

# SUPREME COURT OF SEYCHELLES

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Reportable

[2023] SCSC

XP20/2023

608

In the ex-parte matter of:

In the matter of La Buse Manufacture Ltd

And in the matter of a petition to appoint a new director

**Bernadette Claudia Contoret**

*(rep. by Mr. Frank Elizabeth)*

**Petitioner**

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**Neutral Citation:** *Ex Parte Bernadette Claudia Contoret* XP20/2023 [2023] SCSC

608

4 August 2023

**Before:** A. Madeleine, J

**Summary:** Appointment of director of a company

**Heard:** 19 May 2023 and 21 June 2023

**Delivered:** 4 August 2023

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## ORDER

Application is dismissed.

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## JUDGMENT

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**MADELEINE, J**

### *The Application*

- [1] This is an application by Bernadette Claudia Contoret, a director and minority shareholder of the company La Buse Manufacture Ltd, for the appointment of a second director to the company.
- [2] The Application is made by way of petition supported by affidavit seeking the following orders –

- (a) a hearing of extreme urgency;
- (b) the appointment of Mr. Arnold Machael Jean-Claude Roger Mein as the second director of the company forthwith;
- (c) any other and further orders that the court deems fit and necessary in all the circumstances of the case;

### *Evidence*

- [3] In affidavit made on 21st March 2023, the Petitioner deponed that the company La Buse Manufacture Ltd (hereinafter referred to as the “Company”) was incorporated on 13<sup>th</sup> September 2006 with company number 845063-1 and carries on the business of manufacturing and selling rums as evidenced by the Certificate of Incorporation and the Memorandum and Articles of Association of the Company produced. At the time of incorporation, the original shareholders of the Company were Messrs Renato Longobardi and Giovanni Di Maio. Mr Renato Longobardi held 99 shares in the Company and Mr. Giovanni Di Maio held 1 share in the Company.
- [4] The Petitioner also deponed in her affidavit that she was appointed director of the Company on the 8<sup>th</sup> of September 2020 and produced the particulars of directors of the Company. Also, that she holds one share in the Company and the remainder 99 shares are held in the name of Mr Renato Longobardi.
- [5] Further, that Mr Renato Longobardi, the other director and majority shareholder of the Company, died in Italy on 24<sup>th</sup> December 2022 as evidenced by the Translated Death Certificate produced. As a result of Mr. Longobardi’s death, the company cannot operate with only one director. The affairs of the Company need to be put in order for it to continue to operate sustainably and profitably. If new directors are not appointed as a matter of extreme urgency, the Company is at risk of failing completely and might have to go in liquidation. The statutory annual return is long overdue to be submitted to the Seychelles

Revenue Commission and the new director needs to be appointed for the company to continue its operation forthwith and to sign off the tax return.

- [6] The Petitioner also proposed the appointment of Mr Arnorld Machael, Jean-Claude Roger Mein born on the 2<sup>nd</sup> day of June 1999 as the second director of the Company. Mr Arnorld Machael, Jean-Claude Roger Mein is of age, competent, knowledgeable and is a fit and proper person to be appointed as the second director of the Company since he works for the company and has an in-depth knowledge of the working operations of the Company. He does not suffer from any disability, infirmity or mental incapacity and is ready and willing to act as a director of the company.
- [7] At the hearing of the application, the Petitioner gave evidence to confirm the matters deponed in her affidavit of 21<sup>st</sup> March 2023. In addition, the Applicant clarified that she was appointed as director of the Company on 8<sup>th</sup> September 2010 (and not in 2020) and produced the Company's board resolution dated 8<sup>th</sup> September 2010 and registered on 13<sup>th</sup> September 2010. According to the said resolution, the share of Mr Giovanni Di Maio was to be transferred to the Applicant. Transfer of shares document dated 30<sup>th</sup> December 2010 and registered on 3<sup>rd</sup> September 2011, show that the Applicant receives one share in the Company from Mr Giovanni Di Maio.
- [8] The Petitioner also testified that following the death of Mr Longobardi, the Company has been encountering difficulties. The bank accounts of the Company risks being frozen if no other director is appointed, and the business will have to close. the Financial Services Authority had imposed a deadline for the submission of a list of the directors and shareholders of the Company. The said deadline has lapsed. Tax returns for the year 2022 due on 31<sup>st</sup> March 2023, has not yet been filed with the Seychelles Revenue Commission. At any rate, these have to be signed by two directors. She further emphasised on the suitability of Mr. Arnorld Machael, Jean-Claude Roger Mein to be appointed as the second director of the Company.

- [9] Mr. Arnorld Machael, Jean-Claude Roger Mein testified that he is 23 years old. He is the Production Manager of the Company. He was appointed as Production Manager in October 2022. He has been involved with the Company for some time and was trained by the late Mr Renato Longobardi. He has knowledge of the business operations of the Company. Currently, the Company employs four staff including himself. He also testified that he does not suffer from any infirmity, disability or mental incapacity that impacts on the performance his job. If appointed, he will be able to perform the duties of director of the Company.
- [10] The witness clarified to the Court, that this is the first time that he will be appointed as director of a company. His knowledge of the business operations of the Company is based upon the 6 years that he had worked at the Company. At first he worked part time during school holidays and after school hours. He has been in the employment of the Company since he completed his Advanced Levels and was appointed the Production Manager last October 2022. He confirmed that he consents to his appointment as the director of the Company.

#### *Submissions*

- [11] The Petitioner's Counsel filed written submissions and addressed the court orally on the law. He relied on section 162(1) of the Companies Act 1972 to submit that the Company should have at least 2 directors. With the passing of Mr Renato Longobardi, there is the need to appoint a second director to the Company. The Companies Act is silent on the circumstances when director suddenly passes away although section 124 gives the court power to order an annual general meeting of the company to appoint a director "*[i]f for any reason it is impracticable to call a general meeting if a company in a manner in which meetings for that company may be called...*".
- [12] It was further submitted that section 124 further empowers the court "... *either by its own motion or on the application of any director of the company or of any shareholder of the company who would be entitled to vote at the meeting, order a meeting of the company to*

*be called, held, and conducted in such manner as the court thinks fit...*” and that “*where such order is made may give any ancillary or consequential directions as it thinks expedient; and it is hereby declared that the directions that may be given under this subsection include a direction that one shareholder of the company present in person or by proxy shall be deemed to constitute the meeting.*”

[13] Petitioner’s Counsel submitted that if the court is minded not to make the orders specifically prayed for in the petition, the court is at liberty to make an order under section “24” of the Companies Act in accordance with the prayer 3. in the petition where the Petitioner has prayed the court “*...to make any other and further orders the court deems fit and necessary in all the circumstances of the case.*” In that case the court can make an order that a general meeting of the company be called to appoint an additional director of the company since it is “*impracticable to call a general meeting of a company in a manner in which meetings for that company may be called...*” after the death of its director.

[14] The Petitioner’s submissions concludes that the court should exercise its powers under section 124 of the Companies Act to order a general meeting for the purpose of appointing an additional director of the company in such manner and pursuant to such directions as the court may impose.

### *Law and Analysis*

[15] In terms of section 162(1) of the Companies Act, 1972 (hereinafter referred to as the “Act”), every company must always have at least two directors. If the company has less than two directors, no director or other person shall have the power to carry on the business of the company or to enter transactions on its behalf (other than calling general meetings) until the company has two or more directors.<sup>1</sup> The prohibition to carry out business or transact on behalf of the company does not affect the power of an annual general meeting to appoint directors.<sup>2</sup>

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<sup>1</sup> Section 162(3) Companies Act

<sup>2</sup> Section 162(4) Companies Act

- [16] Section 163 of the Companies Act provides for the manner of appointment of directors in a company as follows –

*“163.- (1) Subject to the provisions of this section, a director of a company may be appointed only by an ordinary resolution passed at a general meeting of the company for a period not exceeding five years, but any director may be reappointed in like manner on any number of occasions for a period not exceeding five years on each reappointment.*

*(2) The memorandum or articles of a company may prescribe the maximum and minimum and minimum number of directors of the company who shall be appointed (being not less than two directors), and such a maximum or minimum number may be varied from time to time by an ordinary resolution passed at general meeting, but so that the minimum number is not less than two.*

*(3) The memorandum or articles may appoint or provide for the appointment of the first directors of the company, but unless the first directors are appointed by a general meeting of the company, they shall all cease to hold office at the termination of the first annual general meeting of the company but shall be eligible for reappointment at the meeting under subsection (1).*

*(4) If a casual vacancy occurs in the office of a director, the directors may fill it, and the person appointed by them shall retire at the termination of the next succeeding annual general meeting, but shall be eligible for re-appointment at that meeting under subsection (1).*

*(5) Any provision in the memorandum or articles of a company by which a director may be appointed in any other manner than the manner provided by this section shall be invalid:*

*Provided that the memorandum or articles may provide for the appointment of one director, or for the appointment of two or more directors (not exceeding in number one-third of the maximum number of directors who may be appointed for the time being) by the holders of debentures issued by the company or by the trustees of the debenture trust deeds covering such debentures.*

*(6) At a general meeting of a company a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be made unless a resolution that it shall be so made has first been agreed to by the meeting without any vote being given against it.*

*(7) The memorandum or articles of a company may provide for the reappointment of a director at the expiration of his term of office without the passing of a resolution by a general meeting to that effect if not other person is or has been appointed by a general meeting in his place, but such a director shall not be reappointed under this subsection if an ordinary resolution is or has been passed at a general meeting that the vacant directorship shall not be filled, or if a resolution for the re-appointment of the director is defeated.*

*(8) This section shall not apply to a managing director or to a proprietary company and shall apply to an existing company only from the date when all directors of the company holding office at the time when this Ordinance comes into force have completed the terms of office for which they were appointed before that time, or have ceased to be directors before the completion of such terms."*

(emphasis added)

[17] The Articles of Association of the Company (hereinafter referred to as the “Company’s articles”) adopt the Regulations set out in Part II of the First Schedule to the Act, except for Regulation 27, the proviso to Regulation 49 and Regulations 56-62 inclusive.<sup>3</sup> It sets the quorum for any general meeting of the Company, save as otherwise provided in the Regulations, to two shareholders present in person or by proxy.<sup>4</sup> As regards the appointment of directors, it stipulates that –

*“3. A director may be appointed for a period not exceeding five years and shall be eligible for re-appointment at the expiration of this term of office. A director may resign his office by giving seven days’ notice of his intention to do so to the Company.”<sup>5</sup>*

[18] The Company’s articles do not provide for the appointment of directors in the event of casual vacancies in directorship. Casual vacancies occur where the office of director is vacated before the expiration of the director’s term of office in the usual course of business, such as upon a director’s death, resignation or in the event of disqualification under section 164 of the Act. Therefore, we fall back on section 163(4) of the Act which provides for such vacancies to be filled by the directors. This is confirmed by the provision of section 122(3)(a) of the Act which requires an ordinary resolution passed by a general meeting of a company for the appointment of a director of a company other than one appointed under, inter alia, section 163(4).

[19] In addition to section 163(4), Regulation 67 of Part II of the First Schedule to the Act (as adopted by the Company in its articles) stipulates that –

*“The continuing directors may act notwithstanding any vacancy in their body, but, if and for so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors or director may act for the purpose of increasing the number*

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<sup>3</sup> Clause 1 Company’s articles

<sup>4</sup> Clause 2 Company’s articles

<sup>5</sup> Clause 3 Company’s articles



*of directors to that number, or of summoning a general meeting of the company, but for no other purpose.”*

(emphasis added)

[20] The combined effect of section 163(4) and Regulation 67 cited above is that where a casual vacancy occurs in the office of director and the number of directors fall below the quorum, *“the continuing directors or director”*<sup>6</sup> may act to appoint a director to achieve the required quorum or summon a general meeting of the company.

[21] Therefore, contrary to Petitioner’s submission neither the Company’s articles nor the Act are silent on vacancies created when a director suddenly passes away. The Company’s articles which incorporate regulation 67 of Part II, First Schedule of the Companies Act<sup>7</sup> and section 163(4) of the Act address the very issue that has been brought before the court.

[22] A second director may be appointed to fill the vacancy created by the death of Mr Longobardi. That appointment is to be made by the Petitioner who is the only continuing director of the Company. The second director’s tenure would only be valid until the next succeeding annual general meeting unless he or she is re-appointment by an ordinary resolution at that meeting.<sup>8</sup>

[23] This leads us to the procedure by which the vacancy can be filled. The Company’s articles are again silent on director’s meetings. It only provides in clause 4 that-

*“A resolution in writing signed by all the directors being entitled to receive notice of a meeting of the directors, or separate copies of any resolution in writing signed individually by such a director, shall be valid and effectual as if such resolution had been passed at a meeting of directors duly convened and held.”*

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<sup>6</sup> Regulation 67, Part II Sch. 1 Companies Act, 1972

<sup>7</sup> Except Reg. 27, the proviso to Reg. 49 and Regs. 56-62 inclusive

<sup>8</sup> Section 164(3) Companies Act

- [24] Regulations 65 and 66 of Part II of the First Schedule to the Act (as adopted by the Company's articles) state as follows –

*"Proceedings of Directors*

*65. The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors, it shall not be necessary to give notice of a meeting of directors to any director for the time being absent from Seychelles.*

*66. The quorum necessary for the transaction of the business of the directors may be fixed by the directors and unless so fixed shall be two.*"

(emphasis added)

- [25] It can be inferred from the above provisions and regulation 67 that a director's meeting would have to be held for the purpose of appointing another director to fill the vacancy. The quorum set for directors' meeting under Regulation 66 of Part II to the First Schedule to the Act is 2 but the Petitioner is the only continuing director of the Company. However, for the purposes of Regulation 67, the Petitioner alone would constitute the necessary quorum for the director's meeting for the limited purpose of appointing a second director or summoning a general meeting of the Company.

*Conclusion*

- [26] As the only continuing director of the Company, the Petitioner could have appointed a second director to the Company without the court's intervention. In fact, the Court does not have any power to appoint directors in such circumstances. For the purposes of the Regulation 67, the Petitioner alone would constitute the necessary quorum for the director's

meeting for the limited purpose of appointing a second director. Once the second director is appointed, then the annual general meeting of the Company would have to be summoned having regards to the estate of the late Mr. Renato Longobardi and the provisions of Part II to the First Schedule to the Act as adopted by the Company in its articles.

[27] There is no need at this point for the court to exercise the power conferred by section 124 of the Act to order a general meeting of the Company as implored by the Petitioner.

*Order*

[28] I therefore dismiss the application.

Signed, dated, and delivered at Ile du Port on 25th July 2023

  
A. Madeleine

