CIV\APN\97\95
CIV\APN\100\95

IN THE HIGH COURT OF LESOTHO

In the matters between :

SETENANE HABOFANOE MAPHELEBA	1st Applicant
SIMON RAKHATI MAKOLOANE	2nd Applicant
THABANG MOSHE	3rd Applicant

and

ERNEST PHALE MOKOENA	1st Respondent
JULIUS MAKAU	2nd Respondent
THABO MAPHIKE	3rd Respondent
EUGENE MAKHABA	4th Respondent
THABISO JONAS	5th Respondent
MAMOHALE MOPELI	6th Respondent

AND

LESOTHO PUBLIC MOTOR TRANSPORT CO. (PTY) LTD	Applicant

and

SETENANE MAPHELEBA	1st Respondent
THABANG MOSHE	2nd Respondent
SIDWELL MATSIE	3rd Respondent
S. R. MAKOLOANE	4th Respondent
JULEA RAPONTS'O	5th Respondent
LESOTHO CREDIT UNION	6th Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 5th day of June 1995

This Court was robbed of an opportunity to hear debate on the two important aspects of the Company law of this country. The aspects will be shown shortly. Mr. Mda for the Six Respondents in CIV\APN\97\95 and for Applicant Company (Lesotho Public Motor Transport (Pty) Ltd), the Company in CIV\APN\100\95) conceded that the meeting of the 2nd March 1995 was invalid as having not complied with Section 99 of the Company's Act No. 25 1967 of Lesotho. The result would be that the Board (of six Respondents) elected on that mentioned date was unlawfully constituted. It was that invalid Board which resolved to bring the proceedings under case number CIV\APN\100\95 in the name of the company.

As a result of the concession by Mr. Mda I then confirmed the following Orders on the 5th May 1995:

(a) That the Applicants in CIV\APN\97\95 are the properly constituted directors of Lesotho Public Motor Transport Co. (Pty) Ltd (the Company).

(b) That the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents in CIV\97\95 are not properly constituted directors of the Company except that 2nd and 4th Respondents remain lawful members of the Board of the Company as originally constituted.

(c) The Respondents each one and severally are interdicted from interfering with the Applicants and the Company in the running of the said Company's affairs except by due process of law.

It is important to note that on the 20th March 1995 Maqutu J ordered for consolidation of the two applications. I will later outline the circumstance of that particular order. On the 22nd March 1995 the Respondents filed a note of withdrawal of the application CIV\APN\100\95 which they justified, in their letter of the 23rd March addressed to the Applicant's attorneys by saying "since your clients have instituted Court proceedings as well and they are using the Company's funds for litigation, our instructions are to withdraw the above application to curtail costs which in the end shall be debited to the Company." The reply by the Respondents (in CIV\APN\100\95) attorneys to the above quoted letter is very brief and says:

> "The said application namely CIV\APN\100\95 and CIV\APN\97\95 have been joined by Order of Court. We do not agree to your withdrawal of the case and in particular that the costs incurred by your clients in CIV\APN\100\95 should be borne by your Company."

It is correct that on the 20th March 1995 Mr. Justice Maqutu

ordered for consolidation of the two applications. The next sentences is in apparent reference to the Rule 43 (1). The rule reads:

> " A person instituting any proceedings may at anytime before the matter has been set down and thereafter by consent of the parties or by leave of the Court withdraw such proceedings."

The sub-rule has to be read with sub-rule 43(1)(d) whose significance to costs cannot be mistaken. It reads:

> "If there is no consent to pay costs contained in the notice of such withdrawal or if such withdrawal or if such taxed costs are not paid within fourteen days of demand, such other party may apply to Court on notice for an order for costs."

Argument was made on the question of the correctness of the meaning of Rule 43(1)(a) being specifically whether :

(a) The Applicants were entitled to refuse to accede to the withdrawal of CIV\APN\100\95 for any reason or for the reasons contained in their already referred to letter. That means that the refusal amounts to

absence of consent.

(b) It is correct that the rationale behind the rule is that the party who institutes a case is not allowed to abandon the matter as it were without the Court having the opportunity to make any of the following orders, namely :

(i) that the party intending to withdraw be allowed to withdraw;

(ii) that the party intending to withdraw be urged to proceed with his case;

(iii) that the party intending to withdraw should pay the costs of the other party.

The object of the notice of withdrawal is to prevent the Opponents of the party withdrawing from incurring further costs. See page 391 of Civil Practice of Superior Courts in South Africa 3rd Edition L de v. Winsen et al (Herbstein and Van Winsen)

I made a finding that when Mr. Sooknanan filed the application CIV\APN\100\95 he could not have been served with the *rule nisi* in the Order of the 15th March 1995. He may have had

notice of the Order before he moved the application CIV\APN\100\95 as this is reflected in the Court file but this is different from that when he launched the application he was aware of the Order in CIV\APN\97\95. Neither were his clients, that is the new Board of Directors. I cannot find fault with Mr. Sooknanan. He is alleged to have said that he had nothing to do with the Respondents. That may not have been true. But his clients were not yet served with the Order. I cannot order costs *de bonis propriis* for that reason. I can only seriously note that having been made aware by Maqutu J. and despite that a notice of withdrawal was filed on the 22nd March 1995, this Applicant Company proceeded to take the following steps:

(a) On the 6th April 1995 it served and filed the answering affidavits of JULIUS MAKAU, THABO MAPHIKE, THABISO JONASE and MAMOHALE MOPELI in one bundle, in addition a voluminous answering affidavit of ERNEST PHALE MOKOENA and an answering affidavit of EUGENE MATSARANKENG MAKHABA in a different bundle.

(b) Fourteen days later, on the 20th April 1995 the Respondents in CIV\APN\97\95 filed a notice of motion supported by the affidavit of the Applicants' attorney Mr. Bikaramjith Sooknanan.

I believe that Mr. Sooknanan has been taken ill and has been out of office for a considerable time. I believe that that letter accompanying a notice of withdrawal was only replied to and served on the 4th April 1995. "The said reply was turning down of said proposal and purporting to reject the aforesaid withdrawal." (See paragraph 9 of Mr. Sooknanan's affidavit). At the end, in paragraph 11 of the affidavit Mr. Sooknanan says:

> " I verily aver that if Applicants' attorneys replied in time, the Respondents would have filed their answering affidavits in time. However, had it not been for my sickness, I could have prepared the Respondents' affidavits in time when I noticed that the Applicants' attorneys were not responding to my letter and the matter could not have been left to my Clerk."

For the actions outlined in (a) and (b) above I would find that these Respondents incurred costs unnecessarily. All that these Respondents had to do if they seriously felt like withdrawing their opposition is to patiently await the date of hearing, to approach the Court and ask for leave of Court in the event of the Applicant's refusal. The Court, in the absence of agreement between the parties, retains a discretion whether or not to allow the withdrawal of a case (see Herbstein and Van Winsen at page

391). The refusal need not have caused them to change their Course in the midstream. Assuming that Mr. Sooknanan carried the instructions of the Respondents well and fully it can only mean that as the date of hearing there was no formal notice of withdrawal. In any event in the absence of such consent or leave, a purported notice of withdrawal would be invalid. Mr. Mda was therefore making a fresh application for withdrawal of the case from the bar. But he was not tendering costs. He had reasons for his decision. One of them was that the Company cannot be awarded costs against itself. One of the questions would be : Were the actions of the Applicant Company in case CIV\APN\100\95 valid when it instituted the application Does it make any difference that when the application was filed the new Board of Directors was not aware of the order of the 15th March 1995 in application CIV\APN\97\95

I did not find merit in Mr. Mda's argument that an award of costs should not be made in favour of the Applicants in application CIV\APN\97\95 by reason of their failure to cite the Company either as one of the applicants or one of the respondents. I do not want to discuss Mr. Mathe's argument in response to that. Since this objection was not raised on the papers it ought not to succeed. This objection whether properly raised or not seems properly to belong to the question success or failure of the application itself not to the question of

costs. This question of costs may even end up being decided on the basis of a well known principle. This principle even speaks about the presence or absence of exceptional reason or circumstances. It is one of the cardinal principles of our law that an award of costs is in the discretion of the Court. The principle is also said to override the general rule that costs follow the event (see LAW OF COSTS 2nd edition 1984 by A.C. Cilliers at pages 8-9 and authorities cited therein and also KRUGER BROTHERS AND WASSERMAN vs RUSKIN, 1918 AD 63 at page 69) There is also a plethora of authority to the effect that the said discretion should be exercised judicially. A judicial exercising of discretion has been described as a non-arbitrary act (see LAW OF COSTS cited above and MERBER vs MERBER 1948(1) 446 at 453).

The Applicants in CIV\APN\97\95 are directors of the Applicant Company in CIV\APN\100\95. The First Applicant is the Chairman of the Company. The said Company is a private Company registered on the 12th July 1979 under number 79\94 by the Registrar of Companies. The requisitioning of meetings is done under section 99(2) of the Companies Act. It has been conceded that the members attempt at requisitioning a meeting was irregular in that the notice did not state the objects of the meeting and was not signed by the requisitionists. It was not conceded however that the notice was faulty by reason of its being not written and not deposited by members of teh Company,

but by the Respondent's Attorney. Neither was it admitted that the requisitionists were not members of the Company. In the South African case of MARION COURT DURBAN LTD vs KIDWELL AND OTHERS 1976 (4) SA 584(D) in commenting about Section 181(1) of the Act 61 of 1973 (which is in pari materia with our Section 99 of Company Act 1967), Leon J had this to say :

> "In terms of Section 181 (1) of Act 61 of 1973 the members are given the right to requisition of a Company to convene a meeting. The requirement is that sufficient particulars should be given in the notice to show the shareholders clearly what the objects of the meeting are and in order to enable them to decide whether or not to attend."

I am satisfied that I need not decide these questions of whether the Respondents' attorney was authorised to issue the notice and whether the requisitionists must also state in the notice of motion that they hold the necessary number of shares. It accordingly has no bearing on the question of costs.

I am satisfied that the Applicants in CIV\APN\97\95 as persons and individuals were entitled to bring the application in their own names. Whether or not they should have joined the Company (much as it was not debated in relation to the merits)

has no bearing on the question of costs. I am not prepared to get into the subtle questions as to whose expenses were involved in their litigation. These may well have been the Company expenses. I take the view that the Applicants were protecting their own rights to directorships and management of the Company. Even if I am wrong I do not see on what basis I can award costs to the Company. The question of costs is not concerned with whether a person who appears to be properly appointed director may validly act in that capacity. He may for that matter be mistaken as to the validity of his appointment. What concerns us here is the question of idemnifying a successful litigant here for his costs. Costs are usually awarded to a successful party being, normally, the party who has been substantially successful. It is clear that I took the view that the Applicants in CIV\APN\97\95 ought to be awarded the costs of the two applications. I did not find that there were any reasons to justify a departure from the general rule.

T. MONAPATHI
JUDGE