CIV/APN/32/80

IN THE HIGH COURT OF LESOTHO

In the Application of :

LESOTHO GLASS WORKS Ltd. Applicant

v.

MABOTE BUILDING CONSTRUCTION 1st Respondent
MINISTRY OF WORKS 2nd Respondent

Reasons For Judgment
Filed by the Hon. Judge Mr. Justice M.P. Mofokeng on the 10th day of April, 1980.

On the 17th March, 1980, the Petitioner obtained, before my Brother Cotran, C.J., ex parte a rule nisi calling upon the respondents to show cause why there should not be an order .

"(1) (a) granting leave to the Petitioner to cause a writ to be issued attaching so much of the amount payable by the Second Respondent to the First Respondent as may be sufficient to satisfy your Petitioner's judgment debt against the First Respondent for payment of the sum of R8,319-68 with interest at the rate of 6% per annum on the sum of R8,639-68 from the 17th October, 1979 to the 1st December, 1979, being the date of payment of a sum of R320-00, with interest on the sum of R8,319-68 at the rate of 6% per annum from the 2nd December, 1979 todate of payment, and costs of suit;

(b) authorising and instructing the Deputy Sheriff to effect such attachment,

(c) directing the Taxing Master of the above Honourable Court to tax your Petitioner's costs of this application as part of the Petitioner's costs awarded to it in Case No. CIV/T/215/1979;

(2) That the Second Respondent be restrained from making payment of any amounts which may be due to the First Respondent to any person other than the Deputy Sheriff on behalf of your Petitioner; pending the final determination of this application;

/(3) .....

(3) That this Order, together with a copy of the Petition and annexures in this matter be served on the First and Second Respondents;

(4) Granting further or alternative relief".
(My underlining)

The Petitioner now seeks confirmation of the above-mentioned rule nisi. The First Respondent has filed opposing affidavit but the Second Respondent has not appeared to oppose the application. I am not surprised.

There are some disquieting features about this application. The very first paragraph of the petition is incomplete. The Petitioner is a company "duly incorporated with limited liability according to the laws of Lesotho....." Tho name of the person representing it, the capacity in so doing and the authorisation are totally missing. Only blank spaces which should have been filled remain. An affidavit was filed on the 2nd day of April 1980 by an employee of the Petitioner's attorneys purportedly trying to explain why the petition was not complete. However despite the allegation therein that a copy of a resolution was annexed to the said affidavit no such resolution was so annexed. The said affidavit was only brought to my chambers on the morning of the 3rd April 1980. Consequently the respondents never had a copy of it served on them. Although the Petitioner states that ·

12.

Your Petitioner verily believes that payment of the amount in question may be made within a very short time and respectfully submits that this is a matter of urgency which justifies the above Honourable Court's hearing this application ex parte; if application were to be made on Notice of Motion in terms of the Rules of the above Honourable Court this would in all probability delay the matter to the extent that payment will have been made before the Honourable Court is in a position to make a final order." (My underlining)

yet the order which was granted the Petitioner on the 17th day of March 1980, together with a copy of the

/petition .....

petition (in terms of prayer three (3) thereof) was not served on the two respondents until on the return day i.e. on the day on which they were to appear before this Court to show cause why the order granted the Petitioner two(2) weeks previously should not be confirmed. The rule nisi was then extended to enable the two respondents time to react. This inordinate delay in this type of case is not only embarrassing but quite unfair to those concerned.

In paragraph 12 of his opposing affidavit, in reply to the Petitioner's paragraph 11 which reads

" 11.

> Your Petitioner has been informed by the said Mr. Dja that he is not empowered to make payments of amounts such as are mentioned above to any person other than the Contractor in question, even though the Contractor should agree to his doing so or should cede his right to payment to any other person."

the First Respondent states

" 12.

> AD PARA 11 :
>
> First Respondent fails to understand the purpose of this paragraph.
>
> (a) If Petitioner alleges that he was informed by Mr. Dja that money held by Government as a debtor to members of the public as creditors is not subject to Garnishee proceedings then First Respondent admits that the correct position of the law is that Garnishee proceedings are not available as against the Government of Lesotho.
>
> (b) In that event, First Respondent puts Petitioner to proof that it has a right to institute Garnishee proceedings against the Government of Lesotho."

Mr. Samuels conceded that if that was the law in Lesotho then obviously his application was bound to fail. The contention by the First Respondent is based upon section 5 of Act 4 of 1965 which reads as follows (with adaptations

/in terms .....

in terms of the law) :

> "5. No execution or attachment or process in the nature thereof shall be issued against the nominal defendant or respondent in any action or other proceedings against His Majesty in His Government of Lesotho or against any property of His Majesty, but the nominal defendant or respondent may cause to be paid out of the revenues of Lesotho such money as may, by a judgment or order of the Court, be awarded to the plaintiff, the applicant or the petitioner (as the case may be)." (My underlining)

There are two ways of looking at this section. Firstly,

> "no execution, attachment or process in the nature thereof shall be issued .... in any action or proceedings...."

i.e. any action or proceedings against His Majesty's Government (hereinafter referred to as the Crown), and secondly,

> "no execution, attachment or process in the nature thereof shall be issued against any property of His Majesty....."

i,e. independently of any action or any proceedings against the Crown.

Mr. Samuels submitted that the section under consideration is only applicable where the proceedings or action directly concern the Crown or where the Crown is one of the contestants to the action. Clearly, this cannot be so if the second prong to the section is also to be considered (as it should). Mr Kolisang, on the other hand, contended that the proceedings before me are for leave to attach the balance of judgment debt, and are, therefore, in the nature of a garnishee order, which is in the nature of execution or attachment.

"Garnishee procedure is a process of execution, albeit against the debtor, involving an attachment of money of the garnishee who is required to pay the Sheriff or the Messenger of the Magistrate's Court." per Caney,

/J, in .....

J, in Maharaj Bros. v. Pieterse Bros. Construction & Anc. 1961(2) S.A. 232 (N) at 237H. The money sought to be attached is the Crown's property and it will remain so until it is paid out to the person entitled to it. Thus paragraph II of the Petitioner's petition expresses the correct position of the law. The heading or description given to the petition by the Petitioner is quite revealing. It states, without any ambiguity :

> "for an interdict and leave to attach certain moneys due by the Second Respondent to the First Respondent." (My underling)

The Petitioner's tenor of his whole petition is that the money owed by the Second Respondent to the First Respondent should not be paid over to the First Respondent in order to enable the Petitioner to execute for his judgment upon it. Indeed, the very first prayer claims attachment. Again, paragraph 7 of the petition is quite clear and it reads :

"

7.

> The Deputy Sheriff has further rendered a return to your Petitioner's said Attorneys to the effect that no other movable property of the First Respondent can be found which may be attached."
> (My underlining)

Therefore, the Court is to help in execution, proceedings against the debtor viz. the First Respondent by attaching the moneys due but still in the hands of the Second Respondent viz. the Crown because the Petitioner submits, in his petition, that "if the Second Respondent pays the said amount to the First Respondent, your Petitioner will receive no portion of such payment." On the papers before me, there is no basis for this submission. In fairness to Mr. Samuels, he did not repeat it in his argument before me. To leave no doubt as to what I have just said namely the true purpose of the proceedings before me, the Petitioner prays that the Court should authorise and instruct the Deputy Sheriff to "effect such

/attachment". .....

attachment." There is, therefore, no question that it is in this petition sought in clear language, to attach moneys in the Crown's hands for the purpose of execution. Indeed, prayer two(2) of the said petition is for no other purpose than execution for execution is a "process by which the Sheriff or the Messenger of the Magistrate's Court procures for a judgment creditor the fruits of his judgment." per Caney, J, in Maharaj Bros. (supra) at page 238. The prayer clearly requests the Court to restrain the Crown from making payment of the money due to First Respondent to any person

> "other than the Deputy Sheriff on behalf of your Petitioner".

In this matter the application is not merely to maintain the status quo and nothing more, until an instituted action shall have been determined. This was the position in the case of Maharaj Bros. (supra) which is clearly distinquishable from the present application before me. Here the interdict is to operate until the attachment is approved or granted by this Court. The moneys sought to be attached is a debt due by the Crown and such moneys cannot, therefore, be subject to a garnishee order by this Court, because such garnishee proceedings necessarily entail attachment and in some cases, execution and as we have seen earlier section 5 of Act 4 of 1965 prohibits any execution or attachment or process in the nature thereof against the Crown (Ex parte Venter, 1940 T.P.D. 382 at 386, Whitecross v. Margolius, 1952(4) S.A. 183 at 181). I have not concerned myself in this judgment with other various meanings the word "attachment" might have. (See Maharaj Bros (supra) p. 238). I found it not necessary to do so for the purposes of this judgment. Finally, I may just add that no reported case emanating from our Court was referred to me by both counsel nor could I find any. I arrived at the decision in this matter through the help of the arguments advanced by both counsel to whom I am greatly indebted.

/For the .....

For the above reasons I came to the conclusion that the application should be dismissed and the rule nisi be discharged with costs and it was so ordered.

JUDGE.
10th day of April, 1980.

For the Applicant : Mr Samuels
For 1st Respondent : Mr Kolisang
For 2nd Respondent : No appearance.