picture in order to receive funding to benefit the company and never when it concerned the company's obligations to the same membership. It would therefore not be proper that for purposes

of the elections, only the field or land owners would be viewed as members a situation that would not be maintained if and when funding for the company was required.

[19] I note the contention by the Respondents that the members that voted were as a result of their membership as confirmed in a letter from the Attorney General. It suffices in this regard to say that the letter in question has no legal basis. It seems to have only helped deepen the divisions and confusion in the company. The membership of the company as found or as recorded in the said letter cannot stand in law for various reasons. The contents of the letter seems to have been elevated to a position similar to that of a court judgment yet the author of it had no legal power to adjudicate existing disputes between parties which is a preserve for the courts. The side adversely affected by the decision contained in the letter should have been heard before being deprived of a right they already had.

[20] Lastly the establishment of the membership should be done according to law and not in a manner that undermines it. It follows that if anyone was not happy with the membership as it stood for whatever reason, that person should have approached court and sought a declaratory order. Until that was done, anyone who considered himself a member because

he had already been accorded that status should remain as such, with unlimited rights to enjoy like every other member of the company unless the founding documents are properly made to direct otherwise in this regard.

[21] Having said what I have above, it becomes clear that not all the members of the company were allowed to vote and enjoy full membership rights. The exclusion of these members from voting and being voted for, compromised the outcome of the elections in my view. If the elections were not properly conducted with the result therefrom being compromised, it follows in my view that the elections as held were a nullity and that the results from them have to set aside.

[22] Having come to the conclusion I have, there is an aspect of this matter I need to mention before making the order I should. During his testimony, Mr. Ntokozo Mkhonta informed this court that in order to preserve the assets of the company, it had been agreed that his employer as the corporation that had an interest in the sugar cane grown by the company and therefore its stability, had to approve any withdrawal of monies from the company's account held with Swazi Bank. In this regard he submitted there was no need for the interim order put in place by this court where it had directed that each side of the apparent two, presents

one person so that the two people presented would be clothed with the authority to become signatories at the bank so as to carry out the necessary transactions to ensure that the company was not permanently and adversely affected. This was not disputed by the parties. This fact was however not known to this court at the time the interim order was made. Had counsel brought this to the court's attention this order would not have been made. In order not to disrupt the functions of the company any further, it is in my view necessary to maintain the current operating position at the bank pending the outcome of the elections ordered by this court.

[23] In the event of this court coming to the conclusion that the elections start afresh, the parties were asked if there was any person who both of them would accept as the one to conduct the said elections. Counsel for both parties agreed on the elections being conducted by the same Ntokozo Mkhonta. They were thus asked to go and confirm with him if he indeed would be willing to do so. The response brought back to the court was that he was willing to do so.

[24] Having said what I have above, it follows that to the extent set out in the order herein below, the Applicant's application succeeds. Accordingly this court makes the following order:-

- 24.1 The elections held by or on behalf of the Company called Takhamiti Farmers Investments (PTY) LTD on the 28th March 2015 together with the results therefrom be and are hereby set aside.
- 24.2 Fresh elections of the Executive Committee of Takhamiti Farmers Association (PTY) LTD be and are to be held on a date to be determined by the person tasked with holding and or conducting the elections which should be done within 14 days from today's date.
- 24.3 Ntokozo Mkhonta, an employee of the Royal Swaziland Sugar Corporation, be and is hereby appointed and or authorized to conduct the said elections on a date he will determine and effectively notify all members of the company of.
- 24.4 Each party shall bear its own costs.

N. J. HLOPHE
JUDGE - HIGH COURT