CIV/APN/323/88

IN THE HIGH COURT OF LESOTHO

In the matter between:-

DAVID WILLIAM FRIEDMAN — Petitioner

and

GUISEPPE ANTONIO MARIO FLORIO — Respondent
(LESOTHO TELECOMMUNICATIONS CORPORATION INTERVENING)

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 15th day of March, 1989

This is an application for the confirmation of a provisional order of sequestration which was granted against the respondent on the 20th October, 1988.

Section 12 (1) and (2) of Insolvency Proclamation No. 51 of 1957 read as follows:-

"(1) If at the hearing pursuant to the aforesaid rule nisi the Court is satisfied that -

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in sub-section (1) of section nine : and

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(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may sequestrate the estate of the debtor.

(2) If at such hearing the Court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die."

It is common cause that the onus of satisfying the Court on the three points mentioned above rests on the petitioning creditor and at no stage of the proceedings is any onus of disproving any of these points shifted to the debtor (Gool v. Rahim, 1938 C.P.D.; Wilkens v. Pieterse, 1937 C.P.D. 165). The onus which rests on the petitioner is the ordinary civil onus to satisfy the Court on a balance of probabilities that the three matters referred to in section 12 of the Insolvency Proclamation in fact exist.

In his founding affidavit (petition) the applicant deposed that he is a director of companies and financier based in Johannesburg. On the 1st January, 1981 he was introduced to the respondent, and as a result of negotiations he advanced to the resondent the sum of R145,000-00 in cash. The money was handed over to the respondent at his premises at c/o Machache Diamond Cutting Works in Maseru. The agreement was verbal and the money was to be repaid within thirty (30) days, together with interest at the rate of 14.5%.

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The applicant states that the loan was not repaid by the respondent. However, during March, 1982 the respondent managed to persuade him to finance the purchase of a parcel of diamonds in the sum of R205,000-00 in cash.

These two transactions are reflected in Annexure "A" which is a copy of a schedule prepared by the applicant's auditors. During 1982 the respondent managed to persuade him to continue advancing funds and a further loan was made in the amount of R90,000-00, together with a further amount of R116,000-00 on the 27th July, 1982 and during March, 1982 respectively. According to Annexure "A" it seems that the advances continued during 1983 and 1984. By February, 1987 the advances amounted to R1,059,000-00 and the interest stood at R1,385,302-93 making a total of R2,444,302-93. The repayments during the entire period amounted to R766,500-00 leaving a balance of R1,677,802-93.

The applicant states that he continued to lend the respondent the sums of money reflected in Annexure "A" without instituting an action for the recovery of the loan because he was a victim of the respondent's persuasiveness; he also laboured under the apprehension that he would not recover these funds and furthermore, took the financial view that it may be better to indulge the respondent for a further period of time in order that the respondent may improve his financial position and meet the claims of creditors. He states that the decisions taken to indulge the respondent were based on a sound financial analysis of the respondent's parlous state of affairs from time to time.

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The applicant deposes that during February and March, 1987 a series of meetings took place which were attended by him (applicant), the respondent and a certain Mr. David Telford who was respondent's accountant. At these meetings an attempt was made to resolve the following:

(a) the amount outstanding, at that point in time, together with interest; and

(b) the basis upon which the respondent would repay the applicant the amount owing.

He states that no agreement was reached. At one meeting in February, 1987 the respondent made a final offer of R292,500-00 in full and final settlement of his claim. The applicant says that he rejected that offer. The respondent subsequently made an offer of R500,000-00 in full and final settlement payable over a period of five years with yearly instalment of R100,000-00. This offer was also not accepted. During these negotiations the respondent mentioned on several occasions that he in fact was insolvent and could not meet his liabilities.

David Telford deposed that he is an accountant and economist by profession and is currently a director of companies carrying on businesses of his own within the Kingdom of Lesotho. In February, 1985 the respondent engaged him as a financial consultant and in September, 1985 the respondent appointed him as the financial manager of his various hotel interests trading as Lesotho Hotels Group. During the course of 1986 he was additionally appointed as director of various of respondent's companies. He states that as a

result of his consultancy and employment with the respondent's group of companies he acquired an intimate knowledge of the affairs thereof.

He confirms the respondent's averment that during the meetings between the applicant and the respondent he was present and that the respondent admitted that he owed the applicant an amount of R292,000-00. However, the applicant was not prepared to accept this amount as a final and full settlement of the money owed to him by the respondent. During the period of his consultancy and employment with the respondent and his group of companies he was aware that the respondent and his companies were commercially insolvent in that there were not funds to meet day to day trading activities of the group.

In his supporting affidavit Shimon Betsalel avers that the respondent is indebted to him in the sum of R48,000-00 and he has attached two copies of I.O.U. and a copy of a cheque which was dishonoured by the bank.

In his opposing affidavit the respondent denies that he owes the applicant, Betsalel or Barberini anything and states that the three of them are indebted to him. He denies that he is insolvent and states that his assets far exceed his liabilities, and that he is able to meet his day to day commitments. With regard to his financial position and solvency he sets out in detail in paragraph 10 of his affidavit the value of his interests in his various companies. According to the figures appearing there it seems to me that the respondent's assets far exceed his liabilities. He denies

that his absence from Lesotho is with the intention to evade his creditors and that he has done everything within his power to remain in Lesotho.

The respondent admits that in March, 1981 he borrowed an amount of R250,000-00 which was to be repaid by the 15th February, 1982 together with interest thereon in the agreed sum of R50,000-00. This debt was repaid on the 21st November, 1981. He avers that every time the applicant lent him money he insisted on security or documentary proof and an acknowledgement of debt. Each and every time that money passed hands, there was either a written agreement, or a written acknowledgement of debt (an IOU) or a security cheque which could be deposited only when the debtor failed to repay the debt timeously. It was agreed that if the debtor repaid the loan and interest in cash or otherwise, the security would be handed back to the debtor.

The respondent states that since 1981 he did borrow money from the applicant from time to time, all on the basis of being strictly short term loans. In each case he would give the applicant an IOU or a security cheque for an amount in excess of the loan because interest had to be included. He states that he has not been particularly careful to file and preserve the documents returned to him, and many of them have been lost or destroyed.

In paragraph 7 of his affidavit the respondent sets out the transactions between himself and the applicant and concludes that it is the applicant who owes him money.

The crucial question in these proceedings is whether the applicant has established on a balance of probabilities the existence of a liquidated claim against the respondent and that the respondent has committed an act of insolvency or is in fact insolvent, and that it will be to the advantage of creditors if the respondent's estate is sequestrated (See Braithwaite v. Gilbert (Volkskas BPK Intervening), 1984 (4) S.A. 717 at p.718).

I have read these lengthy papers and have come to the conclusion that there is a dispute of fact which I am unable to resolve on affidavits. The respondent states that whenever he borrowed money from the applicant there was documentary proof of such transaction in the form of either a security cheque or a written agreement or an IOU. The applicant denies this and alleges that he accepted a security cheque on only one occasion. Mr. De Bruin, counsel for the respondent, submitted that it is improbable that a moneylender would change the system to his detriment. It is improbable that he would have stopped using security cheques. The fact that he no longer holds any is proof that all loans have been repaid.

Mr. De Bruin further submitted that it is improbable that the applicant would lend so much money, to such a despicable man, with such a bad history as a debtor, without taking the elementary precautions of requiring documents to prove the debt and security to secure repayment. He submitted that it is improbable that a bona fide moneylender will allow so much time to elapse before taking steps to recover his money. It is also improbable that a moneylender would continue to throw good money after bad.

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In Braithwaite v. Gilbert (Volkskas Intervening), supra, Zulma, A.J., said the following at p. 721 F-H:

> "It is correct that when a Court hears an application for a provisional order of sequestration it can only hear oral evidence in exceptional circumstances. It can, where there are disputed questions of fact on the day of the hearing of the return day of the provisional order and in a proper case, order vive voce evidence to be led. However, where there are conflicting allegations in the papers before the Court, it is not sufficient for the grant of a final order that the balance of probabilities is in favour of the applicant since the Court must be satisfied that a vive voce examination or cross-examination will not disturb the balance of probabilities before making an order for sequestration on the affidavits. Clearly if the respondent's version is on the face of it so inherently improbable that it cannot reasonably be accepted, or if the admitted facts show that the attack on the validity of the claim or the grounds of insolvency alleged is not honestly made, or if for other sufficient reasons the Court is satisfied that vive voce evidence will not disturb the balance of probabilities, it may grant the sequestration on the affidavits."

In the instant matter the respondent's version is not so inherently improbable that it can be discarded without a thorough consideration. On the contrary, it is the applicant's version which seems to be full of improbabilities. The applicant is a financier and a director of companies, and it is improbable that he would lend the respondent large sums of money for over a period of four years without any documentary proof, especially because he was aware that the respondent was a dishonest man who he describes as a despicable man. It was clear to him that he would ultimately have to institute legal proceedings in order to recover his money.

The applicant relies heavily on the evidence of Mr. Telford who was at one time an employee of the respondent. It is clear

from his evidence that he was involved only in the meetings in which the respondent and applicant attempted to solve their indebtedness to each other. It is common cause that there was no agreement on the exact amount of debt. The respondent denies categorically that he agreed that he was indebted to the applicant in the sum of R292,000-00 or R500,000-00. This is a dispute of fact which I am unable to decide on affidavits. In Plascon Evans Paints Limited v. Van Riebeck Paints (PTY) LTD., 1984 (3) S.A. 623 (A), Corbett, J.A. said the following at p. 634 H. :-

> "It is correct that, where in proceedings or notice of motion, dispute of facts have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justifies such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant, may not be such as to raise a real, genuine, or bona fide dispute of fact .... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks..... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."

In the instant case the respondent has not admitted any facts averred in the applicant's affidavits. I am unable to decide on affidavits whether the respondent is indebted to the applicant in the alleged amount or in the amount he allegedly admitted. The denial by the respondent of the facts alleged by the applicant cannot be said to raise no real, genuine nor bona fide dispute of fact.

It was submitted on behalf of the respondent that if the Court should however find that the disputes of fact were not foreseen and ought not to have been foreseen in the initial stages, then a duty was cast upon the applicant on receipt of respondent's answering affidavit to reconsider his position and to avail himself of alternative remedy open to him. Instead of doing so he chose to file a lengthy affidavit without assisting the Court to any way whatsoever to resolve the particular issue on the affidavits. Reference was made to the case of Mashaoane v. Mashaoane and another, 1962 S.A. 684 at p. 688.

In the instant case meetings were held at which the parties attempted to settle their dispute but no agreement was reached. It must have been very clear to the applicant before he launched these proceedings that the respondent was not going to admit that he was indebted to him in the amount of over R1,000,000. In other words, he must have foreseen that his claim would be seriously disputed. If he relied on the admission allegedly made by the respondent that he owed him an amount of R292,000-00, then it became clear when the respondent filed his answering affidavit that he denied that he ever made such an admission. At that stage the applicant ought to have reconsidered his position and followed the procedure described in Mashaoane's case (supra).

The next question in terms of section 12 of the Insolvency Proclamation is whether the applicant has satisfied the Court that the respondent has committed an act of insolvency or is in fact insolvent. It is common cause that the respondent did not leave this country voluntarily with intent to evade or delay the payment of his debts; he was deported against his will and did everything

within his power to have the deportation order cancelled. There is no satisfactory proof that the respondent has made any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another, or that he has removed any of his property with intent to prejudice his creditors or to prefer one creditor above another. In any case the applicant has failed to prove on a balance of probabilities that the respondent is insolvent in the sense that his liabilities exceed his assets. He has not even stated the liabilities of the respondent except saying that there are other creditors. The respondent has shown his assets and liabilities although they are not supported by any documents. The onus is on the applicant to prove that the respondent is insolvent and he has failed to do so.

The easiest and common method of proving that a person is insolvent is proof that a Court has given judgment against him and that he has failed to satisfy it. In Priest v. Collect, 1930 C.P.D. 392, Gardiner, J.P. said the following at p. 374:

> "The ordinary way of establishing a claim is by way of action. In sequestration proceedings a Petitioner is allowed to set up a claim which he has not established by way of judgment, but if he takes this course, he incurs a great risk. The respondent may deny the debt, or set up a contra-account and ever if the Court is not satisfied as to the denial, or to the validity of the contra-account, yet if it thinks it possible that the Respondent may proceed in making good his defence upon action, it should refuse to sequestrate."

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If the applicant in the present matter had instituted the proceedings by way of an action, he would probably have long obtained a judgment in his favour and executed it. Failure to satisfy a judgment is an act of insolvency.

The case of the intervening creditor (LTC) has the same weaknesses as that of the applicant. It may be that the respondent owes the intervening creditor some money but it has failed to prove that the respondent has committed any act of insolvency or that he is in fact insolvent. It seems to me that it would serve no good purpose to grant a rule nisi when it is very clear that the intervening creditor is unable to prove prima facie that the respondent has committed an act of insolvency or is in fact insolvent.

In the result the rule nisi is discharged with costs, including the costs attendant upon the employment of two counsel. The application by LTC is dismissed with costs, including the costs of two counsel.

J.L. KHEOLA
JUDGE

15th March, 1989.

For the Applicant - Mr. Lubbe
For the Respondent - Mr. De Bruin and Mr. Edling.