FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 6202/2010

In the matter between:-

NOLILI PATRICIA LINDIWE MOKOENA N.O.	First Applicant
NGANGELIZWE JACK SIZANE N.O.	Second Applicant
NOLILI PATRICIA LINDIWE MOKOENA	Third Applicant

and

BOPA-LESEDI DEVELOPMENT (PTY) LTD	Respondent

HEARD ON:	14 APRIL 2011
JUDGMENT BY:	VAN DER MERWE, J
DELIVERED ON:	5 MAY 2011

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[1] This is an application for provisional liquidation of the respondent company on the ground that it is just and equitable to do so in terms of section 344(h) of the Companies Act, No. 61 of 1973.

[2] The respondent is part of a number of companies described as the Bopa-Lesedi Group. It is not necessary to go into the particulars of the other companies. The business of the

respondent is derived mainly, if not exclusively, from contracts entered into with the Free State Provincial Government. It follows that its black economic empowerment ("BEE") status is of critical importance to the respondent. Thirty percent of the shares in the respondent are held by the Ngangelizwe trust. The trustees of the Ngangelizwe trust are the first and second applicants herein. The third applicant is the first applicant in personal capacity. The other seventy percent of the shares in the respondent are held by the Bopa-Lesedi trust. The trustees of this trust are Mr. Johan Hamer, Ms Anneke Kruger, Mr. J.D. Bruwer and the third applicant. When the application was launched, the respondent had two directors, namely the third applicant and Ms Anneke Kruger, with the third applicant as the managing director.

[3] As is evident from what is stated above, the application is brought by the minority shareholder in the respondent as well as the managing director thereof. The application is opposed in the name of the respondent by proper formal majority resolution of the trustees of the Bopa-Lesedi trust, that is the majority shareholder in the respondent. On behalf

of the applicants it is argued that this is not a resolution to oppose the application by the respondent itself. However, I see no reason why the application could not in these circumstances, as of right, be opposed in the name of the company by the holder of the seventy percent shareholding in respondent company. To hold otherwise would uphold meaningless technicality and would be contrary to the letter and spirit of section 34 of the Constitution.

[4] As was often stated before, section 344(h) does not postulate facts but only a broad conclusion of law, justice and equity, as a ground for winding up. Although not constituting a *numerus clausus*, the courts have over the years developed categories of cases falling within the ambit of section 344(h). These categories include the so-called deadlock principle.

[5] In argument before me the ground for the application was confined to this deadlock principle. However, an actual deadlock over a particular issue is not *per se* a ground for liquidation nor is it an essential requirement. This principle is founded on the analogy of partnership and is strictly confined

to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up. It follows that an applicant who relies on this principle for a liquidation order, must not have been wrongfully responsible for the situation which has arisen and in my judgment must show that. Compare **MOOSA, NO v MAVJEE BHAWAN (PTY) LTD AND ANOTHER** 1967 (3) SA 131 (T) at 137 – 138; **EMPHY AND ANOTHER v PACER PROPERTIES (PTY) LTD** 1979 (3) SA 363 (D) at 366 H – 367 C and 368 H; **APCO AFRICA (PTY) LTD AND ANOTHER v APCO WORLDWIDE INC** 2008 (5) 615 SCA at 623 – 625 para [16] – [21].

[6] I am satisfied that the respondent is a company of the type described above and that such relationship of trust and

confidence between the third applicant and the other trustees of the Bopa-Lesedi trust was intended. This point was not seriously contested in argument before me. The third applicant became involved in the respondent on a fulltime basis through the Ngangelizwe trust. The Ngangelizwe trust is regarded by all concerned as the *alter ego* of the third applicant for this purpose. The close involvement of the third applicant in the respondent is *inter alia* demonstrated by the fact that the Ngangelizwe trust is a thirty percent beneficiary of the other shareholder of the respondent, namely the Bopa-Lesedi trust.

[7] It is common cause that this relationship between the members of the respondent has broken down irrevocably. What remains for consideration therefore is whether this was caused by the wrongful conduct of the third applicant.

[8] During August 2010 the third applicant instructed Emex trust to do a BEE audit of the Bopa-Lesedi Group, including the respondent. Emex trust does BEE verification and accreditation and therefore issues certificates *inter alia* used to obtain government contracts. In applications for

provisional liquidation, factual findings may be made on a balance of probabilities on the papers. It is in my view overwhelmingly probable that the destruction of the relationship between the parties resulted from the instruction for the BEE audit given by the third applicant. It was only when this became known on 7 September 2010 that the Bopa-Lesedi trust commenced to attempt everything possible (and not possible) to get rid of the third applicant. The suggestion that the decisive moment in this regard was when it was ascertained on 10 September 2010 that the third applicant had lied about the condition of her health, is seriously unconvincing. I find on a balance of probabilities that the destruction of the relationship of trust and confidence between the members of the respondent, was caused by the instruction for the BEE audit given by the third applicant.

[9] The third applicant says that she acted within her rights when she did so, whereas the Bopa-Lesedi trust says that the third applicant acted in bad faith and in order to prejudice the respondent. There is therefore a conflict of fact on the papers as to the question of whether the third applicant acted wrongfully when she gave instructions for the BEE audit

which caused the breakdown of relationships. This conflict cannot be decided on the probabilities on the papers. The probabilities are in my view more or less evenly balanced. Moreover, this is a dispute within a narrow compass that can be expeditiously disposed of. In all the circumstances this is one of those relatively rare cases where the dispute that I have mentioned should be referred for the hearing of oral evidence. This hearing need not necessarily be before me.

[10] In the result the following orders are issued:

1. The matter is referred for the hearing of oral evidence at a time to be arranged with the registrar of this court on the question whether the third applicant acted wrongfully when she instructed Emex trust to conduct a BEE audit of the Bopa-Lesedi Group and the respondent.
2. The evidence to be adduced at the aforesaid hearing shall be that of any witnesses whom the parties or either of them may elect to call, subject however to what is provided below.
3. Save in the case of any persons who have already deposed to affidavits in these proceedings, neither

party shall be entitled to call any person as a witness unless:

3.1 it has served on the other party, at least 15 days before the date appointed for the hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or

3.2 the court, at the hearing, permits such person to be called despite the fact that no statement has been so served in respect of his or her evidence.

4. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

5. The fact that the party has served a statement or has subpoenaed a witness shall not oblige such party to call the witness concerned.

6. Within 30 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issue referred to above, which documents are, or have at any time been, in possession of or under control of such party.

7. Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.
8. The incidence of the costs incurred up to now, shall be determined after the hearing of oral evidence.

C.H.G. VAN DER MERWE, J

On behalf of the applicants: Adv. H.J. Benade
Instructed by:
Ramothello Raynard & Tsotetsi Inc.
BLOEMFONTEIN

On behalf of the respondent: Adv. P. Zietsman SC
With him:
Adv. N. Snellenburg
Instructed by:
Honey Attorneys
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