

IN THE HIGH COURT OF LESOTHO

In the matter between:

TEBOHO DAMBHA

Applicant

v

FREDERIK BEATRIX PRETORIUS N.O.	1st Respondent
HENDRIK JACOBUS FREDERIK STEYN N.O.	2nd Respondent
R.P.B. ERASMUS N.O.	3rd Respondent
THE MASTER OF THE HIGH COURT OF LESOTHO	4th Respondent
E.G. COOPER & SONS	5th Respondent

Coram:

COTRAN CJ

UNTERHALTER AJ

J U D G M E N T

Filed by the Hon. Chief Justice, Mr. Justice  
T.S. Cotran and the Hon. Mr. Acting Justice  
J. Unterhalter on the 3rd day of December 1982

Cotran CJ,

On 27th September 1982 Maseru Discount Centre(Pty)Ltd was placed in final liquidation in terms of s.173 of the Companies Act 1967 (CIV/APN/195/82). The liquidator is 1st respondent.

On the same day the estate of Mr. T. Dambha was placed in final sequestration apparently in terms of s.8(g) and s.11 of the Insolvency Proclamation No. 51 of 1957 (CIV/APN/213/82). The trustee is 2nd respondent.

On the 14th October 1982 two separate applications were launched by the liquidator of Maseru Discount Centre(Pty)Ltd - 1st respondent - and the trustee of the estate of T. Dambha - 2nd respondent - for orders to join the liquidator as co-trustee of the estate of T. Dambha and for the trustee of the estate to join as co-liquidator of Maseru Discount Centre(Pty)Ltd. Both applications were granted.

Later the same day an application (CIV/APN/263/82) was launched by the joint liquidators - 1st and 2nd respondents - of Maseru Discount Centre(Pty)Ltd seeking an enquiry in terms of s.204 of the Company's Act 1967 and for the appointment of

a Commissioner to conduct such enquiry in terms of s.262 of the Act. Only one name was submitted for the Court's consideration. The application was granted subject however to the submission of the names of more than one candidate, in accordance with practice (see Lipkie and another v Bloemfontein Auctioneers and Agencies(Pty)Ltd 1960(4) SA 672) to enable the Court to make a selection. No other candidates were available and on the 25th October 1982 the original nominee was appointed as Commissioner.

The Commissioner embarked upon the enquiry on the 9th November 1982. Amongst the persons summoned to give evidence was Mr. T. Dambha.

Whilst the enquiry under s.204 of the Companies Act 1967 was in progress the Master of the High Court invoked the provisions of s.152(2) of the Insolvency Proclamation 1957 to conduct an investigation into the insolvent estate of Mr.Dambha and summons was issued for his interrogation accordingly.

Prior to the commencement of the enquiry on the 9th November counsel for 1st and 2nd respondents (Mr. Edeling) and counsel then appearing on behalf of an alleged creditor called Mr. Osman (Mr. Rottanburg) came to a "gentlemen's agreement". The exact terms of the agreement are not clear but its effect was that the creditor's then counsel (Mr. Rottanburg) should somehow look after the "interests" of Mr. T. Dambha. The Commissioner having noticed that counsel of the creditor Osman was protecting Mr. T. Dambha's interests more than his client's, he ruled that Mr. Dambha was not entitled to representation in an enquiry under s. 204 of the Companies Act.

An urgent application (on notice) was launched on the 15th November 1982 by Mr. Dambha, now applicant, seeking relief couched in the following terms :

- " 1. Treating this Application as one of urgency and dispensing with the forms and service provided for in the Rules of the above Honourable Court and disposing of this Application at such time and place and in such manner and in accordance with such procedure (which shall in so far as practicable be in terms of such Rules of Court) as to the above Honourable Court may seem meet;
2. Setting aside the summons issued by the Fourth Respondent under Section 152 of the Insolvency Proclamation Number 51 of 1957 ("the Proclamation") calling for the appearance of the Applicant at 9 a.m. on Monday the 14th day of November, 1982;

3. Staying alternatively setting aside the Enquiry under Section 152 of the Proclamation;
4. Alternatively staying the Enquiry under Section 152 of the Proclamation pending the final determination of this Application, alternatively, pending the closing of the Commission of Enquiry ordered by the above Honourable Court on the 14th day of October, 1982, under Section 204 of the Companies Act Number 25 of 1967 ("the Companies Act");
5. Removing the First Respondent from his capacity as joint liquidator of Maseru Discount Centre (Proprietary) Limited ("the Company");
6. Removing the Second Respondent from his capacity as joint liquidator of the Company;
7. Removing the First Respondent from his capacity as joint Trustee of the Applicant's insolvent Estate.
8. Removing the Second Respondent from his capacity as joint Trustee of the Applicant's insolvent Estate;
9. Setting aside the Order of the above Honourable Court under Civil Application Number 258/82 granted on the 14th day of October, 1982, and the Commission of Enquiry pursuant to such Order of Court;
10. Alternatively to Prayers 2 and/or 3 and/or 4 and/or 9 supra.
  - 10.1. Declaring that the Applicant be entitled to be legally represented by a Solicitor and/or Counsel at any Insolvency Enquiry held or to be held under Section 152 of the Proclamation or at any Commission of Enquiry and in particular the said Commission of Enquiry duly constituted and convened under Section 204 of the Companies Act; either as a contributory or as an examinee at the enquiry;
  - 10.2. Setting aside and reviewing the Rulings of the Third Respondent to the effect that the Applicant was not entitled to be represented at the Commission of Enquiry convened under Section 204 of the Companies Act by Order of this Honourable Court dated 14th October, 1982;
  - 10.3. Alternatively to 10.2 supra, declaring that the Third Respondent erred in exercising his discretion against permitting the Applicant to be represented by a solicitor and/or Counsel at the said Commission of Enquiry and declaring the Applicant to be entitled to such representation.
11. Ordering the First and Second Respondents to pay the costs of this Application de bonis propriis with no Order as to costs against Third, Fourth or Fifth Respondents save in the event of his/her/their opposing this Application or associating themselves with any opposition hereto;

/12. Alternatively

12. Alternatively to 11 supra Ordering the First Respondent and/or the Second Respondent to pay the costs of this Application with no Order as to costs against Third, Fourth or Fifth Respondents save in the event of his/her/their opposing this Application or associating himself/herself/themselves with such opposition;
13. Granting unto the Applicant further and/or alternative relief."

By consent the enquiry under s.204 of the Companies Act and the proposed interrogation under s.152(2) of the Insolvency Proclamation were stayed and the return date for the application was fixed for the 22nd November 1982. In the meantime opposing affidavits were filed as well as a replying affidavit. These were voluminous.

On the return date another advocate (Mr. L. Lawrence SC) appeared on behalf of the applicant. It was intimated at the outset that a settlement was reached (and was in the process of being drawn) on all the issues raised in the application bar one, viz, whether or not the Commissioner was correct in law in disallowing the applicant representation at the enquiry under s.204 of the Companies Act. In view of the importance of the matter raised I sat with Unterhalter AJ. On the 23rd November 1982 the Court made the following Order :

" We declare that the applicant is entitled to be legally represented by an attorney and or counsel at the Commission of Enquiry duly constituted and convened under s.204 of the Companies Act, in terms of CIV/APN/263/82. The applicant has the right of representation throughout the proceedings. The Deed of Settlement of other issues made a Court Order including the question of costs of the two days hearing before us on the 22nd and 23rd November 1982."

We said reasons will be filed later and these now follow. The order embodying the terms of the settlement is annexed to this Judgment.

Unterhalter AJ:

It is not denied that the applicant is the holder of all the fully paid up shares of Maseru Discount Centre(Pty)Ltd (in liquidation). He is also an unrehabilitated insolvent. The argument was centred on the interpretation of certain provisions in the Companies Act 1967 and the Insolvency Proclamation 1957.

Section 262(1) of the Companies Act reads as follows .

"All persons empowered to hold Subordinate Courts and such other persons as the court may appoint shall be commissioners for the purpose of taking evidence or holding any enquiry under this Act in cases where a company is wound up in Lesotho and the court may refer the whole or any part of the examination of witnesses or of any enquiry under this Act to any person hereby appointed commissioner. The Master, the liquidator and any creditor or contributory may be represented at such enquiry by an attorney or counsel".

It was submitted on behalf of the applicant that he was a contributory and as such entitled to representation at the enquiry by an attorney or counsel in terms of the section just quoted. Section 2(1) of the Companies Act defines "contributory" as having the meaning given to it by section 169. Section 169 of the Act reads as follows :

"The term "contributory" means any person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining and all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory."

Section 168(a) of the Act says that :

"In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member."

As it is admitted the applicant's shares are all fully paid, at first blush it would seem that the applicant is not a contributory. However, in Edwards v Woodnutt N.O. 1968(4) SA 184 R. BEADLE, C.J. in examining the Rhodesian(now Zimbabwean) Companies Act which is similar in its terms to the Lesotho Act, said at page 187 E,

"The Act..... must be read as a whole .....  
It will be seen that the word "contributory" is used throughout the Act as synonymous with the word "member" and a fully paid up shareholder is certainly a "member". "

He referred to many sections of the Rhodesian Act where the words were used interchangeably and said that unless there are good reasons for adopting a different construction the same word in a statute should always be construed as having the same meaning. He referred to a number of English cases supporting his interpretation. Among these is Re Consolidated Gold Fields of New Zealand Limited, (1953) Vol. 1 All E.R. 791,

a decision in the Chancery Division by ROXBURGH J. That learned Judge in turn referred to an earlier judgment decided as long ago as 1866, the case being Re Anglesea Colliery Company, (1866) 1 Chancery Appeals 555 which held that holders of paid up shares in companies to which the Act of 1862 applies fall within the description of contributories contained in that Act. ROXBURGH J followed that decision. He declined to follow a decision to the opposite effect, Re Aidall Limited 1933 Ch. 323 because in that matter the attention of the court had not been drawn to the Anglesea decision.

In my view these cases are strongly persuasive and should be followed by this court. I hold therefore that a member of a company falls within the description of "contributory" and may be represented at an enquiry in terms of section 262(1) of the Companies Act.

The next problem for discussion arises from the provisions of section 171(2) of the Companies Act. It reads as follows :

"If a contributory becomes insolvent or assigns his estate under the law relating to insolvent estates, either before or after he has been placed on the list of contributories, then

- (a) his trustee in insolvency or his assignee, as the case may be, shall represent him for all the purposes of the winding up, and shall be a contributory accordingly; and
- (b) there may be proved against the estate of the insolvent or of the debtor who has assigned his estate the estimated value of his liability to future calls, as well as calls already made."

What is to be asked, is whether an unrehabilitated insolvent, such as the applicant, may be represented at the enquiry or whether he is displaced by reason of the provisions of section 171(2) of the Companies Act, by his trustee. The curious situation in the present matter is that the applicant's joint provisional trustees are also the joint provisional liquidators of the company. As liquidators they are concerned to interrogate the applicant in the interests of creditors. As trustees they represent the creditors in the insolvent estate but it is conceivable that conflict situations may arise.

For many years the courts have inclined to the view that an insolvent be allowed to be represented by counsel and

/solicitor.

solicitor. In Shamosewitz v Shamosewitz and others, 1913 WLD 213 De VILLIERS, J.P. at page 219 said that it would be highly undesirable to allow the trustee or any creditor to be represented by skilled professional men, and not to allow the same privilege to the insolvent. He did not agree however, that this was an absolute and unrestricted right. There is a more definite view in the case In Re Breech-Loading Armoury Company, 1867(4) Eq. 454. There, Lord ROMILLY, M.R. said at page 454:

"What reliance could the court place on the evidence of an unfortunate man shut up in a room with the Examiner and hostile counsel without anyone to protect him?"

It was held that he was entitled to be attended by his counsel and solicitor. Similar views were expressed in Re Merchant's Company, 1867(4) Eq. at 457, and in Re Cambrian Mining Company, 20 Ch.D. 376 - see also Halsbury Laws of England 3rd Ed. Vol.6 para 1219 page 620, and notes.

Counsel for first and second respondents drew attention to the difference between the provisions of section 204 and section 205 of the Companies Act. Section 205(3) of the Act provides that the liquidator and any creditor or contributory may also take part in the examination either personally or by attorney or counsel. Such provision does not appear in section 204 of the Act. It was submitted that the reason for this is that section 205(4) of the Act obliges a person examined to answer any question even if it may tend to incriminate him, whereas he is not so obliged if an examination is held in terms of section 204 of the Act. He submitted that the reason for the representation was to guide a person in regard to his duty if incriminating questions were put to him and that as no obligation arose from section 204 to answer questions of that nature there was no need for representation of the person examined. It was maintained that the difference was significant. Similar reasoning was applied by DOWLING, J. in Appleson v The Master and others, 1951(3) SA 141 TPD in regard to representation of an insolvent at an interrogation. There was provision in the legislation for representation in certain circumstances and not in others and because of what the learned Judge described as the pointed omission of the statutory right in the relevant section the court held that the witness did not have the right claimed.

These are undoubtedly significant comments but, in the

absence of an explicit prohibition of representation at the enquiry I do not think that the court should be astute to deprive an insolvent of the guidance and assistance that are available to creditors and the liquidator at an enquiry. A contributory as a member of the company concerned is an investor in that company more especially if his shares are fully paid up. As such he has a very special financial interest in the affairs of the company and the investigation into those affairs. He should have legal assistance if he so desires it when attending at the enquiry as such assistance may be of great importance in regard to his investment.

In Mears v Rissik, Mackenzie N.O. and Mears' Trustee 1905 T.S. 303 the court held that an insolvent retained an interest in the due administration of his estate. It had been argued that as plaintiff in the action the insolvent was not competent to bring it because he was an unrehabilitated insolvent, but the court held otherwise. At page 305 INNES, C.J. said :

"As I have said, generally the trustee is the person to take action in matters connected with the estate; but if the trustee will not do so, or whether bona fide or mala fide does not see his way to take action, is the insolvent on that ground to be without remedy? I should say upon general principles he ought not to be; the law should provide some remedy".

An eloquent illustration of how an insolvent may be prejudiced if he were deprived of the right of representation at the enquiry is indeed the present situation where the applicant's trustees are the co-liquidators of the company. Although section 171(2)(a) of the Companies Act gives the status of a contributory to the trustee of an insolvent I can see no reason why the insolvent through legal representation should not have the right to keep a check upon the conduct of his trustee in regard to his interest in the company as a member and thereby to allow him to safeguard that interest. If the insolvent, as a contributory, may be represented at the enquiry by counsel and attorney, there appears to be no basis for denying him such representation if, during the enquiry, he is required to give evidence. Once he has representation that representation should continue for all purposes.

For these reasons I am of the view that having regard to the circumstances the tradition of fair play mentioned in the



cases to which I have referred should be observed in the courts of Lesotho.

*J. Unterhalter*  
.....  
J. UNTERHALTER  
Acting Judge

Cotran CJ

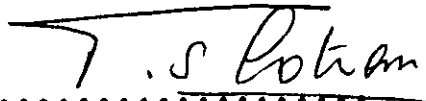
I agree with the Judgment filed by my brother Unterhalter that the applicant is a contributory and is entitled to representation in an enquiry under s.204 of the Companies Act 1967, even though he is an unrehabilitated insolvent, but I wish to add a few comments. The learned Commissioner appears to have adapted Dowling J's interpretation of s.152(2) of the Insolvency Act (of South Africa) in the Appelson's case to an enquiry under s.204 of the Lesotho Companies Act 1967 and this is what Mr. Edeling urged upon us to follow.

There are however two objections to this. Ex-parte City Silk Emporium(Pty)Ltd 1947(4) SA 576 at 579 is authority for the proposition that an examination under s.155 of the Companies Act (of South Africa) deals with a matter which is specially provided for by the Companies Act and consequently the Insolvency Act (of South Africa) is not applicable. Furthermore the text of s.204(2) of the Companies Act 1967 is different from the text of s.155(2) of the former 1926 Act and s.417 of the current Act (of South Africa). One of the main objects of s.155(2) and 417(2)(a) and (b) is to "grill" the officers of the company and those suspected of assisting them in alienating or disposing of the company's assets and if possible to dislodge such persons from any unlawful preference or gain. The enquiry is all embracing. The examinee must answer all questions even though they tend to incriminate him and these can thereafter be used in evidence against him. In R. v Raisun and Pathon 1947(2) SA 881 the whole record was held admissible against an accused in a criminal trial. Our s.204(2) is silent on these matters. It is analogous to s.268(2) of the Companies Act 1948 of England reproduced in Re Rolls Razor Ltd 1969(3) All E.R. p. 1389. The object in all the three sections, is probably the same, viz, discovery, but the manner of carrying it out is different for in Lesotho the examinee (whether or not he is a contributory) still retains the right to refuse to answer questions that tend to incriminate him. This principle

is enshrined in s.23 of the Evidence in Civil *Proceedings* Proclamation 72 of 1830 (Vol. I Laws of Lesotho p. 773). What might or might not be incriminating is often a difficult question to determine and whilst one can always rely on the Commissioner to prevent oppression, it seems to me that his task is rendered less onerous if representation is allowed.

The thought did occur to me of course that an unscrupulous attorney or counsel may attempt to frustrate the task of the Commissioner (a matter that can be adequately dealt with) but other self respecting attorneys or counsel (the majority one would think) would be mindful of the duties entrusted to the Commissioner by the legislature in s.204(2).

Section 262 gives a right of representation to certain classes of persons. We held that the applicant qualifies and that disposes of the matter before us. I am not however entirely certain in my own mind that the section excludes representation for other classes of persons and I would have thought (though I am not deciding) that the Commissioner still retains a discretion over this. It appears incongruous for me to hold that because representation under s.205 is specifically provided for, where such representation is hardly needed (since the examinee has no alternative but to answer) that by implication of the law representation must be denied under s.204 where it may be needed more.

  
.....  
T.S. COTRAN  
Chief Justice

For Applicant : Mr. L. Lawrence SC  
For Respondents. Mr. C. Edeling

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between

TEBOHO DAMBHA

Applicant

and

FREDERIK BEATRIX PRETORIUS

First Respondent

HENDRIK JACOBUS FREDERIK STEYN

Second Respondent

R P B ERASMUS

Third Respondent

THE MASTER OF THE HIGH COURT OF LESOTHO

Fourth Respondent

E G COOPER & SONS

Fifth Respondent

O R D E R

(1)

Applicant hereby withdraws the relief claimed in prayers 5,6,7,8,9, 11 and 12.

(2)

Concerning prayers 1 to 4 this relief is dealt with as follows

- (a) The Master's Enquiry will only proceed after termination of the Enquiry under Section 204 of the Companies Act, unless the Master considers it desirable that the Master's Enquiry proceed prior to such termination, and in such event Applicant will be given notice of three days.
- (b) Applicant may approach the above Honourable Court within three weeks from date hereof, to apply to set aside the sequestration order. In such event notice of at least three days shall be given to the joint Provisional Trustees.

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(c) If the Master's Enquiry should proceed, any party may argue the right to representation in terms of Section 152, either before The Master or before This Honourable Court.

(3)

The costs incurred by the Respondents who opposed this application, in whatever capacity relating to the claims which have been withdrawn and relating to the conduct of any of the Respondents or persons who deposed to Affidavits on behalf of Respondents, and to defend their integrity and conduct, shall be borne by the Applicant on a scale as between Attorney and Client. Such costs shall be taxed by the Registrar of this Honourable Court, or agreed upon between the parties.

(4))

The Applicant shall cause acceptable unimpeachable security to be provided, within ten days, for the payment of the above costs, in the sum of R20 000,00. Such security shall be provided to the Registrar of the above Honourable Court.

(5)

In the event of the security being provided as aforesaid, no Respondent shall proceed against any other person. (ie other than Applicant ) for recovery of the said costs. Should the said security not be provided as aforesaid, Respondents or any of them may proceed against the Applicant and/or any other person or persons mentioned in Respondents' papers, for the recovery of such costs. In the event of such costs not being reasonably recoverable from such other persons, such costs shall be paid in equal shares, jointly and severally, by the Company in Liquidation and the insolvent estate.

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(6)

The costs relating to the argument on representation shall be paid out of the assets of the company in liquidation. Such costs shall include the costs of appearance on 22nd and 23rd November 1982, and shall include the costs of two counsel for Applicant and for First and Second Respondents N O.