



**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case No: CT00721ADJ2021**

**In the matter between:**

**TUMELO MOHLAMONYANE**

**APPLICANT**

**AND**

**BHEKIWE AMANDA NXUMALO**

**RESPONDENT**

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Coram: ISHARA BODASING

Date of Hearing: 27 AUGUST 2021

Date of Decision: 30 AUGUST 2021

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**DECISION** (Reasons and Order)

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**1. INTRODUCTION**

1.1 On 10 July 2020 Tumelo Mohlamonyane (Applicant) was appointed Director of Vittorio Global (Pty) Ltd., (Reg. Nr. 2018/428356/07, hereinafter referred to as “the company”). Simultaneously, Bhekiwe Amanda Nxumalo (Respondent) and Augustine Sodindi who were the company’s directors, resigned. Respondent held 100% of the company’s shares at the time.

1.2 Applicant alleges that Respondent unlawfully removed him as Director, with effect from 22 April 2021. Respondent admits this, but claims that, as the company's sole shareholder, she was entitled to do so.

1.3 Applicant launched this application on 14 June 2021 seeking an order from this Tribunal that Respondent reinstate him as a director of the company because she had sold the company to him during July 2020.

1.4 Respondent filed an opposing affidavit on 14 July 2021 to deny that she sold her shares in the company to Applicant. Respondent avers that she only agreed to appoint Applicant as a director of the company; and that, in retaining her shareholding, she was entitled to remove Applicant as director.

1.5 At the hearing, both parties' legal representatives made submissions in favour of their clients' respective standpoints. I take this opportunity to thank them for assisting this Tribunal to separate the wheat from the chaff.

## 2. ISSUES

The crux of the dispute is whether or not Respondent sold her shareholding in the company to the Applicant.

## 3. APPLICABLE LAW

3.1 Section 35 of the Companies Act 71 of 2008 (the Act) is headed **Legal nature of company shares and requirement to have shareholders**

*(1) A share issued by a company is movable property, transferable in any manner provided for or recognised by this Act or other legislation.*

...

*(3) A company may not issue shares to itself.*

3.2 Section 37 of the Act deals with **Preferences, rights, limitations and other share terms**, and at paragraph (9)(b) states a person;

*(b) ceases to have the rights associated with any particular securities of a company -*

*(i) when the transfer to another person, re-acquisition by the company, or surrender to the company has been entered in the company's certificated securities register;*

3.3 Section 49 of the Act is titled: **Securities to be evidenced by certificates or uncertificated and states:**

*1) In this Part, “certificated” means evidenced by a certificate, as contemplated in subsection (2) (a).*

*2) Any securities issued by a company must be either be*

*a) evidenced by certificates; or*

*b) uncertificated, in which case the company must not issue certificates evidencing or purporting to evidence title to those securities, subject to subsection (6).*

3.4 Section 51 of the Act deals with **Registration and transfer of certificated securities, which** at paragraph (5) states that-

*Subject to section (6), a company must enter in its securities register every transfer of any certificated securities, including in the entry –*

*(a) The name and address of the Transferee*

*(b) The description of the securities or interest transferred*

*(c) The date of transfer;*

And at paragraph (6) provides that-

*A Company may make an entry contemplated in subsection (5) only if the transfer*

*(a) Is evidenced by a proper instrument of transfer that has been delivered to the Company. ...*

3.5 Section 112 of the Act provides for **Disposal by a company of all or the greater part of its assets or undertaking.**

3.6 Section 71 of the Act deals with **Removal of Directors:**

*(1) Despite anything to the contrary in a company’s Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution*

*adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).*

*(2) Before the shareholders of a company may consider a resolution contemplated in subsection (1)-*

*(a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and*

*(b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.*

And at paragraph (9) it states that *“Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for*

*a) loss of office as a director; or*

*b) loss of any other office as a consequence of being removed as a director.*

#### **4. EVALUATION**

##### **Securities Register**

4.1 Section 50 of the Act<sup>1</sup> requires a company to establish, in the prescribed form and maintain in accordance with the prescribed standards, a securities register. There are some requirements regarding what the register must contain per class of issued certificated securities, including the names and addresses of the persons to whom the securities were issued, and the number of securities issued to them.

4.2 Section 49(2) of the Act provides that any securities issued by a company must be evidenced by certificates. The purpose of these sections, including section 51 of the Act, together with regulation 32 of the Companies Regulations, is to create and

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<sup>1</sup> Section 50(2)(b)

maintain accountability and transparency in companies.

4.3I emphasise that the Act requires the register to record the date of transfer and that there must be an instrument of transfer. Respondent produced a share certificate for herself numbered 1. Applicant produced an undated share certificate also numbered 1, and offers no explanation for this anomaly.

### **Directors v Shareholders**

4.4A director differs from a shareholder in terms of function, power and authority, and is legally distinct from the company itself. A shareholder is a holder of a share issued by a company and, like a director, does not own the assets of a company. The company is an independent legal entity that owns the assets of the company. The directors are entrusted by the shareholders of the company with the ultimate responsibility for the functioning of the company.

### **Section 112**

4.5Although the Companies Act does not define the phrase “*fundamental transaction*”, it provides for three types of fundamental transactions, one being a disposal of all or the greater part of the assets or the undertakings of a company – i.e. the sale of the majority of the business assets of a company. Section 112 is triggered only where a company proposes to dispose of all or the greater part of its assets or undertakings other than in relation to transactions concluded (i) pursuant to a business rescue process or (ii) between a wholly-owned subsidiary and its holding company.

4.6The term “*dispose*” in the context of section 112 means a permanent transfer of the ownership of the assets of a company. The term “*the greater part of the assets or undertakings*” in the context of section 112 is defined in section 1 of the Act and in essence means a disposal of more than 50% of a company’s gross assets or entire undertakings, fairly valued. Should this threshold be met, a special resolution of the company’s shareholders is required to approve the contemplated disposal.

4.7 In our common law the English Law principle called the “Turquand Rule” previously applied. This rule creates a presumption in favour of a person dealing with any company. The presumption is that such person may assume that the company has complied with all internal governance rules before entering into a transaction with outside parties. This means that the company cannot afterwards cancel an agreement just by stating that the internal governance (decision making rules) were not complied with. The rule thus protected third parties when dealing with companies from being prejudiced by the company not following internal rules; as it is almost impossible for third parties to verify whether internal procedures have been followed.

4.8 The South Supreme Court of Appeal<sup>2</sup> has ruled that Section 228 of the old 1973 Companies Act prevails over the Turquand Rule. Therefore a company is not bound to an agreement whereby all or the greater part of its assets are disposed of unless the shareholders have given their approval by way of a special resolution. Section 112 of the 2008 Companies Act is substantially the same as Section 228 of the previous Act, so the same reasoning applies herein.

4.9 Rumpff JA explained in *Inland Property Development Corporation (Pty) Ltd v Cilliers*,<sup>3</sup> (a case concerning section 24bis of the Companies Act 46 of 1926):

“In the regard to shares, the word ‘transfer’ in its full and technical sense, is not a single act but consists of a series of steps, namely an agreement to transfer, the execution of a deed of transfer and, finally, the registration of the transfer.”

4.10 The intention that emerges from section 35 is obviously to prevent shares being transferred in a manner other than that determined by the Act and the company’s articles of association.

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<sup>2</sup> Stand 242 Hendrik Potgieter Road Ruimsig Pty Ltd v Göbel NO and Others (2011 (5) SA 1 (SCA)

<sup>3</sup> 1973 (3) SA 245 (A) at 251C invoking the judgment of Lord Reid in *Lyle & Scott Ltd v Scott’s Trustees and British Investment Trust Ltd* 1959 AC 763 (HL) at 778; [1959] 2 All ER 661 (HL) 668.

## **Did the parties intend for Applicant to acquire Respondent's shares in the company?**

4.11 Applicant's Counsel urged this Tribunal to accept that there was a sale agreement between Applicant and Respondent whereby Respondent sold her shares in the company to Applicant. Although there is a confirmatory affidavit in the papers before me, that Applicant's employer paid Respondent for the "purchase"<sup>4</sup> of the company, I am mindful that the said employer and Respondent had a fall-out towards the end of last year.

4.12 Respondent contends that she agreed with Applicant's employer to appoint Applicant as director in the company, so that they could increase their access to government tenders. She alleges that Applicant was not privy to this arrangement. Respondent denies that she sold her shares to Applicant, and submitted that after the fall-out, she wrote to Applicant asking him to resign as Director.

4.13 Counsel for Applicant argued that the parties had the required intention in respect of the sale of shareholding, which means that the statutory requirements are irrelevant. Even if I were to accept (which I do not) that both parties were *ad idem* in respect of the sale of shares, the requirements of the Act are peremptory. This would mean that such an agreement would be void due to a common mistake shared by the parties. I do not make any further comments in this regard.

4.14 Sufficeth to note that it is common cause that the shares in the company are certificated. There is no evidence before this Tribunal that Respondent sold her shares to Applicant in terms of the requirements of the Act.

### **Removal of Directors**

4.15 In order to succeed in proceedings as per S71 of the Act, Respondent has shown that the prescribed procedural and substantive requirements were followed. Applicant admits receiving notice of the meeting but chose not to attend.

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<sup>4</sup> As written in the invoice Respondent sent to Applicant's employer.

## **5. FINDINGS**

5.1 Based on an analysis of the law and a conspectus of the evidence before me, I find that Applicant has failed to show, on a balance of probabilities, that he bought the company's shareholding from Respondent. Accordingly the Respondent remains 100% shareholder in the company.

5.2 Applicant is reminded of his rights on terms of section 71(9) of the Act.

## **6. ORDER**

6.1 The application is refused.

6.2 No order as to costs

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**ADV. ISHARA BODASING**

For Applicant: Adv. M. M. Snyman, instructed by W. S. Nkosi Attorneys Inc.

For First Respondent: Attorneys L. Mbangi Inc.