IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

HELD AT MASERU **CCA/0017/2019**

In the matter between:

DR TUMELO TSIKOANE	**1ST APPLICANT**
`MALINEO TSIKOANE	**2ND APPLICANT**

AND

TOPOLLO TSIKOANE	**1ST RESPONDENT**
TOBATSI ENTERPRISE (PTY) LTD	**2ND RESPONDENT**
REGISTRAR OF COMPANIES	**3RD RESPONDENT**
THE MASTER OF THE HIGH COURT	**4TH RESPONDENT**
STANDARD LESOTHO BANK	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**

Neutral Citation: Dr Tumelo Tsikoane & Another v Topollo Tsikoane & Others [2023] LSHC 52 Comm. (04TH MAY 2023)

CORAM: **MOKHESI J**

HEARD: **02ND MARCH 2023**

DELIVERED **04TH MAY 2023**

SUMMARY

COMPANY LAW: *Judicial dissolution of a company sought by shareholders of the company on the basis of the provisions of section 171(b) (i)- the basis of complaint being that there is a deadlock in the management of the company- principles for determining when a company may be dissolved on the basis of a deadlock in management discussed and applied- The court acceded to a prayer for dissolution.*

ANNOTATIONS

Legislation

Companies Act 2011

Cases

Cilliers N.O and Others v Duin & See (Pty) Ltd 2012 (4) SA 203 (WCC)

Foss v Harbottle (1843)2 Hare 461, 67 ER 189

In re Yenidje Tobacco Co. Ltd [1916] 2 Ch 426 (CA)

Palmieri v AC Paving Co. Ltd 1999 48 BLR (2d) 130 (BCSC)

Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

Re Levine Development (Israel) Ltd 1978 5 BLR 164

Thunder Cats Investments 92 Ltd and Another v Nkonjane Economic Prospecting And Investment (Pty) Ltd and Others 2014 (5) SA 1 (SCA)

JUDGMENT

[1] **Introduction**

This is an application brought by a shareholder of a company to have it dissolved in terms of the provisions of section 171 (b) (i) read with section 172 (2) of the Companies Act 2011 (hereinafter "The Act"). The application was brought on *ex parte* and urgent basis on the 11 November 2019. It served before my late Sister Chaka-Makhooane J who granted the interim reliefs as sought by the applicant. The *rule nisi* which was issued has since lapsed on account of its non-revival by the applicant.

[2] **Background Facts**

Three brothers, that is, the applicant, the 1st respondent and their late brother Raohang Tsikoane floated a company (2nd respondent) in March 2008. They originally held equal shares of 400 hundred each. This shareholding structure appears to have later changed to give the 1st respondent 2000 and rest 400 each. The latter structure is at the centre of the dispute between the shareholders. I deal with this aspect later in the judgement. They all participate in the management of the company serving in various roles. Mr Raohang passed on 03 August 2015. In the aftermath of this death, the relationship between the remaining siblings seemed to have taken a turn for the worse, culminating in various attempts aimed at bringing peace and engendering an environment conducive to harmonious working relationship between them. These attempts seemed to have borne no fruit. It should be stated that the widow of Mr Raohang (Mrs 'Malineo Tsikoane) had stepped into the fold following her husband's death and had at one point through her legal representatives complained about her being sidelined in the running of

the company. Mrs 'Malineo Tsikoane was joined in these proceedings as the 2nd applicant following her application for joinder which was granted on the 18 May 2022. Consequent to the failed mediation attempts, matters came to a head in November 2019 leading to the lodging of this application seeking the above-mentioned reliefs.

[3] The application is opposed by the 1st respondent who had raised points in *limine* of non-joinder and abuse of urgent procedures. Both points are no longer live issues, as regarding the first one of non-joinder, Mrs 'Malineo Tsikoane was joined in the proceedings as the applicant. The issue of abuse of urgent procedure is water under the bridge given the amount of time that has lapsed between the lodging of this application and its actual hearing.

[4] **Respective Parties' Cases**

The applicants:

The 1st applicant's case is that the 1st respondent is the source of all the problems in the company as he runs it autocratically. The 1st applicant accuses the 1st respondent of fraudulently altering the company's shareholding structure thereby making himself a majority shareholder. He further accuses him of being obstructive in implementing the decisions which were collectively reached by the shareholders that, namely, that a resolution be made in writing reversing the company's share capital to its original position when it was registered; that a resolution be made regarding the assessment and valuation of the company assets, and that the shareholders make a resolution pertaining to the 1st respondent buying out other shareholders. The 2nd applicant in the same vein complains about the

1st respondent's manner of running the company. She avers that the 1st respondent fraudulently altered the company's shareholding structure to make himself a majority shareholder.

[5] **The 1st Respondent's Case:**

The 1st respondent denies that he is the cause of the differences between the shareholders. He even goes further to place blame at the door of the 1st applicant for his failure to discharge his duties as the company's Corporate Secretary and for failure scout jobs for the company. He accuses the 1st applicant of failure to attend any site where the company was engaged and for not keeping the minutes of the company's Board meetings. He disputes that he unilaterally increased his shareholding in the company, he however, avers that the increase in his shareholding was the result of the shareholders' collective decision in view of his commitment to the company. He denies that there was ever a decision to reverse the shareholding of the Company. He, however, concedes that a suggestion was made by the parties who attended the meeting for him to buy them out. He states that he did agree with that decision on condition that valuation of the company's assets was made as the company owes him substantial, undisclosed, amounts of money for services he rendered to it when it was engaged in certain projects.

[6] **The Law and Discussion**

This application was lodged in terms of the provisions of section 171(b) of the Act, which provides that the Court may dissolve a company in proceedings instituted by –

> "*(b) a shareholder if it is established that –*

(i) The directors are deadlocked in the management of the company and the shareholders are unable to break that deadlock; and

(ii) Irreparable injury to the company is threatened or being suffered and the business of the company can no longer be conducted to the benefit of the shareholders because of the deadlock referred to in subparagraph (i); or

(iii) The shareholders are deadlocked in voting power and have failed for 2 consecutive annual meeting dates to elect successors to directors whose terms have expired."

[7] The applicants, as can be seen from the above quoted provisions, are seeking the dissolution of the company on the basis that directors are deadlocked in the management of the company and are unable to break such a deadlock to the extent that it is leading to the company likely suffering an irreparable injury or actually suffering it and also that the business of the company is no longer being carried to the benefit its shareholders. This provision dals with winding up of a solvent. This provision provides for a winding up of a solvent company on account of a deadlock of directors in the management of the company. This is a drastic remedy (**Re Levine Development (Israel) Ltd 1978 5 BLR 164, 172)**.

[8] The provision gives a court a discretion whether to dissolve a company on this basis. The exercise of this discretion, as it trite, should be judicial, based on the principle of our company law that the companies are autonomous bodies which have internal democratic processes in terms of

which majority decisions rules. There are two rules which are aspects of this majority rule, namely, the proper plaintiff rule as espoused in **Foss v Harbottle (1843)2 Hare 461, 67 ER 189** and the Non-Intervention rule which espouse a principle that the courts will not intervene in the internal affairs of the companies at the request of disgruntled minority shareholders.

[9] However, at common law, the courts will accede to intervene in the internal workings of the company if there is a deadlock in the affairs of such a company. Section 171(b) (i) and (ii) certainly does embody this exception. In the off-quoted decision of **Palmieri v AC Paving Co. Ltd 1999 48 BLR (2d) 130 (BCSC)**, Levine J outlined the types of situations where it can be said there is a deadlock justifying dissolution of a company on its strength:

> *"Some of the circumstances… that will lead to a finding that it is just and equitable to wind up the company because of deadlock are: there are no other effective and appropriate remedies; there is an equal split or nearly equal split of shares and control; there is a serious and persistent disagreement as to some important questions respecting the management or functioning of the corporation; there is a resulting deadlock; and the deadlock paralyzes and seriously interferes with the normal operations of the corporation."*

[10] Dealing with a similarly worded section 81(1) (d) (i) (aa), (bb) and (ii) of the South African Companies Act No. 71 of 2008, the court in **Thunder Cats Investments 92 Ltd and Another v Nkonjane Economic Prospecting And Investment (Pty) Ltd and Others 2014 (5) SA 1 (SCA)** para.17, the court adopted the following formulation of the deadlock principle:

> *"…The 'deadlock principle', on the other hand is –*
> *'… founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacid or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to partnership business' –"* The court was quoting the famous case of **In re Yenidje Tobacco Co. Ltd [1916] 2 Ch 426 (CA)**

[11] Articulating the deadlock principle in **Cilliers N.O and Others v Duin & See (Pty) Ltd 2012 (4) SA 203 (WCC)** at para.5, the Court said:

> *"… The wider or looser sense of the concept is encountered in the context of the so-called 'deadlock principle; - which is applied in respect of the consequences of a breakdown of trust and confidence between members of a company which because of its peculiar character is in substance akin to a partnership, and thus amenable – subject to important qualifications – to dissolution as a partnership would if relations between the partners became untenable through no fault of the partner claiming dissolution."*

[12] The shareholders of the 2nd respondent are siblings who have equal shares (400 shares each) and the other a majority shareholder (with 2000 shares equating to 71% of the issued share capital). The latter's shareholding is disputed by the other siblings even though the extracts from the office of Registrar of Companies show that he holds 2000 shares. The latter is the only director of the company in terms of the company extract. This is also in conflict with clause 72 of the Company's Articles of Association which

stipulates that the company shall not have less than three directors and no more than five. It further provides that the company's first directors shall be the three siblings. The 1st respondent contends that the company was re-registered, and that, upon reregistration he became the sole director and a majority shareholder. In view of this dispute and on the basis of **Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** the court will proceed on the assumption of truth of the 1st respondent's version that he is the majority shareholder.

[13] Inasmuch as the 1st respondent is the director it is important to recall that the shareholders are siblings, which therefore means that there is no separation between ownership and control of the company. the shareholders are running the company together. Although the 1st respondent is the majority shareholder, there seems to me to be a serious issue of mistrust between the shareholders with the other siblings accusing the 1st respondent of fraudulently altering the company's shareholding structure and for refusing to hold meetings aimed at resolving their differences. Although the latter issue is disputed, one cannot help it but infer from the undeniable mediation efforts by Mr Rafoneke. It is a fact which cannot be denied that Mr Rafoneke was engaged as a mediator between the siblings because they are at war with one another, and this is surely paralysing the company. In one meeting which was held to resolve the differences between the parties it was resolved that the 1st respondent "buy[ ] out other members' shares," which he says was conditional upon the assets of the company being valued. The preparedness of the 1st respondent to see his siblings out of the company is one pointer that the relationship of trust and confidence between the siblings is non-existent or dead.

[14] On the basis of the decision in **In re Yenidje Tobacco Company Limited [1916]2 Ch 426 (CA),** I am of the firm view that the shareholders' relationship in substance akin to a partnership: the company is small, it has insignificant economic footprint; it has only three shareholders who are brothers or two brothers and a deceased brother's widow; in terms of Clause 2 the 2nd respondent is a private company in terms of which transfer of shares is restricted.

[15] Adv. Mda KC, for the 1st respondent, placed much emphasis on the fact that the 1st respondent is the majority shareholder and a sole director, therefore, there cannot be a deadlock at the level of directorship. I do not think looking at a situation of the present matter that narrowly does justice to the relationship between the parties. The relationship of the parties is based on mutual trust and confidence. In view of accusations and counteraccusations levelled -which go to the core of their relationship, being shareholding structure- at each other, it is evident that mutual trust and confidence is no longer there.

[16] Even with the 1st respondent owning the majority of shares, it cannot be denied that the relationship between the parties has irretrievably broken down to the extend where one does not see how even if the meetings are called will be conducted and whether there will be any meaningful engagement between the parties in view of the stated mistrust between them still lingering. (See: **Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting and Investment (Pty) Ltd** case (above)). The existence of the remedy provided in section 55 if ever there is need to invoke

it, will not, in my considered view, be effective due to this mistrust. The same applies to other remedies which minority shareholders may invoke as provided by the Act, they will not be effective. For the above reasons I find that there is a deadlock in the management of the company and that the shareholders are unable to break it, resulting in the likely harm to the company. Due to this deadlock, the business of the company is no longer being conducted to benefit all the shareholders.

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

(i) The application for dissolution of the 2nd respondent succeeds.

(ii) Each party to bear its own costs.

(iii) The 4th respondent is directed to appoint a liquidator in terms of section 127 (2) of the Companies Act No. 62 of 2011, for purposes of carrying out (i) above.

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MOKHESI J

For the 1st Applicant:	**Adv. T. D Ntsiki instructed by V. M Mokaloba & Co Attorneys**
For the 2nd Applicant:	**No Appearance**
For the 1st Respondent:	**Adv. Z. Mda KC instructed by T. Mahlakeng & Co. Attorneys**

For 2nd, 3rd, 4th, 5th, and 6th Respondents: No Appearance