IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal No. 10/16

In the matter between:

LUZALUZILE FARMERS ASSOCIATION	**Appellant**
VS	
THE REGISTRAR OF COMPANIES	**1st Respondent**
THE ATTORNEY GENERAL	**2nd Respondent**
SWAZILAND DEVELOPMENT & SAVINGS BANK	**3rd Respondent**

Neutral citation: ***Luzaluzile Farmers Association vs The Registrar of Companies & 2 Others (10/2016) [2016] [SZSC 33]***

(30 June 2016)

Coram:	**S.P. DLAMINI JA, J.S. MAGAGULA AJA, AND R. CLOETE AJA**
For Appellant:	**M.E. Simelane**
For Respondent:	**T. Dlamini**
Heard:	**26 May, 2016**
Delivered:	**30 June, 2016**
Summary:	***Registration of Companies – essential contents of memorandum of association – effect of registration and issuance of certificate of incorporation by Registrar – Powers of the Registrar to call meetings of companies.***

JUDGMENT

J. MAGAGULA AJA:

[1] The appellant filed an application at the High Court seeking an order in the following terms:

"……

(2) That an interim rule be granted in terms of prayer 3 to 9 with immediate effect returnable on a date to be set by the Honourable Court calling upon the respondent to show cause why it should not be final.

(3) The first respondent's decision to appoint or cause an interim committee to be elected in favour of applicant on the 29th of May 2015 at Vuvulane Inkhundla be reviewed and set aside.

(4) The first respondent be interdicted from assuming the role of director, shareholder or member of applicant by demanding and or imposing himself in the internal affairs of applicant outside the ambit of the Company Act of 2009.

(5) The third respondent be interdicted from changing the signatories of the current executive committee unless a minute depicting elections held in an annual general meeting are presented to it in line with applicant's Articles of Association.

(6) Compelling the third respondent to file to court a list of the surety holders of applicant registered in its favour.

(7) Interdicting anyone from calling any meeting of Applicant without the mandate of legitimately elected National Executive of applicant in terms of the Articles of Association.

(8) That any member of the Royal Swaziland Police be authorized to assist in carrying out into execution prayer 7 hereto.

(9) Costs."

[2] In support of the relief sought the appellant filed an affidavit deposed to by one Sipho Nyambi who described himself as an adult Swazi male of Vuvulane in the Lubombo District and chairman of the Appellant.

[3] The deponent went on to describe the appellant as an Association duly registered in terms of the Company laws of Swaziland and having its principal place of business at Impala Ranch within the Lubombo district. He also attached to his affidavit a document purporting to be a Memorandum and Articles of Association of the Appellant. I shall come back to this document later in this judgment.

[4] He further stated that in their annual meeting held in 2013, the general membership of the appellant in line with the constitution of the appellant which doubles as its articles of association, elected a National Executive Committee comprising of the following:

4.1	Sipho Nyambi	-	Chairman
4.2	Boy Tsabedze	-	Vice Chairman
4.3	Sifiso Zwane	-	Treasurer
4.4	Sibusiso Dlamini	-	Secretary
4.5	Lucky Sukati	-	Member
4.7	Lawrence Mhlanga	-	Member

[5] The deponent further states in the founding affidavit that membership of the appellant is only open to the ***"farmer's children under the jurisdiction of Chief Mbandzamane Sifundza. ……..The joining fee of the association was initially E60.00 but increased to E250.00. Its members all filed suretyship agreements with the third respondent in 1995 in order to obtain a loan to start a sugar cane farming business."***

[6] The deponent further alleges that the association had to be registered with the first respondent so that it could be able to secure a loan as it would have been difficult for the bank to deal with individual members of the association.

[7] The appellant was allocated a piece of land on Swazi Nation Land under Chief Mbandzamane Sifundza's chiefdom to grow sugarcane. It is contended in the founding affidavit that members of the appellant are supposed to be subjects of Chief Mbandzamane Sifundza.

[8] The founding affidavit further reveals that the current committee is not the first leadership of the appellant. The initial committee was chaired by one Meshack Magagula who is referred to as the founding chairman. This founding chairman is blamed by the deponent to the founding affidavit for allowing people who were not subjects of Chief Mbandzamane Sifundza to join the appellant as members. This resulted in the appellant being divided into two factions; those who are subjects of Mbandzamane Sifundza and those who were from other chiefdoms. The subjects of Chief Mbandzamane Sifundza feel that people from other chiefdoms are intruders and not legitimate members of the appellant.

[9] From the papers filed in court it is quite evident that the appellant has been marred by infighting from its inception. Each time the sugarcane harvesting season comes there are squabbles among members of the appellant.

[10] The root of the problems of the appellant seem to be the manner in which it is constituted. Seemingly the appellant started as an association but it was eventually registered with the first respondent as a company. The deponent to the founding affidavit states that this was done so that the appellant could be able to obtain loans from financial institutions.

[11] In any event if the members of the appellant were more than twenty they would have been required by law to register their association as a company. The appellant was registered in 1995 and the relevant law in force at the time was the Companies Act of 1912. Section 4 (1) of that Act provided as follows:

> ***"From and after the 19th February 1912 no company, association, syndicate or partnership consisting of more than twenty persons shall be formed in Swaziland for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association syndicate or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other law of Swaziland, or of Letter Patent, or Royal Charter."***

[12] At a meeting of members of the appellant called on the 30th May 2015, one hundred and thirty nine (139) members attended and signed and attendance register. This leads me to the conclusion that members of the appellant are more than twenty and

have probably been more than twenty from its inception. If this is correct, the appellant has always been liable to register as a company from its inception.

INCORPORATION OF THE APPELLANT

[13] This court dealt to some length with the manner in which the appellant was formed and expressed some serious reservations with the manner of its incorporation. I find it necessary therefore that I should make some comments thereon in this judgment. Section 5 of the Companies Act of 1912 under which the appellant was incorporated prescribes the method of forming a company and it states:

> ***"5. Seven or more persons (or, where the company to be formed will be a private company, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company with or without limited liability."***

[14] Section 6 of the same Act provides:

> ***"6 (1) The memorandum of a limited company shall state:-***
>
> ***(a) The name of the company with "Limited" as the last word in its name;***
>
> ***(b) The place in Swaziland in which the registered office of the company is to be situated.***

(c) The objects of the company;

(d) The amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount

(2) No subscriber of the memorandum of a limited company may take less than one share.

(3) Each subscriber of a limited company shall write opposite to his name the number of shares he takes."

Similar provisions are found in Section 43 of the 2009 Companies Act.

[15] Whilst the memorandum of association submitted to the first respondent for purposes of registration seems to comply with most of the requirements of Section 6 (1) of the 1912 Act, it fails to comply with subsection (2) and (3) thereof. These sub-sections appear to me to be the most vital. Subsection (2) requires that subscribers to a memorandum shall take not less than one share. Subsection (3) requires each subscriber to state the number of shares taken by him opposite his name in the memorandum. None of the subscribers to the memorandum stated the number of shares taken by him. They simply stated that they are businessmen, gave their addresses and signed. The company should not have been registered without complying with this very essential requirement. The liability of the company is said to be limited. This inevitably means that the liability of the company is limited to the shares taken by the members. Since these shares and their values are unknown, the

members have not committed themselves to pay anything towards the liabilities of the company should it be necessary that it is wound up.

[16] Further the capital of the company is simply stated as follows:

"(t) The capital of the association is E200.00."

This statement is absolutely not in compliance with the law. The capital of a company is always stated in shares. Section 6 (1) (e) of the 1912 Act provides that the memorandum shall state ***"the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount."***

Also in the same clause relating to capital, the appellant is described as an association. This creates confusion since the appellant is supposed to be a public company, hence its registration under the Companies Act.

Clearly a lot is wrong regarding the incorporation of this company and it definitely does not meet the requirements of the laws for incorporation.

THE APPEAL

[17] Let me now come to the issues that gave rise to the current appeal. It is stated in the founding affidavit that on the 8th May, 2015 the first respondent called members of the Executive Committee of the appellant together with members of another faction

of the appellant led by one **Space Lotata Dlamini** of Mbelebeleni chiefdom, to a meeting at the Ministry of Commerce Conference room in Mbabane. The deponent to the founding affidavit states that first respondent called the meeting because he had received complaints from members of the said faction. He further alleges that members of the said faction were made to join the appellant by its "founding Chairman **Mr. Meshack Magagula** outside the mandate and objectives of the association."

[18] There was no agenda for the meeting and the first respondent only advised them that his role was to mediate so that common ground could be reached. It does not come out clearly what was the complainant received by first respondent.

[19] The outcome of the meeting of the 8th May 2015 was a resolution that a bigger meeting of all the members of the appellant be held at Vuvulane. At this meeting the first respondent would teach members of the appellant about company law and try to mediate in their matter to curtail the many court applications that crop up during the sugar cane harvesting season. The first respondent was to secure the venue at Vuvulane.

[20] However, first respondent did not personally seek for the venue at Vuvulane. Instead he requested members of the so called faction or aggrieved or disgruntled group to find a venue for him at Vuvulane Inkhundla. This did not go down well with the

Executive Committee as they felt that they were the rightful people to organize meetings of the appellant. They felt that the first respondent should have requested them to organize the venue for the meeting if he was unable to do so. They complained about this turn of events and even produced a court order issued by the High Court on the 15th July 2011 restraining Meshack Magagula and or his agents from calling any general meeting of the members of the appellant without consent of the executive committee of the appellant.

[21] The meeting however proceeded on the 30th May, 2015 after it was announced through the radio on the 28th May, 2015. The Executive Committee felt that first respondent's actions were *mala fide* and that he was siding with the faction which had brought a complaint to him. In paragraph 18.2 of the founding affidavit it is stated:

> ***"…….. He tricked us that his role was to teach company law yet he had ulterior motives to appoint his own people."***
>
> In paragraph 18.3 it is stated:
>
> ***"I got to learn a day before the meeting that the opposite group had been campaigning strongly for seats in the executive committee. This was shocking."***
>
> In paragraph 18.1 the deponent states:
>
> ***"The people who organized the meeting who were eventually appointed in the interim committee were Meshack Magagula's people….."***

[22] Narrating events of the 30th May, 2015 the deponent to the founding affidavit states the following in paragraphs 19 to 21.2 thereof:

> ***"The first respondent duly attended the meeting organized by the aggrieved parties on the 30th May 2015.***
>
> ***19.1 He first started by teaching on the different types of companies and touched upon as to who are members thereof.***
>
> ***19.2 Without notice he then advised us to apply for judicial management of the company so that new people can be elected into office and the association be restarted such that there shall be new registration of members.***
>
> ***20. The second part of his teaching got the aggrieved party excited and they started screaming for elections.***
>
> ***21. In the heat of the moment the first respondent also got excited and without any lawful reason called for elections of an interim committee where the non members were voted in without dealing with our committee that is in place. The original members abstained.***
>
> ***21.1 His interim committee comprised the following people:-***
>
> | | | |
> |---|---|---|
> | ***Nhlanhla Mngometulu*** | ***-*** | ***Chairman*** |
> | ***Norman Gina*** | ***-*** | ***Assistant Chairman*** |
> | ***Sifiso Ndlangamandla*** | ***-*** | ***Secretary*** |
> | ***Alson Lukhele*** | ***-*** | ***Assistant Secretary*** |
>
> ***Members***
>
> ***Hendry Dludlu***

Aaron Simelane
Mashemushemu Dlamini
Thomas Khumalo

21.2 All the people elected are not members of applicant save for Thomas Khumalo."

(The minutes reflect that the meeting was on the 30th and not the 29th of May as stated by the deponent.)

[23] The deponent to the founding affidavit goes on to allege that there was so much chaos during the election process such that even the police who were there were also voting. Voting was done by show of hands contrary to the provisions of the Articles of Association of the appellant which provides that voting should be by secret ballot.

[24] In paragraph 26 of the founding affidavit the deponent states:

"26 The crux of our application is that the first respondent failed to appreciate the powers granted to him for he cannot appoint an interim committee on top of an elected national executive committee and to conduct elections.

***26.1 None of the elected national executive committee members were incapacitated to have caused the first respondent to intervene during his teaching meeting by changing the set up to become an Annual General* Meeting."**

[25] In paragraph 27 of the founding affidavit the deponent further states:

> ***"27 The first respondent has acted ultra vires his power."***

[26] The first respondent has filed an opposing affidavit in which he denies some of the allegations contained in the founding affidavit. He however admits that there is infighting amongst members of the appellant such that it is now divided into factions. He also states that the appellant is not an association but it is a public company incorporated in accordance with the Companies Act of 2009. The appellant was actually incorporated in 1995 under the 1912 Act. However, the 2009 Act provides that companies incorporated prior to 2009 shall be recognized as such under the 2009 Act.

[27] The first respondent also admits that there was a meeting of some members of the appellant on the 8th May 2015 at the Ministry of Commerce Conference room. The meeting came as a result of some members of the appellant lodging a complaint at the Ministry concerning the conduct of the business of the appellant.

[28] In paragraph 12 of his affidavit the first respondent states the following:

> ***"12.2 May I state that after the group came to complain about mismanagement that was reported to be taking place in the administration of the applicant we took it upon ourselves as per provisions of Section 214 of the Companies Act No. 8 2009 to look into the issue.***

12.3 We came to the conclusion that a lot was happening with the applicant that was not in accordance with dictates of the Companies Act of 2009.

12.4 We discovered that members were not aware that the applicant was a public company to begin with, that the applicant since inception has never submitted audited financial statements by a qualified and registered auditor.

12.5 We also as an office listened to both factions who exist within the applicant different occasion and thereafter we arranged a meeting where both factions were in attendance to solve the impasse."

[29] In paragraph 13 of his affidavit the first respondent states:

13.2 ……The meeting that took place at Vuvulane was a result of a meeting that took place on the 8th May 2015 at the Ministry of Commerce Auditorium and it was guided by Section 159 of the Companies Act No. 8 2009.

[30] In paragraph 15.3 of his affidavit first respondent further states:

"15.3 May I state that in all dealing in the affairs of the appellant I have not acted ultra vires my powers but I have been guided by the Companies Act No. 8 of 2009 especially Section 159 and 215."

The first respondent further states at paragraph 16.2 of his affidavit:

"……. Section 159 of Companies Act of 2009 is very clear on the powers to be invoked by the Registrar of Companies in as far as

convention of general meetings and how he has to conduct those meetings.”

[31] I now propose to deal with the Grounds of Appeal against the background of the allegations contained in the affidavits as well as the findings of the court *a quo.* In its first ground of appeal the appellant contends:

> “***1. The learned judge a quo erred in law by holding that Section 159 and 215 of the Companies Act of 2009 mandates the first respondent to intervene in appellant’s affairs”***

The finding of the judge *a quo* being attacked here is found in page 13 and paragraph 30 of his judgment where he states:

> ***“……The arguments by applicant that first respondent acted ultra vires and outside the ambit of the companies Act of 2009 hold no water. It is without question that there was a call by a group of members of the company that the Registrar intervene in terms of Section 159 of the Act and further the Registrar has a right to enquire on issues of membership and shares of a company in accordance with the provisions of Section 215 of the Act.”***

[32] The first section referred to by the learned judge is section 159 and it reads as follows:

> ***“Where all the directors of a company have become incapacitated or have ceased to be directors, the Registrar may unless the articles of a company make other provisions in that respect, on the application of any member of the company or his legal representative, call or direct the calling of a***

general meeting of the company and may give such ancillary or consequential directions as he may deem expedient, including directions modifying or supplementing , in relating to the calling, holding or conduct of the meeting, the operation of the company's articles, and directions providing for one member or the legal representative or by proxy to be deemed to constitute a meeting, and any meeting, held or conducted in accordance with any such directions, shall for all purposes be deemed to be a general meeting of the company held and conducted."

[33] This section definitely empowers the Registrar to call a general meeting of a company. However, there are two conditions which must be satisfied before he does so. Firstly all the directors of the company must have become incapacitated or ceased to be directors. Secondly, the Registrar can only intervene and call such meeting on the application of a member of the company or his legal representative.

[34] In *casu*, the first respondent apparently called or caused to be called two meetings of the appellant. One on the 8th May, 2015 at the Ministry of Commerce and another on the 30th May, 2015 at Vuvulane. The character of the first meeting is not clear as it is not all members of the appellant that were called. It cannot therefore be a general meeting. The first respondent had no power to call such meeting because Section 159 mandates him to call a general meeting. In my opinion he acted *ultra vires* in calling such meeting as it is not provided for in law. Regarding the meeting of the

30th May 2015 which appears to have been a general meeting, the first respondent is empowered to call such meeting where all the directors of a company are either incapacitated or have ceased to be directors. There is nothing to suggest that the directors of the appellant were incapacitated or that they had ceased to be directors. The first respondent therefore had no authority to call or cause such meeting to be called even at the invitation of some members of the appellant. I accordingly find that the first respondent acted ultra vires his powers in calling such meeting.

[35] Having found that the first respondent had no authority to call any of the two meetings it only follows that I find that these meetings were irregular and unlawful. No lawful business could therefore be transacted or conducted at the said meetings. The election of the interim committee was therefore irregular and unlawful and it must be set aside as such.

[36] I am of course mindful of the fact that the appellant is led by an executive committee and not a Board of Directors as such. However, the appellant has been led by this kind of structure since its inception. For all intents and purposes this structure has been performing the function of a Board of Directors and the first respondent cannot seek to invoke and act in terms of the provisions of Section 159 of Companies Act, 2009 whilst it is in existence and its members are not incapacitated.

[37] Section 215 of the Companies Act, 2009 provides:

> ***"215 (1) The Registrar may from time to time by notice in writing require a company or external company to transmit to him within fourteen days after the date of such notice particulars of the transfer of any share or shares and a list of persons for the time being members of the company and of all persons who ceased to be members as from a particular date.***
>
> ***(2) Any company or external company which fails to comply with any requirement of the Registrar under subsection (1) and every director or officer of such company who knowingly fails to comply with such requirement shall be guilty of the offence."***

This section does not even mention the calling of a meeting by the Registrar and there is no way it can authorize the first respondent to call or cause a meeting to be called. It is irrelevant to the issues in *casu*.

[38] The second ground of appeal is stated as an alternative to the first. Having found that the appeal should be upheld on the first ground of appeal I find it unnecessary to deal with second ground of appeal in detail save to point out that it is also a valid and sound ground of appeal. In terms of Section 216 of the Companies Act, 2009 it is the Minister who has the right to investigate the financial interest and control of a company and not the first respondent.

In the result the following order is made:

1. The judgment of the court *a quo* of the 5th February, 2016 is set aside;

2. The rule granted by the court *a quo* on the 8th June, 2015 is confirmed.

3. Costs are awarded to the appellant.

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J.S. MAGAGULA

ACTING JUSTICE OF APPEAL

I agree

_____

S.P. DLAMINI

JUSTICE OF APPEAL

I agree

_____

R. CLOETE