CIV/A/32/94

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MOKHOSI MATEKANE — APPELLANT

and

ANGELUK'SNEK GRAZING ASSOCIATION — 1ST RESPONDENT
LESOTHO AGRICULTURAL DEVELOPMENT BANK — 2ND RESPONDENT

J U D G M E N T

Delivered by the Honourable Mr. G.N. Mofolo
on the 9th day of November, 1995.

This matter comes to me by way of appeal.

In the Magistrate's court at Outhing the plaintiff (now appellant) issued summons against the Defendant (now respondent) Angeluk's Nek Grazing Association claiming:

(a) Payment of damages in the sum of M1,000-00.

(b) Interest thereon at the rate of 12% per annum a tempore morae.

(c) Costs of suit and

(d) Further and/or alternative relief.

The matter being undefended the appellant obtained judgment and issued a writ of execution against the respondent.

The amount claimed had arisen, according to the summons, as a result of respondent impounding appellant's three horses one of which died in respondent's pound.

It is not clear what was done with the writ of execution but it is likely that the court messenger having found nothing executable in the estate of the respondent the appellant applied for a garnishee order for the attachment of 1st Respondent's (judgment debtor's) credit balance lying with the Lesotho Agricultural Development Bank and the 2nd Respondent and garnishee herein.

A Garnisher Order duly signed was issued in the Outhing Magistrate's Court on 9 May, 1994 by the learned Magistrate Mrs. C.M. Moeletsi and it read, inter alia:

IT IS HEREBY ORDERED THAT

1.

(a) The credit balance of the Judgment Debtor's account held by the Garnisher not exceeding M1,429-05 be attached to answer a Judgment recovered against the Judgment Debtor by the Judgment Creditor in the above Honourable Court on the 9th October, 1991 for the sum of M1,429-05 which remains due and unpaid.

(b) The garnishee pay the messenger of this court the sum of M1,429-05 together with M450-00 the costs hereof out of the said credit balance of the Judgment Debtor or, failing such payment, that the Garnishee appear before the above Honourable Court on the 19th day of May, 1994 at 10.30 a.m. then and there to show cause why it should not pay the same.

Importantly, it was garnishee, namely, the 2nd Respondent that was expected to appear before court to show cause why the order prayed for would not be granted. As will become clear later, it depends on the relationship between the garnishee and the judgment debtor whether funds belonging to a judgment debtor can be attached. There are cases where, depending on the contractual relationship between the garnishee and the judgment debtor funds belonging to the latter may not be attached for the benefit of third parties. But such a situation will arise and does arise only where, in my view, the garnishee has resisted the order for attachment by stating its contractual relationship with the judgment debtor.

From the papers, it appears that the garnishee, namely Lesotho Agricultural Development Bank and the second respondent in these proceedings did not oppose the proceedings while on behalf of the 1st Respondent Mr. N.E. Putsoane opposed the application on 8 July, 1994 accompanying the same with 1st Respondent's opposing affidavit.

The garnishee order of the 3 May, 1994, having been made returnable on 19 May, 1994, at 10.00 a.m. on this day only neither party appeared but on 08 June, 1994 Mr. Mda appeared for the applicant; asked for the revival of the rule and extended it to 10 June, 1994. On 10 June, 1994 Mr. Mda appeared and extended the rule to 9 August, 1994 at 9 a.m. or so soon thereafter.

Then on 9 August, 1994 Mr. Mda once more appeared and extended the rule to 15 September, 1994 at 9.30 a.m. or so soon thereafter. The garnishee order which applicant sought was a sequel to a judgment which applicant had obtained against the 1st Respondent herein. On 21 December, 1992 Mr. Putsoane the Chief Legal Counsel had sought to rescind the judgment but nothing had come of the application.

As I have said, on 3 May, 1994 Mr. Mda appeared, asked for a rule which he made returnable on 19th May, 1994 and thereafter there were extensions culminating on 15 September, 1994.

It is worth mentioning that since 19 May, 1994 although the 1st Respondent had lodged his intention to oppose with the Magistrate's Court on 8 July, 1994 neither the 1st Respondent nor his counsel appeared when the rule was returnable. There was no need, in my view, for the 2nd Respondent to appear as no Notice of Intention to oppose the application was filed.

When, on 15th September, 1994 Mr. Mda for the applicant appeared for the confirmation of the order Mr. Putsoane, although he had opposed the application, did not appear. Faced with the confirmation of the order the learned Magistrate appeared to be in sixes and sevens. After engaging in a tirade of the court overlooked this and that, the application was that and this the learned Magistrate referred to several extensions and then

> 'the court's fear was that the other parties know not of the chosen dates. Even to date they still do not know that the court is sitting and hearing this matter.'

I find this pathetic to say but the least. Once a party has joined issues and opposed an application as in this matter, it is stretching the rules too far to assert that the possibility exists that the other party may not know what is going on - especially in an application with an interim relief. Once a party is aware of the return date, such a party is expected to attend on such a return date as it is deemed the final date unless there is reason to have it extended. The learned Magistrate misdirected herself seriously in this regard.

As if this was not enough, the learned Magistrate went on in her judgment

> 'I would add up by saying to my understanding the applicants have brought their case with no clean hands 'they are making a fishing game - so I dismiss the application.'. No costs as the other parties are not before court.'

I do not understand what the court a quo meant by 'clean hands' for clean hands are required from a plaintiff in Equity: i.e. he must be free from reproach, or taint of fraud. All that the doctrine implies is that 'He who comes into equity must come with clean hands' and not have been guilty of improper conduct in regard of the subject-matter.

I fail to understand how the plaintiff has tainted his hands to an extend where, at equity, he cannot be given the remedy he seeks.

Before me and although he did not argue his case before the court a quo, Mr. Putsoane for the Respondent seemed to agree with the learned Magistrate's sentiments and especially to the effect that the Appellant was on a fishing expedition. Indeed it appears to me the Magistrate denied the appellant the remedy sought because she believed appellant was on a fishing expedition. Unfortunately, the learned Magistrate has not explained what she meant by 'no clean hands' and 'a fishing game.'

On the question of costs, where a party does not attend court in circumstances in which such a party should have attended court, a court well instructed awards costs to show its displeasure. When, however, a court is not satisfied that the other party was properly served with the date of hearing, a court would normally be reluctant to proceed with such a case and in this case I come to the conclusion that the learned Magistrate proceeded with the application because she was satisfied the case was properly before her.

In any event, as I have said, once a party has been served with an application, it is incumbent on the opposing party to

attend the return date where there is interim relief and to ask for the discharge of the rule if the applicant is not in attendance. If he does not attend, he has himself to blame.

In so far as attachment of salaries is concerned, courts have been reluctant to make orders attaching salaries of employees. In the very rare cases where this has been done, the view has been that 'there should be a substantial balance after the provisional sentence judgment has been satisfied.'- see Ex-Parte Gregory, 1956(1) S.A. 215(S.R.). But we are not in this appeal dealing with attachment of a salary.

In MUVENGWA v. MATARUTSE AND ANOTHER, 1968(4) S.A. 752(D) an application had been made for attachment of debt alleged to be due or accruing to the judgment debtor in terms of Order 47 of the High Court Practice and Procedure Act. Applicant had obtained judgment against the respondent for #1,788.15.0 together with costs, which judgment had been unsatisfied. He alleged that Barclays Bank as garnishee or holder of the money are indebted to respondent in an amount of #274.11. together with interest.

> 'being the amount standing to the credit of the judgment debtor in respondent's savings account with the garnishee under savings account No.RB.617111'

Refusing the application Goldin J. seemed to have been of the view that the judgment debtor's relationship with the

garnishee bank were such that in withdrawing moneys from the bank the judgment debtor had to fulfil certain conditions and that if the judgment debtor had to fulfil certain conditions before withdrawing any money from the garnishee bank, the judgment creditor was in a worse condition. He went on to say that there was no liability to pay on the part of the garnishee and no cause of action arose against it until certain stipulations had been fulfilled.

He went on at p.753E

> 'Here it is admitted that they have not been fulfilled and therefore no cause of action exists because the Bank is under no liability to pay any portion of the amount deposited with it to the judgment debtor.

The learned Judge having said in terms of Order 43 an applicant must prove that an amount is 'due or accruing due' by the Garnishee to the judgment debtor, continued at p.753C.

> 'A judgment creditor cannot by means of an attachment stand in a better or different position as regards the garnishee than the judgment debtor does. The garnishee is entitled to rely and insist on the fulfilment of the obligations under the contract before any amount becomes due or accrues to the depositor. Since the judgment debtor is not entitled to obtain payment from the Bank of the money in his deposit account without fulfilling the stipulations, it follows that the judgment creditor is not entitled to compel the Bank to make payment without compliance with those stipulations.'

also

> 'I am therefore not satisfied that the deposit account can and should be treated as constituting money due or accruing to the judgment debtor - at p.753H supra.

The ratio of these cases is that although it was held in JACKSON v. PARKER, 1950(3) S.A. 25(E) that an applicant seeking to attach his debtor's property ad fundandam jurisdictionem must satisfy the court that the property to be attached is the property of the judgment debtor and that the onus is on him to so prove, this, in my view, will depend largely on the attitude of the garnishee as will be demonstrated later.

As to the true construction of 'a debt owing or accruing' RAGLEY v. WINSOME (NATIONAL) PROVINCIAL BANK LTD (1952) 1 ALL E.R.637 appears to shed light on this. A question arose whether money repayable on production of the deposit book in the manner prescribed constituted a debt 'owing or accruing.' The judgment is summarised in the head note as follows:

> 'A judgment debtor had a sum of money in a deposit account with a bank, the contract between the bank and the debtor being subject to the conditions
>
> (a) that fourteen days' notice should be given of a withdrawal
>
> and
>
> (b) that money could be withdrawn only on a personal application by the debtor at the bank and on production of the deposit book. On the 11th January, 1952, a notice of withdrawal given by the debtor expired, and, on the same day, the judgment creditor issued a garnishee summons against the bank. The debtor did not apply, personally or at all, for repayment of the money and it was still with the bank.
>
> Held: as the judgment debtor had failed to comply with all the terms of the contract of deposit, he could not obtain payment from the bank of the money in his deposit account, and the judgment creditor could not

> be in a better position than the debtor: therefore, the sum standing to the credit of the debtor's deposit account was not a debt 'owing or accruing' to him from the bank within the meaning of R.S.C., Ord.45, V.1, and the county court Rules, Ord. 27, v, L and it was not a proper subject of garnishee proceedings.'

The ratio of these cases is that money in a banking institution or garnishee must be 'due or accruing' at the time when the attaching order was served and the court is not entitled to change the method of payment, alter the contractual obligations of the parties or render an account due which is in part not due or accruing due on the relevant date. All that this means is that the judgment debtor must have himself facilitated payment and unless he has done so the garnishee would not be in a position to pay the judgment creditor who, as we have seen, is in a worse position as to payment than the judgment debtor.

Moreover, the relation created by the procedure and order made under it does not create a debt which makes the judgment creditor a creditor of the garnishee. It makes it plain that there is neither transfer nor cession of the debt to the judgment creditor.

But a situation may arise where, although it has been held (as in JACKSON v. PARKER, 1950(3) S.A. 25(E) above, that an applicant seeking to attach his debtor's property ad fundandam jurisdictionem must satisfy the court that the property to be attached is the property of the judgment debtor, it will depend also on the attitude of the garnisher as has been demonstrated.

Thus in COMBINED WEIGHING AND ADVERTISING MACHINE CO., (1889) 43 Ch. D.99(C.A.) at pp.105 - 6. Fry. L.J. was quoted as saying:

> 'what the order does is this. it gives the garnishee certain statutory rights; it enables the garnishee to say to the garnisher: 'You shall not pay to your creditor the money which you owe him.' It enables him to give a valid right and discharge for the money. It enables him in the event of the money not being paid to obtain execution. He has all the rights, but there is no transfer of the debt, and he is a creditor.'

It was with these thoughts in mind that Goldin J. in AFRICAN DISTILLERS LTD AND OTHERS v. HONIBAL AND ANOTHER, 1972(3)S.A. 135(R.) at p.136H concluded:

> Accordingly the judgment creditors are not entitled to a judgment for the balance of the sum attached but not paid by the garnishee. They are not entitled to an order for attachment of a debt due to the judgment debtor . They have not become creditors of the garnishee by reason of the order of attachment not having resulted in payment to them.

Too many things seem to be at stake in an application of the nature under review. It appears that where a judgment creditor has obtained an order of attachment of a debt it looks like there will be no relief unless he has also applied for judgment for payment of the money for unless there is such a judgment the process of execution cannot be invoked. There is another attendant problem: It is whether there is provision in the Rules of Court as to the manner of obtaining a writ of execution in garnishee proceedings? In the event, such an execution has to be applied for and can only be granted by the court.

This is the way in which Goldin J. in AFRICAN DISTILLERS LTD v. Or. above at p.137-138H expressed the above view:

> A judgment creditor obtains his right to a debt by means of an order of attachment in garnishee proceedings subject to all rights and defences attaching to it in the hands of the garnishee. The judgment creditor is not placed in a better position and obtains no greater rights than the judgment debtor whose claim against the garnishee is attached by the judgment creditor. Thus a garnishee who did not dispute his liability when the order of attachment was made, and who has not yet paid the judgment creditor, then finds that he is not liable to the judgment debtor in the amount attached or at all can avoid and be released from paying such sum.

Goldin J. also recalling the decision of Darrington J. in NORTON v. YATES, (1906 1 K.B. 112 at p.120 said:

> 'It seems to me, therefore, that EX-PARTE JOSELYNE does not prevent one from holding, in accordance with in re: COMBINED WEIGHING AND ADVERTISING MACHINE CO., that the true effect of the garnishee order is not to transfer the debt but to give a right to the garnishee to say to his original creditor, who has now become judgment debtor: 'I am not going to pay you; I must pay the man who has obtained the garnishee order.'

It was also the view of Goldin J. in AFRICAN DISTILLERS above that if that is the right and true view, then the debt, subject to the order, remains the property of the judgment debtor and the right of the garnishee under the garnishee order nisi is subject to such rights and equities as already exist over it as the property of the debtor, including this particular debt in regard to which he has obtained a garnishee order.

In SIMPSON v. STANDARD BANK OF S.A. LTD. 1966(1) S.A. 590(W.L.D.) a wife who, by order of court on divorce had been granted payment of R1,055 against her husband and the latter had paid only M550, when the wife applied for an order directing the bank to pay the balance due or to issue a rule showing why this amount cannot be paid,

HELD: applicant should have first issued a writ of execution under which the deputy sheriff would have attached the claim against the bank.

HELD, further, that thereafter the applicant should have applied for an order calling upon her ex-husband to show cause why the bank should not be directed to pay over to the deputy-sheriff so much money in their hands, to which her ex-husband was entitled towards satisfaction of the writ, and, in the event of the bank refusing to make such payment, directing the bank to appear and show cause why it should not make the required payment to the deputy-sheriff.

In this matter the Garnisher Order which the appellant obtained in the court a quo reads:-

(a) That the credit balance of the Judgment Debtor's account held by the Garnisher not exceeding M1..429-05 be attached to answer a Judgment recovered against the Judgment Debtor by the Judgment Creditor in the above Honourable Court on the 9th October, 1991 for the sum of M1,429-05 which remains due and unpaid.

(b) That the Garnishee do pay the messenger of this court the sum of M1,429-05 together with M450-00 the costs hereof out of the said credit balance of the Judgment Debtor, or, failing such payment, that the Garnishee appear before the above Honourable Court on the 19th day of May, 1994 at 10.00 a.m. then and there to show cause why it should not pay the same.

In addition, it in terms of garnishee proceedings, it was also required that

> If the Judgment Debtor did not have a credit balance account held by you at the day above mentioned and at the time when this Order was served upon you, should appear at the court and prove the facts. If you do not appear, you may be compelled to pay the debt twice over.

in addition:

> If the Judgment has been satisfied or is, for any reason, no longer operative against you, or if the debt is not due and payable, you should appear at the court and prove the facts; but you cannot be heard on any other point.

As far as this court is concerned, it is a matter of choice whether the appellant should have issued a writ of execution against the garnishee bank and the second respondent herein as this would, have been expeditious. In applying for a garnisher order and following a rather circuitous course I do not think that the appellant was wrong. The garnishee and 2nd respondent bank was given notice as contemplated in SIMPSON v. STANDARD BANK of S.A. LTD. above and for reasons best known to the garnishee the application was not opposed and in the circumstances I cannot say that the debt is not due and payable or that it is accruing due in the absence of opposition by the garnishee bank and the 2nd Respondent herein.

Generally, I come to the conclusion that the learned Magistrate a quo misconstrued the law and misdirected herself both in law and procedure and accordingly the judgment of the court a quo is set aside and substituted by the following:

'The Garnisher Order is confirmed with costs.

1st Respondent is directed to pay appellant's costs on appeal.

G.N. MOFOLO
JUDGE
9th November. 1995.

For the Appellant: Mr. Mda
For the Respondent: Mr. Putsoane