

IN THE HIGH COURT OF LESOTHO

In the Application of :

SURTIES BARGAIN BAZAAR Applicant

v

LESOTHO LOUNGE SUITE
MANUFACTURERS (PTY) LTD. Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 21st day of April
1980

This is the extended return day of a provisional order for winding up of the respondent company granted by Isaacs AJ on the 10th December 1979.

The respondent company has only two shareholders, Mr. Khan and Mr. Ishmail. Both are also the only directors.

The Petitioner is Surties Bargain Bazaar, whose address is Pitso Ground, Maseru reserve, a firm owned by one Ahmed Surtie who avers that he made a loan to the company in the sum of M6200. No date is given of this loan. There are no documents of any nature to show that the loan was actually made to the company. On 30th October 1979 Mr. Ahmed Surtie allegedly "posted" a letter to the company demanding repayment. The registered address of the Company was in fact his own premises. The demand was answered by Mr. Ishmail on 16th November 1979 also writing from the same premises but not on a printed letter head of the company. He acknowledged the debt and wrote that the company will not be able to meet the demand. He signed the letter as a director of the company. A petition for winding up on the grounds that the company was unable to pay its debts ensued in terms of s.173(f) of the Companies Act 1967.

Mr. Franken conceded from the bar that Mr. Ishmail, the

/directors

director who wrote the letter is a brother of Mr. Ahmed Surtie even though their surnames differ.

Mr. Khan, the second director, opposes the petition. He avers that the company has never been advanced a loan either by way of cash or cheque or other form of credit facilities. Such a loan does not appear in the company's books. The letter of demand was never received by him and was never discussed at a company meeting. Mr. Khan avers further that his co-director Mr. Ishmail never brought to his attention the letter of demand nor did he know of the letter admitting the company's inability to pay. It was averred that the loan was non-existent. Mr. Ishmail submitted no affidavit supporting his brother Mr. Surtie.

On balance of the papers before me there appears to be not only a genuine dispute about the existence of the debt but also what looks like collusion between two brothers to bring to an end the operations of the company by dubious means. The legal position is summarised as follows in Buckley on the Companies Acts 11th Ed. pp 356, 357:

"A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the Court. Some years ago petitions founded on disputed debts were directed to stand over till the debt was established by action. The modern practice has been to dismiss such petition".

(See Henochsberg, Companies Act 2nd Ed. p.334, Charlesworth and Cain Company Law 11th Ed. p.543 and Badenhorst vs Northern Construction Enterprises Ltd. 1956(2) S.A. p. 346).

The case here seems to be that the two sole shareholders and directors are at loggerheads with each other with the result that operating the business has become impossible. If such be the case it may be this company should be wound up but not the grounds advanced in the petition.

Provisional order of winding up is therefore discharged and the petition dismissed with costs to respondent. It goes without saying that all the goods of the company attached by the Sheriff should be now released.

For Appellant: Mr. Franken
For Respondent: Mr. Kolisang

CHIEF JUSTICE
21st April, 1980