

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0080/2021

In the matter between:

TAKANA NKHOULA

1ST APPLICANT

MOTHAE NTSANE

2ND APPLICANT

NEO MOFOKA

3RD APPLICANT

AND

AHEAD TECHNOLOGIES (PTY) LTD

1ST RESPONDENT

LIBOKO MOHLALISI

2ND RESPONDENT

REENTSENG MALIEHE

3RD RESPONDENT

‘M’AMABELA MARY MASUPHA

4TH RESPONDENT

MASTER OF THE HIGH COURT

5TH RESPONDENT

ATTORNEY GENERAL

6TH RESPONDENT

Neutral Citation: Takana Nkhoulá & Others v Ahead Technologies (PTY) LTD & Others [2022] LSHC 163 Comm. (18 AUGUST 2022)

CORAM: MOKHESI J
DATE HEARD: 09TH JUNE 2022
DATE DELIVERED: 18TH AUGUST 2022

SUMMARY

COMPANY LAW: *Application for judicial management on account of mismanagement of the company by its directors brought in terms of section 156 (1) of the Companies Act 2011- applicable principles considered and applied.*

ANNOTATIONS

STATUTES:

Companies Act of 2011

Companies Act No. 25 of 1967

BOOKS:

Visser et al Gibson **South African Mercantile and Company Law 8 ed. (Juta)**

CASES:

Estate Looock v Graaff-Reinet Board of Executors 1935 CPD 117

Makhuva v Lukoto Bus Service (Pty) Ltd 1987 (3) SA 376

Plason- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] (3) SA 623 (A)

Reich v Harthorn Syndicate Ltd 1930 NPD 233

ARTICLES:

DA Burdette **‘Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 1) (2004) 16 SA Merc LJ**

R Bradstreet **‘New Business Rescue: Will Creditors sink or swim’ (2011) 128 SALJ 352**

JUDGMENT

[1] **Introduction**

This is an application for judicial management on account of mismanagement, directors acting contrary to the provisions the Companies Act and misapplication of the company's assets by the directors. It was brought by three shareholders of the company in terms of section 156 (1) of the Companies Act of 2011. The application is opposed by the company and three of its directors.

[2] **Parties:**

The applicants are the shareholders of the 1st respondent company. The 1st respondent is a company registered in terms of the Company Laws of Lesotho in 2012. The 1st respondent company provides technical services to Econet Telecom Lesotho (ETL). It does this by providing technicians and rendering technical expertise and/or service for installation and maintenance of ETL landline telephones and other incidental functions. It is common cause that much of the money which comes into the company is from ETL, although that is not its only source of income. It generates incomes, among others, through interest it charges on the loans it extends to only its staff members. 2nd to 4th respondents are the company's directors.

[3] **Respective Parties' Cases:**

The applicants' case

The applicants' case is based on a number of incidences which they view as meriting the order they are now seeking: Failure by the 2nd and 4th respondents (directors) to develop policies that govern the 1st respondent,

which leads to the company being run not in a transparent manner. The consequence of lack of policies led to one Mr Tšira who was suspected of misconduct being promoted regardless of the allegations of misconduct involving company property. The 1st applicant's contract was not renewed on expiry as promised leading him to file suit before the Directorate on Dispute Prevention and Resolution (DDPR). The applicants complain about lack of policies on retirement. The lack of policy in this regard led to the 2nd respondent being required to retire with immediate effect.

- [4] The applicants' complaint further relates to the fact Mr Mosotho being appointed as the company's legal representative after the removal Adv. Monesa. This, the applicants consider to be one of the unexplained major decisions taken by company directors (2nd to 4th respondents) without consulting the shareholders.
- [5] The applicants further contend that dividends are distributed arbitrarily as there is no objective policy governing same. They further complain that they have been denied access to information of the company by the 2nd to 4th respondents, this is despite several requests being made, especially bank statements, and this, the applicants contend, shows that the assets of the company are being mismanaged. The applicants aver that they are issued with financial statements during Annual General Meetings, but those statements are never signed by all the directors.
- [6] Regarding staff loans, the applicants aver that they are not reflected in the financial records for 2016 to 2019. 1st applicant specifically avers that the loan he took in the financial year 2017/18 is not reflected. The applicants

aver that they are suspicious of dishonesty on the part of the 2nd to 4th respondents. In short, the applicants are complaining of mismanagement on the part of the directors. The applicants averred that they referred the 2nd to 4th respondents to the Directorate on Corruption and Economic Offences (DCEO).

[7] **Respondents' Case**

The respondents concede that there are no policies governing various matter to which the applicants alluded. The respondents aver, however, that the application is vexatious as the applicant is on a “crusade to cause instability” in the company since being voted out as a director and that he wants to meddle in its daily operations. The respondents aver that it is the inability of some shareholders to draw a distinction between shareholding and management which led to a shareholders to adopt a resolution that a policy be adopted dealing with this tension and that the company’s legal representative has been consulted to guide the process of developing the said policy.

[8] Regarding promotion of Mr Tšira, the respondents deny that he was promoted despite suspicions of misconduct hanging over his head. They aver that certain enquiries were made and the company management satisfied itself that there was no misconduct committed by the said employee hence the decision to promote him.

[9] Regarding the decision to retire some employees, the respondents aver that because the biggest consumer of its services is ETL, it has to align itself with its demands, and one of those demands is that the 1st applicant supplies

it with employees who are below the age of sixty, as the ones who are beyond this age are not effective, hence the decision to retire over-age employees.

[10] On the issue of loans and interest generated, the respondents aver that the scheme was devised to generate revenue for the company, and that there is no financial misappropriation which has been shown to exist during this time. On the issue of dividends, the respondents aver that in terms of the company's memorandum of incorporation, such an issue is left to the discretion of management in order to keep the company afloat and in a position to pay its debts. They state that the company did not pay dividends for years because the company was still growing. They dispute that the fact that the company's financial statements were earlier signed by one director was indicative of dishonesty but was due to lack of experience on running the company. On the question of audited financial statements, the respondents aver that all the shareholders were given the statements before the Annual General Meeting and that no issues were raised by the shareholders regarding the integrity of the reports. They aver that the company's audited financial statement shows that it has been improving financially.

[11] **Issues:**

Whether there is ground to place 1st respondent under judicial management.

[12] **The Law**

This application is in terms of the provisions of section 156 (1) of the Companies Act 2011 (hereinafter "The Act). The section provides that:

156(1) The court may order Judicial Management under section 125 or upon application by any shareholder, director or creditor if it appears to the Court that-

(a) by reason of mismanagement or any other issue, it is desirable that the company be put under judicial management;

(b) the directors or other officers of the company have acted in a way that is contrary to the provisions of this Act; or

(c) the assets of the company are being misapplied or misused and the viability of the company is threatened

[13] It is apposite to quote the provisions of section 125 of the Act, which make provision for another pathway to judicial management although not germane for present purposes. Section 125 provides that:

“125.(1) A Company shall be put into liquidation by order of court upon application by the Registrar, the company, a shareholder or creditor of the company if the court-

(a) determines that the company is unable to pay its debts, or;

(b) is satisfied that 75 percent of the issued share capital of the company has been lost or has become useless for the business of the company.”

[14] These provisions of the Act are what can be termed an invention to corporate rescue in this jurisdiction. The provisions represent a break from the

shortcomings of the provisions of section 265 of the Companies Act No. 25 of 1967 (hereinafter “1967 Act”) which tended to regard judicial management as an adjunct to liquidation and not as an alternative to it. S. 265 provided that:

“265. (1) Whenever application is made to the court for the liquidation of any company on the ground that such company is unable to pay its debts, or that , by reason of its mismanagement or of its probable inability to meet its obligations or become a successful concern or for some other cause, it is just and equitable that the company should be wound up, and the court, upon consideration of the facts, is of the opinion that, notwithstanding any present inability of the company to meet its obligations or the existence of any other fact or circumstance alleged in the application, there is a reasonable probability that if the company be placed under judicial management as provided in this section it will be entitled to meet such obligations and to remove the occasion for liquidation or dissolution, and that it is otherwise just and equitable that the grant of an order of liquidation should be postponed, the court may, instead of granting a liquidation order, grant an order hereinafter called a judicial management) in terms of this section, to be of force either for a period stated in the order or for an indefinite period.”

[15] At this point one needs to caution against the lavish use of the jurisprudence which was developed under the 1967 Act and the South African authorities when interpreting the provisions on judicial management. Judicial management is a form of business rescue mechanism designed with the purpose of saving companies from dissolution or liquidation. Its aim is to provide the company under judicial management with a breathing space to

gather itself and return to profitability and viability through conservation of its resources (Visser et al **Gibson South African Mercantile and Company Law 8 ed. (Juta) 412**). The procedure aims to place a moratorium on company debts with the hope that it will be returned to viability (**Estate Loock v Graaff-Reinet Board of Executors 1935 CPD 117**). It will therefore be observed that in the 1967 Act era the courts were entitled to place the companies under judicial management in an application for winding up, if it appeared to the court seized with such application, just and equitable to do so.

- [16] The desirability of having corporate rescue procedure of the kind under spotlight as opposed to liquidation was aptly put by R Bradstreet ‘**New Business Rescue: Will Creditors sink or swim’ (2011) 128 SALJ 352**.

“Granting such an order of liquidation results not only in the demise of the corporate entity and the attendant loss of jobs but it may also disrupt other businesses. It is therefore desirable to have legislation that is effective in providing escape routes against such commercial deaths, such legislation that is aimed at rescuing a financially distressed company from its decline towards liquidation.”

DA Burdette ‘**Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 1) (2004) 16 SA Merc LJ pp 243 – 244**, states:

Despite its name, the purpose of business rescue is not necessary to prevent a company or corporation from being wound up or liquidated. Even if the business cannot be restored to a solvent and profitable

status, the return to creditors in the long-run will be much higher. It is stated by Smits:

‘Modern “corporate rescue” and reorganisation seeks to take advantage of the reality that in many cases an enterprise not only has substantial value as a going concern, but its going concern value exceeds its liquidation value. Through judicial bankruptcy procedures, reorganization seeks to maximize, preserve and possibly even enhance the value of the debtor’s business enterprise, in order to maximise payment to the creditors of the distressed debtor.’

[17] This process, is like in the 1967 Act, is still supervised by the courts and not self-administered. As cautioned earlier the Act presents a break from the shortcomings of the 1967 Act and therefore Judicial management under the Act should not be seen as an extraordinary remedy or measure but as serving a far more important role in the wider society. Once it is invoked it acts as precursor to liquidation, if during its currency the judicial manager is of the opinion that its continuance will not enable the company to either meet its obligations or remove the need for judicial management, the judicial manager shall apply to court for the cancellation of the judicial management order and the issue of a liquidation order.

[18] Reverting to section 156 of the Act, the onus is on the applicant to place objective facts before the court to enable it to form an opinion that by reason of mismanagement it is desirable that the company be put under judicial management. The test of reasonable probability which was the main feature of S. 265(1) of 1967 Act has been jettisoned in favour of the lowest threshold. However, this does not absolve the applicant from placing

objective facts showing mismanagement, breach of the Act and misapplication of the company's assets, which may justify an order of judicial management. I will only restrict myself deal with mismanagement as a ground for judicial management. The word "mismanagement" has not been defined in the Act. It is capable of a wide meaning. Under mismanagement as the basis for judicial management, the applicants made several allegations of perceived financial misconduct on the part of the directors. I use the word "perceived" advisedly because the applicants do not posit evidence of same. As an example, the applicants allege that the directors do not declare dividends frequently, but as the respondents said, dividends is a matter falling within management discretion in terms of clause 111 of the Company's Article of Association and can only be done where company profits justify it. The issue of interest on loans has also been explained sufficiently by the respondents. The applicants allege that the 1st respondent management uses an external audit firm which cannot be authenticated. But as the respondent stated, the audit firms' address is sufficiently stated in the audit reports it issued and the said audit firm has always been employed without any query from the shareholders. On the issue of lack of policies on retirement and loans, the respondents averred that the process of developing the policies is on-going and is guided by the company's legal counsel. As can be seen an issue has been disputed, I preferred the version of the respondent on the strength of the **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] (3) SA 623 (A)**.

[19] What I can see here is that the 1st respondent's management is a bit slow in developing policies but as to whether this can be a basis for ordering judicial management is doubtful. It will be observed that all the audit reports do not

paint a picture of the 1st respondent company as being headed towards a precarious financial position, in fact, they paint a picture of it being a going concern. These audit reports have been adopted by the Annual General meeting of the shareholders. The allegations of criminality against company directors have been referred to the Directorate on Corruption and Economic Offences (DCEO) but nothing to date have come out of the referral. Corruption being serious offences, this court cannot lightly label the directors as corrupt in the absence of a clear evidence because the facts presented before me do not show that there is any.

[20] On the evidence presented before me I do not see the management of the 1st respondent being in a deadlock either. As I see it, it is a question of shareholders who are not in management being mistrustful of the actions of their colleagues who are in the management of the 1st respondent. There being no deadlock in the management of the 1st respondent, the court does not find it desirable that the company be placed under judicial management. The company is being run without any hitches at all. The issue of development of policies can aptly be dealt with internally without involving the court (see: **Makhuva v Lukoto Bus Service (Pty) Ltd 1987 (3) SA 376 at I – J**). The courts should be slow to intervene in disputes between shareholders unless it is desirable to do so, for example, where there is an illegal or oppressive conduct on the part of the company or its shareholders (**Reich v Harthorn Syndicate Ltd 1930 NPD 233**). On the issue of internal deadlock see also; **Makhuva** (above) at p.395 A – C.

[21] The company's directors are not at loggerheads as between themselves. The internal controls are still functional to deal with issues which arise from time

to time. What I see in this case to be an issue, are personality clashes between the applicants as shareholders and the directors. This cannot be the basis for an order of judicial management. In **(Makhuva (ibid at p.397c-d))** the court said:

“...[T]here is an avalanche of authority to the effect that a judicial management order is only appropriate where ‘internal control mechanism and ‘domestic remedies’ were entirely ineffectual in overcoming its internal problems, especially if those arose from clashes between the personalities of the various directors.”

[22] Directors acting contrary to the provisions of the Act.

The applicants further alleged that they were denied access to information of the company by the directors despite request. There is a remedy for denial of access to information as the shareholder, in terms of section 34 of the Act. The shareholders of the 1st respondent have a right of access to company information. Denial of this right justiciable at the instance of a dissatisfied shareholder approaching the courts in terms of section 34 of the Act for an order directing the provision of information. This avenue, the applicants, did not make use and therefore, in my considered view this cannot be a ground for ordering judicial management of the 1st respondent even though it constitutes breach of the Act.

[23] The applicants have failed to make out a case for judicial management order based on mismanagement, breach of the Act and misapplication or misuse of company assets.

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

(a) The application is dismissed with costs.

MOKHESI J

For the Applicants: Adv L. Ketsi instructed by Mosuoe and Associates Attorneys

For the 1st to 4th Respondents: Adv. T. Thejane instructed by Mosotho Attorneys

For the 5th to 6th Respondents: No Appearance

