

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0127/2019

In the between:

CHARLES BENTON MANSFIELD

APPLICANT

AND

SPECIALIZED INSURANCE COMPANY LIMITED
RESPONDENT

Neutral Citation: Charles Benton Mansfield v Specialized Insurance Company Limited [2022] LSHC 265 Comm. (27TH OCTOBER 2022)

CORAM: MOKHESI J

HEARD: 08TH SEPTEMBER 2022

DELIVERED: 27TH OCTOBER 2022

SUMMARY

COMPANY LAW: *Applicant shareholder claiming his share of declared dividends- the company contending that the applicant is not entitled to participate in the dividends because he surrendered his shares when his employment as an executive director was terminated by the board- Held, there is no evidence that the applicant surrendered his shares and therefore, he is entitled to share in the declared dividends.*

ANNOTATION

Legislation:

Companies Act 2011

Oaths and Declarations of 1964

Cases:

Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and others [2021] 3 ALL SA 647 (SCA): 2022(1) SA 100

Lohman v Vaal Ontwikkeling 1979 (3) SA 391 (T)

Makoala v Makoala (C of A (CIV) 04/09) [2009] LSCA 3 (09 April 2009)

Masako v Masako and another 2022 (3) SA 403

Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A).

JUDGEMENT

[1] **Introduction**

This is an application in terms of which the applicant seeks a share of declared dividends from the respondent. The only contentious issue is whether the applicant is a shareholder of the respondent. The respondent sought leave to file supplementary affidavit, and such leave was granted.

[2] **Factual Background**

The facts of this case are largely common cause and uncomplicated. The respondent is a company duly registered in terms of the laws of the Kingdom. The applicant is one of the founding shareholders of the respondent. Out of issued nine million and three hundred shares, the applicant held two million and five-hundred shares. It would appear there was some discontent with the level of the applicant's delivery of the mandate cast upon him by the company. This discontent reached its peak when the board of the respondent, at its sitting on 27 November 2018, resolved that the company cut its ties with him as one of its two executive directors.

[3] Consequent to this resolution, the 2nd respondent's Chairman of the board authored a letter addressed to the applicant. The said letter was couched as follows (in relevant parts);

RE: TERMINATION OF A RELATIONSHIP – OFFER OF SETTLEMENT

Kindly note that the Board sitting on 27th November, 2018 resolved that:

Following a very loose relationship between SIC and yourself since July 2015, it has decided to terminate the said relationship with you. A number of factors have contributed to this decision:

- 1. It had no clear terms of reference, making very difficult to regulate. It emerged as things unfolded that its value to the company could not warrant a monthly salary/reward of One Hundred Thousand Maloti (M100,000.00) that you are drawing therefrom. The Board has over some time been seized with this matter trying to ascertain what can be done. You will appreciate that this is a profit-making venture, and the Board was hoping that you would explore other avenues that could improve the company's viability, but to no avail;*
- 2. As if that was not enough, you have not been able to secure a work permit in compliance with the labour laws of this country. This puts the company in very precarious position. It cannot operate in contravention of Lesotho laws.*

It is in light of the above, that the Board has decided to terminate your services with effect from 30th November, 2018 as discussed. In compensation for your loss of income the Company offers you an ex gratia payment of Three Hundred Thousand Maloti (M300,000.00) payable upon acceptance of this offer.

I wish to take this opportunity as a person and on behalf of the Board to wish you well in your future endeavours.

I wish only success for the future of the company.

With kind Regards

(signed)

Charles Mansfield.

- [4] The above letter was accepted by the applicant in a letter addressed to the Board Chairman on the 22 January 2019 , couched as follows (in relevant parts):

Dear Mr Letele

With reference to your letter dated 9 January 2019:

I would like to confirm acceptance of the terms as laid out in the letter and thereby relinquish all duties and responsibilities as executive director of Specialist Insurance Company (Ltd).

In doing so I am grateful for and accept the ex gratia payment offered by the board for loss of income.

I would like to thank the shareholders and board of Specialised Insurance Company for the opportunity to be involved in the start-up and management of the company. I wish only success for the future of the company.

With kind regards

(signed)

Charles Mansfield

- [5] I deliberately reproduced the two letters as this matter turns on the interpretation of the words used in them as will become apparent in due

course. The applicant's case is that he is entitled to declared dividends as the respondent's shareholder. On the one hand, in opposition, the respondent raised two of the so-called points in *limine*, namely; (i) material dispute of fact, (ii) invalid founding affidavit. That material non-disclosure is not a point to be raised in *limine*, has been stated over and over by the courts in this jurisdiction (**Makoala v Makoala (C of A (CIV) 04/09) [2009] LSCA 3 (09 April 2009)** at para. 10, but it would seem that the practice by counsel of raising it as such is sadly unabating. The issue regarding the invalidity of the founding affidavit relates to the fact that the applicant signed it in Maseru on 13 September 2019, while the Commissioner of oaths before whom the applicant signed the affidavit was a warrant officer of the South African Police Service, stationed at Ladybrand, in the Republic of South Africa. The argument went on, given that the Commissioner of oaths was stationed at Ladybrand, the applicant could not have signed the affidavit in Maseru as stated. The argument went on; therefore, the affidavit was improperly commissioned.

- [6] As I understand the Oaths and Declarations of 1964 (hereinafter "Regulations") the affidavit is evidence of a witness made under oath and signed by him/her (deponent), who swears positively to his personal knowledge of facts he is testifying on (**Masako v Masako and another 2022 (3) SA 403** at para. 11). There are three important features of an affidavit, namely; declaration by the deponent, deposition and certificate of attestation which shall have the signature and particulars of the Commissioner of oaths. It is no doubt that the applicant deposed to an affidavit, but what is in contention is that while it is clear that the commissioner of oaths was the South African police officer stationed in

Ladybrand, in the attestation, it is stated that “furthermore that he has signed at Maseru on this 13th day of SEPTEMBER 2019.” The question, therefore, is whether the presence of the words “Maseru” instead of “Ladybrand” should invalidate this document as a properly commissioned affidavit. The answer should be in the negative, for the following reasons: The Court which is faced with challenges to the affidavit on account on non-compliance with the Regulations has a discretion whether to admit the affidavit which does not comply with the Regulations. The overriding factor of course, is whether there has been substantial compliance with the Regulations. (**Lohman v Vaal Ontwikkeling 1979 (3) SA 391 (T)** (decision of the Full Bench of then Transvaal Provincial Division).

[7] Regulation 5 provides that:

“5. (1) No Commissioner of oaths is required to attest an affidavit which is in a language which is not understood by him.

(2) Before attesting an affidavit the commissioner of oaths shall ask the deponent whether he knows and understands the contents of the affidavit and if his answer is in the affirmative the commissioner of oaths shall –

(a) Certify below the deponent’s signature or mark that the deponent has acknowledged that he knows and understands the contents of the affidavit;

(b) Thereafter set forth, in writing, the manner, place and the date of attestation of the affidavit; and

(c) Sign the affidavit by affixing his usual signature in his own handwriting over his designation and shall state below his designation the area in respect of which he holds his appointment as well as the office held by him if he holds his appointment ex officio –

.....”

[8] It was stated in **Lohman** case above dealing with a similar South African Regulations Governing the Administration of an Oath or Affirmations, that the requirement in terms of this Regulation is that the Commissioner of Oaths is required to state the “manner” in which the declaration was taken, whether it was on oath or by way of affirmation. At p.p 396 G – 397A, Nestadt J said:

“...To return to s.4 of the regulations, the question arises what is meant by the requirement that the commissioner must certify “the manner” in which the declaration was taken. In my opinion, what is meant is that the commissioner must state whether the declaration was an oath or by way of an affirmation It seems to me that, provided it appears with reasonable clarity how the declaration was stated to be the truth, namely either an oath or by affirmation, the relevant part of the regulation is complied with...”

[9] At p. 398G the court said:

“...It is now settled (at least in Transvaal) that the requirements as contained in regs 1, 2, 3 and 4 are not peremptory but merely directory; the court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations defending

upon whether substantial compliance with them has been proved or not ...”

[10] In the present matter, in my considered opinion, the fact that in the certificate of attestation, it is stated that the affidavit was deposed to in Maseru, when in fact it was deposed to in Ladybrand in the RSA, does not vitiates the affidavit. Regulation 5 has been substantially complied with. In the exercise of my discretion, I receive the impugned affidavit despite this minor blemish. I turn now to deal with the merits of the application.

[11] The nub of the respondent’s case is that the applicant is not its shareholder. For present purposes, I will reproduce the relevant parts of the respondent’s answering affidavit -as deposed by its Managing Director- so that a full picture of what animated its decision to appropriate the applicant’s shares:

“60. Mansfield and I were exempt from paying cash for our respective shares, on condition that we brought business to SIC. This was a sine qua non of our prospective shareholding.

61. Mansfield was mentioned as a shareholder in the application for the registration of SIC. SIC then issued the share ‘certificate, “CMR4”, to Mansfield in terms of section 20(1) (a) of the Companies Act 18 of 2011, which provides that a company shall immediately after its registration, issue to a person named in the application for registration as a shareholder, the number of shares to be issued to that person.

62. *Mansfield was simultaneously tasked with introducing and bringing investment business to SIC, ancillary to life insurance and retirement funds that he was in lieu of paying for his shares in cash.*

63. *Mansfield has completely failed to uphold his side of his bargain. He failed to introduce the business that he promised. As a result, he must be deemed to have failed to pay for the shares for which he had subscribed.”*

[12] And further at para 67 it is averred that:

“67. SIC has lien over the shares for which Mansfield had subscribed, in terms of article 11(1) of the memorandum of incorporation of SIC. The articles states that the company has a lien over every share which is partly paid, for any part of that premium at which it was issued, which has not been paid to the company, and which is payable immediately or at some time in the future, whether or not a call notice has been sent in respect of it.

68. This lien extends to a dividend. This is in terms of article 11(2) (b). In the above premise, Mansfield would therefore not be entitled to any dividend on account of the lien which SIC has over any shares he subscribed to.”

[13] It is the respondent’s argument that in 2019 when the applicant was terminated as its executive director his shareholding came to an end as well, on account of surrender. That the applicant is a shareholder of the applicant is beyond doubt as even the respondent’s managing director acknowledges this fact. The company records evince this fact as well. The factual storm sought to be generated by the respondent that there is a dispute regarding

the applicant's shareholding is nothing more than a fictitious one. There can never be dispute that the applicant is a shareholder. The company share register which was placed before this court shows that the applicant is the shareholder. In terms of section 29 (3) of the Companies Act 2011, an entry of the name of a person in the share register as a holder of shares is evidence of title to such share. In view of this trite legal position, it was, therefore incumbent upon the respondent when it disputes the applicant's title to bring proof which contradicted this state of affairs, but that did not happen.

- [14] The anterior question to be determined is whether the applicant surrendered his shares when he accepted the termination offer. This would logically involve interpreting the documents (offer and acceptance letters) to determine this question. This exercise will focus on the language used in the documents understood in the context in which it is used and the purpose of the provision. (**Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and others [2021] 3 ALL SA 647 (SCA): 2022(1) SA 100** at para. 25). It is clear from the letter which was written by the chairman of the board to the applicant that there was discontent, at the level of the board, about the ability of the applicant to improve the respondent's viability. It would also appear that this matter had concerned the board for some time. This discontent culminated in the board resolving to "terminate your services with effect from 30th November, 2018 as discussed. In compensation for your loss of income the company offers you an ex gratia payment of Three Hundred Thousand Maloti (M300,000.00) payable upon acceptance of this offer." The applicant accepted the offer and confirmed that he "relinquish[es] all duties and responsibilities as executive director of Specialized Insurance Company

(Ltd).” In my considered view, these letters, show, without any ambiguity that what was offered and accepted is the termination of the applicant’s services as an executive director of the respondent. His acceptance is in line with the offer. I do not see anywhere, as the respondent suggests, where the applicant says he surrenders his shares in the company. The suggestion that by saying he relinquished his responsibilities meant he surrenders his shares, is quite fantastic, and falls to be rejected outright. The offer clearly states it “terminates your services,” and the acceptance says “I ... thereby relinquish all duties and responsibilities.” The words used here admit of no ambiguity, what was offered and accepted is termination of the applicant’s services as an executive director. These words were used in this context. I therefore find that the applicant did not surrender his shares in the respondent.

[15] In realisation of the inevitability of the above conclusion, the respondent argued, through its Managing director, Mr Lazaro, that because the applicant failed to bring investment business to the respondent, he “must be deemed to have failed to pay for the shares to have failed to pay for the shares for which he had subscribed.”

[16] Mr Lazaro’s contentions are untenable: In paragraph 61 of his founding affidavit he avers that him and the applicant as founding shareholders of the respondent, were exempt from paying for cash for their respective shares on condition that they brought business to the respondent. While it is a natural consequence of floaters of a company to improve its viability, if such be precondition for their continued shareholding, my considered view is that it should have been reduced to writing. There is no proof that failure by any of the founding shareholders-cum-executive directors to bring business to SIC

would result in their being deprived of their shares. On the basis of the usual fact-finding tool employed in motion proceedings, the version of the applicant that he did not surrender the shares on the basis of the unknown pact, as suggested by the respondent, should carry the day. The respondent's version is fictitious. **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A).**

[17] The respondent further contends that it has a lien over the applicant's unpaid shares for which he subscribed, in terms of article 11(1) of the company's memorandum of incorporation. This article states that the company has a lien over every share which is partly paid for any part of that share's nominal value and any premium at which it was issued, which has not been paid to the company, and which is payable immediately or at some time in the future, whether or not a call notice has been sent in respect of it. This argument is equally feeble like the preceding ones: In his supplementary affidavit, the respondent's managing director, Mr Lazaro averred, as already stated earlier, that him and the applicant were exempt from paying cash for their respective shares. As proof that indeed the two founding shareholders were exempt from paying cash for their shares, the applicant, on 22 November 2016 sold some of his shares for an amount of one Million Two Hundred and fifty Maloti, to Action Statistical Investment (Pty) Ltd, and the respondent did not claim any security entitlement in respect of the sale of those shares. I therefore find the argument that the Company has lien over the applicant's unpaid shares, to be preposterous and unsupportable.

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

a) The application is granted as prayed in the Notice of Motion, with costs.

MOKHESI J

For the Applicant:

**Adv. T. Mpaka instructed by Du Preez
Liebetrau & Co. Attorneys**

For the Respondent:

**Mr. A Kleingeld from Webber Newdigate
Attorneys**