IN THE HIGH COURT OF LESOTHO

CIV/APN/512/10

In the matter between:

LEHLOHONOLO **PETITIONER**

AND

LETA SECURITY GUARDS (PTY) LTD **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice T. Nomngcongo
on the 10th November, 2010

The applicant has approached this court for a provisional winding up of the respondent company of which he describes himself as managing director and a share holder. The application was made on a certificate of urgency in which the reason for urgency is stated as the huge sums of money to tax authorities, employees and other creditors and if it is allowed to incur further liabilities this would prejudice creditors and shareholders. The certificate further states that the company is being mismanaged by the judicial manager to discharge his statutory duties but instead has delegated them to a shareholder Mr Da Silva.

The applicant filed his founding affidavit and in return the judicial manager of the respondent company Advocate Nathane filed an answering affidavit in which he raised five points in limine. The applicant did not file any replying affidavit apparently contending that the only issue to be determined is whether the

applicant is a creditor of the company and whether it is unable to meet its debts as envisaged by section 173 of the Companies Act 1967 as well as section 174 thereof.

The points in limine raised are serration, lack of urgency, lack of locus standi, non compliance with the oaths and affirmations Proclamation of 1964, material non-disclosure and non-joinder I ordered that these points be argued first as it appears that they might decide the matter conclusively. I will deal with these points not necessarily in the order that they were raised.

The applicant claims urgency from the company's failure to pay taxes and the judicial manager's failure to carry out his duties. The applicant's own papers show that the situation regarding taxes prevailed well before June 2009 when on the 17th June 2009, the company acknowledged receipt of a final demand notice from the LRA. The applicant, and significantly as the managing director, did nothing about this until September this year, when he approached court claiming urgency. Mr Letsika argues that the question of urgency does not arise because the respondent was served with the papers and that he answered and therefore did not suffer any prejudice.

There is no merit in this argument, the fact of the matter is that the applicant approached court in terms of Rule 8 22 (4) and actually moved court which did not accede to his claims of urgency and ordered how to serve papers on the respondent. He has actually taken up the time of the court claiming urgency which the court find to be lacking. He cannot be heard therefore to say that no one suffered prejudice.

The applicant's papers tell that the company is under judicial management. He does not tell us when the judicial management order was made. For all we know,

it might well have been around the same time as it was defaulting on its taxes. Having told us that the company is under judicial management, it is no less than starting that the applicant has not joined the judicial manager in these proceedings if only because in terms of section 266 of the Companies Act he takes over the management of the Company and further in terms of section 268 he takes possession of all its assets movable or immovable. This makes it abundantly clear that he is an interested party who must be joined in these proceedings.

And so it is with the Master of the High Court who may be required make a report before a judicial management order is made. (section 265 (4)). He was fatally not joined in these proceedings.

The petitioner is facing criminal charges, it being alleged that he defrauded the company which he is now asking to be wound up. It is agued on behalf of the petitioner that, there is no relationship between the charge and the inability of the company to pay its debts. This argument is disingenuous for indeed if that is proved against him he would have locus standi to bring these proceedings for memo contra suum factum venire debit(no one neglect to go against his own act). And in this regard it should not be forgotten that the company floundered during the petitioner's own watch. Further more the petitioner following on those charges might well have committed the offences specified in the section 274 of the Act and the court hearing this petition may well say the petition must await the outcome of those criminal proceedings. The non-disclosure of the charge against the petitioner is therefore fatal.

Finally I asked counsel for the petition if the process of judicial management could cheer concurrently with the process of winding up. He conceded that they could not cheer but quoted sections 223, 265 and 271 of the Act. I must say the two sections, 223 and 265 have nothing to do with the remaining in the force or otherwise of a judicial management order. Section 271 might be applicable. It

deals the circumstances under which a court, upon application by judicial manager on any interested person may cancel a judicial management order. I have no such application before me.

The application is dismissed. The respondent has asked for costs on the attorney and client scale. No opposition was proffered by the applicant. In view of the fact that the petitioner has flouted every rule in the book, I find that such an order of costs is appropriate and it is ordered that costs be costs on the attorney and client scale.

T.NOMNGCONGO

JUDGE