

IN THE HIGH COURT OF LESOTHO

In the Application of

LESOTHO NATIONAL DEVELOPMENT
CORPORATION

Petitioner

v

ATLANTIS FOOTWEAR (Proprietary)
LIMITED

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 25th day of April, 1986.

On 11th November, 1985, the Petitioner herein moved the Court for a Provisional Liquidation order couched in the following terms

- "1. That the Respondent company be placed in Provisional Liquidation in the hands of the Master of the High Court,
2. Calling upon Respondent company to show cause, if any, at 09h30 on Monday 2nd December, 1985 why this provisional order should not be made absolute,
3. That service of this order shall be placed in the comet,
4. That service of this order shall be effected on the Respondent at its registered office.
5. The Master of the High Court is hereby directed to appoint Stephanus Andreas Redelinghus a Provisions Liquidator of the Respondent to take immediate control of the company's assets and granting him the powers provided for in Section 188(2)(a)(b)(c)(e)(f)(g) and (h) of the companies Act 1967 as amended,
6. That costs of this Petition be paid out of the assets of the Respondent company's estate,
7. Granting such and/or alternative relief as the above Honourable Court may deem meet."

2/ The founding

The founding affidavit was deposed to by one Brendan Joseph Martin who was authorised so to do per annexure "A" (Special Power of Attorney dated 31st October, 1985) by the Petitioner's Managing Director pursuant to the provisions of annexure "B" (the General Power of Attorney duly registered in the Deeds Registry).

The order was granted as prayed, in terms of prayers 1 - 6 of the Petition, by Levy A.J. on the same day, 11th November, 1985. It was duly published in the comet on 7th December, 1985 and served on the Respondent company at its registered office on 26th November, 1985. Stephanus Andreas Redelinghus was duly appointed by the Master of the High Court as the Provisional Liquidator to exercise powers in terms of the provisions of S.188(2) of the Companies Act 1967.

On 10th February, 1986, the Respondent company intimated its intention to resist confirmation of the order, and duly filed the answering affidavit which was deposed to by one Perumal Muthusamy Naidoo, the Managing Director of the Respondent company, pursuant to a special resolution taken by the Directors of the Respondent company on 8th February, 1986. A replying affidavit was also filed by the Petitioner.

Briefly the facts disclosed by the affidavits are that the Respondent company is indebted to the Petitioner in the sum of M180,750.94 which amount is made up as follows

M135,000.00 being in respect of a medium term loan bearing interest at the rate of 12% per annum, advanced by the Petitioner to the Respondent company and which amount together with interest as aforesaid is presently due and payable by the Respondent company in view of the failure, despite proper demand to make payment. As security for the repayment of this loan, the Petitioner holds a Notarial General Covering Bond, duly registered under No.17176 in the Deeds Registry, Maseru on the 12th day of September 1984 (Annexure 'C'),

M26,719.79 being in respect of an amount which the Petitioner paid to the Standard Chartered Bank Africa PLC on behalf of the Respondent company in terms of a loan guarantee dated 27th March, 1984, issued by the Petitioner in favour of the

3/ Bank

said Bank pursuant to the loan guarantee entered into between the Petitioner and the Respondent company. As security for the repayment of this amount, the Petitioner holds a Notarial Indemnity Bond, duly registered in the Deeds Registry, Maseru, on the 12th September, 1984 (Annexure 'D') and

M19,031 25 being in respect of arrear rental due to the Petitioner by the Respondent company by virtue of an agreement of sub-lease entered into between the Petitioner and the Respondent company on the 14th May, 1984 which amount is presently due and payable. The Petitioner's claim in respect of the above is secured by virtue of the Landlord's Hypothec which exists over the movable assets of the Respondent company to the extent thereof.

On or about the 19th August, 1984, the business premises of the Respondent company was extensively damaged by fire. In consequence of the fire, the machinery had to be replaced, stock in trade, fixture, fitting and work in progress were totally destroyed. Although the Respondent company was insured against destruction of, or damage to, its property by fire, a dispute had arisen between the Respondent company and its insurer, Lesotho National Insurance Company (Pty) Ltd, with regard to the settlement of the Respondent company's claim. The Respondent company was forced to cease operating its business and had been unable to commence work since August, 1984. Consequently the Respondent company had not been able to honour its obligations for payment nor was it likely to do so in view of the fact that the business was not generating any income. Indeed, it was clear from annexure "BJM4", the Auditor's report dated 20th August, 1984, that even before its destruction by fire, the business of the Respondent company had financial difficulties for its expenses were higher than the profits.

In the circumstances, the Petitioner addressed a letter (annexure "BJMI") dated 22nd May, 1985 to the Respondent company demanding payment of the debt. Although in its answering affidavit, the Respondent company denied that the Petitioner had made any such demand there could be no doubt from its letter, annexure "BJMIA", that the Respondent company did in fact receive the abovementioned letter of demand from the Petitioner. Notwithstanding the

4/ demand

demand made as far back as 22nd May, 1985, the Respondent company has to date not honoured its financial obligations to the Petitioner which financial obligations are admittedly far in excess of M100. That being so, the Respondent company must be deemed to be unable to pay its debts for in terms of the provisions of S.172 of the Company Act No.25 of 1967.,

"A company shall be deemed to be unable to pay its debts -

- (a) if a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred rand then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office, and if the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor,"

Now, apart from its inability to settle its indebtedness to the Petitioner, it is common cause that the Respondent company has suspended its business since August, 1984, which period is obviously over a year. That being the case, S.173(c) of the Companies Act, supra, provides

"173. A company may be wound up by the court -

- (a)
 - (b)
 - (c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year
- (my underlinings)

It has been contented in argument that as Mr. Stephanus Andreas Redelinghuys had been acting for the Respondent company in its case against the Lesotho Insurance company he cannot now be appointed the liquidator in the case between the Respondent company and the Petitioner on the ground of divided interests

It will be observed however, that Mr. Redelinghus filed an affidavit in which he disposed that in the case between

5/ the Respondent

the Respondent company and the Insurance company he merely acted on specific instructions received from the Respondent company's attorneys Messrs Berkowitz, Kirked and Cohen and had not at any time consulted with any of the officers, directors, witnesses or any other person employed by the Respondent company in connection with its case against the Insurance company. As soon as he received instructions to attend to the present petition, he communicated this fact to Respondent company's attorneys that he was obliged to withdraw as their correspondent and would give effect to such instructions in view of the fact that the Petitioner had been a client of his firm for a substantial period of time.

I am not convinced that at the time he acted as correspondent for the Respondent company's attorneys in the case between the Respondent company and the Insurance company, Mr. Redelinguys could have been aware that there was going to be a case between the Respondent company and the Petitioner, his client of long standing. In any event as soon as he became aware that there was going to be a case between the Respondent company and the Petitioner his client of long standing, Mr. Redelinguys ought to have ceased to act as correspondent for the Respondent's attorney. This he did and cannot, therefore, be barred from acting as the provisional liquidator in this case.

It was further argued that as its business was destroyed by fire and Lesotho Insurance company delayed to pay its claim, the Respondent company had, for reasons beyond its control, been unable to resume its operations. The court should, therefore, exercise its discretion and discharge the provisional liquidation order. I am unable to agree. As Dowling, J. put it in Service Trade Supplies Ltd v. Dasco and Sons Ltd 1962(3) S.A. p.428

"The cases show that the discretion of the court where unpaid creditors seek a winding-up order against a company unable to pay its debts is in reality a very narrow one, just as its

6/ discretion

discretion to refuse a sequestration order of an application of an unpaid creditor in an insolvent estate is very narrow. In Effune v. Hancock, 1923 T P D.355, a full court decision on appeal by a creditor against a refusal to grant a final winding-up order, at p 354, De Waai, J. is reported to have said, "where a creditor alleges an act of insolvency, and proves his claim, he has the unfettered right to choose his form of execution, one of which is to sequestrate his debtor's estate." and His Lordship goes on to indicate that any discretion the court may have is a narrow one. In the sphere of company law the same sort of approach is valid. The great weight of authority is that generally speaking an unpaid creditor has a right ex debito justitiae to a winding-up order against a company unable to pay its debts."

On the evidence disclosed by the affidavits before me it has been overwhelmingly proved that the Respondent company is indebted to the Petitioner and unable to make repayment. On the strength of the above cited authority, the Petitioner has, therefore, a right to be granted a liquidation order prayed for in the papers. In my opinion, the case is not a fit one where the discretion to refuse the relief sought for can properly be exercised.

I would, therefore, order that the provisional order be made final with costs as prayed.

B.K. MOLAI
JUDGE

25th April, 1986.

For Petitioner	Mr Edelins,
For Respondent	Mr. Hlaoli.