

SOUTH AFRICA / JUDGMENT

Seete v Tshiamo Resources (PTY) Ltd and Another (M121/2018) [2022] ZANWHC 15 (16 March 2022)

[2022] ZANWHC 15

COURT

North West High Court, Mafikeng

BEFORE

Gura

CASE / FILE NUMBER

M121/2018

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NO.: M121/2018

Reportable: YES / NO

Circulate to Judges:

YES / NO

Circulate to

Magistrates: YES / NO

Circulate to Regional

Magistrates: YES / NO

In the matter between: BENJAMIN MMIDIBIDI
SEETE
APPLICANT
and
TSHIAMO RESOURCES
(PTY) LTD
FIRST RESPONDENT
TRIPPLE “M”
MINING (PTY) LTD
SECOND RESPONDENT
OPPOSED MOTION
GURA J
DATE OF
HEARING
: 02
SEPTEMBER 2021
DATE OF

JUDGMENT

: 16 MARCH 2022

FOR THE APPLICANTS

: ADV HJ SCHOLTZ

FOR THE RESPONDENTS

: ADV De VILLIERS

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for hand-down is deemed to be 16 March 2022.

JUDGMENT

GURA J.

Introduction

- [1] This is an application for a final winding-up order of the first respondent on the ground that there is a deadlock in the management of the business and that the applicant, being a minority shareholder is being oppressed.
- [2] The applicant avers that he is a director and a minority shareholder in the first respondent. The first respondent is a company with limited liability incorporated in terms of the Companies Act 61 of 1973, as amended, with its registered address, alternatively, principal place of business, situated at E643 Mositlha Section, Phokeng. The second respondent is also a company with limited liability incorporated in terms of the Companies Act 61 of 1973, as

amended, with its registered address, alternatively, principal place of business, situated at Bellevue, Rinette Office Park, C33 Spruitfontein, Buffelspoort, Rustenburg. The first respondent is holding shares in the second respondent. The second respondent is involved in mining activities on contract basis. No relief is sought against the second respondent, but is merely joined to the proceedings because it has an interest in the outcome of the application.

The applicant's case

- [3] On 18 November 2016, the applicant accepted employment with the second respondent as Mine Overseer. The terms of his employment contract are not relevant for purposes of determination of the current application. Sometime after his employment, the second respondent's representatives (at that stage being the applicant's employer) indicated that a new company should rather be established in terms whereof the applicant could hold shares and be a director and grow with the company. It was his (applicant) understanding that the new company would work hand in glove with the second respondent. He agreed to the proposal as he believed that it would be beneficial to his career. Since the applicant had been offered shares in the first respondent by the second respondent, the latter required that he should resign as Mine Overseer in the second respondent as he would be holding shares and directorship in the first respondent. Applicant subsequently resigned from the second respondent with effect from 1 August 2017. It only later became known to the applicant that the second respondent orchestrated the establishment of the first respondent in order to obtain contracts which require BEE compliance.
- [4] The purpose of the first respondent was to enable the second respondent to apply for various contracts which are BEE related (for which the second respondent on its own did not qualify). In terms of annexure BMS4 to the founding affidavit, the first respondent is the BEE partner to the second respondent. The directorship of the first respondent is as follows: the applicant, Mr GBS Makgala, Mr LH Montsho, Mr JN Mthimunye-Xipu and Mr MK Tleane. The aforesaid people are applicant's co-directors which have strong influence at the Royal Bafokeng which the second respondent hoped would secure contracts for the second respondent. The applicant was in no way involved in the appointment of his co-directors and only learned of their appointment afterwards. The first respondent is accordingly used as a pawn by the second respondent to obtain BEE contracts.
- [5] On 30 August 2017, the Second Respondent's attorney confirmed that applicant is a minority shareholder in the First Respondent and that the First Respondent is a shareholder in the Second Respondent. Soon after his resignation, the applicant experienced antagonism from his co-directors. They also proceeded to conduct the company's affairs without his knowledge and to his exclusion. The applicant has, for instance, never been informed about directors' meetings, nor does he have any idea regarding the financial position of the First Respondent. The applicant avers that he never received any director's compensation or any portion of the profits of the First Respondent. He is totally in the dark as regards the First Respondent's affairs.

- [6] On 12 September 2017, the applicant received an email from attorneys Zietsman Horn indicating that the First Respondent intends to remove him as a director in terms of the provisions of Section 71 (2) of the Companies Act. Consequently he appointed his current attorneys who in reply addressed a letter to Messrs Zietsman Horn in terms whereof it was indicated that the meeting to remove him cannot proceed as he was not aware who the co-shareholders of First Respondent are. Applicant's attorneys also requested a copy of the Memorandum of Incorporation of the First Respondent and the share register. It was also stated that he had also not been provided with reasons as to why the shareholders were considering to remove him as a director. In reply to same, the attorneys on behalf of the Respondents indicated that the shareholders undertake that they would not proceed with Section 71 (2) of the Companies Act but would postpone such to a date to be mutually agreed upon by the shareholders and applicant.
- [7] On 2 November 2017, applicant's attorneys indicated in writing to the attorneys of the First Respondent that due to lack of co-operation an application for the winding-up of the First Respondent would be brought as there is an irresolvable deadlock between directors and shareholders. The Respondents' attorneys replied thereto on 6 November 2017 indicating that they are taking urgent instructions and that they would revert soon as they managed to secure an appointment with their client. Ever since, no reply was forthcoming from the First and Second Respondents and applicant is still excluded from the affairs of the First Respondent. The applicant submits that it is evidently clear that here is a deadlock in the management of the company's affairs and that it would be just and equitable for the company to be wound-up.
- [8] To the best of applicant's understanding, the First Respondent does not have any employees as the First Respondent is merely used as a mask by the Second Respondent to be BEE compliant. There are accordingly no employees or trade unions upon which the application should be served. The applicant would ensure that this application is served on the Master as well as the South African Revenue Services as contained in section 346 (a) and 346 (4)(A)(a) (iii).

The defence

- [9] Both Respondents are opposing the application and their version follows. The applicant has failed to disclose all relevant known facts in his founding affidavit. The original shareholders in the First Respondent are Ms Johanna Mthumunye-Xipu and Mr Gabriel Makgala. A shareholder agreement between these two is dated 14 July 2014.
- [10] Xipu is the holder of 600 ordinary non par value fully paid shares. A portion of the shares held by Mr Makgala and Xipu was transferred to Mr Lazarus Hamilton Montsho with identity number: [...] (10%) and Mr Michael Kabe Tleane with identity number: [...] (10%) and The Mogopa-A-Dira Trust (19%) as well as to the applicant (10%). The applicant received shares because of his employment at the Second Respondent which was preceded by the following events.

- [11] A meeting took place between the second Respondent and AMCU on 4 February 2016 at Impala Shaft Number 7. During the meeting it was recorded that the management of the Second Respondent was approached by the local community including the Bafokeng Head Man, Counsellor and Local Representatives to recruit from their community, when the need arises, before looking at other sources of recruitment.
- [12] During or about 13 June 2016, the Executive Committee of the Royal Bafokeng Nation Traditional Authority resolved to engage the second Respondent on the possibility of forming a commercial partnership through the Bagopo Tshwane Trust. On 20 June 2016, the Second Respondent convened a meeting between AMCU and the local community where the community development of the Bafokeng People was discussed. On 20 June 2016, the second Respondent filed progress report in respect of the Bafokeng Community Development.
- [13] It is against the said background that the First Respondent and Second Respondent entered into discussions with the purpose to give effect to the above Resolutions, Minutes and wishes of the Bafokeng Community. At that stage, the only two shareholders of the First Respondent was Makgala and Xipu. The First Respondent was not fully compliant with the requirements of the Mining Charter and needed a local component of the Bafokeng Nation in order to comply with the Mining Charter.
- 13.1 The Mining Charter had been introduced as part of the Mineral and Petroleum Resources Development Act in 2002. It sought to guide the process of transformation in the mining industry and with the goal that mining companies should do more to develop the communities in which they operated and should also put something back into those arears which supplied the labour.
- 13.2 The Mining Charter also asks for an integrated development plan, hereafter referred to as “the IDP” for the region in which the mining company operates and the implementation of IPD’s both in the area of operation and in the area from which their labour force was sourced.
- [14] In addition the First Respondent would have to register on the Royal Bafokeng Enterprise Development (RBED) and the First Respondent would purchase 26% shares in the Second Respondent. The First Respondent would appoint one director on the board of the Second Respondent. The parties would conclude a sales agreement as well as a joint venture agreement. The parties envisaged a restraint of trade agreement.
- [15] Makgala and Xipu thereafter resolved to change the shareholding in the First Respondent or composition thereof in order to comply and give effect to the provisions of the Mining Charter and Resolutions, Minutes and wishes of the Bafokeng Nation as follows: The Mogopa-A-Dira Trust – (Bafokeng Community) to receive 19% shares, Stephen (of Bafokeng) to receive 10% shares, Lazarus (of Bafokeng - The Headman of the Luka Village) to receive 10% shares, Ben (an employee of the Second Respondent) to receive 10%; Mike (of Bafokeng) to receive 10% and Xipu would remain with 41%.

- [16] The First and Second Respondent resolved that the Second Respondent would at all times have a full-time employee of the First Respondent on its board. This honour befell the applicant. All of the above was done so that the First Respondent could expand and tender on new opportunities at the Impala Mine and elsewhere. The First Respondent thereafter provided a mandate to the auditor to change the First Respondent's directors and to make new appointments. The First Respondent also gave instruction to Stephen Strydom, a professional Chartered Accountant to give effect to the above.
- [17] On 19 January 2017, the First Respondent resolved to enter into a subscription agreement with the Second Respondent and to ratify the provisions of the said agreement. The First Respondent further resolved to nominate Michael Kabelo Tleane with identity number: [...] to serve as a director on the board of the Second Respondent. The parties duly entered into a subscription agreement on 13 February
2017. The Mogopa-A-Dira Trust and more specifically the executive committee on 14 February 2017 confirmed their shareholding.
- [18] The three new and two old shareholders of the First Respondent were still in the process of drafting and finalising the shareholders

agreement of the First Respondent when Xipu received news that the applicant resigned his position at the Second Respondent. This

negated the purpose and basis on which shareholding was awarded to the applicant. The applicant only received his shares because of his employment at the Second Respondent. The applicant was requested to go back to his position of employment at the Second Respondent. The applicant refused and said that he was tired and needed to rest. This was difficult to understand after the amount of R84 500.00 was paid to the applicant by the First Respondent as an advance. The remaining directors, Lazarus Hamilton Montsho, Michael Kabelo Tleane, Gabriel Bareng Makgala Stephen and Xipu thereafter held a meeting on 28 September 2017 to remove the applicant as a director and shareholder of the First Respondent. In the minutes of that meeting, on page two thereof, Xipu recorded that the applicant's shareholding was linked to his employment at the Second Respondent as per the previous resolution that was made in his presence.

- [19] The First Respondent would accordingly by way of a counter-claim (application) apply for the return of the shareholding of the applicant to Makgala premised on Section 163 of the New Companies Act. Its precursor was Section 252 of the old Act which provided that if on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or

inequitable or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may with a view to bringing an end on the matters complained of make such order as it sees fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any member of the company by other

members thereof or by the company. Section 163 (2) of the new Companies Act provides that the Court may make any interim or final order it considers fit, including an order directing the issue or exchange of shares.

[20] The First Respondent is prosperous and successful under the leadership of the remaining four directors, adequately run without

the applicant. The applicant lost all interest in the First Respondent when he (the applicant) resigned his employment with the

Second Respondent during or about August 2017 and has from that date also been absent from the First Respondent. There is no dispute

between the shareholders and the other shareholders did not act contrary to the wishes of the applicant. The applicant forgets that by becoming a shareholder in a company, a person undertakes by his contract to be bound by the decisions of the prescribed majority of the shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder. The applicant does not have locus standi to bring a liquidation application.

[21] The real purpose of this application, it is submitted, is to extort more money from the First Respondent and, or, to utilize the First Respondent as a meal ticket. The applicant already received an advance from the First Respondent in the sum of R84 500.00 paid out as follows:

21.1 R1 500.00 on 7 July 2017;

21.2 R80 000.00 on 3 June 2017;

21.3 R1 500.00 on 4 May 2017;

21.4 R1 500.00 on 7 April 2017.

[22] The First Respondent pledged to the applicant 10% shares on the basis of the applicant's employment as a mine overseer with the Second Respondent. The employment contract coupled with the applicant's background as a mine overseer was considered vital for future projects and are relevant. The Respondents did not ask the applicant to resign. The applicant was asked to return to his position at the Second Respondent. He was reminded that his shareholding and position as a director was conditional upon his employment with the Second Respondent. Not only was the applicant the First Respondent's arcane emissary at the Second Respondent but his then employment would also make it possible for the Second Respondent to tender on future projects. The applicant was one of the five directors. The remaining four directors continue with the business of the First Respondent. It is accordingly incorrect that there is a deadlock in the management of the First Respondent.

[23] On 20 July 2018, the First Respondent filed a counterclaim seeking the relief set out hereafter:

“1. Applicant is ordered to repay the amount of R84 500.00 (Eighty Four Thousand Five Hundred Rand) to the First Respondent within 7 (seven) days from date of order.

2. The auditor of the First Respondent is hereby authorised and directed to cancel the share certificate issued to the Applicant and to return or reissue the shares on the name of Makgala Gabriel Bareng Stephen;
3. Alternatively an order that the shares of the Applicant be returned to Makgal Gabriel Bareng Stephen on such terms as the Court deems just and equitable;
4. A declaratory order that the Applicant was removed, alternatively is removed as a director of the First Respondent, and the auditor of the First Respondent is hereby authorised and directed to file and sign all necessary documentation to reflect same on the records of the Companies and Intellectual Property Commission;
5. Further and/or alternative relief.
6. Costs of suit.”

Applicant's response to counter application

- [24] In his replying affidavit, which also served as an answering affidavit to the counter application, the applicant went along these lines: According to Xipu, annexure B to the answering affidavit is his share certificate wherein it is recorded that he (Xipu) is the holder of 600 ordinary non par value fully paid shares. It will be noted however, that annexure B was cancelled. The share certificate was also never signed by the secretary or directors of the First Respondent. The validity of the aforesaid certificate (annexure B) is accordingly questionable.
- [25] The applicant finds it strange that the Second Respondent entered into meetings and discussions with the Bafokeng Community and even provided shares of the First Respondent to Lazerus Hamilton Montsho who the is headman at the Luka Community of the Royal Bafokeng. The aforesaid conduct is however a clear indication that the Second Respondent, by establishing the First Respondent, gave shares to role players in order to obtain tenders from mines situated in the area of the Royal Bafokeng Nation. The community was not in favour of the Second Respondent operating in the mines. The fact that shares of the First Respondent were given to the headman is also highly questionable. What is also strange is that applicant, learned for the first time that various other shareholders existed in the company as is explained in the answering papers. This is yet a further indication that although applicant had been a shareholder and director on paper, the majority shareholders played their cards close to their chests and had not been transparent in the operation of the Second Respondent. The aforesaid is a clear example that the applicant had been and is still oppressed as a minority shareholder which makes him entitled to the relief sought.

[26] The First Respondent was not established in good faith, as it was seemingly established to obtain tenders. It was used to create a misrepresentation to the applicant that should he resign from the Second Respondent he would be a shareholder to further his career in the First Respondent. The First Respondent was therefore used to get “rid” of him as an employee of the Second Respondent and now the First and Second Respondents want applicant out of the First Respondent. The applicant is confident that the Court will be quick to identify the mala fides of the deponent, First Respondent and Second Respondent.

[27] The applicant denies that he resigned on his own and states that he resigned on 7 AUGUST 2017 as he was told to do so by DEWALD CORNELIUSEN who was the project manager (in order not to enjoy protection of the relevant labour laws). The impression had been created to the applicant that he was now a shareholder in the First Respondent and that he would obviously then further his career in the First Respondent, and share in the profits of the First Respondent. It now seems like the aforesaid was a misrepresentation to him in

order to ensure that he resigns from the Second Respondent. The First Respondent is now also attempting to remove the applicant as a director and shareholder contrary to what he was promised.

[28] The applicant’s understanding of the R84 500.00 that was paid to him is that it was director’s compensation in order to execute our fiduciary duties, as well as to attend meetings and expenses and disbursements associated with that. He denies that the aforesaid constituted a payment in advance. It would be interesting to see which other payments were made to applicant’s co-directors, but it seems like the First Respondent decided not to disclose same. His unilateral removal as director is yet again a further confirmation of his oppression in the company, especially due to the fact that on 28 September 2018, the First Respondent’s attorneys undertook that his removal as director will not be tabled. Nevertheless in absolute mala fides the meeting proceeded and it was decided to remove him as director. This is a clear indication that applicant’s application has extreme good merit that he is oppressed as a minority shareholder and director. It is indeed shocking that the applicant for the first time read in the answering papers that he had been removed as director despite an undertaking not to do so by the First Respondent’s attorneys. The First Respondent did not even have the decency to inform him about his removal after the alleged decision. Surely this decision was arbitrarily taken and in total contradiction with the undertaking of the First Respondent’s attorneys.

Legal principles

[29] Section 81 (1)(d) and (e) of the Companies Act reads:

“81

(1) A Court may order a solvent company to be wound-up if -

- (d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that—
 - (i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and—
 - (aa) irreparable injury to the company is resulting, or may result, from the deadlock; or
 - (bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;
 - (ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or
 - (iii) it is otherwise just and equitable for the company to be wound up;
- (e) a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that—
 - (i) the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or
 - (ii) the company's assets are being misapplied or wasted; or

[30] The shorter Oxford English Dictionary 6 Ed (2007) Vol 1 at 611 defines the word “deadlock” as a “condition or situation in which no progress or activity is possible; a complete standstill; lack of progress due to irreconcilable disagreement on equal opposing forces.” In order to succeed, the applicant had to prove that there was a condition or situation in the management of the company which had totally put a spoke in the wheels of the company. Secondly, the applicant had to show that this “complete standstill” in the management of the company was due to some disagreement which, in its nature, is irreconcilable between opposing parties or forces.

[31] The applicant's case is that he does not know what is happening in the company of which he is a director and a shareholder. He says that he does not even know who are the other directors or shareholders of the company. He was never invited and never attended

any directors' or shareholders' meeting. In brief, he is totally in the dark about the affairs of the company as he is totally side-lined from the governance or affairs of the company. From this exposition it becomes clear that the applicant has failed to show any deadlock in this company. He has accordingly failed to satisfy the requirements of section 81 (1)(d) of the Act.

[32] The applicant sought refuge in the decision of the SCA in *Thunder Cats v Nkonjane Economic Prospecting*[1], and it was submitted that the current matter is similar to the matter in *Thunder Cats*. I have carefully perused Malan JA's judgment in *Thunder Cats* and I find nothing there which supports the applicant's case. The simple truth in casu is that the applicant has failed to surmount the first hurdle – he has failed to prove that there is a deadlock in the company. On that ground alone, his application must fail.

The oppression remedy

[33] The second ground upon which the applicant relied in support of his application for liquidation of the First Respondent is that he (applicant), as a minority shareholder of the company is being oppressed by the conduct of the directors as alluded to earlier in this matter. Section 163 of the Companies Act addresses this aspect but the applicant did not rely on section 163 for its remedy. The oppression remedy in section 163 deals with a situation where the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant. Unfortunately however, section 163 does not apply to a solvent company, such as the current First Respondent.

[34] The hard reality with the First Respondent is that the majority of directors are running the affairs of this company which is in a sound financial footing. The applicant is bound by a decision of the majority of the board members of the company even if the decision is prejudicial to him. The principle of majority rule is part of our company law.

Counter application

[35] The applicant admits having received R84 500 which was paid to him as “director's compensation in order to execute our fiduciary duties, as well as to attend meetings and expenses and disbursements associated with that.” It should be borne in mind that this is the same applicant (in convention) whose complaint is that he was never invited to, nor did he attend any directors' or shareholders' meeting. This is the same applicant who avers that he is totally in the dark about the management of this company because he is being side-lined. The implication from his alleged passiveness and non-participation in governance of the company suggests in my view that he would not have been entitled to director's compensation for performing fiduciary duties.

[36] Be that as it may, the First Respondent has given a sound and rational explanation about the reasons for the payment of R84 500.00 to the applicant. This money, says the First Respondent, was the advance payment to the applicant. This payment is reflected in Respondent's annexure Q. On the other hand, the majority of the board members of the company resolved to remove the applicant as a director and shareholder of the First Respondent in a meeting held on 28 September 2017. The minutes of this meeting is annexure N to the First Respondent's opposing affidavit.

Conclusion

[37] When this matter was argued, Mr De Villiers, for the First Respondent indicated that his instructions were now to insist only on prayers 1, 2 and 6 of their counterclaim (para 23(1), (2) and (6) of this judgment). In view of the conclusion which I have reached, I deem it necessary to deal with the issue of condonation which was pertinently raised by the First Respondent.

Order

[38] Consequently, the following order is made:

38.1 Main application

- The application for winding up of the First Respondent is dismissed with costs.

38.2 Counter application

- Applicant is ordered to repay the amount of R84 500.00 (Eighty Four Thousand Five Hundred Rand) to the First Respondent within thirty

(30) days from date hereof.

- The auditor of the First Respondent is hereby authorised and directed to cancel the share certificate issued to the Applicant and to reissue the shares in the name of Makgala Gabriel Bareng Stephen;
- The applicant to pay the costs.

SAMKELO GURA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION: MAHIKENG

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[1] 2014 (5) SA 1 (SCA).

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Prepared on 10 October 2026 · Esheria