

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0109/2021

In the matter between:

**MOHAU MICHAEL LINAKE
THABISO MADIBA**

**1ST APPLICANT
2ND APPLICANT**

AND

**CHAIRMAN OF THE BOARD: NALEDI
FUNERAL PLANNERS (PTY) LTD
NALEDI FUNERAL PLANNERS (PTY) LTD**

**1ST RESPONDENT
2ND RESPONDENT**

Neutral Citation: Mohau Michael Linake & Another v Chairman of the Board:
Naledi Funeral Planners (Pty) Ltd [2022] LSHC 230 Comm. (27TH OCTOBER
2022)

CORAM: MOKHESI J

HEARD: 10TH AUGUST 2022

DELIVERED: 27TH OCTOBER 2022

SUMMARY

COMPANY LAW: *The shareholder requesting the special meeting to resolve among other things to remove directors without naming them and the reason for their removal- Held, the request is defective for not naming the directors and the reasons for their removal, in terms of section 73(1) of the Companies Act 2011- Court being requested to order the special meeting of the shareholders in terms of section 55 of the Companies Act 2011- Held, that power is excisable only in exceptional circumstances, which in the context of the present case do not exist.*

ANNOTATIONS

Legislation:

Companies Act 2011

Companies Act 1967

Books;

Farouk HI Cassim et al *Contemporary Company Law 2nd Ed. (Juta)*

Cases:

Otto v Klipvlei Diamond Areas (Pty) Ltd and Others 1958 (2) 437 (T.P.D)

Yende v Orlando Coal Distributors (Pty) Ltd and Others 1961 (3) 314 (W.L.D)

JUDGMENT

[1] **Introduction**

The applicants who are the shareholders of the 2nd respondent company lodged an urgent application on the 15th December 2021 seeking the following reliefs:

“1. Interim relief: Part A

Pending the determination of Part B of the Notice of Motion:

1.1 Dispensing with the normal Rules of Court pertaining to Forms, Modes and Period of Service on account of urgency hereof.

1.2 Interdicting and/or restraining the 1st Respondent and anyone from acting under his authority from pursuing and facilitating any form of executive recruitment on behalf of the 2nd Respondent without the involvement of the shareholders pending finalization of these proceedings.

1.3 Interdicting and/or restraining the 2nd Respondent and anyone acting under its authority from confirming employment and appointments of any person to the executive management position without the involvement of the shareholders pending final determination of this matter.

1.4 Suspending and holding in abeyance any such appointments that may have been already made by the 2nd Respondent pending finalization of this matter.

2. Final Relief: Part B

2.1 *Declaring the 1st Respondent's ignorance of the 1st Applicant's requisition for a special shareholders' meeting as unlawful.*

2.3 *Directing the 1st Respondent to call the said special shareholders' meeting no later than fourteen (14) days of termination of these proceedings.*

2.4 *Costs of suit in the event of opposition hereof."*

[2] On the 15 December, after considering the matter, the interim reliefs were granted as prayed in the Notice of Motion by the Duty Judge, and the rule *nisi* was issued returnable on the 31 January 2022. Pleadings were closed on the 28 January 2022 and the heads of argument were filed on the 28 February 2022. The rule was extended on a number of occasions for various compelling reasons. The matter could only be heard on the 10 August 2022, after which judgment was reserved.

[3] **Factual Background**

As already stated, the applicants are shareholders in the 2nd respondent company. The 1st respondent, chairman of the board of the 2nd respondent, is also a shareholder. It would appear that the 2nd respondent (hereinafter 'the company') experienced compliance issues in the form of delayed financial reports, audit reports, and leadership deficit in general. This prompted the board of directors to constitute board sub-committees with the aim of resolving the said challenges. Of particular relevance to the present matter is a sub-committee on Human Resource, Remuneration and Nomination Committee ("HRRNC").

- [4] Consistent with the earlier findings- of investigations which had been conducted- that there was leadership deficit and non-compliance issues and a consequent recommendation for the establishment of a leadership structure of the company which shall have Chief Operations Officer, (COO), the Chief Corporate Affairs (CCA) and the Chief Sales and Marketing (CSM). Fast forward to the 31 July 2021, the Annual General Meeting (AGM) of the company was held, and among the issues deliberated upon were the recruitment of employees and the overhaul of the board of directors by including independent directors from external stakeholders, and the removal of the chairman of the board and substituting him/her with an independent chairperson. On the issue of recruitment of employees, it was resolved that the first opportunity be given to shareholders, staff, and their relatives based on merit, and that the job advertisements should first be circulated among these groups before going public.
- [5] Consequent to the above-mentioned AGM, the board held its meeting on the 06 November 2021, and germane to the present matter, it was resolved that the appointments to executive positions should be made before 30 November 2021. On the 30 November 2021, the 1st applicant wrote to the board and requested a Special Shareholders' Meeting on the strength of Article 48 of the Company's Articles of Association. The purpose, as per the request, of the Special Shareholders' Meeting was to resolve to amend Article 53 of the 'Constitution' and to further resolve to appoint the chairman of the board in accordance with the amended 'Constitution'; to make a resolution to remove the company secretary and for the board to be given power to appoint him/her.

[6] And of relevance to the present matter:

“4. Resolution to overturn resolution/decision taken by Board of Directors.

Overturn the decision/resolution of the Board of Director (sic) to create executive positions and appoint fellow board members, who have been part of every decision making into these positions. Given the apparent conflict of interest inherent in this decision no executive appointments should be made until this resolution has been voted by the shareholders.

5. Resolution to pass a vote of no confidence in the board.

Passing of a vote of no confidence on the current Board of Directors of Naledi Funeral Planners.”

[7] Upon receipt of the above-mentioned letter (requisition) calling for a special meeting, on the 10 December 2021, the board convened a special Board meeting and gave notice to that effect. The meeting was scheduled to be held on the 19 December 2021, and on the agenda was the above-mentioned request for a special meeting. The recruitment process pertaining to the said three executive positions had kicked off and the 1st applicant’s name was on the shortlisted names. Discontent, the applicants lodged the current application seeking the reliefs outlined above. The application is opposed by the Chairman of the Board and the Company.

[8] **Respective Parties’ Cases.**

It is the applicants' case that the recruitment of shareholders to fill in the executive positions posed a conflict of interest questions, and for this reason, they wanted to special shareholders' meeting to discuss same. It is further their case that when the 1st respondent directed the 2nd applicant to issue appointment letters of the shortlisted persons, for appointment to executive positions indifferent to their calls for a special shareholders' meeting, he acted unlawfully.

[9] **Respondents' Case**

The respondents raised a number of the so-called points in *limine*, namely, material non-disclosure, abuse of *ex parte* procedure, lack of urgency, lack of *locus standi in judicio* of the applicants, non-joinder of the successful candidates. On the merits, the respondents contends that the 1st applicant's request for the special meeting did not comply with the requirements of Section 73 of the Companies Act 2011 ("Act") in that he did not name the directors to be removed nor give reasons for their removal; that the resolution sought to be made was on matters the company at the AGM in July 2021 had already made a resolution on how they should be dealt with; that the 1st applicant did not hold the requisite amount of shareholding (not less than 20% of total shareholding of the 2nd respondent company) to have a standing to request special shareholders meeting. The respondent contend that they were not indifferent to the 1st applicants' call for a special meeting as the board in terms of section 99 of the Companies Act 1967 and section 50 read with section 73 of the Act, it of 'necessity' had to be convened to consider the request for a special meeting.

[10] **Issues for determination**

(i) The merits

I have deliberately left out the so-called points in *limine*, as I found them to be without any merit. The fact that I have not specifically and singly dealt with them should not be construed as not having considered them. On the merits, the issues to be determined are whether:

- (i) Whether the 1st applicant's demand for a special meeting was ignored by the board.
- (ii) Whether this court should order the calling of a special meeting in terms of Section 55 of the Act.

[11] **(i) Whether the demand for a meeting was ignored**

It is common cause that the demand for a special meeting of the shareholders was made by the 1st applicant on the 30 November, 2021, and that barely ten days later, issued a reminder to the board that his demand had not been responded to. At this point it is apposite to examine the legal framework applicable to this scenario. The demand for a meeting was made in terms of section 50 of the Act, which provides that:

“50. (1) A special meeting of shareholders entitled to vote on an issue may at any time be called by the board or any other person authorised to do so by the articles of incorporation to consider the issue.

(2) A special meeting shall be called by the board on the written request of shareholders holding shares totalling not less than 5 percent of the voting rights entitled to be exercised on the issue.”

[12] Under the common law, the calling of a meeting by the board of directors falls under their fiduciary duties. This being a fiduciary duty, it must be exercised in good faith, and in the best interests of the company. As the learned authors Farouk HI Cassim *et al* **Contemporary Company Law 2nd Ed. (Juta)** at p. 371 para. 9.7.1 states:

“...The right to participate in a meeting and the right to vote are rights inherent in the ownership of shares, and it is thus not competent for the board of directors to frustrate or impede that right by either not holding a shareholders’ meeting or holding it at a time and a place that make it very difficult for some shareholders to attend ... But in general, directors have a fiduciary duty to convene shareholders’ meeting at a time and a place that make it possible for all shareholders of the company to attend.”

The power to call shareholders’ meeting being only exercisable by the board in terms of the common law, by providing for members/shareholders to demand the convening of a special meeting, the Act provides for a means to convene a meeting other than through the agency and volition of the board of directors.

[13] When the board is faced with a demand in proper form, from a shareholder or shareholders holding shares totalling not less than 5 percent of the voting rights on the issue, the board is bound to accede to the demand. Unlike in the repealed Companies Act of 1967, section 50 of the Act does not make provision for at least two critical items, namely (i) the time within which the meeting shall be called after the request has been deposited. The 1st

respondent's Memorandum of Association also does not make provision for this scenario. In the Companies Act 1967, the meeting had to be called within twenty-one days of the deposit of the requisition. In that Act, the requisitionists were given powers to convene the meeting themselves if the requisition is not acceded to within the time stipulated, but that aspect has been left out in the present Act.

[14] The question therefore to be determined is whether it is out of the realm of reasonableness to require the board to have called the meeting between the 30 November 2021 and 14 December 2021. The answer should be in the negative. In my considered view, the twenty-one-day standard which obtained under the 1967 Act, is still a reasonable one. It provided that the meeting be called within twenty-one days of the deposit of the request. In my view, it cannot be said that the 1st applicant's requisition was ignored by the board. Much stock by the respondents was placed on the shareholding of the applicant, questioning whether he met the shareholding requirement for demanding a special meeting. Without going into the which of the side is correct, my view is that the 1st applicant has at least the threshold shareholding required for this purpose in terms of the Act.

[15] (ii) **Whether the Court should order the calling of a special meeting in terms of section 55 of the Act**

In terms of Section 55 of the Act, the Court is empowered to order the calling of the shareholders' meeting, where it is in the best interest of the company that such a meeting be held. The application may either be by a director of the company or its shareholder. Section 55 provides:

“55. (1) *If the Court is satisfied that –*

(a) it is impracticable to call or conduct a meeting of shareholders in the manner prescribed by this Act or the articles of association; or

(b) it is in the best interests of the company that a meeting of shareholders be held,

the Court may, on application by a director, or shareholder of a company, order a meeting of shareholders to be held or concluded in such manner as the court may direct.

(2) The Court may make the order on such terms as to the costs of conducting the meeting and security for those costs as the court may deem fit.”

[16] The power of the Court to order the calling of a special meeting is not there for mere asking, it is exercisable in exceptional circumstances. The fact that there is a dispute between the shareholders cannot serve as a warrant for the court to exercise this power, unless exceptionality exists. Remarking on Section 62(2) of the Companies Act, 46 of 1926 (South Africa), on the invocation of this power, the court in **Otto v Klipvlei Diamond Areas (Pty) Ltd and Others 1958 (2) 437 (T.P.D)** at p. 441H, said:

“I am of the view that sec. 62(2) can be invoked not only where the impracticability arises because of a deadlock or absence of shareholders or similar reasons but where in all the circumstances it is highly desirable that a meeting should take place. The power given to

the Court to call such a meeting should, in my view, be exercised only in exceptional cases.”

- [17] The emphasis on the exceptionality of the exercise of the power by the courts to call special meetings is based on the general rule that the courts are reluctant to meddle in the internal affairs of companies by make orders on matters which can be regulated domestically by means of a resolution by majority of shareholders (**Yende v Orlando Coal Distributors (Pty) Ltd and Others 1961 (3) 314 (W.L.D) at p. 316 B – C**). The conclusion reached in the preceding discussion that the time for calling of a special meeting had not lapsed, renders it unnecessary to consider whether it is impracticable to call or conduct a meeting or it is in the best interest of a company to call such a meeting. The applicants will still have the opportunity to deal with the issues on which they raised concerns when the meeting is ultimately called. The applicants came to this court prematurely.
- [18] It should, however, be stated that given that the requisition does not name the directors who should be removed and the reason for such removal, it is defective. In terms of section 73(1) of the Act:

“73(1) A board of directors shall call a special meeting for the purpose of removing one or more directors upon receiving a written request signed by the shareholders whose shares represent not less than 20 percent of the issued shares entitled to vote and the request shall name each director whose removal is sought and the reasons for such removal by the shareholders.”

[19] The requirements for the calling of the special meeting on the strength of the requisition by shareholders in terms of Section 50, must be read with Section 73 (1) when the business to be transacted at such a special meeting is the removal of one or more directors of the company. For the requisition for the removal of a director to qualify as proper, the requisitionist must hold shares not less than 20 percent of the issued shares entitled to vote on the issue. In the present matter, the issue of the 1st applicant's shareholding is disputed, but on the basis of the share register attached to the respondents' answering affidavit, the 1st applicant does not have a shareholding which qualifies him, alone, to request the special meeting for the removal of directors. It follows therefore, that when the meeting is called, the issue of the removal of directors should not be on the agenda. This conclusion, for fear of being repetitious, is based on the fact that the requisition is defective for not naming the directors to be removed and the reason for their removal and for lack of requisite shareholding on the part of the 1st applicant to make such a request.

[20] In the result:

- (i) The application is dismissed with costs.

MOKHESI J

For the Applicants:

**Adv. Tuke instructed by K.J Nthontho
Attorneys**

For the Respondents:

**Adv. T. Maqakachane instructed by Lephatsa
Attorneys and Consultants**