C of A (CIV) NO. 22 OF 2003

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

In the matter between:-

THE LIQUIDATOR LESOTHO BANK
(IN LIQUIDATION)
Appellant

and

MAHLOMOLA KHABO Respondent

CORAM:

Plewman, JA
Melunsky, JA
Kumleben, AJA

SUMMARY

Opposed motion – action against liquidator of a company – respondent seeking an order on the liquidator to furnish reasons for rejecting a claim – liquidator not required in law to do so – not competent for court to grant an order setting aside the rejection of the claim when that was not the relief sought – in any event, court erred in granting an order on what was a dispute of fact.

JUDGMENT

Delivered on 7th day of April 2004

KUMLEBEN, AJA

The respondent applied on notice of motion for relief arising from the liquidation of the Lesotho Bank. The appellant is the appointed liquidator.

The claim of the respondent for payment of M234 152.64 against the estate was rejected by the liquidator. The matter came before Guni J who set aside the rejection with costs.

The substantive relief claimed in the notice of motion is for an order:

1. "Directing [Appellant] to furnish the [Respondent] with valid, cogent and reasonable grounds for rejecting [Respondent's] claim lodged with [Appellant] on 14 May 2001;
2. In the even of failure to furnish such grounds as ordered, [Appellant] be ordered by the court to approve and honour [respondent's] claim."

One notes that the second order sought is conditional and dependent upon a refusal on the part of the appellant to comply with the first. The order made by Guni J is that "the rejection [of the claim] is set aside with costs." At the outset of argument counsel were agreed that the order said just that and no more. Any suggestion that the order setting aside the rejection impliedly held that the claim was proved was disavowed.

For the purposes of a decision on appeal only certain of the facts set out in the affidavits need be recited. On 31 January 2001 the Lesotho Bank was placed under voluntary liquidation. The applicant's claim was for M3 234 152.64 for unlawful dismissal. Section 226(1) of the Companies Act, 25 of 1967 ("the Act") requires all claims to be "proved to the satisfaction of the liquidator by affidavit, as near as may be in the form of and containing the particulars prescribed by rules made under S. 311 of the Act."

The claim was rejected by the liquidator on the ground that no such

affidavit was sent to the liquidator or in any event not received, timeously or at all. This was the main issue canvassed in the affidavits and dealt with in the judgment. The court found in favour of the respondent that there had been compliance with section 226 as regards the receipt of the affidavit and implicitly that it was in all respects in order. Before considering the correctness of this conclusion, two other matters arise.

As appears from the notice of motion the substantive relief sought in paragraph 1 is for an order directing the liquidator to furnish reasons for the rejection of the claim. This was the only issue to which the liquidator was called upon to respond and the only justiciable issue the court **a quo** was called upon to decide. The basic question is therefore whether the liquidator is obliged to give reasons: Section 226 (1) of the Act reads as follows:

> "In a voluntary winding up, all claims against the company shall be proved to the satisfaction of the liquidator, by affidavit, as nearly as may be in the form of and containing the particulars prescribed by rules made under section **three hundred and eleven.** If the claim is rejected by the liquidator, the claimant may apply to the court by motion to set aside the rejection."

Had the legislature intended that reasons for rejection were to be furnished, it is in this sub-section that one would have expected to find such a requirement. But there is in fact no such statutory, regulatory or other provision to that effect. This was conceded by counsel for the respondent. The application was thus fundamentally flawed from its inception.

In any event a further difficulty presents itself even if the claim for reasons to be given is to be regarded as competent: in a claim for A, an award of B is impermissible unless the claim for "further and/or other relief" can be invoked. But this "rag-bag" request cannot be relied upon when, as in the instant case, the relief granted [setting aside] is substantially different from that sought [reasons]. This is particularly so since the latter pro tem tacitly acknowledges that, depending on the reasons to be furnished, the refusal of the claim by the liquidator may be in order.

For all these reasons one must conclude that the court **a quo** erred in setting aside the rejection of the claim.

I should, however, comment on what was the main bone of contention in the application. It was whether an affidavit in terms of s 226 was ever lodged with the liquidator. This is explicitly denied by him in his answering affidavit. The correspondence relied upon by the respondent to prove such receipt is inconclusive. The judgment of the court **a quo** held this to be probable. Whether this is so is by the way since a balance of probability is not the test to be applied when motion proceedings present a dispute of fact. The denial is to be accepted unless the papers demonstrate that it is not "real, genuine or bona fide" – see **Room Hire Co, (Pty) Ltd v Jene Street Marisions (Pty)Ltd** 1155 (T) 1163 – 5 and **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A).

Thus, having regard to what was claimed in the notice of motion, the order granted at variance with it, and the dispute of fact that was seen by the learned judge to be the critical issue to be resolved, the order

granted cannot stand.

The appeal is allowed with costs and the order of the court **a quo** is altered to read: "The application is dismissed with costs."

M.E. KUMLEBEN
ACTING JUDGE OF APPEAL

I agree

C. PLEWMAN
JUDGE OF APPEAL

I agree

L.S. MELUNSKY
JUDGE OF APPEAL

Delivered at Maseru this 7th day of April 2004

For Appellant : Mr. Fischer

For Respondent : Mr. P. Tšenoli