IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU **CCA/0052/2022**

In the matter between –

MONICA ISABEL LOURO (N.O) **APPLICANT**

And

GCP EQUIPMENT (PTY) LTD
(IN LIQUIDATION) **1ST RESPONDENT**
RAMAKATANE HOLDINGS (PTY) LTD **2ND RESPONDENT**

Neutral Citation: Monica Isabel Louro (N.O) V GCP Equipment (Pty) Ltd (In Liquidation) and Another [2022] LSHC 275 Comm. (21st October 2022)

CORAM: **M. S. KOPO, J**
HEARD: **15TH AUGUST, 2022**
DELIVERED: **21ST OCTOBER, 2022**

SUMMARY

Procedure – In ex parte application, full disclosure is a sine qua non – Insolvency Proclamation 57 – section 69 (3) thereof does not take away the unlimited jurisdiction of this court – the lawfully appointed liquidator has to be formally removed.

Annotation

Books

Erasmus H J, *et al*. *Erasmus Superior Courts Practice*. *1997*. Juta and Co. Ltd

Herbstein & Van Winsen. *The Civil Practice of the High Courts of South Africa*.2009.Juta and Co. Ltd

Cases

Lesotho

Maphathe and Another v Maphathe NO and others CIV/APN/479/02 [2004] LSHC 89 (22 July 2004)

Mubashir 427 and others v Putsoa and Associates and Another (CIV) APN/385/2020) [2020] LSHC 1

Ntšolo v Moahloli LAC (1985-89)

Smally Trading Company v Lekhotla Matšaba & 10 Others (C of A (CIV) 17 of 2016) [2016] LSCA 22 (25 May 2016)

Vice Chancellor National University of Lesotho v Lana LAC 2000-2004

South Africa

Frank v. Ohlsson’s Cape Breweries Ltd 1924 A.D. 289

Caesarstone Sdol-Yam Ltd. v. The World of Marble and Granite 2000 CC2013 All SA 509 (SCA)

Loader v. Dursot Bros (Pty) Ltd1948 (3) SA 136

Statutes

Companies Act No. 18 of 2011

High Court Rules No. 9 of 1980

Insolvency Proclamation 54 of 1957

JUDGMENT

[A] Introduction

[1] There are two applications in this matter. One is an Application moved on behalf of Monica Isabel Louro in her official capacity as the liquidator of GCP Equipment Parts (Pty) Ltd. Louro is the Applicant while CGP is the 1st Respondent and the 2nd Respondent therein is Ramakatane Holdings (Pty) Ltd. Advocate Mayet appeared before me on the 14th day of June 2022 and moved this Application on an urgent *ex parte* basis. I duly granted the said Applicant a rule nisi returnable on the 2nd day of August, 2022. As an interim order, the second respondent was restrained from removing, selling, alienating or encumbering the assets set out in annexure ML3 to that Application. These were the assets that the Applicant therein sought to take possession of as the liquidator of the 1st Respondent.

[2] The 2nd Respondent then instituted an application with a view to anticipate the rule nisi mentioned in the preceding paragraph. On the 18th day of July, 2022, Advocate Masupha appeared for the 2nd Respondent who is the Applicant in the anticipation application (for convenience it will be referred to as the 2nd Respondent throughout this judgment). Advocate Nkoho appeared for the Applicant, who is the 1st Respondent in the anticipation application (for convenience it will be referred to as the Applicant throughout the ruling). Advocate Nkoho was appearing at the instance of a colleague but had not got the full brief to argue the matter. For that reason, both counsels agreed that the interim order mentioned in paragraph 1 above be stayed and the matter be postponed to the 02nd day of August, 2022 for arguments.

[3] On the 02nd day of August, Advocate Masupha appeared for the 2nd Respondent and Advocate Mayet appeared for the Applicant. The matter was postponed yet again as Advocate Mayet informed the court that Advocate Kleingeld who was briefed to argue the matter was indisposed. The matter was then postponed to the 15th day of august, 2022.

[4] On the 15th day of August, 2022, Advocate Ramochela appeared for the Applicant saying he was now briefed to argue the matter but had not filed the heads of argument since Advocate Kleingeld had promised to prepare them for him. He applied for postponement and tendered wasted costs. I allowed the postponement and ordered that he files heads of argument accordingly and the matter be argued on the 23rd day of August 2022.

[5] I was not impressed with the delay and/or seemingly the lack of zeal by the Applicant to prosecute the matter. It could indeed have been occasioned by the ill health of Advocate Kleingeld as I had accepted so on the 02nd day of August when I was informed so. However, even after that, there was a further delay on a matter that was instituted on an urgent basis. Be that as it may, I gave the Applicant's counsel the benefit of the doubt but it explains why an initially urgent matter took this long and does not augur well for the Applicant.

[6] The Applicant moved the court for an order in the following terms:

a. To have unfettered access to plot 426 Ha Hoohlo, behind Trentyre, Maseru and the assets belonging to 1st Respondent stored therein in terms of Section 69 (2) and (3) of the Insolvency Proclamation 51 of 1957;
b. To allow the Applicant, as a liquidator, to take lawful possession of all the movable property, books, financial records and other source

documents belonging to the 1st Respondent, inter alia, the assets as set out in ML3 attached to the founding affidavit;

c. For the Respondents to forthwith hand over the movable goods as per annexure ML3 to the Notice of Motion to the applicant in terms of section 69 (3) of the Insolvency Act 24 of 1936;

d. An order authorising the issue of search and seizure warrant in terms of Section 69 (2) of the Insolvency Proclamation, 51 of 1957 in respect of all moveable property, books, financial records and other source documents belonging to the 1st Respondent inter alia, the assets as set out in ML3 attached to the Founding Affidavit;

e. The Respondents forthwith provide the applicant with the exact whereabouts of the goods and continue to do so until the applicant is in passion of the movable goods;

f. In the event of the Respondents failing or refusing to forthwith comply with the order granted by this court, that the Lesotho Mounted Police Service alternatively the sheriff of the court wherein the movable goods may be found, with assistance of the LMPS if required, be ordered to attach the goods and return same to applicant;

g. To furnish the Master of the High Court with a valuation of the movable property.

h. In the interim, 1st and 2nd Respondents be interdicted and restrained from removing, selling, alienating or encumbering the assets in question.

[7] On the other hand, the 2nd Respondent moved the court to discharge the rule nisi with costs on attorney and client scale.

[B] APPLICANT'S CASE AND SUBMISSIONS

[8] It is the Applicant's case that she was appointed as the liquidator of the 1st Respondent on the 05th day of May, 2021; and this is common cause. It is also common cause that the 1st Respondent was placed under liquidation per the order of Justice Makara dated the 16th day of December 2020.

[9] It is also the Applicant's case that as the liquidator, in terms of section 69 (2) and (3) of the **Insolvency Proclamation**[1] **(the Proclamation**), she is mandated to secure and take possession of the assets of the insolvent estate. The Applicant further believes that the property of the 1st Respondent (the Insolvent) is in the possession of the 2nd Respondent. The said property is listed in an annexure (ML3) to the affidavit by the Applicant.

[10] The applicant moved the matter *ex parte* since she had the greatest apprehension that if the Respondents were to be notified, the property in question would be removed from the premises and thereby defeating the ends of justice. It is her evidence that since one of the assets is a vehicle, and in her experience of cases of this nature, it was most likely that it would be driven off the property to be hidden away from the sheriff of the court.

[11] Advocate Ramochela argued that this court has unlimited jurisdiction to entertain the matter, contrary to the argument by Advocate Masupha that section 69 of the proclamation stipulates that an application under this section should be made to the District Commissioner. He based his argument on the judgment of the Court of Appeal in **Vice Chancellor**

[1]Proclamation 54 of 1957

National University of Lesotho v Lana[2] which decided that the unlimited jurisdiction of the High Court can only be interfered with through an express provision. Advocate Ramochela went on to argue that per Court of Appeal judgment of **Smally Trading v Matšaba**[3], the mere fact that there is an extra-judicial redress provided for does not mean that this court's jurisdiction is excluded.

[12] On the argument by Advocate Masupha that the time of Applicant as the Liquidator has lapsed, Advocate Ramochela countered that in the absence of any substantive demonstration primarily to the effect that the continuance of such a person in office shall be to the prejudice of the estate in liquidation, the applicant still holds the office and the mere failure to comply with certain conditions cannot by itself automatically constitute her removal from office. He referred the court to the case of **Maphathe and Another v Maphathe NO and others**[4]

[13] And finally, Advocate Ramochela argued that even though the *tacit hypothec* takes precedence, it still has to be perfected through attachment in accordance with proper execution procedure.

[C] THE 2ND RESPONDENT CASE AND SUBMISSIONS

[14] It is common cause that on the 08th day of February, 2019, the 2nd Respondent and the 1st Respondent entered into a sub-lease agreement in terms of which the 2nd Respondent leased a commercial site situated at Ha Hoohlo in the district of this Maseru, registered under lease number 12282-509 to the 1st Respondent.

[2] LAC 2000-2004
[3] (C of A (CIV) 17 of 2016) [2016] LSCA 22 (25 May 2016)
[4] CIV/APN/479/02 [2004] LSHC 89 (22 July 2004)

[15] It is further common cause that 1st respondent occupied the plot from the date of the agreement and in terms of the said agreement it was to pay monthly rentals of **M46,000.00** plus VAT. It is the 2nd Respondent's case that the 1st Respondent paid the said rentals irregularly and as at October 2020, the 1st Respondent was in arrears and owed rent totalling **M379, 000.00**. This was also not disputed and therefore is common cause.

[16] In terms of the said sub-lease agreement, the 2nd Respondent has a right to confiscate the equipment belonging to 1st respondent kept at the plot in question until the said owing rent is paid. Due to the rent that was owing, in October 2020, 2nd Respondent lodged an application for a landlord's *tacit hypothec* in **CCA/0108/2020** and was granted an interim order. The property that belonged to the 1st respondent that was kept at the premises was as a result of the said order attached by the Sheriff of this court.

[17] The 2nd Respondent argued that there has been a material non-disclosure of material facts by the Applicant in this matter. According to the 2nd Respondent, the Applicant was duly notified of the pending matter in **CCA/0108/2020** at the time that the Applicant introduced herself as the liquidator of 1st Respondent. In its Founding Affidavit, the 2nd Respondent mentions that not only did Applicant know about the case but even Mr. Kleingeld, who was instructed to handle the matter by the Applicant, knew about the case and even handled the negotiations on behalf of Applicant. This was not disclosed to the court and therefore shows *mala fides* on the part of the Applicant – so argued the 2nd Respondent.

[18] Advocate Masupha for the 2nd Respondent argued that in terms of section 128 (1) (a) of the Companies Act[5], the right of a liquidator to have custody and control of the company's assets does not affect the right of a secured

[5] Act 18 of 2011

creditor on the property of the company over which such a creditor has a preferential right by virtue of, among others, a landlord's legal hypothec.

[19] Advocate Masupha argued further that the Applicant brought the application in terms of **section 69 (2) of the Proclamation** for the search of the 1st Respondent's property. He argues that, in terms of that section, the Applicant should have applied to the District Commissioner and not to this court.

[20] Advocate Masupha also argued that the term of Applicant as a liquidator has lapsed. He based his argument on sections 92 and 109 of the Proclamation. In terms of those sections, a liquidator is mandated to submit a liquidation and distribution account within six (6) months and publicise in a gazette that she intends to apply for extension if those time lines were not met.

[21] Furthermore, Advocate Masupha argued that in terms of section 134 (7) of the Proclamation, Applicant should have sought authority from the Master of the High Court before she instituted the present proceedings. This is because before a liquidator enters into a major transaction, he/she has to notify the master. Litigation is major transaction, argued Advocate Masupha, and for that reason therefore, Applicant has no authority to institute these proceedings.

[22] Another argument that Advocate Masupha raises is that the Applicant should not have been appointed as a liquidator in the first place as she does not have a place of business in Lesotho.

[23] On the 17th day of June, 2021, the Applicant sent a letter to 1st and 2nd Respondent requesting them to hand over the property in question. It is the

Applicant's case that the 2nd Respondent has not complied with the said letter.

[D] ANALYSIS AND FINDINGS

[I] NON-DISCLOSURE OF MATERIAL FACTS

[24] The application in the main was brought *ex parte*. It is Advocate Masupha's argument that had the court been aware that there was a tacit hypothec on the cards, the court would not have granted the interim order. It is apposite to show that the Applicant has not addressed the question on whether there has been a material non-disclosure in their papers as they have not filed any answering papers on this issue. However, in oral addresses, Advocate Ramochela argued that it is questionable as to whether it came to the attention of the Applicant that there was an interim order per Banyane J. for *tacit hypothec*. It is therefore an issue before this court to determine if indeed there was material non-disclosure of a material fact in this matter.

[25] It is gleaned from the Founding Affidavit deposed to by Bertha Kuni Ramakatane on behalf of the 2nd Respondent that the Applicant was aware of the existence of the tacit hypothec matter since Mr. Kleingeld, who was the one representing the Applicant when this matter was instituted, had instructions from the Applicant to handle the said matter (the tacit hypothec matter). This appears in paragraph 6.21 of the said affidavit.

[26] It is common cause that the order for the tacit hypothec was interim and it was never made final. Be that as it may, this court should have been made aware that there is a contention on the movable property in question. The

fact that the Applicant approached this court *ex parte,* means that her duty of disclosure was at a higher level. This is trite. The Judgment of Sakoane J (as he then was), in **Mubashier 427 and others v Putsoa and Associatesand Another** [6] is very elaborative on this issue. in paragraph 10 of the said judgment, quoting with approval the court of appeal judgment in **Ntšolo v. Moahloli**[7], Sakoane J put it thus;

> *"In exparte proceedings utmost good faith (uberrimae fidei) and full disclosure are sacred, indispensable requirements. In Ntšolo v. Moahloli LAC (1985-89) at 307A-E, Aaron JA said:*
> *"It is well-established that a party who comes to court seeking ex parte relief must take great care in drawing this affidavit, and that*
> *(a) All material facts must be disclosed which might influence the Court in coming to a decision;*
> *(b) Where material facts are not disclosed, then the Court has a discretion to set aside the relief granted ex parte, on the ground merely of the non-disclosure;*
> *(c) This is so whether the non-disclosure was willful and mala fide, or merely negligent.*
> *See for example Schlesinger 1979 (4) SA 342 (W) at 348-9. In most cases, that discretion is exercised against the applicant. The reason for this rule is obvious. It is an extraordinary procedure for a Court to grant relief against a party without that party having had an opportunity to reply to the case made out by the applicant. safeguards are necessary to try to minimise the risks of prejudicing the party against whom the order is sought. The insistence on full disclosure of all the material facts, not only those facts which the applicant considers relevant, but all facts which may possibly influence the Court's decision, is one of these safeguards.*

[6](CIV) APN/385/2020) [2020] LSHC 1
[7]LAC (1985-89) 307

Affidavits are generally drawn by, or with the assistance of, legal practitioners. As officers of the Court, they should be particularly astute to ensure that their lay clients, who cannot the expected to know the procedural rules, do make full and accurate disclosure.""

[27] I do not necessarily believe that the Applicant was wilful and/or *mala fide* in not disclosing that there is an order albeit temporary, for a *tacit hypothec*. However, there is an element of negligence. The evidence on record shows that Mr. Kleingeld, who was the attorney of record of Applicant was privy to this fact. During preparations of this matter, he ended up not being available and the matter was handled by different representatives. He should have briefed them well. The absence of proper brief is informative of negligence.

[28] There was an argument that the order for the *tacit hypothec* was never made final and for that reason therefore, it should be read as non-existent. It is my considered view that, that is neither here nor there. First of all, there is an explanation as to why it was never made final. Secondly, it remains pending. Had that information been availed to me, I would not have granted the interim order.

[II] JURISDICTION OF THIS COURT UNDER SECTION 69 (3) OF THE INSOLVENCY PROCLAMATION

[29] Section 69 (2) and (3) of the Insolvency Proclamation[8], provide that an application for search of the property of an insolvent concealed by some other person will lie with the District Commissioner who will in turn have

[8] supra

powers to grant a search warrant. Advocate Masupha argued that due to this section, this court does not have jurisdiction to entertain the matter.

[30] I believe that this section and its subsections are the legacy of the colonial times when some administration functions and judicial functions were handled by public functionaries. This court can take judicial notice of the fact that even today, marriages solemnised at the office of the District Administrator (the new District Commissioner) are still known to be solemnised by the magistrate. I searched without success to find if this section was ever, repealed or amended. Be that as it may. I believe that section 130 of the Companies Act[9] solves the conundrum. It reads thus;

> *When the Court is satisfied, on the application of a liquidator that there are reasonable grounds to believe that there is in or on any place or thing, any property, books, documents or records of a company, the court shall issue a warrant that authorises the person named in the warrant to search for and seize property, books, documents or records of the company in or on that place or thing and deliver them to the liquidator.*

In comparing this section with section 69 (3) of the Insolvency Proclamation it will be realised that they serve the same purpose. It reads as follows;

> *If it appears to a District Commissioner to whom such application is made, from a statement made upon oath that there are reasonable grounds to suspecting that any property, book, or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is*

[9] supra

otherwise unlawfully withheld from the trustee concerned, within the area of the District Commissioner's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.

It is my considered decision that it would lead to absurdity if we were to force the applications of this nature to still be handled by the District Administrator. Indeed, advocate Ramochela was correct in saying this court has unlimited jurisdiction and it is in situations of this nature that this court should exercise its unlimited powers. This court has jurisdiction to entertain this matter.

[III] DOES THE APPLICANT STILL HAVE AUTHORITY AS THE LIQUIDATOR APPOINTED BY THE MASTER OF THE HIGH COURT?

[31] I have shown that Advocate Ramochela relied on **Maphathe**[10]. I do not see how that judgment assists his case. Mofolo J. in that case was faced with an application for removal of the Executor for reasons advanced not necessarily one whose appointment period had lapsed. This however, shows negligence and inefficiency on the part of the liquidator. It further exposes her to unnecessary challenges in her administrative capacity of the insolvent estate. Be that as it may, it is my considered view that the letter by the Master that has put a time frame on the appointment of the liquidator, is nothing but an administrative requirement meant to put them in check. For a liquidator to be removed, there has to be a deliberate move as envisaged by Section 151(2) of The Companies Act[11] that will give the Master or the court, full grounds upon which to rely on. In the absence of

[10] Supra
[11] Supra

such, it is my conclusion that the Applicant is still the lawfully appointed liquidator.

[E] CONCLUSION AND ORDER

[32] It is my conclusion that the court has jurisdiction to hear this matter even if section 69 seem to confer powers on the District Commissioner. It is further my considered conclusion that there has been a material non-disclosure of material facts by the Applicant. And finally, Applicant is still the lawfully appointed liquidator until removed by a competent authority.

[33] Having concluded thus, the rule granted on the 14th June 2022 is discharged and application in the main is dismissed. It was the Application by 1st Respondent that it should be dismissed with costs on attorney and client scale. While the non-disclosure is something that this court frowns upon, this is a liquidation matter and such a scale may be counterproductive the liquidation process. Advocate Masupha did not move for costs against the liquidator personally and therefore the Application is dismissed with costs on a normal scale.

M.S. KOPO
Judge of the High Court

For Applicant: **Adv. S.K Ramochela**
For 2nd Respondent: **Adv. M Masupha**