IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
15/6/2012
DATE SIGNATURE

CASE NO: 27199/12

DATE: 1 June 2012

IN THE MATTER BETWEEN

C THOMPSON	**FIRST APPLICANT**
COUPLES INVESTMENTS CC	**SECOND APPLICANT**

and

ILIPS (PTY) LTD	**FIRST RESPONDENT**
SHANE THOMPSON	**SECOND RESPONDENT**
SEBOPHILE VENTER MOLAPO	**THIRD RESPONDENT**
NARDUS TRUTER	**FOURTH RESPONDENT**
SHANE THOMPSON N.O	**FIFTH RESPONDENT**

JUDGMENT

LEDWABA, J

INTRODUCTION

[1] The applicants filed an urgent application against five respondents who are opposing the application. The application consists of 321 pages.

[2] The undermentioned summary of the facts are, in my view, important for the understanding of the decision to be made herein.

2.1 The first applicant (Catherine) is the sole member of the 2nd applicant (Couples) which has forty (40%) shares in the 1st respondent (ILIPS).

2.2 The 2nd respondent (Shane) is the sole trustee of Mispah Trust (5th respondent) which Shane is sued in his representing capacity as the trustee of the trust. After hundred (100) shares of the ILIPS were issued on the 16 April 2009, Mispah owned thirty five (35) shares in ILIPS.

2.3 The 3rd respondent (Venter) owned twenty five (25) shares in ILIPS.

2.4 At the outset it should be mentioned that Catherine and Shane are married to each other and they are now involved in an acrimonious divorce proceedings which commenced in 2011.

2.5 It is common cause that in 2009 Mispah disposed of eleven (11) shares from its 35 shares and transferred them as follows:

five (5)	shares to Mr APJ Smit
five (5)	shares to HJ Schlebusch
one (1)	share to Venter.

COMMENTS

[3] Catherine, acting on behalf of Couples, in February 2012 discovered that shares where transferred contrary to the shareholders agreement of ILIPS and that the pre-emptive rights of Couples were infringed. The applicants challenged the said transfer of the share. The other reason for the challenge was that Couples was not notified of the said transfers.

[4] It is further common cause that further various transfers of shares in ILIPS took place among Mispah, Venter and one MA Mahlalela. I do not think it is necessary to go into the details regarding said transfer because the applicants claim is based on the initial transfer of eleven (11) shares to Venter, Smit and Schlebush.

[5] Importantly. Mispah represented by Shane conceded that the transfer of the eleven (11) shares was irregular and a restitution of the said shares took place. (see annexure CT 15 letter from Mispah attorneys dated 28 February 2012).

[6] Shane in paragraph 5.17 of the answering affidavit on page 208 of the paginated papers said the following: *"The share register was rectified during or about April 2012 and accordingly the shareholding of ILIPS has been restored to reflect the shareholders, as those who signed the shareholders agreement on 14 April 2009."*

[7] The shareholders agreement made and entered into by and between ILIPS, Couples, Mispah and Venter in April 2009 clause 11.2.1 – 11.2.2 reads as follows:

"7.1 When a shareholder ("the OFFEROR") intends to dispose of any of his shareholding in the COMPANY, the OFFEROR shall offer the shares ("the OFFER SHARES") in writing to the other shareholders ("the OFFEREE SHAREHOLDERS"), stating the price and the terms of payment required by it and if it intends selling to a particular third party ("the THIRD PARTY") it shall disclose the name of the THIRD PARTY.

7.2 If, within 30 (THIRTY) days after the receipt of the offer ("the OFFER") (during which period the offer shall be irrevocable), it is not accepted in writing in respect of all the OFFER SHARES, by any of the OFFEREE SHAREHOLDERS, if more than one, proportionately to their shareholdings, or in proportions agreed amongst them, the OFFEROR may, within a further 30 (THIRTY) days dispose of the OFFER SHARES (but not fewer) to the THIRD PARTY only, at a price not lower and on terms not more favourable to such person than the price and terms at and on which the OFFEREE SHAREHOLDERS were entitled to purchase them and on condition that the OFFEREE SHAREHOLDERS have consented in writing to the disposal of the OFFER SHARES (on the basis set out above) to the THIRD PARTY which consent each of the OFFEREE SHAREHOLDERS undertakes shall not be unreasonably withheld."

[8] The Applicants' counsel Adv AB Rossouw SC argued that Couples is entitled to claim transfer of the 11 shares on the same terms and conditions that the said shares were disposed of .

[9] The respondent's counsel Adv J Josephson could not argue to the contrary regarding the legal position and he only submitted that the applicants were aware of the transaction and further said the application should be dismissed because the applicants should have foreseen the disputes of facts and they should not have approached the court on motion proceedings.

[10] In my view, on a careful analysis of the facts of this case alleged the dispute of facts raised *in casu* is not of such a nature that this matter cannot be decided on the affidavits especially having regard to certain concessions made by the respondents.

[11] The respondents', in particular Shane, allegation that Couple's demand to purchase the eleven (11) shares would be prejudicial to ILIPS as the BEE status of ILIPS would be sacrificed is not, in my view, a legal justification to refuse the order sought. The BEE status of ILIPS can always be rectified.

[12] The legal position in matters involving infringements of pre-emptive rights is that if a seller concludes a contract of sale or transfer of shares with a third party contrary to the pre - emptive rights agreement, the party whose rights have been infringed can step into the shoes of the third party by unilateral declaration of intent. A contract of sale will then be deemed to have been concluded between the seller and the holder of the pre emptive rights. See *Associated South Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd en andere 1982 (3) SA 893 (A) at 907 D-G.*

[13] The applicants further based this application on the fact that the meeting of the 7th of May 2012 where the respondents dealt with the issue of compelling Couples to agree to the value of shares was irregular and the decision taken at such meeting was also irregular in that clause 12.2.2.2 which reads as follows: "*... within 5 (FIVE) days after learning of the occurrence of any event contemplated in clause 12.1.1 to 12.1.8, anyone member of the OFFEREE, other than the OFFERING SHAREHOLDER, may, by notice in writing, compel the OFFERING SHAREHOLDER to offer his shares in the COMPANY to the OFFEREE at a price being the fair value of the shares to be agreed among all SHARESHOULDERS (including the OFFERING SHAREHOLDER) or, failing AGREEMENT, to be determined by the auditors of the COMPANY. Who shall act as experts and not as arbitrators,*" was not complied with in that the respondents

knew in February 2012 about the applicants attitude of refusing to sign documentation for the FNB facility for financing ILIPS.

[14] The respondent dismally failed to justify the non compliance.

APPOINTMENT OF THE NEW CEO

[15] Shane stated in his affidavit that at the meeting held on 7 May 2012 the shareholders who were present discussed his resignation as the CEO and the appointment of the 4th respondent as the CEO of ILIPS.

[16] Clause 19(1) of the shareholders agreement reads as follows:

> *"The Managing Director/Chief Executive Officer ("managing director") of the COMPANY shall be appointed, removed and replaced by the SHAREHOLDERS at a shareholders meeting."*

[17] Shane stated that because there was a quorum of 60% of the shareholders and further that a round robin resolution was signed by Molapo and himself the appointment of Truter was in accordance with clause 19 of the shareholders agreement.

[18] There is no doubt that the appointment of the 4th respondent did not result from a properly constituted meeting of the shareholders. There was no notice given to Couples regarding a meeting for the appointment of the CEO. The failure to Couples cannot be regarded as accidental or inadvertent failure.

[19] Importantly, Item 7(5) of Schedule 5 (Transitional Arrangements) of the Companies Act 71 of 2008 clearly stipulates that despite anything contrary in a company's Memorandum of Incorporation the provisions of the Act about the meetings of shareholders and the adoption of resolutions apply from the effective

date of the act to every existing company. The effective date of the act is 1 May 2011.

[20] Section 62(1) of the Act stipulates that a company must deliver a notice to all of the shareholders. Section 62(3) prescribes the contents of the notice. Section 62 (4) stipulates that if a company fails to give the required notice of a shareholders meeting, the meeting may proceed if all the persons who are entitled to exercise voting rights acknowledge actual receipt of the notice.

[21] Section 62(6) reads as follows: *"And immaterial defect in the form or manner of giving notice of a shareholders meeting, or an accidental or inadvertent failure in the delivery of the notice to any particular shareholder to whom it was addressed, does not invalidate any action taken at the meeting."*

[22] Mispah and Venter according to the papers, are in the process to enforce the forced sale. The shares of Couples are at a great risk. I find that the matter is urgent.

[23] **I therefore make the following order:**

27.1 The normal forms and service are dispensed with and the matter is regarded as urgent.

27.2 The second, third and fifth respondents are interdicted from selling the shares of the second applicant as decided at a meeting held on the 7th of May 2012.

27.3 The first respondent must rectify and enter in its securities register to reflect the registration of additional 11 (eleven) shares to the shares of the second applicant which shares should be deducted from the shares of Mispah Trust.

27.4 The first respondent must issue a certificate to the second applicant in terms of section 51 (1) of the Companies Act 71 of 2008 reflecting that the second applicant holds 51 (Fifty one) shares in the first respondent.

27.5 The appointment of the fourth respondent as the Chief Executive Officer or Managing Director is declared invalid and is hereby set aside.

27.6 The second, third, fourth and fifth respondents are ordered to pay the costs of the first and second applicants jointly and severally which costs includes the employment of a Senior Counsel.

A P LEDWABA
JUDGE OF THE HIGH COURT

HEARD ON: 30 May 2012

FOR THE APPELLANT: Adv A B Rossouw SC

INSTRUCTED BY: Jaco Roos Attorneys, Pretoria

FOR THE RESPONDENT: Adv J Josephson

INSTRUCTED BY: Botha and De Klerk attorneys, Pretoria