IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.28/2011

In The matter between:-

TSOAKINYE PETER MOSEBO	Appellant
and	
ANGEL DIAMONDS (PTY) LIMITED	Respondent

CORAM : RAMODIBEDI, P
SCOTT, JA
FARLAM, JA

HEARD : 16 APRIL 2012

DELIVERED: 27 APRIL 2012

SUMMARY

Company Law – Provisional winding-up order discharged – petitioner not establishing entitlement to bring application.

JUDGMENT

Farlam, JA

[1] The appellant appeals against an order granted by Monapathi J in the High Court on 19 May 2011 discharging with costs a provisional winding-up order granted by Majara J on 8 October 2010 in respect of the respondent, Angel Diamonds (Pty) Ltd.

[2] Monapathi J did not furnish any reasons when he discharged the provisional winding-up order, nor has he done so since. This Court has on the numerous occasions in the part strongly deprecated the failure by Judges of the High Court to give reasons for their decisions: see, e.g. Qhobela and Another v Basutoland Congress Party and Another LAC (2000-2004) 28 at 38 C-D; Hlalele and Another v Director of Public Prosecutions and Another LAC (2000-2004) 233 at 237 H – 238 A; R v Masike LAC (2000-2004) 557 at 559 G-560 B, and Otubanjo v Director of Immigration and Another LAC (2005-2006) 336 at 343 F – 346 C.

[3] What was said by Friedman JA in Qhobela's case applies to this case also. The passage to which I refer reads as follows:

'It is necessary for the proper administration of justice that courts give reasons for judgment. A litigant has every right to know why a case has been won or lost. And a lower court is also obliged to furnish reasons so that a Court of Appeal will be properly informed as to what prompted the court a quo to arrive at its decision. In the present case no reasons are given by the learned judge a quo either for his order confirming the rule or for his subsequent "ruling". His conduct in this regard is to be deplored.'

[4] Despite the absence of reasons I am satisfied that the provisional winding-up order was correctly discharged.

[5] The appellant had sought the winding-up of the company on the grounds that it was unable to pay its debts and was factually and commercially insolvent and that it was just and equitable that it be wound up. He alleged that he was entitled to seek a winding-up order because the company was indebted to him, so he

said, 'in an amount in excess of M160,000.00, being in respect of money lent and advanced and unpaid remuneration due'.

[6] The application for the winding-up was an unusual one because the company was at the time the subject of a court order granted on 15 June 2010 under case number CIV/APN/333/2010 in terms of which the company's directors were divested of the control and management of the company, which was entrusted by the court order to the appellant and one Engelbrecht, who are minority shareholders in the company.

[7[In consequence of this the confirmation of the provisional winding-up order was not opposed by those in control of the company of the time, namely

the appellant and Engelbrecht, but by a number of 'interested parties', including Thabex Ltd, the majority shareholder in the company, Marius Welthagen, the managing director of the company and the chief executive of Thabex Ltd, Dr John Anthony Cruise, who is a trustee of the CAJ Share Trust, shareholder in the company, and Izak Benjamin van Tonder, another shareholder.

[8] In the main affidavit filed in opposition to the confirmation of the provisional order, which was deposed to by Welthagen, it was alleged that the interested parties represent 78.03% of the shareholding in the company. This allegation and many of the other allegations in Welthagen's affidavit are disputed by the appellant in his replying affidavit but in view of the conclusion to which I have come

that the provisional winding-up order was correctly discharged it is unnecessary to discuss these disputes further.

[9] In my view the order had to be discharged on the simple ground that the appellant failed to establish that the company was indebted to him as he alleged and that he was accordingly entitled to apply for the its winding-up.

[10] In Welthagen's opposing affidavit he specifically denied that any amount was owing by the company to the appellant. He said that the allegation in the petition to which I have referred was 'in stark conflict with what was contained in the main application [i.e. the application for the order granted on 15 June 2010] in

that no reference was made in the main application to an amount in excess of M160,000.00 being owed to the [appellant]'.

[11] He pointed out that the appellant had not provided any supporting documentation regarding his alleged claim and that, though moneys owing to Engelbrecht were mentioned in what he called the main application, no mention was made in that application of the amount of 'in excess of M160,000.00' allegedly owed to the appellant.

[12] Welthagen annexed what he described as the annual financial statements of the company, which did not reflect any moneys owing to the appellant.

[13] In his replying affidavit the appellant said that the financial statements annexed to Welthagen's affidavit were what he described as 'recent fabrications' and he annexed in support an affidavit deposed to by the manager of the Ladybrand offices of a firm of accountants, who stated that he was 'responsible to liase' with the registered firm of independent accountants in Lesotho who are the company's auditors and that he had performed previous accounting and auditing services in respect of the company. He supported the appellant's allegation that the financial statements annexed to Welthagen's affidavit were not genuine.

[14] The appellant did not, however, explain why no mention was made in the main application of moneys owing to him while moneys owing to his co-applicant

Engelbrecht were mentioned. He concluded this part of his affidavit by saying that his claim was 'supported by proper documentation and vouchers too numerous to attach to the papers' and that he would have 'the source documents available for inspection at the hearing of the petition'. They were not.

[15] Counsel for the appellant contended, however, that this gap in the appellant's case was cured by a document allegedly given in January 2010 by Welthagen to Visser Cornelius du Plessis, a shareholder and creditor of the company and of Thabex Limited. This document purports to be a 'trial balance' of the company as at 31 December 2009. It reflects a loan of M5,000.00 allegedly owed to the appellant.

[16] This document was put before the court together with the appellant's replying affidavit. The interested parties were not afforded an opportunity to deal with it, nor was their attention drawn to the statement in question. I do not think that the appellant can rely on it at this stage of the proceedings.

[17] Furthermore when one bears in mind that the appellant and Engelbrecht have been in control of the company since 15 June 2010 it is difficult to understand why, if the appellant is indeed a creditor of the company, no documentation establishing this fact has been put before the court.

[18] I am accordingly satisfied that the provisional winding-up order was correctly discharged and that the appeal must be dismissed with costs to be paid to the interested parties.

[19] The following order is made: The appeal is dismissed with costs.

I.G.FARLAM

JUSTICE OF APPEAL

I agree M.M. RAMODIBEDI

PRESIDENT OF COURT OF APPEAL

I agree : D.G. SCOTT

JUSTICE OF APPEAL

For the appellant : Adv. C. Edeling

For the interested parties : Mr Q. Letsika