

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0018/2019

In the matter between:

SHEN YAO

APPLICANT

AND

**MERITI HOLDINGS (PTY) LTD
TEBOHO MOTHEBESOANE
LESOTHO POST BANK
MINISTRY OF TRADE AND INDUSTRY
REGISTRAR OF COMPANIES
ATTORNEY GENERAL
FIRST NATIONAL BANK LESOTHO LTD**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT**

Neutral Citation: Shen Yao v Meriti Holdings (Pty) Ltd & Others [2022] LSHC
259 Comm. (27th OCTOBER 2022)

CORAM: MOKHESI J

HEARD: 06TH SEPTEMBER 2022

DELIVERED: 27TH OCTOBER 2022

SUMMARY

COMPANY LAW: *The applicant lodged an application to reverse forfeiture of his share by fellow shareholder without proper notices being issued in terms of the company's memorandum of incorporation- Held, meetings held without notices being issued are irregular and resolutions passed consequent thereto are null and void and of no force and effect- Dispute of fact – 2nd respondent's lodging of a separate application wherein a purported dispute of fact is adumbrated, is impermissible.*

ANNOTATIONS

Legislation:

Companies Act 2011

High Court Rules 1980

Cases:

Ripoll – Dausa v Middleton NO and others 2005 (3) SA 141 (c)

Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234

William Mafoso t/a Mafoso Butchery v P. S Ministry of Small Business (C of A (CIV) 59/2018) [2019] LSCA 15 (01 February 2019)

[1] **Introduction**

This matter concerns a dispute over the shareholding of the first respondent company. The matter was argued before my Brother Molete J on the 10 April 2019 but was postponed after arguments because the 1st and 2nd respondents' counsel had argued that there was a dispute of fact. The matter was then postponed, regrettably, on several occasions ostensibly because the 1st and 2nd respondents had lodged what was termed an interlocutory application in terms of which they sought orders subpoenaing certain individuals to appear before court to clear the apparent dispute of fact. I revert to this interlocutory application in due course. The matter had not been finalized until the learned Judge met his untimely death in 2020. This matter was lodged on an urgent basis and a *rule nisi* issued, but despite this, it was postponed and *rule nisi* extended several times. In the main, the applicant had sought an interdictory and declaratory reliefs aimed at restoring his shareholding in the 1st respondent, and other ancillary reliefs.

[2] **Factual Background and the Parties.**

The applicant is an aggrieved shareholder of the 1st respondent company who was ousted, and his shares forfeited. This matter concerns the propriety of this forfeiture. The 1st respondent is a duly registered company. The 2nd respondent is also the shareholder of the 1st respondent company (hereinafter 'Meriti' or 'company'). The 3rd and the 7th respondents are banking institutions at which the 1st respondent holds accounts. The rest of the respondents are cited in their official capacity.

- [3] Meriti was incorporated on 14 December 2010 and its founding shareholders were one Teboho Mmopa, Yan Shie and the 2nd respondent. On its formation Mr Mmopa was its director. On 08 February 2010 Meriti held a special meeting in which certain resolutions were passed. Importantly, Mr Mmopa's resignation as a director was accepted and his three hundred shares (300) be transferred to one Yan Xie. The meeting further resolved that the 2nd respondent's six hundred and fifty shares be transferred to Yan Xie, resulting in the 2nd respondent holding fifty shares (50). It was further resolved that Yan Xie be the signatory to all documents of the company in consultation with the 2nd respondent. A further resolution was that the shareholding be revisited every two years. On 08 December 2011 Meriti's directors were the 2nd respondent and Yan Xie.
- [4] Consistent with the above resolution to review shareholding every two years, Xie held six hundred shares while the 2nd respondent held four hundred shares. On 27 July 2015 a resolution was passed accepting Mr Yan Xie's resignation as a director and his shares were transferred to the applicant, who concomitantly was appointed as the director of the company. Yao held six hundred shares. A resolution was made in terms of which the 2nd respondent transferred five hundred and ten shares to the applicant. As at 07 June 2018 the applicant was still a shareholder.
- [5] It would appear the relations between the two shareholders soured. An indication in the souring of the relationship between the shareholders manifested itself when the 2nd respondent represented to the First National Bank that he was Meriti's sole director and shareholder. On investigating, the applicant discovered that the meeting was supposedly held in his

absence, where the decision to appropriate his shares was made. He uncovered that the 2nd respondent ‘notified’ him through a registered mail – which he posted on 11 December 2018 inviting him to a meeting to be held at 09:00 am on 10 December 2018. The mail was posted after the meeting was held as can be seen.

- [6] A further discovery was that he had been called to a another meeting due to be held on 03 December 2018 where the main item to be dealt with was to “*discuss your failure of paying for the shares that you have acquired in the company.*” The notification was sent by a registered mail, which was posted on 29 November 2018. Another discovery was that the applicant had been notified of the meeting to be held on the 07 December 2018, the purpose of which was to discuss the 03 December 2018 agenda – i.e. none payment for shares by the applicant. The applicant discovered that on 10 December 2018, the 2nd respondent lodged Form 23 in terms of which he changed the shareholding of the company to a single shareholding. He had notified the 5th respondent that the applicant had been notified of the meetings held on 28 November 2018 and 10 December 2018. In this Notice (Form 3 notice) to the 5th respondent, the 2nd respondent states that (where relevant):

Provides contents of the Resolution.

It is resolved that Mr Shen Yao no longer be shareholder of the company as he has failed to attend shareholders meetings that were intended to address the status (sic) of the company and his payments on his shares as he has not paid for them as agreed.

Furthermore Mr Shen Yao is not going to sign any documentation of the company and represent it any way from Banks and other businesses related to the company.

He has failed to come to the meeting where he was going to be part of the discussions those meeting (sic) were called on the 03/12/18, 07/12/18 and 10/12/2018 as such the Board of Directors made a Resolution that Mr Shen Yao is no longer part of the company and his shares be given to Mr TEBEHO MOTHEBESOANE which is 510 shares

Director (signed) 10/12/2018

- [7] The following are common cause facts regarding the above meetings:
- (i) A notice convening a meeting for 07 December 2018 was posted and registered on 11 December 2018, though authored on 03 December 2018.
 - (ii) A notice convening a meeting for 10 December 2018 was authored on 07 December 2018. It was posted on 13 December 2018.
 - (iii) A notice convening the meeting for 3 December 2018 was authored on 28 November 2018. It was posted on 04 December 2018.
- [8] The above state of affairs triggered the lodging of this application which is opposed by the 1st and 2nd respondents. In their answering affidavit the respondents raised the so-called point in *limine* that the applicant's founding affidavit is defective and therefore invalid for the reason that the deponent

could not have signed it as alleged because he was out of the country at the time. The argument is that the affidavit does not comply with sections 3 and 4 (5) of the Oaths and Declarations Proclamation of 1964. In order to test the validity of this argument, the respondents lodged an application on Notice of Motion seeking a plethora of reliefs, chief among which was the subpoenaing of the 1st respondent (applicant in the main) and the commissioner of oaths for purposes of testifying about the alleged signature and attestation. This application was lodged because of what the applicant (2nd respondent in the main) perceived to be the existence of a dispute of facts. I return to this aspect shortly.

[9] **Respective Parties' Cases**

It is the applicant's case that the resolutions and decisions by the 2nd respondent, consequent to these resolutions were irregular and void *ab initio* for failure to comply with the various provisions of the Companies Act 2011. The 2nd respondent on the other hand contends that the statutory notices he issued and the consequent resolutions which were passed removing the applicant as the shareholder of the 1st respondent and forfeiture of his shares, were done within the lawful perimeters.

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

- (i) The propriety of the procedure adopted by the 2nd respondent in dealing with the perceived dispute facts.
- (ii) Dispute of fact
- (iii) The merits

[11] (i) **Propriety of the procedure adopted to deal with a dispute of fact.**

As already stated above, the 2nd respondent faced with what he regarded as a genuine and material dispute of fact, lodged a completely different application on notice of motion seeking to subpoena the applicant and the commissioner of oaths to testify about the whereabouts of the applicant on the day in question. The Director of Immigration was also sought to be subpoenaed to testify about the applicant's whereabouts on the 05 February and 05 March 2019. The main application was partly heard by my late Brother Molete J, and when the matter served before me on the 06 September 2022, I put a question to Adv. Makara, for the 2nd respondent (applicant in the so-called Interlocutory application) whether it was procedurally appropriate to lodge an independent application on notice of motion to deal with the perceived dispute of fact. His answer was that he was forced to do so by the late judge. After some exchange he conceded that it was improper. Consequent to this concession the interlocutory application was dismissed with costs. What follows immediately are the written reasons for the decision.

- [12] The pathways for dealing with the dispute of facts are provided in Rule 8 (14) of the High Court Rules 1980, and it provides that:

“If in the opinion of the Court the application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems appropriate with a view to ensuring a just and expeditious decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear to be examined and cross-examined

as a witness, or it may order that the matter be converted into a trial with appropriate directions as to pleadings or definition of issues, or otherwise as the court may deem fit.”

[13] In motion proceedings a final relief, in case of factual conflict, can only be granted if the facts stated by the respondent together with those admitted by the applicant justify the order (**Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234** at 235 E – G)).

[14] The power of the court to grant a final relief is not confined to this scenario as the court explained in **Ripoll – Dausa v Middleton NO and others 2005 (3) SA 141 (c)**:

*“...The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (**citation omitted**). In such a case the respondent has not availed himself of his right to apply for the deponents’ concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (**citations omitted**) and the court is satisfied as to the inherent credibility of the applicant’s factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (**Citation omitted**). Moreover, there may be exceptions to this general rule, as for example; where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers (**citation omitted**).”*

[15] What this procedure entails is that for the court to conclude that there is indeed genuine dispute of facts, the applicant and respondent's affidavit fall to be considered. It is not open to the respondent to lodge an independent application elaborating the nature of the dispute with supporting affidavits which did not form part of the original set of affidavits, as happened in the present matter. Genuine dispute of facts which are incapable of resolution on papers as they stand before court must be in existence before the party can exercise its options under Rule 8 (14) to apply for referral to *viva voce* evidence of the disputed issue or to apply for conversion to trial of the whole matter. The approach which the 2nd respondent adopted is contrary to this trite one and stood to be dismissed with costs as the court did. As will be seen, the 2nd respondent's denial of the fact that the applicant did not sign the founding affidavit before the commissioner of oaths on the stated date, does not rise to the level where it can be said to create a material and *bona fide* dispute of fact.

[16] After the court had dismissed the interlocutory application, the 2nd respondent's counsel, Adv. Makara, applied from the bar to have the issue of the whereabouts of the applicant ascertained by means of *viva voce* evidence. Making a case for what he called "defective affidavit", the 2nd respondent averred thus in his answering affidavit: (at para. 2):

"Defective Affidavit

It is my submission as advised by my counsel of record that the Applicant's funding affidavit is invalid and nugatory. I aver that the Applicant is a foreign national who as we speak is not even in the country and could not possible have been in the country on the day it is

claimed that he attested to his founding affidavit. I have it on good ground that he left Lesotho for China around the 19th December, 2018 and is still currently out of the country. This I know because his travel tickets were organised at a time when relations were good between us.

I aver that it is impossible that the applicant personally signed the founding affidavit at Maseru on the 05th February, 2019 in the presence of a Commissioner of oath as alleged therein”

[17] It is not denied that the applicant’s signature is the one which appears against the deponent to the founding affidavit. The above excerpt constituting the 2nd respondent’s basis for the existence of a genuine dispute of fact is quite plainly insufficient. Without concrete evidence showing that the applicant was out of the country at the time it is stated he deposed to an affidavit, the allegations in the above excerpt amounts to nothing more than generating much ado about nothing. This does not raise a real genuine or *bona fide* dispute of fact worthy of referral to *viva voce* evidence. It is on the basis of these considerations that this court refused to order referral as requested by the 2nd respondent’s counsel.

[18] **The merits**

The catalyst which brought about this matter are the resolutions which were passed consequent to the notices calling the applicant to the shareholder meetings. These meetings were held in the absence of the applicant. It will therefore be germane to the determination of this matter to consider whether the said meetings were properly convened in line with the Companies Act 2011. It is common cause that the applicant was a 51% shareholder and the 2nd respondent 49% shareholder. The applicant was therefore a majority

shareholder by virtue of the above – stated shareholding. The 2nd respondent avers in his answering affidavit that he:

“[G]ave notice for call on shares with the ultimate forfeiture of the Applicant’s shares and such resolution was duly adopted upon Applicant’s failure to attend. As a result of the Applicant’s failure to attend the meetings, I, as the only present shareholder and a sole director made a resolution to forfeit the Applicant’s shares. I submitted the decision of the 1st Respondent to forfeit Applicant’s shares for registration with the Registrar of Companies and the Registrar of Companies registered the forfeiture of the Applicant’s shares....”

[19] The applicant contends that he was the 1st respondent’s director at the material time and even relies on annexure “A6” to support this view. However, this annexure paints a different picture. Annexure “A6” shows that the 2nd respondent was the director, while the applicant’s directorship was terminated on the 28 March 2017. What now remains for determination is the question whether the applicant was validly deprived of his shares in the 1st respondent company. The resolution to deprive the applicant of his shares was preceded by three notices. The first of these notices was authored on 28 November 2018, inviting the applicant to a meeting to be held at the 1st respondent’s offices on the 03 December 2018, the purpose of which was to “discuss your failure of paying for the shares that you have acquired in the company.” The registering the mail shows that it was posted on the 04 December 2018, a day after the supposed meeting was held. The applicant did not attend all this meeting.

[20] The second notice calling for a meeting was authored on 03 December 2018 “to discuss the previous agenda of the last meeting held on the 03/12/2018, and to pave way for smooth operations of the Company.” The posting envelop shows that it was registered on the 11th December 2018. In the same way the notice was posted after the meeting was supposedly held. The last notice was authored on the 07 December 2018 inviting the applicant to a meeting to be held on the 10 December 2018 to discuss the agenda of the “meeting held on the 03/12/2018 and 07/12/2018.” This notice was posted on the 11 December 2018. These are undisputed facts. Without doubt, these notices were posted after the meetings were supposedly held, and this leads to an inescapable conclusion that the applicant was not notified of the meetings. These irregularities vitiate the resolutions which were passed.

[21] As can be gathered from Form 21 notice to the Registrar of Companies, in terms of which the 2nd respondent notified the former of the change in shareholding of the 1st respondent, it is recorded that the decision the reason to strip the applicant of his shares was due his failure to pay for them and for his failure to attend meetings despite invitation. Even on this ground, the share forfeiture action by the 2nd respondent is flawed. Procedure for issuing call notice requiring the shareholder to pay a call is provided for in the 1st respondent’s Articles of Incorporation, and of relevance to the present matter, Articles 11(1), 14(2), 16 and 17 provides that:

“Notice

11(1) Subject to these articles and the terms on which shares are allotted, the directors may send a notice (a “call notice”) to a shareholder requiring the shareholder to pay the company a specified

sum of money (a “call”) which is unpaid in respect of shares which that shareholder holds at the date when the directors decide to send the call notice.

.....

Failure to comply with call notice

14(1)....

(2) If a sum called in respect of a share is not paid before or on the call payment date, the person from whom the sum is due shall pay interest the sum (sic) from the day appointed for payment therefore to the time of actual payment at such rate or as the directors may determine, but the directors shall be at liberty to waive payment of such interest wholly in part.

.....

Notice of Intended forfeiture

16. A notice of intended forfeiture –

(a) may be sent in respect of any share for which a call has not been paid as required by a call notice;

(b) shall be sent to the holder of that share or to a person entitled to it by reason of the holder’s death, insolvency or otherwise;

(c) shall require payment of the call and any accrued interest by a date which is not less than 14 days after the date of the notice;

(d) shall state how the payment is to be made; and

(e) shall state that if the notice is not complied with, the shares in respect of which the call is payable will be liable to be forfeited.

Directors' power to forfeit shares

17. (1) If a notice of intended forfeiture is not complied with, the directors may decide that any share in respect of which that notice was given is forfeited, and the forfeiture is to include all dividends or other moneys payable in respect of the forfeited shares and not paid before the forfeiture.

(2) A forfeited share may be sold or otherwise disposed off on such terms and in such manner as the directors think fit.”

[22] From the schematic arrangement of these articles it is clear that the shareholder who is required to pay the company a call which remains unpaid must be issued a notice to that effect and if the amount is not paid before or on the date provided, he will be charged interest unless the directors waive payment of interest either wholly or partially. In the present matter the 2nd respondent has not complied with these requisites.

[23] What is also clear, further, is that if the call notice is not honoured by the shareholder, forfeiture does not follow automatically as Article 16 require that the notice of intended forfeiture be issued requiring the shareholder to pay the call and the interest which may have accrued by a particular date, which should not be less than fourteen (14) days after the issuance of notice. Even in this regard the 2nd respondent fell short as this notice was never issued. This notice must state how payment is to be made, and that failure to honour the call will result in forfeiture.

[24] The 2nd respondent had advanced an argument that the applicant failed to exhaust local remedies provided by the Act under section 93, I do not think that this section is of any application in these proceedings because what the applicant is seeking is the reversal of the 2nd respondent's unlawful appropriation of his shares, which conduct formed the basis of the 5th respondent's decision to recognise the change in shareholding within the 1st respondent. The 5th respondent, even though exercising an administrative function in giving credence to the decisions of the 2nd respondent, he/she did so on the instruction or instigation of the latter. There was therefore no need to exhaust local remedies in this case.

[25] The argument that Rule 50 of the High Court Rules was not complied with is equally unsustainable, as the applicant has a choice whether to call for the record of the decision maker. The record is for the benefit of the applicant and if he feels the review can be prosecuted without it, he is free not to seek the record of the decision. In any event the factual basis upon which the 5th respondent made the decision are common cause. There was therefore no need for the record. **(William Mafoso t/a Mafoso Butchery v P. S Ministry of Small Business (C of A (CIV) 59/2018) [2019] LSCA 15 (01 February 2019) at paras. 244 – 25)**. Equally unsustainable are arguments based on section 30 of the Act.

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

- (i) The *rule nisi* is confirmed as prayed, with prayer 2.6 of the Notice of Motion being granted in the alternative.

- (ii) The applicant is awarded the costs of suit in the main application.
- (iii) The Interlocutory application is dismissed with costs.

MOKHESI J

For the Applicant: Mr Q. Letsika from Mei & Mei Attorneys

For the 1st and 2nd Respondents: Adv. S. Makara assisted by Adv. Makhabane, instructed by Naledi Chambers Incorporated

For 3rd, 4th, 5th, 6th, 7th Respondents: No Appearance

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