IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO:48/2013

In the matter between:

BESELE MALAKANE **Appellant**

And

THE EXECUTER, ESTATE OF LATE SIMON MOKONYANA RASEPHEI **1st Respondent**

MASTER OF THE HIGH COURT **2nd Respondent**

MARA HOLDINGS (PTY) LTD **3rd Respondent**

REGISTRAR OF COMPANIES **4th Respondent**

ATTORNEY GENERAL **5th Respondent**

CORAM: HOWIE JA
THRING JA
LOUW AJA

HEARD: 7 APRIL 2014
DELIVERED: 17 APRIL 2014

SUMMARY

Shares in a company transmitted by operation of law on the death of the shareholder to the shareholder's estate – shares purportedly transferred by resolution of directors – no evidence that resolution was a forfeiture of shares – transfer of shares null and void – court mero motu winding up company s 173(d) of Companies Act – no application for winding up – winding up order rescinded.

JUDGMENT

LOUW, AJA

[1] There are two appeals in this matter against the judgment delivered and orders made in the High Court (per Molete, J) on 24 August, 2013.

[2] The first is the appellant's appeal against the dismissal of his application to set aside a directors' resolution which purported to transfer 33 shares in Mara Holdings (Pty) Ltd (Mara Holdings). The second is an appeal by the first respondent, which is supported by the appellant, against the order winding up Mara Holdings.

[3] Mara Holdings was incorporated during 1985 by three founding shareholders and directors who held the 100 issued shares as follows: Oswin Thabo Malakane (33 shares), Simon Mokonyana Rasephei (34 shares) and Seutloadi Malakane (33 shares).

[4] Seutloadi Malakane passed away during 1988. It is not disputed that on his death, his 33 shares were transmitted by operation of law to his estate. It is not clear from the papers, but it would appear that no executor was appointed to his estate and the share register of the company continued to reflect that the 33 shares in question were held in the name of the late Seutloadi Malakane.

[5] The remaining two directors of Mara Holdings passed a special resolution on 3 December 1991 which is recorded as follows in the company records:

> "It was agreed by the Directors that the shares of the late Seutloadi Malakane be given to Mr. SIMON MOKONYANA RASEPHEI, now his total shares will be (67) sixty-seven shares."

[6] The share register was amended on 29 July 1993 to reflect this purported change in shareholding. The name of the late Seutloadi Malakane was removed as a shareholder and the register reflected that the remaining founding shareholders held 67 and 33 shares, respectively.

[7] A dispute arose among the family members of the late Seutloadi Malakane regarding the devolution of his estate which was only resolved in 2011 when the appellant, who is the grandson of the deceased, was appointed by the family as the heir to his estate. The appellant has attached a number of documents to the papers which he alleges confirms that he is the rightful heir to the estate. One of these documents, a court order which he says confirms his status as heir, is, however, not part of the appeal record.

[8] Both remaining founding shareholders and directors of Mara Holdings have since died and although it seems that the company is no longer trading, it has not been deregistered. Mara Holdings is the holder of

the lease to commercial land situated in Upper Thamae on which a petroleum products service station is situated.

[9] The appellant sought orders in the court *a quo*: (1) declaring that the purported transfer of the 33 shares belonging to the late Seutloadi Malakane to Simon Mokonyana Rasephei be declared null and void; (2) that Mara Holdings be directed to amend its share register to reflect that the 33 disputed shares are held by the appellant; and (3) costs of the application.

[10] In a judgment delivered on 24 August 2013, the court *a quo* dismissed the application by the appellant. In addition, without any of the parties seeking such an order, the court *a quo* made a final order winding up Mara Holdings in terms of s 173(b) of the Companies Act, 25 of 1976, on the basis that there were no surviving members of the company.

[11] I deal first with the appeal against the dismissal of the appellant's application. Section 73(1) of the Companies Act provides that

> "the shares ….. of any member shall be moveable property, transferable in the manner provided by the Articles of the company."

[12] The first respondent contends that the resolution taken by the two remaining directors on 3 December 1991 constitutes a valid transfer of the 33 shares from the Malakane estate to Rasephei and that the shares are now an asset in the Rasephei estate. The first respondent relies on the provisions of the Articles of Association of Mara Holdings which entitle the directors of the company to declare forfeit and dispose of the shares of a member under circumstances set out in articles 31 to 36. It was not suggested that there was any other basis upon which the director's resolution could constitute a valid transfer of the shares.

[13] There is no factual basis on the papers for the first respondent's contention. Forfeiture of shares can only arise in terms of articles 31 to 36 (1) where a member fails to pay any call on his shares on the day appointed for payment; (2) the directors in their discretion, thereafter serve a notice on the defaulting member calling for payment on a further appointed day; (3) in the event of a further failure to pay, the

shares may by resolution of the directors be declared forfeit and, thereafter, (4) be sold or otherwise be disposed of in the manner the directors think fit. Once the shares are forfeited, the person who has up to then held the shares, ceases to be a member of the company in respect of the forfeited shares.

[14] There is no evidence that the late Seutloadi Malakane or his estate was ever called upon to pay or failed to pay any call on the shares registered in his name. There is no basis for a finding that the forfeiture provisions of the Articles were set in motion. Articles 25(f) and 30 that were referred to in argument do not give rise to forfeiture and do not further the first respondent's case.

[15] It follows that the resolution of 3 December 1991 did not in itself constitute a valid transfer of the 33 shares from the Malakane estate to Rasephei, nor does it constitute a valid causa for such transfer. The 33 shares have therefore remained and still are, an asset in the Malakane estate.

[16] The appellant further seeks an order directing Mara Holdings to amend its share register so as to reflect that the 33 shares are registered in his name. Prior to the resolution of 3 December 1991, the shares were registered in the name of the late Seutloadi Malakane. It is not clear on the papers whether an executor has been appointed to the Malakane estate. Article 28 of the Articles provides that 'on the death of any member ….. the legal personal representative of such deceased shall be the only person recognized by the company as having any title in the share or shares registered in his name.' The appellant claims to be the heir to the Malakane estate, but his status as heir is not sufficiently clear on the papers. In the circumstances I am of the view that the share register should be amended to reflect the shareholding as it was before it was amended pursuant to the resolution of 3 December 1991, thus leaving it open to those in control of the estate to take the necessary steps to have the share register appropriately amended. The result is that the number of shares registered in the name of Simon Mokonyana Rasephei must be reduced from 67 to 34 shares and that the name of Seutloadi Malakane must be restored to the register with 33 shares reflected in his name.

[17] The court *a quo* made a final order winding up Mara Holdings. There was no application by any of the parties to the application seeking a winding up order. The court *a quo* relied upon s 173(d) of the Companies Act. That section provides that a company may be wound up by the court if the number of members in a private company is reduced to below 2. S 174(1) makes it clear that an application by way of petition must be brought by the company, a creditor or contributor before a company may be wound up in terms of s 173 of the Companies Act. As I have said, there has been no such application. The order winding up the company must consequently be set aside.

[18] The appellant has obtained substantial success on appeal and in my view costs should follow the event. The appeal by the first respondent to set aside the order of winding up was not opposed by the appellant who supported the relief sought and no order as to costs should be made in respect thereof.

[19] The following orders are made

1. The appellant's appeal is upheld with costs.

2. The first respondent's appeal against the winding up of Mara Holdings (Pty) Ltd is upheld with no order as to costs.

3. The order made by the court *a quo* is set aside and replaced with the following order:

"(a) The resolution taken by the two directors of Mara Holdings (Pty) Ltd on 3 December 1991 to award the 33 shares registered in the name of Seutloadi Malakane to Simon Mokonyana Rasephei, is declared null and void and of no effect;

(b) It is directed that the share register of Mara Holdings (Pty) Ltd be rectified to reflect that Simon Mokonyana Rasephei holds 34 shares and that Seutloadi Malakane holds 33 shares in the company.

(c) The first respondent is ordered to pay the costs of the application.”

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W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree

_____
C.T. HOWIE
JUSTICE OF APPEAL

I agree

_____
W.G. THRING
JUSTICE OF APPEAL

Counsel for the Appellant: Adv. E.T. Potsane

Counsel for the First Respondent: Adv. B.E. Sekatle