

**IN THE HIGH COURT OF LESOTHO**

**(COMMERCIAL DIVISION)**

**HELD AT MASERU**

**CCA/0109/2022**

**PLATCORP HOLDINGS LIMITED**

**APPLICANT**

**AND**

**PLATINUM CREDIT LIMITED**

**1<sup>ST</sup> RESPONDENT**

**MOTENA LISHEA N.O.**

(in her capacity as managing director and majority shareholder of the First Respondent)

**2<sup>ND</sup> RESPONDENT**

**NTHABISENG NTHAKO N.O.**

(in her capacity as a director and minority shareholder of the First Respondent)

**3<sup>RD</sup> RESPONDENT**

**ADVOCATE KHATI ERNEST MAHASE**

(in his capacity as Company Secretary of the First Respondent)

**4<sup>TH</sup> RESPONDENT**

**MPHO MONYANE N.O.**

(in his capacity as board chairman and director of the First Respondent)

**5<sup>TH</sup> RESPONDENT**

**LITEBOHO LISHEA N.O.**

(in his capacity as director of the First Respondent)

**6<sup>TH</sup> RESPONDENT**

<b>NTHATI KHUTLISI N.O.</b> (in her capacity as director of the First Respondent)	<b>7<sup>TH</sup> RESPONDENT</b>
<b>LINDIWE ATONTSI N.O.</b> (in her capacity as director of the First Respondent)	<b>8<sup>TH</sup> RESPONDENT</b>
<b>MATSELISO PETRUS N.O.</b> (in her capacity as director of the First Respondent)	<b>9<sup>TH</sup> RESPONDENT</b>
<b>FIRST NATIONAL BANK, LESOTHO</b>	<b>10<sup>TH</sup> RESPONDENT</b>
<b>STANDARD BANK, LESOTHO LIMITED</b>	<b>11<sup>TH</sup> RESPONDENT</b>
<b>LESOTHO POSTBANK LIMITED</b>	<b>12<sup>TH</sup> RESPONDENT</b>
<b>NEDBANK LESOTHO LIMITED</b>	<b>13<sup>TH</sup> RESPONDENT</b>
<b>CDAS, VIA THE ACCOUNTANT GENERAL, TREASURY DEPARTMENT, MINISTRY OF FINANCE</b>	<b>14<sup>TH</sup> RESPONDENT</b>
<b>THE ATTORNEY GENERAL, LESOTHO</b>	<b>15<sup>TH</sup> RESPONDENT</b>

**Neutral Citation:** Platcorp Holdings Limited v Platinum Credit Limited & 14 others [2022] LSHC 298 Comm. (14<sup>TH</sup> DECEMBER 2022)

**CORAM:** MOKHESI J  
**DATE OF HEARING:** 26<sup>TH</sup> OCTOBER 2022  
**DATE OF JUDGEMENT:** 14<sup>TH</sup> DECEMBER 2022

## **SUMMARY**

**CIVIL PRACTICE:** *Application for variation of judgment under common law- Principles applicable considered and applied.*

## **ANNOTATIONS**

### **Cases**

*Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)*

*BP Lesotho (Pty) Ltd v Moloji and Another (1/2006) [2006] LSCA 3 (11 April 2006)).*

*Commissioner SARS v Hawker Air Services 2006 (4) SA 292 (SCA)*

*Firestone SA (Pty) Ltd v Gentiruco A.G 1977 (4) SA 298 (A)*

*Transnet Ltd v Rubenstein [2005] 3 ALL SA 425*

*Vice-Chancellor of the National University of Lesotho and Another v Putsoa LAC (2000 – 2004) 458*

*Zondi v MEC, Traditional and Local Government Affairs 2006 (3) SA 1 (CC)*

## JUDGMENT

[1] This is an application in terms of which the applicant is seeking on an urgent basis, variation of Court Orders granted under cases CCA/0063/22 and CCA/0066/22. The essence of the reliefs sought is to interdict the tenth respondent (“FNB”) from making available for collection an amount of money approximating M48,545,505.00 million, in cash to the representatives of the 1<sup>st</sup> respondent, and the orders directing the FNB to pay the funds they hold in 1<sup>st</sup> respondent’s account into the bank account of the 1<sup>st</sup> respondent held with the Standard Lesotho Bank, and other relief directed at 14<sup>th</sup> respondent (CDAS). The facts which precipitated the acrimonious litigation between the applicant and 1<sup>st</sup> respondent can be gleaned in **Platinum Credit Ltd v Platcorp Holdings Limited [2022] LSHC 199 Comm. (25 August 2022)** read together with the orders of this court which sought to augment it in CCA/0063/22 and CCA/0066/2022. There is no need to rehash the facts as those can be found in the cited decision.

[2] **Factual Background**

CCA/0063/2022

On 08 July 2022, the court issued a rule nisi;

- (i) Directing FNB to preserve an amount of M9, million (nine million Maloti) which was earmarked as a Golden parachute incentive to the 2<sup>nd</sup> to 9<sup>th</sup> respondents, held in the 1<sup>st</sup> respondent’s bank account and
- (ii) An order directing the 2<sup>nd</sup> to 9<sup>th</sup> respondents not to dissipate the first respondent’s funds.

- [3] After initially opposing the above matter on extended return date, the first respondent conceded the application. This concession caused the court to confirm the *rule nisi* and made final order pending the determination of CCT/0397/2022.
- [4] On 26 September, FNB transmitted a letter to the 1<sup>st</sup> respondent advising it that it is terminating its relationship with on the basis that the 1<sup>st</sup> respondent, following internal client screening found that it met “the internal undesirable customer”. In addition to notifying termination, FNB stated that it will closing the account on the 04 November 2022 (“termination date”), and requested that it be provided with banking details of its accounts held with another financial institution into which to credit the balances, and further that “*if you do not provide us with bank details timeously, the Bank will arrange for you to collect the funds in your accounts at our Pioneer Branch at a time not later than 15hr30 on Termination Date.*”
- [5] The FNB transmitted a courtesy copy of the same letter to the applicant. The 1<sup>st</sup> respondent’s Standard Lesotho Bank accounts are the alternative operational accounts which can be jointly administered by both parties, as it formed part of the spoliation order (*status quo* order). The applicant then invited cooperation from the 1<sup>st</sup> respondent to nominate a bank in the wake of FNB’s intended termination of the relationship. The first respondent rejected the invitation and emphasised that the nomination of the alternative bank is the sole preserve of its board directors. A lot of communication passed between the parties, but what is clear is that the 1<sup>st</sup> respondent is still adamant that its joint management and control per the court orders will not

be carried into effect. When it was clear that attempts into prodding the 1<sup>st</sup> respondent into cooperating in its joint management and control, and in this instance nominating an alternative bank, and with the termination date looming large on the horizon, the applicant lodged the current application seeking the reliefs already alluded to in the introductory part of this judgment.

[6] On 15 July 2022, this court had issued a rule nisi in CCA/0066/2022 in terms of which:

- (i) FNB was ordered to reverse a payment of M2.8 Million paid from the 1<sup>st</sup> respondent's bank account in respect of certain individuals, and to preserve it.
- (ii) CDAS was ordered not to make payments into any other nominated banking account contrary to the instructions issued before 7 July 2022, which had nominated the 1<sup>st</sup> respondent's FNB banking accounts.

[7] In the same application, the applicant had sought a declarator that the 2<sup>nd</sup> to 9<sup>th</sup> respondents, who are the 1<sup>st</sup> respondent's board members were in contempt of this court's orders granted under CCA/0057/2022 and CCA/0063/2022. This relief was not granted immediately, but after arguments, judgment was reserved. The said judgment was delivered on 27 October 2022.

[8] The current application is opposed by the 1<sup>st</sup> respondent. In its answering affidavit, points in *limine* of relating to lack of urgency and non-joinder were raised. I revert to these points in due course. In her answering affidavit Ms Motena, who is the 1<sup>st</sup> respondent's Managing Director averred that the variations which are sought by the applicant affect the substantial nature of the orders sought in the application for restoration of *status quo ante* and are therefore, untenable. To the applicant's averment that the 1<sup>st</sup> respondent declined to cooperate with it in nominating a bank after FNB had issued a Notice of Termination of relationship, the 1<sup>st</sup> respondent aver as follows at para. 6.11.1;

*“Contents therein are denied there is no court order that directs the first Respondent to seek cooperation of the Applicant when a bank terminates a banking relationship with the first respondent. Moreover, the Applicant does not have any status quo with the Board of the first respondent and banking relationship between the first respondent and any bank is between the bank and the Board of directors of the firsts respondent and that power is granted to them by the Regulations governing the first respondent.”*

[9] She further states that the 1<sup>st</sup> respondent opposes nominating Standard Bank account as it is under investigation by the Financial Intelligence Unit (FIU). She has however not provided proof of the investigations other than her mere *ipse dixit*.

[10] Applicant's contention is that variation is necessary in view of the FNB's notice of termination of relationship with the 1<sup>st</sup> respondent, and that unless the amount in the hands of FNB is transferred to the 1<sup>st</sup> respondent's bank

account held with the Standard Lesotho Bank, not into Post Bank account to which it does not have access as the 1<sup>st</sup> respondent in contempt of the orders of this court continues to deny it access. Its argument is that unless the money is transferred to eleventh respondent, it will suffer harm as it does not have access to 1<sup>st</sup> respondent account held with the Post Bank. On the other hand, 1<sup>st</sup> respondent contends that variation is unnecessary as Post Bank is one of its bankers.

[11] **Issues for determination:**

- (i) So-called points in *limine* raised
- (ii) Whether variation of orders should be made.

[12] **Points in *limine***

- (i) Non-joinder of the Central Bank.

The 1<sup>st</sup> respondent argued that the Central Bank of Lesotho should have been joined as a party to these proceedings as it appointed the FNB to be the overseer of the loan between applicant and 1<sup>st</sup> respondent. It is trite that a party who has a direct and substantial interest in the outcome of the proceedings must be joined (**Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 653**). The present matter concerns variation of the orders of the court restoring the *status quo ante* between the parties. This matter concerns nomination of a banking institution into which the 1<sup>st</sup> respondent's funds are to be credited following termination of the customer – banker relationship between FNB and the 1<sup>st</sup> respondent. The Standard Lesotho Bank account into which the applicant is desirous of having the funds deposited into is one of the 1<sup>st</sup> respondents bank accounts. In short, this matter concerns movements of funds from one 1<sup>st</sup> respondent's

bank account into another. In my considered view the Central Bank has no direct and substantial interest in the outcome of this matter.

[13] **Lack of urgency**

The 1<sup>st</sup> respondent's contention in this regard is that the matter is not urgent for the reason that the applicant knew as far back as the 30 September 2022 that it (1<sup>st</sup> respondent) does not consent to variation, yet it only lodged the matter on an urgent basis on the 18 October 2022 without proffering any explanation for inaction in the period between the two dates.

[14] It is trite that urgency has nothing to do with the substance of the dispute between the parties. It is rather about the abridgment of times and forms prescribed in the Rules of this court (**Commissioner SARS v Hawker Air Services 2006 (4) SA 292 (SCA)** at para. 9). It is equally trite that when a matter is brought to court on an urgent basis a case for urgency should be made out in the founding papers and the certificate of urgency should also state the grounds on which Counsel consider the matter to be urgent and worthy of skipping the queue of other matters awaiting attention of the Judge (**Vice-Chancellor of the National University of Lesotho and Another v Putsoa LAC (2000 – 2004) 458** at para.16).

[15] In my judgment the certificate of urgency and the founding affidavit make out a proper case for this matter deserving an urgent treatment. In the certificate urgency, Adv. Roux SC for the applicant, states that the reasons for lodging the matter on an urgent basis is due to the fact that the tenth respondent (FNB) has terminated its relationship with the 1<sup>st</sup> respondent and

had requested that an alternative banking institution be nominated before the termination date of 4 November 2022, failing which it will make available to the 1<sup>st</sup> respondent for collection an amount M48,5 in cash. He contended that were this amount of money be made available to the 1<sup>st</sup> respondent in cash, it would amount to allowing the latter to circumvent the orders granted in CCA/0063/2022 and CCA/0066/2022.

[16] It will be recalled that after the FNB, had on courtesy basis, made the applicant aware that it was terminating its relationship with the 1<sup>st</sup> respondent, on 28 September 2022. Consequent to the notice of termination, the 1<sup>st</sup> respondent's legal representatives submitted correspondence to the applicant requesting it to provide details of its representatives who would be allowed to have access to its FNB account in order to comply with the order of this court. At the time of this request, the 1<sup>st</sup> respondent's legal representatives were displaying utter dishonestly and disingenuity given that they were aware that the FNB account will be terminated on the 04 November 2022. This is the sort of nonchalant attitude they have always displayed towards the orders of this court, however, be that as it may, this issue has been appropriately dealt with in another matter. The applicant requested the cooperation nominating the alternative bank, but the 1<sup>st</sup> respondent refused to cooperate. The 1<sup>st</sup> respondent declined to consent to variation of the orders now in issue in view of the supervening event of impending termination of relationship between it and FNB.

[17] On 14 October 2022 applicant's attorneys transmitted a letter to the 1<sup>st</sup> respondent and other respondents, but in particular in relation to the 1<sup>st</sup> respondent it pleaded with it to comply with the Court orders by consenting

to nomination of Standard Lesotho Bank as an alternative banker and to consent to variation of the court orders. When it was clear that the 1<sup>st</sup> respondent was unwilling to cooperate, the applicant lodged the current application. A picture painted by these facts is that the applicant did not sit on its laurels but was instead engaged prodding the 1<sup>st</sup> respondent into agreeing to variation of court orders and nomination of Standard Lesotho Bank as the alternative banker. With the termination date looming large in the horizon, the applicant cannot be faulted for approaching this court in this manner (**Transnet Ltd v Rubenstein [2005] 3 ALL SA 425** at para. 33).

[18] I turn to deal with the merits of the application. This application was lodged in terms of the common law. Once judgment is given in a matter it is final and the court giving it cannot vary or rescind it, as the matter of course except where the aim is to correct, alter or supplement the judgment or order(**Firestone SA (Pty) Ltd v Gentiruco A.G 1977 (4) SA 298 (A) at 306H – 308A**). The rule against judgments not being amenable to be rescinded or altered once delivered is based on two important considerations, that is, to ensure finality to litigation, and because the judge is *functus officio*. These principles, it must be stated are applicable to final orders or judgment. Interlocutory orders stand on a different footing as was stated in **Zondi v MEC, Traditional and Local Government Affairs 2006 (3) SA 1 (CC)** at para. [30] where the court said;

*“Simple interlocutory orders stand on a different footing. These are open to reconsideration, variation or rescission on good cause shown. Courts have exercised the power to vary simple interlocutory orders when the facts on which the orders were based have changed or*

*where the orders were based on an incorrect interpretation of a statute which only became apparent later. The rationale for holding interlocutory orders to be subject to variation seems to be their very nature. They do not dispose of any issue or any portion of the issue in the main action.” (emphasis added) (see on interlocutory orders, **BP Lesotho (Pty) Ltd v Moloji and Another (1/2006) [2006] LSCA 3 (11 April 2006)**).*

[19] The order which the applicant seeks to vary is merely interlocutory, as it restored the *status quo ante* pending final determination of the dispute between the parties. The current orders now being sought serve to vary the order which was originally given in light of the changed factual basis on which it was made. In the original order the 1<sup>st</sup> respondent held an account with FNB but that has changed with the latter bank’s decision to terminate its relationship with it.

[20] What is being sought in this case is the substitution of FNB with the Standard Lesotho Bank in view of the impending closure of the 1<sup>st</sup> respondent’s bank account. The 1<sup>st</sup> respondent refuses to cooperate in nominating the Standard Lesotho bank as the alternative bank despite the fact that it already has a bank account there. Instead, it resists variation based on spurious and contrived grounds that its Standard Lesotho Bank account is a subject of Financial Intelligence Unit investigation for money laundering. It contends that variation is not necessary because it has already nominated Post Bank as the alternative bank; that its board of directors is not bound by this court’s restoration-of-*status-quo* order as it is invested with the sole responsibility of determining where its money should be banked. It is common ground that the Standard Lesotho Bank is the secondary banking

institution which is used by the 1<sup>st</sup> respondent to collect and disburse funds. The Standard Lesotho Bank forms part of the orders and it is the bank into which both parties have access. The applicant does not have access to the 1<sup>st</sup> respondent 'Post Bank account(s). By refusing to nominate the Standard Lesotho Bank as the alternative bank, the 1<sup>st</sup> respondent is being deliberate because it knows that the applicant would not have access to its Post Bank accounts. Given that the orders which are now being sought to be varied are not final in nature, and the orders being sought seek to supplement them to make them practical in the light of the supervising event of the looming termination of relationship by the FNB, this court would allow the variation. The relief with regard to CDAS is not opposed by it, but as I see it, it falls within the same mould.

[21] In the result the following orders are made;

(a) The application is granted as prayed with costs, which costs should include costs consequent upon employment of a Senior Counsel.

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**MOKHESI J**

**For the Applicant: Adv. J Roux SC instructed by Webber Newdigate Attorneys**

**For the 1<sup>st</sup> respondent: Adv. Tšenase instructed by Thabane Attorneys**

**For 2<sup>nd</sup> to 15<sup>th</sup> respondents: No Appearance**

