

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION: BLOEMFONTEIN

Case No.: 2530/2014

In the matter between:-

NETCARE HOSPITAL GROUP (PTY) LTD

Appellant

And

AFRI 'NNAI HEALTH PTY LTD & FIVE OTHERS

Respondents

CORAM: DAFFUE, J

JUDGMENT BY: DAFFUE, J

HEARD ON: 27 NOVEMBER 2014

DELIVERED ON: 26 FEBRUARY 2015

I INTRODUCTION

- [1] This is a rather unique and novel application in terms whereof applicant seeks relief from this court relating to the internal affairs of another company. The leave, if granted, will also have an effect on the directorships in a Lesotho company. At the heart of the dispute is the continued existence of the Queen 'Mamohato Memorial Hospital ("the hospital") in Maseru, Kingdom of Lesotho and the rights of

the people of Lesotho to receive much needed medical care in a first-class facility.

II THE PARTIES

[2] Applicant is Netcare Hospital Group Pty Ltd (“Netcare”). Afri ‘Nnai Health Pty Ltd (“Afri ‘Nnai”) is the first respondent and a private individual and psychologist of profession, Lehlohonolo Mosotho (“Mosotho”), a shareholder and director of Afri ‘Nnai is cited as second respondent. Third respondent is Tsepong (Pty) Ltd, (“Tsepong”) and the fourth to sixth respondents are respectively Excel Health Services (Pty) Ltd, D10 Investments (Pty) Ltd and Women Investment Company (Pty) Ltd.

[3] The application is opposed by first and second respondents only. Adv IP Green SC appeared with Adv YF Saloojee for Netcare and Adv MDJ Steenkamp represented first and second respondents.

III RELIEF SOUGHT

[4] Netcare seeks a temporary interdict pending the finalisation of arbitration proceedings between it and Afri ‘Nnai in Lesotho. It seeks the following relief:

- 4.1. that second respondent (Mosotho) be removed as a director from the board of directors of third respondent (Tsepong),
- 4.2. that first respondent (Afri ‘Nnai) be interdicted and restrained from nominating or appointing the second respondent as its representative on the board of

directors of third respondent, and

- 4.3. that second respondent be interdicted and restrained from accepting a nomination or an appointment by the first respondent to the board of directors of third respondent.
- 4.4. Costs of suit are also sought from first and second respondents jointly and severally, they being the only respondents who oppose the application.

IV THE ISSUES

- [5] The nub of the dispute is whether applicant is entitled to relief that can be regarded as nothing else but interference by this court with the internal affairs of Afri 'Nnai and Tsepong, first and third respondents respectively, especially insofar as the relief relates to the directorships of third respondent, a foreign company.

V SUMMARY OF THE SALIENT COMMON CAUSE FACTS

- [6] The following facts are common cause:
 - 6.1. The hospital is the pre-eminent provider of much needed medical care to the people of the Kingdom of Lesotho. There is no other comparable hospital in Lesotho.
 - 6.2. The hospital is owned through Tsepong and is part of a private/public partnership.
 - 6.3. Netcare, Afri 'Nnai and fourth to sixth respondents are shareholders in Tsepong and a shareholders' agreement regulates the rights and obligations of these parties. Tsepong and fourth to sixth

respondents are companies incorporated under the laws of the Kingdom of Lesotho.

- 6.4. Netcare and Afri 'Nnai are South African companies and Mosotho is resident in Bloemfontein, South Africa.
- 6.5. Mosotho is a director of Tsepong, he having been nominated by Afri 'Nnai in accordance with the provisions of the aforesaid shareholders' agreement. Mr S Lejakane, who is also a member of Tsepong's audit committee, has been appointed Afri 'Nnai's alternate director in Tsepong.
- 6.6. There is animosity amongst the various role players and the objective facts indicate that Netcare's representatives and Mosotho do not sit around the same fire. They do not see eye to eye.
- 6.7. Netcare, believing that Mosotho in his capacity as director of Afri 'Nnai acted in a manner that constituted a breach of the shareholders' agreement, exercised its right to acquire Afri 'Nnai's shares in Tsepong in accordance with the shareholders' agreement and at a price determined through a mechanism set out therein.
- 6.8. In June 2013 Afri 'Nnai brought an application in the Lesotho High Court to interdict the disposal and/or acquisition of shares in Tsepong. The shareholders' agreement contains an arbitration clause and consequently, the High Court, after several postponements eventually on 20 May 2014 referred the matter to arbitration. Arbitration proceedings are

now pending in Lesotho to resolve the dispute.

- 6.9. If Tsepong is allowed to fail, the hospital will close down and it will have dire consequences for the Lesotho people. Tsepong admits about 50 percent of all in-patients in Lesotho and provides a number of specialised health care services that were not available in Lesotho before.
- 6.10. Mosotho accused Netcare in the past and in doing so attributed racial qualities to the parties - Netcare being referred to as a “big white South African company” and the other shareholders in Tsepong as “poor blacks”. Later on Netcare was accused of corrupt activities and at this point in time Mosotho refuse to approve Tsepong’s annual financial statements although these have been recommended for approval by its audit committee, including Mr Lejakane of Afri ‘Nnai who is a member of that committee. Mosotho also convinced fourth and fifth respondents’ nominees on the Tsepong board not to approve the aforesaid financial statements. A deadlock has therefore arisen in this regard.
- 6.11. The non-approval of the financial statements has several consequences which may negatively influence and seriously hamper the running and existence of the hospital. No annual general meeting of shareholders of Tsepong can be held. In terms of an agreement between the World Bank and Tsepong a grant of over 6 million US Dollar was

given to Tsepong on certain terms and conditions, one thereof that audited financial statements be furnished from time to time. The financial statements for the year ending 30 September 2012 should have been furnished by March 2013 and these are still outstanding. The non-approval of the audited financial statements is also in breach of the Public/Private Partnership Agreement with the Government of Lesotho, as well as the Common Terms Agreement entered into between the Development Bank of Southern Africa and Tsepong and the other parties.

VI JURISDICTIONAL POINT

[7] Mr Steenkamp submitted on behalf of 1st and 2nd Respondents that this court does not have jurisdiction to grant relief, based on two foundations, i.e.:

1. Tsepong is registered under the laws of Lesotho, and
2. the shareholders' agreement refers to the laws of Lesotho and all Tsepong's affairs are conducted in Lesotho.

[8] Mr Green submitted on behalf of Netcare that the relief sought would not operate against Tsepong directly and although the consequences will be felt in Lesotho, this court has jurisdiction over both Afri 'Nnai, a South African company with registered address in Bloemfontein and Mosotho, a resident of Bloemfontein, Free State Province. It is probably not coincidental that Mosotho's residential

address is also the registered address of Afri 'Nnai. Any relief granted will be effective in respect of both these respondents.

- [9] My *prima facie* view was that this court had jurisdiction to entertain the application. I reconsidered the matter and am of the view that this court has no jurisdiction in respect of the real, main and primary issue, to wit whether or not Mosotho shall be removed from Tsepong's board of directors. The other relief claimed are in essence side issues in order to convince this court that it has jurisdiction. Section 21(1) of the Superior Court's Act, 10 of 2013 reads:

“A division has jurisdiction over all persons residing in, or being in, and in relation to all causes arising.... triable within, its area of jurisdiction”

My initial reaction was to dismiss the point *in limine*. The court has jurisdiction over the entity, Afri 'Nnai and the person, Mosotho, but this appears to be beside the point as I'll indicate *infra*. However, and even if the point *in limine* was to be dismissed, it is an entirely different matter whether relief should be granted based on the requirements of temporary interdicts and I shall deal with this aspect *infra* when the law is applied to the facts.

- [10] Mosotho is a duly appointed director of Tsepong, a foreign company. His appointment was effected in terms of the shareholders' agreement entered into in Lesotho which

agreement stipulates that the laws of the Kingdom of Lesotho shall apply in respect of any business and/or disputes arising from the agreement. The relief claimed in paragraphs 1.2 and 1.3 of the notice of motion is immaterial at this moment in time. Mosotho is Afri 'Nnai's incumbent director on Tsepong's board and it is not anticipated that he might be appointed in that position. If Mosotho was not appointed as yet, and relief in terms of paragraphs 1.2 and 1.3 only was sought, I would not have any hesitation to find that this court has jurisdiction. The converse is true. This court lacks jurisdiction to grant an order removing Mosotho from Tsepong's board of directors.

- [11] Mr Green summarised respondents' jurisdictional attack incorrectly. He submitted that the challenge to this court's jurisdiction is wrong for two reasons, to wit (a) both Mosotho and Afri 'Nnai are domiciled within the court's jurisdiction and the relief claimed will be effective against them and can be enforced within this court's jurisdiction and (b) the removal of Mosotho as a director of Afri 'Nnai is relief that operates against Mosotho who is within the court's jurisdiction. I do not agree. Firstly as to (a), he may be correct in respect of the relief sought in paragraphs 1.2 and 1.3 as mentioned, but not in respect of the main relief. Secondly as to (b), no relief is sought that Mosotho be removed as director from Afri 'Nnai's board, but from Tsepong's board. The first entity is a South African company domiciled in the Free State Province, but the

other clearly not. Mr Green also submitted that the suggestion that Tsepong's domicile is relevant misses the point as the relief sought does not operate against Tsepong. Such argument is in direct conflict with paragraph 1.1 of the notice of motion, the primary relief sought and the rationale which runs like a golden thread through applicant's papers. It wants to get rid of Mosotho's interference and the only effective means is to achieve this is to have him removed as director and thus eliminated from Tsepong's board meetings.

- [12] I do not agree with Mr Green's submission that the fact that Tsepong is a Lesotho company does not bar the granting of an order that has an effect on it. The judgment in **Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd** 2014 (3) SA 265 (GP) relied upon does not assist him. The facts are not on all fours with the facts *in casu*. It is true that a more relaxed view as to jurisdiction has been adopted by the court recently. Considerations of appropriateness and convenience have to prevail. The judgment in **Multi-Links** is distinguishable. The Nigerian company, APSN, was found to be a necessary party to the proceedings. It was common cause that the court had jurisdiction over APS, a company which concluded the Super Dealer Agreement (SDA) and ceded or purported to cede the SDA to APSN with the consent of Multi-Links. The determination of the dispute between Multi-Links and APS would determine the same issue which is in dispute between Multi-Links and APSN. APSN

instituted a money claim against Multi-Links under the auspices of the Arbitration Foundation of South Africa (AFSA) and the parties concluded a deed of submission to arbitration in order to allow the arbitrators to determine the validity of the SDA. The arbitration was pending when the matter was heard by the court. Both Telkom and Multi-Links instituted action against inter alia APSN, Telkom claiming money from it and several other defendants, and Multi-Links claiming damages and an order that the arbitration proceedings will cease to have effect in respect of certain specified issues. The SDA was central to all disputes and claims. All the defendants, save for APSN, were persons residing or being in the court's jurisdiction. APSN was controlled by APS, a South African company.

- [13] In **Bid Industrial Holdings (Pty) Ltd v Strang** 2008 (3) SA 355 (SCA) the court had to deal with the constitutionality of arrest to found or confirm jurisdiction. The court commented on the jurisdictional principles that have originated, and particularly the principle of effectiveness, and stated at para [55] that “courts have always sought to avoid having to try cases where their judgments will, or at least could, prove hollow because of the absence of any possibility of meaningful execution in the plaintiff's jurisdiction.” It proceeded at para [57] as follows: “As to the principle of effectiveness, despite it having been described as ‘the basic principle of jurisdiction in our law’ it is clear that the importance and significance of attachment has been so eroded that the value of attached property has sometimes been ‘trifling’.”

- [14] Mr Green correctly submitted that the *continetia causae* rule is recognised in our law. This is evident from judgments such as **Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd** 1962 (4) SA 326 (A) and **Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others** 2001 (4) SA 1184 (SCA) at para [22]. In terms of this principle a court having jurisdiction over a part of a cause will be justified in exercising jurisdiction over the whole cause of action based on considerations of convenience, justice and good sense. I respectfully agree with the conclusions arrived at in these judgments, but the facts therein are clearly distinguishable from the facts *in casu*. It is unnecessary to examine the judgments, save to mention the following. In **Roberts Construction** the parties to a construction contract concluded in Johannesburg in respect of a bridge built across the river between the Free State and Cape Province were *peregrini* of the Free State. Certain of the contractual obligations had to be performed in the Free State and the court *a quo* ruled that it had jurisdiction to adjudicate the dispute as well as the alternative claim. The Appeal Court dismissed an appeal against the court *a quo*'s finding that it had jurisdiction on the basis that the two claims really constituted one case and that it would be inconvenient if the alternative claim had to be instituted in another court. In **Ngxuza** several persons entitled to disability grants decided to launch a class action against the Provincial Government. Some of these persons were not resident in the jurisdiction of the Eastern Cape Division,

but within the jurisdiction of the Ciskei High Court. The Supreme Court of Appeal dismissed an appeal against the judgment of the High Court that it had jurisdiction, relying on **Roberts Construction**. It found that the High Court had “jurisdiction over the original applicants and over members of the class entitled to payment of their pensions within its domain.” This, according to the SCA, was sufficient to give the court a *quo* jurisdiction over the whole class. These two judgments are distinguishable from the matter before me and therefore, I am not bound to find that this court has jurisdiction *in casu*. I shall however consider the further arguments on the basis that I may be mistaken in this regard,

VII REQUISITES FOR TEMPORARY INTERDICTS

[15] An applicant applying for an interim interdict must demonstrate that the following well-known requirements have been met:

1. a prima facie right;
2. a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
3. the balance of convenience favours the granting of an interdict; and
4. the applicant has no other satisfactory remedy.

[16] Regarding the establishment of a prima facie right it was submitted on behalf of Netcare that it is entitled to protect its financial interest in Tsepong, and if Tsepong’s

management is not restored there is a real risk of its funders declaring it to be in breach of their funding agreements and this will lead to Tsepong's winding up, with significant loss to Netcare. It was also submitted that Netcare has an obligation to attempt to ensure that the hospital remains open.

- [17] With reference to the second requirement of a temporary interdict it was submitted on behalf of Netcare that the efficient running of Tsepong's business has been compromised and if this is allowed to proceed, the hospital may close down its doors with enormous financial harm and it may also result in the dying of patients.
- [18] It was submitted that the balance of convenience clearly favours Netcare insofar as the interim interdict will not result in any harm to Mosotho, whilst Netcare will suffer harm if the interim interdict is not granted. If Mosotho stays on as director of Tsepong, the company will remain dysfunctional and its hospital business will be compromised.
- [19] Lastly and with reference to an alternative remedy, it was submitted that a simple vote to remove Mosotho is not readily available under the Lesotho Company's Act. It was acknowledged that Mosotho's actions resulted in the formation of shareholder factions that is not in the best interest of Tsepong. In this regard it is clear from the papers that the nominees of fourth and fifth respondents

on Tsepong's board have sided with Afri 'Nnai and Mosotho in the past.

VIII **DIRECTOR'S DUTIES**

- [20] It goes without saying that directors owe fiduciary duties to the company. If a director acts in breach of a fiduciary duty, he may depending on the circumstances also act in breach of his duty of skill and care. See **Henochsberg on the Company's Act, 71 of 2008**, p 295. A director must exercise his duties honestly and in the company's interest. An obstructive approach is not an honest exercise by a director of his duty. Animosity demonstrated by a director may be a factor to be considered as a breach of a duty as director.
- [21] It is also true that a director has a duty to question conduct, agreements and transactions which appear to be not in the interest of the company. A director must exercise an independent and unfettered discretion and he should not be a mere dummy or puppet, blindly following instructions of another. He may also not shut his eyes to corporate misconduct.
- [22] Much more can be said about the roles and functions of directors and their duties of good faith towards the companies that they serve. Bearing in mind the conclusion at which I arrive herein, it is not necessary to go into further detail.

- [23] Whilst admitting that the interdict sought in this application may appear to be novel it was submitted on behalf of Netcare that Mosotho's conduct brings him squarely within Section 162(7)(a)(ii) of the South African Companies Act, although it was conceded that the South African Companies Act does not apply to Tsepong, being a Lesotho registered company. Section 162 was merely referred to, not to establish an independent ground to seek interdictory relief, but to illustrate that the scope of the relief sought is in substance recognised in the Act.
- [24] I was not referred to any authorities with specific reference to the application of Section 162, and I will deal with this aspect again when I apply the law to the facts. It is also necessary to refer to the Lesotho Companies Act, 18 of 2011, bearing in mind that this court is required to remove Mosotho as a director from the board of directors of Tsepong, a Lesotho registered company, it being the primary objective of Netcare.
- [25] Section 73 of the Lesotho Act provides for the removal of directors and to achieve this, a board of directors shall call a special meeting for the purpose of removing one or more directors. A director of a company may be removed from office by ordinary resolution passed at a special meeting called for that purpose or for purposes that include the removal of the director.
- [26] Section 76 of the Lesotho Act stipulates that if the

company or a director proposes to engage in conduct that contravenes the articles of incorporation of the company or the Act, the company, a director or shareholder of the company may apply to court for an order interdicting the company or the director from so acting. It is clear that if Mosotho or any other director of Tsepong engages in conduct contravening the Lesotho Act or the articles of association of the company, an interdict can be obtained and if such is granted the court may also grant consequential relief as it deems fit.

- [27] The fundamental duties of directors are recognised in Section 63 of the Lesotho Act. In terms of Section 63(1) a director, when exercising powers or performing duties, shall act in good faith and on reasonable grounds in the interest of the company. In terms of Section 63(2) a director, when exercising powers or performing duties as a director, shall exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances, taking into account the nature of the business of the company, the nature of the decision taken, the position of the director and the nature of the responsibilities undertaken by that director. Mosotho's conduct will have to be measured in terms hereof and if it is found by the Lesotho court that he is in breach of his fundamental duties as a director, there appears to be no reason why relief should not be granted, but that judgment is the prerogative of the Lesotho court and not this court.

- [28] Section 80 of the Lesotho Act provides for further relief in the event of breach of a duty owed by the company to a shareholder. A shareholder may therefore apply to the court for an order requiring the board to take any action that is required to be taken by the articles of incorporation of the company or the Act and the court may, if satisfied that it is just and equitable to do so, make an order and grant such other consequential relief as it deems fit. Netcare as a shareholder of Tsepong would therefore be entitled to apply to the court in Lesotho to direct the board to accept the financial statements if a proper case can be made out that those audited statements should be approved. Again, it remains the prerogative of the Lesotho court and not this court.

IX APPLICATION OF THE LAW TO THE FACTS

- [29] I am not persuaded that Netcare has proved a prima facie right. There is no doubt that it has financial interests in Tsepong that need protection. Although this court has jurisdiction to entertain the application, especially pertaining to prayers 1.2 and 1.3 of the Notice of Motion, it does not have jurisdiction to grant the relief in paragraph 1.1 which is the primary relief sought. Even if I am mistaken in this regard, I firmly hold the view that this court, a South African court should not and cannot interfere in the internal affairs of Tsepong, a Lesotho registered company, and in doing so directly interfere with the autonomy of the Lesotho High Court and the sovereignty of the Kingdom of Lesotho. In any event, the referral to Section 162 of the

South African Companies Act does not support Netcare at all. As conceded, Netcare does not seek an order from this court placing Mosotho on probation in respect of his directorship of Afri 'Nnai, the South African company. It wants Mosotho to be removed as director of Tsepong, albeit on a temporary basis.

- [30] I wish to emphasise that my finding that Netcare does not have a *prima facie* right and that the first requisite for interim interdicts has not been met, does not mean that I agree with and/or condone Mosotho's criticism and viewpoint. If I had to act as presiding officer in Lesotho, applying the laws of that country, I would probably be inclined to grant interim relief to ensure that the business of Tsepong and the operation of the hospital are not jeopardised.
- [31] I accept that severe financial prejudice may follow if the dispute cannot be resolved sooner than later. It is not necessary to consider the second and third requisites of interim interdicts as it may be accepted that these have been proven.
- [32] I am not convinced that Netcare does not have any other satisfactory remedy. It is the business of Tsepong and the running of the hospital in Lesotho that are under the spotlight. The Lesotho Companies Act provides sufficient relief for aggrieved shareholders and/or directors and/or companies as mentioned *supra*. No reasons have been

advised as to why a special board meeting could not be convened in order to oust Mosotho. If such action is not successful because Netcare cannot obtain a majority vote, it would still be entitled to approach the Lesotho court in terms of Section 76 and/or Section 80 of the Lesotho Act.

[33] Finally, any court should be weary of interfering in the internal affairs of companies, but more importantly, it would be advisable not to interfere with the adjudication of disputes falling within the domain of a foreign country and in this case, our neighbour the Kingdom of Lesotho.

X ORDER

[34] Consequently the following order is issued:

1. The application is dismissed with costs.

J. P. DAFFUE, J

On behalf of the applicant: Adv. IP Green SC and YF Saloojee
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On behalf of the respondents: Adv. MDJ Steenkamp
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