

C OF A (CIV) NO. 16/96

IN THE LESOTHO COURT OF APPEAL

In the matter of:

'MATANKI LINTSI

APPELLANT

AND

HATOOA MOSE MOSALI (PTY) LTD.

RESPONDENT

Held at: MASERU

CORAM:

STEYN, J.P.
BROWDE, J.A.
VAN DEN HEEVER, A.J.A.

JUDGMENT

STEYN J.P.:

On the 7th September, 1995, the High Court granted an application for the issue of a *rule nisi* in terms of which the company Hatooa-mose-mosali (Pty) Ltd. (the company) was placed under provisional judicial management.

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The rule was extended from time to time, but in the interim the company operated under the control of the judicial manager appointed by the Court.

However on the 8th of March, 1996, the Court *a quo* discharged the *rule nisi* and nullified the appointment of the judicial manager.

It is against this order that the Appellant appeals.

Most of the facts of the matter appear from the judgment of the Court *a quo*. Two matters not referred to specifically in the Court's reasoning when discharging the rule need to be emphasised. It is common cause that it was the unlawful conduct of the Respondents, inasmuch as they forcefully ejected management from the control of the company, which led to the Appellant's bringing the application for judicial management.

The other important fact is that the application was supported by a substantial majority in value of the shareholders including the company Mahlaseli (Pty) Ltd. which had advanced the working capital to enable the company to expand its business operations. This company is by

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virtue of the loan capital it advanced also a major creditor.

The learned Judge *a quo* seems to have placed reliance for his decision *inter alia* on the substantial number of shareholders that had sought to intervene and to resist the making of the order sought. Whilst members in the sense of counting heads, should not be ignored, it is trite that the destiny of a limited liability company is determined by its stakeholders in value. It is the extent of the equity investment which is to be evaluated when deciding upon whose views are to receive paramount consideration. This is of course always subject to the limitation that such majority may not oppress a minority or ride roughshod over its interests.

In his reasoning the learned Judge summarizes his views as follows:

"I have already said that it was not shown the respondent company was in financial difficulties save that it was represented that it was viable and that the fact that dividends have not been declared is probably because of applicant's mismanagement; this contention was supported by at least fourteen (14) intervening respondents comprising a huge body of the respondent company shareholders and accordingly I do not find it just

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'and equitable given the circumstances of the respondent company to place it under judicial management."

Now it is true that the financial viability or lack thereof can, depending on the facts of the case, be a crucial consideration in deciding whether a judicial management order should be granted or not. However, as was submitted by Mrs. *Makara* in her able argument, in the present case it was the impasse that had resulted from the unlawful seizure of control by minority shareholders in value that had precipitated a crises that cried out for resolution. Third party intervention was one manner in which the impasse could be resolved, sound management reintroduced and longer term viability resolved.

Judicial management is one form in which such intervention can occur. In my view there can be no doubt that it was just and equitable that such an order should have been granted, more particularly in view of the fact that the substantial majority of those who have invented resources support such a course of action. Certainly it would be patently unjust to leave the control of the company in the hands of those - a minority in value at that - who usurped such control unlawfully.

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For these reasons the appeal succeeds. The order discharging the *rule nisi* is set aside with costs. In its place the following order is made.

1. The *rule nisi* is confirmed and in terms thereof HATOOA-MOSE-MOSALI (Pty) Ltd. is placed under Judicial Management in terms of Sections 264 and 265 of the *Companies Act*, 1967.
2. The Master of the High Court is directed to appoint forthwith MOTLATSI MPOBOLE as JUDICIAL MANAGER who shall be appointed in terms of Sections 185 and 186 of the said Act and any person thus far vested with the management of the company shall from the date of the making of this order be divested thereof, and the police are hereby ordered to provide any assistance the judicial manager may require during the term of his office.
3. The Judicial Manager shall take over the management of the company in terms of Section 266 of the Act and shall in terms of Section 266(b) submit to a meeting of creditors of the company a

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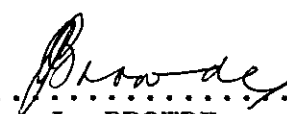
report as contemplated in the said Section.

4. While this judicial management order is in force all actions and execution of all writs, summonses and other processes against the company shall be stayed and not proceeded with without leave of the High Court being first obtained.
5. The Judicial Manager shall otherwise fulfil his duties in terms of Section 268 of the said Act.

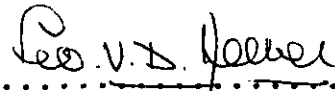
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 J.H. STEYN
 PRESIDENT OF THE COURT OF APPEAL

I agree:

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 J. BROWDE
 JUDGE OF APPEAL

I agree:

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 L. VAN DEN HEEVER
 ACTING JUDGE OF APPEAL

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Delivered at MASERU on this ...^{29th}..... day of JUNE, 1996.