

**IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)**

HELD AT MASERU

CCA/0102/2021

LITJOTJELA MALL (PTY) LTD

1ST APPLICANT

**THE BOARD/EXECUTIVE COMMITTEE
LITJOTJELA MALL (PTY) LTD**

2ND APPLICANT

REFILOE EGNATUCS LETUKA

3RD APPLICANT

MOLETSANE S. JONATHAN

4TH APPLICANT

‘MALIHANELO P. MOLAPO

5TH APPLICANT

‘MAMOTSAMAI TLELASE

6TH APPLICANT

LETUKA SELUPE

7TH APPLICANT

SAMUEL LEMAO

8TH APPLICANT

‘MABOFIHLA KHOTHATSO

9TH APPLICANT

THABANG NKUKE

10TH APPLICANT

ROSA M. LETELE

11TH APPLICANT

‘MALIHOTETSO A. NTHOLI	12TH APPLICANT
‘MATHABO J. McCLOY	13TH APPLICANT
And	
LITJOTJELA MALL (PTY) LTD	1ST RESPONDENT
JOANG MOLAPO	2ND RESPONDENT
‘MAMPHAPHATHI KATISO	3RD RESPONDENT
THE ESTATE OF THE LATE MOTHAE MAFIKE	4TH RESPONDENT
MINISTRY OF TRADE, INDUSTRY, COOPE- RATIVES AND MARKETING/ REGISTRAR OF COMPANIES	5TH RESPONDENT
THE MASTER OF THE HIGH COURT	6TH RESPONDENT
THE ATTORNEY GENERAL	7TH RESPONDENT
NEDBANK LESOTHO	8TH RESPONDENT

Neutral Citation: Litjotjela Mall (Pty) Ltd and 12 others v Litjotjela Mall
(Pty) Ltd and 7 others CCA/0102/2021 [2021] 150 COM (08/12/2021)

RULING

CORUM:	MATHABA J
HEARD ON:	02/12/2021
DELIVERED ON:	08/12/2021

Summary

Company law – a company is a separate legal person from its shareholders – property vested in a company cannot be regarded as vested in shareholders – shareholders do not have a right to company’s bank accounts and buildings – such right is deferred until winding up and is subject to claim by other creditors – interim interdict to freeze the accounts of a company at the instance of shareholders refused.

Annotations:

Statutes:

Companies Act No. 18 of 2011

Cases:

Grobbelaar v Grobbelaar 1959 (4) SA 719 (A).

Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others (Case no 1423/2018) [2020] ZASCA 83(unreported)

Itzikowitz v Absa Bank Ltd [2016] ZASCA 43

Salomon v Salomon & Co Ltd [1897] AC 22 (HC)

INTRODUCTION:

[1] This is an urgent *ex parte* application in terms of which the applicants seek the following prayers:

“-1-

That a Rule Nisi be issued returnable on the date and time to be determined by this Honourable Court. Calling upon the Respondents to show cause, if any, why an order in the following terms shall not be made final:

- (a) The period and modes of service stipulated by the Rules of Court be dispensed with on account of urgency hereof;
- (b) A *declarator* that the 1st to 4th Respondents are in breach of contract by refusal/failure to distribute shares to the 1st and/or 2nd to the 13th Applicants;
- (c) That the 2nd to 4th Respondents be interdicted from holding themselves out as sole proprietors of LITJOTJELA MALL PTY (PTY) (sic) *inter alia* by:
 - (i) Opening bank accounts in Applicant/s names, collecting cash/rentals from 1st Applicant/s tenants, refusing to distribute shares to the 2nd to the 18th Applicants, and by;
 - (ii) Depriving 2nd to 18th Applicants access, possession, use and enjoyment of LITJOTJELA MALL PTY LTD properties.
- (d) That the 1st to 6th Respondents be jointly and/or severally directed to distribute *pro rata* shares to the respective Applicants, forthwith.
- (e) That the Applicants' Account/s kept at the 6th Respondent' bank under LITJOTJELA MALL PTY LTD: Current Account Number: 031000003584 and Call Account: 031900000998 be freezed pending finalization of this Application.
- (f) That 1st to 4th Respondents be restrained and interdicted from collecting cash, rentals from tenants, utilizing, administering, alienating, distributing or disposing off any of the shares/properties of LITJOTJELA MALL PTY LTD pending the finalization of this Application.

- (g) Respondents and/or those acting under or through them be directed to jointly and/or severally restore possession of the following items of property and the keys pertaining thereto to the 2nd to 18th Applicants and/or its agents;
- (i) LITJOTJELA MALL PTY LTD's office situated at Litjotjela Mall premises, Sir Seretse Khama Road, Maputsoe
 - (ii) All LITJOTJELA MALL PTY LTD documentation sounding in proper books of accounts, date stamps, share certificates, share inheritance letters and all other incidental office items of property.
- (h) That Respondents be directed to pay costs of this application jointly and/or severally only in the event of contesting this same.

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That Prayers 1 (a), (e) and (f) operate with immediate effect as an interim interdict”.

The application was filed on the 30th November 2021 and Mr. *Sehapi* appeared before me on the 2nd December 2021 to move it.

[2] According to the applicants, the 3rd to the 18th applicant, as well as the 2nd and 3rd respondent, including the late *Mothae Mafike*, are the descendants of twenty people who informally formed the 1st applicant during 1978 with each contributing a share capital of M200.00.

[3] Based on the certificate of incorporation which has been filed of record, the company was legally incorporated on the 28th March 1988. Its subscribers and first directors were *Mooki Vitus Molapo*, *Masupha Katiso* and *Pascalis Tseliso Mafike*. They are the forefathers of the 2nd to the 3rd respondent and the late *Mothae Mafike*.

[4] The trio had taken matters into their hands and proceeded to register the company upon realizing that it was not legally registered. They subsequently reported to the annual general meeting of the members held on the 23rd October 1988 that they registered the company and duly submitted registration documents to the members. Both the Memorandum and Articles of Association of the company dated the 11th February 1988 have been filed of record. The applicants contend that 3rd to the 18th applicant, as well as the 2nd to the 3rd respondent, including the late *Mothae Mafike*, inherited the shares of their forefathers in the 1st applicant and are therefore its shareholders.

[5] A tug of war has ensued between the 3rd to the 18th applicant and the 2nd to the 4th respondent which centres around re- distribution of shares. In January 2021, the company had to be re- registered. The company was not re- registered following promulgation of the Companies Act No. 18 of 2011 and a call by the Registrar of Companies for companies to be re – registered.

[6] According to applicants they were advised amongst others by the Ministry of Trade that re-registration had to be done by the direct descendants of the trio who initially registered the company. This meant that the 2nd to the 3rd respondent had to re – register the company. The agreement between the members of the applicants and the 2nd to the 3rd respondent was that after re-registration, the 2nd to the 3rd respondent will then re – distribute the shares to other company shareholders in a manner proportionate to their share capital.

[7] What has precipitated the application according to the applicants is that following re-registration of the company in January 2021, the 2nd to the 3rd respondent have been conducting themselves in an evasive and fraudulent manner as follows: “(1) by refusing to formally deliver or distribute the shares to other company members/shareholders in line with the agreement, (2) by illicitly breaking into the companies office and changing locks and locking office, (3) by refusing to attend company meetings duly called by the Board/Executive Committee to give the updates on how the company is doing. (4) by Mr. Joang Molapo soliciting company’s monies from the company’s tenants without knowledge and consent of other company shareholders.”

[8] I observed that the 1st applicant is also cited as the 1st respondent. I asked Mr. *Sehapi* to address me on this aspect as I did not understand how a company can be both applicant and respondent at the same time. Instead, Mr. *Sehapi* undertook to prepare heads of argument and to provide me with relevant

authorities in this regard. He argued that the 1st applicant has two factions hence it is cited as both the 1st applicant and 1st respondent. I pointed out to him that, even if it were to be factually correct that the company has two factions, it legally remains one legal entity separate from its shareholders.

[9] I have considered all the cases cited¹ by Mr. *Sehapi* in his heads of argument in this regard. I have found them all irrelevant. This after I had emphasised to Mr. *Sehapi* that I needed authorities that directly address my query. In each of the cases cited by Mr. *Sehapi* in his heads of argument on this issue, the parties were different except in **Grobbelaar v Grobbelaar**, 1959 (4) SA 719 (A).

[10] In **Grobbelaar**, *supra*, an executor found himself in an awkward position of on the one hand having to pursue his claim as a creditor of the estate and on the other hand as an executor to defend the estate against the same claim. The case is written in Afrikaans and nothing in the short English summary supports the point that Mr. *Sehapi* wanted to pursue. In fact, the Court observed that the executor “*in this position is obliged to take sides. He cannot remain impartial and must be removed from office*”.

¹ National Gambling Board v Freestate Gambling Board [2001] 3 ALL SA 529 (A), Basson v Redelinghuys 1945 CPD 194, Webster v Webster en 'n Ander 1968 (3) SA 386 (T), Conradie en Ander v Smit 1966 (3) SA 368 (A), Ex parte Khan 1962 (4) SA 119 (N)

[11] I can only pause to indicate that heads of argument are intended to assist a Court in adjudicating over a dispute. Irrelevant and wrong legal principles in the heads of argument are frowned upon by this Court. It bears emphasizing that Counsel has a duty to Court to be diligent and demonstrate utmost honesty in preparation of the heads of argument. It is unfair to expect Courts to be efficient in the dispensation of justice when they are made to expend time and energy considering irrelevant judicial decisions to which they are directed by Counsel.

[12] Another hurdle on the way of the applicants which I pointed out to Mr. *Sehapi* was that there was nothing of record to show that the members of the 2nd applicant are a properly constituted board of directors of the 1st applicant. A Board of directors of a company is appointed in terms of Section 58² and the relevant documentation, including a consent form from a director envisaged in Section 58 (3) is filed with the Registrar of Companies. Having been alerted to the fact that there are factions in the company, I had to be cautious that it is properly constituted board of directors that took the decision to institute the application.

[13] It is a notorious fact, for which I take judicial notice that, information pertaining to companies, including their officers and directors, is

²Companies Act, *supra*,

freely accessible online from the website of One -Stop Business Facilitation Centre where companies are registered. I observe that the company registration documents relevant to its re-registration have not been annexed to the founding papers. How the applicants were able to access the company's 1988 registration documents and fail to access the 2021 documents relevant to company's re – registration beats my imagination.

[14] There was no clear answer from Mr. *Sehapi* as to why the applicants have not annexed the registration documents of the 1st applicant on their founding papers for the Court to confirm; firstly that the company was re – registered in January 2021 and secondly that the 3rd to the 6th applicants were indeed named as the directors of the 1st applicant upon its re – registration or were subsequently appointed as such. I even reminded Mr. *Sehapi* that the information is easily accessible online.

[15] It is clear from the applicants' own papers that the company was re-registered by the 2nd to the 3rd respondents and they were the ones who were going to re – distribute the shares. In the absence of information to the contrary, I would imagine these are the people who were registered as the subscribers and directors of the 1st applicant. Alternatively, they are the ones who can disclose as to who they named as directors when the 1st applicant was re – registered in January 2021.

[16] Confronted with these challenges Mr. *Sehapi* referred the Court to annexure A to the founding affidavit. Annexure A is a document titled “RE: LITJOTJELA MALL RESOLUTION”. The resolution is couched as follows:

“Passed by the Applicant’s Executive Committee on this 15th day of October, 2021. Applicant’s members resolved to institute proceedings against Mr. Joang Molapo, Mrs, ‘Mamphaphathi Katiso and the estate of the late Mothae Mafike and incidental parties, claiming amongst others, restoration of the company’s properties and the issuance and/or distribution of shares to all Applicant’s members.

[17] I have serious reservations with this resolution which is also inelegantly drafted. It refers to the applicant without being specific as to which of the applicants between the 1st and the 2nd applicant it is referring to. Again, 1st applicant members or shareholders cannot resolve to institute the proceedings on behalf of the 1st applicant. A company is a legal person³ whose affairs are managed by a board of directors⁴ or properly appointed executive management⁵. Consequently, it is the board of directors or properly delegated persons that can sue or defend action on behalf of a company and not shareholders. The Articles of Incorporation of the 1st applicant have not been provided for this Court to see the powers of the shareholders of the 1st applicant.

³Section 9 of the Companies Act, *supra*.

⁴Section 59 of the Companies Act, *supra*.

⁵Section 60 of the Companies Act, *supra*.

[18] While I accept that a written resolution is not a *sine quo non* for a company to sue, in the circumstances of this case where it is clear that the parties are fighting for the control of the 1st applicant, I am unable to find that the 1st applicant is properly before Court without proof that the 3rd to the 6th applicants are its directors and were therefore entitled to take a decision to institute instant proceedings. I do not question the fact that the applicants may have inherited the shares from their forefathers, but that they are the directors of the 1st applicant is highly questionable. From the applicants' own version, it seems that the 2nd to the 3rd respondent are in control of the 1st applicant, they are even the ones who declared dividends to the applicants.

[19] Before I deal with the interim relief sought by the applicants, it is perhaps convenient at this stage to indicate that according to the seminal company law case, **Salomon v Salomon & Co Ltd** [1897] AC 22 (HC) a company is a separate legal person from its shareholders. This principle has been codified in the Companies Act, *supra*, which indicates that upon its incorporation, a company is separate from its shareholders and that it has the capacity to own property and has rights and privileges of a natural person.⁶The situation is not only unique to Lesotho. In **Itzikowitz v Absa Bank Ltd** [2016] ZASCA 43 the Court said the following at paragraph [9] of the judgment:

⁶Section 9 of the Companies Act, *supra*..

“...The notion of a company as a distinct legal personality is no mere technicality – a company is an entity separate and distinct from its members and property vested in a company is not and cannot be, regarded as vested in all or any of its members. Generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity. A company’s property belongs to the company and not its shareholders. A shareholder’s general right of participation in the assets of the company is deferred until winding – up, and then only subject to the claims of creditors...”.

[20] **Itzikowitz**, *supra*, was quoted with approval in **Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis** and Others (Case no 1423/2018) [2020] ZASCA 83 where it was concluded that a shareholder does not suffer any personal loss merely because the company in which he is a shareholder has suffered damages. Where a company suffers loss as a result of breach of duty owed to it, only the company can sue in respect of that loss. A shareholder can only have a claim in respect of a loss caused to it by breach of duty owed to the shareholder⁷.

[21] In the result, inasmuch as I appreciate the frustration of the 3rd to the 13th Applicant, there is no legal basis for this Court to grant the interim relief that is being sought in the Notice of Motion. Firstly, looking at prayer 1 (e), it is not clear which of the applicants’ accounts must be freezed. Even assuming that

⁷Section 79 (1) of the Companies Act, *supra*.

reference is to the accounts of the 1st applicant, this prayer is not tenable. The accounts belong to the 1st applicant and the other applicants do not have a right to them just by virtue of being shareholders. Again, there is nothing placed of record to support the apprehension that these accounts are being handled inappropriately.

[22] This Court is also unable to issue the restraining order or an interdict in terms of prayer 1(f). The 2nd to the 13th applicant have not demonstrated *prima facie right* to the relief being sought. Neither can they have a well-grounded apprehension of harm in the circumstances when in the first place the property in issue is not theirs. It is the company that will suffer harm as a legal person if the money is not being collected for its good. Inasmuch as the applicants complain that the 2nd respondent is collecting rentals from tenants, there is no evidence that he is misappropriating these funds. The applicants have not demonstrated why the balance of convenience favours them and why they claim not to have alternative remedy. Besides the power to instigate removal of directors, shareholders have statutory remedies when directors are no longer acting in the best interest of the company. These remedies are provided for from Section 76 to Section 81 of the Companies Act⁸.

[23] In the circumstances, I make the following order:

⁸*Supra*.

1. As far as it relates to the adjudication of the prayer 1 (e) and (f), in the notice of motion, the applicants' non-compliance with the Rules of Court that govern the modes and times of service in the proceedings before this Court is condoned;
2. The application for temporary relief in respect of prayers 1(e) and (f) in the notice of motion is dismissed.
3. The application is postponed *sine die* in respect of other prayers that the Court has not pronounced itself on.
4. The 2nd to the 13th applicants are directed to serve the application to the respondents.

A.R. MATHABA J
Judge of the High Court

For the Applicant: Mr. F. Sehapi