

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

ZAKHURA ENTERPRISES (PTY) LTD

APPLICANT

AND

**KHALIL AHMED
FIRST NATIONAL BANK**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Coram : **Hon. Molete J**
Date of hearing : **12th March, 2013**
Date of judgment : **12th June, 2013**

SUMMARY

*Company Law – Director denying agreements with 1st Respondent -
Company Registered under 1967 Act – Number of Members reduced below
minimum required the Act – Court under the circumstances may wind up the
Company – Discretion of the Court to take relevant factors to be considered –
Parties given time to consider their positions to possible winding up order –
Matter adjourned for 90 days for that purpose.*

ANNOTATIONS

CITED CASES

**Excel Health (Pty) Ltd vs Dr Teboho Masia and Others – Court of Appeal
CIV 40 of 2012 (unreported)**

**Marrok Plase (Pty) Ltd v Advanced Seed Co (Pty) Ltd 1975(3) SA 403(A)
page 411C**

STATUTES

Companies Act NO.25 of 1967

BOOKS

- [1] Applicant in this case has approached the Court on urgent basis for a declaratory order that;
- (a) The sublease between Fazila Osman Zakhura and 1st Respondent be declared *null* and *void ab initio*.
 - (b) That the sale agreement between the same two individuals in respect of Applicants stock be declared *null* and *void ab initio*.
 - (c) That the lease agreement between the 1st respondent and 2nd respondent be declared *void ab initio*.
 - (d) That both Respondents be evicted from the premises of 1st Respondent known as Plot Number 0672-518 situated at Mafeteng.

- (e) That 2nd Respondent be ordered to cease all buildings and renovations on the disputed property.
- (f) That the deputy sheriff be authorized to carry out the eviction.
- (g) Costs of the Application against first Respondent and against second Respondent only in the event of opposition.

[2] The Applicants case was that her company, 1st Respondent is the owner of a plot in Mafeteng described Plot Number 06472-518 which is the disputed plot. The Applicant represented by Fazila Osman Zakhura in the proceedings basically alleged that she had been sick and hospitalised due to a problematic pregnancy which removed her from the business from June 2012 until at least November 2012 when she then discovered that a sale agreement and sublease agreement had been entered into purportedly between herself and 1st Respondent.

[3] She denied any participation in the agreement of sale of stock, furniture and appliances worth about R287,915-00 and any knowledge of the sublease agreement transaction in respect of the premises. In short she denied her signature on both these documents. She actually made the statement that her signature “was difinitely forged”, but apparently she took no steps to report to the Police what would amount to theft. In respect of the sublease agreement she said the “agreement is nothing but a forgery”.

[4] In his opposing Affidavit 1st Respondent raised some points in limine; relating to non-joinder; lack of urgency and the lack of authority of the deponent to the founding Affidavit to bring these proceedings. On the

merits he insisted that both documents were signed by Fazila. He said at paragraph 15 of the Affidavit in respect of the agreements;

“.....if it means I cheated or committed fraud, I vehemently deny that. Fazila is deliberately distorting the truth because she now wants the tenant that I secured for herself”.

The tenant referred to was 2nd Respondent Bank.

- [5] When the parties initially appeared before this Court. It was agreed that it would be in the interest of both that the sublease agreement with 2nd Respondent be honoured and maintained, and that the *status quo* be as if the agreements were valid until the matter is finalised. This made sense because none of the parties would gain anything from the ejectment of 2nd Respondent, while they made at least M8,000-00 each from continuing with the sublease with the Bank. In any event some payments were already being made in respect of the sale agreement.
- [6] The case proceeded on the 6th March 2013. **Mr Mosotho** for Applicant was ready to proceed with his expert witness, presumeably on the authenticity or otherwise of his clients signature, but **Mr Ratau** insisted on argument about the authority of the Applicant to bring these proceedings. He submitted that the resolution of that aspect of the matter will dispose of the case entirely.
- [7] Reliance was placed upon the fact that none of the directors of the company being Ismail Osman Zakhura (or Alli Ismail Zakhura in his capacity as the executor of the deceased estate of Ismail Osman Zakhura) and Ahmed Mohamed Modan authorised the institution of these proceedings as directors

of the company. The question was therefore if she could do that on her own in the absence of the other two directors.

- [8] In the replying Affidavit, the Applicant stated that in terms of the Law authority is sufficiently established by alleging that she is both a shareholder and director of Applicant company. There is authority to that effect from both the High Court and Court of Appeal. It has however always also been a good practice to attach a resolution where there is a dispute on authority. It was not done in this case. However it appears that this case need not be determined on that ground as such.
- [9] It is common cause that the Applicant company was registered and incorporated in terms of the Companies Act of 1967; which is the Act that is applicable to it, it is also common cause that one to the directors Ismail Osman Zakhura died in a car accident some time prior to the present proceedings being lodged, and before the new 2011 Companies Act came into operation.
- [10] The estate of Ismail Osman Zakhura appointed Ali Ismail Zakhura as the executor, hence the argument that he should have indicated his approval of the proceedings to be instituted. That may be so, but it is qualified by Article 25(e) of the Company's Articles which provides that;

“If any person shall become entitled to any share by reason of the death or insolvency of any member he shall be bound forth with to offer the same for sale to the members of the Company - at a fair price, such price to be determined by agreement between such person and the directors or in default of agreement by the auditors for the time being of the company,

whose decision shall be conclusive and binding on the company and all other persons interested in the shares.....”

It may therefore be concluded that the executor of the estate had a limited role and the obligation to sell the shares forthwith and could not have any role in the company according to its Articles of Association.

- [11] Regarding the shareholding of Ahmed Moddan, Fazila Zakhura stated in her replying Affidavit that he was her husband; and they were finally divorced in the High Court on the 5th October, 2010. She attached the final decree of divorce granted by my brother Justice Peete on that date.
- [12] She further alleged that Moddan had voluntarily ceased to be a shareholder in the company after he transferred his shares in the company to her for an amount of M50,000-00 maluti. A receipt signed by Moddan was attached. It had no date for the transaction, but bears a stamp of the Master of the High Court dated 19th April 2011. No further Affidavits were filed, and that means Moddan did not dispute the sale of shares to Fazila.
- [13] It would seem that at the time the proceedings were instituted therefore, the Applicant company had only one director, Fazila Zakhura was at the time the sole director hence her inability to file a resolution. The Court of Appeal has held that a failure to register an appointment; (and by extension a resignation); is a “*defect*” within the meaning of section 141 of the Companies Act¹. It followed the case of **Morris v Kanseen 1946 Ac 459 (ttl) at 471** in this regard.

¹ Excel Health (Pty) Ltd vs Dr Teboho Masia and Others – C of A CIV 40 of 2012 (unreported) Page 15

- [14] It was also held by the Court of Appeal in that case that it is not necessary to attach “*a copy of an extract from the records kept at the office of the Registrar of Companies showing who were the directors-----*. *A failure to register their appointments would in any event not affect the validity of their Acts.*”²
- [15] In the present case therefore it would appear that nothing was done to alter the original list of directors or subscribers to the memorandum of association, which is an acceptable defect according to the binding Authority of the Court of Appeal.
- [16] Equally the fact that no changes were registered in the office of the Registrar of Companies specifically to show that Moddan had sold his share to Fazila Zakhura for M50,000-00 is of little consequence according to the Court of Appeal because “*A failure to register their appointments would in any event not affect the validity of their acts.*” This in my view would apply equally to the resignation, sale of shares and other registrable events that the company is obliged to record with the Registrar of Deeds. The Court of Appeal whose decisions are binding on the High Court has held that such omission may be ignored. It followed the case of **Marrok Plase (Pty) Ltd v Advanced Seed Co (Pty) Ltd**³.
- [17] The inevitable conclusion that such authorities have for the case before me is that the Applicant Company has had the number of its members reduced to

² Excel Health Case – supra on Page 14

³ 1975(3) SA 403 (A) at 411C

below two members; in fact one member remains; namely; Fazila Osman Zakhura under Section 173 (d) of the 1967 Companies Act that is a ground for winding up of the company by the Court.

- [18] There are other allegations made by Respondent on record about the fact that the company is no longer actively engaged in any business activity and has since ceased business operations; that it has no trading licence and that it has not filed the necessary financial reports with the relevant authorities. It is however unnecessary to go into those aspects of this case.
- [19] It is also unnecessary to determine the point *in limine* on authority of the Fazila to represent the company because of the possible winding up order that this Court may make.
- [20] There are a variety of factors that the Court should take into account in the exercise of its discretion to order winding up of the company. The relevant section of the Companies Act, is couched in terms that allows the court to exercise a discretion. It is provided that “*A Company may be would up by the Court*” if the number of members is reduced to below two.
- [21] The Court in making its order must consider the following relevant factors;
- (a) That there is a neutral or unconcerned party involved in this litigation being the 2nd respondent who need not be adversely affected by the order.
 - (b) That the parties have also agreed that in any event they both would like to keep the First National Bank as a tenant.

- (c) That Applicant, or Fazila may be given the opportunity to make proposals or recommendations to the Court as to who should be appointed a liquidator.
- (d) That the new Companies Act does make provision for a sole director and shareholder company. In this regard Fazila Osman Zakhura may be desirous of registration under the new Act.
- (e) That the interests of both parties may not be best served by a liquidation order, as none of them asked for nor anticipated it.

[22] In the light of the above, I am not inclined to give an immediate winding up order, and I think it would be just and equitable to allow the parties to reconsider their positions in the light of a possible liquidation order. I will therefore give them an opportunity to do so if it will suit them and if liquidation is preferred to propose the terms and conditions thereof in the light of the factors set out above.

[23] It may be inevitable for the liquidator to refer the question of validity or otherwise of the agreements for determination by this Court. He will be entitled to do so.

[24] The order I make is as follows;

1. The matter is postponed to the 13 September, 2013 being a period of ninety (90) days from today.

2. During that time the parties must consider their options or proposed terms and conditions of a winding up order.
3. If no agreement or compromise solution is reached by 13 September 2013, the order of winding up the company will follow.
4. The parties shall maintain the status quo as regards the arrangements for payment and allocation of the funds as previously agreed and ordered.
5. The costs of the application up to the present shall stand over until the final order is made.

L.A. MOLETE
JUDGE OF THE HIGH COURT

Applicant's Counsel : Adv. Mosotho
Respondent's Counsel : Adv. Ratau