IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.24_00

In the matter between:

SABELO MDUDUZI MASUKU N.O.		**APPELLANT**
VS		
MERIDIEN RECOVERIES (PTY) LTD		**RESPONDENT**
CORAM	**:**	**BROWDE JA**
	:	**STEYN JA**
	:	**BECK JA**
FOR THE APPELLANT	**:**	**MR. SMIT**
FOR THE RESPONDENT	**:**	**MR. FLYNN**

JUDGMENT

Steyn JA:

This most unusual litigation was initiated in the High Court by way of a combined summons. In his particulars of claim, the appellant, (Plaintiff in the ***court a quo***) sought an order sitting aside two final liquidation orders granted by the High Court on the 30th June 1981 in respect of two companies; viz Powerforce Construction (Pty) Ltd and Cemco (Pty) Ltd.

An exception was taken to the appellant's particulars of claim on the ground that it did not disclose a cause of action. In its exception the first respondent (the respondent) relied on the following grounds:

> "1. The Plaintiff's claim is for a rescission of final liquidation orders granted on the 30th June 1981.

1.1 The Plaintiff alleges that the Court was induced to grant the said orders by a fraudulent representation made by the first defendant.

2. The Plaintiff seeks no relief in the action other than the rescission of the said orders. The Plaintiff seeks no relief against the First Defendant (Respondent).
3. The Plaintiff has no interest in the action instituted and accordingly lacks ***locus standi in judicio*** to sue for the relief sought in the action."

This exception was argued before Sapire CJ who, without giving any reasons, upheld the exception. It is against this order that the appellant has appealed to this court. In its notice of appeal the appellant, because no reasons for judgment were given, was obliged to allege general grounds upon which his appeal was based. One of these grounds was that the appellant has no ***locus standi***, in as much as he was executor dative in the estate of one Tyrer who died in 1955. It was alleged that Tyrer in his personal capacity had in his lifetime had sufficient interest in the matter. He had been granted leave in his personal capacity to intervene in the liquidation proceedings and had in fact done so.

It was also alleged in the grounds of appeal that the ***court a quo*** should have held as a matter of public policy that it is contrary to the administration of justice to permit a judgment obtained by fraud to stand. The facts alleged in the particulars of claim, it is averred, justified a rescission of the relevant judgment ***mero motu.***

The following matters are relevant for the purposes of the decision of this appeal.

1. The appellant has claimed no relief against the Respondent, or indeed any relief against anyone.
2. There is no allegation made that anyone has sustained any prejudice or suffered any loss or damage as a consequence of the liquidation orders.
3. It is clear that there are other parties (the liquidator, the creditors and those against whom the allegations of fraud are made) who would have a real and substantial interest in the matter and who have not been cited.
4. It is clear from the judgment of the High Court in the liquidation, that the Judge held that there was no sufficient reason "even seriously to suspect" that the parties cited as

conspirators, had conspired against Tyrer to bring about a malicious winding up. Indeed the court held that the probabilities overwhelmingly favoured the bank (the respondent) and declined to accede to an application by Tyrer to hear oral evidence on the issue.

5. The ***ratio decidendi*** which underpinned the High Court's decision to grant the liquidation orders was that there was a deadlock between the directors and that it was just and equitable that the companies should be wound up.
6. There are no factual averments made which could, if proved, establish any interest on the part of the deceased estate represented by the appellant. Neither, as indicated above, does the appellant claim any relief against the Respondent.
7. There are no allegations made in the pleadings as to what the benefits are for the appellant should it succeed in having the liquidation orders set aside.

When the matter was argued the Court raised with counsel for the appellant the question as to whether as a matter of overwhelming probability there were not several parties who would have an interest in whether the liquidation orders were or were not to be set aside. Counsel's response was that this point had not been taken and that the Court should not do so ***mero motu***.

In this regard it should be noted that in both **COLLIN V. TOFFIE 1944 A.D. 456** and in **HOME SITES (PTY) LTD V. SENEKAL 1948(3) SA514 (A)** the Court of Appeal in South Africa ***mero motu*** took the point of non-joinder of parties who would have "a direct and substantial interest" in the matter. (See also **AARON V JOHANNESBURG MUNICIPALITY 1904 T.S. 696).** The right, indeed the obligation of the court to do so is spelt out by Fagan AJA in the well-known case of **AMALGAMATED ENGINEERING UNION VS MINISTER OF LABOUR 1949(3) 637** at 655-660. At the latter page the court says:

> "The Court will not, for instance, issue a decree, which will be a ***brutum fulmen*** because some person who will have to co-operate in carrying it into effect, will not be bound by it."

See in this regard also **HERBSTEIN AND VAN WINSEN, THE CIVIL PRACTICE FO THE SUPREME COURT OF SOUTH AFRICA** at page 165-166. The learned authors say (op cit):

> "When a party who should have been joined in the proceedings has not been joined the defendant may raise the defence of non-joinder. The issue of non-joinder may also be raised by the court ***mero motu***, even on appeal." (own emphasis)

Its is abundantly clear that the liquidator would have a direct and substantial interest in any order setting aside the decree in terms of which the companies were wound up. It is clear from the papers that certain assets of the companies were sold for substantial sums of money to third parties. A liquidation and distribution account was submitted to the Master and presumably approved. Those who received dividends pursuant to this account would also, so it would seem to me, have a direct interest in the event of the orders of liquidation being set aside.

The failure to cite the liquidator appears clearly to be a barrier to appellant succeeding in obtaining the relief he seeks.

However, even more substantively I am of the view that the executor dative has failed to establish that Tyrer's estate has any direct or substantial interest in the relief claimed. No allegation has been made that the late Tyrer suffered loss or damage as a result of the alleged fraud. In any event, if Tyrer did, the appropriate action to take would be to sue for such damage and not to seek to set the liquidation orders aside.

This litigation ***in casu*** is misconceived. No cause of action can be founded on the factual allegations made by the appellant. The exception was accordingly correctly upheld.

I must record however that both the parties, particularly the appellant as well as this Court are seriously disadvantaged by the fact that no reasons for judgment were given.

A litigant needs to know why judgment has been given against him. The Court of Appeal similarly requires the presiding judicial officer to furnish reasons for judgment. This would enable an appellant to comply with the provisions of the Rules of Court and to set out on which grounds it challenges the correctness of the judgment appealed against. The present is not the

only case that has come before us where no reasons have been given for the decision made. It is an unacceptable practice and cannot be tolerated.

J.H. STEYN JA

I AGREE : J. BROWDE JA

I AGREE : C.E.L. BECK JA

Delivered on this day of December 2000.