IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 4/2015

In the matter between

LESOTHO PUBLIC MOTOR TRANSPORT (PTY) LTD **APPELLANT**

And

LESOTHO BUS AND TAXI OWNERS ASSOCIATION **1ST RESPONDENT**

ADV. BERNARD MOSOEUNYANE MASIPHOLE **2ND RESPONDENT**

ADV. HOPOLANG NATHANE KC **3RD RESPONDENT**

MASTER OF THE HIGH COURT **4TH RESPONDENT**

ATTORNEY GENERAL **5TH RESPONDENT**

CORAM: FARLAM, AP
MOKGORO, AJA
LOUW, AJA

HEARD: 20 APRIL, 2016

DELIVERED: 29 APRIL, 2016

SUMMARY

Companies Act, 2011 - judicial management - powers, functions and duties of directors of company under judicial management - section 128 (1) (b) of Companies Act, 2011 - Rules of Court - notice of motion a nullity for non-compliance with Rule 8(7) - order made pursuant to void notice of motion a nullity.

JUDGMENT

LOUW AJA:

[1] On 5 May 2014, Monapathi ACJ, made a final order placing the appellant company (the company) under judicial management in terms of sec 156 of the Companies Act of 2011 and appointing two judicial managers.

[2] On 16 May 2014 the directors of the company launched an application in the name of the company for rescission of the order on the basis that the order was null and void *ab initio*.

[3] In a judgment delivered on 16 February 2015, Sakoane AJ held that by reason of the provisions of section 128 read with section 158 of the Companies Act, the directors of a company under judicial management are precluded from instituting proceedings in the name of the company and dismissed the

application for rescission. This is an appeal against the order refusing to grant rescission.

[4] The application was brought in the name of the company with supporting affidavits by two of its directors. The respondents did not file answering affidavits (save for an affidavit filed by T Faro the deputy sheriff in regard to the service of the notice of motion). The respondents were content to file a notice in terms of Rule 8 (10) (c) raising the point of law that the company, having been placed under judicial management, lacked locus standi to bring the application.

[5] There are disputes of fact on the papers in regard the question of service of the application. In the return of service filed by the deputy sheriff, he states:

"On the 17th April 2014, I proceed to serve the respondent with a copy of the certificate of urgency. It was served upon one Mr Monare who called himself the Operation Manager of the respondent. Mr Monare stamped and signed the original document to witness the service."

[6] The Certificate of Urgency is signed and is stamped on the face of it with the company's stamp. It contains the words Received 17/04/2014 17H00. It is not disputed that the stamp is that of the company and that the signature is that

of Mr Monare who was a director of the company. The dispute regarding the service arises from the supporting affidavits by two directors of the company, Mr Moeketsi Tsatsanyane and Mr Molatsi Mabote on the one hand and the affidavit of Mr Faro the deputy sheriff.

[7] Save to say that the affidavits on both sides are rather terse on material issues of the dispute, it is not necessary to consider the matter any further. I accept that there is a genuine and bona fide dispute of fact which should be resolved in accordance with the rule in *Plascon - Evans Paints (Pty) Ltd v van Riebeeck Paints Pty Ltd*, 1984 (3) SA 623 (A) at 643E-635C, by accepting the respondents' version that service of the papers did take place sometime during the course of 17 April 2014.

[8] I turn to consider whether the company through a resolution taken by its board of directors is entitled to bring an application to set aside the order placing it under judicial management.

[9] Section 158 deals with the effect of the commencement of the judicial management of a company and incorporates, by reference, the provisions of section 128 of the Act. The relevant parts of the sections provide as follows:

"158 Effect of the Commencement of Judicial Management.

As from the commencement of judicial management, the judicial manager shall have custody and control of the company's assets and the provisions of section 128 relating to the effect of commencement of liquidation shall apply and reference to the liquidator shall be taken as reference to the judicial manager and judicial management, as the case may be.

128. Effect of the commencement of liquidation

(1) As from the commencement of the liquidation of a company:

(a) the liquidator shall have custody and control of the company's assets;

(b) the directors shall remain in office but cease to have powers, functions or duties other than those required or permitted to be exercised under this part;

(c) a person may not commence or continue legal proceedings against the company or in relation to its property, or exercise or enforce a right or remedy over or against property of the company, unless the liquidator otherwise agrees or the Court otherwise orders;

. . ."

[10] The provisions of section 128 (1) (b) are relevant to the question whether the directors have the power to approach the Court to set aside the order placing the company under judicial management. The provisions of section 128 (1) (c) concern legal proceedings against the company or proceedings relating to property of the company and are not relevant to the facts of this case.

[11] Counsel for the appellant submitted that serious material defects in the procedure adopted by the respondents in bringing the application to place the company under judicial management rendered both the application and the order made pursuant thereto null and void.

[12] The application in this matter was served on the company during the course of 17 April, 2014 and it was consequently not an ex parte application. The notice of motion therefore had to comply with the provisions of Rule 8 (7), which reads:

> *"8 (7)Every application other than one brought ex parte shall be brought on notice of motion as near as may be in accordance with Form J of the First Schedule hereto and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice thereof is to be given."*

[13] Form "J" sets out the substantial procedural rights of the respondent after being served with the notice of motion. The respondent is informed that if he intends opposing the application, he is required to notify the applicant's attorney in writing on or before a date specified in the notice and further that he is required within fourteen days of giving notice of his intention to oppose, to file his answering affidavits and to appoint an appropriate address at which he will accept notice and service of all documents in the proceedings. The respondent is further informed that if he does not file a notice of intention to oppose, the application will be heard on a specific date mentioned in the notice.

[14] The notice of motion used by the applicant did not comply with Rule 8 (7). It was in fact an adapted Form I which is the form used for ex parte applications. It was not only addressed to the registrar, but also to the respondent company. It is not "as near as may be in accordance with Form 'J'." The date for the hearing of the application specified in the notice of motion was the very day on which the notice of motion was served namely, 17 April 2014. Although the application was ostensibly brought in terms of Rule 8 (22) as a matter of urgency and informed the respondent that an order would be sought dispensing with the rules relating to the modes of service and time limits provided for in the rules, the application did not come before the Court on 17 April 2014, the day specified in the notice of motion. The matter was not on that day postponed to some specified future date.

The application was then set down on 25 April 2014, more than a week later (a fact which suggests that the applicant did not consider the matter to be urgent) without notice to the company. In the result the respondent was left completely in the dark as to when, if at all, the matter would be placed on the roll for hearing.

[15] When the matter came before Mahase, J on 25 April 2014 without any notice to the respondent, the learned judge refused to hear the matter and ordered that

(a) all interested parties should be heard before the Court could dispose of the matter in any manner, an order which clearly meant that all such interested parties should be given notice of any further date upon which the matter would again come before the Court;

(b) the Court declined to dispense with the forms and service provided for in the rules and ordered that the matter should follow the normal modes of process and periods and that all the provisions of the rules should be adhered to. It is clear that the Court was of the view that the application lacked the requisite degree of urgency and that the learned judge declined to exercise the powers under Rule 8 (22). The matter was then not properly on the Court roll and for that reason the Court declined to hear the matter. The usual and appropriate order in such circumstances is to strike the application

from the roll. If the applicant then wished to proceed with the matter, it could do so in accordance with the directions given by Mahase, J, that is on a notice of motion, duly amended to be as near as may be in accordance with Form 'J' (Rule 8(7)).

[16] The application came before Monapathi, ACJ on 5 May 2014, without the notice of motion being amended and without notice to the company. The final order made by Monapathi ACJ on 5 May 2014 follows the relief sought in the original notice of motion save that no dispensation was granted in regard to the orders made by Mahase, J in regard to the procedure to be followed nor were the forms, service and time periods provided for in the Rules dispensed with.

[17] In accordance with the orders made by Mahase, J, this is application should have been brought in terms of Rule 8 (7) as near as may be in accordance with Form "J". The rule stipulates what the notice of motion should contain and spells out the procedural rights of the respondent. In *Simross Vintners Pty (Ltd) v Vermeulen* 1978 SA 779 (T) at 781 GH, Coetzee, J stated in regard to a notice of motion:

"It is an important document as it initiates proceedings against another person who can only ignore it at his peril …. It is the

commencement of proceedings upon which the whole case is built."

[18] It was further held in *Simross Vintners (Pty) Ltd v Vermeulen* at 782AB that where in an application which is not brought ex parte and which does not fall under Rule 8 (22) (as was clearly held by Mahase, J in this case when she refused to hear it and ordered that the normal Rules and time periods be adhered to), the notice of motion is not in substantial and material respects as near as may be in accordance with Form "J", the notice of motion is a nullity. I agree.

[19] Since the application that came before Monapathi ACJ on 5 May 2014 on a notice of motion which did not comply at all with Rule 8(7) and was a nullity, it follows that the order placing the company under judicial management should not have been made and is itself a nullity.

[20] The next question is whether the company has the power despite the provisions of section 128 (1) to approach the Court through a resolution of the board of directors to set aside the order on the basis that it was a nullity.

[21] There is no equivalent of section 128 in the previous South African Companies Act, 61 of 1973 and the South African decisions which deal with the position of directors of a

company in liquidation or under judicial management in terms of that Act are not of assistance in this case.

[22] During the course of argument, we were referred to the provisions of section 471A which was introduced in Australia by the Corporate Law Reform Act, 1992, which reads;

"While a company is being wound up in insolvency or by the Court, a person cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer of the company, except

(a) …

(b) …

(c) *With the liquidator's approval, or*

(d) *With the approval of the Court."*

[23] The effect of the introduction of section 471A on the powers of directors of a company being wound up has been discussed in a number of decisions of the Australian Courts. These decisions are not of any real assistance because the section gives the court a discretion to decide whether it is appropriate for the directors to be permitted to bring proceedings to set aside the liquidation. Section 128 (1)(b) does not give the Court such discretion.

[24] In this case it is not necessary to consider whether the directors have residual powers. The judicial management never commenced and the provisions of section 128 (1)(b) never took effect. This is so because both the notice of motion which commenced the proceedings and the order made pursuant thereto, were nullities. The directors of the respondent company were therefor not barred from exercising their powers, functions and duties and they were entitled to bring proceedings in the name of the company to show that the order which purported to deprive them of their powers and functions as directors was a nullity and to no effect. It follows that the appeal must succeed.

[25] The following order is made

1. The appeal is upheld with costs.
2. The order made by the Court a quo is set aside and the following order is substituted therefor:

    1. The order granted on 5 May 2014 placing the company Lesotho Public Motor Transport Company (Pty) Ltd, is declared to be a nullity and is set aside;

2. The first, second and third respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

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W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree:

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I.G. FARLAM
ACTING PRESIDENT

I agree:

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J.Y. MOKGORO
ACTING JUSTICE OF APPEAL

For the Appellant: Mr Maqakachane

For the Respondent: Mr Letsika