IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C of A (CIV) 45/2013**

In the matter between:

PHOKENG FUNERAL PARLOUR (PTY) LTD **APPELLANT**

and

THE CENTRAL BANK OF LESOTHO **RESPONDENT**

CORAM: SCOTT, A.P.

FARLAM, J.A.

THRING, J.A.

HEARD: 6 OCTOBER, 2014

DELIVERED: 24 OCTOBER, 2014

SUMMARY

Funeral undertaking company wound up under section 47 of Insurance Act, 1976 for conducting an insurance business without being registered as insurer under the Act

– amount in definition of 'funeral business' in Act cannot be amended upwards by court to allow for inflation – Commissioner not obliged to give appellant a hearing before applying for liquidation - Commissioner not empowered to use powers under sections 40 and 44 of Act against appellant, not being a registered insurer, before deciding to apply for winding up – power to apply for winding up under section 47 unaffected by enactment of new Companies Act, 2011 – no necessity to apply for provisional order - winding up order not abuse of court process.

JUDGMENT

FARLAM, JA:

[1] In this matter the appellant appeals against an order for its winding up made on 24 September 2013 by Molete J., sitting in the Commercial Division of the High Court.

[2] The order was made in terms of section 47 of the Insurance Act, 18 of 1976, as amended, which, as far as is material, reads as follows:

'The Commissioner may apply to the court for the winding up of any insurance company on any of the following grounds, namely –

(a) .....

(b) .....

(c) .....

(d) *... that the continuance of the operations of the insurance company in Lesotho is prejudicial to the public interest.'*

Section 2 of the Act contains a definition of an '*insurance company'* which reads as follows*: 'any person carrying on insurance business'.* It follows, as this court held in MKM Marketing Ltd and Others v The Commissioner of Insurance and Others, C of A (CIV) 24 of 2011, not yet reported, that a company doing insurance business in Lesotho can be wound up whether or not it is registered under the Act.

[3] The essential facts in this case are not in dispute.

At the time when the order which is the subject of the appeal was made the appellant conducted a funeral undertaking business, in respect of which it held a licence to trade issued under the Trading Enterprises

Act, 11 of 1993. Among its activities was the conducting of a group funeral scheme known as the Umbrella Group Funeral Scheme. Under this scheme what is called 'funeral cover' was provided to members of burial societies, who paid to the appellant what were described as premiums, either monthly or annually in advance. The benefits received by members on the death of the principal member, his or her spouse, a child or the birth of a stillborn child included monetary benefits ranging from M5 000 to M15 000, depending on the premium paid. The appellant was not registered as an insurer or as an insurance broker and the funeral scheme it conducted was not underwritten by a registered insurer.

[4] The respondent, the Central Bank of Lesotho, which in terms of section 47 of the Central Bank of Lesotho Act, 2 of 2000 is the Commissioner of Insurance, applied for the liquidation of the appellant on the ground that by conducting its funeral scheme the respondent was conducting an insurance business which was unlawful because the appellant was not registered under the Act. The respondent's Governor referred in the founding affidavit to the various controls relating to registered insurers which are contained in the Insurance Act, viz

the requirements regarding share capital, working capital, the keeping of records, accounts and reserve funds, statements of account, audit reports, actuarial reports, authenticated annual statements, reports to the commissioner, inspection of documents, supervision of the commissioner, etc, none of which applies in respect of the funeral scheme conducted by the appellant.

[5] The respondent also contended that the members of the public who pay premiums to the appellant would not be adequately protected if the appellant were not put into liquidation and a liquidator appointed to investigate the appellant's affairs.

[6] The learned judge agreed with these contentions and held that the respondent was entitled to an order of liquidation in terms of section 47 of the Insurance Act. He said that if the appellant was operating an illegal business (as he held it was) 'it would be directly in the public interest to stop the activities of a company that is trading illegally and not subject to any supervision as required by law. It is the Commissioner of Insurance who is obliged and mandated to protect the public.'

[7] The judge referred to the definition of an insurance contract contained in Lake v Reinsurance Corporation Limited 1967 (3) SA 124 (W) at 127 – 128, viz,

> '*a contract between an insurer … and an insured …, whereby the insurer undertakes in return for the payment of a price or premium to render to the insured a sum of money, or its equivalent on the happening of a specified uncertain event in which the insured has some interest.*'

[8] It is clear that the appellant's funeral scheme falls squarely under that definition, and Ms da Silva Manyokole, who appeared for the appellant, did not contend otherwise. Instead she based her attack on the order of the court on six main grounds, viz.

(a) the appellant is not conducting an unlawful insurance business because in terms of the definition of 'funeral business' inserted in section 2 of the Act by section 2(b) of the Insurance Amendment Act, 20 of 1983, a funeral undertaker may, she contended,

conduct a funeral scheme without being registered as an insurer provided the benefits payable under the scheme do not exceed the amount laid down in the Act and, so she contended further, the benefits paid out under the appellant's scheme do not exceed that amount when it is adjusted for inflation;

(b) the respondent should have exercised its powers under sections 40 and 44 of the Act to request information from the appellant and to investigate its affairs before making the decision to apply for the liquidation of the appellant;

(c) the respondent was obliged by reason of the common law principles of natural justice to have given the appellant a hearing so as to provide it with an opportunity to explain itself before proceedings were instituted for the appellant's liquidation;

(d) it is no longer competent for a liquidation order to be made under section 47 of the Insurance Act because since the coming into operation of the new Companies Act, 18 of 2011 a company

can only be put into liquidation on the grounds set forth in section 125 of the new Companies Act, i.e., where the court determines that it is unable to pay its debts or where the court is satisfied that 75 percent of its issued share capital has been lost or has become useless for the company's business;

(e) the respondent should not have applied for a final order of liquidation against the appellant but should instead have sought a provisional order; and

(f) the winding up order was an abuse of court process because it was sought merely to enable the liquidator to investigate the affairs of the company and not because it was insolvent.

[9] In my view none of these points has any substance.

[10] The contention that the appellant's funeral scheme does not fall foul of the Act cannot be sustained. I shall assume in what follows (without deciding the point) that licensed funeral undertakers who are not registered

insurers may conduct funeral schemes where the benefits payable on the death of a person do not exceed M1000, the amount stated in the definition of 'funeral business'.

[11] Ms da Silva Manyokole submitted that typical burial costs must have been about M1000 in 1983 when the definition of 'funeral business' was inserted in the Act but, she said, as a result of inflation burial costs have since then escalated to an amount equal to or more than M15 000. 'For instance', she said, the 'cost of a cow which is normally slaughtered for use in the funeral costs between M6000 and M8000 minimum': therefore she continued, '[the amount of M1000] cannot be the actual cost of the whole funeral or what the legislature intended.'

[12] She submitted further that the amount in the section had been abrogated by disuse and she relied in this regard on the decision of the South African Appellate Division in Golden China TV Game Centre and Others v Nintendo Co Ltd 1997 (1) SA 405 (A). She contended that in accordance with the principle that 'the law is always speaking' words in what she called 'old legislation'

should be interpreted according, to their present day meaning. Her final submission on this point was that the definition of 'Funeral Business' 'if it is read literally leads to absurdity.'

[13] This point was not raised on the papers nor in the notice of appeal and the statements made in the appellant's heads regarding the comparison between the burial costs in 1983 and those today (which I have quoted above) are not based on any evidence. I am prepared, however, to take judicial notice of the fact that burial costs, like most other costs, have as a result of the ravages of inflation risen significantly in the 31 years since 1983 but I do not think that that assists the appellant. Apart from the fact that modern statutes are not abrogated by disuse (see Devenish, Interpretation of Statutes p 67) what the appellant is asking the court to do is not to interpret the statute but to amend it to bring it in line with present day monetary values. That is the function of the legislature, not the court.

[14] The principle that the law is always speaking, which was enunciated by the eminent Victorian draftsman Lord Thring, is extensively discussed by Francis Bennion in

his book Statutory Interpretation 3 ed at pp 686 *et seq*. Extracts are quoted in my judgment in Fourie and Another v Minister of Home Affairs and Others 2005 (3) SA 429 (SCA) at 480 B – 481F. The basic approach adopted in cases where this principle is applied is one of subjecting wording in statutes which no longer appear to achieve the intention the lawgiver had in mind to what is referred to as a strained construction. Examples are given in the extract quoted in Fourie's case at 481 B – F. None of the examples given involves adjusting monetary amounts to allow for inflation. A moment's reflection will indicate the impracticability of undertaking such an exercise. How soon after the law was passed must adjustments be made? How frequently thereafter? How must the adjustments be calculated? Furthermore, it appears that the Lesotho legislature from time to time amends its Acts so as to alter monetary amounts contained therein to cater for changes in the purchasing power of money. Two examples (chosen at random from the annual volumes of The Laws of Lesotho) include the following:

(1) sections 6 (2) (a) and 14 (2) of the Hire Purchase Act, 27 of 1974, amended by sections 5 and 9 of

the Hire Purchase (Amendment) Act, 9 of 2000; and

(2) Schedule to the Societies Act, 20 of 1966, repealed and replaced with the schedule set forth in section 3 of the Societies (Amendment) Act, 6 of 2001.

The fact that the amount in the definition of 'funeral business' has not been amended may indicate an intention on the part of the legislature to leave it unaltered despite the changes in the purchasing power of money since 1983.

[15] The case of Golden China TV Game Centre and Others v Nintendo Co Ltd, supra, to which the appellant's legal representative referred, does not provide support for her submissions on this point. The question for decision in that case was whether computer games enjoyed copyright protection as 'cinematograph films' under the South African Copyright Act, 98 of 1978 and the Copyright Amendment Act, 125 of 1992. The South African Appellate Division held that they did because the Copyright Act employed very wide terms, most likely to cover future technical innovations by using general

words. As Harms J.A. put it (at 412 F – G) the general scheme of the Act suggested '*that the definitions in the Act should be interpreted "flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force (the Legislature) periodically to update the Act" (WGN Continental Broadcasting Co et al v United Video Inc 693F 2d 622 at 627)'.*

[16] There are in my view two answers to the appellant's contention that the Commissioner should have used its powers under sections 40 (1) and 44 of the Act before applying for the liquidation of the appellant.

[17] The first answer is that the two sections empower the commissioner to take certain steps against registered insurers and not entities such as the appellant which, as it will be recalled, was not a registered insurer. Section 40 (1) of Act empowers the Commissioner to require any insurer to supply it with documents or information in relation to its insurance business. Section 44 empowers the Commissioner to investigate the affairs of an insurer where there is reason to believe that the interests of policyholders are in jeopardy or that the insurer is

unable to meet its obligations or has made default in complying with any of the provisions of the Act. Section 2 of the Act defines an 'insurer' as 'an insurance company which is registered under section 10 of this Act for the purpose thereof, either as domestic insurer or foreign insurer'. 'An insurance company, it will be recalled, is defined as 'any person carrying on insurance business'. Insurance business is defined as 'the assumption of the obligation of an insurance company in any class of insurance business and includes re-insurance business'. It is thus clear that the respondent was empowered to apply for the liquidation of the appellant but not to use its section 40 and section 44 powers against it.

[18] The second answer is that even if it had been able to use those powers against the appellant it was not obliged to do so as the powers were permissive, the word 'may' being used in each case. The Commissioner was satisfied on the information available to it that the appellant was conducting an unlawful insurance business and it was clearly in the public interest, as the judge correctly found, that the appellant be liquidated so as to put a stop to the unlawful business.

[19] The appellant's contention that the respondent was obliged by the common law rules relating to natural justice to give the appellant a hearing before applying for its winding up is also erroneous. The rules of natural justice sought to be invoked oblige a public official or a body empowered to do an act or give a decision prejudicially affecting an individual in his or her liberty or property or existing rights to give an opportunity to such person to present his or her case before those powers are exercised: see Matebesi v Director of Immigration and Others LAC (1995 – 1995) 616 at 621 I to 622B. They do not apply where a decision is taken to approach a court for relief because in such a case the respondent will have the opportunity to present his or her case in court.

[20] The appellant's contention that it is no longer competent for a liquidation order to be made under section 47 of the Insurance Act is entirely without merit. Section 47 is still on the statute book and is unaffected by the repeal of the 1967 Companies Act and the simultaneous enactment of the new Companies Act, 18 of 2011.

Section 9 (2) of the Interpretation Act, 19 of 1977 reads as follows:

> *'(2) Where an Act repeals and re-enacts, with or without modification, any provision of a former Act, references in any other Act to the provision so repealed shall be construed as references to the provision so re-enacted'.*

Section 49 of the Insurance Act provides that Part IV of the Companies Act of 1967 (which contains the rules governing winding up) shall also apply in the case of the winding up of insurance companies. This section is now to be read as incorporating the rules governing winding up set out in Part XVI of the Companies Act of 2011, which therefore apply in the case of insurance companies being wound up under section 47 of the Insurance Act. In this regard it is important to note that section 173 of the 1967 Act, which was contained in Part IV, set out seven grounds on which companies would be wound up, only one of which was contained in section 47 (i.e. that it appeared from a statement furnished under the provisions of the Act or from the results of an investigation made under the Act that it was insolvent). It follows that the fact that section 173 of the new Act does

not provide for the winding up of an insurance company because the continuance of its operations in Lesotho is prejudicial to the public interest takes the case no further.

[21] In paragraph 4.1 of the appellant's heads of argument it is stated that the respondent applied for the liquidation of the appellant in terms of the new Companies Act. This is incorrect: prayer 2 of the notice of motion states that what is sought is an order putting the appellant into liquidation in terms of section 47 of the Insurance Act. It is thus clear that this part of the appellant's argument is based on a faulty premise.

[22] The appellant's contention that the respondent should have applied for a provisional order rather than a final one is in my view incorrect. Assuming, without deciding, that provisional winding up orders may still be made under the new Companies Act, despite the difference in wording between section 125 of the new Act and section 175 of the old Act (which provided for interim orders to be made in winding up applications, provisional orders being a species of interim orders to be made in winding up applications: see Collective Investments (Pty)

Ltd v Brink and Another 1978 (2) SA 252 (N) or 255 C – D), I am satisfied that a final winding up order was appropriate in this case as affidavits had been filed by the appellant in opposition to the order sought, the matter was fully argued and it was decided on the common cause facts.

[23] The appellant's last contention that the application for a winding up order was an abuse of the process of the court because it was sought merely to allow the liquidator to investigate the affairs of the company ignores the fact that the actions of the appellant in conducting an unlawful insurance business were correctly held by the judge to be prejudicial to the public interest.

[24] In all the circumstances I am satisfied that the appeal must fail. The following order is made: the appeal is dismissed, with costs.

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I.G. FARLAM

JUSTICE OF APPEAL

I agree

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D.G. SCOTT

ACTING PRESIDENT APPEAL

I agree

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W.G. THRING

JUSTICE OF APPEAL

For appellant : Ms M Da Silva Manyokole

For respondent : Mr P J J Zietsman