IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 40 OF 2012**

In the matter between:

EXCEL HEALTH (PTY) LTD	**APPELLANT**
and	
DR. TEBOHO MASIA	**1ST RESPONDENT**
MUSANDA INVESTMENT (PTY)LTD	**2ND RESPONDENT**
MEDICAL EQUIPMENT PROCUREMENT COMPANY (PTY) LTD	**3RD RESPONDENT**
TS'EPONG (PTY)LTD	**4TH RESPONDENT**
REGISTRAR OF COMPANIES	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**

Coram: Ramodibedi P
Scott JA
Howie JA

Heard: 3 April 2013
Delivered: 19 April 2013

Summary

Authority to institute proceedings on behalf of company challenged – such authority established – breach by Director of fiduciary duty - acquiring for his own benefit a corporate opportunity falling within the scope of the company's business – benefit restored to the company.

JUDGMENT

SCOTT JA

[1] The appellant is a private company registered in accordance with the laws of Lesotho. It was established in 2005 by a group of medical doctors to serve as a vehicle for furthering their common business interests. The first respondent, to whom I shall refer as Dr Masia, is a director and chairperson of its board of directors. The second respondent is Musanda Investment (Pty) Ltd ("Musanda"). Dr Masia and his wife are its sole directors and shareholders. The appellant instituted motion proceedings in the High Court in which it sought an interdict restraining Dr Masia and Musanda from receiving any dividends or other benefits accruing to them from Musanda's shareholding in the third respondent, Medical Equipment Procurement Company (Pty) Ltd ("Mepco"). The appellant also sought orders directing that Musanda's 15 percent shareholding in Mepco be transferred to the appellant

and that Mepco be directed to disclose all dividends, and to render an account of the business profits, paid to and /or due to Musanda by virtue of the latter's said shareholding. The relief sought was founded on the contention that the 15 percent shareholding in Mepco constituted a corporate opportunity to which the appellant was entitled and that by causing the shares to be registered in the name of Musanda, being a company in which Dr Masia and his wife were the sole shareholders rather than in the name of the appellant, Dr Masia had acted in breach of his fiduciary duty owed to the appellant as a director. Dr Masia, acting on his own behalf and on behalf of Musanda, denied the claim and in opposing it, raised a number of points *in limine*, three of which were upheld by the Court *a quo*. They were: (a) Dr Chale Moji, who deposed to the founding affidavit, lacked *locus standi in judicio*; (b) Dr Moji had not been properly authorized by the appellant to institute proceedings against Dr Masia and Musanda; and (c) disputes of fact precluded the matter from

being decided on the papers. Before considering these issues it is necessary to outline the background to the claim and the questions in dispute.

[2] In pursuance of one of its stated objects the appellant purchased a 15 percent shareholding in the fourth respondent, Ts'epong (Pty) Ltd, ("Ts'epong") which manages the Queen 'Mamohato Memorial Hospital. The board of directors of Ts'epong comprises the chairpersons of the companies which have a stake in Ts'epong. As chairperson of the appellant, Dr Masia accordingly became a member of Ts'epong's board of directors as the appellant's representative. During the construction phase of the Queen 'Mamohato Memorial Hospital and its allied clinics it became apparent that there was a need for the procurement of medical equipment for the hospital and the clinics. This prompted the establishment of Mepco which was to take charge of the equipment already part of the project and to purchase any further equipment that

may have been required. According to the appellant, the board of Ts'epong resolved what shareholding each member would have in Mepco and that the appellant was allocated a 15 percent shareholding. The appellant says further that when Mepco was actually floated Dr Masia substituted Musanda for the appellant as the holder of 15 percent of the shares in Mepco. This is denied by Dr Masia who points out that Mepco was an independent company, that it was not "part of" Ts'epong and that only one director of Ts'epong was also a director of Mepco. However, it is common cause that a 15 percent shareholding in Mepco was registered in the name of Musanda and not the appellant. Dr Masia paid the purchase price of M15000 out of his own pocket.

[3] When the shareholders of the appellant discovered what Dr Masia had done they were adamant that the 15 percent stake in Mepco be transferred to the appellant. At a meeting on 11 August 2011 Dr. Masia denied that he had done anything

wrong. He contended that he had rightfully "explored for himself" an opportunity by engaging his own company (Musanda) in a new company (Mepco)that had no link with Ts'epong. He complained that he had always been the person looking for opportunities for the appellant, "dragging them around", starting from the time when he came up with the idea of forming the appellant company. According to the appellant, Dr Masia agreed when confronted to transfer Musanda's shares in Mepco to the appellant. Dr Masia, on the other hand, says that he agreed to withdraw his company (Musanda) from Mepco as a compromise and for the sake of peace with his colleagues, "which withdrawal [he] could renege from any time".

[4] On 21 August Dr Masia wrote to the appellant:

> "This is to make you aware that I have notified the chairman of the medical company (Mr Thuso Green) that Musanda is withdrawing and its stake will be

transferred to Excel Health. We should start thinking of which board member will represent Excel Health as a director in the company. I think this item will be on the agenda in the special shareholders meeting. Whether the transfer is free or not will be decided in that meeting. People should not panic. I will not spend a cent of the dividends until we have reached a friendly conclusion".

The special shareholders meeting of the appellant referred to by Dr Masia was held on 6 November 2011. Item 3.4 of the minutes of the meeting reads:-

"The chairman, Dr Masia, informed the shareholders that he had taken a decision to withdraw from the medical equipment company i.e. Musanda (sic), and was prepared to transfer his stake thereof to the mother company and thereby ceding his shares to

> Excel Health. He would, however, have to be reimbursed his M15000 that was invested as capital in the medical equipment company. The shareholders were therefore asked to consider the reimbursement, and perhaps with a premium and/or interest."

The meeting resolved that Dr Masia would be reimbursed his M15000, without a premium or interest. Subsequently on 19 December 2011 the directors of Musanda, ie Dr Basia and his wife, resolved:

> "1. To sell the company's shares in Medical Equipment Procurement Company (Pty) Ltd (Mepco) to Excel Health (Pty) Ltd.
>
> 2. The sale will come into effect once all the necessary processes have been completed."

However, the sale and transfer of the shares did not take place. Dr Masia changed his mind. He wrote to the appellant on 23 December 2011:

"After serious consideration I feel the outcomes have been unfair towards me as an individual and should be referred to an independent arbitrator."

The appellant subsequently learned that Dr Masia had received sometime in January 2012 payment of the sum of M250 000 from Mepco. It thereupon launched the application resulting in this appeal.

[5] It is convenient now to consider the so-called points *in limine* upheld by the Court *a quo*. The first requires no discussion. Dr Moji, the deponent to the appellant's founding affidavit, is an adult medical doctor. He clearly has *locus standi*, whether he was a director of the appellant or not.

[6] The second is whether Dr Moji was duly authorized by the appellant to institute proceedings on its behalf. In the first paragraph of his affidavit Dr Moji described himself as the vice-chairman of the board of directors of the appellant and attached a copy of a resolution which he said was that of the

appellant. The resolution authorized him to depose to the affidavit and institute the proceedings in question. It is dated 14 February 2012 and signed by five persons. Their names, as they appear on the resolution, are:-

" 1. Dr Teboho Thabane (Treasurer)

2. Dr Thabiso Kolobe (Member)

3. Dr Hlalele Mofubelu (Deputy Secretary-Member)

4. Dr Palesa Mohaleroe (Secretary-Member)

5. Dr N.C. Moji (Deputy Chairman)"

[7] The allegations contained in the first paragraph of Dr Moji's affidavit and the copy of the resolution were all that was required at that stage to establish Dr Moji's authority to institute the proceedings. In his answering affidavit Dr Masia averred, however, that the appellant had only two directors, himself and Dr Mofubelu (who is one of those who signed the resolution). In support of this averment, he

referred to the appellant's Articles of Association (annexed to the appellant's founding affidavit for a different purpose) and pointed out that the first two directors were stated to be himself and Dr Mofubelu. He contended that in the circumstances the persons whose names are listed above could not have validly resolved that proceedings be instituted.

[8] The first opportunity Dr Moji had to answer these allegations was in his replying affidavit. He testified that at an Annual General Meeting held in June 2006 the structure of the board was changed by the appointment of additional directors and the re-appointment of the existing directors. The board then comprised the following members:

Chairman :	Dr Masia
Vise Chairman:	Dr Moji
Secretary:	Dr Mohaleroe
Vice Secretary:	Dr Mofubelu
Treasurer:	Dr Thabane
Ordinary Members:	Dr McPherson

Subsequently, he said, Dr McPherson and Dr Ramaili ceased to be members and Dr Kolobe was brought onto the board. He referred also to a number of documents which supported his evidence. These included the minutes of a meeting of the appellant's board of directors dated 16 October 2011 which was annexed to Dr Moji's founding affidavit. The directors attending the meeting were the same as those, save for Dr Masia, who signed the resolution referred to in paragraph 6 above. In his answering affidavit, Dr Masia made no attempt to challenge the correctness of these minutes. Other documents referred to by Dr Moji and annexed to his replying affidavits were emails which Dr Masia had either sent to or received from the persons listed making arrangements for the holding of board meetings. Of particular significance is a letter described as a "Formalities

Certificate" addressed to the Development Bank of Southern Africa. The first paragraph reads:

> "We T Masia, C Moji and H Mofubelu, being directors of Excel-Health (Proprietory)Ltd being duly authorized to deliver this Certificate hereby make the following certifications on behalf of Excel-Health (Proprietory) Ltd."

The signatures of the three directors appear at the foot of the page. Each bears the date 11 February 2009. This document, in particular, is, of course, wholly inconsistent with Dr Masia's assertion that Dr Moji is not a director of the appellant and that the only directors of the appellant are the two original directors referred to in the company's Articles of Association.

[9] Counsel for the respondents made much of the fact that the resolutions appointing the persons said to be directors had not been produced. But the fact that the minutes of the resolutions were not produced is not decisive. Dr Moji states

under oath that there were such resolutions and his evidence in this regard is unchallenged. It is true that this appears in his replying affidavit but this was the first occasion on which he could refute the allegation that he lacked authority. In these circumstances, had the respondents wished to challenge Dr Moji's evidence they could have filed a further affidavit, if necessary with the leave of the court which would have been granted.

[10] It is also true that a copy of an extract from records kept at the office of the Registrar of Companies showing who were the directors was not produced. But this is of little consequence. A failure to register their appointments would in any event not affect the validity of their acts. Section 141 of the Companies Act 1967 provides:

> "The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualifications"

A failure to register an appointment would clearly constitute a "defect" within the meaning of the section.

See eg Morris v Kanssen [1946] AC 459 (HL) at 471: Marrok Plase (Pty)Ltd v Advanced Seed Co. (Pty) Ltd 1975 (3) SA 403 (A) at 411C – 43C.

[11] It follows that in my view the authority of Dr Moji to institute the proceedings on behalf of the applicant was established and the Court a quo erred in coming to the opposite conclusion.

[12] The third point *in limine* upheld by the Court *a quo* was that there were material disputes of fact on the papers which could not be resolved without recourse to viva voce evidence and which ought to have been anticipated by the applicant. The Court made no attempt to indicate the disputes in question, other than to observe that "the very basis of the application is in dispute". The starting point in the inquiry is to ascertain what is common cause on the papers. There is no

dispute that Dr Masia is a director of the appellant. It appears from the appellant's Memorandum of Association that one of its stated objects was "To subscribe for or otherwise acquire shares or other interest in or securities in any other company". In pursuance of this object the appellant acquired a 15 percent stake in Ts'epong. Dr Masia became a director of Ts'epong by virtue of his position as chairperson of the appellant's board of directors. It is common cause that during the construction phase of the Queen 'Mamohato Memorial Hospital, in which Ts'epong was involved, it became apparent that there was a need for the procurement of medical equipment for the hospital and this prompted the establishment of Mepco. While there is some dispute on the papers as to the precise circumstances in which Dr Masia came to register in the name of Musanda a 15 percent shareholding in Mepco, what is clear is that the shares became available to Dr Masia by reason of his membership of Ts'epong's board. Indeed, it is not in dispute that the

shareholding in Mepco was discussed at a board meeting of Ts'epong at which it was proposed that a 15 percent shareholding in Mepco be offered to the appellant. It can also not be disputed that Dr Masia used the opportunity to purchase the shares, which he did, not on behalf of the appellant but on behalf of Musanda.

[13] As a director, Dr Masia owed the appellant a fiduciary duty to act in its best interests. What this entails in relation to corporate opportunities was considered in **Da Silva and Others v CH Chemicals (Pty) Ltd** 2008 (6) SA 620 (SCA) at para 18 where the following was said:

> "It is a well established rule of company law that directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company. They may not make a secret profit or otherwise place themselves is a position where their fiduciary duties conflict with their personal interests. A consequence of

> the rule is that a director is in certain circumstances obliged to acquire an economic opportunity for the company, if it is acquired at all. Such an opportunity is said to be 'corporate opportunity' or one which is the 'property' of the company. If it is acquired by the director, not for the company but for himself, the law will refuse to give effect to the director's intention and will treat the acquisition as having been made for the company."

As to what constitutes a "corporate opportunity", the court at para 19 had this to say:

> "while any attempt at an all – embracing definition is likely to prove a fruitless task, a corporate opportunity has been variously described as one which the company was 'actively pursuing' (Canadian Aero Service v O'Malley (1993) 40 DLR (3rd)37 (SCC) at 382);

or one which can be said to fall within 'the company's existing or prospective business activities' (Davies, *Gower and Davies*' *Principles of Modern Company Law*. 7ed at 422); or which related to the operations of the company within 'the scope of its business' (Bellairs v Hodnett and Another 1978 (1) SA 1109 (A) at 1132H); or one which falls within its ' line of business' (Movie Camera Co (Pty) Ltd v Van Wyk [2003]2 AII SA 291(C) at 308b and 313d-e). Ultimately, the inquiry will involve in each case a close and careful examination of the relevant circumstances, including the opportunity in question, to determine whether the exploitation of the opportunity by the director, whether for the director's own benefit or for that of another, gave rise to a conflict between the director's personal interests and those of the company which the director was then duty-bound to protect and advance."

[14] The taking up of the shares in Mepco was clearly an opportunity that fell within the scope of the appellant's business. It had previously acquired a 15 percent stake in Ts'epong and the purchase of a similar interest in Mepco would have constituted an opportunity to further its business interests. The opportunity became available by reason of Dr Masia's membership of Ts'epong's board as the appellant's representative. It was in the circumstances a corporate opportunity which can rightly be said to be the property of the appellant. By causing the shares to be purchased by Musanda, Dr Masia was in my view quite clearly acting in breach of his fiduciary duty owed to the appellant.

[15] It follows that the appeal must succeed. In view of the conclusion to which I have come on the papers I can see no reason for referring the matter back to the Court *a quo* to consider the merits of the appellant's claim.

[16] The following order is made:

(A) The appeal is upheld with costs.

(B) The order of the Court *a quo* is set aside and the following substituted in its stead:

"(1) The second respondent is ordered to transfer its 15 percent shareholding in the third respondent to the applicant against payment by the applicant of the sum of M15 000.

(2) Upon compliance with the order referred to in paragraph (1) above:

(a) The first and second respondents are interdicted and restrained from receiving any dividends, profits or other benefits accruing to them from the second respondent's shareholding in the third respondent;

(b) The third respondent is directed to expunge from its register of members the name of the second respondent and substitute therefor the name of the applicant;

(c) The third respondent is directed to render a full account to the applicant of all dividends, profits or other benefits which accrued to the first and/or second respondent by reason of the latter's shareholding in the third respondent;

(d) The first and second respondents are ordered to pay to the applicant all dividends, profits or other benefits received from the third respondent in consequence of the second

respondent's shareholding in the third respondent.

(3) The first respondent is ordered to pay the applicant's costs of suit."

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D G Scott
Justice of Appeal

I concur

_____
M M Ramodibedi
President of the Court of Appeal

I concur

_____
C T Howie
Justice of Appeal

For the appellant: Adv K. Ndebele

For the first and second respondents: Adv A.M. Chobokoane