**CCA/8/2012**

# IN THE HIGH COURT OF LESOTHO

In the matter between:

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

## JUDGMENT

**Coram : Hon. Molete J**
**Date of hearing : 09th August, 2012**
**Date of judgment : 18th October, 2012**

## *SUMMARY*

*Application – Proceedings instituted by Company – Necessity to show that official of the company duly authorized to Institute proceedings – The official must be authorized by resolution of the board – Matter may be dismissed by the Court for lack of proper authority. Disputes of fact – Applicant ought to bring action where there are material disputes – Where disputes should have been foreseen by applicant court will dismiss the application.*

ANNOTATIONS

CITED CASES

**In Re Hydrodam (Corby) Ltd (1994) BLC 180 @ 183.**

**Num v Freegold Consolidated Mines (1998) BLLR 712 at 712.**

**Ts'ekelo v Majalle LAC (2004 – 2006) 606 at 610.**

**Plascon–Evans Paints Ltd v Van Riebeek Parts (Pty) Ltd 1984(3) SA 623 at 634 635.**

**Makhutla and Another v Makhutla and Another LAC (2000 – 2004) 480 at 485.**

STATUTES

**Companies Act 2010**

**High Court Rules 1980**

BOOKS

**Simon Mortimore QC – Companies directors, duties, liabilities and remedies.**

**[1]** The Applicant in this matter sought the following relief on Notice of Motion accompanied by a Certificate of Urgency;

"2. A *rule nisi* be issued and granted…….calling upon respondents to show cause why the following orders shall not be made final;

3 (a) The 1st and 2nd Respondents be interdicted and restrained from taking any dividends, profits and or benefits accruing from 2nd Respondent shareholding in the 3rd Respondent;

4 (a) That it be declared that the 1st Respondent's act of diverting and exploiting the Applicant's exclusive business opportunity to the 2nd Respondent is both wrongful and unlawful;

(b) 3rd Respondent be ordered and directed to expunge from the records its register of members the name of the 2nd Respondent and substituting same with the name of the Applicant;

(c) 2nd Respondent's 15% shareholding in the 3rd Respondent be and is hereby transferred to the Applicant.

(d) 5th Respondent be ordered and directed to expunge from the records its records of shareholders of 2nd Respondent the name of the 2nd Respondent and substituting same with the name of the Applicant;

(e) Alternative to prayer d) 5th Respondent be ordered and directed to facilitate formal transfer 2nd Respondent's shares in 3rd Respondent to the Applicant Company.

5(a) Alternative to prayers 3, and 4, it the 2nd Respondent be directed that to honor terms and conditions of transfer of shares agreement which was concluded by it and the Applicant Company and be directed to transfer its shares held in the 3rd Respondent Company to the Applicant Company as it has been agreed.

(b) The 2nd Respondent be and is hereby held liable and accountable for the loss of all dividends, profits, and/or benefits which it received from the 3rd

Respondent after the breach of agreement from the 23rd December 2011 to the date when this application reaches finality."

**[2]** In the founding Affidavit, the deponent, one Dr Chale Moji states that he is the vice-chairman of the Board of directors of Applicant. He attaches a resolution with five signatures of the Board authorizing him to appoint a legal representative and to sign all necessary papers in the proceedings

**[3]** The relevant paragraph of Dr Moji's Affidavit to these proceedings; that seems to be the reason why this Application was filed in the first place appears in paragraphs 34 and 36 of his Affidavit, where he states as follows;

"34. I was informed by Mr Green telephonically and believe the same to be true that 2nd Respondent represented by the 1st Respondent had some time in January 2012 proceeded to receive M250,000.00 (Two Hundred and Fifty Thousand Maloti) as part payment for dividends. This latter development is clearly evidence that the 1st and 2nd Respondent has clearly reneged from the originally concluded terms. 1st Respondent has clearly dishonored his initial undertaking that he would not use even a cent of dividends and breached the agreement of transfer of shares."

**[4]** He goes on to say at paragraph 36 that;

"This matter is very urgent because we received information from the Applicant 3rd Respondent that the company is about to divide and share dividends. I am informed and reasonably belief same to be true that the dividends to be shared worth millions. The 1st and 2nd Respondents are at liberty to receive such dividend and profits from the 3rd Respondent at any time. The 1st and 2nd Respondent have

already stated and if they are allowed to take more of the dividends, the Applicant shall suffer irreparable harm because that is the benefit which is due to our company."

**[5]** The certificate of urgency filed on behalf of the Applicant, further confirms that the overriding concern and fear of the Applicant was that the 1st Respondent would receive monies to which Applicants claim title.

**[6]** The reasons for urgency are stated as follows in the Certificate;

"1. The Applicant has on the 30th January 2012 received information from the 3rd Respondent that its shareholders are about to share dividends which worth millions and the 2nd Respondent is about to get its share.

2. The Applicant stands to lose a substantial amount of money to the tune of Millions of Maloti, which is likely to be taken by the 1st and 2nd Respondent as share of dividends in the 3rd Respondent. The 1st and 2nd Respondent knows well that 2nd Respondent is not entitled to receive such.

3. The 2nd Respondent has already received M250,000.00 as first payment of the dividends. This has prejudiced the applicant and it seems the 2nd Respondent is likely to get additional payments".

**[7]** The 1st to 3rd Respondents filed their Affidavit to oppose the matter. It was made by 1st Respondent. He raised certain points *in limine* which were argued by Counsel for the parties before the merits were considered.

**[8]** The points *in limine* raised in the opposing Affidavit were;

(a) The absence of *locus standi in judicio* for institution of proceedings.

(b) Resolution to institute proceedings not taken by the Board of directors of Applicant.

(c) Exhaustion of local remedies.

(d) Material dispute of fact.

(e) Lack of urgency.

**[9]** Applicants counsel in argument confined himself to the first two grounds and the material disputes of fact arising in the matter. Mr Ndebele for the Applicant submitted that the matter could proceed to the merits despite the points *in limine* raised by Mr Loubser.

**[10]** On the aspect of authority to institute proceedings and lack of *locus standi* of the deponent to the founding affidavit it appears to be common cause that the deponent is neither a director nor a shareholder of the Applicant company. This is clear from his response to the challenge of authority where he says;

"…… to sign the papers and institute proceedings on behalf of the Applicant company one does not necessarily have to be a director or shareholder of a company. One's authority and/or *locus standi* emanates from the resolution of the Board of directors."

**[11]** Indeed even when one examines the memorandum of association of the company the deponent's name is absent in the list of subscribers to the memorandum of

association. He is therefore neither a director nor a shareholder of the Applicant company.

**[12]** The deponent fails to meet the requirements of a director or manager in any sense. The Companies Act 2010 in Section 2(1) defines director as;

"Director includes any person occupying the position of a director or alternative director of a company, by whatever name".[1]

**[13]** The learned author Simon Mortimore Q.C defines that "the word 'director' as meaning 'the person having the direction, conduct, management or superintendence of the affairs of the company"[2]

In this case before court, the deponent to the Affidavit has not shown or even attempted to place before the court any facts which could lead the court to the conclusion that he is a director, not even *a de facto* director.

**[14]** In **Re Hydrodam (Corby) Ltd** Millet J at page 183 has this to say on that aspect;

"To establish that a person was *a de facto* director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could probably be discharged only by a director"[3]

**[15]** The only function that the deponent relies upon is the institution of the present proceedings, but he has submitted that he need not be a director or shareholder of a

[1] Companies Act 2010, Section 2(1).
[2] Simon Mortimore QC : Companies directors, duties, liabilities and remedies at P64-65.
[3] In Re Hydrodam (Corby) Ltd (1994) 2 BLC 180 @ 183.

company to be authorized. The Applicant therefore submits that he does not need to have any official capacity within the company to institute proceedings on its behalf. That implies that a company need not act through its officials. That argument cannot be valid.

**[16]** Assuming that the court holds the view in favour of the Applicant and the deponent that anybody can institute proceedings on behalf of a company; the question still remains whether such person was duly authorized by the company's Board of directors.

**[17]** The 1st Respondent in his Affidavit says as the chairman of the Board of directors he was never informed of the meeting in which the appointment of deponent was to be resolved. He says at that time there were only two directors of the company being himself and one Dr Hlalele Mofubelu. This fact is confirmed by the Articles of Association of the company where in clause 72 it is provided that;

"The number of directors shall not be less than two (2) nor more than ten (10) the first directors shall be;

Dr Teboho Masia

Dr Hlalele Mofubelu"

**[18]** In his submissions and in reply to the Court; Mr Ndebele conceded that the Board had never met to resolve that additional directors be appointed. It is therefore a mystery how the five individuals who signed the resolution claim to be directors of the company.

**[19]** The submission of the Applicant is that those who signed the resolution are the *appointed directors* alternatively *de facto* directors. It is however a bare allegation without any legal or factual basis. Indeed the direct contrary is apparent from the written submissions of Mr Ndebele for the Applicant where it is said;

"Though there is no formal document to prove the appointment, the court is bound to accept the facts as alleged on behalf of the applicant to the effect that the appointment, were made".

**[20]** It is again a mystery and argument without substance. The court can never be *bound* under any circumstances to accept the facts as alleged by Applicant even where there is no formal document to prove the appointments. The fact that there is no resolution to appoint the additional five members as directors simply means they were never appointed as directors. It cannot be construed otherwise and the court is not bound to accept it, particularly where it is disputed by Respondents.

**[21]** In all the circumstances of this case I am of the view that the deponent to Applicant's Affidavit was not properly appointed to represent the company. He was neither a director nor shareholder in the company; and the people who resolved to appoint him were not the Board of directors of the company and therefore could not authorize him to act on its behalf.

**[22]** It is apparent from the submissions by Mr Ndebele that he fully appreciates this principle of law. This can be found in his written submissions where he quotes the following as trite law, from the case of **Num v Freegold Consolidated Mines**[4].

[4] Num v Freegold Consolidated Mines (1998) BLLR 712 and 716 Para 13

"Individuals purporting to institute proceedings on behalf of the artificial person must prove on balance of probabilities that he has authority to do so …… The question in a matter ……. where the authority is challenged, is always whether the evidence before Court does or does not establish authority …… and if it does not establish authority has been granted, the court has to uphold the challenge of such authority"

That is a correct statement of the law. The court in this matter is of the view that it applies and will follow it.

**[23]** A further aspect that requires the attention of the court are the disputes of fact that arise in this matter, and whether the Applicant ought to have foreseen them. In essence, should the matter have been brought by way of an Action as opposed to an Application.

**[24]** The very basis of this application is in dispute. The applicant says that the 1st Respondent is about to receive dividends which he is not entitled to receive and which lawfully belong to Applicant. The 1st Respondent denies this allegation and states that;

"While I admit that I did receive the sum of M250,000-00 from 3rd Respondent, these were not dividends but payment for my services that I have rendered to 3rd Respondent".

And in his replying Affidavit the Applicant's deponent could not go further than to say;

"Contents herein noted. It is denied that the payment was made for the 1st Respondent's personal services rendered by him personally. The M250,000-00 taken was paid 2nd Respondent as dividends alternatively the benefits that we are complaining about and they ought to have accrued to the Applicant."

**[25]** The Applicant has not placed anything before court to support this essential allegation which is the basis of his Application; not even the supporting Affidavit on one Mr Green from whom he says he obtained the information.

**[26]** The other prayers and relief sought by Applicant are equally incapable of resolution without the hearing of oral evidence; for example;

"4(a) That it be declared that 1st Respondents act of diverting and exploiting Applicant's exclusive business opportunity to 2nd Respondent is both wrongful and unlawful."

and

"4(c) 2nd Respondents 15% shareholding in the 3rd Respondent be and is hereby transferred to the Applicant."

and

"4(d) 5th Respondent be ordered and directed to expunge from the records its records of shareholders of 2nd Respondent the name the 2nd Respondent
and substituting the same with the name of the Applicant."

**[27]** Can the Court or declare that 1st Respondent is diverting Applicants exclusive business without evidence? Can it order transfer of 2nd Respondent's shares in Applicant without evidence? Can it order 5th Respondent to expunge from the shareholders of 2nd Respondent the name of 1st Respondent and substitute it with the name of Applicant without evidence?

The answer to all the above is no and the Court therefore is unable to decide the matter on application.

**[28]** The list goes on and on. It is difficult to find any relief sought by Applicant in this matter that could be resolved without hearing evidence. The rules of court in Rule 8(14) of the High Court Rules that applies here states that if in the opinion of the court the matter cannot be properly decided on affidavit, the court may in its discretion dismiss the application or make an appropriate order to ensure a just and expeditions decision[5].

**[29]** In the case of **Ts'ekelo v Majalle**[6] Grosskoff JA held that in view of the serious dispute of fact that arose in that case the Respondent was not entitled to the relief claimed in prayer (b). The Judge of Appeal in that case went on to emphasize that;

"The denial by the Respondent of a fact alleged by the applicant must of course be more than a bare denial and should also raise *a bona fide* dispute of fact"[7].

[5] High Court Rules – Rule 8(14)
[6] LAC 9 (2004 – 2006) 606 at 610
[7] ibid

**[30]** There are numerous cases that have since followed the criteria set out in the case of **Plascon-Evans Paints Ltd V Van Riebeek Parts (Pty) Ltd**[8]**,** including the matter of **Makhutla and another V Makhutla and another**[9] of our appellate division.

**[31]** In the heads of argument drafted by Mr Chobokoane for the Respondents in this matter, it is submitted that the disputes of fact arising in this application are enough to warrant a dismissal of the Application. I am in agreement with that submission. The disputes in this matter are glaring. They are material disputes of fact and which ought to have been foreseen by Applicant and in the light thereof this matter should not have been brought by Application.

**[32]** It follows that on the reasons stipulated above this Court is bound to dismiss the Application. The order of the Court is as follows;

The application is dismissed with costs.

**L.A. MOLETE**

**JUDGE**

**For Applicant : Mr K. Ndebele**

**For Respondents : Mr P.J. Loubser**

[8] 1984(3) SA 623 (4) at 634 - 635

[9] LAC (2000 – 2004) 480 at 485