

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.: 23/2019

CCA/0035/2016

In the matter between:

**LIQUIDATORS OF THOTANYANA MINING
& CIVIL WORKS (PTY) LTD (in liquidation)
APPELLANT**

and

MRS M VILAKAZI

1ST

RESPONDENT

DEPUTY MASTER

OF THE HIGH COURT

2ND

RESPONDENT

MASTER OF THE HIGH COURT

3RD

RESPONDENT

THE ATTORNEY-GENERAL

4TH

RESPONDENT

FIRST NATIONAL BANK

LESOTHO LIMITED

5TH

RESPONDENT

STANDARD LESOTHO

**BANK LIMITED
RESPONDENT**

6TH

Coram: PT DAMASEB, AJA
CHINHENGO, AJA
MTSHIYA AJA

Enrolled: 13 May 2020 (For determination by way of written submissions in terms of CA President's COVID-19 PD 2020).

Delivered: 29 May 2020

Summary

Companies Act 2011 and Insolvency Proclamation 1957 - do they provide for provisional liquidators? - Is there provision for first meeting of creditors to proof claims and elect liquidators?

JUDGEMENT

PT Damaseb AJA:

[1] This is an appeal (and cross-appeal) against the judgement and order of Molete J making certain declaratory orders following a dispute that arose between the liquidators of a company in liquidation (Thotanyana) and two banks, First National Bank Lesotho Ltd (FNB) and Standard Lesotho Bank Ltd (Standard bank), collectively 'the Banks' which, it is common cause, are hire-purchase creditors of Thotanyana.

[2] The essence of the dispute is whether the loans extended to Thotanyana by the Banks under hire purchase agreements entitle the Banks to realise, alienate and to retain the proceeds of sale of the hire-purchase assets, without surrendering it to the liquidators who will retain the funds in the general pool of the sequestrated company's estate - for the benefit of all creditors, both secured and unsecured.

[3] Thotanyana was liquidated on 5 December 2014 and the appellants (Liquidators) were appointed by the Master of the High Court (master) on 15 December 2014. A dispute arose between FNB and the Liquidators about how certain assets purchased by Thotanyana on hire-purchase should be dealt with. The Liquidators took the view that those assets are estate assets in the liquidation, that FNB is a creditor of the estate and that its claim is secured by the assets, provided it filed a claim. On the other hand, FNB maintains that it is the owner of the assets bought on hire-purchase; that the assets are not estate assets and that, as hire-purchase creditor, it is not secured by any assets and that, as a hire-purchase creditor, it has the right to dispose of the assets to liquidate the debt owed by Thotanyana.

[4] In view of the impasse, FNB asked the Master to make rulings, a move that was opposed by the Liquidators who felt that the Master had no such power. The Master gave certain rulings any way - in favour of FNB - or at least against the

wishes of the Liquidators. The rulings are summarised by the Liquidators in their founding affidavit as follows:

- '(a) That it was within the Master's power to make the rulings in question;
- (b) That the applicant liquidators opted to release the FNB financed vehicles to the 5th Respondent during December 2014;
- (c) That the 5th Respondent was, at the time of the alleged release of the FNB financed vehicles, the owner of the vehicles;
- (d) That the Applicant liquidators' notice in terms of s135(10) came as an afterthought "upon realisation that they may possibly not receive any remuneration";
- (e) That there is no reason why the FNB financed vehicles should not be realised by FNB after the liquidators have released it to them;
- (f) That if the creditor realises the FNB financed vehicles, there will be no remuneration due to the liquidators of the company in liquidation;
- (g) That it was improper for the provisional liquidators to have sought expert legal advice without authorisation from the Master or creditors;
- (h) That the Applicants are provisional liquidators, not liquidators'.

[5] Aggrieved by the Master's conduct, the Liquidators approached the High Court (the Court) on an urgent basis seeking interim relief pending a review application, challenging the Master's rulings and seeking a host of declaratory relief, including the following:

- (a) The Companies Act 2011 (CA 2011) does not provide for or contemplate any first meeting of

creditors for purposes of proof of claims and election of liquidator;

- (b) If at any stage there is a need or request to appoint any additional liquidator, the Master may do so, bearing in mind the wishes of the creditors and any decision of the Master in that regard may be reviewed by the Court;
- (c) The liquidator(s) appointed by the Court or the Master in terms of the CA 2011 are liquidators and not provisional liquidators;
- (d) Section 86 of the Insolvency Proclamation 1957 applies also when a company is liquidated. The rights of hire purchase creditors are amended in terms of s 86. The assets are then estate assets and the creditor is a secured creditor;
- (e) Liquidators are entitled to remuneration on the sale of security assets, even if they should be sold by the creditor 'if entitled' to sell;
- (f) Liquidators have the right to take expert legal advice without prior authorization of the Master or creditors.

[6] The application was opposed and during the course of exchange of pleadings, the 6th respondent, Standard Bank, with leave of the court joined the proceedings, and made common

cause with FNB as it was similarly situated in respect of assets sold to Thotonyana on hire-purchase.

[7] In his written reasons handed down after hearing the parties, Molete J set out the issues he was called upon to decide as follows:

- (a) Whether the CA 2011 provides for the appointment of a provisional liquidator and whether that Act contemplates any first meeting of creditors for the purpose of proof of claims and election of a liquidator?
- (b) Whether s 86 of the Insolvency Proclamation 1957 has the effect of 'amending' the rights of hire-purchase creditors such that the hire-purchased property become estate property and the hire-purchase creditor becomes a secured creditor?;
- (c) Whether the Liquidators are entitled to remuneration on the sale of secured assets even if sold by the creditor, assuming the creditor is entitled to sell?
- (d) Whether the Liquidators have the right to seek legal advice without the authorisation of the Master?

[8] After hearing the parties, Molete J, on 19 March 2019, made an order in the following terms:

'(1) The Master of the High Court may from time to time be called upon to make rulings and findings with regard to a company in liquidation and it is the role of that office to do so.

(2) The Companies Act 2011 makes no mention of a provisional Liquidator but the Liquidator and Master of the High Court are required to comply with the Insolvency Proclamation ...regarding meetings of creditors.

(3) The Hire-Purchase owners of a property are secured creditors, but should they realise the proceeds of a sale of any of such assets the funds must be paid over to the Liquidators to be dealt with in the liquidation and distribution account.

(4) The Liquidators have the right to take expert legal advice without the authority of the Master or the Creditors.'

The appeal

[9] The Liquidators, although in substance successful, noted an appeal against the judgement and order of the High Court. Their complaints are that:

- (a) The High Court misdirected itself in finding that the Liquidators and the Master are required to comply with the Insolvency Proclamation 1957 regarding meetings of creditors - instead of finding that the CA 2011 does not provide for or contemplate any first meeting of creditors for purposes of proof of claims and election of liquidators;

- (b) That the High Court ought to have declared that if at any stage there be need or request to appoint an additional liquidator, the Master may do so bearing in mind the wishes of creditors and that the decision of the Master may be reviewed by the High Court;
- (c) That the High Court ought to have declared that liquidator(s) appointed by the High Court or the Master in terms of the CA 2011, are liquidators and not provisional liquidators.

The Banks' purported cross-appeal

[10] It will be recalled that Molote J handed down judgment on 14 March 2019. The Banks never brought any application to seek a stay of its execution pending appeal. Although, as is now apparent, the Banks wished to cross-appeal the judgment and order of Molete J, they took no steps to prosecute such cross-appeal.

[11] When the matter was set down in a previous session of this court, the banks lodged a notice of cross-appeal dated 12 November 2019 and received by the court's Registrar on 7 January 2020. The principal gripe expressed therein is that the High Court misdirected itself in finding that the Banks, although secured creditors, should realise the proceeds of sale of the assets and pay over to the Liquidators to be dealt with in the liquidation and distribution account.

[12] It is common cause that the notice of cross-appeal was hopelessly out of time but it was not accompanied by a condonation application. That is of great concern because the appeal was previously stood down to afford the Banks the opportunity to apply for condonation. Even when the appeal was re-enrolled for the current session, no application for condonation was filed by the Banks – only undated heads of argument received by the Registrar on 9 March 2020. Those heads purport to address both the Liquidators’ appeal grounds and those set out in the ‘cross-appeal’.

[13] It defies reason that the Banks seek to pursue the cross-appeal without seeking condonation for the late filing of the cross-appeal. I agree with Mr Letsika for the Liquidators that, in the absence of a condonation application for its late prosecution, the cross-appeal falls to be struck off the roll, with costs.

Liquidators appeal

[14] It now remains to consider the Liquidators’ appeal. That calls for an analysis of the High Court’s reasons and orders in so far as it is relevant to the Liquidators’ appeal grounds.

[15] Correctly recognising that the CA 2011 makes no mention of a provisional liquidator, Molete J asked himself what the implication is of the omission against the backdrop of the Liquidators’ assertion that the omission implied that the Master was not required to call a first meeting of creditors for the twin

purposes of: proof of claims and the election of a trustee (or liquidator).

[16] The learned judge concluded that because s 124 of the CA 2011 by reference incorporates the Insolvency Proclamation 1957 in respect of 'meetings of creditors' (*vide* s 124)¹ the first meeting of creditors is envisaged under the scheme of the CA 2011. According to the learned judge, where the Master appoints or nominates a liquidator 'that does not preclude the general body of creditors from exercising their right to "elect" a liquidator. It therefore becomes inconsequential whether or not the word "provisional liquidator" is found' in the Companies Act 2011'.

[17] Molete J then proceeded to consider the Banks' claim that they remain the owners of the hire-purchase assets even after Thotanyana was placed under liquidation. The judge placed reliance on s 135(3) of the CA 2011 to resolve that dispute. The section provides as follows:

¹ 124.(1) Subject to this Part, the rules in force under the law of insolvency with respect to the estates of persons adjudged insolvent shall apply in a liquidation of a company to -

- (a) meetings of creditors;
 - (b) the rights of secured and unsecured creditors;
 - (c) claims by creditors; and
 - (d) the valuation of future and contingent liabilities.
- (2) A person who is entitled to make a claim and receive payment in whole or in part from a company shall be entitled to do so in a liquidation of a company.
- (3) In applying rules of the law of insolvency in liquidation a claim by an unsecured creditor admitted by a liquidator shall be treated as if it were a debt proved in accordance with the requirements of the Insolvency Proclamation 1957 or any other law relating to insolvency.

“A secured creditor may –

- (a) Realise any property subject to a charge; if entitled to do so
- (b) Claim as a secured creditor in the liquidation, or
- (c) Surrender the charge to the liquidator for the general benefit of creditors, and claim in the liquidation as an unsecured creditor for his whole debt”.

[18] The judge reasoned that the Banks’ claim to realise the assets could only arise ‘if’ they were ‘entitled to do so.’ Since the “entitlement” was not defined in the CA 2011, resort had to be had to the Insolvency Proclamation 1957. He concluded that the Insolvency Proclamation 1957 does not include a hire-purchase seller such as the Banks as it mentions only the holder of a promissory note and a holder of a landlord’s hypothec. The result is that the Banks can only claim as secured creditors and even if they are allowed to sell the higher-purchase assets, they were required ‘to pay the whole amount to the liquidators to deal with in terms of the law as part of the liquidation process. The learned judge justified that conclusion on the basis that the ‘Hire-Purchase Seller would be entitled to receive only the balance outstanding in terms of the agreement’. He went on to hold that ‘even the question of the entitlement of the liquidators to be paid from the funds becomes redundant, because the funds are dealt with in the liquidation and distribution account.’

Grounds of appeal considered

[19] Briefly stated, the appeal grounds are:

- (a) First meeting of creditors for proof of claims and election of liquidators is not part of the CA 2011;
- (b) Additional liquidators may be appointed by the Master if need arises subject to the High Court's review power;
- (c) CA 2011 only makes provision for appointment of liquidator(s) and not provisional liquidator(s).

[20] It should be apparent from all that I have said so far, that the real disputes between the Liquidators and the Banks are (a) whether the Banks are entitled to sell the hire-purchase assets to liquidate the debts owing to them before accounting to the Liquidators, (b) whether the Liquidators were entitled to seek legal advice and (c) whether the Liquidators are entitled to remuneration from the hire-purchase assets. On those issues the Liquidators achieved success in the High Court. Against that backdrop, it is not immediately apparent why the Liquidators have appealed. I say so, and repeat that, the High Court made the following crucial findings in favour of the Liquidators:

- (a) The proceeds of sale of the hire-purchase must, if sold by the Banks, be paid over to the Liquidators to be retained in the pool of the assets of the company in liquidation for the benefit of all creditors.

- (b) The liquidators' fees may be paid from the hire-purchase assets.

[21] Be that as it may, by appealing and advancing the grounds of appeal such as they have done, the Liquidators have chosen the battlefield and the rules of engagement. They must stand or fall by those. Perhaps they needed an authoritative interpretation of the relevant provisions of the CA 2011 and the Insolvency Proclamation 1957 as they are insolvency practitioners. Ordinarily, the court will not accept an invitation to provide advisory opinions, but the issues placed before us arise from live disputes; so I will proceed to deal with the grounds of appeal.

[22] I will consider first the issue of liquidator(s) versus provisional liquidator(s). The heads of argument filed on behalf of the Banks do not address that issue. The issue appears to have become a live issue because at some stage the Liquidators were referred to as 'provisional liquidators' as I will show below.

[23] The confusion obviously arose because of the existence of such a distinction under South African law. In any event, it appears to me to be a distinction without difference even under South African law where provision is made therefor. Under South African law, the powers of a provisional liquidator are the same as those of a liquidator.²

² See s 1(1) of the SA Companies Act 61 of 1973, which defines a "liquidator" as including, unless the context indicates otherwise, a provisional liquidator: *Ex parte Provisional Liquidators Pharmacy Holdings Ltd* 1962 (2) SA 12 (W) 14; *Ex*

[24] Coming to the position in Lesotho, in terms of the CA 2011, the power of the Court to appoint a liquidator is triggered by an application brought to it under s 127(1) to place a company under liquidation. According to s 127:

*'(2) If the Court is satisfied that it is necessary or expedient for the purpose of maintaining the value of assets owned or managed by the company, appoint a liquidator; **otherwise the Court shall direct the Master to appoint the liquidator.***

(3) The appointment of a liquidator by the Court under subsection (2) shall be subject to confirmation by the Master.

(4) Before confirmation by the Master, a liquidator appointed by the Court shall have the rights and powers, duties and entitlements of a liquidator, unless the Court limits the powers or imposes conditions on their exercise.

*(5) The Master **shall confirm or appoint a liquidator in accordance with the law governing insolvency.***' (My emphasis).

[25] Subsection (5) of s 127 makes clear that whether the liquidator is confirmed by the Master after appointment by the Court or by the Master on the direction of the court, it 'shall' be 'in accordance with the law governing insolvency'.

[26] Section 128(1) of the CA 2011 in turn states:

'As from the commencement of the liquidation of a company-

parte Contemporary Refrigerator (Pty) Ltd 1966 (2 SA 227 (D) 229.

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

[27] Subsection (4) of s 127 of the CA 2011 contemplates that the liquidator appointed by the Court must be confirmed by the Master. But before such confirmation, the liquidator 'shall have the rights and powers, duties and entitlements of a liquidator, unless the Court limits or imposes conditions on their exercise.'

[28] In other words, upon appointment by the Court and before confirmation by the Master, a liquidator has the same powers as the liquidator appointed by the Master.³ The intent is clear: To cloth the liquidator with sufficient authority to safeguard the assets of the company in the *interregnum* before confirmation by the Master. The liquidator appointed by the court and subject to confirmation by the Master should, therefore, not be confused with the one appointed by the Master on the direction of the Court.

[29] The parties failed to ventilate in their pleadings and in written submissions on appeal the manner in which the Liquidators in the present case were appointed, yet that is a very important consideration in determining the critical issue they expect the court to decide.

³ Section 129 of the CA 2011 sets out the powers of the liquidator to include 'the powers necessary to carry out his or her functions and duties' under the CA 2011 'and those provided for under the Insolvency Proclamation' or any other law relating to insolvency.

[30] I have had regard to the record and the following becomes apparent from the annexures to the affidavit deposed to by FNB's Head of Credit, Mr Vusi Yende, on behalf of the Banks. In a letter dated 9 December 2014 to the Master (Annexure *FNB 1*: Record p. 124) lawyers Du Preez, Liebetrau & Co. wrote to the Master on behalf of FNB to record the following:

**'FNB v Thotanyana Mining & Civil Works (Pty) Ltd
(CCT/173/2013
Standard Bank Lesotho Bank/ Thotanyana Mining & Civils
(Pty) Ltd (CCA/0033?2014**

The aforesaid company was liquidated by order of the High Court in the aforesaid application. You are referred thereto that **the Court directed** that you make an appointment of the liquidators in the estate within 14 days. We represent the major creditors in the estate who are exposed to claims against the estate exceeding an amount of M20 million. On behalf of the creditors we therefore request that you appoint the following provisional liquidators upon the nomination of the liquidating creditors herein:

Me Moroesi Tau

Mr DG Roberts

Mr CB St. C Cooper'.

[31] Three things are clear from this letter. First, the Court granted an order of liquidation without appointing liquidators. Second, the Court directed the Master to appoint the liquidators. Third, the lawyers mis-characterised the liquidators to be appointed by the Master by importing the language of 'provisional liquidator' not used in the CA 2011.

[32] I have already demonstrated that the Master either confirms a liquidator (ie when the Court appoints), or appoints one when the Court has not itself appointed, 'in accordance with the law governing insolvency'.⁴ The Liquidators in the present case are therefore appointed by the Master on the direction of the Court 'in accordance with the law governing insolvency'.

[33] The appointment of a liquidator (or 'trustee' in the language of the Insolvency Proclamation 1957) is governed by s 40 of that Proclamation, which states:

- (1) *On receipt of an order of the Court sequestrating an estate finally, the Master shall immediately convene by notice in the Gazette, a first meeting of the creditors of the estate for the proof of their claims against the estate and for the election of a trustee.*
- (2) *The Master shall publish such notice on a date not less than ten days before the date upon which the meeting is to be held and shall in such notice state the time and place at which the meeting is to be held.*
- (3) *After the first meeting of creditors and the appointment of a trustee, the Master shall appoint a second meeting of trustees for the proof of claims against the estate, and for the purpose of receiving the trustee's report on the affairs and condition of the estate, and giving the trustee directions in connection with the administration of the estate. The trustee shall convene*

⁴ The Companies Act 2011, s 127(5).

such meeting in the manner prescribed in subsections (1) and (2).

[34] I am therefore satisfied that Molote J was correct when he concluded at para [18] of his judgement that:

'Where the Master "appoints" or "nominates" a liquidator, that does not preclude the general body of creditors from exercising their right to "elect" a Liquidator. It therefore becomes inconsequential whether or not the word "provisional liquidator" is found in the Companies Act 2011. In practice, at the first meeting, the Master's appointment is usually confirmed, but legally the meeting is not obliged to do so and it is not precluded from confirming the master's or electing a different Liquidator. In any event, the Master is required to take account of the requisitions and wishes of creditors in making the initial appointment in terms of the Act.'

[35] This conclusion also disposes of appeal ground (a).

[36] As for appeal ground (b), asking the Court to declare that the exercise of the Master's power to appoint additional liquidators is reviewable by the High Court is entirely unnecessary because such a power is inherent in the jurisdiction of the High Court. Similarly, it was utterly otiose to ask the High Court to declare an obvious thing such as that the Master may appoint additional liquidators if the need arises. I find it unnecessary for this court to make any order in that respect in the appeal. In any event, if one has regard to the rulings of the Master which were being impugned (*vide* Record,

p 7 and quoted in para [4] of this judgement) one does not find anything there by way of the Master's ruling which suggests that the Master took a view contrary to what is sought by way of a declarator.

[37] Since I am satisfied that it has not been demonstrated that the High Court misdirected itself in the respects alleged by the Liquidators, the appeal must fail.

Costs

[38] The Banks have conducted themselves in the most reprehensible manner in the manner that they pursued their cross-appeal and their conduct deserves censure. Besides, ordering the Liquidators to pay the costs of the appeal serves no purpose and it is more appropriate that costs be in the liquidation. The costs relating to the ill-fated cross-appeal is a different matter. It will be unjust for the estate to bear the costs of the Banks' lack of diligence. The costs of the struck cross-appeal must therefore be borne by the Banks.

The order

[39] In the result, I make the following orders:

- i. The appeal is dismissed and the costs of both parties to be in the liquidation;
- ii. The cross-appeal is struck from the roll and the Banks shall bear the Liquidators' costs consequent upon the

employment of instructing and instructed counsel,
where engaged.



P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



M. CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:



T. MTSHIYA
ACTING JUSTICE OF APPEAL

For Appellant: Mr. Q. Letsika

For Respondents: Adv. T. Mpaka (for the 5th and 6th Respondents)