CIV/APN/130/80

IN THE HIGH COURT OF LESOTHO

In the Application of :

KENNETH C.S. GRADWELL	1st Applicant
KWAME OFINAM	2nd Applicant
PINO GUISEPPE FLORIO	3rd Applicant
J.G. SMITH	4th Applicant

v

T.S. LEFALATSA	Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice F.X. Rooney on the 25th day of January, 1982.

Mr. P.B. Geldenhuys for 1st Applicant
Mr. S. Harley for 2nd, 3rd and 4th Applicants,
Mr. H.M. Raubenheimer for the Respondent.

On the 14th December, 1981, I made a final sequestration order against the respondent. I allowed the costs of the 2nd and 4th applicants against the insolvent estate and reserved for further consideration the costs of the 1st and 3rd applicants.

These sequestration proceedings have had a long history. They began on the 7th August, 1980 when the first applicant petitioned this Court for an order that the estate of the respondent be placed under provisional sequestration in the hands of the Master. The matter was mentioned before the Court on the 11th August, 1980 and there followed a series of postponments until the 28th September, 1981 when a provisional sequestration order was made. The reason for the tardiness of the first applicant has become apparent from the numerous affidavits filed.

Section 10 of the Insolvency Proclamation lays down the conditions which are required to exist before this Court may make a provisional sequestration order. Included is the requirement that the Court must be of opinion that prima facie there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is sequestrated. Not only should the petition include such an allegation, but, it must contain information to enable

2/the Court to form .....

the Court to form an opinion on the matter of advantage to creditors (Meikles (Gwelo)(PVT) Ltd v. Potgieter 1957(2) S.A. 20).

The first applicant complied with this requirement and stated that it was in the interest of the respondent's creditors that a trustee be appointed to take control of the assets of the respondent and to realise the same and take further personal assets and preserve and distribute them equitably among the creditors. The first applicant went on to allege that the trustee could investigate and hold an inquiry in regard to any undue preferences which may have been made by the respondent as envisaged in Sections 29, 30 and 31 of the Insolvency Proclamation.

Having thus proclaimed that he was acting in the interest of the creditors of the respondent generally, the first applicant entered into negotiations with the debtor in the expectation that he would secure thereby a settlement of the debt due to him without regard for the interests of the other creditors. The first applicant negotiated with a third party (who stated he was acting on behalf of the respondent) for the settlement of his claim by the acceptance of diamonds to the value of M53,000. The first applicant alleged in his petition that the respondent was indebted to him to the extent of M84,860.

Not only did the negotiations between the first applicant and the respondent fail to achieve a result satisfactory to the former, but they enabled the latter to claim in his opposing affidavit that he had discharged his indebtness to the first applicant by handing over to him certain diamonds in full settlement of his claim. For this Court to have resolved that issue between the parties would have entailed the taking of oral evidence. Insolvency proceedings are not a proper forum in which to resolve disputed claims. (in re Gold Hill Mines 1883 23 Ch D 210 and Diamandis v. Speedy Lines Holdings 1975 (1) B.L.R. 70).

There was no dispute about the indebtness of the respondent at the time that the petition was presented to this Court. It was the subsequent activity of the first applicant which created a new situation. I see no reason why the general body of creditors should be asked to bear the first applicant's costs on this account in the circumstances I have described. He has only himself to blame,

3/ if having set ....

if having set the law in motion, he applied the brakes in a futile endeavour to achieve an advantage for himself. I make no order for costs in favour of the applicant.

On the 12th December, 1980, the second and third applicants applied by way of notice of motion for leave to join as petitioners in the case instituted by the 1st applicant. Although the motion was opposed by the respondent, leave was granted on the 28th September, 1981 when the provisional sequestration order was made. The 3rd applicant alleged that the respondent was indebted to him in respect of money lent as follows :

(a)	On the 10th June, 1978	R13,000
(b)	On the 15th Oct., 1978	8,000
(c)	On the 8th Feb., 1979	2,200

As evidence of this indebtness, the 3rd applicant placed before the Court three cheques namely :

1. One for R13,000 dated 14th June, 1978
2. One for R8,000 dated 21st Oct., 1978 and
3. One for R2,200 dated 12th Feb., 1979

all signed by the respondent and made payable to cash or bearer. None of the cheques was presented for payment. In an affidavit filed in opposition, the respondent admitted that he had borrowed money from the 3rd applicant against a pledge of his Jaquar X J 6 motor vehicle. He claimed that all these loans had been repaid by him and on each occasion he had redeemed his security. The cheques were intended to be acknowledgements of his indebteness. Once again it would not have been possible for this Court to have resolved the issue raised by the respondent without hearing oral evidence. The 3rd applicant has not chosen to proceed on an obvious and ascertainable legal claim capable of quick and ready proof. (Diamandis v. Speedy Lines Holdings, supra). I take the view that the intervention of the 3rd applicant was unnecessary and did not contribute to the progress of the action taken , nor could it be said to have influenced the result in any material way. In the circumstances, I am not prepared to order that the 3rd applicant's costs be paid out of the assets of the insolvent estate of the respondent.

4/ The second applicant .....

The second applicant obtained an order for costs in this Court in CIV/T/134/77 and holds two certificates from the taxing master, the first dated 13th November, 1979 for M4314.93 and the 2nd on the 16th July, 1980 for M118.61. In addition he has a claim for interest amounting to M378.40. In his replying affidavit dated the 6th February, 1981, the respondent admitted his indebtness to the 3rd applicant in the amount claimed and stated "I am even up to day, prepared to pay this said gentleman".

The 2nd applicant relied upon an act of insolvency in terms of Section 8(b) of the Insolvency Proclamation. He alleged that he issued execution against the property of the respondent and that the Deputy Sheriff on the 7th December, 1979 made a nulla bona return. This was repeated on the 1st July, 1980 with a similar result.

The first nulla bona return reads "The defendant has got no attachable assets save his house furniture which is under H.P. Agreement with Bradlows of Bloemfontein". The second nulla bona return states "The defendant has failed to satisfy the demands in not showing whether he has any attachable assets. The house is still registered in favour of Lesotho Housing Corporation".

In reply, the respondent contended that the return of service made by the Deputy Sheriff was not correct in that he had immoveable property registered in his name namely site 431, New Europa, district of Maseru. He further alleged that he had moveable property which could be attached to satisfy the above mentioned debt. He did not say where these movables were to be found or what they were. In support an affidavit was filed by the Deputy Sheriff concerned. He said in regard to his return of service dated 7th July, 1980 "I on his (Lefalatsa's) request made a personal search at the Registry of Deeds on the above mentioned date (5-2-81) and found that site 431 situated at New Europa Maseru had been registered in his name since 15th April, 1980. When the return of service dated 1st July, 1980 was made, the information that the property was registered in the first respondent's name was given to me by the staff of the Registrar of Deeds office. I now believe that this information was incorrect".

5/ An act of insolvency .....

An act of insolvency if alleged must be proved. As Aguda C.J. said in African Gate and Fence Works v. Andrew Hajionnou 1974(2) B.L.R. 29 at 30

> "In my view clear proof is required to establish the fact that a respondent has committed an act of insolvency. See Corner Shop (Pty) Ltd. v. Moodley 1950 (4) S.A. 55 especially at 59. As Roper. J., pointed out in that case which concerned a similar provision of a South African Act, 24 of 1966, two distinct types of acts of insolvency are contemplated by the provision. In respect of both types there must be an existing sentence of a Court of competent jurisdiction which the respondent has not satisfied. The first act requires that the Deputy Sheriff must have required the respondent to satisfy the judgment debt and the respondent must have failed to do so. Furthermore the Deputy Sheriff must have required the respondent to point out to him sufficient disposable property to satisfy the judgment debt and the respondent must have failed to point out such property. In this case there is nothing to indicate that the Deputy Sheriff ev asked the respondent to satisfy the debt or to point out his disposable propety. I agree with Mr. Ettlinger that disposable property must be distinguished from mere possessions and that a judgment debtor may not think of his money in the bank or other incorporeal property as part of his possessions. This argument is more valid in this case where the petitioner in paragraph 6 of his petition has alleged that the respondent was carrying on business and that he has several lucrative contracts to execute and that "he is or will be in receipt of substantial sums of money".
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> The second act of insolvency is where it appears from the return made by the Deputy Sheriff that he had not found sufficient disposable property of the respondent. This second act of insolvency may come about where the Deputy Sheriff was unable to find the respondent for example, having absconded from the country and the Deputy Sheriff has made a return concerning the disposable property of the respondent and this if found to be insufficient to satisfy the judgment debt. As I have taken the view that what the law prescribes is disposable property, not possessions, it is clear therefore that there is no proof that the respondent had committed an act of insolvency either of the first or of the second type. As Botha, Judge President of the Orange Free State Provincial Division of the Supreme Court of South Africa, said in Lotzof v. Raubenheimer 1959(1) S.A. 90 at page 92, it is not the words Nulla Bona or the form of the document on which they appear which are of improtance, but whether the facts necessary for establishing either act of insolvency as set out in Section 8(b) have been proved. In this case the evidence as disclosed by the return of the Deputy Sheriff does not establish either of the two acts of insolvency as set down in this section. The words Nulla Bona carry no magic in them: there must be evidence that no sufficient disposable property to satisfy the debt was found."

6/ Applying this .....

Applying this principle to the first return of the Deputy Sheriff, it is to be noted that he did not say that he required the respondent to satisfy the judgment debt and that the latter had failed to do so. Without disclosing the source of his information the Deputy Sheriff states that the defendant has no "attachable assets". Disposable property and attachable assets mean much the same thing. The Deputy Sheriff uses the same phrase in the return dated 1st July, 1980. In the second return reference is made to a failure on the part of the respondent to satisfy a demand to show whether he had attachable assets. The Deputy Sheriff made a reference (which he acknowledges to be an error), to the respondent's house being "registered in favour of Lesotho Housing Corporation". The return is made by a layman. The reference to the Lesotho Housing Corporation suggests only one of two possibilities either that the house was owned by the Lesotho Housing Corporation and had not been transferred to the respondent or there was a bond on the house in favour of the Lesotho Housing Corporation.

The respondent has succeeded in establishimg that he was the registered owner of the Land on the 1st July, 1980. He has made no reference whatsoever to the existance of any bond on the property. If he was the holder of free and unencumbered property as at the 1st July, 1980 then he had at his disposal assets sufficient to satisfy the relatively small debt then due to the second applicant. Although the respndent has gone to the trouble of obtaining a correction from the Deputy Sheriff, he has carefully refrained from asserting the exact position. He does not say that the land is free of mortage bonds.

If immoveable property is mortgaged it cannot be regarded as disposable property. (Fourie v. Bezuidenhout 1932 T.P.D. 110).

Although there are deficiancies in the Deputy Sheriff's returns to the writs of execution, I propose to take the broad view and I find that they consitute nulla bona returns sufficient to meet the requirements of Section 8 of the Insolvency Proclamation.

If my conclusion in regard to the Deputy Sheriff's returns is not correst, this is a case where, even if the

7/ debtor had not .....

debtor had not committed an act of insolvency, the preponderence of evidence leads me to the conclusion that he is in fact insolvent under Section 12 (1)(b) of the Insolvency Proclamation. It is not in dispute that the respondent has outstanding judgment debts which he has not paid for several years. The respondent has not placed before this Court information as to the property he possesses and which would be sufficient to satisfy his liabilities.

He gives his own estimate of the value of his estate without any mention of his liabilities. He gives no explanation as to why he has not paid his debts. As Innes C.J. said in the case of De Waard v. Andrew & Thienhans Ltd 1907 T.S. 727 at 733 "To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of the man who does not pay what he owes". See also Langstone v. Lambert 1948 (4) S.A. 392.

On the 14th October, 1981, the 4th applicant intervened in these proceedings in support of the other applicants. He has a judgment against respondent dated the 18th September, 1978 and the amount due is R8,514. He was concerned (not without reason) that the respondent might reach a settlement with the other applicants or any one of them prejudicial to his interests. The respondent admits owing the 4th applicant the money claimed. The 4th applicant was fully justified in intervening in these proceedings and he should be allowed his costs out of the insolvent estate.

F.X. ROONEY
JUDGE.

2nd February, 1982.

Attorney for the 1st Applicant : Messrs. Du Preez, Liebetrau & Co
Attorney for the 2nd, and 3rd Applicants : Mohaleroe, Sello & Co.
Attorney for the 4th Applicant : Messrs. Du Preez, Liebetrau & Co.
Attorney for Respondent: E.G. Cooper & Sons,