

IN THE HIGH COURT OF LESOTHO

In the application of:

INTERNATIONAL FREIGHT AND TRAVEL SERVICES
(PROPRIETARY LIMITED)

APPLICANT

and

MILLAN'S MOTORS (PROPRIETARY) LIMITED

RESPONDENT

RULING

Delivered by the Honourable Acting Justice Mrs K.J. Guni
on the 17th day of July, 1995

INTERNATIONAL FREIGHT AND TRAVEL SERVICES (PTY) LTD. is the applicant in this matter. An urgent exparte application was made for an order whose effect was an attachment of respondent's moveable property - for the satisfaction of a writ of execution that would be issued in the future in an action to be instituted by the applicant against the respondent.

The respondent owes this applicant an amount of M208,000.00 for service rendered by this applicant to the respondent at the latter's special request. The applicant approached the court in the fashion mentioned above for the following reasons, as they appear in the applicant's founding affidavit by one MR SOLOMON TAKALIMANE.

First; Applicant is desperate to hold on to disposable property belonging to Respondent in view of the fact that the office from which respondent runs its business is also occupied by (2) two other companies which are associated to the respondent company.

This desperation of applicant company is heightened by the fact that its total exposure to the respondent's group of companies is approximately M1000,000.00 without any reasonable prospects of payment.

Secondly; The applicant's clearing licence was in or about February, 1995 suspended by the director of customs on account of its debts to the department arising from moneys unpaid by this group of companies and that such licence is likely to remain suspended as the upliftment of the suspension was conditional on payment.

Lastly but most importantly was the fact that there are no visible fixed assets belonging to the respondent from which the applicant can hope to satisfy the judgment should it be granted against the respondent. The motor vehicles imported by the respondent are immediately re-exported and removed out of the jurisdiction of this court on their arrival.

An interim order was granted in the terms stipulated in the notice of motion. Those terms are:-

- (a) authorising the Deputy sheriff of the High Court of Lesotho or her lawful deputy to take into her custody and keep a white rolls royce and a black jaguar belonging to Respondent pending the determination of an action to be instituted by Applicant within 3 days hereof or until otherwise advised by Applicant;
- (b) authorising Applicant or any other clearing agent to impound any other shipments or goods consigned to Respondent and to hand same over to the Sheriff or her lawful Deputy to deal with as specified in (a) above pending determination of the proposed action or until Respondent has fully paid off its debt to Applicant;
- (c) appointing the Applicant's warehouse in its yard on Lioli Road, Maseru Industrial Area as the Deputy Sheriff's storage for the purposes of this application;
- (d) directing Respondent to desist from dealing in any other way with the cars mentioned in (a) above or other goods specified in (b) above or in any way interfering with their removal to the sheriff or her lawful deputy;

The motor vehicles mentioned in (a) above were in the applicant's yard at the time applicant's attorneys of record were being instructed to go to court to obtain an order for their further and lawful detention by the applicant. Despite the understanding reached by Mr. Abubaker representing respondent company and Mr. Takalimane representing applicant Mr. Abubaker with the manager of his companies Mr. Khabele Lesema Surreptitiously drove out the motor vehicles through the unused gate of the applicant's yard.

In this business world there appear to be many types of business persons of all shades, colours and characters. There are those who are smart and honest. They have their opposites. There are those who are cunning and dishonest. They also have their opposites. There are those who are easily convinced by even most incredulous of things. They are slow of wits. The

list can go on and on. It is inexhaustible.

As it appears from the papers filed of record by the parties, respondent was initial not a credit customer of the applicant. Respondent failed to pay fully for the services rendered to it by applicant. From the discussion which ensued or arose as the result of respondent's failure to effect payments fully, the parties appear to have reached an agreement that respondent be afforded credit facilities. Respondent's failure to effect payments opened doors for him to even get more services on credit from applicant company. It seems the respondent's credit worthiness was never tested. He simply wormed himself into the position of a credit worthy customer. The respondent company was experiencing cash flow problems when decision to afford it credit facilities was reached.

The actions of both parties demonstrate no urgency for the payment of outstanding balance. Both parties saw a need for an increase in the respondent's indebtedness to the applicant. Placed in that position respondent was able to secure more services from applicant and by so doing increase its indebtedness to the tune of M208,000.00. When these decisions were made; 1st to afford respondent credit facilities, secondly to continue to render more service and increase his indebtedness; The applicant was aware or should have been aware of the respondent's office and the circumstances it is complaining of in this application.

Attempts were made to secure payment from respondent by

applicant of that outstanding balance of M208,000.00. Mr. Takalimane of applicant company was becoming desperate as the directors of Board of his company were putting pressure on him to secure payment. Paragraph II of founding affidavit. He was failing to convince respondent company's representative to pay up. Mr. Takalimane's position was apparently becoming more and more desperate. Like a drowning man he grabbed hold of every straw that floated past him. The first straw was a promise that a motor vehicle will be given by respondent to applicant to hold as security for the existing debts owed by respondent to applicant. That promise was never fulfilled. Mr. Takalimane demanded as instructed by the board of directors of applicant company some firm commitment of payment. Further negotiations led to Mr. Abubaker making out two postdated cheques, which after he had secured the required signature, were handed over to the applicant company. They were valued at (M100,000.00) one hundred thousand maloti each. They were both bad cheques. They both bounced. All these events clearly show that the applicant easily believed every word that respondent told him that good times for his company are due around the corner, but not quiet making it around that corner. Applicant was strung along for a considerable distance for sometime.

All said and done applicant persisted in taking desperate actions. Applicant obtained an order exparte in the terms specified in the Notice of Motion. The respondent on the return date came to show cause why such an order should not be confirmed.

First of all respondent claims that applicant can institute an action against respondent and execute in terms of the judgment it may obtain. It was ordered that such action be instituted within 3 days of the interum order having been made. This is one way of obtaining redress lawfully and urgently should the applicant decide to apply for summary judgment within the time allowed by the rules of High Court. There is no provision in our law for attachment of property for the purposes of executing against it in the future should applicant obtain judgment in the action that was to be instituted where both parties are "incola". Both parties are companies registered in Lesotho as shown in paragraphs 3 and 4 of founding affidavit and not denied in the respondent's affidavit.

Respondent's property may be attached in terms of rule 6 (1) HIGH COURT RULES if the respondent is a peregrinus. This is not applicant's claim. Applicant is not proceeding on that basis.

The applicant may have lawfully approached the court in that fashion and the court may have considered to confirm the interim order granted if the applicant had a real or personal right in the property it claims it wants to hold on to. The applicant does not claim to have any of these rights such as hypothec, lien, pledge and/or retained ownership. The applicant does not give authority to support the manner in which it has approached the court. Desperation alone does not give this court the authority to adopt inappropriate measures while there are proper actions which the applicant should have taken to recover its

J.K. GUNI
(ACTING JUDGE)

For Applicant : Mrs Makara
For Respondent : Mr. Buys