IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO. 07/2017

CIV/APN/415/16

In the matter between:

'MAMOTSAPI PHAFOLI	**1ST APPELLANT**
'MATLOTLISANG LIBOTI	**2ND APPELLANT**
RETSELISITSOE MOKHOTHO	**3RD APPELLANT**

And

PROVISIONAL LIQUIDATORS OF	
MKM STAR LION GROUP	**1ST RESPONDENT**
MKM STAR LION GROUP ESTATE (in liquidation)	**2ND RESPONDENT**
SIMON THEBE-EA-KHALE	**3RD RESPONDENT**
MOTHOFELA RAMAKATSA	**4TH RESPONDENT**
MOROA PROPERTY INVESTMENT (PTY) LTD	**5TH RESPONDENT**
MASTER OF THE HIGH COURT	**6TH RESPONDENT**
ATTORNEY GENERAL	**7TH RESPONDENT**

And

'MANTSIUOA ADELINA RIKABE	**1ST INTERVENER**
KHOTSO DAVID MABELE	**2ND INTERVENER**
'MAMATHE EUSEBIA SEHALE	**3RD INTERVENER**

CORAM : DR. K. E. MOSITO P.

M. CHINHENGO AJA

M. MOKHESI AJA

HEARD : 23 November 2018

DELIVERED : 07 December 2018

SUMMARY

Companies – Application for intervention by prospective creditors – Court brushing aside their application without hearing the applicants' application for intervention – whether such not a mistrial – whether such proceedings not a nullity – Whether the sale of property consequent upon the directive by the court that sale proceeds not a nullity – effect of such mistrial.

JUDGMENT

DR. K. E. MOSITO P

BACKGROUND

[1] This is an appeal against the judgment of the High Court (**Molete J**) handed down on 20 December 2016. The appellants (as applicants), approached the High Court for an order that a *rule nisi* issue returnable on the date and time to be determined by the court calling upon the respondents to show cause, if any, why the following orders shall not be made absolute:-

> *"1. The Rules of this Honourable Court as regards period and modes of service are hereby dispensed with on account of the urgency of this matter.*
>
> *2. The 5th Respondent is hereby interdicted and/or restrained from proceeding with the contemplated sale of properties in annexure "**MP9**" below pending finalization of this matter.*
>
> *3. 1st Respondents are hereby interdicted and/or restrained from disposing of in any manner any assets and or*

documents in their possession by virtue of being in provisional liquidators.

4. *Rule Nisi is hereby issued and returnable on the 5th day of December 2016 calling upon the Respondent to show cause, if any, why:-*

   a. *The 1st Respondent shall not be removed as provisional liquidators of the 2nd Respondent.*

   b. *Alternatively the 1st Respondents and 6th Respondent be directed to convene first general meeting of creditors and contributories within six weeks of the completion of this matter where the following should dealt with:*
      i) *Progress report of the 1st Respondent's duties.*
      ii) *Production, inspection and auditing of records of 1st Respondents' duties.*
      iii) *Appointment of liquidators,*
      iv) *Proof of creditors' claims.*
   c. *The Respondents shall not be directed to pay costs of this application on attorney and client's scale but only in the event of opposition.*

5. *Prayers 1,2, and 3 above operate with immediate effect as interim relief."*

[2] The matter came before **Peete J** in the High Court on 15 November 2016. The learned judge granted the interim order sought. On 29 November 2016, the 1st and 2nd respondents filed a notice of anticipation. The notice anticipated the return date to to 1 December 2016. I may mention in passing that no affidavit was filed justifying the anticipation. I shall revert to this aspect later. There was however, an answering affidavit filed by the first respondent. It is not clear on record as to what happened on the anticipated date. It appears from the ruling of Molete J that, on 1 December 2016, the matter came before him and he postponed it to 12 December 2016 to give the parties a chance to agree on aspects of the matter, especially urgency. They failed to agree and it was further postponed to 14 December 2016 for further hearing and possible agreement. I must also mention that on 9 December

2016, the applicants filed a replying affidavit. On 14 December 2016, the learned judge heard the matter and made a ruling on 20 December 2016.

[3] On 20 December 2016, the learned judge handed his ruling and stating *inter alia* that:

> *"It is trite and established in our law that the reasons for urgency must be set out in the certificate, and that together with surrounding facts, it must establish urgency completely.*
>
> *On the first ground. The liquidators were duly appointed and confirmed by the Master of the High Court. The refusal to renew the work permits of the liquidators has been challenged and it is common cause that the matter is still pending. It has been by the Court of Appeal that liquidators do not require work permits as they are not employees. I therefore found that the urgency of the matter is not established on this ground."*

[4] On 23 January 2017 the present appellants approached the a quo for an order in the following terms:

> *"(a) That the execution of judgment in CIV/APN/415/16 be stayed pending the finalisation of this application.*
>
> *(b) Granting the applicants leave to appeal against the judgment of this honourable court in CIV/APN/415/16 dated the 20th of December 2016.*
>
> *(c) Granting the applicants stay of execution of judgment in CIV/APN/415/16 pending finalisation of the appeal.*
>
> *(d) That the respondents be ordered to pay the costs of this application only in the event of opposition hereof.*
>
> *(e) That the applicants be granted such further and/or alternative relief as this honourable court may deem fit.*
>
> *(f) That prayers 1 and 2(a) operate with immediate effect as an interim relief thereof.*

[5] This move was conceivably considered necessary as some of the orders given were interlocutory and it was considered that they could only be appealed with leave of Court. The respondents filed

their notice of Intention to oppose on 23 January 2017and what they called an Interim Answering affidavit on 25 January 2017. That Interim Answering affidavit was replied to. Since the propriety of that procedure seems to have been agreeable to all parties, I prefer to let sleeping dogs lie. The matter came before Molete J in the High Court on 7 February 2017. The learned judge gave the appellants leave to appeal.

PRELIMINARY OBJECTIONS

[6] In advance of considering the issues on appeal, it is apposite at this juncture, to begin with the preliminary issues raised by Mr Edeling for the first respondent. At the commencement of the proceedings on appeal, the learned counsel argued that the appellants have not complied with the Rules of Court in as much as the record was not delivered and filed in time. He contended that the appellants had not demonstrated any real interest in th in pursuing the appeal and, so argued the learned Counsel, the appeal should be struck off from the roll with costs.

[7] It appears that the Notice of Appeal is dated 20 January 2017.The Record was filed on 31 July 2017. The Appellants answered by indicating that the Registrar's Circular had directed that the records be filed on or before 3 August 2017. Thus, since the appellants' record was filed on 31 July 2017, it was therefore filed on time. In my opinion, there is substance in what the appellants are saying on this issue.

[8] Mr Edeling further contended that, the heads were late, but the appellants attorney, Mr Mukhawana had filed an affidavit explaining that he was indisposed. He had even attached a medical

certificate of incapacity. There was therefore, no substance in these preliminary objections as they were both satisfactorily accounted for. on appeal. These preliminary objections are dismissed.

THE ISSUE ISSUES

[9] The crux of this appeal is whether there was no mistrial in the court a quo regard being had to the manner in which this application was handled by the court a quo.

THE LAW

[10] There are three High Court Rules which are central to the resolution of this appeal, viz: Rule 8(4), Rule 8(18) and Rule 8(22) of the **High Court Rules 1980**. Rule 8(4) provides that:

> *(4) Ever application brought ex parte shall be filed with the Registrar before noon on two court days preceding the day on which it is to be set down to be heard. If brought upon notice to the Registrar, such notice shall set forth the form of order sought, specifying the affidavit filed in support thereof and request the Registrar to place the matter on the roll for hearing.*

[11] As appears from the rather lengthy background given above, an application was brought ex parte and on the basis of urgency and placed before Peete J. He granted the *rule nisi* on 15 November 2016. The return date was anticipated to 1December 2016. This was purportedly done in terms of Rule 8(18) of the **High Court Rules 1980**. The Rule provides that:

> *(18) Any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than 48 hours notice.*

[12] In operationalising the above Rule, this Court has, in the past held that an application anticipating the return day must be supported by an affidavit. As Ramodibeli JA put it **Adoro v Kou Kou and Others**:

> [21] *Regarding issue (1) above, there can be no doubt in my mind that, as I have pointed out above, the first respondent's application to anticipate the return day was not supported by an affidavit and as such was not properly motivated at all. To that extent it was, as it seems to me, undoubtedly bad and irregular.* [1]

[13]This Court then pointed out that,"... if need hardly be stated that any application to Court requires to be properly motivated in order to enable the Court seized with the matter to properly formulate its mind whether to accede to it or not. Indeed an application for anticipation for the return day as *in casu* is not just there for the taking. Different considerations apply such as for example the convenience of the parties and the Court itself, the importance of the matter, the urgency of the matter, prejudice to the parties (the list is not exhaustive)." I am of the view that, the philosophy behind Rule 8(18) is to enable an *ex parte* applicant to know why the return day was anticipated. This can only be achieved if a properly motivated affidavit. Otherwise, an *ex parte* applicant may as well be exposed to prejudice in the conduct of his or her case.

[14] The third Rule is Rule 8(22). The Rule provides that:

> *(22) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance*

---

[1] *Adoro v Kou and Others LAC (2000-2004) 514 at para 21.*

> *with such procedure as the court or judge may deem fit.*
>
> *(b) In any petition or affidavit filed in support of an urgent application, the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be afforded substantial relief in an hearing in due course if the periods presented by this Rule were followed.*
>
> *(c) Every urgent application must be accompanied by a certificate of an advocate or attorney which sets out that he has considered the matter and that he bona fide believes it to be a matter for urgent relief*.

[15] In operationalising this Rule, this Court has, in the past held that a certificate of urgency must contain grounds of urgency. A certificate of urgency can only be of assistance to the court if it is the legal practitioner's honest opinion of the urgency of the case derived from an analysis of the facts of the case. The content of a certificate should not be considered a substitute of the circumstances to be contained in petition or affidavit filed in support of an urgent application.

CONSIDERATION OF THE APPEAL

[16] I turn now to the merits of the appeal. The logically anterior enquiry is whether the learned judge did bring an impartial and open mind to bear on the matter. I fear that the way in which this case was tried a quo, is likely to conduce to the suspicion of bias in the minds of many. I must however hasten to say that, as was pointed out by Ponnan JA (Cachalia JA, Theron JA, Mathopo JA and Mbatha AJA concurring) in ***Mulaudzi v Old Mutual Life***

Assurance Co (South Africa) Ltd and Others[2], 'the law will not lightly suppose the possibility of bias in a judge. But, there is also the simple fact that bias is such an insidious thing that even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by it.'[3] Having said so, we must always bear in mind the words of wisdom contained in **S *v Le Grange*[4]** that, it is our duty to examine the

---

[2] Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others 2017 (6) SA 90 (SCA)

[3] See S v Le Grange and Others 2009 (2) SA 434 (SCA) (2009 (1) SACR 125) paras 25 – 26. Le Grange added:

'Benjamin Cardozo recognised this when he stated:

"We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos", which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."

[4] S v Le Grange and Others 2009 (2) SA 434 (SCA) (2009 (1) SACR 125). '[14] A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be manifest to all those who are concerned in the trial and its outcome . . . . The right to a fair trial is now entrenched in our Constitution . . . . The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done, but also be seen to be done has been recognised as lying at the heart of the right to a fair trial . . . .

. . .

[21] It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described — perhaps somewhat inexactly — as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has

allegation. The appellants complain that, the learned judge erred in granting an order not sought by any of the parties. In several of its decisions this Court has deprecated the practice of granting orders which are not sought by the litigants.[5] Similarly, it has more than once deplored the practice of relying on issues which are not raised or pleaded by the parties to litigation.[6] In the Court a quo, there was no prayer for the Court to order that the liquidators should go ahead and sell the assets within a particular period. However, the court proceeded to give such an order. That, in my opinion, ought not to have been done. This ground is well-taken.

[17] The next ground is that, the learned judge erred in deciding the urgency of the intervention application on the basis of an unsigned unconditional undertaking. In the present case however, the learned judge writes that he became "satisfied that the unconditional undertaking by the 1st respondent to invite offers from any other persons will adequately address any possible urgency or prejudice as identified by the applicants." Both counsel were unanimous before us that, the unconditional undertaking by

---

been said to mean a departure from the standard of even-handed justice which the law requires from those who occupy judicial office. In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in G a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

[5] *See for example: The Presiding Officer N.S.S.(L. Makakole) v Malebanye Malebanye C of A (CIV) 05/07 at par 9; Nkuebe v. Attorney General and Others 2000 – 2004 LAC 295 at 301 B – D; Mophato oa Morija v. Lesotho Evangelical Church 2000 – 2004 LAC 354.*

[6] *See for example Frasers (Lesotho) Ltd vs Hata-Butle (Pty) Ltd 1995 – 1999 LAC 698; Sekhonyana and Another vs Standard Bank of Lesotho Ltd 2000-2004 LAC 197; Theko and Others v Morojele and Others 2000-2004 LAC 302; Attorney-General and Others v Tekateka and Others 2000 – 2004 LAC 367 at 373; Mota v Motokoa 2000 – 2004 LAC 418 at 424. National Olympic Committee and Others vs Morolong 2000 - 2004 LAC 449.*

the 1st respondent was not pleaded but was made from the bar. In my opinion, it was a fatal misdirection for the court in motion proceedings, to have based its decision on that unconditional undertaking by the 1st respondent. In terms of Rule 8(22) of the **High Court Rules 1980**, the court should look to the applicants' affidavit for the circumstances which the applicant avers render the application urgent and, also the reasons why the applicant claims that he could not be afforded substantial relief in an hearing in due course if the periods presented by the rules were followed.

[18] It must be borne in mind that, an applicant has to set forth explicitly the circumstances which he avers render the matter urgent. Such applicant must state the reasons why he claims that he cannot be afforded substantial relief in an hearing in due course if the periods presented by this Rule were followed. Thus, the question of whether a matter is sufficiently urgent as an urgent application is underpinned by the issue of absence of substantial relief in an application in due course. Rule 8(22) allows the High Court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules, the applicant may not obtain substantial relief.

[19] Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out in the petition or affidavit filed in support of an urgent application and secondly, whether the applicant seeking relief will not obtain substantial relief at a later stage. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. It is to the petition or affidavit filed in support

of an urgent application that the Court must look. Had the learned judge examined paragraphs 18 to 22 of the affidavit, he would have discovered that, the consideration of the first requirement, being why is the relief necessary today and not tomorrow, would have placed the court in a position where the it must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen.

[20] The next complaint by the Appellants is that, the learned Judge *a quo* erred in disregarding the fact that by ordering the liquidators to proceed with the sale of the estate property on the 31st day of January 2017, he was effectively disposing of the whole case on the merits before having given the appellants a hearing on the same. I am not persuaded by this complaint. I say this because; liquidation is a process through to the first and final liquidation, distribution and contribution account. The sale of the property is but one stage in the process of liquidation.

[21] The next ground of appeal is that, the learned Judge a quo erred in granting a final order namely that the liquidators may proceed with the sale of the estate property on the 31st day of January 2017, which order has the effect of adversely affecting the rights of the interveners before hearing and joining them as parties in the main application. A party seeking to intervene in proceedings can either do so in terms of rule 12 of the ***High Court Rules 1980***, or in terms of the common law. It is well established that an intervening creditor may be given leave to intervene at any stage, either to oppose the liquidation or to have a *rule*

nisi discharged. As appears from ***Fullard v Fullard,***[7] the court must take a practical view in these matters and also bear in mind the interests of the general body of creditors. As indicated in ***Nel and Others NNO v The Master and Others*; ; *M & V Tractor and Implement Agencies BK v Vennootskap DSU Cilliers en Seuns en Andere (Kelrn Vervoer (Edms) Bpk (tussenbeitredend) and other related matters*** .[8] these principles also apply in applications for winding-up of companies. In my opinion therefore, the court a quo ought to have taken a practical approach so as to enable the intervening creditors to take part in the process so as to safeguard their interests. It was not proper to turn them away unheard. As indicated earlier, a creditor is entitled to intervene in a liquidation application without having to prove an additional legal interest.

[22] The appellants further complaint is that, the learned judge *a quo* erred in concluding that when granting the interim interdict during the motion court Peete J may have not had an opportunity to consider the reasons for urgency and whether they are sufficient in the absence of any evidence to that effect. I am of the view that there is substance in this complaint. There was no basis for this speculative conclusion which was not a statement of fact on the record. There was not a shred of evidence to support it. As Beyers, JA pointed out in ***Rhodesian Corporation Ltd v Globe and Phoenix Gold Mining Co Ltd,*** [9] the law could not, have intended speculative inferences to be drawn from, so wide an area of investigation. There was simply no

---

[7] *Fullard v Fullard 1979 (1) SA 368 (T) at at 372B; Jhatam v Jhatam 1958 (4) SA 36 (N).*

[8] *Nel and Others NNO v The Master and Others 2000 (2) SA 728 (W) at 731F and at 732 F; M & V Tractor and Implement Agencies BK v Vennootskap DSU Cilliers en Seuns en Andere (Kelrn Vervoer (Edms) Bpk (tussenbeitredend) and other related matters 2000 (2) SA 571 (NC) at 577F.*

[9] *Rhodesian Corporation Ltd v Globe and Phoenix Gold Mining Co Ltd 1934 AD 313.*

basis on the record before us on which the court *a quo* was entitled to speculate that, when granting the interim interdict during the motion court, Peete J may not have had an opportunity to consider the reasons for urgency and whether they were sufficient in the absence of any evidence to that effect.

[23] Furthermore, it was a mistrial for the learned Judge *a quo* to have held that the main application and the intervention application may be pursued in the ordinary way and postponing the same sine die when he had ordered that the sale (which forms the core of the main application) may be proceeded with on the 31st day of January 2017. The situation is compounded by the fact that, the learned Judge *a quo* erred in disregarding the fact that he treated the matter as being urgent in terms of the co-called notice of anticipation filed by the first respondents, the court, upon pronouncing itself on the issue of whether the main application is urgent or not, stated that the matter was not urgent per se and order that it be treated as an ordinary application in terms of the rules of this honourable and thereafter postponed the same *sine die*. The element of urgency continues to persist for so long as the harm remains or continues.

SUMMATION

[24] To sum up, in my opinion, the learned judge erred in denying the intervening applicants an opportunity to intervene at that stage. The principles governing applications for intervention by unsecured creditors have been set out in ***Fraser v Absa Bank***

Ltd.[10] The intervening applicants ought to have been given an opportunity to access justice then.

What happened in the court a quo was a mistrial. It is akin to what happened in ***Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others (supra).*** Courts of law are constitutionally obliged to give a fair hearing to persons in proceedings for determination of the existence or extent of any civil right or obligation instituted by any person before such a court.[11] It is not quite clear to me that the Court a quo was obliged to refuse to hear and determine an intervention application between parties claiming rights to participate in liquidation litigation, unless there had been an infringement of the rights of one of them.

It is wholly fallacious to suppose that a contract of sale made contrary to the constitution, law and public policy can stand. Such is not the law. A contract is totally void if, when it is made, it is opposed to morality or public policy.' I must indicate that, the learned Counsel, Adv Motsie for the appellants impressed upon us that, should we find that the sale of the assets was carried out in violation of the intervening applicants' rights to be heard, we should then hold such a sale to be declared a nullity. I therefore hold that this sale undertaken as a result of an order not sought by a party in circumstances as the present, is a nullity. To avoid further prejudice to the intervening applicants, I would order that that the liquidation process be halted pending finalization of their intervention application.

---

[10] *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae) 2007 (3) SA 484 (CC) para 58.*

[11] See Section 12(8) of the Constitution of Lesotho.

COURT ORDER

[25] In the result, it is ordered that
:

(a) The appeal succeeds with costs.

(b) The judgment of the court a quo is set aside.

(c) The sale of the assets is a nullity.

(d) The Registrar is to ensure that the intervention application is enrolled and placed before a different judge to be dealt with expeditiously.

_____

DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

_____

M. CHINHENGO AJA
ACTING JUSTICE OF APPEAL

I agree:

_____

M. MOKHESI
ACTING JUSTICE OF APPEAL