

**IN THE HIGH COURT OF LESOTHO
(Commercial Division)**

In the matter between:

TŠEPONG (PTY) LTD

APPLICANT

AND

**NETCARE HOSPITAL GROUP
(PTY) LTD**

RESPONDENT

JUDGMENT

Coram : **L. Chaka - Makhooane J**
Date of hearing : **26th March, 2015**
Date of Judgment : **20th August, 2015**

SUMMARY

Application to refer the matter to arbitration – Court finding that the parties have a Shareholders’ Agreement and Clause 26 provides for arbitration – Matter referred to arbitration.

- [1] The applicant initially approached the Court on urgent basis seeking prayers that are couched in the Notice of Motion in the following manner:
1. *The normal modes and periods of service be dispensed on grounds of urgency hereof.*

2. *A rule nisi be issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondent to show cause, if any, why:*
 - (a) *The Special Resolution passed by the Board of Directors of the Applicant on the 12th May 2014 shall not be declared valid and of full force and effect.*
 - (b) *The applicant's decision to commission a forensic audit into its own affairs shall not be declared valid*
 - (c) *The Respondent, in its capacity as the appointed Administrator of Queen Mamohato Memorial Hospital and Maseru Urban Area filter clinics on behalf of the Applicant, shall not be ordered and directed to cooperate fully with any forensic auditor(s) appointed by the Board of Directors of the Applicant in terms of the Special Resolution of the 12th May, 2014.*
3. *The Respondent pay costs of this application on attorney and own client scale.*
4. *Further and / or alternative relief.*
5. *Costs of suit on attorney and client scale*
6. *Prayer 1 operates with immediate effect as interim relief.*

[2] The application is opposed in its entirety, including the question of urgency. **Mr Mosotho** for the applicant appeared before me together with **Mr Zeitzman** and following their representations, the Court granted an order for dispensation. However, in order to balance the scales, the Court also insisted that the parties agree on a time frame within which all the papers will have been filed and exchanged. Dates were agreed upon including the filing of heads of arguments.

- [3] The matter was set down for hearing for the 22nd July, 2014. The matter was postponed once since then to the 4th August, 2014 and the *rule nisi* extended thereto. Nothing happened in this matter until the 26th March, 2015 when **Mr Mosotho** appeared together with **Mr Green SC** who was now appearing for the respondent. Obviously the *rule nisi* had lapsed. Be that as it may, of interest is the fact that in perusing the record, it is apposite to mention that only the respondent had filed its heads of argument since the 4th July, 2014 and that the applicant had not.
- [4] It was at this juncture that **Mr Mosotho** informed the Court that they had written to the respondent through its Attorney of record **Mr Kleingeld** that the matter be referred to arbitration. **Mr Green SC** opposed that move arguing that what should be referred to arbitration would be a dispute between Tšepong (Pty) Ltd and Netcare (Pty) Ltd. He insisted that the current application before the Court is a dispute between shareholders and **Dr L. Mosotho** for Afri'n nai Health (Pty) Ltd (“Afri'n nai”) and that, that dispute cannot be taken to arbitration. According to him the wrong parties are before the Court.
- [5] What seems to puzzle me in this matter is that as already mentioned, initially the matter came to Court under the guise of an urgent application. This was in June 2014. The Court then set a time line for the filing of papers and afforded the respondent an opportunity to supplement its Answering Affidavit and even allowed the parties to file heads of argument. This was in July 2014. Amazingly seven (7) months later the applicant approaches the Court for the Court to refer the matter to arbitration. No reasons were advanced for the lull.

- [6] Be that as it may, it seems to me that all parties are agreed that there is a Shareholders' Agreement which provides for amicable dispute resolution and arbitration.¹
- [7] The respondent's counsel calls for the Court to dismiss the application in its entirety and not even consider the arbitration route. I respectfully disagree. It would be remiss of me to overlook the fact that there is a dispute between the shareholders. The question that would be asked here, is whether this Court as opposed to arbitration, would be the proper forum to decide the shareholders dispute. I believe that the dispute *in casu* falls to be referred to arbitration, in terms of **Clause 26** of the Shareholders' Agreement.
- [8] The respondent has raised the issue of non-joinder more than once. The problem here is that no arguments have been heard in the main application for the Court to address the issue of non-joinder and any other question raised. It shall be recalled that before the matter was heard, the applicant applied for this matter to be referred to arbitration.
- [9] I am satisfied that it makes sense to allow the process of arbitration to proceed to finality and that the Court must indeed give effect to the agreement of the parties in terms of the Shareholders' Agreement.

¹ See clause 26 of the Shareholders' Agreement.

[10] I thus make the following order:

- (a) The matter is referred to arbitration in terms of **clause 26** of the Shareholders' Agreement.

L. CHAKA-MAKHOOANE
JUDGE

For Applicant : **Adv. Green SC**

For Respondent : **Adv. Mosotho**