C OF A (CIV) NO.39 OF 1994

IN THE COURT OF APPEAL OF LESOTHO

In the matter between :

FEEDEM CATERING SERVICES (PTY) LTD . . Appellant

and

FEEDEM CATERING SERVICES (LESOTHO) (PTY) LTD Respondent

Coram : Steyn J.A.
Browde J.A.
Kotze' J.A.

JUDGMENT

BROWDE J.A.

This is an appeal against an order granted by Lehohla J on 22 November 1994 in terms of which the learned judge, *inter alia*, discharged a provisional winding up order which had been granted at the instance of the appellant against the respondent and also granted a judicial management order against the respondent at the instance of one Mamathe

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Florina Ntlhasinye and a company known as M.L.R. Food Company (Pty) Ltd.

The appellant seeks an order on appeal to the effect that the provisional order of liquidation be made final and that the order of judicial management be set aside.

The matter was originally heard by Lehohla J in September 1992 and the respondent was placed in provisional liquidation. Thereafter Ntlhasinye delivered an answering affidavit which purported to be on behalf of the company and at the same time delivered a petition in her personal capacity for a judicial management order against the respondent and an application for the removal of one H.J.F. Steyn who had been appointed the provisional liquidator. Various interdicts were sought by Ntlhasinye which are irrelevant to this appeal. After the appellant had delivered its replying affidavit in the liquidation proceedings and an answering affidavit to the petition for judicial management the matter was argued during December 1992. The order by Lehohla J as referred to above was issued in November 1994, that is almost 2 years after the argument was completed. I should say at the outset that it

can scarcely be justified for any judgment to be reserved for so long a period but in a matter such as the present in which the future life and administration of a company is to be determined, such a delay is, with respect, quite unacceptable. This is a case, par excellence, in which justice delayed was justice denied.

The allegations and counter-allegations contained in the papers were comprehensively set out in the judgment of the court *a quo* and I do not intend to repeat them herein save insofar as it may be strictly necessary to do so. It is sufficient for the purposes of this judgment to state that it was common cause between counsel who appeared for the respective parties before us that the respondent is a small domestic company in which the appellant is a shareholder to the extent of 49% of its issued share capital and Ntlhasinye a shareholder to the extent of 51%. The company's bank account was run on the basis that two signatories were required to its cheques and the local activities of the company were conducted by Ntlhasinye.

In September 1992 Ntlhasinye submitted to the respondent's bank what purported to be a special resolution passed by the respondent at a meeting of the respondent's

board of directors. The effect of the resolution was to have permitted Ntlhasinye to operate and sign on the account in the books of the bank as sole signatory. No such meeting had taken place nor had such resolution been passed. This was obviously a stratagem to enable Ntlhasinye to by-pass the other members of the company thus enabling her to use the respondent's money at her will. This conclusion is borne out by the admitted fact that in or about September 1992 Ntlhasinye diverted at least the sum of M481,115.31 into a bank account in the Agricultural Development Bank which, although in the name of the respondent, was operated on at least in part for her own personal needs. She and her husband were the signatories and some of the respondent's money thus diverted was placed into other accounts in the names of her children.

These two examples of rank dishonesty on the part of Ntlhasinye are part only of a litany of complaints which the appellant has in regard to the conduct of Ntlhasinye and which, according to the petition for the liquidation order, led to the situation in which several of respondent's cheques were dishonoured by the bank and an amount of almost M1 Million was owed to but three of its creditors and was overdue for payment.

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In her answering affidavit Ntlhasinye admitted "passing" the false resolution and also admitted the diversion of the funds. Whatever the reasons for these actions (Ntlhasinye says they were "defensive" tactics) it is clear that there is a justifiable lack of confidence in the management of the respondent, which alone would be a proper basis for a finding that it is just and equitable that the respondent should be wound up. In Emphy and Another v Pacer Properties (Pty) Ltd 1979(3) SA 363(D) Leon J said that the "just and equitable rule must not be limited to cases where the sub-stratum of the company has disappeared or where there has been a complete deadlock." The learned judge was, of course, referring to section 344 of the South African Companies Act which provides that a company may be wound up by the Court if it appears to the Court that it is just and equitable that the company should be wound up. (The equivalent of Section 173(f) and (g) of the Companies Act of this Kingdom). Leon J then added (at p 366)

> "Where there is in substance a partnership in the form of a private company, circumstances which would justify the dissolution of the partnership would also justify the winding up of the company under the just and equitable clause."

Ntlhasinye controlled the affairs of the respondent and lack of probity in her conduct in regard to the

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respondent's business was, for whatever reason. wrongful to such degree that it seems to me there is no hope that there will be any co-operation in the future between the parties concerned. See in this regard Pienaar vs Thusano Foundation and Another 1992(2) SA 552 (BGD) at 581.

It follows that in my judgment there was sufficient evidence before the court *a quo* to justify the final winding-up of the respondent on the ground that it was just and equitable.

The learned judge *a quo* appears to have regarded the conduct of Ntlhasinye in a less serious light than I do. For example, he was impressed by the fact that the money which was deviated to the Agricultural Development Bank was placed in an account operated in the respondent's name. The enormity of the fact that one of the signatories was Ntlhasinye's husband appears to have escaped him since he records in his judgment, without comment, that Ntlhasinye says:

> "Regarding the withdrawal of funds to be placed in the names of my children, I state that I was not aware of this. My husband did this on the advice of attorneys we used in Maseru immediately after provisional liquidation."

The fact that these were company monies and that company

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was not paying its creditors timeously was not commented upon by the learned judge nor does it appear to have been taken into account when exercising his discretion in regard to what order to make for the future activities of the respondent.

Another strange omission by the learned judge was to pay no regard to the wishes of the creditors of the respondent. As I understand the position all the trade creditors supported the application for a winding-up order but even Mr. Alberts who appeared for the respondent and who argued the case with vigour, could not point to any specific allusion in the judgment of Lehohla J. to the interests of creditors. Both Mr. Van Blerk S.C. who, with Mr. K. Tip appeared for the appellant and Mr. Alberts agreed that in dealing with the concept of what is "just and equitable" the Court must take into account the competing interests of all involved in the matter, which, of course, includes the creditors of the company. One of the objects of a winding-up order is to provide an orderly administration of the assets of the company so as to ensure that all creditors who are able to prove their claims receive as high a dividend as is attainable in the circumstances. The judgment of Lehohla J shows that before

dealing with the merits of the application for winding-up in any depth the learned judge, because Ntlhasinye, purporting to act on behalf of the respondent, withdrew the latter's opposition to the application for judicial management brought by herself and M.L.R. Food Company (Pty) Ltd granted that order without further order. He said:

> "In this posture )sic) of events it wold seem to be time saving to grant the application for an order for judicial management with costs to the 1st Petitioner and as set out in the Notice of Motion Mr. S.C. Buys of the firm Du Preez Liebetrau & Co. is appointed Judicial Manager."

In my opinion in approaching the matter in this way and, as I have already said, in disregarding the views of the creditors, the learned judge clearly misdirected himself. It was incumbent upon him to view the matter objectively and to decide whether, in the circumstances a judicial management of the company was a viable alternative to the winding up order. The prospects of the company weathering the storm created by the breakdown in the relationship between the shareholders, the mal-administration of which Ntlhasinye was admittedly guilty, the loss of the contracts, the apparent liability of the respondent to meet its day to day commitments all had to be weighed in the scales against the winding up order before deciding whether or not judicial management was a practical

alternative. This was not done by the learned judge and consequently it is now the function of this Court to properly assess the position and exercise its discretion as to what is best having regard to all the competing interests including, as I have indicated those of the creditors.

As I have said there is no indication in his judgment that Lehohla J had any regard for the expressed views of the creditors. He decided however, not to confirm the provisional winding up order because of what he described as serious and material non-disclosures in the appellant's founding affidavits. The non-disclosures complained of were :

(a) The failure to make disclosures about the conduct of Mr. Steyn who was appointed as the provisional liquidator;

(b) The failure to disclose correspondence that had passed between the appellant and Ntlhasinye during the period August to September 1992;

(c) The failure to disclose the true facts concerning the money in the Agricultural Bank, more particularly that the appellant's deponent Webb, was aware that the money had been so deposited 4 days before the application for liquidation was launched.

With regard to (a) above the complaint against Steyn

in the judgment is to the effect that his conduct after his appointment was inimical to the interests of the respondent in the he "gave away" its main assets i.e. the contracts it had and its staff to what is described as a puppet company of the appellant. Whether that is so or not - Mr. Steyn deposes to the contracts being a liability - it is not anything that could have been disclosed when the application was launched. I have read the correspondence referred to in (b) above and I consider that had they been referred to in the founding affidavit they would have strengthened the appellant's case and not weakened it. As far as (c) is concerned Mr. Van Blerk has pointed out that the fact of the diversion of the funds was referred to in the founding affidavit. The deponent Webb stated that whether or not it was theft he was not in a position to say but he was certain that the funds had been diverted. I do not think that the non-disclosure of the fact that the money was deposited in the name of the respondent was material since it does not detract from the sinister implication of Ntlhasinye's husband being a signatory and the admission that the money was used by him and Ntlhasinye for their own purposes.

Even however if there was a non-disclosure of a

material fact I do not think that the learned judge, had he exercised his discretion judicially, would have granted the order for judicial management which he did, in place of the winding-up order sought by the appellant and supported by the creditors.

The learned judge referred to the judgment of Aaron JA in Ntsolo v Moahloli C of A (CIV) 8/1987 and relied for his conclusion on the dictum in that case that where material facts are not disclosed, the Court has a discretion to set aside the relief granted ex-parte, on the ground merely of non-disclosure. I doubt, however, that that proposition was intended by Aaron J.A. to apply to a case such as the present one. That it would apply to the case in which only the interests of the applicant and the respondent are concerned I accept - but where, as in casu, the interests of third parties are involved, namely the creditors, I do not accept that the non-disclosure of a material fact can have the effect of adversely affecting their rights to the extent involved in the order issued by Lehohla J.

I agree with the submission of Mr. Van Blerk that as far as the respondent is concerned its chances of becoming a successful venture were (at the time of Lehohla J's

order) and still are so remote as not to warrant the slightest degree of optimism. In fact counsel have informed us that because of the long delay before the order of the court *a quo* was issued it was decided to pay out the creditors as if the respondent was in liquidation. As a result most of the funds available to the respondent have been distributed. It is clear, therefore, that a judicial management order makes no commercial sense whatsoever and that the only realistic solution is to wind up the company.

As I have already pointed out Mrs Ntlhasinye was personally responsible for the opposition to the application as also for launching the application for a judicial management order. In my judgment both procedures were ill-conceived and should have been rejected by the court *a quo*. Mrs Ntlhasinye must therefore be responsible for the costs occasioned thereby.

The appeal is upheld with costs including the costs of two counsel. The order of the court *a quo* is set aside and substituted by the following order:

1. The rule is confirmed and a final winding-up of the respondent company is hereby ordered.

2. The application for a judicial management order and the other relief sought in such application is dismissed with costs.

3. The costs occasioned by both the opposition to the application for liquidation and the bringing of the application for judicial management are to be borne by Mrs Ntlhasinye.

J. BROWDE
JUDGE OF APPEAL

I agree

J. H. STEYN
JUDGE OF APPEAL

I agree

G. P. C. KOTZE'
JUDGE OF APPEAL

Delivered at Maseru this 27th day of October, 1995.