IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO.33/2013

In the matter between:-

RANKALIMENG MOKHELE	**1ST APPELLANT**
MALEBOHANG MAREKA	**2ND APPELLANT**
MATLOTLISANG LIBOTI	**3RD APPELLANT**
MOTLALEHI NTALA	**4TH APPELLANT**
MATSELISO SELONGOANA	**5TH APPELLANT**
MALEBOHANG MOLETE	**6TH APPELLANT**
MAMOTSAPI JULIA PHAFOLI	**7TH APPELLANT**
MAMOTLATSI RAPHUTHING	**8TH APPELLANT**
LITSEBE MOKHACHANE	**9TH APPELLANT**
MAMATITI MATEBELLO PAKELA	**10TH APPELLANT**
SEKHOHOLA THAMAE	**11TH APPELLANT**

AND

MASTER OF HIGH COURT **1ST RESPONDENT**

STAR LION GROUP LIMITED (In liquidation) **2ND RESPONDENT**

MKM MARKETING LIMITED (In liquidation) **3RD RESPONDENT**

STAR LION GOLD COIN (PTY) LIMITED

(In liquidation) **4TH RESPONDENT**

STAR LION INSURANCE LIMITED

(In liquidation) **5TH RESPONDENT**

THE ATTORNEY GENERAL **6TH RESPONDENT**

AND

DG ROBERTS N.0 & CB St C COOPER N.O

(In their capacity as the appointed Provisional Liquidators

Of MKM Star Lion Group Estate and of the 2nd to

5th Respondents) **1st OPPOSING PARTY**

DANIEL GERHARDUS ROBERTS **2ND OPPOSING PARTY**

CHAVONNES BADENHORST ST CLAIR

COOPER **3RD OPPOSING PARTY**

TRUSTEES OF THE INVESTORS TRUST **4TH OPPOSING PARTY**

CORAM : SCOTT AP

HOWIE JA

FARLAM JA

HEARD : 1 OCTOBER 2013

DELIVERED: 18 OCTOBER 2013

Summary

Companies – Appointment of Provisional Liquidator – whether competent after final winding up order granted – whether provisional liquidators in their personal capacity entitled to intervene in application for order to appoint another person as provisional liquidator on basis that their appointments invalid.

JUDGMENT

FARLAM JA:

[1] This case is a sequel to an appeal heard in this Court in October 2011 in which the judgment was delivered on 21 October 2011: see **MKM Marketing Ltd and Others v the Commissioner of Insurance and Another**, C of A (Civ) no.24 of 2011, as yet unreported.

[2] In that matter appeals against final orders for the winding up of the four appellants in that case were dismissed save that paragraph 3 in each of the orders appealed against was deleted. In the paragraphs in question the court *a quo* had purported to appoint Messrs Daniel Gerhardus Roberts and Chavonnes Badenhorst St Clair Cooper as provisional

liquidators of the four companies which appealed against the winding up orders, viz Star Lion Group Ltd, MKM Marketing Ltd, Star Lion Gold Coin (Pty) Ltd and Star Lion Insurance Ltd.

[3] The paragraphs appointing Messrs Roberts and Cooper as provisional liquidators in the four companies were deleted because section 185 of the Companies Act 25 of 1967 only empowers the master to appoint liquidators (although section 185 (3) (b) provides that the master must appoint any person whom the court has directed to be appointed as a provisional liquidator), and it was clear that paragraph 3 of each of orders was erroneously granted. Because the court was informed that it was common cause that the master had after the orders were granted appointed Messrs Roberts and Cooper as provisional liquidators on 23 May 2011, after they had found security to her satisfaction, it made no orders replacing the paragraphs it deleted.

[4] On 24 October 2011 the present appellants launched an application in the High Court for an order directing the master to appoint Mr Tankiso Hlaoli as provisional liquidator to the four companies on the basis that the master's appointment of Messrs Roberts and Cooper as provisional liquidators was invalid.

[5] On 27 October 2011 Messrs Roberts and Cooper launched an application for leave to intervene in what I shall call the main application and to be joined as parties in order to oppose the application. They applied together in their capacities as provisional liquidators of the four companies (as 'first opposing party') and in their personal capacities (as 'second and third opposing parties'). On the same day the trustees of the Investors Trust, who are cessionaries of certain liquidated claims against each of the companies and who had intervened in the liquidation application as additional applicants for winding up orders in respect of the companies, also applied for leave to intervene (as 'the fourth opposing party') and to be joined as a party in order to oppose the application. They brought a counter-application for an order declaring that Messrs Roberts and Cooper were the duly appointed provisional liquidators of the companies and, in the alternative, for an order directing the master to appoint them as provisional liquidators of the companies.

[5] On 2 December 2011 the trustees of the Investors Trust filed an amendment to their counter-application in which they sought, inter alia, the following further relief, viz.

(a) that the master be directed to issue certificates of appointment in favour of Messrs Roberts and Cooper as provisional liquidators reflecting that the appointments were made in terms of section 185 of the Companies Act (this was because the letters of appointment previously issued had erroneously referred to the Administration of Estate Proclamation 19 of 1935 and were headed 'Letters of Administration'); and

(b) a declarator that all acts already performed by them 'purportedly as provisional liquidators are valid and will remain so until and unless set aside by the Court.'

[6] On 11 November 2011 the appellants filed a counter-application in which an order was sought in the following terms:

'(a) that the 4th opposing party has no legal personality and therefore no *locus standi* to bring the counter-application;

(b) that the master had no power in terms of the Administration of Estates Proclamation to appoint Messrs Cooper and Roberts as co-liquidators. Such appointments could only be done in terms of section 185, 186, 240 and 241 of the Companies Act;

(c) that the 1st to 4th opposing parties be ordered to pay costs hereof on attorney and client scale, jointly and severally, the one paying, the other to be absolved;

(d) further and/or alternative relief.'

[7] The matter came before **Musi AJ,** who dismissed the main application with costs. He also dismissed the appellants' counter-application with costs on the attorney and client scale, the appellants being ordered to pay the costs jointly and severally, the one paying, the other to be absolved.

[8] The learned judge also granted the applications to intervene brought by the first opposing party (Messrs Roberts and Cooper in their capacities as provisional liquidators of the companies) and the fourth opposing party (the trustees of the Investors Trust) and ordered the appellants to pay their costs jointly and severally, the one paying the other to be absolved.

[9] The application by Messrs Roberts and Cooper to intervene in their personal capacities, as second and third opposing parties, was dismissed with costs and they were ordered to

pay the appellants' costs jointly and severally, the one paying the other to be absolved.

[10] Prayers one and two of the fourth opposing party's amended notice of motion were granted with costs, the appellants being ordered to pay the costs jointly and severally, the one paying the other to be absolved.

[11] It will be recalled that these prayers were in the alternative. In prayer one the fourth opposing party asked for an order declaring that Messrs Roberts and Cooper were duly appointed as provisional liquidators to the companies, while in prayer two the fourth opposing party asked that the master be directed to appoint them as provisional liquidators. It was common cause at the hearing of the appeal that the grant by the court *a quo* of both these prayers was erroneous and that if the court *a quo*'s finding that Messrs Roberts and Cooper were validly appointed by the master on 23 May 2011 was correct the court should only have granted prayer one of the fourth opposing party's amended notice of motion.

[12] When the appeal was argued counsel for the appellants stated that the only ground on which he sought to attack the court's *a quo*'s dismissal of the main application was the contention

that it was not competent for the master to appoint Messrs Roberts and Cooper as provisional liquidators of the companies after final orders for their winding up had been granted. This renders it unnecessary to consider other contentions which were raised by the appellants in the court *a quo* relating to the alleged invalidity of their appointments as provisional liquidators, whether their appointments had been validly cancelled by the master and whether they were fit and proper persons to continue as the provisional liquidators of the companies. The questions, which were comprehensively dealt with in **Musi AJ**'s judgment and decided in favour of Messrs Roberts and Cooper, accordingly do not have to be considered in this judgment.

[13] In my opinion the contention advanced on behalf of the appellants that Messrs Roberts and Cooper could not validly be appointed as provisional liquidators after final winding up orders were made is not correct. As Mr **Edeling**, who appeared for the first to third opposing parties, pointed out this submission overlooks section 185 (2) of the Companies Act 25 of 1967, which, as far as is material reads as follows:

> '(2) On the winding-up being made or thereafter when, for whatever cause, there is no person acting as liquidator of the company-

(a) all the property of the company shall be deemed to be in the custody or control of the Master until a liquidator or provisional liquidator is appointed and is capable of acting as such;

(b) …the Master may appoint any fit person or shall appoint any person whom the court has directed to be appointed as provisional liquidator of the company to hold office until the appointment of a liquidator, and may, or shall, as so ordered by the court, restrict his powers by the terms of his letter of appointment.'

[14] It is thus clear that the appellants' attack on the dismissal of the main application must fail.

[15] Counsel for the appellants also contended that **Musi AJ** had erred in making costs orders against the appellants on the attorney and client scale in respect of the appellants' counter-application and in respect of their opposition to the intervention applications of the first opposing party (Messrs Roberts and Cooper in the capacities as provisional liquidators) and the fourth opposing party (the trustees of the Investors Trust).

[16] **Musi AJ**'s reasons for making the attorney and client costs orders against the appellants are set out in paragraph 72 of his judgment, which reads as follows:-

'[72] There was no need and reason to oppose the intervention applications of the Investors trust and the 1st opposing party. It was done out of malice and not genuine. The costs of those applications should be paid on the attorney and client scale. Likewise the applicant's counter-application was nonsensical because the issues raised therein were legal points that could be raised without a substantive application. The costs of this application should also be paid on the attorney and client scale.'

[17] I cannot fault the reasoning in that paragraph. The finding of malice in respect of the opposition to the intervention applications of the Investors Trust and the provisional liquidators in their capacities as such is in my view justified. I also agree with the learned judge's statement that the appellants' counter-application was nonsensical for the reason he gives. In the light of those findings I do not think that it can be said that he erred in exercising his discretion to grant costs on the attorney and client scale.

[18] I turn now to the cross appeal brought by Messrs Roberts and Cooper against **Musi AJ**'s dismissal of the intervention application brought by them in their personal capacities. The relevant part of his judgment on this point reads as follows:

'[13] ...In order to succeed the applicants must show that they have a direct and substantial interest in the subject matter of the litigation which could be prejudiced by the judgment of the court and that the application is made seriously and not frivolously. The applicants must also show that their allegations constitute a *prima facie* case or defence.

...

[14] A direct and substantial interest is a legal interest. It is an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation. See **Henri Viljoen (Pty) Ltd v Awerbuch Brothers** 1953 (2) SA 151 (O) at 169 H; **Sizwe Development and Others** [1991 (1) SA 677 (**TKGD**)] and **Brauer v Cape Liquor Licensing Board and Others** 1953 (3) SA 752 (C).

[15] The interest that Messrs Coopers and Roberts, in their personal capacities, have is stated by them as follows:-

> "We have a personal interest in retaining our appointments and in the remuneration we hope to earn and be paid for the work already done and to be done."

By their own admission their interest is an indirect and financial interest. In their personal capacities they have no right to relief based on the determination of substantially the same question of law or fact. Their applications ought to be dismissed with costs.

[19] The principles expounded in the case of **Henri Viljoen (Pty) Ltd v Awerbuch Brothers** have, as was pointed out by **Corbett J** in **United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another** 1972 (4) SA 409 (C) at 415 H, 'been referred to and adopted in a number of subsequent decisions … and it is generally accepted that what is required is a legal interest in the subject matter of the action which would be prejudicially affected by the judgment of the Court.'

[20] The **Henri Viljoen** and the **United Watch and Diamond Co.** cases and other South African cases which have followed them have been cited with approval in Lesotho: see, e.g. **K.T. Khauoe v Attorney General & Another** 1991-1996 LLR 1705 (HC) at 1710; 1993-1994 LLR-LB 470 (HC) at 481-2.

[21] I agree with Mr **Edeling**'s submission that in the present case Messrs Roberts and Cooper did not have merely an 'indirect' financial interest. Their interest may well have been a financial one – as they say they hoped to earn remuneration and to be paid for the work they had already done and still were to do. But their interest was clearly direct. The appellants wanted Mr Hlaoli appointed on the basis, as I have said, that there were no provisional liquidators appointed because, so they contended, the purported appointments of Messrs Roberts and Cooper were invalid. The subject matter of the suit was the position of provisional liquidator to the companies. If the order sought by the appellants had been granted it would have directly impacted on Messrs Roberts and Cooper because their rights to hold the positions of provisional liquidators and to earn remuneration therefrom would have been held to be non-existent.

[22] It follows that the cross-appeal by the second and third opposing parties (Messrs Roberts and Cooper in their personal capacities) must succeed with costs.

[23] The following order is made:

1. Subject to what is said in paragraph 2 hereof the appellants' appeal is dismissed with costs.

2. (a) Ground 1 of the appellants' appeal and the cross appeal of the fourth opposing party are upheld with no order as to costs.

   (b) The first sentence of paragraph (g) of the order of the court *a quo* is set aside and is replaced with the following:

   'Prayer one of the fourth opposing party's amended notice of motion is granted with costs.'

3. (a) The second and third opposing parties' cross appeal against the dismissal of their application to intervene succeeds with costs.

(b) Paragraph (b) of the order of the court a quo is set aside and replaced with the following

'The applications of the second and third opposing parties are granted with costs. The applicants are ordered to pay the costs jointly and severally, the one paying the other to be absolved.'

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I.G. FARLAM

JUSTICE OF APPEAL

I agree _____

D.G. SCOTT

ACTING PRESIDENT

I agree _____

C.T. HOWIE

JUSTICE OF APPEAL

For Appellant : K.E. Mosito, KC

For 1st, 2nd and 3rd Opposing Parties: C. Edeling

For 4th Opposing Party : P.J.J. Zietsman