IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 16/10

In the matter between:-

MAKHOABE MOHALEROE **APPELLANT**

and

LESOTHO PUBLIC MOTOR TRANSPORT COMPANY (PTY) LTD **1ST RESPONDENT**

LESOTHO BUS AND TAXI OWNERS ASSOCIATION **2ND RESPONDENT**

CORAM: SMALBERGER, JA
HOWIE, JA
FARLAM, JA

HEARD: 6 April 2011
DELIVERED: 20 April 2011

SUMMARY

Companies – Court order granting person disqualified under s 144 (1) (d) of Companies Act 25 of 1967 leave to become director not operating retroactively – rejection of points in limine (i) that material dispute of fact foreseeable, (ii) that new matter impermissibly allowed in replying affidavit, (iii) that matter not urgent and (iv) that doctrine of res judicata applied.

JUDGMENT

FARLAM, JA

[1] This is an appeal from a judgment of Lyons AJ, sitting in the Commercial Court in the High Court, who granted orders as prayed in two applications which were consolidated and argued before him at the same time.

[2] The Lesotho Bus and Taxi Owners Association was the first applicant and the Lesotho Public Motor Transport Company (Pty) Ltd the second applicant in the first application.

[3] In the second application the association was the second applicant and the company was the first. In what follows, I shall call them the 'association' and the 'company'.

[4] The main relief sought in the first application was an

order directing the Registrar of Companies to register or cause to be registered a resolution dated 27 October 2009 and a Form L dated 28 October 2009 appointing five new directors of the company. The Form L to which the application related set out the names of the five persons who according to the resolution had been elected as new directors of the company as well as the names of the appellant and his son Pule Mohaleroe, who were reflected as former directors who ceased to be directors on the date of the resolution. In the column headed 'nature of change' appears the word 'disqualified'.

[5] The appellant and his son were granted leave to intervene in the application. The appellant filed an answering affidavit in which he denied that the resolution of 27 October 2009 was valid, it being his contention that the persons who attended the meeting at which the resolution was allegedly passed were not members of the company.

He contended further that he had not validly been disqualified as a director. He initially stated that the company had two directors, namely himself and his son, but he went on to say that his son ceased to be a director when Guni J delivered judgment in what was described as 'the interlocutory intervention application'. It appears from the papers that the appellant's son accepts the decision of Guni J and nothing further need be said about him.

[6] The respondents' case that the appellant was not a director of the company was based on two grounds: the resolution of 27 October 2009 which purported to disqualify him and the fact that he was convicted in 1986 on a charge of theft by false pretences and sentenced to a term of imprisonment without a fine, with the result that he was disqualified from being a director of a company (save with leave of the court) in terms of section 144 (1) (d)

of the Companies Act No. 25 of 1967.

[7] The appellant contended that this disqualification was removed on 1 March 2010 when Hlajoane J granted his application for a declaration that he is qualified to act as a director of companies in terms of section 144 (1) (d) of the Act.

[8] The second application was brought by the company and the association against the appellant, his son Pule Mohaleroe and six other respondents who are tenants of the company, occupying premises in the company's building at Bus Stop Area, Maseru. The main relief sought in this application comprised orders:

(a) declaring that the appellant and his son were not directors of the company; and

(b) interdicting the appellant and his son from

collecting monthly rentals from the six respondents who were the company's tenants and interdicting those respondents from paying their monthly rentals to the appellant and his son, in both cases pending the final determination of the application.

[9] The appellant also opposed this application. He admitted that the said tenants paid their rentals to him but said that he collected these rentals lawfully.

[10] In both applications he raised a number of points in limine.

[11] In his original notice of appeal the appellant persisted in three of these points in limine, viz:

(i) that a material dispute of fact was foreseeable and therefore proceeding by way of application

was not appropriate;

(ii) that new facts had impermissibly been allowed in the replying affidavit filed on behalf of the respondent; and

(iii) that the respondents had not been justified in bringing the applications as matters of urgency.

[12] In his additional notice of appeal the appellant persisted in a further point which had been raised in limine, viz that the doctrine of res judicata applied as this Court, so he alleged, gave judgment in his favour in a case where the company had instituted proceedings on the same facts founding the same cause of action against the same respondents. The judgment to which he referred was given in civil appeal no 6 of 2009.

[13] The deponent of the replying affidavit in the first application and the founding affidavit in the second application, Mr. Makalo Monare, stated that the amended articles of association of the company incorporate a shareholders' agreement. In terms of this agreement the entire share capital of the company is held by trustees nominated by the association. He stated further that he and Chief Nkau Nkuebe were appointed trustees by the association in 1996 and they were confirmed as trustees in 2008. 99.925% of the shares in the company are held by Chief Nkuebe and himself as trustees. He annexed a resolution of the members of the company authorizing the institution of the first application and explained that when it was passed the company had no directors as one of its three directors, Mr. S.H. Mapheleba, had died, another, Mr. T. Moshe, had resigned and the third, the appellant, was legally disqualified.

[14] In his answering affidavit in the first application and his opposing affidavit in the second application the appellant denied that trustees were nominated by the association to hold shares on its behalf in the company.

[15] Annexed to the replying affidavits of Mr. Monare in both second applications was an affidavit by Ms Mapheleba-Lebentlele, the daughter of the late Mr. S. Mapheleba, the administrative secretary to the board of directors. She confirmed that according to the files of the company the memorandum and articles of company were amended to incorporate the shareholders' agreement to which Mr. Monare referred and which was annexed to his replying affidavit in the second application.

[16] After the replying affidavit of Mr. Monare in the second application was filed the learned judge in the Court a quo asked both counsel for the appellant if they had

instructions that their client wished to present any further evidence. They replied that they had no such instructions.

[17] During argument before this Court counsel for the appellant correctly conceded that the appellant is not a director of the company and that the order made by Hlajoane J on 1 March 2010 does not alter the position, as it clearly cannot operate retroactively; see Ex parte Hemphill 1967 (3) SA 101 (D) at 103 E-F, where Fannin J discussing the equivalent provision in the Companies Act then in force in South Africa, said:

> *'In the case of a convicted person such as is referred to in sub-sec 1 (c) [the equivalent of section 144 (1) (d) of the Lesotho Act], that person ceases to be disqualified only upon the Court granting him leave to become a director. Until he gets that permission, he remains a person disqualified from holding that office'.*

[18] It is not suggested that the appellant was re-appointed as a director after Hlajoane J's order. He clearly was not a director before her order and nothing happened thereafter to alter that position. Lyons AJ was accordingly correct in holding (in par 48 of his judgment) that the appellant was not wrongly removed and as he was purportedly appointed after his conviction and sentence for theft in 1986 it is clear that he never validly became a director.

[19] As he is not a director, and has not been authorized by the directors to act on the company's behalf it is clear that unless one of the points in limine he raised is upheld the Court a quo correctly granted the relief sought in the second application.

[20] The first application was dealt with as follows in the judgment of the Court a quo.

'[51] The extra ordinary meeting of 27 October was called for by the two Trustees, Mr. Nkuebe and Mr. Monare (pages 242 – 243 of record). They relied on sec. 99 of the Act. Between them they held far more that one twentieth (1/20) of the paid up capital required by sec. 99. They also gave the correct notice period of not less than twenty one (21) days. The Trustees, though both holding their shares in trust for the Association, hold them severally – that is each Trustee has a separate and distinct bundle of shares that may be separately disposed of (see Amended Constitution of the Association registered 10 May 1983, clause c (viii) (a) at pages 15-16 of record). It is reasonable to infer that the 2 Trustees were in attendance at the meeting of 29 October as they had called it. They therefore constituted a quorum pursuant to article 47 of the Company's Articles of Association (page 47 of record). I am satisfied that the requirements of the Companies Act and the Articles of Association have been sufficiently complied with for the resolution of 27 October to have effect. The Registrar may now proceed to register the appropriate forms relative

to that resolution'.

I agree with this paragraph and have nothing to add to it.

[21] Again, unless one of the points in limine is upheld, the judge a quo cannot be faulted for granting the first application.

[22] The judge dealt with the points in limine as follows in par 49 of his judgment:

> *'[The appellant] makes them purportedly in his capacity as a director. That is the whole foundation of his case. But he is not, and was not a director.'*

[23] I do not agree that the appellant made these points in his capacity as a director. The relief sought in the second application was sought against him in his personal capacity. As far as the first application is concerned he claims to be a shareholder of the company, having acquired his shares, so he says, from a former director

Mr. T. Moshe. In her affidavit Ms Mapheleba-Lebentlele dealt with the question as to whether the appellant was a shareholder in the company as follows:

> ' *Mr. T. Moshe has never lodged with my office as the Secretary to the Board any offer to sell any share belonging to him; as he never had any shares. Even assuming, without conceding that he had any share, the transfer of shares on the 6th June 2008 was invalid for the following reasons: In terms of* ***annexure B22B*** *hereto attached the notice of the 28th May 2008 for a meeting to be held on the 30th May 2008 on which a special resolution was made, did not only contravene the* ***s 108 of the Companies Act*** *for lack of the requisite* ***21 days notice*** *mandated thereby, but also contravened the Articles of Association of the Applicant Company. That resolution was unlawfully taken, null and void. The purported transfer of shares on the 6th June 2008 … was therefore invalid. There has never been any lodgment of a document of transfer of shares from Mr. Moshe to Mr. Makhoabe'.*

[24] Lyons AJ did not make a finding on the question as to whether the appellant is a shareholder in the company. In the circumstances I am prepared to assume, without deciding, that he was. That being so, he would have had the right as a shareholder to oppose an order dealing with the registration of a resolution appointing new directors to the company and he would have been entitled in that capacity to raise points in limine as part of his opposition to the relief sought.

[25] It is accordingly necessary for this Court to consider whether the points in limine have any merit.

[26] I am satisfied for the reasons that follow that none of them is well taken and that all must be dismissed.

[27] The point taken in the first application that a material

dispute of the fact should have been foreseen must fall away in the light of fact that the Court a quo was able to deal with the matter on the papers without referring it to evidence.

[28] The objection that new facts had been wrongly permitted in the replying affidavit is also without substance. As was pointed out in Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) at 177 H-178 A, the rule that new matter in replying affidavits must be struck out is 'not a law of the Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits.'

[29] Apart from the fact that the matter objected to could reasonably be categorized as not being 'new matter'

because it constituted a permissible reply to the appellant's answering affidavit, it is clear that Lyons AJ's decision to allow it to remain after enquiring whether the appellant wished to reply cannot be faulted.

[30] The point that the proceedings should not have been instituted as matters of urgency and accordingly the point based on High Court rule 8 (22) (b) cannot be raised at this stage on appeal where the applications were disposed of in the Court a quo after the appellant had been given a full opportunity to put his case: Commissioner, South Africa Revenue Services v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA) at 299 F – 300G (paras 9 to 11), approved by this Court in Afrisure Finance and Eezy Management Services v 'Maneo Lechaka and 36 Others, C of A (CIV) 29/09, delivered on the 22 October 2010.

[31] The attempt to invoke the doctrine of res judicata must

also fail. In the judgment of this Court on which the appellant sought to rely, the decision in favour of the appellant was based on the fact that the facts averred by the respondent in the case before it and admitted by the appellant (who was also the appellant in civil appeal 6 of 2009), together with the facts alleged by the appellant, did not justify the finding of the Court a quo that the deponent (in that case) and not the present appellant was the director/chairman of the applicant (see para 11 of the judgment). That finding was not a final and definitive judgment on the merits but was the equivalent of an order for absolution. It accordingly did not give rise to the defence of res judicata. See African Wanderers Football Club (Pty) Ltd v Wanderers Football Club 1977 (2) SA 38 (A).

[32] In the result I am satisfied that the appeal must be

dismissed with costs and it is so ordered.

I.G. FARLAM
JUSTICE OF APPEAL

I agree:

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

C.T. HOWIE
JUSTICE OF APPEAL

For Appellant: Adv. L.A. Molati

For 1st Respondent: Adv S.T. Maqakachane

For 2nd Respondent: Adv K. Ndebele