

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0056/23

In the matter between:

**NETCARE HOSPITAL GROUP PROPRIETARY
LIMITED**

PLAINTIFF

AND

TŠEPONG PROPRIETARY LIMITED

1ST RESPONDENT

**EXCEL HEALTH SERVICES PROPRIETARY
LIMITED**

2ND RESPONDENT

**AFRI'NNAL HEALTH PROPRIETARY
LIMITED**

3RD RESPONDENT

**D10 INVESTMENTS PROPRIETARY LIMITED
RESPONDENT**

4TH

**WOMAN INVESTMENT COMPANY
PROPRIETARY LIMITED**

5TH RESPONDENT

Neutral Citation: Netcare Hospital Group Proprietary Limited v Tšepong Proprietary Limited & Others [2023] LSHC 146 Comm. (30 NOVEMBER 2023)

CORAM: MOKHESI J
HEARD: 21 AUGUST 2023
DELIVERED: 30 NOVEMBER 2023

SUMMARY

COMPANY LAW: *A shareholder seeking leave to institute derivative action on behalf of the company in terms of Section 77 of the Companies Act, 2011- the requisites thereof articulated and applied- Authority to represent a company by a director- Although there is no invariable rule that a company resolution be attached to deponent' s affidavit evidencing authority, where such is questioned, sufficient aliunde evidence must be produced- In the present matter the director did not have authority to represent the company.*

ANNOTATIONS

LEGISLATION

Companies Act, 2011

CASES

LESOTHO

Central Bank of Lesotho v Phoofolo LAC (1985 - 89) 253

*Richard Friedland and others v Lehlohonolo Mosotho and others
CCA/0063/2020 (unreported) (15 October 2020)*

SOUTH AFRICA

Ikowitz v ABSA Bank 2016 (4) SA 432 (SCA)

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

*Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347
(C)*

*Netcare Hospital Group (Pty) Ltd v Afri Nnai Health (Pty) Ltd and
others (2530/2014) [2015] ZAFSHC 40 (26 February 2015)*

JUDGMENT

[1] Introduction

This is an application for leave to institute derivative action by a shareholder brought in terms of the provisions of Section 77 of the Companies Act, 2011. The following orders are sought in terms of the Notice of Motion:

“1. The Applicant’s non-compliance with the Rules of Court relating to form, service and time periods is hereby condoned and the matter is heard as one of urgency.

2. A Rule Nisi be and is hereby issued calling upon the First Respondent and any persons who have a lawful interest in this order to appear and show cause, if any, on a date and time to be allocated by the presiding Judge, why the Applicant should not be granted leave, at its election and its sole discretion -

2.1 To intervene in the pending arbitration proceedings between the Government of Lesotho and the First Respondent conducted before Arbitrator Heher (Retd J) in terms of the Arbitration Agreement concluded on 27 June 2016 (a copy of which is annexed marked “A”) to determine disputes between them arising out of the

Public Private Partnership Agreement (as amended) concluded between the Government of Lesotho (represented by the Ministry of Health and Social Welfare) and the first Respondent on 27 October 2008 (“PPP Agreement”) for the purposes of continuing the arbitration proceedings and further to pursue the claims against the Government of Lesotho arising from the PPP Agreement (as set out in annexure B), in the name of and on behalf of the First Respondent; alternatively,

2.2 to continue, on behalf of the Applicant, with pending action between the Applicant and the Government of Lesotho in the High Court of Lesotho under case number CCT/0127/2020 and further to pursue the claims against the Government of Lesotho arising from the PPP Agreement (as set out in annexure B), in the name of and on behalf of the First Respondent; further alternatively,

2.3 to bring such proceedings as may be necessary, in the names of and on behalf of the First Respondent, to pursue the claims against the Government of Lesotho arising from the PPP Agreement (as set out in annexure B); and

2.4 to take such steps and do such things as may be necessary to give effect to this order and to protect the interests of the First Respondent.

3. The orders in paragraphs 1 and 2 above shall operate with immediate effect pending the return day of this application.

4. The applicant is granted further and/or alternative relief.”

[2] Background Facts

This application is opposed. The applicant is a company registered in terms of the laws of South Africa. It is a 40% shareholder of the 1st respondent. The 1st respondent is a company registered in terms of the company laws of Lesotho. The 2nd, 4th and 5th respondents are companies registered in terms of the company laws of Lesotho. Their shares in the 1st respondent stands at 20%, 10% and 10% respectively. The 3rd respondent is a company registered in accordance with company laws of South Africa. It is a 30% shareholder in the 1st respondent.

[3] The 1st respondent was incorporated in 2006 as the provider of health care and other services at Queen ‘Mamohato Memorial Hospital on behalf of the Government of Lesotho in terms of the Public Private Partnership Agreement (“PPP

Agreement”) concluded between the 1st respondent and the Government of Lesotho on 27 October 2008. The Chief Executive Officer of the applicant and directors of other shareholders of the 1st respondent comprise the 1st respondent’s board of directors. As this court made it plain, in **Richard Friedland and Others v Lehlohonolo Mosotho and others CCA/0063/2020 (unreported) (15 October 2020)** at para. 3 there have been running internal ructions between the shareholders and their directors leading to legal actions in this court while others spilled into the South African courts, resulting in the Free State High Court in **Netcare Hospital Group (Pty) Ltd v Afri’Nnai Health (Pty) Ltd and Others (2530/2014) [2015] ZAFSHC 40 (26 February 2015)** at para. 6.6 to remark as follows:

“There is animosity among the various role players and the objective facts indicate that Netcare’s representative and Mosotho do not sit around the same fire. They do not see eye to eye.”

- [4] The PPP Agreement was repudiated by the Government of Lesotho in August 2021. At the time of termination there were pending litigation and arbitration proceedings in which the 1st respondent was suing the Government of Lesotho to recover the money owing. In some cases, the applicant is suing derivatively for the 1st respondent to recover debts owing by the Government of Lesotho (CCT/0127/2020). The amounts claimed are quite substantial it should be stated.
- [5] It is common cause that the applicant has raised the issue of the Government of Lesotho's (GoL) indebtedness with the 1st respondent's board, the latest such incident being on 17 May 2023. It is also common cause that the debt is worth more than one billion Maloti and was due to prescribe on the 24 August 2023. Some of the debts have already prescribed as they were not pursued by the 1st respondent's board. With the looming prescription of this substantial amount of money the 1st respondent's board at its meeting acknowledged that it was owed huge sums of money by the GoL but instead resolved to take action against the applicant. It is against

this factual backdrop that the applicant instituted the current proceedings in the manner alluded to above.

[6] **Respective Parties' Cases**

Applicant's case

The applicant has raised the question regarding Prof. Mosotho's authority to represent the company. The essence of the applicant's case is that the 1st respondent's board's deadlock has led to its debts prescribing and the last and substantial one on the brink of being hit by prescription.

[7] The bases of the applicant's case that the board of the 1st (i) respondent is dysfunctional owing to internal squabbles and that since the PPP Agreement was cancelled the 1st respondent has become insolvent as it was established as a special purpose vehicle solely reliant on the GoL payments.

(ii) The sign that the board of the 1st respondent has failed to institute action to recover the money owed by the GoL is illustrated by the fact that the applicant has already instituted two proceedings in the name of the 1st respondent

claiming an amount in excess of M1,5 billion from the GoL for breaches of the PPP Agreement.

(iii) The issue of the GoL's indebtedness has been raised in the 1st respondent's board meetings, the latest being on 17 May 2023, but instead of the board resolving to institute claims against the GoL it resolved to take action against the applicant despite the claims being on the brink of prescribing in terms of Section 4 of the Government Proceedings and Contracts Act, 1965.

(iv) The applicant avers that the proceedings are likely to succeed as they are based on claims for unlawful cancellation by the GoL of the PPP Agreement and its breaches.

[9] **Respondent's Case**

The respondents contend that the applicant does not have a right to represent the 1st respondent as the latter is able to represent itself and to pursue its rights. They contend that the 1st respondent is pursuing its interests, and they make

reference to a letter of 29 September 2021 by the then Principal Secretary in the Ministry of Health to the 1st respondent in which he states, at para. 4 thereof:

“4. Therefore, GoL expects nothing from Tšepong except an invoice reflecting the GoL compensation amount pursuant to clause 56 of the PPPA (compensation on termination for operator Default). Note that the compensation shall be paid in accordance with the PPPA read with the Lenders Direct Agreement and other financing documents.”

[10] The 1st respondent denies that its claims have prescribed and para. 72 of its Answering affidavit avers that:

“72. I deny contends of paragraph 37. There no claims that have prescribed. Tšepong is still acting on its rights. There derivative action is unnecessary in the circumstances. Tšepong is fully aware of the provisions of the Government Proceedings and Contracts Act 1965 and has prepared adequately to ensure that all its claims against the Government are filed in the next few days of less than a week in computation” (sic).

[11] **Issues for Determination**

- (i) Points in *limine* raised
- (ii) The merits should the point in *limine* not succeed.

[12] **Professor Mosotho's authority to represent Tšepong**

The applicant's contention is that Prof. Mosotho who deposed to affidavit on behalf the 1st respondent has not been authorised by its board as no resolution to that effect has been attached to the answering affidavit. On the issue of authority Prof. Mosotho avers that:

"2. I am a founding director of Tšepong (Pty) Ltd which I refer to simply as Tšepong hereunder.

3. I am a director and chairman of the third respondent

4. I depose to this affidavit in the respective capacities stated above. The respective companies have resolved to oppose the present application.

5. The fourth respondent also opposes this application and has resolved to make common cause with the contents of my affidavit.

6. I submit that I am in the circumstances duly authorized to depose to this affidavit on behalf of the opposing respondents stated in the notice of intention to oppose."

[13] I wish to deal with the applicable law before I determine whether Pro. Mosotho has been authorized by the 1st respondent to oppose this application. The approach to the issue of authority to institute proceedings on behalf of the company is to look at the affidavit the person who proclaims to be acting on authority together with the copy of the resolution of the company annexed to such affidavit. However, resolution need not always be attached if there is enough evidence on the affidavit evincing authority (**Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C) 352 A - B**). In **Central Bank of Lesotho v Phoofolo LAC (1985 - 89) 253** at 258J - 259B the court stated the approach as follows:

“The respondent had contended in the court a quo that there were two technical grounds on which the appellant’s opposition should fail. The first technical ground was that no resolution, evidencing the authority of the Governor to depose to an affidavit on behalf of the appellant, or to represent the appellant in the proceedings, was filed. This objection was without substance; and was correctly dismissed by Molai, J. There is no invariable rule which requires a juristic person to file a formal resolution, manifesting the

authority of a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts. In the present case the authority of the Governor to represent the appellant in the proceedings in the court a quo appears amply from the circumstances of the case, including the filing of the notice of opposition to the application.”

[14] From the foregoing it is clear that Prof. Mosotho is not authorized to represent the 1st respondent. He speaks in cryptic terms that “the respective companies have resolved to oppose the present application.” It is also clear that 3rd and 4th respondents oppose the application. Dr Smith avers that the 2nd respondent neither opposes nor support the application, and that the 5th respondent supports the action as can be garnered from their email in which they specifically state that they support the action. This shows that 50% of the shareholders support the action. It is therefore highly unlikely that in the board meeting this scenario would change. Deponent to the founding affidavit, Dr Smith is one of the directors of the 1st respondent and he pleads that he does not know of any meeting where a resolution was passed to oppose this action.

[15] In my considered view, apart from the fact that Prof. Mosotho is one of the directors of the 1st respondent, more in the form of a resolution was needed to proof authority to represent. The cryptic manner in which he pleads authority in the circumstances of this case is insufficient to prove authority. I therefore find that Prof. Mosotho does not have authority to represent the 1st respondent. There is insufficient *aliunde* evidence of authority in this case. The denial by Dr Smith of Prof. Mosotho's authority is not a bare one.

[16] Having reached the above conclusion, the next issue to be determined is whether the applicant has made out a case for the relief sought. Section 77 of the Companies Act, 2011 provides that:

“(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, or intervene in proceedings to which the company or related company is a part, for the purpose of continuing, defending or discontinuing the

proceedings on behalf of the company or related company.

(2) without limiting subsection (1), in determining whether to grant leave, the court shall have regard to -

(a) the likelihood of the proceedings succeeding;

(b) the costs of the proceedings in relation to the relief likely to be obtained;

(c) any action already taken by the company or related company to obtain relief; and

(d) the interests of the company or related company in the proceedings being commenced, continued, defended or discontinued, as the case may be.

(3) An application for leave to bring proceedings or intervene in proceedings shall be granted only if the Court is satisfied that -

(a) the company or related company does not intend to bring, diligently continue, defend or discontinue the proceedings; or

(b) it is in the interests of the company or related company that the conduct or the proceedings should not be left to the directors or to the determination of the shareholders as a whole.

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

(5) Where leave is granted under this section on the application of the shareholder or director to whom leave was granted to bring or intervene in the proceedings, the Court shall -

(a) make an order authorizing the shareholder or any other person to control the conduct of the proceedings

(b) give directions for the conduct of the proceedings;

(c) make an order requiring the company or the directors to provide information or assistance in relation to the proceedings;

*(d) make an order directing that any amount ordered to be paid by a defendant in the proceedings shall be paid in whole or part, to former and present shareholder of the company or related company;
or*

(e) make an order that the whole or part of the reasonable costs of bringing the action or intervening in the proceedings including any costs

relating to any settlement compromise or discontinuance be borne by the company, unless the Court is of the opinion that it would be unjust or inequitable for the company to bear the costs.

(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.”

[17] A salutary principle of our company law is that a company has a distinct legal personality from its members. The incident of this separate legal personality is that the company’s legal interests can only be protected by it not its members (**Ikowitz v ABSA Bank 2016 (4) SA 432 (SCA) at para. 9**): see **Foss v Harbottle (1843) 2 Hare 461, 67 ER 189**). A derivative action was however designed by the courts as an exception to the principle that the company is the “proper plaintiff” to protect its legal interests. The statutory position in terms of Section 77 above, abolishes and substitutes a right of any person to bring proceedings other than the company itself when its legal interests are at stake. This section designates certain categories of persons as being eligible to bring proceedings on behalf of the

company in certain defined circumstances. In terms of Section 77 (1) a shareholder or director of a company may apply to court for leave to bring proceedings in the name on behalf of the company or a related company or intervene in proceedings in which a company or related company is a litigant, for purposes of continuing, defending or discontinuing proceedings on behalf of the company or related company.

[18] I considered the applicant's papers, and I am satisfied that the application fulfils the requirement of Section 77: There is a likelihood of the proceedings succeeding as the applicant would be pursuing a claim for damages for breach of contract by the GOL; the applicant has undertaken to pay the costs of this application and the intended derivative action; there are proceedings which have already been commenced and should be pursued to finality; the intended action involves substantial amounts of money.

[19] In the result the following order is made:

- (i) The application is granted as prayed in the Notice of Motion.

MOKHESI J

**For the Applicant: Adv. PJJ Zietsman SC instructed by
Kleingeld Attorneys**

**For the Respondents: Adv. LA Molati instructed by
Mukhawana Attorneys**