



**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO: 2597/2023**

In the matter between:

**HAINAN SHU**

**FIRST APPLICANT**

**SHENGQUAN ZHENG**

**SECOND APPLICANT**

And

**FEI ZHENG**

**FIRST RESPONDENT**

**JAMES MATHEBULE**

**SECOND RESPONDENT**

**BRIAN FIGUEIREDO**

**THIRD RESPONDENT**

**MUZIWANDILE HLATSHWAYO**

**FOURTH RESPONDENT**

**COMMISSIONER OF MINES**

**FIFTH RESPONDENT**

**MABANDLA J. MANZINI N.O**

**SIXTH RESPONDENT**

**REGISTRAR OF COMPANIES**

**SEVENTH RESPONDENT**

**ATTORNEY GENERAL N.O**

**EIGHTH RESPONDENT**

Neutral citation : *Hainan Shu & Another v Fei Zheng & 7 Others*  
2597/2023 SZHC 05 [2023] 01/02/2024.

**CORAM:** B.S DLAMINI J  
**DATE HEARD:** 22 November 2023  
**DATE DELIVERED** 01 February 2024

**Summary:** *Urgent Application-Applicants seeking interdict and declaratory relief- circumstances under which such relief may be granted examined-Respondents raising points in limine inter alia, that (a) application contains disputes of fact; (b) that requirements for the grant of either an interim or final relief have not been satisfied and (c) that there has been a non-joinder of material party in the proceedings.*

**Held;** *The points in limine raised on behalf of the Respondents are good points and are accordingly upheld- Application is dismissed with costs on the ordinary scale.*

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## JUDGMENT

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### INTRODUCTION

[1] In an application brought under a certificate of urgency on or around the 3<sup>rd</sup> November 2023, the Applicant sought to be granted relief as follows;

“1. The Applicant are condoned [sic] for the non-compliance with the forms, time limits, manner of service and that this matter is enrolled to be heard as one of urgency [sic].

2. A *rule nisi* is hereby issued calling upon the Respondents to show cause on a date to be fixed by the above Honourable Court why an order in the following terms should not be made final;

2.1 The counter-signing of Notarial Mining Lease in relation to Magomba Coal Mining (Pty) Limited by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents and/or anyone acting on their behalf or behest is hereby interdicted;



- 2.2 The removal of the Applicants as directors and shareholders of Magomba Coal Mining (Pty) Limited by the 1<sup>st</sup> Respondent is hereby declared null and void and therefore set aside;**
- 2.3 The appointment of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents as directors and/or shareholders of Magomba Coal Mining (Pty) Limited is hereby declared null and void and therefore set aside;**
- 2.4 The 7<sup>th</sup> Respondent is ordered and/or directed to update the company records of the company Magomba Coal Mining (Pty) Limited as set out above;**
- 2.5 The Notarial Mining Lease on behalf of Magomba Coal Mining (Pty) Limited prepared by the 6<sup>th</sup> Respondent is ordered to be amended by removing any reference to Eswatini Technologies (Pty) Ltd and replace it with Magomba Mining (Pty) Limited.**
- 2.6 The First to Fourth Respondents are ordered to pay the costs of the application.**

3. Pending finalization of the matter in due course it is ordered that prayer 2.1 should operate with immediate and interim relief to preserve the *status quo*.
4. Granting the Applicant further and/or alternative relief."

[2] In support of the relief sought, the deponent to the Founding Affidavit alleged that he and the second Applicant are directors and shareholders in a company registered as Mogomba Coal Mining (Pty) Limited. First applicant alleged that he owns 16% of the shares in the company while the second Respondent owns 68% of the shares in the said company.

[3] According to the Applicants, on the 10<sup>th</sup> October 2022, there was a meeting of the Board of Directors of Magomba Coal Mining (Pty) Ltd, which meeting culminated to the transfer of the 16% shares and 68% respectively to them accordingly. This meeting is captured in minutes of the Board attached as annexure "AA2" in Applicant's application. The minutes are as follows;

" **SPECIAL RESOLUTION OF SHAREHOLDER**



**MINUTES OF MEETING OF THE SHAREHOLDERS OF  
MAGOMBA COAL MINING (PTY) LTD, HELD AT  
EZULWINI ON THE 16<sup>th</sup> OCTOBER 2022**

**PRESENT: ALBERTINA PAULINO GUAMRE**

**HAINAN SHU**

**CHANG HE**

**YE ZHANG**

**ZHENG FEI**

**IT WAS RESOLVED THAT;**

- 1. The shareholders of Magomba Coal Mining (Pty) Ltd have resolved to appoint ZHENG SHENGQUAN to be a director of the aforesaid company with effect from 11 November 2022;**
- 2. The shareholders of Magomba Coal Mining (Pty) Ltd have resolved to appoint SHU HAINAN to be a director of the aforesaid company with effect from 11 November 2022;**
- 3. The shareholders of Magomba Coal Mining (Pty) Ltd have resolved to appoint ZHENG FEI to be a director of the aforesaid company with effect from 11 November 2022**

- 4. HUIJAN HOUSING & CONSTRUCTION LDA transfers 68% shares of Magomba Coal Mining (Pty) Ltd to ZHENG SHENGQUAN;**
- 5. HUIJAN HOUSING & CONSTRUCTION LDA transfers 16% of Magomba Coal Mining (Pty) Ltd to SHU HAINAN;**
- 6. ZHENG FEI c/o HUIJAN HOUSING & CONSTRUCTION LDA shall retain 16% of Magomba Coal Mining (Pty) Ltd.”**

[4] It is Applicants' contention that the changes in the company structure of Magomba Coal Mining (Pty) Ltd as per the resolution of the 10<sup>th</sup> October 2022 was implemented by the Registrar of Companies on the 11<sup>th</sup> October 2022.

[5] The Applicants further contended that their purported removal by the First Respondent in terms of the resolution taken by the latter on the 26<sup>th</sup> May 2023 was unlawful and wrongful. In the same resolution of the 26<sup>th</sup> May 2023, the second, third and fourth Respondents were appointed as directors. This, according to Applicants, was similarly wrongful and unlawful in that they, as directors, did not sanction the



appointment of these individuals to be shareholders of Magomba Coal Mining (Pty) Ltd.

- [6] In their quest to deal with the matter, Applicants sought an interim order in terms of prayer (2.1) of the notice of motion. This prayer sought to interdict the first to sixth respondents from signing the Notarial Mining Lease Agreement pending finalization of the matter in Court.
- [7] The Applicants alleged that the Notarial Mining Lease is making reference to another company called Eswatini Mining Technologies (Pty) Ltd. This company is to be a beneficiary in line with the shareholding of the first to fourth Respondents. Applicants alleged that they do not know this company nor did they sanction it to be part of the beneficiaries arising from the operations of Magomba Mining Ltd.
- [8] In response to Applicants' application, the Respondents raised several points in *limine*. The first to fourth Respondents raised their own points in *limine*. Similarly, on behalf of the fifth and seventh



Respondents, the Attorney General raised a number of points in *limine*. The relevant points in *limine* were *inter alia* that;

- (a) The matter contains material disputes of fact which cannot be resolved on the papers.
- (b) The application is fatally defective for non-joinder of material parties, namely Magomba Coal Mining (Pty) Ltd and Ruijan Housing and Construction LDA.
- (c) The Applicants have failed to satisfy the requirements of an interim or final interdict.

[9] In motivating the point on disputes of fact, the First Respondent, who deposed to the Answering Affidavit, disputed the meeting allegedly held on the 10<sup>th</sup> October 2022 in which First and Second Applicants were appointed as directors and shareholders of Magomba Coal Mining (Pty) Ltd. First Respondent also denied knowledge of the minutes or being part of a signatory to same. Respondents further argued on this point that the share certificates allegedly in favour of Applicants were reflecting that Applicants were holding 16 shares and 68 shares respectively in Magomba Coal Mining. This, according to Respondents, is patently wrong in that the company has an issued

share capital of E 100,000.00 divided into 100,000 shares of E 1.00 each. The argument along this line was that 16% shares translates to 16,000 shares instead of 16 shares. Similarly 68% shares translates to 68,000 shares instead of 68 shares as reflected in the share certificates.

[10] The second point *in limine* against the application was that the non-joinder of material parties, being Magomba Coal Mining and the Mozambican company (Ruijan Housing and Construction LDA) was fatal to applicants' application. It was argued on behalf of Respondents that it was necessary that the two entities be joined in the proceedings as these had substantial and direct interest to the orders sought.

[11] The other point *in limine* raised by Respondents was that Applicants failed to meet the requirements of an interdict. On this point, the argument raised was that Applicants failed to establish any clear right to the relief sought in that they failed to establish that they were directors or shareholders of Magomba Coal Mining. Linked to this argument was that the Applicants failed to come up with the requisite capital in consideration of the shares issued by the company. The



argument in this regard was that the alleged payment by Applicants in consideration of the shares was to another company and not Magomba Coal Mining as the latter did not even have a bank account in the country.

### **ANALYSIS AND FINDINGS**

- [12] This matter was heard on the 22<sup>nd</sup> November 2023 and an *ex tempore* ruling was delivered on the 23<sup>rd</sup> November 2023. A question needed to be asked whether or not the Applicants were indeed directors and shareholders of Magomba Mining Coal (Pty) Ltd (hereinafter referred to as “Magomba Mining”) and, if so, how this came about. In the founding affidavit, Applicants allege that they became shareholders and directors of Magomba Mining pursuant to a meeting of the board of Magomba Mining held at Ezulwini on the 10<sup>th</sup> October 2022.

### **DISPUTES OF FACT**

- [13] The first difficulty is that Applicants in their own words allege in the founding affidavit that the Mozambican company (Ruijan Housing and Construction LDA) held a 100% shareholding in Magomba Mining on registration of the latter. By law, the Mozambican

company had to first hold its own meeting with the aim of selling or disposing of its 100% shareholding before any claim could be made by any third parties that they own shares in Magomba Mining. The meeting of the 10<sup>th</sup> October 2022 (assuming this was held as alleged) could not dispose of shares held by another entity. Having shares in the Mozambican company by First Applicant which in turn held 100% shares in Magomba Mining, does not equate to holding shares in the latter company. From this angle alone, the transaction relied upon by First Applicant as giving him or even the First Respondent the right to dispose of the shares in the manner they did on the 10<sup>th</sup> October 2022 was unlawful and could not give rise to enforceable rights and obligations. Put conversely, without a resolution from the Mozambican company (Ruijan Housing and Construction LDA), there could not have been a proper disposal of the shares. The Court was not shown any resolution made by Ruijan Housing and Construction LDA in which this company sells or disposes of its 100% shares held in Magomba Mining Ltd to a third party.

[14] Even if I may be wrong that the 100% shares held by the Mozambican company in Magomba Mining had to be first sold or transferred to



First Applicant before they could be transferred to other third parties, the fact of the matter is that the meeting of the 10<sup>th</sup> October 2022 has been denied by the First Respondent. The two individuals, namely First Applicant and First Respondent may have been instrumental in the formation of Magomba Mining Ltd. The main problem now is that one is pointing to the North direction while the other is pointing to the South direction.

[15] The meeting of the 10<sup>th</sup> October 2022 is crucial to Applicants' cause of action. If this meeting is disputed and cannot be independently validated, the Applicants' case is bound to disintegrate and fall apart. The First Respondent's response to the allegation of a meeting of the 10<sup>th</sup> October 2022 is as follows;

**“37.1 The contents of this paragraph are disputed. The contents of annexure “AA2” is dispute [sic] and I wish to state that the signature appearing on this annexure is not my signature and I was not part of that purported meeting where the resolutions were taken. The company has not had any banking details during the period where the Applicants were directors hence I am not aware of any investment that**

was made to the company by the Applicants. The Applicants therefore have to disclose as to which company they paid the alleged invested amounts. I have never signed any resolution and minutes as alleged or any other subsequent document seeking to purchase shares that I have held and understood to be owned by myself.”

- [16] There is therefore a material dispute as regards the shareholding in Magomba Mining. First Respondent holds himself to be the true and lawful owner of the 100% shares held with the Mozambican company. Indeed a perusal of the directorship in Magomba Mining as per its articles and memorandum shows that First Respondent is the only first director in that company. This Court agrees with the statement of law in **Simalu Mining (Pty) Ltd and Four Others v Zibon Sibanda and 13 Others**, High Court of Zimbabwe, Civil Case No: 325/2020 in which the Court held that;
- “I cannot decide this matter on the papers. I cannot grant an order where material and serious disputes of fact abound. I cannot simply ignore such material and factual disputes. The Respondents...I am satisfied that the applicants have chosen this



procedure well aware of these disputes of fact. It is important to note that the applicants have sought to suppress the background to this matter by simply asserting that they are the registered owners of the mining claims in dispute. I reiterate that there are material disputes of fact, which is not capable of resolution on the papers. In the circumstances, the last two preliminary points referred to in this judgment are upheld.”

- [17] The Applicants’ right to the relief sought is founded on their legal standing in Magomba Mining. Those rights are being vehemently disputed. Until those rights are ventilated, Applicants right to the relief sought remains elusive. I therefore upheld this point of law and dismissed the application based *inter alia* on this point.

#### **NON-JOINDER**

- [18] The second point raised on behalf of the Respondents related to the failure by Applicants to join Magomba Coal Mining (Pty) Ltd either as Applicant or one of the Respondents. In **Meshack Makhubu and Another v Regional Education Officer-Hhohho and Another Civil Case No: 25/2019**, the Court cited with approval the case of

**Amalgamated Engineering Union v Minister of Labour 1949 (3)**

SA 631 at 637 in which the Court held that;

**“If a party has a direct and substantial interest in the order the court might make in the proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined.”**

[19] In the present matter, Applicants’ counsel was wise enough to realize that the point of non-joinder might present a serious problem to his case. In his wisdom, Applicants’ counsel duly prepared and hastily filed an application seeking to have Magomba Mining joined as a party to the proceedings. Applicants’ counsel however did not apply to have an order issued in which Magomba Mining is joined as a party in the proceedings. To file an application within an application is one thing, but to apply for an order to be granted in terms of that application is another process.

[20] In the Court’s view, the orders sought by Applicants cannot be granted without Magomba Mining being joined as a party to the proceedings. There is no doubt that Magomba Mining has a direct and substantial



interest in the orders sought by Applicants. One of the orders sought for instance, is that the Notarial Mining Lease should be amended to exclude the company registered as Eswatini Mining Technologies (Pty) Ltd. Surely Magomba Mining has a substantial and direct interest in such an order.

- [21] Similarly, the company which is the subject of prayer (2.5) of Applicants' prayers, namely Eswatini Mining Technologies (Pty) Ltd, was not cited or joined in the papers and yet a substantively prejudicial order was sought against it. This cannot be allowed in any legal environment, no matter how backward the judicial system of that social setting may be.
- [22] The Court also noted that the company which allegedly held 100% shares in Magomba Mining on registration of the latter company was also not joined in the proceedings. This company (Ruijan Housing and Construction LDA), has a direct and substantial interest in the proceedings being the lawful and undisputed holder of the first 100% shares which are now in dispute between the parties. The necessity to join this company cannot be overemphasized as it would be

imperative to know how it disposed of or transferred its shares to either First Applicant or the First Respondent.

[23] The point on non-joinder was likewise found to be a good point and was similarly upheld with the result that Applicants' application was dismissed with costs.

#### **FAILURE TO MEET REQUIREMENTS OF AN INTERDICT**

[24] The final point raised on behalf of Respondents was that Applicants' application failed to meet the requirements for the grant of a final interdict. This point is directly or indirectly linked to the point on disputes of fact. If the Applicants' rights to claim shareholding and directorship in Magomba Mining is found to be shaky and disputed on the papers and in argument, it means there is no clear right upon which to grant the relief claimed. There are numerous decisions in this jurisdiction to the effect a claim for the grant of either an interim or final interdict must be founded on a clear right.

[25] The Supreme Court of Eswatini in **Maziya v Ndzimandze (2 of 2012)** [2012] SZSC 23 (31 May 2012) held that;



“[41] From the forgoing, 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.”*

[26] Accordingly, the point in *limine* on failure by Applicants to meet the requirements of an interdict is upheld and the application is dismissed with costs.

[27] It is for these reasons that Applicant’s application was found to be lacking in substance and thus dismissed on the 23<sup>rd</sup> November 2023. I did not find it necessary to explore the other points *in limine* raised on behalf of the Respondents.

[28] It also needs mention in passing that at the hearing of the matter on the 22<sup>nd</sup> November 2023, the Court sought to enquire from Applicants' counsel what the legal effect of prayer (2.1) was within the context of the matter. An interim order was being sought to interdict the first to sixth Respondents from signing the Notarial Mining Lease. Assuming Applicants were able to convince the Court to grant an interim order as prayed for, the question arising is whether the interim order was supposed to be confirmed at the conclusion of the matter? Applicants' counsel conceded that the interim could not be confirmed at the conclusion of the matter as that would have meant an end to the life span of Magomba Mining Ltd. The company needs the Notarial Mining Lease to be signed especially by the Commissioner of Mines and the Notary Public cited in the papers. A confirmation of the interim order would thus have been detrimental to Magomba Mining. This prayer was nothing but a futile attempt aimed at creating grounds for bringing the matter under a certificate of urgency.

[29] In conclusion, the orders granted by this Court on the 23<sup>rd</sup> November 2023, are hereby confirmed as follows;



- (a) The Respondents' points *in limine* are upheld with the result that Applicants' application is dismissed.
- (b) The Applicants' are ordered to pay costs of application in the ordinary scale.



B.S. DLAMINI J

THE HIGH COURT OF ESWATINI

*For Applicants:*                      *Attorney Mr. ND Jele*  
*(Robinson Bertram)*

*For 1<sup>st</sup> -4<sup>th</sup> Respondents:*    *Attorney Mr. H. Magagula*  
*(Dynasty inc. Attorneys)*

*For 5<sup>th</sup> & 7<sup>th</sup> Respondents*   *Attorney Mr S. Hlawe*  
*(Attorney General's Chambers)*

