

IN THE HIGH COURT OF LESOTHO

In the Matter of :

LESOTHO BANKApplicant

and

LESOTHO HOTELS INTERNATIONAL (Pty)
LTD IN JUDICIAL MANAGEMENT 1st Respondent

THE MASTER OF THE HIGH COURT OF
LESOTHO..... 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 26th day of September, 1995.

On 13th May, 1993, the applicant herein filed, with the Registrar of the High Court a notice of motion, in which it moved the court for an order framed in the following terms:

- "1. Granting (in so far as may be necessary) the applicant leave to sue the 1st Respondent for relief set forth in prayers 2, 3, 4 and 5 below;
2. Declaring that the lease (annexed to the petition as Annexure F thereto) has been cancelled, alternatively hereby cancelled;
3. Ejecting the 1st Respondent from the premises known as "VICTORIA HOTEL" situate at Kingsway, Maseru (the Victoria premises) and all other persons, corporations and other legal entities of whatsoever nature who occupy the Victoria premises

- through the 1st Respondent;
4. Directing the 1st Respondent to pay the costs of this application;
 5. Granting the Applicant further and/or alternative relief."

The 1st Respondent intimated intention to oppose this application. The 2nd Respondent did not. Affidavits were duly filed by both the applicant and the 1st Respondent.

It is, perhaps, convenient to mention, at this juncture, that on 8th June, 1993 another application styled "Notice of Motion Incorporating Urgent Relief" was filed by S.C. Buys N.O. against the Lesotho Bank as applicant and Respondent, respectively. Although the Respondent intimated intention to oppose and affidavits were duly filed by the parties, the application was not pursued at the hearing of this matter. Wherefor I need not concern myself with this application in the present judgment.

It is, however, worth mentioning that at the commencement of the hearing, on 1st August, 1995, the 1st Respondent filed, with the Registrar of the High Court, a notice in which it proposed to raise a number of legal points in limine. The notice had been served upon the applicant on 17th July, 1995. The Court was asked for a ruling as to whether arguments should be

heard first on the points in limine and then on the main application or on both the points in limine and the main application simultaneously.

After a brief argument, the court considered the matter and took the view that there were two alternatives. The court could properly either hear arguments on the points in limine separately or on the main application and the points in limine simultaneously. Even in the second alternative i.e. where it had heard arguments on the main application and the points in limine simultaneously, the court would still have to make a decision first on the points in limine. If, in either alternatives, the points in limine were upheld then that would be the end of the matter. In that eventuality the arguments on the main application would have been a waste of time inevitably resulting in unnecessary costs. Consequently the court ruled that arguments should first be heard on the points in limine and only in the event of the points in limine being dismissed would arguments on the main application be heard.

By the consent of both counsels the only point in limine which really required to be argued before dealing with the main application was:

- "1 Has the applicant made out a case for the relief in paragraph 1 of

the notice of motion?

2. If so, is Applicant entitled to leave to institute the ejectment proceedings?"

It is common cause from the affidavits that prior to 30th July, 1982 a certain Antonio Mario Florio acquired the hotel keeping business of Lesotho Hotels (Pty) Limited (in liquidation) which the latter conducted amongst other places, at a place called "Victoria hotel" here in Maseru. On 30th July, 1982, applicant and Antonio Mario Florio entered into a written lease agreement (annexure "F" to the founding affidavit) whereby the former, inter alia, let to the latter "Victoria hotel" premises for a period of 20 years commencing on 1st August, 1982. In terms of Clause 9 of the lease agreement (annexure "F") Antonio Mario Florio was entitled to cede his rights and obligations under the lease. Subsequent to the conclusion of the lease agreement (annexure "F") Antonio Mario Florio, therefore, sold the business of the Victoria hotel which he had acquired from the Lesotho Hotels (Pty) Limited (in liquidation) and ceded his rights and obligations, under the lease agreement, to the 1st respondent.

It is not in dispute that after Antonio Mario Florio had sold the business of Victoria hotel and ceded his rights and obligation, under the lease agreement, to the 1st Respondent, a certain Marry

Marmaduke Rantenbach caused, presumably in terms of the provisions of S. 265 of the Companies Act 1967, the 1st Respondent to be placed under provisional judicial management. The provisional management order was confirmed by the High Court on 18th November, 1988.

It is significant that paragraph 7 of the final judicial management order provided that:

"7. while the judicial management orders are in force, all actions and execution of all writs, summons and other processes against the companies be stayed and be not proceeded with without leave of the above Honourable Court first being obtained."

The above cited paragraph 7 of the final judicial management order is in accordance with the provisions of the Companies Act, 1967, of which paragraph (d) of Section 266 (1) clearly provides, in part:

"(d) while the judicial management order is in force all actions and the execution of all writs, summons and other processes against the Company be stayed and be not proceeded with without leave of the court first obtained."

In his founding affidavit, the applicant averred

that the above cited Clause 7 of the final judicial management order was directed at granting the 1st Respondent a moratorium, whilst under judicial management, against existing summons and other court processes which were in existence at the time the judicial management order was granted. The present application did not, in the contention of the applicant, fall within the purview of Clause 7, a fact which was, however, denied by the 1st Respondent in the answering affidavit.

I was referred to Volume two of Henochsberg Company Act by Henochsberg where at p.760 the learned Author had this to say on the issue:

" The directions, if given, relate to proceedings in existence at the date of the order and to future proceedings...."

See also the head note, in the decision of Samuel Osborn (S.A.), Limited v. United Stone Crushing Company (Pty) Limited (under judicial management) 1938 WLD 229 by Greenberg, J.P. which reads, in part:

"The power given to the court ... to stay proceedings against a company, under judicial management refers to future as well as pending proceedings"

On the authority of the above cited work of

Henochsberg and the decision in Samuel Osborn (S.A.) Limited v. United Stone Crushing Company (Pty) Limited (under judicial management) 1938 WLD 229 it seems to me that the proceedings which the applicant wants to institute against the 1st Respondent do fall within the purview of Clause 7 of the provisional judicial management order confirmed by the court on 18th November, 1988. The applicant's contention that they did not, does not, therefore, hold water. That being so, the applicant must first obtain leave of court before it can properly institute proceedings against the 1st Respondent. In the event of the court finding as it does, that the proceedings which the applicant wants to institute against the 1st Respondent fall within the purview of Clause 7 of the judicial management orders, the applicant applies for leave to sue the 1st Respondent for relief set forth in prayers 2, 3, 4 and 5 of the notice of motion.

It is, perhaps, significant to mention that, on 2nd March, 1992 and whilst the judicial Management Order was still in force, the applicant addressed the letter (annexure "G" to the founding affidavit) to the 1st Respondent advising that the lease agreement (Annexure "F") was thereby cancelled and the latter required to vacate the "Victoria Hotel" premises by the 31st March, 1992. The ground upon which the applicant took the move to cancel the lease agreement

(annexure "F") and require the 1st Respondent to vacate "Victoria Hotel" premises was that the latter had breached the conditions of the lease agreement. The 1st Respondent denied, however, that it had breached any of the conditions of the lease agreement (annexure "F") and did not, therefore, vacate the "Victoria hotel" premises. Hence the institution of the present proceedings, by the applicant, for an order as aforesaid.

It is clear from the affidavits that 1st Respondent conducts business at "Victoria hotel" premises. However, the applicant's letter of 2nd March, 1992 had the effect of preventing the 1st Respondent from conducting business at "Victoria Hotel" premises and thus destroy the company which was under judicial management. As it will be shown in a moment, the applicant could not properly take such an action, against the 1st Respondent, without first obtaining leave of the court.

It is not in dispute that the court has a discretion whether or not to grant the applicant leave to sue the 1st Respondent, which is under judicial management, for relief sought in prayers 2,3, 4 and 5 of the notice of motion. Such discretion must, however, be exercised judicially. To do so, it is, in my view, important that the court bears in mind the

purpose of a judicial management order. In the decision of Millman, N.O. v. Swartland Huis Menbleerders BPK 1972(1) S.A. 741 Baker, A.J. stated, at page 744B:

"The objectives of a judicial management order are to postpone a liquidation of a company which is in difficulties and to provide a moratorium for that company for a period long enough (it can be either a period fixed by the court or an indefinite period) to enable that company to meet its obligations and to become a successful concern."

From the above cited passage in the decision of Millman, N.O v. Swartland Huis Menbleerders BPK 1972(1) S.A. 741 there can be no doubt that the purpose of a judicial management is to preserve, and not destroy, a company which is capable of becoming a successful concern. In the present proceedings, the applicant seeks leave to sue the 1st Respondent, which is a company under judicial management orders, for cancellation of the lease agreement (annexure "F") and the latter's ejectment from the place on which it conducts business viz. "Victoria hotel" premises. This is a drastic action against the 1st Respondent. If the applicant were to obtain judgment, the 1st Respondent would obviously be unable to carry on business with the inevitable result of aborting the purpose of the judicial management order. To succeed in such a drastic move against the 1st Respondent, the

applicant must, in my opinion, satisfy the court that the former has no chance of trading out of its financial difficulties.

As it has been stated, earlier in this judgment, the ground upon which the applicant seeks leave to sue the 1st Respondent for cancellation of the lease agreement (annexure "F") and ejectment from the "Victoria hotel" premises is that the latter has breached the conditions of the lease agreement. There is no allegation in the applicant's affidavits that the 1st Respondent, admittedly a company under judicial management orders, is incapable of trading out of its financial difficulties and has, therefore, no chance of becoming, once more, a successful concern.

In the circumstances, I am unable to find that the applicant has made out a case for the relief in paragraph 1 of the notice of motion. Consequently, I come to the conclusion that the point in limine was well taken and ought, therefore, to succeed with costs (of two advocates) to the 1st Respondent.

