



IN THE HIGH COURT OF ESWATINI

JUDGEMENT

HELD AT MBABANE

Case No. 2620/2023

In Matter between:

MANUAL GEORGE MATSIMBE

1st Applicant

M POWER INVESTMENTS (PTY LIMITED)

2nd Applicant

And

MICHELLE ZWANE

1st Respondent

CRAIG SCOT DU TOIT

2nd Respondent

DU TOIT HOLDINGS (PTY) LTD

3rd Respondent

THE REGISTRAR OF COMPANIES N.O

4th Respondent

THE ATTORNEY GENERAL N.O

5th Respondent

Neutral citation: Manual George Matsimbe and Another v
Michelle Zwane and Four (2620/2023) SZHC 356
[2025] (06.02.2025)

CORUM: Z Magagula J

Date heard: 05.07.24

Date delivered: 06.02.25

JUDGMENT

[1] In this application the applicant seeks the following orders;

1. *Ordering and directing the 4th Responders to file a report within 14 days from grant of this order, relating to changes of directorship and shareholding from the 3rd Respondent from on or about June 2018 to date of order.*
2. *Ordering and directing that prayer 1, operate as an interim order with immediate effect.*

3. *Ordering and authorising the 4th Respondent to reverse the changes of the 3rd Respondent to reflect the Applicant and the 1st Respondent.*
4. *Ordering and Authorising the 4th Respondent to allow filing of a new Form J reflecting the Directors of the 3rd Respondent to be the Applicant and the 1st Respondent as per the minutes of 16 July 2018.*
6. *Ordering and authorising the 4th Respondent to reverse the changes of the shareholding of the 3rd Respondent to reflect the shareholders of M power Investments (Pty) Limited (Forty Nine (49) shares) and Graig Scott Duit Toit (fifty One (51) shares*
7. *Ordering the 4th Respondent to allow the filing of a new Form C reflecting M Power Investments (Pty) Limited and Craig Scott Du Toit as share holders of the 3rd Respondent.*
8. *Costs of suit against the 1st the 1st Respondent.*

BACKGROUND

[2] The 1st Applicant and the 1st Respondent (hereinafter referred to as the parties) were in a romantic relationship from which a child was born. It

would appear that this relationship does not subsist anymore. During the subsistence of relationship between the parties, the Second Applicant company was incorporated. The Second Applicant was incorporated with a total share capital of 1 000 shares of E 1.00 each. The 1st Applicant held Ninety (90) shares while the 1st Respondent held Ten (10) shares.

[3] According to the 1st Applicant, the incorporation of the 2nd Applicant was solely financed by him and the 1st Respondent's ten (10) shares were neither a donation nor a gift, but she was merely holding those shares in a nominal capacity or for administrative purposes. The 1st Respondent obviously has a different idea. She avers in her answering affidavit that she contributed financially and intellectually in the incorporation of the 2nd applicant, so she is not holding the Ten (10) shares for administrative purposes.

[4] The parties are also the founding directors of the 2nd Applicant whose sole purpose was to be used as a vehicle for investment in the business of the 3rd Respondent, Du Toit Holdings (Pty) Ltd, [Du Toit Holdings].

[5] On or about the 13th of October 2018 the 2nd Applicant duly represented by the 1st Applicant entered into an agreement for the purchase of 51 shares in Du Toit Holdings held by the 2nd Respondent and one Michael Viljoen. This sale of shares agreement was subject to a suspensive condition that

the purchaser, the 2nd Applicant, must have fulfilled the conditions stipulated in an earlier contract for the purchase of 49 shares in the Du Toit Holdings¹.

[6] Pursuant to the agreement of sale of shares the 2nd Respondent filed a Form J with the Registrar of companies which form reflected the resignation of Graig Scott Du Toit and Micheal Viljoen as directors of Du Toit Holdings and the simultaneous appointment of the 1st applicant and 1st Respondent as the new Directors. This change was reflected to have taken place on the 16th July 2018².

[7] On the same date a meeting of the share holders of Dut Toit Holdings (Pty) Ltd was held and present were Scott Du Toit, Micheal Viljoen and the 1st Applicant. In that meeting the following resolutions were taken³.

1. *That Craig Scott Du Toit transfer 37 of his shares to M.Power Investments (Pty) LTD.*
2. *That Micheal Viljeon transfer 12 of his shares to M. Power Investments (Pty) Ltd.*

¹ Pages 28-35 of the book of pleadings.

² Pages 39-40 of the book of pleadings

³ Page 46 of the book of pleadings

3. *That Craig Scott du Toit resign as a director with immediate effect.*
4. *That Micheal Viljoen resign as a director with immediate effect.*
5. *That Manuel George Matsimbe be appointed a director with immediate effect.*
6. *That Michelle Nothando Zwane be appointed a director with immediate effect.*

[8] On the 18th October 2018 a meeting was held by the shareholders of Du Toit Holdings and present were the parties and Craig Scott Du Toit. The Minutes of this meeting reflect that⁴:

1. *Craig Scott Du Toit is appointed a Director.*
2. *M. Power Investments (Pty) LTD transfer 49 shares to Michelle Nothando Zwane.*
3. *That Manuel George Matsimba has resigned due to personal reason and is leaving the shares behind.*

⁴ Page 47 of the book pleadings

- [9] The minute is signed by all the parties present. On the same day the 1st Applicant apparently wrote a letter to Du Toit Holdings in which he resigns as a director of the company stating that he is leaving the shares to the company⁵.
- [10] On the 22nd November 2018, a document or pro-forma headed “ Transfer of shares, stock, Debentures or options” was prepared and signed ostensibly by the parties. In this Pro-Forma M.Power Investments and in parentheses Manuel George Matsimbe and Michelle N. Zwane, in consideration of an unstated sum paid by Michelle Nothando Zwane transferred to Michelle Nothando Zwane’s shares resigning from 1-49 in Du Toit Holdings, (pty) LTD. A share certificate was also issued⁶.
- [11] On the 24th November 2018 one Cecelia Hlobsile Zwane filed with the Registrar of companies a Form J reflecting that the 1st Applicant had resigned as a director of Du Toit Holdings and that Craig Scott Du Toit had be appointed in his place. A Form C filed on the 10th December 2018 reflected that the only shareholders of Du Toit Holdings (Pty) LTD were the 1st Respondent and 2nd Respondent’s⁷.

⁵ Page 48 of the book of pleadings

⁶ Pages 56 and 57 of the book of pleadings

⁷ Pages 59 to 65 of the book of pleadings

- [12] It would seem that the First Applicant was re-instated both as a director and shareholder of Du Toit Holding on the 21st July 2020, with the 2nd Respondent again transferring his 51 shares to him. This is evidence by a resolution signed by all three parties, and a form J, also filed by Cecelia Hlobisile Zwane.
- [13] On the 24th June 2021, the 1st Respondent Filed with the Registrar of companies, Form C, being the requirement in term of Section 151 (1) of the companies Act 8 of 2009 reflecting that as at 30th June 2020 the shareholders were herself, with 49 shares and the 2nd Respondent with 51 shares⁸.
- [14] This background is sourced from the Applicants founding affidavit and the documents annex thereto. Following an order of this court, the Registrar of companies, who has been cited in these proceedings as fourth Respondent, filed a report on the statutory filings or returns trail of the 3rd Respondent. That is Du Toit Holding (Pty) LTD.
- [15] The 4th Respondent's report was filed on his behalf by the 5th Respondent, the Attorney – General. I mention this because of two things. The first is that the report was filed under a different case number, case number

⁸ Pages 74-80 of the book of pleadings

1112/22, secondly, there are two reports. According to the Applicants, and this is not denied by the 1st Respondent the 1st report was filed in respect of earlier proceedings involving the same parties.

[16] In both reports the 4th Respondent details the history of the statutory filings by or on behalf of the 3rd Respondent. In the First report the 4th Respondent concludes by undertaking to await the outcome of those proceedings. In the second report the 4th Respondent concluded; for reasons stated; that the 1st Applicant and the 1st Respondent are the directors of the 3rd Respondent (Du Toit Holdings (Pty) Limited and that the 1st and 2nd Applicants are the only shareholders.

[17] There are a few other documents annexed to the pleadings. Reference thereto has been deliberately omitted as they do not have any tangible effect on the outcome of this matter.

[18] Now, on the 13th October 2018, Craig Scott Du Toit and Micheal Viljoen sold and ceded their joint shareholding being 51 shares in Du Toit Holdings (Pty) Limited to M Power Investments (Pty) Limited. This sale and the subsequent cession of the 51 shares was, subject to a suspensive condition that the purchaser, M Power (Pty) Ltd should fulfil the condition of an earlier agreement to purchase 49 shares from the sellers.

[19] In these proceedings there is no mention of the earlier agreement, that is for the purchase and sale of the 49 shares. It seems safe to conclude that the suspensive conditions was met. This may be evidenced by the fact that both the 2nd Respondent and Micheal Viljoen transferred the 49 shares to the 2nd Applicant and further ceased to be directors of the 3rd respondent. Du Toit and Viljoen were replaced by the 1st Applicant and the 1st Respondent as Directors, who both accepted their appointments.

[20] As of the 16th July 2018, all 100 shares in Du Toit Holdings were owned by the 2nd Respondent. On the 18th October 2018 there is what appears to be extracts of minutes, of the shareholders of the 3rd Respondent where the 2nd Respondent is re-appointed a Director, the 2nd Applicant transfers 49 of its shares to the 1st Respondent and the 1st Applicant resigns as a director for personal reasons and leaves the shares behind. Reproduced herein below is the "Resolution" in its entirety.

**MINUTES OF A MEETING OF THE SHAREHOLDERS OF DU TOIT
HOLDINGS (PROPRIETARY) LIMITED HELD ON 18TH OCTOBER
2018**

**PRESENT: CRAIG SCOTT DU TOIT, MANUEL GEORGE
MATSIMBE, AND MICHELLE NOTHANDO ZWANE.**

NOTICE OF MEETING: Majority shareholders being present and entitled to vote it was resolved that the requisite notice of the meeting be waived it be declared constituted.

IT WAS RESOLVED

- 1. THAT Craig Scott Du Toit be appointed to be a director of Du Toit Holdings (Proprietary) Limited.
- 2. THAT M Power Investment (Proprietary) Limited transfer 49 of their shares to Michelle Nothando Zwane.
- 3. THAT Manuel George Matsimbe has resigned due to personal reasons and is leaving the share behind.

There being no further business the meeting then adjourned.

.....
**Craig scott Du Toit – Appointed
Director**

.....
**Manuel George Matsimbe – Resigned
Director**

.....
Michelle Nothando Zwane –Director

Signed this 18th Day of October 2018

[21] There are disturbing features to this resolution. First what right does the directors of Du Toit Holdings have to transfer 49 shares in M Power Holdings to the 1st Respondent. Secondly, all the shares in Du Toit Holdings are owned by the 2nd Applicant, this therefore means the 1st Applicant has no shares to “leave behind” in Du Toit Holdings; thirdly, there is no cession of the 49 shares to 1st respondent and lastly; Craig Scott Du Toit does not accept his appointment as a director. This resolution appears to be a *brutum fulmen*. The directors of Du Toit Holdings had no business allotting shares they did not own, and any attempt to do so is unlawful.

[22] I have difficulty in accepting the authenticity of extracts of the minutes of Du Toit Holdings (Pty) LTD of the 18th October 2018, the purported letter of resignation by the 1st Applicant and the letter appointing 2nd Respondent as a Director of the same date. Contrary to Section 194 (1) of the companies Act, the 2nd Respondent did not consent to his appointment as a Director. Further, the right to nominate and appoint a person as a director vests with the members or share holders of the company. It would appear that in *casu*, Craig Scott Du Toit was not appointed by M Power Investments (Pty) LTD the sole shareholder or by

a person duly authorised to act on behalf of M Power Investments (Pty) Limited. For the foregoing reasons, I cannot accept that The first respondent was validly allocated 49 shares in M Power investments (Pty) limited and or that the 2nd Respondent's purported re-appointment as a director of 3rd Respondent is lawful.

[23] The true position in the company seems to be this, that the 2nd Respondent sold and transferred his and Micheal Viljoen shares to the 2nd Applicant. He therefore did not have 51 shares to transfer to the 1st Applicant on the 21st July 2020. Du Toit sold his 51 shares to the 2nd Applicant. Clause 1.4.8 of the memorandum of agreement describes the shares as " 51 shares belonging to Craig Scott Du Toit". Clause 2.3 provides " The purchaser wishes to purchase the shares in the business..."

[24] In the premises I make the following orders; structure of the 2nd Applicant M Power Investments is as follows in (i) directors are;

The 1st Applicant; and

The 1st Respondent

(ii) *The shareholders of the 2nd applicant are the 1st applicant within Ninety (90) shares and the 1st Respondent within ten (10) shares.*

- (iii) *The Directors of the Du Toit Holdings (Pty) LTD are the;*
- *The 1st Applicant.*
 - *The 1st Respondent*
- (iv) *The entire 100 shares in Du Toit Holdings (Pty) LTD are owned by the M Power investments (Pty) LTD..*
- (v) *The 4th Respondent is hereby ordered to permit the filing of the necessary statutory forms to reflect orders (i) to (iv) above.*
- (vi) *Costs of suit against the 1st Respondent on the ordinary scale.*



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Z. Magagula
Judge of the High Court

Appearances:

For the Applicants – Kenneth Simelane

For the Respondents – C. Mamba

