IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISON, PRETORIA)

REPORTABLE: YES/NO	
OF INTEREST TO OTHER JUDGES: YES/NO	
REVISED.	
……..	……..
SIGN SIGNATURE	**DATE**

CASE NUMBER:A292/2021

In the matter between:

NXUMALO BHEKIWE AMANDA	Appellant
and	
COMPANIES INTELLECTUAL PROPERTY COMMISSION (‘CIPC’)	First Respondent
THE COMPANIESTRIBUNAL OF SOUTH AFRICA	Second Respondent
SIKHITHA LINDELANI N.O	Third Respondent
MALOMINI STRATEGISTS (Pty) LTD	Fourth Respondent
MOHLAMONYANE KLAAS TALA	Fifth Respondent

JUDGEMENT

MPOFU AJ

[1] INTRODUCTION

[1.1] The appellant. Nxumalo Bhekiwe Amanda, ('Nxumalo') appeals against the judgment, determination, order, directives and/or decision, including the order as to costs, ('the Decision'), of the second respondent, the Companies Tribunal of South Africa, (the Tribunal) which was given on 28th September 2021.

[1.2] The Companies and Intellectual Properties Commission, (CIPC), is the first respondent herein.

[1.3] Malomini Strategists (Pty) Ltd, the subject matter of this dispute, is the fourth respondent herein.

[1.4] Mohlamonyane Klaas Tala is cited as the fifth respondent herein.

[1.5] The main parties herein are forthwith referred to as Nxumalo and Mohlamonyane respectively unless circumstances demand otherwise.

[2] Nxumalo's appeal is predicated on s 195 (7) of the Companies Act 71 of 2008 as amended as well as the Regulations thereto, (the Act), and is a sequel to an application by Mohlamonyane who was the applicant in the proceedings before the Tribunal as amplified under '*Background Facts Embodying the case before the Tribunal*' herein below. In the aforesaid proceedings before the Tribunal, in the main, Mohlamonyane averred:

[2.1] That he bought Malomini (Pty) Ltd Strategists from Nxumalo as articulated herein below;

[2.2] That his removal as director of Malomini Strategists (Pty) Ltd was allegedly unlawful; and,

[2.3] That the appointment of Nxumalo as director of Malomini Strategists was unlawful.

[3] After considering the application which was resisted by Nxumalo, the Tribunal gave its Decision per its Panel member, Sikhitha Lindelani NO, (third respondent), who issued an order in the following terms:

[3.1] The application for relief is granted, (in favour of applicant);

[3.2] The Companies and Intellectual Property Commission is hereby ordered to remove the first respondent Bhekiwe Amanda Nxumalo, with Identity number: 880210 0649 08 9, as director of Malomini Strategies (Pty) Ltd with registration number: 2013/182330/07 within a period of 10 (ten) days from date of receipt of this order;

[3.3] The Companies and Intellectual Properties Commission is hereby ordered to register Klaas Tala Mahlomonyane, with Identity number: 850402 5988 08 3, a director of Malomini (Pty) Ltd with registration number: 2013/182330/07 within a period of 10 (ten) days from date of receipt of this order;

[3.4] The Registrar of the Companies Tribunal is hereby directed to deliver copies of all the papers filed with it and a copy of

this decision to the Commissioner of Companies and Intellectual Property Commission within Five (5) days from the day of handing down of this order.

[3.5] The first respondent is ordered to pay costs of the applicant which costs shall be on a scale as between party and party.

Nxumalo's grounds of appeal are set out as follows:

[4] Nxumalo took issue with the Tribunal's Decision in the following terms:

[4.1] The learned Panel member failed to pay forensic attention to the facts before him and made factual findings and conclusions whereupon he would base his determination;

[4.2] During the Tribunal's proceedings, the Panel member ordered the respective parties to file supplementary affidavits and HEADS of Argument. Nxumalo alleges that the Panel member paid little or no regard to her additional submissions thereto;

[4.3] Alleged failure of the Panel member to deal with a share certificate alleged to have been fabricated by Mohlamonyane, Nxumalo states that this was calculated to mislead the Tribunal and ought to have been censored by the Panel member;

[4.4] He made several undue factual and gratuitous assumptions;

[4.5] The finding by the learned Panel Member that a company includes shares is without merit or basis and is not supported by *any* law or provision in the Companies Act;

[4.6] The Panel Member failed to address Nxumalo's argument based on case law and provisions in the Companies Act that shares belong to shareholders and that a company cannot issue shares to itself;

[4.7] The Panel member did not engage the fact that authorized but unissued shares have no rights attaching to them until they are issued;

[4.8] No evidence was relied upon for the conclusion by the Panel member that transfer of shares was recorded by the company in its share register in terms of the Companies Act. This was allegedly not support by any facts.

[4.9] The Panel member misconstrued the legal nature and consequences of the transaction that took place between Nxumalo and Mohlamonyane;

[4.10] The Panel member failed to attach the correct corporate legal labels to the transaction and gave an incorrect assessment thereof.

[4.11] The Panel Member's construct of the meaning and essence of a company as a fictitious and artificial entity with a separate legal *persona* from its members was allegedly flawed. The ***locus classicus*** on this subject cited by Nxumalo and elicited by the Panel Member is Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 539;

[4.12] The learned Panel Member gave an incorrect construct of the nature of a contract for the sale of the company that it and only entails the sale of the business of a company or its shares, not the company, and that therefore, in the

strict sense of the corporate word, a company is incapable of being sold; it is only its equity held by its members, in this case its shareholders that can be sold and subsequently transferred in the legal manner;

[4.13] The Panel Member failed to appreciate that the agreement between the Nxumalo and Mohlamonyane was no sale of the company, neither did it pass as a sale of anything, and it therefore lacked validity, for want of compliance with the formalities for the sale of the business of a company, even as articulated in Nxumalo's supplementary Heads of Argument;

[4.14] In the minimum the learned Panel member ought to have found that there was no consensus as to the subject-matter of the sale, an ***error in negotio.***

[4.15] Despite acknowledging in his determination that a company has a separate legal existence, the Panel Member erred in not deciding, that the company should firstly have been a party to the agreement, whatever the purpose of the agreement was. The agreement does not make the company a party but the subject of the sale. This includes that Nxumalo could not stand in representation of the Company.

[4.16] The Decision of the Panel member was against the trite principles of corporate law thus indefensible, and contradicted legal principles governing company law.

[4.17] The learned Panel Member erred in finding that a company can be a subject of a sale agreement in that he should, and ought to have found that it is the shares, business and/ or the equity in

the company that should at all times be the subject of sale.

[4.18] The learned Panel Member misdirected himself in finding that the ***essentiala*** of a contract of sale had been satisfied in the purported agreement between Nxumalo and Mohlamonyane and that the ***merx*** had been clearly and adequately described In the agreement even If it is found that it was, it was incapable of being the subject of sale in respect of the company that may be a subject of a sale agreement.

[4.19] The Panel Member erred in finding that Nxumalo took the law into her hands and thereby misdirected himself. Nxumalo allegedly complied with s 71 of the Companies Act; he also gave Mohlamonyane sufficient time in keeping with the **audi *ałterum partem*** rules and the Promotion Administrative Justice Act (PAJA) by inviting Mohlamonyane to give reasons why he should not be removed as director. Mohlamonyane did not respond to the invite;

[4.20] Save as aforesaid, should it have been argued that Nxumalo was incompliant, which allegedly did not obtain, that still would not have cured the invalidity of the sale agreement ***qua*** company law;

[4.21] The Decision of the learned Panel Member is not sustained by the weight of the f a ctual evidence and the corresponding applicable law;

BACKGROUND FACTS EMBODYING THE CASE BEFORE THE TRIBUNAL

[5] For good measure, a concise history of the litigation between the parties to contextualize and elicit the issue for appeal for determination before this court is apposite.

[6] By way of background, the gravamen of the historical litigation herein owes its origins to a purported purchase and sale agreement of a private company with limited liability named, Malomoni Strategists (Pty) Ltd Registration Number: 2013/182330/07, (herein Malomini), by and between Nxumalo to Mohlamonyane, concluded by the parties on 13th November 2020 in the amount of R2 650.000.00

[7] Pursuant to clause '3' of the aforesaid contract, the parties completed the requisite CIPC Forms to put into effect the aforesaid transaction, with Mohlamonyane being added as director of the company and Nxumalo resigning, as confirmed by lodging these changes courtesy of the formalities of the CIPC.

[8] Nxumalo effected the delivery of the company upon receipt of payment of the aforesaid purchase price in the amount of R2 650 000.00, being the ***quid pro quo*** of the sale and purchase of the company.

[9] Pertinently, clause '3' of the contract relating to '*delivery*' makes plain that the seller (Nxumalo) shall effect delivery of the Company upon receipt of payment

[10] Clause '4' of selfsame contract is instructive in the respects that the risk and benefit will pass from the Seller to purchaser upon delivery of the

Company.

[11] The issue of the agreement between Nxumalo and Mohlamonyane came to a head in a dramatic turn of events consequent upon Nxumalo unilaterally convening a shareholders meeting and therein purportedly removed Mohlamonyane as director of Malomini and reinstated herself with effect from 22nd April 2021, according to documents Nxumalo lodged with the CIPC. Nxumalo invoked the provisions of s 71(1) of the Act in that regard.

[12] Given her unilateral decision to remove Mohlamonyane as Malomini's director, Nxumalo proffered as her main argument that the sale agreement concluded between the parties was not valid in law ***ab initio*** absent a description of the ***merx*** in the sale agreement. Nxumalo contended that it is required in law to state the aspect of the company being sold.

[13] The aforesaid controversy culminated in a poised Mohlamonyane approaching the Tribunal, to seek relief in terms whereof he sought his reinstatement as Malomini's director and the simultaneous removal of Nxumalo as such.

[14] Nxumalo opposed this application at the Tribunal ***albeit*** without success.

[15] In the ensuing outcome, the Tribunal handed down its decision on 28th September 2021 in respect thereto, it ordered the CIPC to remove Nxumalo as Malomini's director and register Mohlamonyane accordingly.

[16] The Tribunal was satisfied that the parties concluded a valid contract of

sale and purchase and that the subject matter of the ***merx*** was Malomini with the aforementioned registration number; the sale of the company was perfected by due delivery by Nxumalo to Mahlomonyane; and that the latter had paid the aforementioned amount in consideration thereto.

[17] Clearly aggrieved by the Tribunal's aforesaid Decision, Nxumalo noted an appeal at the High Court on 30th September 2022, pursuant to s 195(7)[1] of the Act. The grounds of appeal are as set out at paragraph '2' herein above.

[18] The Tribunal summarized its Findings and Decision as issued by its Panel member, (the Third Respondent), in the following terms:

18.1 A company can be a subject matter of a sale agreement;

18.2 The ***merx*** has been adequately described in the sale agreement;

18.3 The sale agreement is therefore valid and enforceable by the applicant as against the respondent;

18.4 The respondent was not entitled to take the law into her own hands;

18.5 The respondent was obliged to observe the rule of law;

18.6 The respondent should have followed due legal process if aggrieved;

18.7 The Tribunal held that the application for relief is granted and the applicant, Mohlamonyane, was to be reinstated as director of Malomini Strategist (Pty) Ltd and the Companies and Intellectual Property Commission was ordered to remove the respondent, (Nxumalo), as director of Malomini Strategist (Pty) Ltd.

OBSERVATIONS AND DISCUSSION

[1] This section provides, 'a decision by the Companies Tribunal with respect to a decision of, or a notice or order issued by, the Commission is binding on the Commission subject to any review by, or appeal to, a court.

[19] Based on the facts and evidence before the appeal court, it is uncontentious that Nxumalo, who was Malomini's director, also commanded 100% shareholding thereof, prior to concluding the written sale and purchase agreement, with Mohlamonyane on 13th November 2020.

Was the *merx* fully described in the written purchase and sale agreement between the parties, the absence of which rendered the contract invalid *ab initio*?

[20] In the proceedings before the Tribunal, the Panel member quite rightly latched on to Nxumalo's argument for her decision to unilaterally remove Mohlamonyane on the basis that the Sale Agreement is not valid in law ***ab initio,*** for want of description of the ***merx*** as is required in law in this context, to state the particular aspect of the company being sold.

[21] The Tribunal vigorously confronted the aforesaid question against an investigation of the requirements for a valid agreement, the ***essentialia*** of a contract in contract law parlance.

[22] The Tribunal found that in terms of the Sale Agreement between the parties, the company was sold by Nxumalo and bought by Mohlamonyane on 13th November 2020 and that, the subject matter of the ***merx*** is Malomini Strategist (Pty) Ltd, the company. The Tribunal was of opinion that the ***merx*** is embodied in and by the aforesaid name of the company and its corresponding registration number ***viz***, 2013/182330/07 and both appear ***ex facie*** in the sale agreement.

[23] Based on the aforesaid established facts, the ***merx*** was definite, ascertainable and not vague, accordingly, the ***merx*** was described fully and or with sufficient specificity.

[24] The Tribunal's finding and conclusion that a valid contract was formed is buttressed on sound legal principles and good authority, ***inter alia*** Kerr's[2] assertion that a contract of sale is formed when two or more parties who have the requisite intention agree together or appear to agree that the one, called the seller or the vendor, will make something, called the thing sold or the ***res vendita*** or ***merx,*** available to the other, called the buyer or the purchaser, in return for the payment of a purchase price. The Tribunal mirrored this definition against the case of **Treasurer – General v Lippert**[3] where the full Board of the Judicial Committee of the Privy Council cited with approval De Villiers J's pronouncement that:

> 'A sale is a contract in which one person, (the seller or the vendor), promises to deliver a thing to another, (the buyer or emptor), the latter proposing to pay a certain price.'

[25] The Tribunal went at length to expatiate this issue including that the parties were ***ad idem negotio***, and concluded that the essential elements being the thing being sold by the Seller and the price paid by the Buyer were present. The appeal court agrees with the Tribunal's findings as amplified in the following terms:

> [25.1] The subject matter of the Sale Agreement is the company and the common intention of the parties was very clear on this aspect. By

[2] Professor AJ Kerr: The Law of Sale and Lease (2004) 3rd Edition Butterworths: Durban; Kerr: Law of South Africa vol 24 at 3
[3] (1883) 2 SC 172

inference, the company including all its assets, shares, liabilities etc, was sold by Nxumalo to Mohlamonyane. It is also important to note the fact that Nxumalo accepted the payment of the purchase price of R2 650 000.00 from Mohlamonyane. Despite Nxumalo raising claims that the Sale Agreement was invalid ***ab initio***, Nxumalo never tendered repayment of the purchase price to Mohlamnyane, she furthermore failed to proffer any justifiable reason for her retention of the purchase price. It was argued on her behalf that the money which was paid in consideration of the sale was meant to be her payment no where in the sale agreement is there a provision for such alleged payment. Nxumalo cannot unilaterally decide terms not even forming part of the sale agreement and seek to bind Mohlamonyane or the company thereto.

[25.2] Paragraph '22' ***supra*** has already painted a crisp picture to demonstrate the imperatives of how a contract of sale is formed as is given expression when two or more parties who have the requisite intention agree together or appear to agree in terms whereof the seller or the vendor, will make something, called the thing sold or the ***res vendetta*** or ***merx,*** available to the buyer or the purchaser, in return for the payment of a purchase price and how this definition has taken root and has virtually remained the same.

[25.3] Meckeurian in Sale of Goods in South Africa provides that, the essential elements of a contract of sale are the following:

[25.3.1] An agreement, (***consensus ad idem***), of the parties;

[25.3.2] A thing to be sold, (***merx***), must be identified; and,

[25.3.3] A price, (***pretium***), with a view to exchanging the thing for the price.

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[25.4] The parties to any sale agreement must have a meeting of the minds with regard to the object of the contract. Such object is generally to purchase and to sell the thing concerned for the price agreed upon. The seller usually ensures the transfer of possession and/or ownership of the thing sold to the buyer. The general principles relating to consensus in purchase and sale are the same as those pertaining to other contracts in terms of which consensus is required as summarized thus:

[25.4.1] There must be an agreement of the minds of the parties, mutually communicated, usually by means of offer and purchase;

[25.4.2] The parties must act with the intention of contracting a sale. There must be a ***concursus animorum animo contrahenhendi*;**

[25.4.3] The agreement should be free from mistake or error, and should not have been induced wrongfully by misrepresentation, duress or undue influence.

[25.4.4] The agreement should be legal and satisfy the dictates of public policy.

[25.4.5] The agreement should be rational. It cannot therefore exist in cases of extreme youth, irrational intoxication and insanity.

[25.5] In sales agreements in particular, there must be agreement between the contracting parties with regard to the following important points:

25.5.1 The subject matter of the sale and its essential characteristics;

25.5.2 The price to be paid; and,

25.5.3 Any other item raised in the negotiations and expressly or impliedly regarded as material.

[25.6] On the aforesaid premises, it is plain that there are two essential elements of a contract of sale to wit, the thing sold by the seller; and, the price to be paid by the buyer.

[25.7] The existence of the aforesaid ***essentialia*** denote that there is a sale agreement. Neither delivery nor payment is necessary to the creation of the contract, for they both fall within the category of its performance. Because delivery or payment are not necessary for the creation of the contract of sale, it can be said that it is the agreement to sell alone that constitute the contract of sale. Legal rights and duties flow immediately upon conclusion of the sale agreement and not from delivery or at another juncture. The following was stated in **Nimmo v Klinkenberg Estates Co Ltd[4],**

[4] 1904 TH 310 at 314

> **'**The word 'sale' is used with various meanings. To lawyers discussing it from an academic point of view it means the time when the parties have arrived at a valid and binding agreement, apart from any question whether the purchase price has been paid or whether there has been delivery of the article sold.'

[25.8] From what has been postulated herein above, a contract of purchase and sale is generally described as a contract whereby one person agrees to deliver to another the free possession of a thing in return for a price sounding in money, thus, a sale is a contract in which one person, the seller or vendor, promises to deliver a thing to another, the buyer or emptor, the latter agreeing to pay a certain price in consideration for the thing that is sold and delivered to him/her. In simple terms, a sale is a contract which can be concluded by an agreement signed or agreed to by the parties. Notably, there can be no sale without a price, similarly, there can be no sale without a thing to be sold. In this case, from the Sale agreement entered into between the parties, it is clear that there was an agreement. Nxumalo sold the whole company described in the Sale agreement to Mohlamonyane for the stated amount above which amount was undisputedly paid by Mohlamonyane, whereafter, all risk and benefits passed to Mohlamonyane. Nxumalo resigned and Mohlamonyane was registererd as a sole director of the company.

[26] It bears mention that the Tribunal afforded the parties an opportunity to file supplementary heads of argument to cast more light on their respective arguments. Flowing from the aforesaid further submissions from the respective parties, the Tribunal furnished an analysis of the issue on the following terms:

[26.1] The question which must be answered is whether a company is

capable of being sold. The Panel member made clear that despite making bold assertions that a company cannot be sold, the respondent failed to provide any legislation or common law rule which states that a company cannot be sold. The Panel member could not find any provision in the Act which expressly or impliedly states that a company cannot be sold. The Panel member considered the provisions of the Labour Relations Act[5], (the LRA), relating to the transfer of a business as a going concern. Section 197A of the LRA provides that '*business*' imports the meaning '*whole or part of a business, trade, undertaking or service* and '*transfer*' means, the transfer of a business by one employer, (old), to another employer, (new), as a going concern.

[26.2] The test for determining a '*going concern*' is a comparison of the business before and after the transfer and establishing whether it remains sufficiently the same. For s 197 to be applicable, the following hold sway:

[26.2.1] The business is transferred from one employer to another;

[26.2.2] The transfer includes the whole or a part of a business; and,

[26.2.3] The business is transferred as a going concern.

[26.3] The Tribunal correctly found that a company can be the subject matter of a sale agreement and that it is clear that the parties were at the stage concluding the Sale Agreement ***ad idem*** about the ***merx*** of the Sale Agreement and same had been fully described therein. There was absolutely no evidence to substantiate Nxumalo's

[5] 66 of 1995

argument that the subject matter of the Sale Agreement concluded with Mohlamonyane was very cryptic and vague.

[26.4] It follows from the above that if one has regard to what the parties agreed to in their Sale Agreement, the company and by inference, the company, including all assets, shares, liabilities, etc was sold by Nxumalo to Mohlamonyane for a specific amount of money. The argument that the Sale Agreement should have stated that the subject matter of the sale should have been a specific number of shares in the company, does not have any legal basis. In terms of the Sale Agreement, a whole company was sold and such sale is valid in terms of the law of contract. It is clear from what transpired after 13 November 2020 that even Nxumalo accepted such sale to be valid and that is the main reason why she resigned as a director of the company.

[26.5] The papers before the Tribunal bear testimony that Nxumalo resigned as director on 13th November 2020, this being a common cause issue . Mohlamonyane was appointed as director and he alone was left in charge of the company with effect from 13th November 2020. The aforesaid resignation of Nxumalo and Mohlamonyane's appointment respectively, were in line with the provisions of s 70(6)[6] of the Act, recorded by the CIPC on 16th November 2020.

[26.6] The post 13th November 2020 events are indicative of the understanding between the parties of their respective obligations to the Sale Agreement. Nxumalo clearly had no interest in the company and its affairs subsequent thereto. The effect of the sale of the

[6] 'Every company may file a notice within 10 business days afer a person becomes or ceases to be a director of the company.

company by its very nature, translated to the divesting of Nxumalo's powers, rights and legal entitlements dually, as director and shareholder, that she previously had in relation to the company, prior to the conclusion of the Sale Agreement.

[26.7] Nxumalo could not have legally convened a shareholders meeting of the company. She was neither a shareholder nor a director of the company at that stage, neither did she have an interest in the company and its affairs. She could not have taken a decision unilateraly at such shareholders meeting to have Mohlamonyane removed because she ceased to be a shareholder and director of alomini. Nxumalo had recourse to due process of the law in the event of being so aggrieved, an omission she conceded to in argument before the Tribunal.

[27] The appeal court is of opinion that nothing could be singled out in the supplementary submissions filed by the parties which had an effect to upset the Tribunal's take on the above circumscribed issues. Accordingly, there is no legal basis to interfere with the findings, reasoning and conclusions of the Tribunal in the aforesaid respects.

[28] Based on the aforesaid conclusions of fact and law, we posit that this founds the Tribunal's Decision that Nxumalo was not entitled to take the law into her own hands by removing Mohlamonyane based on her apparent perception that the written contract of purchase and sale was not valid ***ab initio*** for want of full description of the ***merx.*** The Tribunal also correctly pronounced that Nxumalo ought to have followed due process.

NXUMALO CONTRACTED THE SALE AND PURCHASE AGREEMENT IN HER PERSONAL CAPACITY

[29] As a precursor to succeeding observations and considerations herein, it seems prudent to make plain from the outset that Nxumalo entered into the aforesaid Sale Agreement in her as the sole director and 100% shareholder of Malomini.

[30] Nxumalo's contention about the absence of company representation in the sale and purchase agreement, because a company enjoys separate legal personality (while true), as well as the absence of a resolution adopted by the company to that effect, is of no moment. That Nxumalo was intent on selling the company cannot be gainsaid, she was the sole director and 100% shareholder of Malomini, she had the power to sell the company as a whole as she wished, and that's exactly what she did in this instance.

[31] Likewise, Nxumalo's argument that the sale and purchase contract was drafted by an accountant, implying the paucity of sound legal advice, does not advance her cause any further, neither does the proverbial shifting of the goal posts occasioned by the after the fact legal advice she obtained, as she pointedly submitted.

[32] This logically leads the appeal court to reflect on the momentous implications of the sale of a company by a person enjoying 100% shareholding in the company.

[33] However, preceding the aforesaid subject, the following cogent aspects

represent some of the crucial provisions of the sale and purchase agreement which were taken into account by the appeal court and which objectively viewed, were consistent with the common intention of the parties:

[34] The Tribunal took due legal cognizance of the implications of clause '3' of the written agreement of the contract relating to '**delivery**', which makes bold that the Seller, (Nxumalo), shall effect delivery of the Company upon receipt of payment. The appeal court is not assailed by any doubt in its mind that Malomini was effectively delivered to Mohlamonyane upon receipt and acceptance of the agreed to sum of R2 650 000.00 by Nxumalo from Mohlamonyane.

[35] The Tribunal furthermore ***inter alia***, took legal notice of the fact that clause '4' of the sale and purchase contract provides that the **risk and benefit** will pass from the Seller, Nxumalo, to purchaser, Mohlamonyane, upon delivery of the Company.

[36] Paragraph '5' of the written contract states as follows:

> '*The purchaser shall be liable for all income tax, provisional tax and value added tax that is due to SARS from 1st March 2020.*'

THE IMPLICATIONS OF SELLING AND PURCHASING A COMPANY.

[37] It is accepted that a company is owned by its members who hold shares in the company. However, the members do not own the business or assets of the business, nor are the rights and obligations flowing from the business those of the members. Owning shares in a company entitles a member to certain rights in relation to the company, the most significant of which are the right to vote at meetings of members and the right to share in a distribution of profits by the company.

[38] Apart from being Malomini's director, a position she relinquished to Mohlamonyane became the incumbent thereof, Nxumalo owned 100% shareholding in Malomini. Nxumalo also disposed of her shares as a result of the Sale Agreement.

[39] Where a person sells all the shares in his/her company, s/he is selling the company itself. A company is its own legal entity that can enter into contracts and own assets. The sole shareholder is the owner of a company. In the circumstances, a sale of a company occurs when the company's sole shareholder sells all his/her shares (the whole company) to someone else (the purchaser).

[40] The aforesaid circumstances obtained between Nxumalo and Mohlamonyane in relation to the written contract they entered into and on occasion of Nxumalo resiling from the Sale Agreement, this prompted Mohlamonyane to approach the Tribunal for relief.

[41] Essentially, in the sale of the company, the shareholder sells the shares entitling ownership of the company to the purchaser. In return, the shareholder gets the sales price. Through the transaction, all the rights and responsibilities attached to the ownership of shares, such as debts and liabilities, are transferred to the purchaser.

[42] It bears mention that the purpose of acquiring the 100% shareholding of the company is to secure absolute control of the company. The effect of selling his/her

company means that a new owner will take ownership of the company.

[43] The purchaser will also take control of the company's assets and liabilities. To wit, Where a person owns all the shares in a company and sells those shares to a purchaser, the seller ceases to own the company, but the purchaser does.

[44] This is the practical and legal effect flowing from the sale of the company by Nxumalo to Mohlamonyane. The further effect thereto is that Nxumalo was not legally entitled to call Malomini's shareholders meeting unilaterally on 13th November 2020, needless to mention reinstating herself as director and removing Mohlamonyane as such.

[45] Nxumalo's omission to follow due process and resort to self help following upon her unfounded apprehension that the sale and purchase contract was invalid ***ab initio,*** made it incumbent upon her to approach the court for appropriate relief. Such conduct does not earn the approbation of the proper administration of justice.

[46] In the proceedings of the Tribunal thereof, Nxumalo made light of the share certificate produced by Mahlomonyane, the issue of the share certificate arose from the legal effect of the Sale Agreement in terms whereof, Mohlamonyane obtained the certificate to signify his shareholding in Malominini.

[47] The court's view is that in the event that Nxumalo is of opinion that such shareholder's certificate was vitiated by fraud or misrepresentation arising from her

allegations of fabrication as it were, it behoved Nxumalo to approach the relevant authorities to seek appropriate intervention. However, no proven facts were presented to the Tribunal in support of Nxumalo's contention of the aforesaid fabrication of the shareholders certificate by Mohlamonyane. In the circumstances, the Tribunal could not have been expected to engage the issue in the absence of proven facts.

[48] In Nomasthethu (Pty) Ltd v City of Cape Town[7], the SCA held that it is trite law that fraud is conduct which vitiates every transaction known to the law. This principle resonates with an earlier judgment of the SCA in Esofranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others[8] which was referred with approval by Lord Denning's dicta in Lazarus Estates Ltd v Beasley[9], to wit:

> 'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever . . .'

[49] In conclusion, the appeal court's approach is that the Tribunal was best placed to make the requisite assessment on these matters, noting that it would not be appropriate neither conscionable in the absence of being at the coalface of such assessment, for an appellate court to interfere with the decision of the court of first instance as long as it is judicially made on the basis of the correct facts and legal principles.

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[7] 2020 JDR 1279 (SCA)
[8] [2014] 2 All SA 493 SCA paragraph 11
[9] [1956] 1 QB (CA) at 712

[50] The Panel member made an order that the Tribunal directs the CIPC to remove Nxumalo as director of the company and reinstate Mohlamonyane as director of the company, even though the application was not served on the CIPC. The Panel member furthermore concluded that it was in the interest of justice and fairness to finalize this matter as quickly as possible and directed the Registrar of the Tribunal to deliver the application together with his decision to the CIPC.

[51] In the result, the following order is made:

ORDER

i. Nxumalo's appeal is dismissed;
ii. The Tribunal's decision is confirmed;
iii. The Appellant, (Nxumalo), is ordered to pay respondent's costs on a party and party scale including costs of Counsel.

A MPOFU AJ

ACTING JUDGE OF THE HIGH COURT

I agree

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L M MOLOPA-SETHOSA J
ACTING JUDGE OF THE HIGH COURT

For the Appellants	: Adv: MMNYATHELI
Instructed by	: L MBANGANI ATTORNEYS
For the Respondent	: Adv: M M SNYMAN
Instructed by	: WS NKOSI ATTORNEYS