CCA/0035/2016

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

In the matter between

LIQUIDATORS OF THOTANYANA MINING

& CIVIL WORKS (PTY) LTD (in liquidation) APPLICANT

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 6TH RESPONDENT

JUDGMENT

Coram : L.A. Molete J
Date of hearing : 06th March, 2018
Date of Judgment : 14th March, 2019

SUMMARY

Liquidation – Declaratory orders sought by Liquidators – Whether Master is entitled to make rulings – Whether 2011 Companies Act provides for Provisional Liquidator – Effect thereof – Liquidators not expected to seek Masters permission to seek expert legal advice – Hire Purchase Property on liquidation – How is it to be treated – Declaratory orders granted in respect of only some of the prayers sought by liquidators.

ANNOTATIONS

CITED CASES

MOLELLE AND OTHERS V R (CRI/T/95/2002) in *http://www.Lesli.org.ls/judgt/High Court 2004/2009*.

LEPOQO SEOEHLA MOLAPO V DIRECTOR OF PUBLIC PROSECUTIONS 1997(8) BCLR 1154

NKUEBE AND OTHERS V MINISTER OF FINANCE AND OTHERS CIV/APN/111/2001 in *http://www.Lesli.org/ls/judgt/high court/201/49*

DUBLIN CITY DISTILLERY V DOHERTY [1914] AC 823

BOWMAN NO V SACKS AND OTHERS 1986 (4) S.A. 459

DE WET NO V UYS NO EN ANDERE 1998 (4) SA 694

STATUTES

COMPANIES ACT 1967

COMPANIES ACT 2011

INSOLVENCY PROCLAMATION 1957

HIRE PURCHASE ACT 1974

[1] This is an application by the liquidators of **Thotanyana Mining and Civil Works (Pty) Ltd** (in liquidation) for an interdict pending the finalisation of the matter and for a declaratory order which is the ordinary relief set out in the notice of motion.

[2] The interdict sought to prevent the Respondents banks from alienating, selling or otherwise disposing of the assets sold to the company in liquidation. The banks sold them to the company under a series of hire

purchase agreements. The interdict was pending the final determination of the matter and the ordinary relief sought.

[3] In the ordinary relief, the Applicant sought a review of the decision of the **Master of the High Court.** The decision was made in response to 5th Respondents request to call a meeting of creditors in the estate, whereupon the Master made certain rulings and findings. It is the Applicants' contention that it was not within the Master's power to make the rulings in question.

[4] The rulings of the Master will be dealt with later, all that should be said for now is that they are very much linked or even intertwined with the declaratory orders the Applicants seek, with the result that some of the declaratory orders sought will have a bearing on the Masters rulings.

[5] The declaratory orders sought were in paragraph 2 of the notice of motion and can be summarised as follows; it should be declared:

(a) That the Companies Act 2011 does not provide for the appointment of provisional liquidators and by extension does not contemplate any first meeting of creditors for the purposes of proof of claims and election of the liquidator.

(b) That Section 86 of the Insolvency Proclamation of 1957 applies when a company is liquidated, and the rights of the hire-purchase creditors are amended in terms of Section 86; with the result that the assets become estate assets and the creditors become secured creditors.

(c) That the liquidators are entitled to remuneration on the sale of secured assets even if they are sold by the creditor "if entitled to sell".

(d) That the liquidators have the right to take legal advise without prior authorisation of the Master or Creditors.

[6] It is necessary to first set out a brief history of the matter and the issues that are common cause between the parties: These are:

(a) The company was liquidated on the **5th December 2014** and three liquidators were appointed namely; **Attorneys Mr B. st cl. Cooper**, **Mr D.G. Roberts** and **Ms M. Tau – Thabane**, the Applicants herein

(b) It is unclear what steps were taken towards liquidation of the company, but the liquidators found it necessary to seek expert legal advise in connection with the claims of the two banks, which claims were secured. The banks had sold to the company in liquidation motor vehicles and machinery under various hire-purchase agreements.

(c) Following the advice, it seems that the liquidators then issued notices in terms of the **Companies Act No10 of 2011,** with particular reference to **Section 135(10).** The banks were called upon to file their claims as secured creditors within 20 working days, failing which they would be taken to have surrendered their charge to the liquidators for the general body of creditors.

(d) It is common cause that the vehicles and machinery were at that stage already in the possession of the banks though parties differ on why they were in the possession of the banks.

(e) The banks, in particular the **FNB,** held the view that they were entitled to realise the property in terms of **Section 135(3) of the Companies Act** and then claim as an unsecured creditor for any balance due, or alternatively account for the surplus only; if there is any. They denied that the vehicles were property in the estate in liquidation because ownership never passed to the company in liquidation as the Banks were not paid in full.

(f) On the other hand, the liquidators maintain that the banks could not do this; because the property of the company in liquidation became estate property and could only be realised by the banks with their consent and that of the Master. The total proceeds are to be paid into the estate to be dealt with by the liquidators in their final account.

(g) The **FNB** then wrote to the **Master of High Court** to request a first meeting of creditors to be held and reiterated their position that they remain owners of the vehicles. They sought the Master to make a ruling to clarify and interpret the **Insolvency Proclamation, 1957, the Hire Purchase Act 1974** and **the Companies Act 2011.**

(h) The **Master of the High Court** did give a ruling in the matter on the **9th May 2016**. It is in this ruling that she promised to call the first meeting of creditors, and also made some added comments and findings which did not sit well with the Applicants. The result was this application in which amongst other things, the Applicants even question the authority of the Master to adjudicate and determine the matter.

(i) After a number of interlocutory applications and disputes about the filing of further affidavits and Applicants' Attorneys and Counsels' rights to be heard in Court on behalf of the Applicants, it was finally decided that the Court should go to the merits of the case to avoid confusion and mistakes that could occur in the future.

[7] This is what this judgment will set out to do and in doing so I am convinced that the first step is to interpret the law in this respect being both the **Companies Act 2011** and the **Insolvency Proclamation 1957**.

[8] In terms of **Section 124** of the **2011 Companies Act,** the **Insolvency Proclamation** is extended to apply to liquidations in the following manner:

> "(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 of creditors; and
>
> (d) The valuation of future and contingent liabilities"

[9] I agree that the words subject to this part; (i.e. the part dealing with liquidation) places a restriction on instances in which the Insolvency Proclamation may be applied. It means that where the **2011 Companies Act** deals with a topic, that topic is regulated by the Act and not the Proclamation.

[10] I am of the view that the purposive approach to the interpretation of this section is necessary. The Court has to properly examine and infer the design and purpose behind it. There is a long list of cases on this topic in the highest courts of Lesotho and South Africa.

Molelle and Others v R[1] **(*www.Lesli.org.ls/judgt/High Court 2004/2009)*.**

Lepoqo Seoehla Molapo v Director of Public Prosecutions[2]

Nkuebe and Others v Minister of Finance and Others[3]

Eyob Belay Asemie v P.S. Ministry of Home Affairs[4]

[11] Counsel also agree and hold the same view of the need to apply the purposive approach to the interpretation of the statutes, but they disagree on how it should be applied, and the end result or consequence of its application.

[12] I would like to first of all deal with question of whether the Master had the power to make the rulings in question. It is submitted that the Master's powers are limited to those set out in the **Companies Act 2011** and nowhere does it include the power to decide law. The question then becomes; does the Master in her ruling purport to declare the law? Also, whether the Master would be otherwise empowered to authorise and confirm the agreement or arrangements between liquidators and creditors.

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1 (CRI/T/95/2002) in www.lesli.org.ls/judgt/high court/2004-2009
2 1997(8) BCLR 1154
3 CIV/APN/111/2001 in http://www.lesli.org/ls/judgt/high court/201/49
4 http://www.lesli.org/ls/judgt/high court/2013/19

[13] In this instance, it appears that the Master was approached by the banks who declared that they had agreed with the liquidators to sell off the assets and account to them. They further sought the guidance of the Master regarding provisions of the Companies Act and the liquidation process. The Master confirmed the arrangement and gave her views on a variety of matters concerning the estate. She was entitled to do so and that is her role. It only turned out later that the liquidators and the banks had not agreed on how to treat the proceeds of the sale. My view is that the Master was entitled to do that; and it is up to liquidators if they feel that any ruling or interpretation is erroneous to take it on review to the Court. This is provided for in the Act.

[14] The purpose of the Act and the process of liquidation is for the liquidators to serve the interests of the creditors to realise the best and highest dividend possible from the assets found in the estate. The liquidators are at all times obliged to perform their duties under the supervision and control of the **Master of the High Court** in terms of the applicable legislation, and the creditors' resolutions. It is therefore unavoidable that the Master will be called upon to make decisions and offer interpretation of the law on a number of issues relating to any liquidation, from time to time. That is acceptable and within the powers of the office of Master of the High Court.

[15] The next question to consider is whether the Act makes provision for a provisional-liquidator or only a liquidator. What is the implication of the **2011 Companies Act** making no mention of a provisional liquidator. The Applicants submit that the fact that the Act does not make any mention of a provisional liquidator, means there would be no need for the Master to call "a first meeting of creditors for the proof of claims and for the election

of a trustee." Their argument is that the Master would in terms of the Act have appointed a final liquidator and nothing else would be necessary.

[16] The immediate problem I see with this argument is that, the **2011 Companies Act** clearly provides for the application of **Insolvency Proclamation** in respect of four instances and the first one is "meetings of creditors", and therefore it cannot be argued that the Insolvency Proclamation does not apply. The Act in that regard is specific.

[17] The second problem is that the Act and the Proclamation do not present mutually exclusive scenarios and reading them together does not result in any conflict in regard to the meetings of creditors. The fact that the 2011 Act makes no mention of a provisional liquidator does not mean that the first meeting of creditors is not a requirement. It is provided for in the **Insolvency Proclamation** which applies to companies in liquidation in term of **Section 124 Companies Act 2011.**

[18] A distinction should be made between the powers of the Master to "appoint" the liquidator and those of the general body of creditors to "elect" the liquidator. 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.

[19] The next point to consider is whether the banks are correct in their argument that they remain owners of the assets bought under a Hire-Purchase agreement even after an order of liquidation has been made. Section 135(3) of the Companies Act provides that:

"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."

[20] It is clear from the above that in order to realise the property the creditor must be "entitled to do so". To establish who is entitled to do so one must turn to the Insolvency Proclamation because the Act does not set out or define the entitlement. It suffices to mention that the Proclamation does not include Hire Purchase Seller in the position similar to that of 5th and 6th Respondents. It specifically mentions the holder of a Promissory Note and one who has Landlords Hypothec; but not a seller under a Hire-Purchase agreement.

[21] It means that the Banks can only claim as secured creditors, and even if they are allowed to sell the property subject to a charge of the Hire-Purchase agreement, they have to pay the whole amount to the Liquidators to deal with in terms of the law as part of the liquidation process.

[22] This must be so because the Hire – Purchase Seller would be entitled to receive only the balance outstanding in terms of the agreement. The applicants' example in their heads of argument is very appropriate and relevant; that is to say; look at a scenario in which the property is worth a Million and the buyer has already paid Nine Hundred and Eighty Thousand when he is liquidated; the only sum due to the seller must be Twenty Thousand and the balance has to be allocated to other creditors. This should be done by way of the liquidation and distribution account and consequently all the proceeds must be paid into the liquidation account. In that way, 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.

[23] The last issue to consider is whether the Liquidators need to seek the authority of the Master prior to seeking legal advice on any matter.

[24] According to the 2011 Companies Act, there is provision for the Liquidators to institute legal proceedings. They may apply to Court for an Inquiry (section 132), set aside voidable dispositions (S 141) apply to Court for directions (S 150) and take the Master's decision on review, S 151 (4).

[25] Furthermore in terms of section 129(1); It is provided that

> "A Liquidator shall have the powers necessary to carry out his or her functions and duties under this Act and those provided for under the Insolvency Proclamation, 1957 or any other law relating to insolvency."

The powers must include the power to engage legal counsel for expert opinion and also to institute proceedings.

[26] One can easily imagine a scenario where there has been a voidable disposition, and the property is about to be removed from the jurisdiction of the Court. It requires an urgent *exparte* application to prevent that from happening. Will the Liquidator have to wait to be granted the authorisation of the Master before taking action? Similarly if the Liquidator seeks to take the Master on review; is he or she expected to obtain the Master's permission? What if it is refused?

[27] I am of the view that the powers of the Liquidator necessary to carry out his or her functions must include the powers to institute legal proceedings and equally to seek expert legal advice without having to first obtain the permission of the Master.

[28] The declaratory order sought is limited to the aspect of permission before seeking expert legal advice, and does not extend to institution of legal proceedings; but I am satisfied that even though I am not required to, I can safely say the liquidators do not need permission to seek expert legal advice nor to institute legal proceedings.

[29] Insolvency Practitioners are usually lawyers; who should not be unduly restrained in carrying out their duties, especially where the relevant laws do not make any provision for that. It is sufficient that their main objective is to deal with estates for the benefit of creditors and with a view to obtain the highest possible return for them. Should the Liquidator act against the interest of the creditors, he/she may be required to pay costs out of his or

her own pocket. Indeed, that is why amongst other things they are required to file sufficient security, for the proper performance of their duties.

[30] There are numerous cases and authorities to this effect[5]

The cases of Dublin City Distillery v Doherty,[6] Bowman No v Sacks and others[7] and **De Wet NO v Uys No En endere**[8] even go further to state that the liquidators may even require the creditors to ratify the unauthorised decisions of Liquidators *ex pst facto.* I agree with these authorities and would follow them in Lesotho cases to the extent that they may be applied.

[31] In the result, the declaratory orders I feel justified to make in accordance with the foregoing are as follows;

(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 1957** as 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.

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5 Aubu v Perlow and another. In re Perhow and Another v Auby (A
6 [1914] AC 823
7 1986 (4) S.A. 459
8 1998 (4) SA 694

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

[32] Therefore the declaratory orders are made as set out above, and there will be no order as to costs, save to say that the costs of this matter shall be costs in the liquidation.

L.A. MOLETE

JUDGE

For Applicants	**:**	**Adv C.S. Edeling**
For Respondents 2-5	**:**	**Adv M. Sekati with Adv R.J Tseuoa**
For Respondents 6 & 7	**:**	**Adv T. Mpaka**