CIV/APN/ /2011

IN THE HIGH COURT OF LESOTHO

In the Matter Between:-

MOOSA CASH & CARRY (PTY) LTD **APPLICANT**

And

TEBELO MAKHAKHE **1st RESPONDENT**

THE SHERIFF OF THE HIGH COURT **2nd RESPONDENT**

In RE:-

CIV/T/532B/2011

IN THE HIGH COURT OF LESOTHO

In the Matter Between:-

TEBELO MAKHAKHE **PLAINTIFF**

And

FRASERS LESOTHO (PTY) LTD **DEFENDANT**

JUDGMENT

Coram : Hon. Majara J

Date of hearing : 23rd September 2013

Date of judgment : 12th August 2014

Summary

Application for rescission on grounds of mistake common to parties – mistake due to representation of one party's Counsel – who has locus standi – any party affected by order or judgment of court - effect of liquidation after commencement of proceedings – matter to be proceeded with only with leave of court.

ANNOTATIONS

BOOKS

1. H.R. Hahlo; South African Company Law Through the Cases, 3rd Edition

STATUTES

1. High Court Rules of 1980
2. Companies Act No. 25 of 1967

CASES

1. Metcash Trading Africa (Pty) Ltd v Frasers Lesotho (Pty) Ltd CIV/APN/195/2005

2. ‘Malebina Rosa Lepamo v Lesotho Bank and Ors LAC/REV/83/03 (unreported)
3. ‘Mampe Khaebana v IFTS (Pty) Ltd in Liquidation & 3 Ors C of A (CIV) No. 26 of 2005
4. Foss v Harbotle (1843) 4 HARE 46 67 ER

[1] This application was brought on urgent basis for rescission and stay of execution, pending finalization of this matter in terms of which the applicant seeks a judgment that was delivered by this Court in **CIV/T/532B/2011** to be set aside on the basis of a mistake common to the parties as well as costs and further and/or alternative relief.

[2] A brief background to this application is that the respondent herein instituted an action against **Frasers Lesotho (Pty) Ltd** for payment of damages in the sum of **M34, 000.00** together with interest thereon at the rate of 18% per annum from the 20th November 1996 being the value of plaintiff’s goods which he alleged the defendant had failed and/or refused to release them. It was not in dispute that the said goods had been attached and removed by the messenger of Court following a default judgment that was entered against the plaintiff for payment of **M7, 589.92** by the Mafeteng Magistrate’s Court.

[3] After the goods were attached, they were kept at the defendant’s business premises in Maseru whose storage facility was hired by the Messenger of Court. In its judgment dated and delivered on the 10th February 2010 this Court found in favour of the present respondent. Pursuant to that judgment the Deputy Sheriff attached property which the applicant alleges belongs to it as it attained ownership of the defendant in the action. It is his case that the property is subject to sale at any time to its prejudice hence the present applicant.

[4] n the founding affidavit deposed to by one **O.S.M. Moosa**, who describes himself as the Managing Director of the applicant, the defendant in **CIV/T/532B/02** namely**, Frasers Lesotho (Pty) Ltd** is a registered company and a subsidiary of the applicant herein post liquidation. It is his case that at the time the action was instituted against it in 2002 the defendant was operating as Frasers Lesotho Limited and did not belong to the applicant herein but was under a different ownership.

[5] Before the judgment of the Court in that trial **Frasers Lesotho (Pty) Ltd** was placed under provisional liquidation on the 20th May 2005 per an order of my sister Hlajoane J in **Metcash Trading Africa (Pty) Ltd v Frasers Lesotho CIV/APN/195/2005** subsequent to which **Frasers Lesotho (Pty) Ltd** was placed under final liquidation on the 27th June 2005 per this Court's final order of liquidation.

[6] Pursuant to a Sale of Share Agreement i.e. Annexure **"MCC A"** between **Metcash Trading Africa (Pty) Ltd and Moosa Cash and Carry (Pty) Ltd**, the applicant herein, ownership passed on to the latter but only with liabilities known to it and to be dealt with in terms of the stipulations in Annexure **"MCC B"**.

[7] The 1st respondent opposes this application on the grounds that amongst others, representations were made on behalf of **Frasers Lesotho (Pty) Ltd** by its Counsel the late **Advocate Makeka KC** to the effect that the company had not been liquidated and was back in business and that the case against it could proceed.

[8] Secondly that the applicant is stopped from moving this application when a representation had been made on behalf of the defendant in **CIV/T/532B/02** and that presentation prejudiced him in that pursuant to it, he failed to take timely legal appropriate steps to recover his claim against the defendant therein. That in

addition, the defendant's Counsel in the main trial could not have been mistaken in his response to the Court's enquiry whether it was proper to proceed with the case against the defendant therein.

[9] Further that the present applicant lacks *locus standi in judicio* to apply for rescission in this application as per his averment, the defendant in the main action was not liquidated but apparently reached a compromise with its creditors and thus continues to exist even if shares have changed hands. Lastly, that in the circumstances of the present case it cannot properly be held that a reasonable mistake as contended by the applicant, was committed.

[10] Against this backdrop, there are mainly three issues for determination, namely whether the present applicant has the *locus standi* to apply for rescission of a judgment that was granted in favour of the respondent **in CIV/T/532B/02** to which it was not a party; whether the defendant in the main was indeed liquidated and whether there is a mistake common to both parties on the basis of which the decision in **CIV/T/532B/02** can be rescinded.

[11] In connection with the issue of *locus standi in judicio,* **Adv. Hlalele** made the submission that the applicant has a claim on the property sought to be attached and executed as it has **Frasers Lesotho (Pty) Ltd** as its subsidiary company post this Court's provisional and final orders of liquidation in **CIV/APN/195/2005**.

[12] That in terms of the **Companies Act**[1], no action shall be proceeded with or commenced against a company except by leave of the court and subject to such terms as the court may propose. He added that representations made by the late **Adv. Makeka** are not conclusive as the orders of liquidation before the Court are sufficient to negate them. Further that **Adv. Makeka** represented **Frasers Lesotho**

[1] Section 180 (a) Act No. 25 of 1967

(Pty) Ltd prior to the liquidation and did not have the authority to represent the company that was in liquidation in any subsequent appearances.

[13] It was his further submission that both the provisional and final orders of liquidation are on record as evidence of the fact and are therefore inconsistent with the said representation. Further that the respondent erroneously proceeded with the main action to completion contrary to the statutory provisions of the **Companies Act** and the Court properly advised could not have proceeded with the matter.

[14] Lastly that the respondent herein was not disclosed as one of the creditors of **Frasers Lesotho (Pty) Ltd** prior to or post liquidation and that the agreement of sale of shares between the applicant and Metcash was done with bona fide knowledge of the liabilities under Frasers as were disclosed by Metcash.

[15] For the respondent, **Adv. K Mohau KC** made the contention that if indeed it be true that the applicant is now the holding company of Frasers that merely means it holds more than 50% of its equity share capital or is a member of such company and controls the composition of its board of directors. [2]

[16] It was his submission that the present applicant has no right to have brought this application as its status is no different from any shareholder in a company that has no right to institute proceedings on its behalf and that this application has to fail on this ground alone.

[17] With respect to the issue whether there was a mistake on the basis of which the Court can grant the order sought, Counsel for the respondent made the submission that the alleged mistake has not been proved at all and the statement made before the Court by the late **Makeka KC** was unequivocal and there is no evidence that it was made without the knowledge of the correct facts.

[2] Section 115 (1) (a) & (5) of the Companies Act

[18] Further that even if this Court were to hold that Frasers Lesotho was at one point liquidated it should hold that the its liquidator acquiesced in the action against the company proceeding and waived any right to object to the case proceeding against the company he/she was winding up. Lastly that otherwise the question that would need to be asked is who was giving instructions to the defendant's lawyers throughout the time the main case was proceeding.

[19] I now proceed to deal with the issue whether the present applicant has the *locus standi* to bring this application. It is my view that the answer to this issue lies in whether or not as alleged, **Frasers Lesotho Pty Ltd** was liquidated and sold to the applicant herein as a matter of fact and if, so what are the consequences or effect thereof.

[20] I have stated that inn this regard, it is the case of the applicant that the company was placed under provisional liquidation per Hlajoane J's order and under subsequently final liquidation. This is disputed by the respondent who relies on a representation that was made by the late **Adv. Makeka KC** before the Court that the company was not liquidated as had earlier been suggested by his colleague, **Adv. Sephomolo**.

[21] In my opinion, the issue whether or not a company was placed under liquidation is one of fact that is easily determinable by reference to the Court's records because liquidation is a judicial process that is done in terms of the provision of the law, the **Companies Act**. It is also my view, that where there is a dispute regarding this factor, the Court should not be concerned with the correctness or otherwise of whatever presentations that might have been made either by officers of this Court or anyone because it is a matter of public records.

[22] For his part, the applicant handed in the provisional order of liquidation and later handed in through his legal Counsel what is on the face of it, a final liquidation order granted by the late Honourable Molai J on the 4th July 2005. Although the date that appears on the final liquidation order differs from the one that was avered by the applicant, it is my view that since it is not its authenticity that is disputed, but rather reliance is placed on the representations that were made by Counsel for the defendant in the main action, it has to be accepted as a true reflection of an order of this Court.

[23] In other words, even if it can be accepted that **Adv. Makeka KC** did make a representation that the defendant in **CIV/T/532B/02** was not in liquidation post the institution of the main action, this does not in itself negate the fact that the defendant was as a matter of fact liquidated *ex facie* the two orders of the Court. Thus unfortunately even though made, it is my opinion that the representation does not carry more weight than the two orders of Court.

[24] To support its contention that Frasers Lesotho (Pty) Ltd was never liquidated, the respondent annexed a copy of an incomplete record of proceedings held at the DDPR between **Moeketsi Moroka v Frasers Lesotho Ltd,** to his answering affidavit. Perusal thereof reveals part of a cross-examination of one of the witnesses with respect to the status of **Frasers Lesotho Ltd** and whether it was sold and/or placed under liquidation. Unfortunately, most of the answers are not clear as this is a transcribed record. However, the crucial evidence is that of a witness, *Mr. Galhenage* who per an incomplete portion of his answer is that *"I work at Fr…"* which presumably means Frasers Lesotho Ltd. At p 47 thereof, he responds as follows to **Mr. Mohau's** question on the issue of whether or not Frasers was liquidated:-

"May I answer by saying that the company was not liquidated when we bought the company. It's an ongoing company. It was just not liquidated."

[25] It is however worthy to point out that this portion is where the copied part of the record ends so that his answer to Mr. Mohau's question whether he was testifying to that, speaking on behalf of Moosa' Cash and Carry is not captured. What I observe is that Mr. Galhenage's status in the company is not clear nor is the question whether he holds any brief for Frasers or the present applicant and if so in what capacity. It is also not clear who he means by '*we'* in his response and in the absence of any other information to enlighten me I am unable to place much value on this record.

[26] I have already shown that it is incomplete and has very scant information that would be of any real assistance on this issue. This is especially so in the light of the existence of the orders of the Court that I have referred to above. It is therefore my view that having accepted that there is documentary proof of the alleged liquidation that far outweighs the contents of that record.

[27] Thus, the next issue for my consideration is whether or not given these circumstances the applicant herein has the *locus standi* to bring this application. In this connection the Rules of Court prescribe the person who and the circumstances under which variation or rescission of orders or judgments may be granted. Rule 45 [3] provides as follows in relevant parts:-

"(1) The court may, in addition to any other powers it may have ***mero motu*** *or upon the application* ***of any party affected****, rescind or vary –*

[3] Rule 45 of the High Court Rules of 1980

(a) An order or judgment erroneously sought or ***erroneously granted in the absence of any party affected thereby****:*

(b) An order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) An order or judgment granted as a result of a mistake common to the parties." (my emphasis)

[28] The above rule provides for three scenarios when any party can seek variation or rescission. In his papers, the present applicant invokes the provisions of paragraph (c) namely that the judgment of the court in **CIV/T/532B/02** was erroneously granted due to a mistake common to the parties in the action regarding the issue of liquidation of the defendant therein. The respondent in turn contends that he proceeded with the action on the basis of a representation by the defendant's Counsel in the action to the effect that the defendant was not liquidated thus, there was no mistake.

[29] While the respondent's assertion is not disputed, it is my view that that factor notwithstanding, a mistake is one regardless of how it came about. In other words the Court is not called upon to enquire into the reasons behind the, that is, whether it was caused by the utterances, actions or other conduct of one of the parties. What is important to consider is whether it has been established that there was a mistake on the basis of which the applicant can succeed in its prayers.

[30] Having already found that the existence of both the provisional and final Court orders of liquidation falsify the representation by **Adv. Makeka**, it is my view that this suffices for the Court to find that indeed there was a mistake common to both parties in that a representation which was incorrect was made. Thus, even though it was not a party to the proceedings as presently constituted,

the applicant came to Court on the basis of a writ of execution of that judgment on its property. It is therefore my opinion that it is an affected party as envisaged by the rule and should be found to have the l*ocus standi* to seek relief in the manner it did.

[31] his in turn leads to a determination of what are the consequences of the liquidation. In terms of **S180 of the Companies Act** which the applicant relies on it is provided that:-

"In a winding up by the court –

No action or proceeding shall be proceeded with or commence against the company except by leave of the court and subject to such terms as the court may impose;
Any attachment or execution put in force against the assets of the company after commencement of the winding up shall be void*;*

Every disposition of the property (including rights of action) of the company, and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up shall, unless the court otherwise orders, be void." (my emphasis)

[32] In my opinion, the above provisions are clear and need no interpretation. Coming back to the facts of the present case, the evidence that has been placed before the Court on behalf of the applicant shows that there was a Sale of Share Agreement between the applicant and Metcash. This means that there was a transfer of shares and/or alteration in the status of members of **Frasers Lesotho (Pty) Ltd** so that section 180 has to apply.

[33] Further, in the light of the fact that it is not the case of the respondent that he sought the leave of court to proceed with the action, albeit this is understandable due to the representation, the judgment is his favour is rendered void by the

statutory provision referred to above. In this regard, I wish to adopt the remarks of the Labour Appeal Court in the case of '**Malebina Rosa Lepamo v Lesotho Bank & Ors**[4] where it quoted with approval the decision of the Court of Appeal in **Mampe Khaebana v IFTS (Pty) Ltd in Liquidation & 3 Ors** [5] *to wit*:-

> *"IFTS was placed under provisional liquidation on 20 August 1998 and finally on19 September 1998. The bank was voluntarily wound up on 31 January 2001.*
> *It was conceded that at no stage was leave of the court – by definition the High Court – requested or granted. The section 180 (a) requirement is so explicit and mandatory that Mrs Kotelo so (sic) be forgiven for not having any submission to overcome this obstacle of non-compliance on the part of the applicant."*

[34] For this reason, the submission that the applicant acquiesced to the matter being proceeded with cannot stand because the statutory provision is mandatory in its terms. While it is common cause that the main action was instituted prior to the liquidation of **Frasers Lesotho (Pty) Ltd**, it has not been suggested that the action was **proceeded with**, with leave of the court as required by the provision.

[35] At any rate, pursuant to paragraph (c) of section 180 quoted above, it does not matter whether the status of the applicant is that of a shareholder or not in light of the fact that per the said agreement, it purchased 95% of the shares of Frasers Lesotho (Pty) Ltd thus altering the status of the members thereof as envisaged by the section.

[36] This brings me to the last submission that was made on behalf of the respondent on the basis of the discussion of the rule in **Foss v Harbotle (1843) 2**

[4] LAC/REV/83/03 (unreported) par. 12
[5] C of A (CIV) No. 26 of 2005

HARE 461, 67 ER 189 by HR Hahlo.[6] In this connection **Adv. Mohau KC** submitted that the present applicant has no right to have brought this application in view of the position of the law stated at p534 of Hahlo's work, *to wit*, *"if a wrong is committed against a company the proper person to sue is the company, as the injured party, and not an individual shareholder"*. This principle is reiterated by the Court in the Foss case and I am in respectful agreement with it.

[37] *In casu*, at page 18 of the record is a document entitled Resolution of the Directors of **Frasers Consolidated (Pty) Ltd (Comprising Frasers Lesotho (Pty) Ltd – post liquidation)** in which it was resolved that **Moosa Cash & Carry (Pty) Ltd** as a holding company of **Frasers Consolidated (Pty) Ltd** institutes this application and that Mr. O.S.M. Moosa the deponent to the founding affidavit be empowered to sign all documents to effect the resolution.

[38] In my opinion, although the present application was instituted by **Moosa Cash & Carry (Pty) Ltd** pursuant to the resolution referred to above, it cannot be correctly argued hat it is suing as an individual shareholder because the resolution is that of **Frasers Consolidated (Pty) Ltd** which *ex facie*, was made on the 5th April 2011. Thus, this argument does not advance the case of the respondent any further and has to fall away.

[39] It is for all the foregoing reasons that I accordingly enter judgment in favour of the applicant in terms of prayers 1 and 2 in the Notice of motion. However, it is my view that because of the fact that the respondent proceeded with the matter pursuant to the representation of the defendant's Counsel in **CIV/T/532B/02**, it would be a miscarriage of justice to order that he pays the costs of this application. Accordingly, there is no order as to costs.

[6] South African Company Law Through the Cases; 3rd Edition p 535

N. MAJARA
JUDGE

For the applicant : Mr. Hlalele

For the respondent : Mr. K. Mohau KC