IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 06/2013

In the matter between:

PRIVATE SECTOR FOUNDATION OF LESOTHO	**APPELLANT**
And	
THABO QHESI	**1ST RESPONDENT**
OSMAN MOOSA	**2ND RESPONDENT**
STANDARD LESOTHO BANK LTD	**3RD RESPONDENT**
KUTLOANO SELLO	**4TH RESPONDENT**
GENERAL SENTLE	**5TH RESPONDENT**
JERRY FOULO	**6TH RESPONDENT**
MONTS'UOE LETHOBA	**7TH RESPONDENT**
MOLOI SETHATHI	**8TH RESPONDENT**
TS'OLO LEBITSA	**9TH RESPONDENT**
'MATJAMA MOLEFI	**10TH RESPONDENT**
LIMO MATHOLO	**11TH RESPONDENT**

Coram : Scott JA

Hurt JA

Thring JA

Heard : 10 April 2013

Delivered : 19 April 2013

Summary

Res Judicata – requirement that cause of action and relief claimed be the same in both cases relaxed in appropriate circumstances – election of executive committee of business association at meeting convened contrary to its constitution held to be invalid.

JUDGMENT

SCOTT JA

[1] The Private Sector Foundation of Lesotho is a business association registered as such in accordance with the laws of Lesotho. Its objectives include the promotion of the long term development of the private sector in Lesotho and the promotion of sustained dialogue between the government and the private sector.

[2] Regrettably, its members include two factions, the one led by Mr Osman Moosa, the other by Ms Mosothoane. Moosa was appointed chairman of the PSFL in October 2009. He was subsequently convicted of tax evasion following a plea bargaining

agreement with the prosecuting authorities. Mosothoane and her supporters called upon him to convene a meeting of members at which his suitability to continue as chairman could be discussed. This he declined to do.

[3] On 7 May 2012 a number of members signed a petition calling for a special general meeting to be held on 24 May 2012 for the purpose of considering *inter alia* an amendment to the constitution, the conviction of Moosa and the tendering process in relation to the Polihali dam. At the meeting, which was not attended by Moosa and others, a new executive committee was elected with Mosothoane as its chairperson.

[4] On 15 June 2012 an application was made to court at the instance of the new executive committee in the name of the PSFL for an order prohibiting and restraining Moosa and other respondents, presumably members of the former executive committee (save for the Standard Lesotho Bank which was the third respondent), from

conducting any transactions on behalf of the PSFL or otherwise engaging in its affairs, and for an order:-

> "That it is declared that the executive committee that was elected on the 24th May 2012 during the extraordinary annual general meeting be declared to be a lawful committee with rights, privileges and obligations as stipulated in the applicant's constitution."

[5] The application was opposed and on 30 August 2012 dismissed by Mahase J on the ground that the meeting of 24 May 2012 was unlawful for want of compliance with the constitution of the PSFL.

[6] In the meanwhile, on 11 June 2012 the constitution was "replaced" by a new constitution which, it was alleged, had been previously approved and on 2 August 2012 the chairperson, Mosothoane, (elected at the meeting on the 24th May 2012), purporting to act in terms of the new constitution, gave notice of an annual general meeting to be held on 31 August 2012 after being petitioned to do so by more than 20 percent of the paid up membership. In terms of the notice the items to be discussed included the minutes of the

previous meeting and the "election of office bearers (circumstances that led to the appointment of the new executive committee on 24 May 2012)". The meeting, which was held the day after Mahase J gave judgment, was attended by more than 50 percent of the paid up members. An executive committee was elected comprising, it would seem, the same persons who had been elected at the meeting on 24 May 2012.

[7] The following day, 1 September 2012, an application was made as a matter of urgency at the instance of the same executive committee in the name of the PSFL, against the same respondents as before, seeking the same relief save that this time the Court was asked to declare the executive committee elected on 31 August 2012 (as opposed to the one elected on 24 May 2012) to be a lawful committee "with rights, privileges and obligations as stipulated in the applicant's constitution".

[8] A rule nisi and interim order was granted *ex parte* but opposed on the return day which was postponed for argument. On 13 February 2013 Peete J dismissed the application; hence the appeal.

[9] The reasoning of the learned judge was, in short, that the meeting and appointment of the executive committee on 24 May 2012 had been held to be unlawful by Mahase J in proceedings between the same parties with the result that he was precluded from revisiting the issue of their validity and that since the executive committee appointed on 31 August 2012 "was elected under direct sponsorship and auspices of the committee elected on 24 May 2012" its appointment, too, was unlawful. In this regard, he pointed to the fact that the meeting on 31 August had been convened by a notice issued by Mosothoane in her capacity as chairperson of the committee elected on 24 May 2012 and held in pursuance of a constitution registered by that same committee at the Law Office on 11 June 2012.

[10] The principal issue in this appeal is accordingly the validity of the election of the executive committee on 31 August 2012. The outcome of the inquiry will also determine whether the PSFL could have authorized the proceedings being brought in its name.

[11] As appears from the aforegoing, it is not in dispute that the annual general meeting held on 24 May 2012 and the election of an executive committee at that meeting, were found to be unlawful by Mahase J. In issue in the present case is whether that finding is to be regarded as *res judicata* between the parties. It is admittedly so, as pointed out by Mr Letsika who appeared for the respondents, that the cause of action in the two applications was different, as was the relief claimed in respect of the meetings sought to be declared lawful. But this is not decisive of the issue.

[12] It is now well established that the requirements for the *exceptio rei judicata* will be relaxed in appropriate circumstances to the extent that the *exceptio* will be upheld in respect of a particular issue of law or fact even where the relief claimed and the cause of action

are not the same, provided that the parties are the same and the same issue arises. Whether the relaxation will be justified or not will depend on a consideration of the circumstances of each case. In **Smith v Porrit 2008 (6) SA 3003 (SCA) at para 10** the following was said:

> "Following the decision in **Boshoff v Union Government** 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of

> fact or law was an essential element of the judgment on which reliance is placed. Where the plea *of res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in **Kommissaris van Binnelandse Inkomste v Absa Bank BPK** 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata.* The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case by case basis".

The application before Mahase J was the first step in the ongoing dispute between the same parties for control of the PSFL. The two

applications are closely related. The application in the present case was launched in consequence of the dismissal of the application before Mahase J. In these circumstances, the Court *a quo* was, in my view, correct in upholding the respondents' contention that Mahase J's finding as to the invalidity of the election of an executive council at the meeting of 24 May 2012 was *res judicata* between the parties.

[13] On 1 October 2011 the first respondent, Mr Thabo Qhesi, was appointed Chief Executive Officer for a period of one year, ending on 30 September 2012. On 13 June 2012 Mosothoane wrote to Qhesi informing him that the "board" had decided to suspend him as CEO with immediate effect. But the election of the "board" (and Mosothoane as its chairperson) must be accepted as being invalid for the reason previously stated. In the circumstances, Qhesi's suspension must similarly be regarded as being invalid.

[14] It will be recalled that it was Mosothoane, purporting to act in terms of the replaced constitution, who on 2 August 2012 gave

notice of the annual general meeting to be held on 31 August 2012. The provision of the constitution in terms of which she purported to do so is article 14.1.2.

It reads:

> "The Chief Executive Officer shall, in consultation with the chairperson of the Executive Committee, call the Annual General Meeting, whenever it is necessary, or upon the request of [a] simple majority of the Executive or upon the written request of twenty percent 20% of fully paid up members of the Foundation"

Ms Makamane, the deponent to the founding affidavit, explained that the chairperson was obliged to act on her own in convening the meeting since the CEO had been suspended. But if Qhesi's suspension is to be regarded as invalid, as I think it must, it follows that on 2 August 2012 he was still the CEO and remained such until 30 September 2012. In terms of art. 14.1.2 he was accordingly the person who was obliged, in consultation with the

chairperson, to call an annual general meeting. Mosothoane was not the lawfully elected chairperson. Moosa, who had been unlawfully ousted on 24 May 2012, still occupied that position. It follows that Mosothoane's act in calling an annual general meeting was irregular and in breach of the PSFL's constitution.

[15] Mr Letsika submitted, however, that in the absence of prejudice to an affected party an irregularity such as the one referred to would not have the effect of rendering invalid any resolution taken at the meeting. In support of this proposition he cited a number of decided cases of varying relevance including two of the Appellate Division of South Africa, namely **Osman v Jhavary and Others** 1939 AD 351 at 360 - 361 and **Jockey Club of South Africa and Others v Feldman** 1942 AD 340 at 358 – 359. What these cases establish is that a resolution taken at a meeting which was convened not in accordance with the constitution of an association will *prima* facie be invalid, but a court will disregard the

irregularity if it can be shown that a party affected thereby has suffered no prejudice.

[16] The resolutions taken at the meeting of 31 August ousted Moosa as chairman and replaced the executive committee. The meeting was held notwithstanding that the judgment of Mahase J delivered the previous day had the effect of rendering unlawful both the convening of the meeting and the meeting itself. It is true that more than 50 percent of the paid up members attended the meeting but significantly none of the respondents did. The fact that they and others did not do so is understandable in the light of Mahase J's judgment. Had they done so, there is nothing to suggest that the resolutions taken at the meeting would have been carried. The absence of prejudice was accordingly not established. It follows that the election of the executive committee on 31 August 2012 was invalid.

[17] It follows, too, that in my view Peete J correctly dismissed the application (launched on 1 September 2012) and the appeal must fail.

[18] The appeal is dismissed with costs.

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D.G. Scott
Justice of Appeal

I concur

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N.V. Hurt
Justice of Appeal

I concur

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W.G. Thring
Justice of Appeal

For the appellant Mr Q. Letsika
For respondents Adv M.V. Kesuoe