C. of A. (CIV) No. 6/98

IN THE LESOTHO COURT OF APPEAL

In the matter between:

THE EXECUTOR, ESTATE OF THE LATE PUSETSO MAKOTOANE	APPELLANT
and	
THE ATTORNEY GENERAL	FIRST RESPONDENT
THE DEPUTY-SHERIFF (MR. LEMENA)	SECONDRESPONDENT

HELD AT:
MASERU

CORAM:
LEON, J.A.
BROWDE, A.J.A.
SHEARER, A.J.A.

JUDGMENT

LEON, J.A.

The appellant was the unsuccessful applicant in the Court **a quo**. As a result of an urgent application, she had sought and obtained certain interim relief in the High Court. The matter was then opposed by the First Respondent. After all the affidavits had been filed the relief which the appellant sought before the Court **a quo** was:

"(a) Second Respondent be interdicted forthwith from pursuing service, execution, removal and sale in execution of any property in the estate of the late PUSETSO MAKOTOANE, pending the administration of the said estate by the executor thereof.

(c) Respondents be interdicted from interfering in any manner whatsoever with the due administration of the estate of the late PUSETSO MAKOTOANE and the executor thereof, except by due process of law.

(d) Respondents be ordered to pay the costs hereof on an Attorney and Client scale."

The Court **a quo** refused the relief sought and discharged the Rule. It is against that judgment that this appeal is brought.

Most of the facts in this case are common cause or not seriously in dispute. However, there is one matter to which it is convenient to refer at this stage. The appellant, who is the duly appointed executor of her late husband's estate did not discharge her duties as timeously as the law required her to do. Indeed there were long delays in performing her duties. She ascribes this to her leaving the matter in the hands of Counsel and the delay was not of her making. The learned Judge **a quo** was not impressed. He went so far as to say that he was left "with the

uncomfortable feeling that the appellant was playing for time" and that her delay (to which I shall refer) was "grossly unreasonable" The feeling that the appellant was playing for time is not supported by the affidavits and does not, in any event, affect what essentially is a matter of interpretation.

Following upon the death of her husband the appellant was appointed executrix to his estate and issued Letters of Administration by the Master on the 14th November 1996 pursuant to the Administration of Estates Proclamation No 19 of 1935. She engaged services of counsel Mr. Phafane to assist her in the discharge of her duties.

On the 27 and 28th November 1997 (about a year later) the appellant caused notices to appear in the MOAFRIKA NEWSPAPER calling upon all creditors to lodge their claims within 30 days of those publications. On the 19th December 1997 the appellant caused a similar notice to be published in the Government Gazette under section 46 of the Administration of Estates Proclamation calling upon all creditors to lodge their claims against the Estate within 30 days of the publication; all the notices were said to be in terms of section 46 while the address given where claims were required to be lodged was that of her counsel's chambers.

However as far back as the 28th February 1997 the First Respondent who is a

judgment creditor against the Estate in an amount over M2 million had issued a writ of execution against the Estate. That was after the appellant's appointment but before the aforesaid publication of the notices. Pursuant to that writ of execution and on the 10th December 1997 (i.e. subsequent to the publication of the notices) the second respondent took an inventory of certain items belonging to the Estate despite the appellant's protests. She alleges that the first respondent is in the same position as any other creditor and that he was obliged to lodge his claim like any other creditor, instead of "trying to help himself to the Estate as fast as possible." Her protests were of no avail because on the 18th December 1997 the second respondent arrived at her house with a truck seeking to remove the goods appearing in the inventory and causing the appellant to seek relief from the Court.

The appellant alleged that not only were the said actions prejudicial to the due performance of her functions but also prejudicial and harmful to other creditors who may wish to lodge their claims in accordance with the relevant provisions of Proclamation No 19 of 1935. She had also been advised by her counsel that the actions of the respondents were prohibited by section 47 of the said Proclamation.

An opposing affidavit was filed by Mr. THAMAE the Principal Secretary of the Ministry of Finance. In that affidavit it is alleged that the appellant simply sat back

and did nothing despite reminders from the Master. It is also alleged that no inventory had been prepared by the appellant. In reply the appellant put up a copy of the inventory dated 22nd January 1998.

Mr. Thamae draws attention to the fact that the writ of execution was issued following upon a judgment. Although the executrix had been appointed at that time (28th February 1997) no notices to creditors had been published despite the fact that Letters of Administration had been issued more than three months before that time. He alleges further that nothing in law prohibited the writ of execution from being "sued out". He claims that he has been advised that there is no provision in the law which prevents the suing out of the writ at the time when it was sued out. The mere fact that an executrix had been appointed was not enough: that had to be coupled with publications in the Gazette and a newspaper. He alleged further that the appellant, as the wife of the deceased, has a direct interest in the estate and will do everything possible to delay the process of recovering the debt as she stands to suffer directly if payments are made from the estate." As I have indicated earlier that averment found favour with the Court **a quo** despite the appellant's denial and her allegation that she had left the matter to Counsel. Finally Mr. Thamae refers to certain without prejudice correspondence which indicates that the appellant's counsel was endeavouring to settle the first respondent's claim.

After setting out the facts the learned Judge refers to the provisions of section 44, 46, and 47 of the Administration of Estates Proclamation No 19 of 1935.

Section 44 of the Proclamation obliges every executor as soon as letters of administration have been granted to make subscribe and transmit to the Master the requisite inventory.

The relevant part of Section 46 of the Proclamation provides:-

> "Every executor shall, so soon as he has entered on the administration of the estate cause a notice to be published in the Gazette and in a newspaper circulating in the district in which the deceased ordinarily resided .. .. calling upon all persons having claims against the deceased or his estate to lodge the same within such period from the date of the latest publication of the notice as is therein specified not being less ... ... than thirty days or more than three months, as is deemed by the executor proper in the particular circumstances of each case ...."

> Section 47 of the Proclamation reads:-
> "No person who has obtained judgment of any Court against any person in his lifetime or against his executor shall sue out or obtain any process in execution of that judgment before the expiration of the period notified in the Gazette in manner provided in section 46 of the proclamation, and no person shall thereafter within six months after the

> grant of letters of administration obtain any process in execution of any such judgment without first obtaining an order of the Court."

I pause to observe that it is common cause that no such order of Court was ever sought or obtained.

The learned Judge reasoned in the following way. It was common cause that on the 28th February 1997 when the first respondent sued out the writ the appellant had not yet complied with the provisions of section 46 (the publication of the notices section). He held "accordingly" that there is nothing in section 47 which prohibits a creditor from suing out a writ before publication is effected. "It is only after such publication has been made that a creditor is obliged to await the expiration of the period notified in the Gazette. Conversely I hold that the granting of letters of administration alone is not sufficient to prohibit a creditor from suing out a writ of execution of judgment against the deceased or his executor."

Having considered the Proclamation the learned Judge held that there was nothing in it to indicate that the legislature intended to deprive a creditor of his common law right to execute a writ in pursuance of a judgment he has lawfully obtained against the deceased or his executor before the requisite notice and publication referred to in section 46 of the Proclamation. Nor could section 47 assist the appellant.

The granting of letters of administration alone (so held the learned Judge) was not a bar to a creditor suing out a writ in execution of judgment. He held further that it was incumbent upon the appellant as executrix of the estate to have caused the necessary publications to appear "as soon as" she had been granted letters of administration on 14 November 1996. If she had done that then the first respondent would have been precluded from pursuing the writ in question within six months after the grant of letters of administration. As she had failed "dismally" to comply with the relevant requirements of the proclamation she had only herself to blame.

On behalf of the appellant it is contended that section 47 of the Proclamation prohibits the very action which the respondents embarked upon. Execution is stayed permanently except with leave of the Court. It is submitted that the interpretation placed by the court on section 47 conflicts with the very purpose for which an executor is appointed i.e. to liquidate it in accordance with the provisions of the statute. To permit individual creditors to help themselves to the estate by writs of execution "in total disregard of the appointment of the executor and her statutory functions is to render the statute irrelevant and inoperative." It is further pointed out that the purpose of staying execution is to make a distribution to creditors after realisation of the estate and that the actions of the respondents usurps the functions of the Master in the protection of the interests of creditors, heirs,

legatees and other persons having claim on the estate. Finally it is pointed out that it is the executor's duties to liquidate the estate which is achieved when it is reduced into possession, cleared of debts and other immediate outstandings and left free for enjoyment by the heirs.

On behalf of the first respondent (Mr. Putsoane argued this case forcefully) reference is made to the delays in filing an inventory and in the publications which shall take place within a reasonable time. That did not occur. It is pointed out that the writ of execution was sued out by the first respondent long before any publication was effected. As such the writ was not prohibited by section 47. Reliance is also placed on the second part of section 47 which is to the effect that after publication no process can be sued out in execution of a judgment within a period of six months from the date of granting of letters of administration. That leads to the interpretation that the granting of letters of administration does not **per se** prevent the suing out of a court process in execution of a judgment. In order for a suing out of a process in execution of a judgment to be prevented publication must first take place. There is nothing to prevent it before publication.

It will be convenient at this stage to say a brief word about the relevant law relating to administration of estates.

In MEYEROWITZ : THE LAW AND PRACTICE OF ADMINISTRATION OF ESTATES (5th ed) page 218 sec 16.2 the learned author states:-

> "as the purpose of staying execution is to enable the executor to make a distribution to creditors and heirs generally, following the procedure laid down in the Act, the court will not lightly grant leave to execute; good reasons would have to be advanced why execution should proceed."

In my view there is no difference between the principles underlying the South African Administration of Estates Act No 66 of 1965 and Order 19 of 1935 with which we are concerned.

In the case of **THE HEIRS HIDDINGH vs de Villiers and Others** 9 S.C. 208 (PC) the following was succinctly stated by the Privy Council at p.308 in dealing with the duties of an executor. "It is laid down that his duty is to liquidate the estate. But an estate is liquidated when it is reduced into possession, cleared of debts and other immediate outgoings and left free for enjoyment by the heirs."

The actions of the respondent in this case prevented the appellant from discharging her duties by usurping her functions to the detriment of the other creditors.

Reference can usefully also be made to **CILLIERS N.O. vs KUHN 1975 (3) SA**

(NK) where it was held that the ordinary meaning of "liquidate" is to put in order and that of "distribute" is to separate into parts and it is in these senses that the words are used in section 13(1) of the South African Administration of Estates Act. In other words to put the estate in order by, for example, paying the debts etc and thereby putting it into a state in which the assets can be separated into parts and divided among the heirs.

If the interpretation adopted by the Court **a quo** were to be followed it would have the effect of turning the law relating to the Administration of Estates on its head by allowing creditors to issue writs of execution and act upon them to the detriment of other creditors whenever, as here, an executor is dilatory in performing his or her duties. In my view the remedy of an aggrieved creditor in such a case is to obtain an order of court compelling an executor to act within a specified time.

In enacting section 47 no doubt the legislature contemplated that an executor should act promptly. But that does not mean that it intended to offer a creditor **carte blanche** to levy execution whenever there was delay on the part of an executor.

In order to give effect to the principles underlying the administration of estates I am of the opinion that the section 47 must be interpreted to mean:-

1) that no creditor who has obtained judgment against a deceased or his executor may sue out or obtain any process in execution of that judgment before the expiration of the period notified in the Gazette in the manner provided in section 46 (which refers to publication in the Government Gazette and a newspaper) (which did not happen here)

and

2) no person shall thereafter within six months after the grant of letters of administration obtain any process of execution in execution of such judgment without obtaining an order of court.

In the present case the writ of execution was issued within three months of the grant of letters of administration and on that ground alone falls foul of the provisions of section 47

In reaching the above conclusion I have not overlooked the fact that the appellant failed to act "as soon as" is required by section 46 of the Proclamation and that no doubt the legislature contemplated that she should do so. But the remedy lay in the respondent's hands. By acting as he did he prejudiced the rights of all the other creditors and in conflict with all the principles underlying the administration of estates.

For these reasons I am of the opinion that the court erred in its conclusions. In my judgment the appeal must be allowed with costs and the order of the Court **a quo** be altered to one confirming the Rule with costs.

R.N. ~~LEON~~
JUDGE OF APPEAL

I agree

J. BROWDE
ACTING JUDGE OF APPEAL

I agree

D.L.L. SHEARER
ACTING JUDGE OF APPEAL

Delivered at Maseru on this 31st day of July 1998.