

IN THE HIGH COURT OF LESOTHO

In the Application of

MOPANI (PROPRIETARY) LIMITED

Applicant

VS

ISMAEL M MONARE

Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 6th day of March, 1989.

On the 13th May, 1988 the applicant obtained ex parte
an order couched in the following terms:

1. The respondent is directed to hand over all assets of the Applicant, including keys, in his possession to the Deputy Sheriff forthwith;
2. That the respondent be restrained from entering upon any of the premises where the Applicant conducts businesses or interfere with its business activities or affairs in any way whatsoever;
3. That the respondent be restrained from assaulting, interfering or threatening any of the Applicant's employees, shareholders or directors;

4. That the respondent be called upon to show cause on the 27th day of May 1988 why paragraphs 1, 2 and 3 above should not be made a Final Order of Court and why he should not be ordered to pay the costs of this application;
5. That paragraphs (1) to (3) operate with immediate effect as a temporary Interdict.

After several extensions of the rule the matter was finally argued before me on the 10th February, 1989. I reserved judgment to to-day.

The applicant is a registered company with an authorised share capital of 2,000 shares divided into 2,000 shares of M1-00 and only four (4) shares were taken up at its registration on the 19th October, 1982. The applicant presently conducts two businesses in the B.K. Taoana Centre namely Farmhouse Kitchen and Pazazz Boutique. It appears from the papers filed of record, especially the Articles of Association of the Applicant, that on registration the applicant had two directors, namely, Jacqueline Carol Quin and Ursula Felicitas Rausch. The Articles of Association appear on page 124 of the record as Annexure EATE 7.

On the 26th January, 1983 Jacqueline C. Quin resigned as a director of the applicant and on the same day Elizabeth Ann T. Everett was appointed director of the applicant; (See Annexures EATE 8 on pages 144 and 145 of the record). The two annexures are prescribed forms in terms of section 158 of Companies Act of 1967 and show that when Miss Quin resigned as a director of the applicant Miss Everett was appointed director of the applicant. Both documents were signed by Miss Rausch who was a director of

the applicant. In any case, in her replying affidavit to Miss Everett's supplementary affidavit, Miss Rausch admits that Miss Everett was appointed director of the applicant. She denies that Miss Everett was ever appointed managing director of the applicant, however it is common cause that she is a director and a member of the applicant.

Section 27 (2) of the Companies Act 1967 (hereinafter referred to as the Act) provides that every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company. The name of Everett appears in the register of members of the applicant (See page 99 of the record which is an extract from the applicant's register of members).

It is common cause that Miss Everett is a member and a director of the applicant and in paragraph 11 of her replying affidavit to Miss Everett's supplementary affidavit, Miss Rausch admits that Miss Everett had been entrusted the daily management responsibilities over the period 1985, 1986 and 1987.

The position of Miss Rausch in the company also seems to be very clear; she was one of the directors when the company was incorporated and held two shares. On the 28th December, 1984 she resigned as a director of the applicant (See Form L on page 158 of the record). On the same day she sold her shares to Mr. David Telford for R2,500 (See transfer certificate on page 159 of the record). The shares were held in trust for Miss Rausch and a declaration of trust was signed by Mr. Telford (page 161 of the record). It is significant that even in the register of members of the company

(page 200 of the record) it is clearly recorded that Mr. Telford is holding the shares in trust for Miss Rausch. I say it is significant because the respondent alleges that Miss Everett's annexures are false documents made by her to build a strong case. The information in the register tallies with the declaration of trust which Miss Rausch has in her possession.

In his affidavit Mr. Telford deposes that in March, 1985 he resigned his directorship in favour of Miss Rausch. This fact is admitted by Miss Everett in her affidavit and she points out that at that stage she was the only remaining director in charge of the applicant's affairs.

In her letter dated the 28th December, 1984 Miss Rausch stated that she was resigning as director of the applicant due to business commitments in Swaziland (See page 157 of the record). There is nothing to show that she was ever appointed a director of the company again. However, she remained a member of the company because Mr. Telford held the shares in trust for her.

On the 27th November, 1987 Miss Rausch wrote a Notice of Sale of Shares addressed to Miss Everett as The Secretary/ Director of the applicant in which she offered to sell to her all her entire shares in the company for the sum of R10,000-00 (See Annexure EATE4 to Everett's replying affidavit). Miss Everett declined the offer and stated that she was aware that Rausch intended to sell her shares to one Mrs. A. Sehlabaka and she indicated that she would exercise her rights in terms of the Articles of Association to refuse to accept Mrs Sehlabaka as a shareholder (page 186 of the record).

It seems that the proposed sale to Mrs Sehlabaka fell through and on the 4th March, 1988 Miss Rausch sold her two ordinary shares to the respondent for the sum of M1,000-00. A form for the transfer of shares was properly executed (See Annexure "A" to Rausch's supporting affidavit).

In her founding affidavit Miss Everett deposes that on the 4th March, 1988, the respondent, accompanied by Rausch and David Telford, came to one of the applicant's businesses, Farmhouse Kitchen Restaurant and informed her that Respondent had bought the shares Rausch held in the applicant. She says that the respondent immediately demanded that she hand over the keys of the restaurant to him and he informed her that he was placing his own nightwatchman at the premises to make sure that the property of the restaurant would not disappear.

Everett states that she informed the respondent that he was not entitled to act in the manner he did as he had no rights in the applicant. He was not a director of the applicant. At best he could be a shareholder of two shares sold to him by Rausch. The respondent told her that he was dismissing her as a director of the applicant and that she would receive written notification of this fact the following day.

On the 5th March, 1988 the respondent came to the restaurant and informed her that he intended to change the operations of the applicant and that he intended to trade as a restaurant with a liquor licence in future. She informed him that the owner of the premises was not prepared to consent to the selling of liquor on the premises. He informed her that he had appointed the auditing firm,

Deloitte, Haskins and Sells, as auditors of the applicant and that she must hand over all the books to this firm. She refused to do so.

On the 24th March, 1988 Miss Everett states that she was informed by the respondent that he intended to apply for a liquor licence for the restaurant and that on the following day the premises should be closed because the Health Inspector would be coming for an inspection for the purposes of obtaining the trading licence. She says that as the respondent had threatened her before and as he seemed to be hostile, she decided to carry out his instructions and on the 26th March, 1988 the premises were cleaned thoroughly. The respondent then sent one of the employees to collect the keys for the restaurant under the pretences that the Health Inspector was visiting the premises.

Shortly after the keys were collected, certain people were seen at the restaurant changing the locks. They were carrying out the instructions of the respondent. She states that ever since that event she has not been able to enter the business of the applicant peacefully to conduct the business of the applicant and was at one stage assaulted by the watchman placed there by the respondent.

On the 31st March, 1988 the respondent dismissed certain of the staff and took full control of the applicant's business, Farmhouse Kitchen Restaurant. He ran the premises but failed to pay any money he received in the bank account of the applicant.

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In his opposing affidavit the respondent alleges that the applicant's sub-lease of the premises at which the restaurant is conducted has expired and that the sub-lease is presently in his name. He has not attached any copy of a sublease to confirm his allegation. On the other hand the applicant has attached a copy of lease of the premises to Everett's replying affidavit (See EATE1). The copy reveals that the lease was for a period of thirty five (35) months and it commenced on the 1st October, 1986. According to my calculation the lease shall expire on the 31st August, 1989. The story by the respondent that he now has the lease in his own name cannot be correct and as I indicated above he has not attached any copy of such lease to confirm his story. If his story were to be believed it would mean that the lessor has entered into two contracts of lease with two different persons for the same period. The respondent has not supported his story with an affidavit from the lessor.

In paragraph 6 of his opposing affidavit the respondent avers that after buying the shares of Miss Rausch, he approached Miss Everett to ascertain what the position of applicant was but Miss. Everett could not have anything to do with him and refused him access to the books of account of applicant and its financial and bank statements.

The respondent later alleges that Miss. Everett agreed to give him the keys and she said she had nothing to do with applicant and was not even a director. I find it unbelievable that Miss. Everett could refuse to give the respondent the books of account and financial and bank statements of the applicant but willingly give the respondent the keys of the premises where applicant

carried on its business. In any event the most important aspect of the case is to determine what position the respondent held in the company.

A company and its members are bound by the articles of association of the company. In the instant case the articles of association of the applicant are Annexure "EATE 7" to Miss Everett's supplementary affidavit. Article 23 relates to the transfer and transmission of shares and reads as follows:

"The instrument of transfer of any share in the Company shall be in writing, and shall be executed by or on behalf of the transferor and transferee, and duly attested and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the Register in respect thereof."

It seems to me that there was only partial compliance with the provisions of Article 23 when Miss Rausch transferred her shares to the respondent. A proper deed of transfer of shares was in writing and was signed by both Miss Rausch and the respondent and was duly attested by Mr. Telford. The Article 23 further provides that after the execution of the instrument of transfer the transferor shall be deemed to remain the holder of such shares until the name of the transferee is entered in the Register in respect thereof. It is common cause that the name of the respondent has never been entered in the register of the applicant and that the shares in question are deemed to be still in the name of Miss Rausch.

In terms of section 27 (2) referred to above the respondent is not a member until his name appears in the register. It is

again common cause that the name of the respondent does not appear in the applicant's register.

Section 93 of the Act provides that the register of members shall be prima facie evidence of any matters by this Act directed and authorised to be inserted therein. I am of the opinion that the respondent failed to rebut this prima facie case that his name does not appear in the register of the applicant. He is therefore not a member of the applicant. The shares he acquired are still regarded as being in the name of Miss Rausch.

The next question is whether a person who is not a member nor a director of a company can control it and have the right to have its business and assets in his possession and control. The answer must be in the negative. Article 77 provides that the affairs of the applicant shall be done by its directors (See page 135 of the record). The respondent has no rights in the applicant and as I have indicated above he cannot even be regarded as a shareholder before his name has been entered in the register of the applicant.

It was submitted on behalf of the applicant that section 30 of the Act provides that Articles of Association of a private company must restrict the right to transfer shares. In the instant case Article 25 (page 127) sets out the restrictions applicable. In essence, the member who wishes to sell must first offer his rights to existing members at a certain price. If they do not accept, he may then sell to an outsider at the same price.

I agree with the above submission and wish to point out that even section 73 (1) provides that shares of members are transferable only in the manner provided by the Articles. It is common cause that Miss Rausch offered her shares for sale to Miss Everett at a price of M10,000 (See page 111 of the record). Miss Everett declined the offer (See Annexure "D" to Rausch's supporting affidavit). It now appears from the papers filed of record that Miss Rausch sold her shares to the respondent for M1,000. (See Annexure "A" to respondent's opposing affidavit). Miss Rausch was under an obligation in terms of the Articles of Association of the applicant to sell her shares to the respondent, an outsider, at the same price of M10,000 which was rejected by Miss Everett.

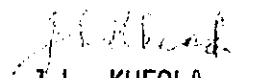
It is Miss Rausch's contention that Miss Everett allowed her to sell her shares to the respondent. It will not be possible to make a decision on this point on affidavits. However I am of the opinion that there will be no need to refer this matter to trial because the matter can be finalised basing the decision on undisputed facts which are:-

- (a) Everett is a member and director of the applicant.
- (b) The respondent is neither a member nor a director of the applicant.
- (c) The respondent was in possession of the assets and business of the applicant.

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In the result I make the following order:

- (a) The respondent is directed to hand over all assets of the applicant, including keys, to Miss Everett as director of the applicant, and if the keys are still in the custody of the Deputy Sheriff, he is ordered to hand them over to Miss Everett;
- (b) The respondent is restrained from entering upon any of the premises where the applicant conducts businesses or to interfere with its business activities or affairs in any way whatsoever;
- (c) The respondent is restrained from assaulting, interfering or threatening any of the applicant's employees, shareholders or directors;
- (d) The respondent is ordered to pay the costs of the application.


J.L. KHEOLA
JUDGE

6th March, 1989.

For the Applicant - Mr. Buys
For the Respondent - Mr. Pheko.