

CCA/64/2013
CCA/66/2013
CCA/67/2013

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

STANDARD LESOTHO BANK

APPLICANT

AND

MABOTSANG MATSOSO

1st RESPONDENT

PALO THONKHA

2nd RESPONDENT

**KARABO MOOHLO t/a SHAKHANE COMPUTERS
SUPPLIERS (KB GENERAL DEALERS)**

3RD RESPONDENT

JUDGMENT

Coram : L. Chaka-Makhooane J

Date of Hearing : 28th September, 2015

Date of Judgment: 25th August, 2016

SUMMARY

Insolvency – Petition for sequestration – Section 9 (1) of Insolvency Proclamation 1957 – Bank as petitioner seeking to recover monies allegedly syphoned from several Lesotho government accounts held with petitioner – 1st and 2nd respondents responsible for all transactions involving Lesotho government accounts – Petitioner having received instruction to close certain government accounts – Monies transferred

from those accounts without authority from petitioner and credited to accounts related to respondents – Respondents arguing that the money being claimed belongs to the Lesotho government and not the petitioner – Petitioner having satisfied on a balance of probabilities the elements of sequestration – Petition for sequestration granted.

ANNOTATIONS

CITED CASES

1. Alley Cat Clothing (Pty) Ltd v De lisle Weare Racing [2002] 1 ALL SA 123.
2. Bumford and Athol Frank v Long 1953 (1) SA 486.
3. Concrete Roots (Pty) Ltd v Tigeli C of A (CIV) No. 10/2010 [2010] LSCA 25.
4. De Waard v Andrew and Thienhauns Ltd 1907 TS 727.
5. Harding and Others v Standard Bank of South Africa Ltd 2004 (6) 464.
6. Irvin & Johnson Ltd v Basson 1977 (3) SA 1067.
7. LTR Beleggings (Edms) BPK v Hechter (Mynhardt Toetredend) 1977 (1) SA 22 (NC).
8. Meskin & Co v Friedman 1948 (2) SA 555 W.
9. Mpaka v Lesotho Bank LAC (2000 – 2004) 328.

BOOKS

1. Hoffman & D Zeffert, The South African Law of Evidence, 4th Edition.
2. Mars, The Law of Insolvency in South Africa, 7th Edition.

STATUTES

Insolvency Proclamation No.51 of 1957.

- [1] This is a petition for the sequestration of the respondents' estates in terms of **Section 9** of the **Insolvency Proclamation** ("Proclamation").¹ **Section 9** of the Proclamation reads as follows:

"A creditor (or his agent) who has a liquidated claim for not less than one hundred maloti, ... against a debtor who has committed an act of insolvency or is insolvent, may petition the Court for the sequestration of the estate of the debtor."

- [2] The petitions involving the present respondents were filed separately and since they involved the same factual issues, by consent of the parties, they were later consolidated.² In addition, it was agreed by all parties that for purposes of convenience in the present petitions, judgment on one of the respondents shall be judgment for the rest of the petitions. Nonetheless, I find it more appropriate to consider each case against the respective respondents.

- [3] The petitions are vigorously opposed by all the respondents.

¹ No. 51 of 1957.

² The cases have been filed under case numbers **CCA/64/13**, **CCA/66/13** and **CCA/67/13** in respect of 1st, 2nd and 3rd respondents respectively.

- [4] Before the merits were argued, the respondents raised various points *in limine* and on the 28th March, 2014 the points were dismissed as a whole, with costs.

The Petitioner's case

- [5] During the period between October and December, 2011 the 1st and 2nd respondents, whilst under the employ of the Petitioner, together with the 3rd respondent, are alleged to have acted in concert to steal Eleven Million, Five Hundred and Fifty-Four Thousand, Eight Hundred and Fifty-Three and Seventy-Eight Lisente (M11, 554, 853.78). The money was allegedly siphoned from eight (8) Lesotho Government accounts to various unauthorized accounts belonging to and/or having relations with the respondents.
- [6] It is common cause that the 1st respondent was employed by the petitioner as a Relationship Manager, Corporate and Investment Banking, while the 2nd respondent was employed as an Assistant in the Corporate Division. It is further not denied that they were both responsible for all transactions involving Lesotho Government accounts. The petitioner claims that this petition is intended to recover the money due to it from the respondents. The bank seeks to secure the respondents' assets and dispose them off to recover the debt.
- [7] During or about the 28th November, 2011 the petitioner received a letter from the government instructing the petitioner to close down its eight (8) accounts

held with the petitioner.³ Without the account holder's valid instruction, various transfers were made from these accounts to other several accounts thereafter. The 1st and 2nd respondents were, as alleged, particularly and personally responsible for carrying out and completing the instruction.

[8] It is further alleged that the respondents used the same *modus operandi* to commit theft and fraud to steal a total amount of Eleven Million, Five Hundred and Fifty-Four Thousand, Eight Hundred and Fifty-Three and Seventy-Eight Lisente (M11, 554, 853.78) through different transactions. In all the these transactions, a fraudulent instruction from a particular government ministry would purport to transfer money to a particular private company's account, using fraudulent signatures of the following civil servants; **MM Rasekoai** and **MT Moletsane**.

[9] The illegal transfers would first be consolidated into one government account, which is the Rural Finance and Enterprise account, before being transferred into accounts of private companies having relations with the respondents.⁴ It is claimed that the companies which received the said amounts from that specific government account, belong to the 3rd respondent.

[10] In particular, it is the petitioner's case that an amount of Three Million Two Hundred Thousand Six Hundred and Forty and Sixty Lisente (M3, 200, 640.60) was stolen by the 3rd respondent and her sister, who is the 1st

³ See annexure "A".

⁴ See annexures "F2", "F3" and "F4".

respondent. Initially, on or about the 22nd December, 2011 an amount of One Million Seven Hundred and Seventeen Thousand Eight Hundred and Twenty and Thirty Lisente (M1, 717, 820.30) was stolen from the Rural Finance and Enterprise account and was transferred into the 3rd respondent's account held with the First National Bank (FNB).⁵

[11] Thereafter, on the 30th December, 2011, One Million Four Hundred and Eighty-Two Eight Hundred and Twenty and Thirty Lisente (M1, 482, 820.30) was supposedly siphoned from the Lesotho government account to the 3rd respondent's account at FNB.⁶ To be precise, the money was allegedly transferred from the Rural Finance and Enterprise account into the 3rd respondent's account held with FNB.

[12] It is further alleged that, an amount of Four Million Four Hundred and Thirty-Two Thousand One Hundred and Twenty-One and Thirty-Six Lisente (M4, 432, 121.36) was transferred from the Rural Finance and Enterprise account into the 3rd respondent's account at FNB.⁷ A similar transaction was fraudulently effected, and this time the amount was Three Million One Hundred and Eighty-Nine Nine Hundred and Twenty-Two and Twelve Lisente (M3, 189, 922.12).⁸ Yet another transaction that was seemingly concluded in exactly the same manner was in the amount of Two Hundred and Fifty Thousand Maloti (M250, 000.00).⁹

⁵ See annexures "C1" and "C2".

⁶ See annexure "B1" and "B2".

⁷ See annexures "D1" and "D2".

⁸ See annexures "E1" and "E2".

⁹ See annexures "F1" and "F2".

- [13] Lastly, an amount of Four Hundred and Eighty-Two Thousand One Hundred and Sixty-Nine and Seventy Lisente (M482, 169.70) was allegedly transferred from the Rural Finance and Enterprise account to the account of the 3rd respondent's company, Storm Enterprises, held with Nedbank.¹⁰
- [14] The petitioner avers that, acting in concert with the recipient companies of the stolen funds, the respondents received payments from the companies shown above, and they subsequently transferred the funds to their respective accounts held with Absa Bank Limited, at its Ladybrand branch.¹¹ The 1st respondent thereafter resigned from the petitioner's employment on 31st December, 2011, coincidentally immediately after the unlawful scheme was completed.
- [15] According to the petitioner, the 1st respondent has since acquired a vast estate of properties, both movable and immovable, which she could not have amassed through her normal salary and income. She presently owns two immovable properties in Lesotho and has luxury vehicles such as a Range Rover, a Toyota Quantum and various others. She also holds an account with Absa Bank in the amount of Six Million Maloti (M6, 000, 000.00).¹²
- [16] The petitioner has declared that the funds stolen belong to it and not the government. It is the petitioner's case that the 1st and 2nd respondents, as

¹⁰ See annexures "FA5", "G1" and "G2".

¹¹ See annexure "R1".

¹² See annexure "R1".

employees of the petitioner, should have closed the government accounts, but instead, they stole the money which belonged to the petitioner. The petitioner further asserts that the respondents knew about the valid instruction at the time, that notwithstanding, they committed the fraud.

[17] The petitioner continues to aver that as a result of the unlawful transfers, the respondents have become indebted to the petitioner, and therefore, the petitioner is entitled to recover the full amount of Eleven Million, Five Hundred and Fifty-Four Thousand, Eight Hundred and Fifty-Three and Seventy-Eight Lisente (M11, 554, 853.78) from the same respondents. The petitioner further shows that the respondents will be unable to repay the money, even if their assets are taken into account.

[18] The petitioner further shows that the 1st and 2nd respondents had no valid authority to effect the above transfers. It is the applicant's case that any deposits of money made by the holder of an account become the property of the petitioner. It is further the plaintiff's case that it need not prove an act of insolvency, it is sufficient to show that the insolvent respondents are unable to pay their debts. It is for the respondents to show ability of payment of debts in the present petition.

[19] According to the petitioner, the respondents are unable to repay the money they stole from the petitioner unless their respective estates are sequestrated, and further that, it would be to the advantage of the respondents' creditors that their respective estates are sequestrated.

The respondents' case

- [20] In response to the above allegations, the respondents have pleaded that they did not steal any money from the petitioner. They state that the bank accounts from which the petitioner alleges that money was stolen from belong to the Lesotho government and not the petitioner. Furthermore, the respondents have alleged that a case of theft has been opened against them, and they have not yet been convicted for the crime. It is their case that the present petition is therefore premature.
- [21] The 1st respondent states that the estate that she has acquired is from the monies she received when she resigned from the petitioner's employment. She claims she has a thriving business in the construction industry. Furthermore, her house is bonded and her vehicles are on hire purchase. Therefore, it is her case that all these facts attest to the fact that she did not steal any monies to acquire her assets. She also denies holding an account with Absa Bank in the amount of Six Million Maloti (M6, 000, 000.00).
- [22] It is the 1st respondent's case that it could not be plausible for her to steal such huge amounts of money because the petitioner had authorized her to transfer a maximum limit of only Three Million Maloti (M3, 000, 000.00). She alleges that any transfer of an amount of money exceeding her limit would have been rejected by other departments within the petitioner. Nonetheless, it is to be noted that the 1st and 2nd respondents have both claimed that the transfers of money to the 3rd respondent are legitimate and lawful transfers,

notwithstanding the fact that some of these transfers exceeded their supposedly prescribed limits.

[23] The 1st respondent further shows that she and the 2nd respondent only authorized transfers whereas the processing of the transfers was done by other departments within the bank. She refutes the allegation that the transfers were illegal by showing that the Lesotho government was effecting lawful payments to their business partners. Furthermore, she denies having family relations whatsoever with the 3rd respondent. As a result, she argues that she cannot be declared as insolvent.

[24] The 2nd respondent on the other hand claims that all the transfers, which the petitioner alleges were fraudulent, were executed before the instruction to close the accounts was received by the petitioner. According to him, the petitioner has confused the dates of events, in that, the instruction to close the accounts was received on the 4th January, 2012 while the alleged fraudulent transfers were effected on the 28th November, 2011, 22nd December, 2011 and 30th December, 2011. As a result of this confusion, it is his case that the petitioner has no cause of action.

[25] He has brought a similar argument to that of the 1st respondent in that he could not steal such huge amounts of money from the petitioner since his transfer limit did not exceed Three Hundred Thousand Maloti (M300, 000.00) and any transfers beyond that amount could have been queried by the petitioner. Nevertheless, he has on the other hand alleged that the transfers which he

effected were lawful, despite the fact that they seemingly exceeded his prescribed limit.

[26] The 2nd respondent denies that he received payments in his account held with Absa Bank. He further claims that, since the petitioner has failed to attach some evidence to the effect that it has compensated the Lesotho government for the loss they incurred as a result of the alleged fraud, the petitioner is therefore, not entitled to recover any money from him and the other respondents.

[27] The 3rd respondent's version does not differ much from that of the 1st and 2nd respondents. She denies trading as **Shakhane Computers** and avers that the company belongs to one **Madaniel Shakhane**. She avers that investigations into her indebtedness with the petitioner have not been concluded, and as a result, this petition is premature. In addition, she refuses to admit that she received any illegal transfers from Lesotho government accounts held with the petitioner.

[28] The alleged theft, as claimed by the 3rd respondents, was against the Lesotho government and not the petitioner. She further shows that the correct specimen signatures of the Lesotho government officials should have been attached to these proceedings for the Court to compare them with the allegedly forged signatures.

[29] In a nutshell, all the present respondents deny that they stole money from the petitioner and they consequently deny that they are indebted to the petitioner. Furthermore, they argue that they are not insolvent in as much as they are not unable to pay their alleged debts.

Issues for determination

[30] For purposes of the present exercise, the issues to be determined by the Court are therefore whether: firstly, on a balance of probabilities, the respondents have stolen the money in question from the petitioner; secondly, as a result of the theft, the respondents have become indebted to the petitioner; thirdly, the respondents are in fact insolvent in that they are unable to pay the debt; and lastly, the petitioner has followed the correct procedure instead of suing for damages.

[31] I pause here to mention that it is quite unfortunate that the respondents' case seemed to be misguided since it focused on the fact that no act of insolvency has been proven,¹³ whereas the petition is based on insolvency as a fact.¹⁴

[32] I now turn to the issues for determination in more detail. The question whether the respondents have stolen money from the petitioner is in my view, the most vital part of these proceedings. The transfer of funds from the Lesotho government bank accounts into accounts held by **K. B. General Dealers** and

¹³ Section 8 of the Proclamation.

¹⁴ Section 9 (1) of the Proclamation.

Storm Enterprises has, on a balance of probabilities, been proven, and moreover, this fact stands unchallenged. In fact, according to the respondents those were lawful transfers.

[33] The reason advanced by the 1st and 2nd respondents as to why such transfers were effected is that the two companies were Lesotho government business partners.

[34] It is common cause that the 1st and 2nd respondents were responsible for handling Lesotho government accounts held with the petitioner, and the petitioner has shown that the two respondents effected the said transfers. Not only do the respondents not deny the allegations, the 1st respondent shows that she had been authorized by the petitioner to transfer money to the tune of up to Three Million Maluti (M3 000 000.00). The 1st and 2nd respondents also showed that theirs was only to authorize the transfers while the processing of the transfers was done elsewhere.

[35] Furthermore, the 2nd respondent has alleged that the transactions were not fraudulent because the instruction to close the government accounts was received after the transfers were effected. Notwithstanding that assertion, it is common cause that during the period between November, 2011 and January 2012, monies were transferred from the government accounts to **K. B. General Dealers** and **Storm Enterprises** and the instruction to close the government accounts was received within the same period. Subsequent to the transfers, the 1st and 2nd respondents resigned from the petitioner's

employment. Thereafter, they appeared to have accumulated massive estates within a period of two years.

[36] The 1st respondent in defending her assets showed in reply that, her estate was acquired as a result of monies she received when she resigned from the petitioner's employ. The 1st respondent also has a thriving business in the construction industry. Her house at Ha Thetsane was bonded with the petitioner while her vehicles were on Hire Purchase. The 2nd respondent did not even bother to respond to the allegation on the accumulation of his assets.

[37] In circumstances of this nature, guidance is to be found in **Concrete Roots (Pty) Ltd v Tigeli**¹⁵ where one of the three directors of a company had sued the other two directors for breaching their fiduciary duty to their company, after they had formed another competing company. When dealing with the circumstantial evidence before the Court, **Howie JA** had the following to say:

[11] The problem for the appellant is that once those are the facts the conclusion has to be that Lehobo and Pitso practised an intentional deception on Pile. The inevitable inference is that the appellant's competition with Pile was unfair and so constituted an actionable wrong. It is not without significance that in the short period of its existence the appellant had achieved a government contract which, but for the appellant, would no doubt have been granted to Pile.

¹⁵ C of A (CIV) 10/2010.

[12] These circumstances justified interdictory relief pending the action, as well as the orders for disclosure, even without regard to the question whether money was being siphoned off from Pile to the appellant. However, such bank statements as there are on record, although they do not paint the full picture (for instance Pile's current account and call account details, as presented, do not relate to the same dates) nevertheless justify the conclusion that Pile's funds were modest and dwindled even further whereas substantial sums passed in and out of the appellant's accounts. It is not disputed on the papers that by the time of the interim order on 20 March 2009 there was a total in Pile's accounts, taken together, of not much more than M6000. The combined total in the appellant's accounts was in excess of M120 000.

[13] Tigeli's allegations were also not disputed that when he met with Lehobo and Pitso early in March 2009 it was evident to him, judging by the outward manifestations of their respective lifestyles and the vehicles they were driving, that their fortunes had enjoyed an infusion of prosperity.

[14] Counsel for the appellant contended that it was not the most probable inference from all the facts presently proved that Pile's money was dishonestly being transferred to the appellant. I think it is. This necessitates a restraint not only upon Lehobo and Pitso who are the people responsible for Pile's current misfortunes but also upon the appellant, to which their knowledge and actions are in law attributable.

[38] It is my view that it cannot be sheer coincidence that during the period when the instruction to close the Lesotho government accounts was received, huge amounts of money were transferred from these accounts to **K.B General**

Dealers and Storm Enterprises. It is therefore, highly probable, as depicted by the authority quoted above, that the two companies in the present case had fraudulent relations with the respondents, in that, the stolen monies were transferred from the government accounts to those companies' accounts, then from the companies' accounts to the respondents' personal accounts at ABSA Bank.

[39] The cogency of circumstantial evidence usually arises from the number of independent circumstances which all point to the same conclusion.¹⁶ In my view, the respondents have *prima facie* stolen the money in question.

[40] The second issue to be determined is whether the respondents' theft amounts to indebtedness. It is important to note from the outset that the relationship between the bank and its customer will in general exhibit features of debtor and creditor, of agency and of mandate.¹⁷ In other words, when funds were illegally expropriated from the government accounts by the petitioner's agents to the 3rd respondent's accounts, the petitioner became indebted to the Lesotho government.

[41] Similarly, when the respondents stole money from the petitioner, they became indebted to the bank, hence the present proceedings.

¹⁶ Ibid. see also Hoffman & D. Zeffert, *The South African Law of Evidence*, 4th Edition Butterworth's 1988

¹⁷ See *Harding and Others v Standard Bank of South Africa Ltd* 2004 (6) 464 at 467 I – 468 A.

[42] In **Alley Cat Clothing (Pty) Ltd v De Lisle Weare Racing**¹⁸ an employee of Alley Cat, Reddy, used money that he stole from the company to settle his gambling debts with De Lisle. He had first deposited the money into his account before making the payments to De Lisle and **Hugo J** had this to say on ownership and rights to the money:

*“It will be of some comfort to those who keep their money under their mattresses to know that they maintain ownership of their coins and notes while those who deposit their money in banks lose their ownership and retain only personal right against the bank. See **Dantex Investment Holdings v National Explosives (Pty) Ltd (in liq)** 1990 (1) SA 736 (A) at 748 F”*¹⁹

[43] The Learned Judge continues to indicate that:

*“The crime of theft was complete when the money was credited to Reddy’s account.”*²⁰... *By the time he made payment to defendant the damage had already been done to the plaintiff; it had already permanently lost ownership of the money represented by the cheques and it was left with a personal right to claim such monies from Reddy’s bank or its own bank.”*²¹

¹⁸ [2002] 1 ALL SA 123 (D)

¹⁹ Ibid at 131 C-D.

²⁰ Ibid at 131 C.

²¹ Ibid at 131 G-H.

I therefore, find that as a result of the theft committed by the respondents, they became indebted to the petitioner, since it had retained ownership of the money from the Lesotho government. The petitioner is thus entitled to claim the money stolen from it, from the respondents.

[44] Another question to be addressed is whether the respondents are in fact insolvent; that they are unable to pay the debt. The petitioner has presented the respondents' assets known to it, and the respondents have not denied having such assets. Instead, they have confirmed that they indeed have the assets. However, they have not shown that, in the event that this Court finds that they are indeed indebted to the petitioner, they could be able to pay the money in question to the petitioner, since the burden of proof shifts to them at this stage.²²

[45] **Innes, CJ in De Waard v Andrew and Thienhauns Ltd²³**, remains firmly apposite:

“... the Court has a large discretion in regard to making the rule absolute: and in exercising that discretion the condition of a man's assets and his general financial position of a debtor who says, ‘I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities’. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.”

²² See Bumford and Anthol Frank v Long 1953 (1) SA 486;

²³ 1907 TS 727 at 733. See also Mpaka v Lesotho Bank LAC (2000-2004) 328.

I respectfully agree. Therefore, since the respondents have not paid their debt to the petitioner, they remain insolvent.

[46] In the premises, I find that the respondents are unable to pay the amount of money they owe the petitioner and have as a result, subjected themselves to the present sequestration proceedings.

[47] The last issue to be determined is whether the petitioner has followed the correct procedure by instituting these proceedings, instead of suing for damages. It is trite that where a debtor is insolvent, it is to the advantage of all creditors to sequester the debtor than for one creditor to institute action proceedings against the debtor.²⁴ The rationale is not only that all creditors will benefit, but also that the remaining assets of the debtor will be secured. In light of these facts, it is my view that it was logically correct for the petitioner, as a creditor, to opt for sequestration proceedings in these circumstances.

[48] It is to be noted that the total amount claimed (M11, 554, 853.78) has been precisely established and supported by documentary evidence. Moreover, the respondents have not disputed or even challenged the accuracy of the amounts claimed against them.

²⁴ Meskin & Co v Friedman 1948 (2) SA 555 W at 559; and LTR Beleggings (Edms) BPK v Hechter (Mynhardt Toetredend) 1977 (1) SA 22 (NC) at 24.

Conclusion

[49] In my view, the petitioner has satisfied, on a balance of probabilities, all the requirements for sequestration. It is in light of the aforementioned reasons that the final order for the sequestration of the respective respondents' estates is granted.

[50] The following order is therefore, made;

- (a) The petition for the sequestration of the estates of the respondents, is granted as prayed for in the petition for sequestration.
- (b) The *rule nisi* issued in June, 2013 is hereby confirmed.

L. CHAKA-MAKHOOANE
JUDGE

For Petitioner : **Mr Mpaka**
For Respondents : **Mr Molapo**