CCA/0063/2020

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

In the matter between:

RICHARD FRIEDLAND	**1ST APPLICANT**
CHRISTOFFEL SMITH	**2ND APPLICANT**
NETCARE HOSPITALS GROUP (PTY) LTD	**3RD APPLICANT**
NETCARE HOSPITALS (TPY) LTD	**4TH APPLICANT**
MAY MOTEANE	**5TH APPLICANT**
WOMEN INVESTMENT COMPANY (PTY) LTD	**6TH APPLICANT**

AND

LEHLOHONOLO MOSOTHO	**1ST RESPONDENT**
AFRI'NNAI HEALTH (PTY) LTD	**2ND RESPONDENT**
NORMAN MOJI	**3RD RESPONDENT**
EXCEL HEALTH N SERVICES (PTY) LTD	**4TH RESPONDENT**
THUSO GREEN	**5TH RESPONDENT**
D10 INVESTMENT (PTY) LTD	**6TH RESPONDENT**
TSEPONG (PTY) LTD	**7TH RESPONDENT**
REGISTRAR OF COMPANIES	**8TH RESPONDENT**
ATTORNEY GENERAL	**9TH RESPONDENT**
CENTRAL BANK OF LESOTHO	**10TH RESPONDENT**
NEDBANK LESOTHO LTD	**11TH RESPONDENT**
DEVELOPMENT BANK OF SOUTHERN AFRICA	**12TH RESPONDENT**

IN RE:

LEHLOHONOLO MOSOTHO	**APPLICANT**

AND

TSEPONG (PTY) LTD	**1ST RESPONDENT**
REGISTRAR OF COMPANIES	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

JUDGEMENT

Coram : Mokhesi J

Date of Hearing : 09th SEPTEMBER 2020

Date of Judgement: 15TH OCTOBER 2020

SUMMARY

CIVIL PRACTICE: *The applicants seeking rescission of an order in terms of Rule 45 of the High Court Rules- Definition of a director of a company considered and applied- Application for rescission granted as prayed.*

ANNOTATIONS:

BOOKS:

Herbstein & Van Winsen ***The Civil Practice of the High Courts of South Africa (2009) 5ed. Vol.1***

CITED CASES

Netcare Hospital Group (Pty) Ltd v Afrinnai Health (Pty) Ltd and Others (2530/2014 (2015) ZAFSHC40 (26 Feb.2015)

Leen v First National Bank Lesotho (Pty) Ltd C of A (CIV) No.16A/16 [2016] LSCA 27 (28.10.2016)

Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape [2003]2 ALL SA 113

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)

Priestly v Clegg 1985(3) S.A 950

Athmaran v Signh 1989 (3) SA 953 (D) 956

Theron NO v United Democratic Front and Others 1984 (2) 532

Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) ; 2012 (4) SA 593 (SCA)

Re Kaytech International P/C; Secretary of State for Trade and Industry v Kaczer and others [1999] 2 BCLC 351

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)

National Independence Party & others v Manyeli 2007-2008 LAC 10

Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 SA 151(0)

Foss v Habottle [1843] EngR 478; (1843)2 Hare 461

Re Kaytech International P/C; Secretary of State for Trade and Industry v Kaczer and Others [1999] 2 BCLC 351.

National Independence Party & others v Manyeli 2007-2008 LAC 10

Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 SA 151(0)

Foss v Habottle [1843] EngR 478; (1843) 2 Hare 461.

Edwards v Halliwell [1950]2 All ER 1064

Rosebank Mall (PTY) v Cradock Heights (PTY) LTD 2004 (2) SA 353

STATUTES:

High Court Rules 1980

Companies Act No.18 of 2011

MOKHESI J

[1] INTRODUCTION

This is an application for rescission in terms of Rule 45 of the High Court Rules, 1980[1]. The foundational basis of the applicants' case is that the order against which rescission is being sought was either sought or granted erroneously.

[2] FACTUAL BACKGROUND

A brief factual genealogy of this case is apposite. The applicant in the main application was **Dr Lehlohonolo Mosotho. Tšepong (Pty) Ltd**, **Registrar of Companies** and **Attorney General** were cited as the respondents. Dr Mosotho is a director of one of Tšepong (Pty) Ltd's shareholders, Afrinnai Health Proprietary Limited. Mosotho sued in his personal capacity as one of the directors of Tšepong, seeking quite a plethora of reliefs. The application was moved *ex parte* and on urgent basis on the 26th June 2020. The court granted interim reliefs in terms of prayer 3 of the application. Mr Letsika appeared before court representing Tšepong (1st respondent). The *rule nisi* was issued returnable on the 08th July 2020. On that date both Mr Potsane, for the applicant, and Mr Letsika for the 1st respondent company, respectively were before court. Mr Letsika intimated that inasmuch as the 1st respondent had filed a Notice of Intention to oppose, the discussion between the him and Mr Potsane had led to the company to no longer oppose the application, hence confirmation of the Interim Order. For completeness, though a bit longish, the terms of the order are worth reproducing as they will become relevant in the course of this judgment:

[1] Rule 45

"1. The Rule Nisi herein issued on the 26th June, 2020 is hereby confirmed in that:

1.1 The Board of Directors of the First Respondent is ordered and directed to operate the banking accounts of the First Respondent and in that regard it be ordered and directed that third parties including banks, financial institutions and other institutions must act on the instructions of the Chairperson and such other member of the First Respondent is Board as the Board of Directors shall designate by written resolution or on the instructions of such names of the Board of Directors as the Board of Directors by majority of three (3) members shall by written resolution designate, concerning all transactions in respect of the banking accounts, negotiable instruments, cheques, promissory notes and other documents of a liquid in nature for and on behalf of the First Respondent.

1.2 The Board of Directors making a majority of three (3) members in a lawfully convened meeting; and the Court shall be the sole authority to determine if such meeting was or was not convened lawfully, shall not be entitled to pass a resolution.

1.2.1 Authorising the withdrawal of moneys from any banking institution, financial institution; insurance company, or any company or any institution which holds moneys and funds for the account of and on behalf of the First Respondent;

1.2.2 Changing the signatures of any person including the current signatories at any banking institution or financial institution operating the bank accounts of the first respondent.

1.2.3 Making payments for and on behalf of the First Respondent in the course of business of the First Respondent and in particular the Board of Directors be given full powers to authorise and approve all kinds of payments to shareholders, directors, creditors and service providers of the first respondent;

1.2.4 Filling vacancies on the Board of Directors or its committees.

1.2.5 Adopting, amending or repealing by-laws including articles of incorporation and shareholder agreements subject to the provisions of the Companies Act.

1.2.6 Establishing a committee which shall consist of, among other persons, at least one director and may delegate the committee, any one of its powers except its powers as contemplated in Section 62(1) of the Companies Act;

1.2.7 Authorising consultants, forensic auditors, financial advisors; legal advisors and such other advisors as the board of directors shall engage, to conduct an audit of the books of accounts, financial statements, documents and to provide such advice as they in their professional

judgment shall deem fit and generally for carrying out their functions and obligations as instructed by the board of directors to do such other things as the board of directors shall require and would of if personally executing such assignments;

1.2.8 Authorising lawyers, debt collectors or other professionals to institute or defend legal proceedings for and on behalf of the First Respondent for any cause whatsoever including but not limited to:

1.2.8.1 Collection of debts and moneys due and payable to the First Respondent;

1.2.8.2 Defending legal proceedings for and against the First Respondent;

1.2.8.3 Settling, compromising or terminating such legal proceedings;

1.2.8.4 Arbitration of disputes between the First Respondent and its shareholders directors, the Government of Lesotho and Other third parties.

1.3 Board of Directors of the First Respondent is allowed and permitted to enter into any agreement or purport to act on behalf of the First Respondent and to represent to any person or body that they are entitled to represent the views, affairs, business and management of the first respondent as long as their resolutions have been approved and signed by a minimum of three (3) directors who attended a meeting

lawfully convened in accordance with the Companies Act or the Articles of Incorporation.

1.4 The resolutions and other decision of the board of directors made by them while they purported to act on behalf of and for the First Respondent and specifically the resolution, if any, that purported to authorise certain board members to engage in certain defined activates such as the engagement of forensic auditors, lawyers to represent the First Respondent and other consultants, which were necessary for the protection of the rights and interests of the First Respondent, be declared to have been validly made and passed as long as they were supported by a minimum of three (3) directors in a meeting convened for that purpose;

1.5 It be declared that all the resolution passed and approved by three (3) members of the First Respondent's Board of Directors are binding on the First Respondent, its shareholders, directors, employees and third parties with the consequence that the directors passing such resolutions are entitled to ensure their compliance in implementing them in accordance with law;

1.6 The resolution dated 19th December 2019 passed by three (3) out of five (5) board members of the First Respondent in terms of which the board of directors resolved:

1.6.1 To defend and oppose the relief sought in proceedings CCA/01/158/2019 between Christophel Smith and Tšepong (Pty) Ltd;

1.6.2 To appoint legal representatives to represent the first respondent in those legal proceedings;

Is declared to be valid and in compliance with the Companies Act with the result that the First Respondent is liable for the fees of Board of Directors be entitled to pay their reasonable fees as in its sole discretion shall determine.

2. The Board of Directors, acting on the basis of majority of its members with a minimum of three (3) members, shall always be entitled to pass and approve resolutions on behalf of and for the First Respondent and that such resolutions shall be acted upon by any person as the decisions of the First Respondent and any acts committed and done as a result of such resolutions shall be taken to be binding upon the First Respondent, its Board of Directors and Shareholders.

3. There is no order as to costs"

[3] It should be stated Tšepong was incorporated in 2006 to provide health care and other services at Queen 'Mamohato Memorial Hospital on behalf of the Government of Lesotho in terms of the Public Private Partnership Agreement ("PPP Agreement") concluded between Tšepong and the Government of Lesotho on the 27th October 2008. Tšepong has five shareholders, namely Netcare Hospital Group Proprietary Limited ("Netcare") which has shareholding of 40% and a majority shareholder therefor; Women Investment Company Proprietary Limited, a minority shareholder with 10% shareholding ("Women"); Afrinnai Health Proprietary Limited ("Afrinnai") with 20% shareholding; Excel Health Proprietary Limited ("Excel") with 10% shareholding; D10 Investments

Proprietary Limited ("D10") with 10% shareholding. The Chief Executive of Netcare and directors of other shareholders comprise the board of directors of Tšepong. That there is disharmony among shareholders is not an understatement, this is given legal wrangles which have played themselves out before this Court, and the courts of South Africa **(See: *Netcare Hospital Group (Pty) Ltd v Afrinnai Health (Pty) Ltd and others*[2])**.

[4] Following confirmation of the Interim Order, it would appear, the 1st applicant in the rescission application first got wind of its existence when an instruction was issued to Nedbank effecting the terms of the order. Consequently, the applicants in the current recession application launched an application for rescission of that order. In the current application the applicants are; 1st applicant Dr Richard Harold Friedland who is one of the directors of Tšepong and Chief Executive Officer of Nedcare; 2nd applicant, Dr Christoffel Smith, who is General Manager: Finance Netcare and who identifies himself also as a director of Tšepong. I will come to the issue of his directorship in due course as it is disputed; 3rd applicant, Netcare Hospital Group Proprietary Limited (Netcare) which is a major shareholder of Tšepong; 4th applicant, Netcare Hospitals Proprietary Limited ("Netcare Hospitals"); 5th applicant, May Ada Moteane one of Tšepong directors and a representative of 06th applicant, Women Investment Company Proprietary Limited ("Women"). The respondents are Lehlohonolo Mosotho who is one of directors of Tšepong and a representative of the 2nd respondent, Afrinnai Health Proprietary Limited which is also Tšepong shareholder; 3rd respondent, Norbert Moji one of the directors of Tšepong and a representative of its shareholder and 4th

[2] (2530/2014 (2015) ZAFSHC40 (26 Feb.2015)

respondent Excel Health Proprietary Limited; (Netcare Management") a subsidiary of Netcare which provides health and other essential services to Tšepong in terms of a Clinical Services, Equipment, IM&I and Soft facilities Management Agreement concluded between itself and Tšepong; 5th respondent Thuso Green, one of Tšepong's directors and a representative of its shareholder D10 Investments Proprietary Limited; 7th respondent, Tšepong Proprietary Limited; 8th respondent, the Registrar of Companies; 9th respondent, Attorney General; 10th respondent, Central Bank of Lesotho; 11th respondent, Nedbank Lesotho Limited; 12th respondent, the Development Bank of Southern Africa. These are the parties to this rescission application.

[5] The nub of the applicants' case as I understand it is captured in paragraphs 27-28 of Smith's Founding affidavit, in which he says:

> *"27. The effect of the Final Order is that it effectively hands over the control of Tšepong's bank account to only three of six directors on Tšepong's board, in breach of the express provisions of the Tšepong Shareholders' Agreement. The terms of the Final Order also contradict the express provisions of the Management Agreement between Tšepong and Netcare Management, which was concluded on or about 20 March 2009, and in terms of which Netcare Management (and later Netcare Hospitals) was appointed as Manager and administer of the Company's business. Clause 6.11 of the Management Agreement provides that Netcare Hospitals' identified representatives shall be the only signatories to the company's bank accounts.*

28. The shareholders Agreement and the Management Agreement were concluded in consequence and fulfilment of the PPP Agreement. A breach of these agreements are to my understanding, a breach of the PPP Agreement, and risks the continued operation of the LPR Hospital."

[6] The applicants contend that they were not aware of the main application which they argue should have been served upon all Tšepong's shareholders and directors, and that they should have been cited as well. And, so, the context in terms of which the applicants seek to rescind the Final Order is its prejudicial effect on the Shareholders Agreement, Netcare Management Agreement to which Tšepong (even though "it" decided not oppose the application) is a party, and lastly the PPP Agreement.

[7] In response to the application, 1st respondent, Dr Mosotho and 3rd respondent Dr Moji and 7th respondent, (Tšepong) raised issues pertaining to *locus standi* of the applicants to institute these proceedings, without following the provisions of Section 77(1) of the Companies Act NO. 18 of 2011 relating to derivative actions. The attack against Dr Smith is even more strident as they say he is not one of Tšepong's directors as his name does not appear on the register of Tšepong's directors filed with Registrar of Companies. Dr Mosotho also raised the issue of misjoinder of 2nd, 6th, 10th and 12th respondents as no relief is sought against them.

[8] **Issues to be determined:**

(a) Whether Dr Smith is a director of Tšepong (Pty) Ltd.

(b) Whether the applicants, as directors and shareholders of Tšepong (Pty) Ltd have *locus standi* to bring this application.

(c) Misjoinder:

[9] Rescission in terms of Rule45 (1) (a).

This rule provides that the court may *mero motu* or on application by a party affected by the order, rescind or vary an order or judgment erroneously sought or granted in the absence of any party affected by it. A judgment or order will be rescinded in terms of this sub-rule if at the time the judgment or order was issued there existed a fact which if the judge would have been aware it would not have granted the judgment or issued an order **(*Leen v First National Bank Lesotho (Pty) Ltd C of A (CIV) No.16A/16*[3]*).*** As to the exposition of the proper context for interpretation of Rule 45 see: ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*** [4].

[10] An order granted in the absence of a party who has a direct and substantial interest in the outcome of the case falls within the mould of erroneously granted judgments because it is a salutary principle of our law that a court cannot and should make an order which prejudicially affect parties who are not before it who have a direct and substantial interest in outcome of the case (***Amalgamated Engineering Union v Minister of Labour***[5] **; *Priestly v Clegg*[6])**. Even where the court was not legally competent to issue an order, is an order erroneously issued **(*Athmaran v Singh*[7])**. The court has

[3] [2016]LSCA 27 (28.10.2016 at para. 28
[4] [2003]2A11 SA 113 at para.4
[5] 1949 (3) SA 637 (A) at 651
[6] 1985(3) S.A 950 at 953I-954I
[7] 1989 (3) SA 953 (D) 956 infine – 957A

a wide discretion whether or not to grant an application under this rule, which discretion will be exercised in favour of the applicant where the applicant:

> "…….through no fault of his own, not afforded an opportunity to oppose the order granted against him, and when, on ascertaining that an order has been granted in his absence, he takes expeditious steps to have the position rectified." (***Theron NO v United Democratic Front and others***[8])

[11] Whether Dr Smith is one of Tšepong's Directors:

The meaning of a "director" must be sourced from the provisions of the Companies Act No.18 of 2011 (the "Act"). S.56 of the Act defines a "director" thus;

> *"56(1) For the purpose of this Part, "director" in relation to a company, includes-*
>
> *(a) a person who exercises or is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the articles of incorporation of the company, would be exercised by the board; or*
>
> *(b) a person to whom or duty of the board has been directly delegated by the board with that person's consent or*

[8] 1984 (2) 532 at 536 G-H

acquiescence, or who exercises the power or duty with the consent or acquiescence of the board.

(2) If the articles of incorporation of a company, confer a power on shareholders which would otherwise be exercised by the board, a shareholder who exercises that power or who takes part in deciding whether to exercise that power shall be deemed, in relation to the exercise of that power, to be a director for purposes of this part."

[12] This section has to be read with s.58 (3), which provides that:

"(3) A person shall not be appointed a director of a company unless he or she has consented, as in the Schedule, Form8, to be a director and certified that he or she is not disqualified from being appointed or holding office as a director of the company."

It is S.58(3) which elicited much spirited debate from the respondents' counsel; the argument being that Dr Smith has not consented as required by S.53(3) nor certified that he is not disqualified from being a director as his name does not appear on the documents lodged with the Registrar of Companies. It is common cause that this is the case, however, the fact that Dr Smith has not consented and certified as required by S.58(3) is not determinative of the question whether or not he is a director. This will involve interpretation of S.56 and S.58 (3) of the Act. It is trite that interpretation is a unitary process; It is aimed at ascribing the meaning to words used in the provision of the statute, deploying the ordinary rules of grammar and syntax; the context in which the provision appear, its purpose

and the material known to its drafters fall into the matrix of considerations (***Natal Joint Municipal Pension Fund v Endumeni Municipality***[9].

[13] By using the word *"includes"* under S.56(1) legislature signified a clear intention not to limit the definition of a 'director' to scenarios mentioned under S.56(1) and (2). It will be observed that even under S.56(1) that definition is expansive to include persons who actually control the company but may not necessarily have been validly appointed as such, and those who are "entitled" to exercise control. The ordinary meaning of the word *"entitled"* according to **Concise Oxford English Dictionary 10th Ed.** (Revised) by Judy Pearsall at p.475:

> *"1. Give a right to. 2 give a title to (a book, play etc)"*

In my judgment the use of the word in S.56(1) (a) would refer to a situation where a person was validly appointed to be director. A person who is validly appointed would thus be 'entitled' or have a right to control the company. When S.56 is real together with S.58(3) a clear picture emerges. When appointing a director, certain statutory formalities such as consenting and certifying non-disqualification must be followed, but when it comes to defining a "director" is, the Act eschews formalism in favour of substantive or situational reality.

[14] This statutory recognition of substantive reality when it comes to defining a director serves the purpose of recognising that there are different types of directors. These different types are recognised in our corporate law, *viz*; (a) *de jure* director – director validly and formally appointed; (b) Nominee

[9] [2012] 2 All SA 262 (SCA) ; 2012(4) SA 593 (SCA at para 18)

director, (c) puppet director; (d) shadow director, and (e) *de facto* director. It is with the last type with which we are concerned in this case. A *de facto* director is a director who was not appointed either validly and formally or was not appointed at all (***In re Hydrodam (Corby) Limited [2994]2 BCLC 180***. For characterization of a director as *de facto*, a person must have assumed responsibilities, status and function in the company 'as if he were a *de jure* director' (***Re Kaytech International PLC; Secretary of State for Trade and Industry v Kaczer and Others***[10]**)**.

[15] With this legal background out of the way, I revert to the facts of this case. Crucially, as regards the Dr Smith, Dr Moji (3rd respondent) makes the following telling allegations in his answering affidavit:

> *"26. The second applicant plays a key role in the respondent company as a representative of Netcare, who have management contract with Tšepong and have effectively assumed its mandate as a matter of fact on the ground. The second applicant is the source of frustrations of the operations of Tšepong and has been responsible for causing operational havoc and uncertainty by pursuing an unnecessary aggressive stance against the Government of Lesotho through the Ministry of Health ("Government")"*

And further in para. 29 said:

> *"29 It is important to mention that the entire project ie its implementation and execution including invoicing is in the hands of the second applicant and Netcare. He operates the bank accounts*

[10] [1999]2 BCLC 351

of the respondent company by arrangement as I will fully explain below on how the signing of Tšepong's bank accounts is done….."

Under para.30 he says;

"30. In particular the second applicant failed to provide information on how much Netcare and Botle have benefited under the different contracts that they have with Tšepong. The reason is not hard to find and I will provide substantiated evidence later on, he is conflicted. He is a director in Botle. He is an employee of Netcare. He is a signatory to the banking accounts of Tšepong and as a matter of fact is the "Chief Executive Officer" of Tšepong because every affair of the company revolves around him and without him nothing happens. He defies the authority of the board of directors and is supported by his employers, Netcare and Netcare Hospitals."

[16] It is common cause that Dr Smith who is an employee of Tšepong's major shareholder, Netcare, was not formally appointed as director in terms of S.58(3). This shortcoming notwithstanding, it is evident that on the ground Dr Smith exercises substantial powers as alluded to by Dr Moji. He also sits on the board as evidenced by the board minutes annexed to the papers filed of record. The above averments coming from one of the directors of Tšepong, regarding Dr Smith's involvement in the company, are telling. I find Dr Moji's questioning of Dr Smith's directorship in this application disingenuous given that coming from his own mouth, the latter exercises substantial control at Tšepong, even to the extent, as he suggests, of defying the board of directors. Clearly, Smith is a *de facto* director. I therefore, find that the objection that Smith is not Tšepong's director falls to be rejected.

[17] Whether the applicants, as directors and shareholders of Tšepong (Pty) Ltd have *locus standi* to bring this application on the strength of Tšepong Shareholders Agreement:

I agree with the applicants that the proper context within which to decide this application and the issue of the applicants' *locus standi,* is the context in terms which Tšepong as the company came into existence, and the agreements it entered into consequent thereto. *Locus standi* has two facets to it. The first aspect refers to capacity of the litigant to institute the proceedings, and the second facet relates to the interest the litigant has in the relief claimed, or the right to claim relief (Herbstein & Van Winsen ***The Civil Practice of the High Courts of South Africa (2009) 5ed. Vol.1*** at 143. A party must have a direct and substantial interest in the subject-matter of the application. As regards parties to multi-party agreements the remarks of Cilliers AJ in ***Rosebank Mall (PTY) v Cradock Heights (PTY) LTD***[11] at p.366 para.14, are apposite:

> *".....The mere feature that a person is a party to multi-party agreement does not necessarily have the consequence that such a person has a direct and substantial interest of a legal (in contradistinction to financial) nature in litigation between or among other parties to the agreement. It depends on an analysis of the rights and obligations created by the multi-party agreement. Where a right sought to be enforced vests in parties jointly, or an obligation sought to be enforced rests on parties jointly, joinder of the joint creditors or joint debtors is generally necessary. Such joint*

[11] 2004 (2) SA 353

contracting parties are in a similar position to joint owners and partners…"

It is common cause that Tšepong came into being to be a referral hospital. The idea of a referral is the brainchild of the Government of Lesotho (GOL) which saw a dire need to have a referral hospital in the kingdom. In order to achieve this goal, the GOL entered into a Public Private Partnership Agreement with a successful bidder for the provision of this critical health service. Tšepong was a successful bidder and therefore, the main player in this project. Tšepong is a juristic person duly incorporated in terms of the Company Laws of Lesotho. Following its incorporation, it entered into Shareholders Agreement with all its shareholders catering for a number of matters including (purposes of this judgment) regulation of meeting of the board, voting and quorum for board meetings and appointment of directors.

[18] On the appointment of directors the Agreement provides that (in clause 12.2.1) that each shareholder holding 20% of the equity shall be entitled to nominate one (1) director for every 20% of the equity that the shareholder holds, and to have such a director appointed by the Board. Regarding the issue of quorum for board meetings the agreement provides (in clause 13.6.1) that:

"A quorum at any Board meeting shall be any 3 directors, save that a quorum must include one Director who has been nominated by Netcare, present at the commencement and for the duration of the meeting."

[19] It should be stated that Tšepong had further concluded a Management Agreement with the subsidiary of Netcare, Netcare Hospitals (4th applicant) in terms of which the latter was to manage Tšepong, and to do all sorts of

things associated with management, but crucially, for purposes of this judgment (under clause 6.11) to:

"6.11 have sole authority (but subject to the PPP Agreement and any agreement for financing of the Business with lenders) to open, operate and sign banking accounts and negotiable instruments of the Business and have full access to all books and records of the Business to enable it to perform its duties and functions as set out herein;"

[20] The respondents had argued that the terms of Shareholders Agreement are contrary to S.64(2) of the Act. I do not wish to enter that debate now as the issue before this court is whether its order should be rescinded on the basis that the applicants were not served with the application in a matter in which they have a direct and substantial interest in its outcome, variously on the basis of the Shareholders Agreement, Management Agreement between Tšepong and Netcare Hospitals, and PPP Agreement itself.

[21] I turn to consider the terms of the Final Order consider indeed prejudiced the applicants' rights in the shareholders' and Management Agreements: As the starting point, quiet clearly, paragraph 1.1. of the Final Order ordering that the Board of Directors of Tšepong a to operate its banking accounts runs counter to Clause 6.11 of the Management Agreement and is prejudicial to the 4th respondent's interests. That order could not have been validly made without citing the 4th respondent and consequently being heard before the order was issued, I therefore find that the 4th respondent had a direct and substantial interest in the subject-matter and outcome of the main application.

[22] As regards shareholders Agreement it is equally clear that when the Final Order decreed that the Board of Directors by means of a resolution should amend or repeal Shareholders' Agreement without affording each shareholder an opportunity of being heard, was untenable. There is no merit in the applicants' argument that the directors representing respective shareholders should have been served with the main application and joined as they have a direct and substantial interest in the outcome of the application. It is salutary that when a wrong is committed against the company it is that company that is the proper plaintiff, not anybody else-including its directors. The directors do not have any direct and substantial interest in the matter in which company's interest are at stake, theirs is only financial in the least. In conclusion therefore, the 1st, 2nd and 5th applicants do not have the *locus standi* to institute this proceeding. As for the rest of the applicants it is undoubtedly clear that they were not served with the application, and in their absence prejudicial orders were made. It is trite that an order which prejudicially affect a party who was heard before it was issued is a nullity (***Amalgamated Engineering Union v Minister of Labour [12]: National Independence Party & others v Manyeli[13])***

[23] Shareholders Agreements are recognised in our Company Law, for example in ***Russell v Northern, Bank Development Corporation Ltd [1992]1 W.L.R. 588***, the court accepted the validity of personal contractual obligations between shareholders that can effectively prevent alterations of the articles of incorporation and for their enforcement by specific performance. However, in the same case it was held that a company could

[12] 1949 (3) SA 637 (A) at 659
[13] 2007-2008 LAC 10

not validly by means of an agreement bind itself not to alter its articles of association.

[24] Mr Letsika, for the 7th respondent, further advanced an argument that applicants are non-suited to bring this application unless they comply with the provisions of S.77(2) of the Act, by first seeking leave of Court to bring the proceedings.

> *"77(1) subject to subsection (2), a shareholder or director of a company may apply to court for leave to bring proceedings in the name and on behalf of the company or a related company, or intervene in proceedings to which the company or a related company is a party, for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company or related company."*

This section is a statutory manifestation of the rule in ***Foss v Habottle***[14]**,** though in an attenuated form**.** This rule is to the effect that individual shareholder cannot bring proceedings to complain of irregularities in the manner in which the company is being run where the irregularity can be cured by majority vote, but this does not cover situations the illegality is being complained of because the majority cannot cure the illegality by a vote. S.77 is a statutory attenuation of the harshness and or rigidity of this rule. I do not wish to discuss this rule and its relation to S.77. It suffices for purposes of this judgment to have concisely stated it. The full gamut of the rule was articulated in ***Edwards v Halliwell***[15]. In my judgment, reliance by the Mr Letsika on S.77 as non-suiting the applicants in this case is quite misplaced. Shareholder and the management agreements to which

[14] [1843] EngR 478; (1843)2 Hare 461
[15] [1950]2 All ER 1064 at 1066-7

Tšepong is a party, are contracts which create rights and obligations as between the contractants, and if as in this case, a third party (Dr Mosotho) assails the contract to which he is not party possibly with the collusion of one of the contractants (Tšepong) without citing those parties, the latter are entitled to approach this Court to rescind that decision. This being purely a matter in which parties to the contracts are seeking to protect their rights under the contracts, is tenable and independent, and did not warrant invocation of S.77. The two agreements gave rise to rights in *personam* enforceable by the parties to the contracts.

[25] Misjoinder of 8th to 12th respondents:

It is common cause that there was no order sought against these respondents. These respondents as it was argued by Mr Potsane, for the 1st respondent, were misjoined. There no order sought against them, neither do they have any "legal interest in the subject matter of the action… which could be prejudicially affected by the judgement." (***Henri Viljoen (Pty) Ltd v Awerbuch Brothers***[16]**.** The Development Bank of Southern Africa (12th respondent) only has a financial interest in the outcome of the litigation by virtue of having advanced loans towards the carrying out of the project, but their interests end there. I therefore find that the 8th to 12th respondents have been misjoined in these proceeding.

[26] Costs:

Dr Mosotho launched the proceedings in the main application in his personal capacity as a director. It is trite that costs are in the discretion of the Court and that they follow the event. I therefore, I do not see any reason for not following these trite principles in this case. This costs order is not

[16] 1953(2) SA 151(0) at 167H

applicable the T'sepong as in my judgment it should not be made to bear the consequences of the toxic fights between its shareholders.

[27] In the result, the following order is made:

(a) The Final Order granted by this Court on 8th July 2020 be and is hereby rescinded.

(b) Costs are awarded to the 3rd, 4th, and 6th applicants against the 1st respondent.

(c) Under *Prayer for further and/ or alternative relief*, Dr Mosotho is directed to join the applicants as the respondents in the main application.

MOKHESI J

For Applicants : **Adv. M.E. Teele K.C**
Instructed by Harley and Morris Attorneys

For 1st Respondent: **Adv T. Potsane**
Instructed by K.J. Nthontho Attorneys

For 7th Respondent: **Mr .Q. Letsika from Mei & Mei Attorneys**