C. OF A. (CIV) No. 16 of 1997

IN THE LESOTHO COURT OF APPEAL

In the matter between:

TONGAAT-HULETT SUGAR LIMITED APPELLANT

and

MICHAEL PHILLIPS RESPONDENT

Held at:
MASERU

Coram
STEYN, P
VAN DEN HEEVER, J.A.
BECK A.J.A.

JUDGMENT

VAN DEN HEEVER, J.A.

Appellant ("Tongaat") applied in the Court a quo for a provisional order of sequestration of the estate of the respondent ("Phillips"). It was granted on 5 June 1996, returnable on 5 August. It was opposed. The return date must have been extended from time to time, the matter being set down ultimately for 12 May 1997. The Court (Lehohla J) on 26 May 1997 discharged the provisional order with costs, but gave no written reasons for doing so. The notice of appeal filed a week later accordingly fired buckshot instead of bullets. It avers to all intents and purposes, that the court should have been satisfied that all the requirements for a final order were established, that the legal arguments that had been raised in Phillips' opposing affidavits and presumably during argument held no water, and that there were no grounds for exercising any discretion against confirming the rule nisi despite there being no flaws in Tongaat's application.

The Petition.

Mr. E.F. lawson deposed to this. The facts set out may be summarised thus:

> Tongaat carries on business as a sugar refiner and distributor, and has its head office in Natal.
>
> Phillips, a married man who lives in Leribe, carries on business in Lesotho and the RSA. He was formerly the managing director of Angies Enterprises (Pty) Ltd ("the Company"), incorporated and registered in Lesotho but placed in provisional liquidation by order of the High Court of Lesotho on 15 May 1996.
>
> During March of 1996 Tongaat sold and delivered to the Company

four consignments of 34 tons each of sugar. In payment for these, Phillips gave Tongaat two cheques dated 28 and 29 March and for R158 237,60 and R316 475,20 respectively. Both were drawn on account 047 049 404 881 with the Standard Chartered Bank Lesotho Limited of Maputsoe. Though this account is one operated by the Company, the cheques, which Phillips, as Managing Director an officer of the Company, signed or permitted to be signed on behalf of the Company, did not bear its name in legible characters, in contravention of the provisions of section 86(1)(c) of the Companies Act no 25 of 1967 of the Kingdom of Lesotho. Consequently Phillips became personally liable in terms of section 86(4)(b) when the cheques of which Tongaat was and is the holder for value, were dishonoured by the Bank by non-payment.

Phillips is insolvent. He owes Tongaat a total of R474 713,10. On 22 April 1996 G.T. Surtie obtained judgment against him in the Lesotho High Court for R203 625,06. The only asset he has of which Lawson is aware, is a credit of R36 000 with the Standard Bank of South Africa at Ficksburg. He may also own the house in which he lives. He drives a white BMW, a maroon BMW, a panel van and an imported 4 x 4; and his wife drives a Mercedes Benz.

There is a possibility that Tongaat may be able to recover R140 000 from the Receiver of Revenue in respect of a VAT refund to which Tongaat is entitled, having exported the consignments of sugar to Lesotho.

There are vehicles registered in the name of Mrs Phillips: a 1987 International truck, a 1993 Mercedes truck, a Mercedes powerliner truck, and two trailers; which would vest in the provisional trustee on Phillips' sequestration, Mrs Phillips then being burdened with the onus of showing how she acquired these assets - which should, Tongaat submits, form part of Phillips' estate, and which Tongaat fears will be removed from Lesotho and the jurisdiction of its High Court should sequestration not be granted.

It will be to the advantage of creditors that these vehicles be not so removed; and that a trustee investigate what has happened to the considerable proceeds from the sale of the sugar bought by the Company from Tongaat and Illovo, such proceeds having been seemingly paid to Phillips himself and not the Company.

Annexed to the Petition are copies of the dishonoured cheques made out to Tongaat and Illovo, the Illovo petition on which the liquidation of the Company was obtained, the judgment against Phillips in favour of Surtie relating to rental, and the formal documents relating to security and the appointment of a provisional trustee.

The Companies' Act

Since a good deal of Phillips' opposition to the rule nisi granted is based on his interpretation of the relevant provisions of the Companies Act No. 25 of 1967 it is apposite to quote them here.

Section 86(1)(c) of this provides:

> "Every Company -
>
> .....
>
> (c) shall have its name mentioned in legible characters in all business letters, notices and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company ....."

And section 86(4)(b) reads:

> "If any officer of a company, or any person on its behalf -
>
> (a) .....
>
> (b) ..... signs or permits to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque or order for money or goods where its name is not mentioned in manner aforesaid, or
>
> (c) .....
>
> he shall be guilty of an offence, and liable on conviction to a fine not exceeding one hundred rand and shall further be personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount thereof, unless it is duly paid by the company"

Phillips' Opposing Affidavit

This is short on detail, by and large makes broad statements some of which are *prima facie* strange. He either knows little of his wife's financial interests, or chooses not to reveal them to the Court. He says -

He is married out of community of property.

He admits that the consignments of sugar were purchased as alleged, but denies that he is personally liable on the dishonoured cheques whether to Tongaat or Illovo:

- he was totally unaware that the Company was required to have its name on its cheques

- for three years the Company has been doing business with Tongaat, which knew it was dealing with an incorporated company, as Illovo also did.

He denies that the dividend from the Company will be negligible. The amount due to Illovo is approximately R600 000, not R1 710 725,06

Tongaat's claim against him personally, if it exists, is premature. Personal liability in terms of section 86 arises only

"when same is not duly paid by the company itself, a fact which can only be established once the dividends are paid out. Liquidation is a form of payment by the company"

He admits the judgment taken by Surtie, and that he has not applied for stay of execution though having noted an appeal; and says

"I might however sold in the light of the present application there will be no need to apply for the stay of execution on the judgment" (sic)

[If he intends to say that the sequestration in itself will prevent Surtie from executing on his judgment, the contention can be no comfort to creditors where Phillips is attempting to get rid of that incumbrance]

The amount to his credit in Ficksburg has been attached pursuant to

Tongaat's application for his sequestration in the Free State; which he is also opposing.

He owns the house in which he lives in Leribe. It is worth about R750 000, and is bonded for R500 000.

The white BMW he sometimes drives belongs to his wife, as does the maroon one and a Mercedes. He has never owned and driven a panel van and 4 x 4. The other vehicles referred to by Tongaat (as registered in his wife's name), are "as far as I am aware" his wife's property and have been pledged by her - he does not say to whom, or why. Tongaat has laid no foundation for any fear that any vehicles will be removed from Lesotho.

He denies that he is in fact insolvent. Apart from the money in his Ficksburg account under attachment and the difference between the value of his house and the bond burdening it, he has three unencumbered businesses:

–	Angies Boutique worth	R150 000
–	Angies Take Aways worth	60 000
–	Angies Bar worth	60 000

From these he receives "sufficient income" He does not tell us what that is nor what the relevance is of income from these, in regard to paying large capital amounts which are presently due.

As far as he is aware, the VAT refund will go to the Company, which, although exempted, paid VAT on the consignments from Tongaat which apparently passed it on the Receiver.

He says

> "I admit that there is problem with recovering all this money from the Receiver but do not have exact knowledge as to where the problem lies"

He denies that it will be to the advantage of his creditors that he be sequestrated;

Taking Phillips' own figures at best (and of course subject to the submissions made on behalf of Tongaat as to the effect of Section 86 of the Companies Act) Phillips is hopelessly insolvent. He admits to liabilities totalling R934,713.10: the Tongaat claim, minus the full VAT refund should it be obtained, plus Phillips' estimation of the Illovo claim:

R 474 713,10
- 140 000,00

334 713,10
+ 600 000,00

934 713,00
==========

The value he himself places on his house, Ficksburg bank account and three businesses, totals only R556,000, leaving a shortfallof R378,713.

Reasons for judgment recording why the provisional order of sequestration had been discharged were belatedly filed on 26 January 1998. The Judge *a quo* found that the amount of the Company's debts to Tongaat and Illovo had not been established since notionally dividends could in time be payable by the liquidator; and that he had a residual discretion to discharge the provisional sequestration on grounds of equity - relying for the latter on a "more or less comparable case, i.e. Durham Fancy Goods Ltd. v Michael Jackson (Fancy Goods) Ltd. and Another. (1968) 2 AER 8 97."

Mr. Hoffman who appeared before us for the respondent did not rely on the reasons afforded in the judgment and rightly so. In Durham's case

the error in the bill of exchange was made by the very party claiming to benefit thereby subsequently - an entirely different situation to the one we have here. There is ample authority that the provisions of Section 86 of the Lesotho Companies Act, which for practical purposes are identical to those of section 50 of the South African statute, no. 61 of 1973 and its precursor, are to be taken literally. See for example Cilliers and Benade, Maatskappyereg 4th ed par. 6.2 at pages 91-2; LAWSA Reissue Vol 4(1) par. 82 at p.144; Abro v Softex Mattress (Pty) Ltd. 1973(2) S.A. 346, 350 D-F. Indeed this "legal" defence was explicitly abandoned before us.

Nor is there any merit in the argument advanced by Phillips and accepted in the Court *a quo*, that someone in his position is liable only "for so much as is irrecoverable from the company." The company could only be said to have "duly paid" the amount of the cheques had they been met on presentation by the bank on which they were drawn.

Mr. Hoffman before us took a different tack, and urged in the first place that the liability of the Company to Illovo had not been proved on the return day on a balance of probabilities. He submitted that there was no proper affidavit by Illovo before the court, since the annexures to Lawson's petition were mere unsigned copies, nor is there any allegation that Illovo intends to pursue any claim in terms of Section 86 against Phillips personally.

The first of these contentions cannot be sustained. Tongaat alleged as a fact that Illovo had obtained an order provisionally liquidating the company and has a claim against the respondent personally for

R1,710,725.06 on the same grounds as found the respondent's liability to Tongaat This can be nothing but an eliptical averment that the respondent signed cheques which did not bear the full name of the Company, in favour of Illovo. The unsigned Illovo petition with the relevant cheques attached, were not said to be (Tongaat's only) proof of its factual allegation. Respondent in his opposing affidavit disputed the quantum, not the origin, of the relevant debt; and denied that it was indeed one claimable from him as a matter of law: on his (erroneous) interpretation of the section.

Whether Illovo intends pursuing its claim against respondent must also be irrelevant. Unless and until something like a waiver is alleged and proven, what matters in judging whether respondent is insolvent, is whether the debt exists, to be weighed in the scale against assets.

Then Mr. Hoffman urged that the appellant had not discharged the difficult onus of proving actual insolvency. He referred us to a number of decisions in which the court refused to confirm a rule nisi sequestrating the respondent, on the grounds that too much time had elapsed for the court to be satisfied on a balance of probabilities that the respondent was indeed insolvent. As I understand his argument, the passage of too much time between the provisional order and the (extended) return day, imposes an obligation on the petitioning creditor to inform the court on the return day of the respondent's then financial situation. The provisional trustee could and should have filed a report providing recent information, he contends.

Mr. Hoffman understandably would not be pinned down on the question, how long a delay is too long. Here, he said, the delay was too

long for the Court to have been satisfied on a balance of probabilities that the debtor's position had not altered.

The cases he referred to deal with sequestration obtained on the strength of "acts of insolvency," legislatively defined or are distinguishable on other grounds. He could not point us to any such decision based on time-lag where the sequestrating creditor had relied on having *prima facie* established a significant shortfall between the debtor's assets and liabilities. Since "acts of insolvency" are merely facts from which the legislature authorises an artificial inference that may be totally incorrect in logic - that the debtor is not paying because he cannot do so, - it is understandable that a court may require to be placed in the position to be able to make its deduction from fact, not legislative fiction, where considerable time has elapsed since the "act of insolvency" was committed.

Here Tongaat made out a *prima facie* case that the respondent's liabilities substantially exceed the value of his assets. Respondent could and should have offered some material in rebuttal, had anything happened to alter his situation between provisional sequestration and return day. To burden Tongaat with the onus of submitting further material would be to expect of it to disprove any one of a multitude of speculative happenings.

In my view the appeal should be allowed, the order discharging the rule nisi be altered to one confirming it, the provisions of the Insolvency Act to follow their ordinary course.

It is ordered accordingly

L. VAN DEN HEEVER
JUDGE OF APPEAL

I agree:

J. H. STEYN
PRESIDENT OF THE COURT OF APPEAL

I agree

C. E. L. BECK
ACTING JUDGE OF APPEAL

Delivered at Maseru this 4th day of February, 1998.