CIV/APN/298/93

IN THE HIGH COURT OF LESOTHO

In the matter between:

GIOSEPPE FLORIO	APPLICANT
AND	
LESOTHO FOOTBALL ASSOCIATION	1ST RESPONDENT
LESOTHO BANK	2ND RESPONDENT

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 19th day of September, 1994.

On the 13th September, 1993 I discharged with costs the *Rule Nisi* in this matter wherein the Applicant had, on the 13th July, 1993, made an urgent application in the following terms:-

"(a) Pending finalisation of this application, second respondent should not be ordered forthwith to freeze the account No. of Lesotho Football

/...

Association. LEFA, and not to allow any withdrawals from the same account except for the purposes of paying its outstanding account with Victoria Hotel.

(b) Directing firth respondent to use the funds in its account with Lesotho Bank forthwith to settle its debt amount to M76,322.65 to the Account of Victoria Hotel.

(c) Directing first respondent to pay for the costs of this application.

(d) Granting applicant further and/or alternative relief"

This was an application on a certificate of urgency. The remedies sought gave me great difficulty. The Bank was being directed to freeze First Respondent's account and First Respondent was being compelled to pay M76,322.65 into the Account of Victoria Hotel. This Victoria Hotel is owned by Lesotho Hotels International (Pty) Ltd. which was not a party to these proceedings.

Applicant had brought this application because he claims to be the main shareholder in Lesotho Hotels International (Pty) Ltd. The provisions of the company law and the veil of

incorporation are things Applicant has not been made aware of. Had this aspect of the case come to the notice of Applicant, he would probably not have brought this application because only Directors of the company have the *locus standi in judicio* to do so. A shareholder's rights can be vindicated in some other ways which the company law provides.

This matter does not seem to have had the good fortune of being treated as urgent despite the accompanying Certificate of Urgency. This is probably because there was a shortage of Judges. Even so, for such a *Rule Nisi* to have been extended to a date eleven months away reduces the whole concept of urgency to absurdity. Be that as it may, on the 25th October, 1993, the *Rule Nisi* had been extended to the 13th September, 1994. When this was done, the matter had already been set-down to that day by Notice of Set-down dated 15th October, 1993.

On the 13th September, 1994, Mr. Mafantiri, who had appeared for Applicant on previous occasions, appeared before me. With him was Mr. Phafane who appeared for First Respondent. Mr.Phafane was ready to proceed while Mr. Mafantiri was not. Mr. Mafantiri asked for a postponement stating he was at the traffic court. I telephoned the traffic court and arranged that Mr. Mafantiri should be excused from attendance for a few hours, this was

agreed. I gave Mr. Mafantiri until 2 p.m. in the afternoon which would have given him three hours to prepare for this application. The view I took was that clients had waited for a year to be heard. Mr. Mafantiri did not avail himself of this opportunity to prepare after I had outlined points on which I would like to be addressed. The view he took was that he would not be able to persuade me that this application was in order. I therefore discharged the *Rule Nisi* promising to file reasons later.

According to Applicant his residence permit was revoked four years before July 1993. This means therefore that he had not resided in Lesotho since 1989. He claims that this was

> "Because there were several vultures among the then powerful people in this country who scrambled for *his* business interests."

Applicant says he put Lesotho Hotels International under judicial management because of these people. The company is still under a Judicial Manager although Applicant's residence permit had just been reinstated when he brought this application. If that is the case only the Judicial Manager who is not a party in these proceedings has the *locus standi* to bring these proceedings as he is the sole person under the law who represents

both the creditors, the company and shareholders. He is a Court Officer answerable to the Master of the High Court. Judicial Management, liquidation and sequestration (in respect of custody of the debtor's property) are for all practical intents and purposes the same in consequences. In all of them the reason for bringing those judicial proceedings is that creditors have not been paid or that creditors are not likely to be paid therefore curial intervention is sought to protect the interests of the creditors, debtor or the investors.

Section 265 of the Companies Act 1967 makes it clear that judicial management is embarked upon when:

> "there is a reasonable probability that if the company be placed under judicial management...it will be enabled to meet its obligations and to remove occasion for liquidation, and it is otherwise just and equitable that the grant of an order of liquidation should be postponed..."

This application may be made to the Court by any creditor or member of the company. The main reason that should be behind the making of the application for judicial management is when the root of the company's failure to meet its obligations is that of

mismanagement. The effect of placing a company under judicial management that in terms of *Section 265* read along with *Section 185 (2)* of the *Companies Act* 1967 is that all the property of the company is deemed to be under the control of the Judicial Manager. Debts owed to the company which Applicant is singling out in this application are the property of the Company. They are deemed to be in the custody of the Judicial Manager.

Could it not be that Applicant's intervention (where the law recognises the Judicial Manager as the sole authority) will cause confusion? It seems to me Applicant's interference can only be deemed to make the mismanagement of Lesotho Hotels International (Pty) Ltd. worse. It defeats the very Judicial Management Order that Applicant sought. This Court cannot undermine its own order and render the legal remedy provided for in *Sections 264 to 271* of the *Companies Act, 1967* ineffectual by allowing Applicant to interfere with the Judicial Manager's administration.

Inasmuch as all books of account and business operations are in the hands of the Judicial Manager, Applicant cannot be deemed to know anything about the affairs of Lesotho Hotels International (Pty) Ltd. All the information that appears in Applicant's affidavit cannot in the absence of an explanation be known to Applicant. He does not even say how he came by this

information. If he had said how he came by this information, perhaps the Court could assess its value. Even so, this could only be done if Applicant had demonstrated that he had a title to sue. I have already said Applicant's papers disclose he has no title to sue, the papers only disclose unlawful interference with the Judicial Manager's functions. If Victoria Hotel loses money, that is a matter for the Judicial Manager. He is the one who should take action against the world at large if necessary, subject to the judicial management Court order.

The case of *Setlogelo v Setlogelo* 1914 AD 221 reveals clearly that before the Court can restrain first Respondent from operating his bank account, applicant must demonstrate the following:-

(a) A clear right to that remedy. Applicant has not right to come to court.

(b) Applicant must also show irreparable harm if the order is not granted. If Applicant had a title to sue then the Court would assess whether or not this remedy ought to be granted.

(c) Applicant has an alternate and correct remedy of going

through the Judicial Manager. Applicant has not told us why he has not done so.

(d) The balance of convenience is against the granting of this remedy. To freeze Applicant's account, although there is no judgment against first Respondent (or for that matter a pending action), would, in my view, be oppressive on the First Respondent. *Prinsloo v Luipaardsvlei Estate and Mining Co.* 1933 WLD 6 at page 25. The Court has to weigh the rights of First Respondent against those of applicant, because applicant is not the only one with rights.

The problems of Applicant do not end there. I am not sure I could order First Respondent how he should run or operate his bank account. If the judgment had been given in an action for the recovery of debt, funds from First Respondent's bank account could be seized through a warrant of execution (in the ordinary way) to satisfy the court's judgment. Although First Respondent's deponent says he has been told that First Respondent has paid Victoria Hotel and that is a bare assertion, the source of his information has been disclosed. It is hearsay but we know the source. Applicant has not disclosed where he took the papers he relies from nor has he disclosed how he knows First Respondent

has not paid. The onus of proof is on Applicant. Applicant has furthermore not bothered to reply to First Respondent's affidavit.

What ought to have happened was that the proper authority should have brought an action for the recovery of the M76,322.65 in the ordinary way. Application proceedings are just not appropriate. As it turns out, Applicant is not even that authority.

It is for these reasons that I discharged the *Rule Nisi* with costs.

Delivered on the 13th Day of September, 1994.

W.C.M. MAQUTU
JUDGE

For the Applicant : Mr. M. Mafantiri
For the 1st Respondent: Mr. S. Phafane
For the 2nd Respondent: