

IN THE HIGH COURT OF LESOTHO.

In the Application of :

R.T. MORRISON (PTY) LTD. Applicant

v

WALTER M. BELLE Respondent

REASONS FOR JUDGMENT.

Filed by the Hon. Mr. Justice M.P. Mofokeng
on the 28th day of August, 1981.

Subsequent to my judgment delivered on the 3rd June, 1980, Mr. Newdigate made an application to bring a fresh application on the same papers. The application was not opposed and a proper resolution as required by the Court was to be filed into Court within 14 days. The respondent were permitted to file whatever affidavits they thought necessary. The matter was subsequently postponed, to enable the respondents to file any papers, if any. But when the matter finally came before me on the 10th August 1981 there was still no response from the respondents. I must mention that the applicant had satisfied the conditions laid down that the applicant had satisfied the conditions laid down by the Court.

The facts of the application are clearly set out in the petition of one Nico Errol Smith as follows:-

- "3, The respondent is WALTER M. BELLE, who formerly carried business at Maseru in the Kingdom of Lesotho under the style or title of MAPELENG BUILDING MERCHANTS, with postal address

P.O. Box 435, Maseru. As will appear from the averments later contained in this Petition, the respondent has left Lesotho, and his present whereabouts are to your Petitioner unknown, save that it is understood that he may be at Herschel in Transkei.

4. The respondent is indebted to your Petitioner in the sum of R11,699.95 (ELEVEN THOUSAND SIX HUNDRED AND NINETY NINE RAND AND NINETY FIVE CENTS) on open account and a further sum of R1,807.92 (ONE THOUSAND EIGHT HUNDRED AND SEVEN RAND AND NINETY TWO CENTS), on so-called "cement account", making total indebtedness of R13,507.87 (THIRTEEN THOUSAND FIVE HUNDRED AND SEVEN RAND AND EIGHTY SEVEN CENTS), for goods sold and delivered by your Petitioner to the Respondent in Maseru over a period of time up to and including November 1979. Your Petitioner holds no security for payment of the said amount, all of which is due and payable by the Respondent to your Petitioner.

5. To the best of your Petitioner's knowledge and belief, the respondent is, in addition to his abovementioned indebtedness to your Petitioner, indebted to other creditors in at least an amount of R11,400.00 (ELEVEN THOUSAND FOUR HUNDRED RAND), being creditors represented by Attorneys, Du Preez Liebetrau and Co. of Maseru, a sum of approximately R33,000.00 (THIRTY THREE THOUSAND RAND) to Barclays Bank International Limited in Maseru, which debt is secured by a First Mortgage Bond, and to other creditors represented by your Petitioner's Attorneys, Webber Newdigate & Co. of Maseru, whose claims total an amount of approximately R11,000.00 (ELEVEN THOUSAND RAND). The respondent's debts therefore total at least an amount in the vicinity of R69,000.00 (SIXTY NINE THOUSAND RAND). Your Petitioner is aware of the fact that in pursuance of Writs of Attachment the Deputy

Sherrif of the above Honourable Court attached the respondent's movable property valued by him at approximately R15,000.00 (FIFTEEN THOUSAND RAND), and that the respondent is entitled to the right of occupation of certain immovable property situated in Maseru, the value of which is to your Petitioner unknown.

6. Your Petitioner respectfully refers to the Affidavit of its Attorney, Henry James Newdigate of the firm Webber Newdigate & Co. of Maseru, which is annexed hereto, and with reference to which your Petitioner respectfully makes the following submissions:

(a) That the respondent has committed an act of insolvency, as contemplated by Section 8(a) of the Insolvency Act, 1957, in that he has left Lesotho or being out of Lesotho remains absent therefrom, or has departed from his dwelling or has otherwise absented himself, with intent by so doing to evade or delay the payment of his debts; in this regard, your Petitioner respectfully makes the following submissions:

(i) That is clear that the respondent had from time to time sought extension for payment of his creditors Baldwins Limited and H. Incedon & Co. (S.A.) Limited, and that it appears that, apart from raising a loan on Mortgage Bond, to which annexure "C" to the said Affidavit refers in its statement that the respondent had "become slightly liquid recently", payments were being made from the proceeds of the respondent's business;

(ii) That the respondent well knew that he was indebted to the creditor H Incedon & Co. (S.A.) Limited together with a number of other creditors;

(iii) That the circumstances of his departure

from Lesotho, without even informing his wife or his Attorney, the said Mr. Harley, is inconsistent with an intention to pay his debts in Lesotho;

- (iv) That the respondent's letter dated the 27th February 1980, annexure "1" to the Affidavit of the said Mr. Newdigate, confirms this intention, in that he states quite definitely that he has no intention of returning to Lesotho and that he has abandoned his business in Lesotho;
- (v) That while the respondent attempted, by granting the Powers of Attorney to the said Mr. Newdigate to effect a distribution of the proceeds of his assets amongst his creditors, he could have no assurance that the proceeds would indeed be sufficient to meet the claims of all creditors; that his departure from Lesotho and his remaining absent from Lesotho was and is clearly with the intention of evading personal liability for his debts, with an intention that his creditors would be obliged to recover what they could from the proceeds of his assets in Lesotho; it is in your Petitioner's respectful submission significant that the exercise of the powers which he sought to grant is specifically limited to Lesotho and that no attempt is made by the respondent to provide for payment of any short-fall which there may be between the proceeds of his assets and the total of his debts, and significant that he has furnished no address outside Lesotho at which contact may be made with him; that it is further significant that in annexure "J" to the said Affidavit the respondent directs that payment is to be made to his wife of "any surplus thereafter that there may be"; the respondent was therefore unable to contemplate with any confidence that there would not be a

short-fall;

- (vi) That the respondent made no attempt to give details of his creditors and the amounts owing to them; although it appears that the respondent gave instructions to his Attorney, the said Mr. Harley, to negotiate for time with certain creditors, there can be no assurance that any person acting by virtue of the Powers of Attorney contemplated by the respondent would be in a position to establish the identity of all the respondent's creditors;
 - (vii) That, by reason of the foregoing, it appears that the respondent's actions were aimed simply at divesting himself of any further responsibility for payment of his debts;
 - (viii) That, in any event, the inevitable consequence of the respondent's actions is delay in the payment of his debts, and this was therefore the intention of the respondent.
- (b) That alternatively the following letters each constitutes an act of insolvency by or on behalf of the respondent as contemplated by Section 8(g) as being a notice in writing to any one of his creditors that he is unable to pay any of his debts, namely:
- (i) His letter to Mr. H.J. Newdigate dated the 27th February 1980, being annexure "1" to the Affidavit of the said Mr. Newdigate,
 - (ii) The letter from the respondent's said Attorney, Mr. Harley, being annexure "C" to the said Affidavit, in its reference to the Respondent's having "become slightly liquid recently" taken inconjunction with the terms of the extension set out in annexure "B" to the said Affidavit, and
 - (iii) The letter from the respondent's Attorney the said Mr. Harley, dated 7th August 1979,

being annexure "E" to the said Affidavit, taken together with the requirements set out in annexure "D" to the said Affidavit that payment be made by the end of July 1979,

all the said communications having been directed to the said Mr. Newdigate acting on behalf of the respondent's creditor, H Incledon & Co.)*. (S.A.) Limited.

7. Your Petitioner respectfully submits that it will be to the advantage of creditors of the respondent if his estate is sequestrated. Your Petitioner respectfully refers to the fact that certain creditors have taken judgment against the respondent and have caused Writs of Execution to be executed against his movable property; the sale in execution pursuant to such Writs is likely to take place in the near future, and the proceeds of such sale will then be distributed only amongst creditors whose Writs share in such proceeds, to the exclusion of other creditors. Your Petitioner states further that, by reason of the absence of the respondent from Lesotho, and the abandonment of his business, there is no person who has locus standi to effect an equitable distribution of the proceeds of the respondent's assets amongst all his creditors, and that it is only by requiring creditors to prove claims against the insolvent estate of the respondent that his creditors and their claims can be finally determined and an equitable distribution made amongst them. Your Petitioner states further that the said Mr. Harley, acting on behalf of the respondent, caused an attachment to be made of a certain tractor in execution of a judgment in favour of the respondent against a firm known as Tsenoli Construction, that an offer was made to the Deputy Sheriff of the above Honourable Court for purchase of the said tractor, that interdict proceedings have been instituted by a third party in the above Honourable Court,

to restrain the sale thereof, the return date of which proceedings is Tuesday the 15th April 1980, and that it would be just and equitable, in the interest of the body of the respondent's creditors that a Trustee in Insolvency be appointed to safe-guard the interests of creditors in relation to such proceedings (the respondent presently being absent from Lesotho) and in particular to ensure that the proceeds of any sale in execution which may result should be equitably distributed amongst the body of creditors of the respondent."

The gist of Mrs. Belle's opposition to this application was neatly put by her counsel, Mr. Kolisang in his written supplementary heads of argument, when he said: "The crucial question to be answered is whether at the time of the alleged act of insolvency W.M. Belle, the respondent, was trading in his personal capacity or whether he was trading in a corporate character, that is to say whether he was in fact a director of a Company MAPELENG BUILDING MERCHANTS (PTY) LTD."

For the applicant to succeed in an application of this nature he must show:

- (a) that the respondent has committed an act of insolvency;
- (b) that the respondent is indebted to it in an amount of not less than R100.00, and
- (c) that it is in the interests of creditors for the respondent to be sequestered.

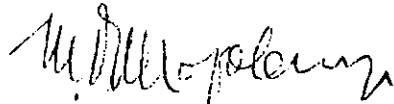
I have perused the voluminous papers before me and I am satisfied that the applicant has adequately discharged the onus upon it. Moreover, there have been no opposing papers filed by the respondent W.M. Belle. He was willing, all along that his estate be sequestered. If he had changed his mind and had other ways of paying his creditors other

than by sequestration he would surely have filed opposing papers. The respondent owed a large number of creditors a fact which Mrs. Belle is unable to dispute. These debts remained unpaid for a long time. The respondent sought extensions of time within which to pay but he did not adhere to those same arrangements. I am satisfied, and respondent said so, that he left this Kingdom with no intention of coming back to face his creditors. Instead he made unbusiness like arrangements of signing a power of attorney without having made prior arrangements nor was he subsequently available to give instructions. Some of his assets had already been attached in the execution of the judgment of Incledon. At the time, therefore, the respondent abruptly left the country without informing his wife and attorney, his affairs were in a terrible state of affairs.

It is true that a company had been formed but in certain cases the respondent continued to do business in his own name. In other cases, he paid the so-called business accounts with his own personal cheques. The business and personal cheques were separate and distinct and came from two entirely different banks. In any event, the respondent did not obtain the consent of the creditor that that a third party had now taken over the liability and absolved the debtor. Until, therefore, the creditor consented to such a delegation the debtor remains indebted to the creditor. Mrs. Belle does not anywhere in her papers allege that any such consent was given by the applicant. The ingenious contention on behalf of Mrs. Belle would be a welcome relieve to debtors in evading their creditors. All they have to do is to incur huge debts in their personal capacities, and, without paying a cent, then

have companies formed and fold their hands and smile and when creditors demand payment, they are simply told with a broad smile that they should direct their business to the companies which have now taken over the liabilities of the debtors. Unfortunately things don't work out that way in the business world. As I have said earlier, if a third party has to come into the picture to disturb the relationship between the creditor and debtor both parties must consent to such an arrangement. That was not done in this present matter before me.

For the above-mentioned reasons the Order was confirmed with costs (Excluding the costs occasioned on the 21st November 1980 per Court's Order)


J U D G E.

28th day of August, 1981.

For the Applicant : Mr. Samuel

For the Respondent (Intervener, Mrs. Belle): Mr. Kolisang.