IN THE HIGH COURT OF SWAZILAND

Civil case No: 1713/2013

In the matter between:

NOMCEBO NKAMBULE	**FIRST APPLICANT**
GEFFREY SHONGWE	**SECOND APPLICANT**
NORMAN BISHOP TSHABALALA	**THIRD APPLICANT**
THEMBINKOSI DLAMINI	**FOURTH APPLICANT**

AND

MCHALANGENI DEVELOPMENT COMPANY (PTY) LTD	**FIRST RESPONDENT**
ALBERT MDLULI	**SECOND RESPONDENT**
BUSI DLAMINI-SHONGWE	**THIRD RESPONDENT**
DANIEL SIBIYA	**FOURTH RESPONDENT**
AMOS GAMA	**FIFTH RESPONDENT**
PAUL DLAMINI	**SIXTH RESPONDENT**
ABIE MDLULI	**SEVENTH RESPONDENT**
LUKE SHONGWE	**EIGHTH RESPONDENT**

Neutral citation: *Nomcebo Nkambule & 3 Others v. Mchalangeni Development Company (Pty) Ltd & 7 Others (1713/2013) [2014] SZHC63 (3rd April 2014)*

Coram: **M.C.B. MAPHALALA, J**

Summary

Civil Procedure – final interdict – the requirements thereof considered – application dismissed with costs at attorney and own client scale.

JUDGMENT
3 APRIL 2014

[1] An urgent application was lodged on the 1st November 2014 on an *ex parte* basis for a rule nisi to issue calling upon the second, third, fourth, fifth, sixth, seventh and eighth respondents to show cause on a date to be fixed by this honourable court why the following orders should not be made final: Firstly, interdicting and restraining the second to eighth respondents from transacting and/ or having any dealings on behalf of the first respondent; secondly, directing the second to the eighth respondents to identify and disclose all of the first respondent's bank accounts. Thirdly, directing that deposits continue to be made into the bank accounts of the first respondents; fourthly, that the second respondent be ordered to hand over all the copies of financial records and commercial documents of the first respondent including the sale agreement with Swaziland Revenue Authority as well as lease Agreements with Shell Galp and all other tenants to the newly appointed Treasurer of the first respondent, Thembinkosi Dlamini, the fourth applicant; fifthly, directing the second to the eighth respondents to account for all income and expenditure of the first respondent to its shareholders as from November 2003 to-date; sixth, that prayers 3.1 to 3.6 operate as an interim order with immediate effect. The applicants sought for costs in the event the respondents oppose the application. Accordingly, a rule nisi was issued as sought by the applicants.

[2] It is common cause that the second to the eighth respondents have at all material times constituted a Board of Directors of the first respondent; however, on the 27th August 2013, the Board of Directors through its secretary, the third respondent, gave notice of an Annual General Meeting. The meeting was subsequently held on the 21st September 2013 where the second to the eighth respondents were voted out of office as the Board of Directors of the first respondent and the applicants were voted into office. Similarly, it is not in dispute that the applicants are shareholders of the first respondent.

[3] The applicants contend that the second to the eighth respondents have exercised exclusive control over the first respondent for the past ten (10) years, and, that during that time, they have failed to convene annual general meetings, account and disclose the financial standing of the first respondent to its shareholders and to discharge their fiduciary duties in respect of the first respondent to the benefit of its shareholders. The second to the eighth respondents concede at paragraph 31 of their answering affidavit that there have been no annual general meetings in the past ten years save for 2006. They argue, however, that the shareholders have always been kept informed about the activities of the company and dividends paid timeously; however, they do not disclose why they failed to convene the annual general meetings. Incidentally, at paragraph 17 of the answering affidavit, again the second to the eighth respondents concede that "the source of the whole misunderstanding is the Board's failure to convene Annual General Meetings, save for 2006 where the shareholders gave them a mandate to continue in

office". Again the second to the eighth respondents fail to disclose the reason for their failure to hold annual general meeting; similarly, no minutes are attached to the answering affidavit in support of the 2006 mandate by the shareholders.

[4] Contrary to the allegations by the respondents, the applicants contend that the last annual general meeting was held on the 1st November 2003 where a resolution was adopted inter alia, appointing the second respondent as treasurer of the company and the seventh respondent as the vice-chairman of the company. The failure to hold annual general meetings resulted in the shareholders signing a petition dated 27th July 2013 requesting an extra-ordinary general meeting. Due to the pressure exerted by the shareholders, the second to the eighth respondents called for an annual general meeting scheduled for the 21st September 2013 at Ngwenya Village Hall; the Notice of the 2013 Annual General Meeting of shareholders dated 27 August 2013 was circulated to members. The agenda was:

(a) Proxy

(b) The current status of the filling station.

(c) The financial affairs of the company.

(d) The status of the assets of the company.

[5] The petition called for an extra-ordinary meeting, and, demanded that on receipt of the petition, all business negotiations and proceedings be stopped in order to allow for a proper reporting at the meeting. The petition further demanded a written report by the directors on the financial affairs of the

company, the current status of the Filling Station and the status of the assets of the company. The petition also demanded the setting of a date for the election of the Board of Directors.

[6] It is apparent from the evidence that the meeting did not go smoothly by virtue of what the other shareholders perceived to be a very brief financial statement presented by the second respondent that there was E300 000.00 (three hundred thousand emalangeni) in the company's account without stating the name of the bank, whether there was any other source of income received by the company and the report pertaining to the current status of its assets.

[7] The second respondent, in his financial report said nothing about the sale of the company's immovable property to the Swaziland Revenue Authority, the monthly rental income received from the Filling Station as well as income received from other tenants conducting business on the property. In their answering affidavit, the second to eighth respondents do not deny these allegations save to say that what has not been disclosed is common knowledge with the parties.

[8] It is not in dispute that the second to the eighth respondents were in office since 1st November 2003, and, it is not denied that the election of a new Board of Directors was long overdue or that the fourth, fifth, sixth and eighth respondents were not lawfully voted into office by the shareholders. A proposal by the second to the eighth respondents that elections should be held in February 2014 was therefore rejected by shareholders on the basis that the

elections were long overdue. The shareholders further argued that they could not postpone the elections on the basis that they did not know the financial status of the first respondent and, that the respondents exercised exclusive control over the company without accounting to the shareholders of the company. The shareholders demanded that a meeting should be held on the 19th October 2013 for the purpose of electing a new Board of Directors. They further demanded that the second respondent should present during the meeting, a financial statement on the status of the company as well as all the documents previously sought on the meeting of the 21 September 2013, namely audited financial statements as from 2003, the Lease and Sale Agreements as well as the list of the company assets.

[9] Prior to the meeting scheduled for the 19th October 2013, an attempt was made by the second respondent to have the meeting postponed to 15th February 2014; he is alleged to have sent a correspondence to the shareholders on the 17th October 2013 trying to have the meeting postponed. The respondents did not attend the meeting scheduled for the 19th October 2013 on the basis that an annual general meeting requires fourteen days notice to the Board, and, thereafter, the meeting held at a date not less than twenty-one (21) days from the notice. They further contend that the applicants gave them only seven days notice, and that such notice was in the circumstances irregular. However, it is apparent from the evidence that the second to the eighth respondents were aware of the meeting since the date had been fixed during the meeting of the 21st September 2013.

[10] At the meeting convened on the 19th October 2013, the shareholders resolved to elect a new Board of Directors. Similarly, a vote of no confidence was passed on the respondents, and they resolved to institute the present proceedings. The respondents do not dispute the evidence of the applicants that they have been marginalised by the second to the eighth respondents in the affairs of the company, that they have no knowledge of the bank accounts of the company, and no audited financial reports since 2003.

[11] The applicants contend that they have a right to the relief sought on the basis that all attempts previously made to protect their interests as shareholders have been disregarded by the respondents who have failed to properly discharge their fiduciary duties. They further contend that statutory meetings have not been held since 2003 and that a proper financial reporting on the status of the first respondent has not been done since they took office. They also contend that the respondents have concluded bindings contracts to the company without advising and seeking the approval of the shareholders. It is against this background that they seek an order for the freezing of the bank accounts of the company; they deny as alleged by the respondents, that they were always kept abreast of the activities and dealings of the company, and, no evidence has been adduced by the respondents in this regard whilst admitting that there was a meeting in 2006, the applicants have argued that the said meeting did not yield any fruits and that to-date no minutes were circulated to shareholders; and, the respondents have not disputed that no audited financial reports have been submitted by the respondents since 2003.

[12] The applicants deny knowledge of annexure "B" attached to the answering affidavit as being the Memorandum and Articles of Association of the first respondent. The name of the company in terms of annexure "B" is Mcalangeni Company Limited formed on the 11 July 1978. According to the applicants, annexure "N12" constitutes the correct Memorandum and Articles of Association of the first respondent, the correct name of the company appearing thereto as Mchalangeni Development Company (Pty) Ltd, registered and incorporated on the 15th November 1963. The respondents have not applied for leave to file a further affidavit in response to the replying affidavit. Annexure "N4" is a certificate issued by the Minister of Enterprise and Employment in terms of the Companies Act approving the change of name of the first respondent from Gregory Mchalangeni Development Company (Pty) Ltd. Similarly, the respondents do not dispute the evidence of the applicants that there was a quorum of Shareholders in the meeting held on the 19th October 2013 or the evidence that the meeting had been postponed on the 21st September 2013 to the 19th October 2013.

[13] It is not disputed that the respondents paid dividends to shareholders; however, it is apparent from the evidence that no audited financial reports were ever submitted by the respondents to the shareholders. Similarly, the respondents did not call annual general meetings or made an account to the shareholders on the financial standing of the company. Furthermore, the allegations by respondents that they were not afforded an adequate opportunity to prepare for the meeting is not supported by the evidence. After being served with the petition on the 27th July 2013, the respondents scheduled an annual general

meeting for the 21st September 2013 which notice gave them fifty-six days to prepare for the meeting; hence, they had an adequate opportunity to prepare for the meeting. In addition it is the shareholders who postponed the meeting from the 21st September 2013 to the 19th October, 2013; the further postponement of the meeting on the 15th October 2013 to the 15th February 2014 was not sanctioned by the shareholders. For these reasons the alleged irregularity of the Notice for convening the annual general meeting on the 19th October 2013 is misconceived. Similarly, the procedure followed in the meeting was not flawed as alleged by the respondents.

[14] It is common cause that on the 1st November 2013, a *rule nisi* was issued calling upon the second to the eighth respondents to show cause why the orders sought should not be made final. The *rule nisi* was further ordered to operate as an interim order with immediate effect. However, during the return date, the applicants argued that the second to the eighth respondents were not complying with the interim order. This Court subsequently made an order on the 24th February 2014 directing the respondents to comply with the *rule nisi* pending finalisation of the matter. There is a further affidavit filed by the applicants on the 13th December 2013 showing that contrary to the answering affidavit disclosing a credit balance of E301 486.44 (three hundred and one thousand four hundred and eighty-six emalangeni forty four cents) held at the Swaziland Building Society under account No. 114009184 in the name of the first respondent; they sought and were given by the bank a printout of a statement on the 10th December 2013 reflecting the activity in the account.

[15] The statement noted the following: firstly, that the account disclosed by the respondents is a permanent shares account with a balance of E306 747.40 (three hundred and six thousand seven hundred and forty seven emalangeni forty cents) as at 26th June 2013. Secondly, there is also a special savings account which was not disclosed, which had a balance of E155 661.00 (one hundred and fifty five thousand six hundred and sixty-one emalangeni) as at 11 December 2003. Thirdly, that save for the substantial credit of E675 000.00 (six hundred and seventy-five thousand emalangeni) into the Savings Account, the funds in the account have continued to be depleted over the years. Fourthly, that prior to the issuance of the interim court order freezing all accounts of the first respondent and interdicting the respondents from making withdrawals from the company's bank accounts, the balance in the Special Savings Account stood at E24 919.57 (twenty-four thousand nine hundred and ninety-one emalangeni fifty-seven cents) as at 31 October 2013. Fifthly, that in terms of the printout of the statement as at the 30 November 2013, the Special Savings Account has a balance of E8 157.83 (eight thousand one hundred and fifty seven emalangeni eighty three cents) indicating that funds have continued to be debited notwithstanding the interim order. The funds so withdrawn after the issue of the interim order in the sum of E16 761.74 (sixteen thousand seven hundred and sixty-one emalangeni seventy four cents) should be refunded by the second to the eighth respondents; and, an order for costs at a punitive scale against the respondents personally is in the circumstances appropriate for defying the interim order on the 4th November, 2013.

[16] *Cameroon JA* in *Fakie NO v. CCII Systems (Pty) Ltd* 2006 (4) SA SCA 326 para 22 and 23 said the following:

> **"22. ... Once the prosecution has established (i) the existence of the order, (ii) its service on the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was wilful and mala fide, the offence will be established beyond reasonable doubt: the accused is entitled to remain silent, but does not exercise the choice without consequence.**
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> - **It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.**
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> **...**
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> - **To sum up:**
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> **(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.**
>
> **(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.**

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

[17] It is common cause that the respondents did not hold general meetings contrary to section 155 of the Companies Act No. 8 of 2009 which makes it mandatory for a company to hold annual general meetings to deal with matters prescribed by the Act, the Articles of the company as well as matters of interest to the company. The holding of the annual general meeting is so important that in the event the Board of Directors fails to do so, section 155 of the Companies Act allows members to apply to the Registrar of Companies who may call or direct the holding of the meeting. Furthermore, section 158 of the Act provides for the calling of general meetings on requisition by members. Notwithstanding what has been said above, section 156 provides for a private company to dispense with the holding of annual general meetings. This could be done by means of an elective resolution in accordance with section 185 of the Companies Act. However, when members consider that there is need to hold a general meeting, they could still invoke section 155 and 158 of the Act and call a meeting.

[18] It is common cause that major decisions regarding the structure, the financial status of the company, the rights and liabilities of shareholders and Directors, possible compromises, amalgamations and reconstructions and further investments are taken during the annual general meeting. The continued existence and advancement of a company is not the exclusive preserve of the Board of Directors; however, the members have a direct and substantial interest in the company, and, they need to be kept abreast on the affairs of the company and to receive audited financial reports to gauge the economic status of the company and the effectiveness of the Board of Directors. It is always expedient to appreciate that the meeting of members does have a final say over the Board of Directors with the powers to remove the Board where necessary.

- See: Colliers and Benade "Company Law – Practitioners Edition" at p. 172.
- Section 200 Companies Act of 2009
- Contemporary Company Law

Farouk Cassim *et al*, second edition, 2013, Juta & Co. Ltd at pp 440-443; 369-375.

[19] The applicants seek a final interdict against the second to the eighth respondents, and, it is apparent from the evidence that as shareholders they have a clear right to institute the present proceedings in order to protect their interests. As stated in the preceding paragraphs, the Company's Act allows shareholders to monitor the management as well as the affairs and financial

progress of the company. They have a right to hold annual general meetings, receive audited financial reports and where necessary, remove the Board of Directors from office.

[20] The Supreme Court of Swaziland in the case of *Maziya Ntombi v. Ndzimandze Thembinkosi* Civil Appeal case No. 02/2012 at para 41 approved and applied the principle enunciated in the case of *Setlogelo v. Setlogelo* 1914 AD 221 at 227. In that case Innes JA held that the requisites for the right to claim an interdict are a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. At paragraph 43 of the Maziya Ntombi judgement (supra), I had this to say:

> **"43. ... 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."**

See also the case of *Swaziland Theatre Club v. Zodwa Shabalala & Two Others* Civil Appeal No. 43/2013

[21] In the circumstances it is not necessary for me to deal with the other requirements of a final interdict. Suffice to say that the failure to call annual general meetings and submit audited financial reports is highly prejudicial to the applicants, and, this covers a period of about ten years. Monies belonging to the company have been withdrawn and utilised without reference to the shareholders even after the issue of the *rule nisi*. Certain immovable property

has been disposed without reference to the members, and no account made to members. The bank accounts and monies held on behalf of the company have not been disclosed to the members; certainly, the interdict is the only remedy available to the applicants in the circumstances.

[22] Accordingly, I make the following orders:

- The *rule nisi* is hereby confirmed as follows:
  - The second to eighth respondents are interdicted and restrained from transacting and/or having any dealings on behalf of the first respondent.
  - The second to eighth respondents are directed to identify and disclose all of the first respondent's bank accounts.
  - The second to eighth respondents are hereby interdicted and restrained from making withdrawals of money in any bank account held by the first respondent.
  - The second to eighth respondents are hereby directed to deposit any moneys held by them on behalf of the first respondent in its bank accounts.
  - The second respondent is directed to hand over all the copies of financial records and commercial documents of the first respondent including the Sale Agreement with Swaziland Revenue Authority as well as the Lease Agreement with Shell Galp Filling Station and all other tenants to the newly appointed Treasurer of the first applicant, Thembinkosi Dlamini, the fourth applicant.

- The second to the eighth respondents are hereby directed to account for all income and expenditure of the first respondent to its shareholders as from November 2003.

- The second to the eighth respondents are hereby directed to repay all monies withdrawn from the first respondent's bank accounts after the issue of the *rule nisi* in November 2013 totalling E16 761.74 (sixteen thousand seven hundred and sixty-one emalangeni seventy four cents) jointly and severally the one paying the others to be absolved within sixty days of this order.

- The second to the eighth respondents are directed to pay costs of suit at attorney and own client scale jointly and severally the one paying the others to be absolved.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant — Attorney Bongi Magagula
For First Respondent — Attorney Sipho Nkosi