

SOUTH AFRICA / JUDGMENT

# Basotho Meat Enterprise v Falcodor 199 cc t/a Iceburg Trading N.O and 2 others (847/2024) [2024] ZAFSHC 268 (27 August 2024)

[2024] ZAFSHC 268

## COURT

Free State High Court, Bloemfontein

## BEFORE

Gusha AJ

## CASE / FILE NUMBER

847/2024

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 847/2024

In the matter between Basotho Meat Enterprise (PTY) LTD APPLICANT (Registration Number 64985, Tin Number: 200084530-1) And Falcodor 199 CC t/a Iceburg Trading N.O. FIRST RESPONDENT (Registration Number: 2003/1785541/23) Elizabeth Jacoba Engelbrecht SECOND RESPONDENT Hermanus Phillipus Van Reenen Steyn THIRD RESPONDENT

Neutral citation: Basotho Meat Enterprise v Falcodor 199 cc t/a Iceburg Trading N.O and 2 others

Coram: Gusha AJ

Heard: 8 August 2024

Delivered: This judgment was handed down and released to SAFLII. The date and time for hand-down is deemed to be 27 August 2024hg

Summary: declaratory order – ownership – moveable property – point in limine – locus standi.

## ORDER

1. The point in limine is upheld.
2. The applicant to pay the costs of this application on an attorney and client scale. said costs to include the respondents' costs of the order of Van Rhyn J, of 22 December 2023.

## REASONS

### FOR JUDGMENT

Gusha AJ

- [1] The applicant is a private company duly registered in terms of the laws of the Kingdom of Lesotho (Lesotho) with its place of business at House No 5 Koenaneng Street, Thetsane West, Maseru, 100, Lesotho. Mr. Mosito Nicholas Khethisa (hereinafter interchangeably referred to as Mr. Khethisa or the deponent) is in terms of the applicant's articles of incorporation, both a shareholder and one of its Directors, and purports to act on its behalf herein. [1]
- [2] The first respondent is a close corporation duly incorporated and registered in terms of the laws of the Republic of South Africa (the Republic) with its place of business at 1 Swanepoel Street, Senekal, Free State. The second respondent is the widow of the late Mr. Stefan Engelbrecht (the deceased), she is also the Executor of the deceased estate. The deceased was a co-director and co-shareholder in the applicant.[2] The third respondent is an adult male attorney and is cited herein in his capacity as an Executor of the deceased's estate.
- [3] It appears from the papers before me that this matter has an arduous history. The parties have been involved in litigation with each other in Lesotho and here in the Republic for some time. Relevant to these proceedings, however, are the urgent proceedings the applicant launched in this court on 22 December 2023 under case number 6843/2023 wherein it primarily sought an order that the respondents be interdicted and restrained from selling, transferring and or disposing any moveable properties stored at certain premises in Senekal. In those proceedings the parties were cited as they are herein.
- [4] Having heard the parties,[3] Van Rhyn J granted an order (the order) on 22 December 2023 in the following terms;
1. Respondents are permitted to hold the sale of moveable properties mentioned in annexure MNK 27 of the founding affidavit, stored at 1 Swanepoel street, Senekal at business premises trading as L Torro Meat Company.
  2. The amount of monies accrued from the sale of the properties mentioned in paragraph 1 above, be held in a trust account of the attorneys appointed by the parties or the Registrar of the Honourable Court or the Sheriff of the Honourable Court until the issue of dispute over proceeds of the sale of the mentioned moveable properties stored at 1 Swanepoel Street, Senekal at business premises trading as L Torro Meat Company is solved;
  3. The Respondents are ordered to provide the Applicant's attorneys with complete records of the sale transaction within five
- (05) days after the sale has been completed.
4. The Applicant is ordered to institute legal proceedings on or before the 15th February 2024 for the determination of the ownership of the properties mentioned above.

5. Costs of this application to be costs in the main action / application.
- [5] The aforementioned order is the precursor to the present proceedings which Mr. Khethisa launched on 14 February
2024. The latter asserts in his founding and replying affidavits that he is duly authorized to launch these proceedings in terms of the aforesaid order as a shareholder of the applicant and states further that 'I have been duly and/or accordingly authorized to launch and to proceed with this application by the other shareholder by virtue of a confirmatory/ ratification affidavit deposed to by Mrs. Xiaoyi Yao and the power of attorney she compiled.'
- [6] In terms of its current notice of motion the applicant seeks an order in the following terms;
- i. That it be declared the owner of certain moveable property.[4]
  - ii. That any person in possession of the monies accrued from the sale of the properties as mentioned in paragraph 1 above is ordered to pay the monies aforesaid to the Trust account of the applicant's attorneys of record within five days of this order or upon receipt of payment.
  - iii. In the event there is no successful bidder for the properties in disputes(sic) the respondents are ordered to return the properties to the applicant within ten after the date of the auction or this order and/or pay the applicant an amount of money it has incurred towards its business within ten days of the auction or this order (sic).
  - iv. Alternatively, in the event the Honourable court find that the applicant is not the owner of the properties mentioned in paragraph 1 above, then in that event, the respondents are ordered to pay the applicant the amount of money it has contributed to the business operations and the amount of money it has paid to first respondent to acquire the properties aforesaid to the Trust account of the applicant's attorneys of record within five days of this order or upon receipt of payment.
  - v. Costs of suits in the event of opposition (sic).
  - vi. Further and/or alternative relief.
- [8] The respondents oppose the relief sought and raised a point in limine; that Mr. Khethisa lacked locus standi to act on behalf of the applicant. They further raised various factual disputes which essentially go to the heart of ownership of the moveable property for which the applicant seeks a declaratory order. At the start of these proceedings I directed that the point in limine be adjudicated on prior to hearing the merits, as I held the view that in the event I upheld the point in limine, it would be dispositive of the present proceedings. Pursuant to hearing arguments on the point in limine, I upheld same and reserved the reasons therefor, which I provide below.

- [9] The respondents submitted that Mr. Khethisa who launched these proceedings and deposed to a founding affidavit premising his authority to act on behalf of the applicant on both his status as a shareholder and the court order, lacks locus standi. They asserted that a proper reading of the order reveals that a reliance thereon is misplaced.
- [10] In amplification of their opposition, the respondents furthermore contended that Mr. Khethisa elected, as is evident from his founding affidavit, to approach the court as a shareholder and not as a duly authorized director of the applicant, as is required by s 66 of the Companies Act 71 of 2008 (the Act).
- [11] Conversely, in addition to the court order, the deponent asserted that he also had the necessary locus standi to act on behalf of the applicant, as he held a power of attorney from Mrs. Xiao Yao (Mrs. Yao) who is also a shareholder and director of the applicant. He further asserted that regard being had to his and Mrs. Yao's shares in the applicant,[5] they were the majority shareholders and that, so the argument progressed, armed with her power of attorney, he was entitled to act on behalf of the applicant. Counsel for the deponent further submitted that in terms of the laws of Lesotho, Mr. Khethisa, as a shareholder and in terms with the Companies Act 18 of 2011 of Lesotho (the Lesotho Act), was entitled to act on behalf of the applicant without any resolution from the board directors. In fact, he advanced an argument that in Lesotho a company had no distinct juristic persona, it's shareholders and directors were intrinsically intertwined. This argument was however baldly advanced from the bar and no authority, legislation or case law from Lesotho was advanced in support thereof.
- [12] I agree with the first assertion by the respondents. In my view, a careful reading of the order reveals that what Van Rhyn J authorized was for the applicant (as a juristic person) to institute proceedings on or before a certain date. The court made no determination in its order regarding the merits of the application, standing of or the authority of the deponent to act on behalf of the applicant in the urgent application and beyond. In my view if Mr. Khethisa wanted to act on behalf of the applicant, he had to ensure that he was clothed with the necessary authority to act. The order cannot and indeed did not clothe him with the authority to act on behalf of the applicant.
- [13] Central to the issue of locus standi as raised by the respondents are the questions as to precisely who in law can institute proceedings on behalf of a company, and the purview and position of a shareholder in relation to a company and its assets.
- [14] I had regard to both the Lesotho Act as well as the applicable sections of our Companies Act. Section 9 of the Lesotho Act provides that;
- ‘Legal personality, capacity and powers of a company
9. (1) A company shall, upon its incorporation, be a person in its own right, separate from its shareholders, and shall continue in existence until it is removed from the register of companies in accordance with this Act. (my own emphasis).

- (2) Subject to this Act and its articles of incorporation, a company shall have the capacity, rights, powers and privileges of a natural person and may do anything which it is permitted or required to do by its articles of incorporation or under this Act, including
- a) the right to sue and be sued;
  - b) the power to make or amend by-laws not inconsistent with its articles of incorporation or this Act;
  - c) the right or power to acquire, hold, use or dispose of any interest in any property;
  - d) the right or power to acquire, hold, use or dispose of any shares or obligations of any other company;
  - e) the power to enter into contracts, incur liabilities, issue bonds and obligations and secure its obligations with its property;
  - f) the power to lend money and invest its funds; and
  - g) the power to elect directors and appoint employees and agents of the company to conduct its business and exercise its powers within or outside Lesotho. (3) An act of a company shall not be invalid by reason that the act is contrary to its articles of incorporation or this Act. (4)
- Subsection
- (3) does not limit the rights of shareholders to act against the company or against its directors to restrain the act.’
- [15] Similarly, section 59 of the Lesotho Act is instructive with regards to the separate nature of a company as a juristic person separate from its shareholders;

‘Management of company 59. (1)

59. (1) The business and affairs of a company shall be managed by, or under the direction or supervision of the board of the company, which shall have all the powers necessary for managing, directing and supervising the management of the business and affairs of the company, subject to modifications, exceptions or limitations in accordance with the articles of incorporation.’

[16] Section 66(1) of our Companies Act provides that;

‘Board, directors and prescribed officers

66. (1) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise.’

- [17] In my view, nothing in the provisions of the Companies Acts of both the Republic and Lesotho seem to support the contention advanced by the deponent. In my view, both provisions of the respective Companies Acts are instructive; the directors of companies are empowered by legislation, as well as by their company's articles of incorporation to manage the company's business, to transact on its behalf and to delegate their powers and functions. They exercise their powers collectively, by majority vote, as a board. The ultimate power in a company is with the board of directors, and not with the shareholders.[6] It has been held that there are cogent reasons for this position, same being that 'the conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members'.[7]
- [18] When proper regard is had to both pieces of legislation, it is evident that the deponent's assertion is untenable. The pleaded case and arguments advanced, that as a shareholder Mr. Khethisa, was clothed with the authority to act on behalf of the applicant is erroneous and bad in law- he is simply not suited. The fact that he is both a shareholder and a director still does not make him suited. The applicant and not Mr. Khethisa might have a claim for the relief sought in the notice of motion, in order to act on behalf of the applicant as a director, he needs a resolution from the board of directors, absent this, he is simply not suited. In any event Mr. Khethisa pleaded no such case, his case is premised solely on his standing as shareholder vested with the control of his shares and the proxy from Mrs. Yao in respect of her shares. It needs restating that

a company acts through its duly authorized board of directors and not through its shareholders. A shareholder has no authority to act on behalf of a company unless such authority is expressly conferred on the shareholder(s) by the company's articles of incorporation. Mr. Khethisa pleaded no such case in his founding affidavit and I also could not discern same on the papers before me. In both countries', shareholders are vested with limited rights and duties which attach to their shares held in the company. The point in limine stands to be upheld for these reasons alone.

- [19] In my view, for the same reasons as enunciated above, not even the power of attorney relied upon is sufficient to clothe him with the necessary authority to act. It is apposite, for purposes of this judgment, to reproduce herein without emendation, the special power of attorney-

'SPECIAL POWER OF ATTORNEY

I, the undersigned,

Mrs. XIAOYO YAO

Do hereby nominate, constitute and appoint MOSITO NICHOLAS KHETHISA with power of substitution to be my lawful Attorney / Representative and Agent in my place and stead, in the shareholders meeting with regard to BASOTHO MEAT ENTERPRISES (PTY) LTD scheduled for Saturday, 10th September 2020 or anytime thereafter in the event that the said meeting do not take place on the said date due to unforeseen circumstances, to participate, discuss, negotiate, vote and take decisions thereat and sign all documents,

deal with and finalize all issues relating to the affairs of BASOTHO MEAT ENTERPRISES (PTY) LTD within the spirit and scope of the Agenda tabled and adopted for the purposes of the said meeting.

AND generally for effecting the purposes aforesaid, to do, or cause to be done whatsoever shall be required as fully effectively, for all intends and purposes, as I might or could if personally present and acting herein- hereby ratifying, allowing and confirming and promising and agreeing to ratify, allow and confirm all and whatever the said Attorney and Agent shall lawfully do or cause to be done by virtue of these presents.

SIGNED AT MASERU THIS 09 DAY OF OCT 2020 IN THE PRESENCE OF THE UNDERSIGNED WITNESSES.'

[20] Evidently, the power of attorney was granted to Mr. Khethisa to act as a proxy for Mrs. Yao at a shareholder's meeting and not a meeting of board of directors. Furthermore, at no stage does Mr. Khethisa make out a case that the said meeting materialized, either on 10 September 2020 or anytime thereafter. If the said meeting materialized, nowhere is a case made out that a resolution was taken that Mr. Khethisa was to launch these proceedings acting on behalf of the applicant. A bald reliance on this special power of attorney, in his papers and during oral submissions, without anything more, does not assist Mr. Khethisa and cannot be countenanced.

[21] In light of the foregoing, in my view the applicant has not shown the requisite locus standi. Accordingly, the application cannot succeed.

[22] With regards to costs, it is a well-established principle of our law that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and party scale. Equally established is the principle that the court exercises a discretion when considering an appropriate costs order and should of necessity, exercise same judiciously.[8] In the exercise of its discretion the court must carefully weigh the issues in the case, the conduct of the parties and any other

circumstances which may have a bearing on the issue of costs and then make such order as would be just and equitable.

[23] In the present matter I awarded costs on a punitive scale. In my view, the applicant and or the deponent who purported to act on behalf of the applicant, ought to, as early as 20 September 2021[9] and perhaps as late as the 10th April 2024[10] have realized that the manner in which they approached this case was fatally flawed, not only because of the lack

of locus standi but also because, mindful and aware of the material factual disputes between the parties, the applicant still elected to launch motion instead of action proceedings. Simply raising the aspect of referral for oral evidence in the replying affidavit when same was not canvassed in the applicant's founding papers can simply not be countenanced. It is trite that a referral to oral evidence is not intended to cure the defects in the applicant's founding papers or close holes in it. It is further established law that a court has a discretion to decide whether to allow a referral oral evidence, a court will however dismiss an application if the applicant should have realized, at the time it launched it application, that a dispute of fact incapable of resolution on the papers, would ensue. [11]

[24] In conclusion, even when the aspect of locus standi and the material disputes of fact were raised in the respondents' answering affidavit, the applicant still persisted with the ill-fated application in its current form. Under these circumstances in my view it is apposite that the applicant be mulcted with a punitive costs order on an attorney-client scale as a way of showing the court's displeasure at the improper litigious approach adopted by the applicant.

[25] In the result, I make the following order

1. The point in limine is upheld.
2. The applicant to pay the costs of this application on an attorney and client scale. said costs to include the respondents' costs of the order of Van Rhyn J, of 22 December 2023.

NG GUSHA, AJ

Appearances For the Applicant: Adv PS Mpholoane Instructed by: Khambule Attorneys  
Bethlehem C/O Mokhomo Attorneys Bloemfontein For the First to Third Respondents: Adv  
Donnelly-Bornman Instructed by: Symington and De Kok Inc Bloemfontein

[1] Annexure MNK 5 and 16 of the applicant's founding affidavit.

[2] Ibid.

[3] The respondents submit that due to the timing of the urgent application, they were not in a position to oppose same and instead elected to agree to the order being made.

[4] Notice of motion, prayer 1 p2 as well annexure MNK 27 of the applicant's founding affidavit.

[5] The applicant holds 400 shares, Mrs. Yao holds 250 and the deceased holds 250 shares.

[6] Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd and others [2014] 3 All SA 591 (WCC) para 31. Meskin et al Henochsberg on the Companies Act, 71 of 2008 Vol

(1) 250(3) Service Issue 30.

[7] Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530.

[8] Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another

[2015] ZACC 22; 2015 (5) SA 245 (CC) para 85.

[9] The date on which the first order was granted by the Lesotho High Court (Commercial Division) in this arduous litigious history between the parties.

[10] The date on which the applicant's replying affidavit was deposed on.

[11] Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949

(3) SA 1155 (T); Plascon-Evans Paints (Ltd) v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A); National Director of Public Prosecutions v Zuma [2009] ZASCA 1; [2009] 2 All SA 243 (SCA).

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