CIV\APN\202\96

IN THE HIGH COURT OF LESOTHO

In the application of :

TONGAAT - HULETT SUGAR LIMITED **Applicant**

vs

MICHAEL PHILLIPS **Respondent**

J U D G M E N T

Filed by the Hon. M L Lehohla on the 26th day of January, 1998

The Court having heard concluding addresses on this matter on 2th May, 1997 gave an order on 6th May, 1997 in favour of the respondent in the following terms:

"On the basis of a more or less comparable case i.e. Durham Fancy Goods, Ltd vs Michael Jackson (Fancy Goods) Ltd. And Another (1968) 2 ALL ER 897 to the instant one where the English court found that a transgression of the relevant section of the Act (108 of 1948) does not necessarily mean that the person who signs a company cheque which does not reflect or display the full name of the

company, should be subjected to enforcement of a claim in terms of the relevant section of the Act because it would be inequitable to do so, I am inclined to the view that this is not a proper case where the respondent should be subjected to the full rigour of the sequestration law. Consequently the provisional sequestration order is discharged with costs."

The headnote in the authority cited above is to the following effect:-

"The plaintiff company drew a ninety - day bill of exchange on a company whose correct name was 'Michael Jackson (Fancy Goods), Ltd.', but which was referred to in the bill and the form of acceptance prepared by the plaintiff company as 'M. Jackson (Fancy Goods), Ltd.,' J., a director and secretary of the drawee company at the time, signed the acceptance of the bill without correcting the error in the name of his company. The bill was dishonoured on maturity, J, having severed his connexion with the drawee company and it having gone into liquidation. In an action in which it was sought to make J. personally liable on the bill by virtue of s.108 of the Company Act, 1948,

Held: although the name attributed to the drawee company in the bill of exchange was a misdescription and J., by signing the bill on behalf of the drawee company, had contravened s.108 of the Companies Act, 1948, and rendered himself personally

liable under that section on the bill, the plaintiff company was estopped from enforcing that liability, since they themselves were responsible for the wrong description and impliedly represented that they would treat acceptance in that form as being regular and not giving rise to personal liability ----------

although the plaintiff company was estopped, the civil liability created by s.108 would have been available to any other holder who was unaffected by the equitable defence----------"

The petitioner had obtained before Monaphathi J on 15th May 1996 an order at page 4 of the record in the following terms to wit, that

1.1 ----------

1.2 Respondent be placed under provisional winding up int he hands of the Master of the High Court of Lesotho.

2. A Rule Nisi is issued calling upon the Respondent and all other interested parties to show cause, if any, to this Honourable Court on the 10th June 1996 at 9h 30 am or so soon thereafter as the matter may be heard, why a final order of liquidation should bot be granted.

3. This order be published once in the Lesotho Today.

4. ----------

5. ----------

The petition sets out that Tongaat - Hulett Sugar Limited the Petitioner is a company duly incorporated according to the Law of the Republic of South Africa and carries on business as a sugar refiner and distributor having its head office at 1001, Umhlanga Rocks Drive, La Lucia, KwaZulu Natal.

The Respondent is a businessman who carries on business in the Kingdom of Lesotho and South Africa. He is also said to be the former managing director of a company known as Angies Enterprises (Pty) Limited which was registered and incorporated in the Kingdom of Lesotho and has been placed under provisional liquidation by means of the order given by the High Court on 5th May, 1996. See Annexure A at page 4.

The Respondent resides at Leribe in Lesotho in a large house near the Petrol Station there. He is married to Thembisile Patricia Phillips but the Petitioner doesn't know what law governs that marriage.

The Petitioner alleges that the Respondent is indebted to it in the following amounts:

1. An amount of R 158 237.60 being in respect of a cheque dated 8 March 1996 (copy annexed and marked "B").
2. An amount of R 316 475.20 in respect of a cheque dated 9 March 1996 (copy annexed and marked "C").

The Petitioner alleges that the liability arose under the circumstances set out

below, to wit, that:

1. during March 1996 the Petitioner sold and delivered to Angies Enterprises (Pty) Limited ("The Company") four consignments, each consisting of 34 tons of sugar;
2. the cheques, annexures "B" and "C" were in payment of the said consignments,
3. the cheques were both signed by the Respondent, or alternatively he permitted the said cheques to be signed on behalf of the Company,
4. the cheques were drawn on the Standard Chartered Bank Lesotho Limited of Maputsoe ---------- in Lesotho.
5. the Petitioner is and was at all material times the holder of the said cheques for value,
6. the said cheques were duly presented for payment to the Standard Chartered Bank Lesotho, Maputsoe Branch, where they were dishonoured by non-payment and returned marked "refer to drawer",
7. the said cheques were drawn on account 047 049 404 881 which is an account operated by the Company;

The Petitioner accordingly stated that the Respondent breached the provisions of Section 86 of the Companies Act 25 of 1967 of the Kingdom of Lesotho ("the Act") in that

(a) the cheques did not have mentioned thereon, in legible characters, the Company's name as required by Section 86 (1) © of the Act;

(b) the cheques were dishonoured by non payment,

© the Respondent had signed the cheques, or permitted same, to be signed on behalf of the Company,

(d) the Respondent was an officer of the Company, inasmuch as he was the managing director thereof,

(e) he is accordingly liable in terms of Section 86(4) (b) of the Act for the amount of the said cheques.

A copy of Section 86 of the Act is annexed marked D at page 2, section 86 (4) (b) reads;

If any officer of a company, or any person on its behalf

(a) ----------

(b) issues or permits the issue of any business letter, notice or other official publication of the company, or 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 wherein its name is not mentioned in manner aforesaid, or

© ----------

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."

The Petitioner states that it holds no security for its claim save that:

1. it may obtain a dividend from the company in liquidation. At this stage it is impossible to say what that dividend will be but it is likely to be negligible because:

(a) the creditor who obtained the winding up order against the Respondent, Illovo Sugar Limited of Durban, KwaZulu Natal ("Illovo Sugar") has a claim against the Company in the sum of R 1 710 75.06, and has attached Annexure "E" consisting of two cheques drawn in favour of Illovo Sugar Limited for R 85 087.89 each. Both cheques were referred to "drawer."

In response to the Petitioner's averment at page 8 paragraph 6 the respondent at page 65 denies that the Petitioner would receive a negligible dividend from the Company's estate owing to the claim by Messrs Illovo Sugar Limited for R 1 710 725.06. The reason he gives for this assertion is that this amount will be taken up with the liquidators. He further indicates that the amount due to Illovo Sugar Limited is in the region of R 600 000.00.

The Respondent goes further to submit that even if it is found that Section 86 of the Companies Act above makes him liable for the amount of the cheques in question, the Petitioner is still not entitled to claim from him until it is shown that

Angies Enterprises (Pty) Limited in liquidation shall not be able to pay the amount of the cheques. He submits that section 86 above makes it clear that personal liability for the drawer of the cheque only comes into play when same is not duly paid by the company itself, a fact which can only be established once the dividends are paid out. Thus the Respondent submits that liquidation is a form of a payment by the company. The purpose of winding-up the company is to benefit all the creditors.

The straw at which the respondent is clutching appears to me to be what the authority of Epstein vs Bell and Another 1997 (1) SA 483 at p.489 denounced in regard to the basic principle of *actus non facit reum, nisi mens sit rea* in the following terms:-

" -------- of course, the lawmaker has it within its power to override this fundamental principle of fairness, and to make absolute the duty of compliance with its behests, thus rendering innocent violations punishable. But such an inroad into individual freedom should be made to appear very plainly, so that he who runs may read. Then the Court would not have to grope for the legislative intention as to *mens rea* amid ambivalent considerations such as purpose, penalty, and the reasonableness of going one way or the other."

Having based his submission on the above authority in favour of the Petitioner Mr Fisher rammed the point home by indicating that "The language of the

prohibition in section 50 (1) (similar to Lesotho's 86) of the Act is plainly peremptory. "See Epstein p. 489 E - F.

The Petitioner avers that the Respondent has breached the provisions of section 86 above in the following respects, to wit, that

(a) the cheques did not mention thereon, in legible characters, the company's name, as required by section 86 (1) ©.

(b) the cheques were dishonoured by non-payment

© the respondent signed the cheques

(d) the respondent was an officer of the company inasmuch as he was the managing director thereof;

(e) the petitioner holds no security for this claim.

In further support of the respondent's indebtedness and de facto insolvency the petitioner alleges that the respondent is indebted to Illovo Sugar Ltd in the sum R 1 70 725.06 on the same grounds that he is liable to the petitioner. But as has been shown the Respondent at page 66 denies any personal indebtedness to the Petitioner "in the amount totalling R 474 713.10 or any amount whatsoever." The Respondent also lays much store by his statement with regard to Illovo Sugar that "Illovo Sugar has also been doing business with the company for quite a few years and was fully aware that it is doing business with a limited company.

The Petitioner further alleges that the respondent is indebted to it and to Illovo

Sugar in that a judgment was granted by the High Court on 22nd April, 1996 against the respondent in respect of arrear rentals in the sum of R 203 625.12. In response the respondent admits that in fact the arrear rental was due to a certain Mr G.T. Surtie. The Respondent further asserts that an appeal has been noted against this decision although an application for stay of the execution thereof hadn't yet been moved even though an appeal to the Court of Appeal does not automatically act as stay. He is however hopeful that in the light of the instant application there might be no need to apply for stay execution of the judgment.

The Petitioner alleges that the Respondent's liabilities far exceed his assets. In response the Respondent at page 67 paragraph 8 denies that his liabilities exceed his assets and thus denies that he is insolvent.

What appears to be common cause can be summed up as follows:-

1. The Respondent signed all the cheques in question in his capacity as an officer of the company. At page 64 at 5.2 He says "I further admit that I signed these two cheques on behalf of Angies Enterprises(Pty)Limited."

2. The petitioner including Illovo Sugar Ltd are holders of all the cheques in question.

3. The company's name was not mentioned on the cheques in legible characters. See page 64 paragraph 5.3.

4. The cheques in question were dishonoured by non-payment.

5. The company name is not mentioned at all in respect of the two cheques drawn in favour of the petitioner, whilst the cheques drawn in

favour of Illovo Sugar Ltd make no reference to the abbreviation "Ltd" and "PTY" or the full versions of these abbreviations.

The Respondent's defence on papers in respect of non-compliance with Section 86 is as follows and to wit, that :

(a) he was totally unaware that the company's name had to be mentioned on its cheques. At 5.3 on page 64 he says

> "I was totally unaware that the company was required to have its name mentioned on its cheques. Neither my lawyers nor my bookkeepers at any stage informed me that this is required. I, however understand that the purpose of the aforesaid enactment is to prevent persons from being deceived into the belief that they have security with unlimited liability of common law when they have the security of a limited company".

(b) the company has been doing business with the petitioner for some three years and petitioner knew who it was doing business with at all material times.

© the Petitioner should in any event excuse the company; meaning should seek payment from the company before doing so from the Respondent.

Mr Wessels for the Respondent insisted that the Petitioner bears the onus of proof that the Respondent is actually insolvent and urged the Court not to exercise its discretion in favour of final sequestration. At page 59 of ***Corner Shop(Pty)Ltd vs Moodley*** 1950(4) SA 55 (T) Roper J. said :

> "The necessity of clear proof of insolvency where no act of insolvency is established, even in cases where the creditor has alleged a state of

insolvency as one of the grounds of his petition, has been pointed out repeatedly".

It should be borne in mind that there are no replying affidavits in this application because the Petitioner's counsel had to waive them on account of their having been filed out of time and the Court having refused to grant condonation for that irregularity. Moreso because they were not authenticated but instead signed before a person who had pecuniary interest in the petition. Thus without replying affidavits the Court cannot accept that the cheques to Illovo Sugar were signed on behalf of the company in liquidation i.e. Angies Enterprises(Pty)Ltd.

In the absence of the replying affidavits it stands undisputed that the Respondent's nett assets amount to approximately R550 000-00; while the indebtedness of Angies Enterprises (Pty)Ltd to the Petitioner amounts in approximate terms only to R600 000-00.

Mr Wessels made a strong plea that because it is recognised that the liability cannot be absolute then it stands to reason that a person can have a defence in terms of section 86.

I view with favour the submission that the Lesotho and South African Law

is largely based on the English Law which as earlier shown in **Durham** that in comparable circumstances, the Court found that a transgression of the relevant section of the Act (section 108 of the 1948 Act) does not necessarily mean that the person who signs a company cheque which does not reflect or display the full name of the company, should be subjected to the enforcement of a claim in terms of the relevant section of the relevant Act, because it would be inequitable to do so.

Thus the respondent's defence is based either on estoppel and or equity. But even if these two are rejected it seems to me that the respondent has one more shaft left in his quiver in that there would be no clear proof of insolvency because the petitioner's claim is less than the nett balance of the respondent's assets. Moreover the Petitioner has not shown that Angies Enterprises creditor is going to sue the respondent and require him to pay. To satisfy the Court of this they would have got affidavits from the company but on the contrary Illovo has proceeded against the company and not against the respondent Philips. He owes them R500 000-00.

It is not known what the Petitioner is going to derive from the dividends paid to creditors. The amount they may be entitled to claim from the respondent is still uncertain. Thus they don't have liquidated claim at this stage which is a requirement for sequestration.

All in all the Court has a discretion but I am persuaded to the view that where Queens Bench says equity demands that a person in these circumstances should not be saddled with a final order which is a very drastic act, I feel it would be too rash to press on regardless.

In ***Bouwer vs Andrews*** 1988(4) SA 337 ECD at 339 H Kannemeyer J. in circumstances similar to the instant respondent's said :

> "Thus, in my view, the defendant is liable on the cheque, subject to any defences available to him, not because he signed as agent for a non-existent principal but because of the operation of s.23(2) of Act 69 of 1984. It should be mentioned that the fact that the registration number of the close corporation does not appear on the cheque also renders the defendant, as signatory, personally liable. ..... Evidence may be led that the signatory signed on behalf of the close corporation in order to establish the former's liability ..... But enforcement of such liability by way of provisional sentence proceedings can never be competent since evidence of the name or correct name of the company, as the case may be, must be adduced, i.e. liability does not appear *ex facie* the bill only".

I may just hark back to **Epstein** to indicate that at p.487 Magid J also accepted, in circumstances analogous to the instant case, that a litigant who has signed a cheque in contravention of the South African equivalent of the Lesotho Companies Act section 86 (i.e. section 50(3)(b) -

> "is entitled to raise an estoppel against his opponent when the latter has made a representation with the intention that it be acted on and

which has caused the litigant to alter his position to his prejudice".

To say, as argued by *Mr Fisher*, that estoppel doesn't apply "for we didn't persuade Respondent not to put the name Angies" is to take too simplistic a view of the instant matter.

In this connection the act of estoppel on which the Respondent seems to rely is that the Petitioner accepted the cheque as a cheque drawn by the company (Angies) in respect of a debt of that company.

The submission has merit therefore that in view of the fact that liability is not absolute notwithstanding contention by the Petitioner to the contrary, even if the Respondent is liable, the Petitioner does not yet have a liquidated claim against the Respondent, as its claim would only become liquidated once it appears how much would be owing to it after a dividend has been paid by the company in liquidation. After all it is a requirement for a petition for sequestration that the petitioner should have a liquidated claim against the Respondent. In this regard Meskin on **Insolvency Law** has this to say in the loose-leaf addition at 2-1 :

> "A liquidated claim, in this context, is a claim for an amount which is fixed, either by agreement or by an order of the Court or otherwise".

It is not known how much if anything is going to be due or payable by the Respondent to the Petitioner.

Similarly, **Erasmus (Superior Court Practice)** says in this regard at B1-10 :

> "A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment".
>
> Further at B1-212 :
>
> "The following have been held not to be liquidated amounts in money : an account containing some items which the Defendant contends to be overcharged for, and other items for goods sold which he contends were not of the quality guaranteed; a disputed partnership account extending over two years, determination whereof required evidence to be taken on commission in a foreign country; an account guaranteed by the Defendant, where the Defendant's liability depended upon the contingency of the principals failing to pay; a claim for interest against the Defendant where the Defendant had never agreed to pay any interest; an untaxed bill of costs, the costs of transfer of a property, where transfer had not yet been passed; an uncertain claim for money alleged to have been stolen"

It is consideration of the above and parallel instances cited by the learned author that this Court is of the view that caution is advised here where the Petitioner relies on actual insolvency of the Respondent, for fear that after a dividend has been paid it might very well appear that insofar as the respondent might have been insolvent if the alleged debts are taken into consideration, he might, on the other

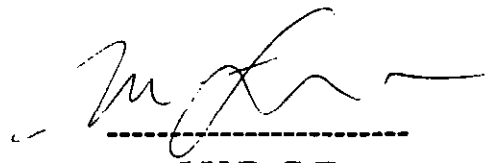
hand, very well be solvent if the Petitioner's alleged claim had been reduced by the amount which it receives as a dividend from the company in liquidation. The Court is wary therefore that when deciding whether it should exercise the discretion which it has to grant a final order, because as stated by Meskin : **Insolvency Law** 22-4

> "Notwithstanding that the creditor is able to establish all the elements of the case for sequestration, the Court still has a discretion as to whether or not to grant sequestration order, whether provisional or final".

In the instant matter where the replying affidavits have been waived the Court is left in an even more unenviable situation than where it has to decide in an oft-denounced situation between which of the two type writers to believe. In the less irksome of the two situations above it is better to err in favour of the Respondent. Thus it would be more justified to do so where a worse situation than choosing which of the two type writers to believe, prevails.

For the above reasons the provisional sequestration order was discharged

with costs.



JUDGE
26th January, 1998

For Applicant : Mr Fisher
For Respondent : Mr Wessels