CIV/APN/432/96

IN THE HIGH COURT OF LESOTHO

In the matter between

GRADDY LIMPHO TŠOAELI	**APPLICANT**
and	
CAXTON MATLAMUKELE MATETE	**1ST RESPONDENT**
G.M. TELECOMMS (PTY) LTD.	**2ND RESPONDENT**
STANBIC BANK LTD.	**3RD RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On 5th day of March 1997.

On the 27th day of November 1996 I granted a Rule Nisi calling upon the Respondents to show cause why the third Respondent shall not be directed to reactivate the second Respondent's bank account and to allow the latter to withdraw funds in the normal way from the bank account in question under the signatures of the authorised representatives. The rule further called upon the respondents to show cause why the first Respondent shall not be interdicted and restrained from interfering, in any way whatsoever, with the normal day to day business activities of the second Respondent.

I directed that the said bank account of second Respondent be reactivated with immediate effect. I should mention straight away that I did so in the best interests of both the Applicant and the second Respondent as well as the latter's creditors as I felt that they could only come off worse if the said bank account remained closed.

It appears from the papers before me that the Second Respondent was duly registered on the 11th August 1993 with the Registrar of Companies under No.93/147. In terms of the Memorandum of Association the subscribers to the issued share capital were the Applicant and the First Respondent with five hundred shares each.

The Articles of Association provided that the first directors would be the Applicant and the First Respondent. Indeed this is common cause.

The Applicant charges however that the First Respondent has failed to pay the amount of R500.00 to take up the shares in the Second Respondent that he subscribed for and that therefore he is not a lawful shareholder of the company.

In paragraph 6 of his Answering Affidavit however the first Respondent Matlamukele C. Matete deposes as follows:

"6.

AD PARAGRAPH 7 THEREOF:-

I note with interest applicant's averment that the company has been

operating contrary to the statutory requirements, which is one of the reasons why it should be wound up. I do not agree however that the company has otherwise been running illegally and do put applicant to the proof of same. In particular I have paid for my Share Certificate annexed hereto marked "CM1". This fact is also reflected in the company register. Applicant knows about my share certificate very well. He has even appended his signature on it."

It is significant that the Applicant has not filed a replying affidavit and consequently the allegations made by First Respondent in this paragraph remain uncontroverted. What is more the said Share Certificate Annexture "CM1" is self explanatory that the First Respondent is a fully paid shareholder of the Second Respondent. This certificate is dated 31st August 1993 long before the launching of this application and it is not denied that it bears the signatures of both the Applicant and the First Respondent as directors.

In my judgment a share certificate is prima facie evidence of the title of the member to the shares described therein.

In the circumstances therefore I have no hesitation in finding that the First Respondent is a lawful shareholder and director of Second Respondent. The matter, however, does not end there.

One Kagwa who initiated the registration of the company but who never took up shares in the company for reasons which are not immediately apparent to me, has always attended to the administrative side of the business of the company while the Applicant is responsible for the technical side and field work. Kagwa was also

responsible for preparing and keeping the books of account of the Second Respondent and the day to day financial matters thereof. There is absolutely no allegation or evidence however that he was the managing director and I am satisfied therefore that he was merely an employee of the company. By the same token I am satisfied that Kagwa had no direct and substantial interest in the matter since he was not even a shareholder and that consequently Mr. Phoofolo's complaint that he should have been joined as a party in these proceedings has no merit.

In paragraph 12 of his founding affidavit the Applicant Graddy Limpho Tšoaeli makes the following damaging allegations against the said Kagwa:

"12.

> It was towards the end of September 1996 that certain problems arose within the company, because I established that KAGWA was using company funds for his personal matters, and also had instructed Attorneys to transfer all the shares in the company to him and to change the directorships in the 2nd Respondent. He also instructed Attorneys to file the necessary documentation to the effect that the (sic) he was the Managing Director of the 2nd Respondent."

In paragraph 10 of his Answering Affidavit Matlamukele C. Matete does not deny these allegations; he merely contends himself by stating that they were not brought to his notice.

Although Kagwa himself denies these allegations it is significant that he was hauled before a meeting of directors as an employee of second Respondent and

failed to deny the aforesaid allegations made against him as a result of which his services were summarily terminated.

In paragraph 14 of his answering Affidavit First Respondent significantly makes common cause with Kagwa in the following terms:-

"14.

AD PARAGRAPH 18 THEREOF:-

It is true that the account belongs to the company and not applicant, hence it should be the company to complain about its suspension, and not applicant. Since the meeting at which KAGWA was purportedly dismissed was illegally convened, such decision was also unlawfull (sic). Applicant's annexture "D" tells the bank manager irrelevant stories. It certainly does not or request the bank to re-activate the account. The bank account was requested to be frozen because there was a dispute between first respondent and applicant about first respondent's because there was a dispute between first respondent and applicant about first respondent's status in the company. It would therefore not be proper that applicant who has unlawfully usurped absolute control of the company be allowed to operate the company's account by himself alone, until the dispute has been settled. It was for that reason that our then attorney addressed a letter to the bank on my behalf to temporaily (sic) halt the operations in the account. The advise (sic) to have the account frozen was made by the Managing

Director as the signatory and not myself."

I am satisfied therefore that by addressing a letter to the bank to temporarily halt the operations in the account the First Respondent actually interfered with the affairs of the second Respondent to its prejudice. In my view he was thus not acting in the best interests of the Second Respondent or its creditors. On the contrary he acted to the prejudice of both the company and the creditors in as much as it obviously cannot trade or pay its creditors as long as its bank account remains closed.

In fairness to Mr. Phoofolo he conceded as much, and properly so in my view. On this ground alone this application ought to succeed.

See Robinson v Randfontein Estates G.M. Co Ltd. 1921 A.D. 168, 179-180.

Mr. Phoofolo was then constrained to argue that the applicant has no locus standi in as much as the rights violated, so the argument went, are those of the second Respondent and not individual directors. I do not agree. In my judgment a director is entitled to institute action or obtain an interdict against his co directors in a case where the latter are acting against the best interests of the company as in this case. This is more so in the present case in as much as the Applicant is not only a director but also a subscriber and shareholder in the company holding five hundred shares thereof. He is thus the co-owner of the company together with the First Respondent. This court subscribes to the view that a share in a company gives rise to a right of action entitling its owner to a certain interest in the company, its assets and dividends.

See Moosa v Lalloo and Another 1957 (4) S.A. 207 at 222 per Caney J.

On the authority of Setlogelo v Setlogelo 1914 AD 221 at 227 I am satisfied that Applicant has shown a clear right, injury actually committed and absence of similar protection by any other remedy. The closing of the bank account of the company is such a drastic step that the company cannot trade to its obvious prejudice and that of its creditors as well as the Applicant himself.

Although in his Notice of Intention to Oppose dated 27th November 1996 Mr. Phoofolo has given the impression that all the three respondents in this matter are opposing the matter and that he is actually representing them all, he conceded during argument before me that there is no such authorisation from the Second and Third Respondents. There are no resolutions filed on their behalf authorising opposition to these proceedings nor are there affidavits from duly authorised persons to show that these respondents are opposing the matter. In the circumstances I find that there is no opposition to this application by the Second and Third Respondents.

In the result therefore the Rule is hereby confirmed as prayed in terms of prayers 2 and 3 of the Notice of Motion with costs against the First Respondent only.

M.M. Ramodibedi

JUDGE

5th day of March, 1997.

For Applicant: Mr. Buys

For Respondent: Mr. Phoofolo