CIV/APN/374/2002

IN THE HIGH COURT OF LESOTHO

In the Matter Between:

MOTEBELE J. MABATHOANA (AS A CONTRIBUTORY OR AN OTHERWISE INTERESTED PARTY)	Applicant
and	
THE LIQUIDATOR OF HATA-BUTLE (PTY) LTD (IN LIQUIDATION)	1st Respondent
THE MASTER OF THE HIGH COURT	2nd Respondent
THE ATTORNEY-GENERAL	3rd Respondent

Ruling

Delivered by the Hon. Mrs Acting Justice A. M. Hlajoane on the 6th September, 2002.

This was an ex parte Application whereby the Applicant applied for relief for both restraining order and mandamus as will be gathered from the prayers sought. The prayers were framed as follows:

(a) The rules, forms and time limits as to notices and service of process may not be dispensed with an account of the urgency of this application.

(b) The current liquidator of Hata-Butle (Pty) Ltd (in liquidation) may not be restrained from exercising the functions of liquidator until this Application shall have been disposed of.

(c) The current liquidator may not be required to comply with the provisions of section 188(2) (a) of the Companies Act, 1967.

(d) The current liquidator may not be required to comply with the provisions of section 191 of the Companies Act.

(e) The current liquidator may not be required to comply with the provisions of section 246 of the Companies Act.

(f) The current liquidator may not be required to comply with the provisions of section 248 of the Companies Act.

(g) The current liquidator may not be compelled to disclose the reserve price at which he intends any willing Purchaser to bid for the property in the event that the public auction that was scheduled to take place on 14th June, 2002 has been called off and/ or postponed to an undisclosed date.

(h) Any willing Purchaser may not be allowed to tender a reasonable offer in court.

(i) The current liquidator may not be compelled to disclose for the scrutiny of interested parties the accounts of revenue in rentals which have accrued to the estate of Hata-Butle (Pty) Ltd (in liquidation) since his appointment as liquidator as well as disbursements in salaried and wages and maintenance of the property.

(j) This Honourable Court may not remove the current liquidator in terms of section 189, (3) read with section 240 (b) (iv) and (v) and other relevant provisions of the Companies Act, 1967, and replace him by the appointment of Mr T. Hlaoli or Mr Z. Mda or both of them as co-liquidators who will be disinterested and neutral attorneys to take immediate charge of the estate of Hata-Butle (Pty) Ltd (in liquidation) for a fair and unbiased process of the liquidation assignment.

(k) That the costs of this application be costs of the liquidation process.

(l) That this Honourable Court grants Applicant further and/or alternative relief.

(m) That prayers 1(a) and (b) operate with immediate effect as interim order pending the finalization of the Application.

On the date of the hearing of this matter the 1st Respondent as clearly indicated in his opposing affidavit raised the following points *in limine*:

(i) That the Applicant has no *locus standi in judicio.*

(ii) That there was no urgency in the matter.

Locus Standi

In his founding papers, Applicant alleged that by reason of having been a director of Hata-Butle (Pty) Ltd (in liquidation) and also on the strength of being a contributory or otherwise an interested party in the affairs of that company, he was entitled to bring this Application.

A contributory has been defined under section 169 of the Companies Act to mean,

> "Any person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining and all proceedings prior to the final determination of the persons who are to be contributories, includes any person alleged to be a contributory."

It has been the first Respondent's contention that in fact on the facts of this Application, Applicant has not stated facts upon which this Court could be in a position to determine whether he was actually a "contributory" *vis-a-vis* the company

in liquidation. Neither has he stated when he was a director of the Company in liquidation. On the facts of this case, the Court could not find anything on the record to justify classifying the Applicant as a contributory. He also has not stated when he was a director.

Even assuming that he was once a director, under Company Law legal persons like companies during their normal operations, are represented by directors but once they are put under liquidation, the administration of their affairs will be in the hands of the liquidators, sections 185 (1) and 186(1) of the Companies Act 25 of 1967. Which means that once a Company is wound up, directors cease to be directors of the company. **Attorney General v Blumenthal 1961 (4) S. A. 314.** This the Court also confirmed in the case of **Van Zyl No v Commissioner for Inland Revenue 1997 (1) S. A. 883,** that assets of a company remain vested, upon its liquidation, in the company, and that the liquidator supersedes the directors as manager of the company.

Indeed section 189 (3) of the Act entitles any person who feels aggrieved by any act or decision of the liquidator to apply to Court for a relief. But the aggrieved person has to be someone with an interest in the affairs of the company. The interest should not only be out of curiosity or concern, but pecuniary or proprietary, **Re Roemapton Swimming Pool Ltd 1968 [3] All E R 661**. A director will definitely be an interested party, but, it is not enough just to allege you are a director without proof of such an allegation. **Ex parte strip Mining: In Re Natal Coal Exploration Co Ltd 1999 (1) S. A. 1086**, the Court refused to confirm the rule on the ground that there had been insufficient proof of the Appellant's entitlement to be regarded as a creditor. The Act has not allowed the liquidator in his management to operate

without any control; section 190 of the Act puts the liquidator under the supervision of the Master of the High Court.

The applicant has only alleged but not established that he has *locus standi*, therefore the point raised in limine succeeds.

Urgency

This Application was moved on urgent basis on the 13th August, 2002. The papers show that the Application was moved the same day as borne out by the clerk of the Court's date stamp. In his papers, the applicant pointed out that a sale by Public Auction of the Company's property was supposed to have taken place on the 14th June, 2002, but was postponed. This means that the Applicant knew of the postponement of the auction in June, as he even approached the offices of the liquidator but decided to wait. It was only in August when he then decided to file an Application after he had waited for something like two months.

When Applicant so rushed to this Court and proceeded ex parte, he must have been aware that he was asking for a relief that was going to affect the rights of other persons in which case the application of the rules of natural justice must have come to his mind, but instead , as was said in **LUTARU v NUL C of A (av) 13 of 1998**, he just lightly employed this procedure. Rule 8 (22) (b) of the High Court Rules specifically demands that circumstances rendering an application to be urgent must be set forth in detail. This Rule is mandatory, so that its non-compliance justifies dismissal of an Application with an appropriate order of costs.

Because the Applicant allowed some time to elapse before bringing this Application to Court, his application therefore has failed the test for urgency. He has also failed to shortly state his grounds for urgency, which failure may well lend to the dismissal of his Application, the Commander **LDF v Matela 1999 - 2000 LLR and LB 13** on this ground also the Application falls to be dismissed with costs.

Finally, this Application was filed and moved on the 13th August 2002, and the rule made returnable on 23rd August, 2002. On the 23rd the matter was postponed and rule extended at the instigation of the Applicant and the 1st Respondent therefore prays for wasted costs for that day. In **Grobbelaar v Snyman 1975 (1) S. A. 568**, the defendant was ordered to pay wasted costs as he had been benefitted by the postponement. In this case the Applicant benefitted from the postponement of the 23rd August as he only managed to file his replying affidavit on the 27th August as borne out by the clerk of Court's date stamp.

The Application therefore is dismissed with costs including the wasted costs for the 23rd August, 2002.

A.M. HLAJOANE
ACTING JUDGE

For Applicant : Mr Moruthoane

For first Respondent : Mr Wessels S.C.