CIV/APN/197/2000

IN THE HIGH COURT OF LESOTHO

In the matter between :

LESOTHO BANK **PETITIONER**

and

MPAKA JEREMIAH MPAKA **RESPONDENT**

For Petitioner : Mr. T. Hlaoli

For Respondent : Adv. H. Van Heerden
(Instructed by Du Preez, Liebetrau & Co.)

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 12th day of October 2000

My full reasons will follow.

It will be recalled that on the 29th this Court decided that points-in-limine and merits should be argued together and I am merely making this speech today to decide the matter and my full reasons will follow.

I decided the points-in-limine by saying firstly *loco standi*. When admission

was made firstly by the Respondent that he dealt with the Petitioner as a customer and that he was indebted to the Petitioner in a demonstrable way I do not see how *loco standi* could be questioned when it was undisputed that there have been dealing with Lesotho Bank and then Lesotho Bank Limited which is, as said from the bar, a successor to Lesotho Bank unless something more was shown by Respondent.

On urgency I said it may be that Respondent felt that he should have had notice of the application in which case he still must have spoken about and shown prejudice which was said to have been caused by the application having been made *ex parte*. The prejudice in the way the application was served. That is when the *rule nisi* had already been issued. But urgency was justified by Petitioner when it showed that Respondent had gone about to change the nature of his business in a way that could suggest most probably an intention to divert the activity or dissipate the commercial assets to the prejudice of creditors. When this was unanswered there was a proper case for having moved the case *ex parte* without notice for the *rule nisi*.

On that question of conflict between provisional trustee and his firm of attorneys I spoke about the remote way in which the likelihood of conflict of interest was said to have been suspected between the appointed firm and the appointed trustee. I felt that the Respondent's argument was not persuasive enough in the light of and in the context of the Petitioner having in fact been represented in these proceedings by the firm of T. Matooane & Co. It may be, objectively, having regard to the resolution of the Board and annexure "C" that conflict would be suspected but it is no easy matter unless there is more of a demonstration of this likelihood because the principle is that the Master exercises control over the liquidation of the estates such as the instant one. The participation by the creditors, the respondents such as the present one in respect of accounts, administration of accounts, closing of the statement, inventories lessens the likelihood of that conflict.

Unless the complaint has to do with the integrity or honesty of a trustee which is a serious allegation which the Court cannot be said lightly and which when seriously suggested the Court will take cognisance of it by way of a proper investigation.

There was an allegation that there had been absence of hearing, when the Respondent said he has not been given a hearing. I felt this point was unfounded and had not been seriously demonstrated. As the law stands it is the practice to issue *rule nisi* originated by *ex parte* motions which are premised on urgency which I have already commented about. It is rare that on confirmation of an order a respondent will not have been afforded a hearing to be heard or an opportunity. In such a rare case one would correctly speak of a hearing not having been afforded and the final rule being a nullity. That would be where for example there has been no service of *rule nisi* at all.

Indeed one cannot suggest that the procedure of provisional liquidation will not spell hardships to the Respondent. But it is a procedure which is recognized and still stands together with our rules of Court. In some countries such as South Africa as I have been informed the South African Law Commission is looking for ways of changing the procedure of interdicts and notices on respondents in liquidation or insolvency cases. This is being done presumably to ameliorate certain difficulties or hardships. May be this question of *ex parte* procedure is one of the issues that are being addressed by the said Commission.

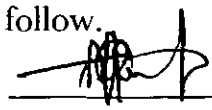
On this question of the section 165 and 166 of the Labour Code whereby there is an objection to the appointment of the Trustee, in way it has been put, my comment would be that the labour regulations regulating labour issues cannot invalidate authority given by Court to a Legal Practitioner admitted in this Court when being appointed as a Trustee. Alternatively the trusteeship relationship or

such a status as this one in a liquidation situation is not a master and servant relationship. One can arguably be appointed or an appointment can arguably be made in a situation such as this one where Mr Buys is appointed by virtue of being an Attorney not as being an employee nor an employer.

On the merits I feel that the petitioner has proved a claim which was not denied that the Respondent has committed acts of insolvency. He has failed to discharge the onus of rebutting a *prima facie* case mainly that his estate was insolvent and was not paying its debts. I did not see any dispute of fact where the indebtedness to the Petitioner was not challenged. It is not a dispute of fact that the Respondent merely said that the Petitioner should have filed an action as against going for liquidation procedure.

Again on the vexed the question of appointment of Mr. Buys, the allegation is made against him about his having dealt with certain estate or estates in a dilatory careless or negligent manner. This does not take into account that the trustee is effectively speaking a servant of the Court and of the Master of the High Court. The administration of an estate is under the supervision of the Master. These allegations against Mr. Buys are scanty and are unsubstantiated. I would loath to act on the allegations which appear on their face to be vague as those. If there was more or enough evidence for example of the Master or from people intimately associated with the alleged badly dealt with estates I would perhaps have been persuaded to consider this matter. It is unsafe for the Court to lightly take allegations that border on or are disguised charges of dishonesty against Legal Practitioners not least on anybody or a citizen. It would be interesting as to how the Master dealt with these complaints against Mr. Buys if there were such complaints.

I had no hesitation in confirming the rule with costs to the estate. I have already dismissed the points-in-limine with the comments I have already made. As I said my reasons will follow.



T. Monapathi
Judge