IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

In the matter between:	**CCA/0045/2023**
CGM INDUSTRIAL (PTY) LTD	**1ST APPLICANT**
PRESITEX ENTERPREISES (PTY) LTD	**2ND APPLICANT**
AND	
MADHAV VASANT DALVI	**1ST RESPONDENT**
SUSHAMA DALVI	**2ND RESPONDENT**
CHAITANYA MADHAV DALVI	**3RD RESPONDENT**
SHARMALA ROYA	**4TH RESPONDENT**
DENIMAGIC (PTY) LTD	**5TH RESPONDENT**
NEDBANK LESOTHO LIMITED	**6TH RESPONDENT**
STANDARD BANK LESOTHO LIMITED	**7TH RESPONDENT**
DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES	**8TH RESPONDENT**
LESOTHO NATIONAL DEVELOPMENT CORPORATION	**9TH RESPONDENT**
LAND ADMINISTRATION AUTHORITY	**10TH RESPONDENT**
MASTER OF THE HIGH COURT	**11TH RESPONDENT**
ATTORNEY GENERAL	**12TH RESPONDENT**
LESOTHO HOUSING AND LAND DEVELOPMENT CORPORATION	**13TH RESPONDENT**
ALCHEMY TEXTILES) PTY) LTD	**14TH RESPONDENT**
‘MANEO POOPA (EXECUTRIX TO THE ESTATE OF THE LATE CLARK TAELO POOPA)	**15TH RESPONDENT**

Neutral Citation: CGM Industrial (PTY) LTD & Another v Madhav Vasant Dalvi & 14 Others [2023] LSHC 143 Comm. (14 SEPTEMBER 2023)

CORAM: **MOKHESI J**

HEARD: **05TH JUNE 2023**

DELIVERED: **14TH SEPTEMBER 2023**

SUMMARY

Company Law: *The correct procedure for bringing a derivative action in terms of section 77 of the Companies Act 2011- The company should be cited as the respondent not applicant because the proceedings would not have been authorised by its board of directors- Citing the company as the applicant is a fatal irregularity.*

ANNOTATIONS

Legislation:

Companies Act 2011

Cases:

England

Beattie v Beattie Ltd [1938] Ch. 708 (CA)

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

Roberts (FC) v Gill & Co. Solicitors and Others [2010] UKSC

Spokes v Grosvenor Hotel [1897] 2 QB 124

South Africa

Desai v A H Moosa (Pty) Ltd 1932 NPD 157

JUDGMENT

[1] **Introduction**

This matter concerns the correct procedure to be followed by a person who desires to bring an application for leave to sue on behalf of the company in terms of the provisions of Section 77 of the Companies Act 2011. When the matter was argued before me on 05 June 2023, I made an order that the application should be dismissed on account of the irregular procedure adopted by Mrs Eugenia Shia Chia Chang. Ms Chang claims to be a shareholder of the two companies which have been cited as applicants in this matter. I use the word "claims" because the issue of her shareholding is a disputed territory. For purposes of this judgment, I will assume that she is the shareholder. The companies in question are CGM Industrial (Pty) Ltd and Presitex Enterprises (Pty) Ltd. Each company has two shareholders. The majority shareholder in each of them is a company by the name of Solandra Incorporated (BVI), which is in liquidation in the British Virgin Islands.

[2] **Background Facts**

In both companies Ms Chang's brother is the minority shareholder with one share. Solandra Incorporated (BVI) owns nine hundred and ninety-nine shares of one thousand issued shares. On 05 June 2023 the current application was lodged in terms of which CGM Industrial (Pty) Ltd and Presitex Enterprise (Pty) Ltd were the applicants and were suing their director and other parties. In the application, the relief being sought in the main was that:

> *"3. Leave be granted allowing the Applicant's minority shareholder to institute the present proceedings for and on behalf of and in the names of the Applicants in terms of Section 77 of the Companies Act 2011."*

[3] Other incidental reliefs were also sought, but for purposes of this judgment it is unnecessary to allude to them. The 1st to 5th respondents raised the point of law regarding Ms Chang's authority to represent the applicants as she is not the companies' shareholder. During arguments Mr Ndebele was further pressed upon to explain the procedure adopted by Ms Chang in citing the companies as applicants before leave is granted to her to sue on their behalf. Mr Ndebele's answers were unconvincing to say the least. He appeared to see no harm in adopting this course as he considered it to be a mere technicality which can be overlooked. He was mistaken as will be shown in due course. After arguments I made an *ex tempore* judgment that the

procedure adopted by Ms Chang to cite the companies as applicants in her application as a shareholder seeking leave to sue on their behalf is irregular. The application was dismissed with costs to be paid by her. I promised to deliver full written reason for my judgment in due course. What follows are those reasons.

[4] **Issues for determination:**

(i) Whether Ms Chang has authority to depose to affidavits on behalf of the companies and

(ii) The correct procedure for bringing a derivative action.

[5] **Legislative background and rationale**

Derivative action is provided for in Section 77 of the Companies Act 2011. It provides that (in relevant parts):

> *"(1) Subject to subsection (2), a shareholder or director of a company may apply to court for leave to bring proceedings in the name and on behalf of the company or a related company is a party, or intervene in the proceedings to which the company or related company is a party, for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company or related company.*
>
> *(2)* ….
>
> *(3)* ….

(4) Notice of application shall be served on the company or related company, which may appear and be heard and shall advise the court whether or not it intends to bring, continue, defend, or discontinue the proceedings

(5) ….

(6) Unless otherwise provided in this section, a shareholder shall not be entitled to bring or intervene in any proceedings in the name of, or on behalf of a company or a related company."

[6] Derivative action is brought by a person to protect the company from the wrongs of those in its control, and thus to protect its legal interests. When derivative action was coined by the courts, it was meant to be an exception to the general principle of our company law that the company is the "proper plaintiff" to sue to protect its own legal interests (**Foss v Harbottle (1843)2 Hare 461, 67 ER 189).** This section abolishes and substitutes the right of any person at common law to lodge proceedings other than the company itself where its legal interests are at stake and in need of protection. The section allows certain designated groups of persons to bring derivative action namely: directors or shareholders. The director or shareholder will only succeed to bring derivative action if the company does not bring the

claim itself. The first step to bring derivative action is to seek leave to bring derivative action.

[7] However, in these types of matters, what rarely engages the minds of the court is the proper procedure to be followed for lodging proceedings for leave to bring a derivative action on behalf of the company. I refer to it as rarity because the question of procedure is taken as settled and trite since time immemorial. The present matter is one of those rare incidences where the matter is disposed of on account of a wrong procedure followed by the shareholder seeking leave to bring proceedings on behalf of the company.

[8] As already stated in preceding paragraphs, the 1st to 5th respondents raised an issue of Ms Chang's authority to bring the proceedings against them. I ruled that the objection was well-taken and I dismissed the application with costs to be paid by Ms Chang. The proper procedure for applying to seek leave to bring proceedings on behalf of the company or in its name, is for the person seeking leave to cite himself or herself as the applicant and the company as the respondent. The reason for is so that the company will be bound by the judgment and be in a position to receive the benefits of the said judgment. This was made clear in the case of **Roberts (FC) v Gill & Co. Solicitors and Others [2010] UKSC** where Lord Collins said:

"57. A derivative action is brought in representative form, and the company is joined as a defendant in order for it to be bound by any judgment and to receive the fruits (if any) of the judgment, and because the action has not been authorised by its board or general meeting: Spokes v Grosvenor and West End Railway Terminus Hotel Co. Ltd [1897] 2 QB 124, which is the leading authority on the joinder of the company in derivative actions. A L Smith LJ said (at 126)

"That in the circumstances of this case the company are necessary parties to the suit I do not doubt, for without the company being made a party to the action it could not proceed."

58. Chitty L J said (at 128-129)

"To such an action as this the company are necessary defendants. The reason is obvious: the wrong alleged is done to the company, and the company must be the party to the suit in order to be bound by the result of the action and to receive the money recovered in the action. If the company were not bound they could bring a fresh action for the same cause if the action failed, and there were subsequently a change in the board of directors and in the voting power. Obviously in such action as this is, no specific relief is asked against the company; and obviously, too, what is recovered cannot be paid to the plaintiff representing the minority, but must go into the coffers of the company. It was argued for the appellants that the company were made a party for the purpose of discovery only, and authorities were cited to shew that when no relief is asked against party he cannot or ought not to be compelled to make discovery. But this argument and these authorities have no bearing on the present case, where, as already shewn, the action cannot proceed in the absence of the defendant company, and

the defendant company are interested in and will be bound by the results.""

[9] The same approach was articulated in **Beattie v Beattie Ltd [1938] Ch. 708 (CA) at 718; Spokes v Grosvenor Hotel [1897] 2 QB 124** cited with approval in **Desai v A H Moosa (Pty) Ltd 1932 NPD** 157 at 159.

[10] In the present matter Ms Chang has cited the companies as the applicants instead of respondents. The anomaly of the application is that by citing the companies she gives a wrong impression that they are *domini litis* when as a matter of fact they are not. The suit has not been sanctioned by the board of directors, but instead, it is Ms Chang who is bringing proceedings seeking leave to sue on behalf or in the names of the two companies. It is odd that she cites the companies as the applicants. I therefore find that Ms Chang lacks standing and authority to bring this application.

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

(i) The Application is dismissed with costs to be paid by Ms Eugenia Shia Chang.

MOKHESI J

For the Applicants: **Mr. K. Ndebele from K. Ndebele Attorneys assisted by Mr M. Rasekoai**

For the 1st Respondent: **Mr Q. Letsika from Mei & Mei Attorneys Inc.**

For the 2nd to 5th Respondents: **Adv. S. Phafane KC instructed by Mei & Mei Attorneys**

For the 6th to 15th Respondents: **No Appearance**