IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIV. CASE NO. 1544/92

In the matter between:

SWAZILAND DEVELOPMENT AND SAVINGS BANK	Judgment Creditor
and	
ODI (PTY) LIMITED	Judgment Debtor
GOVERNMENT OF SWAZILAND	Garnishee

CORAM : SAPIRE A.J.

FOR THE APPLICANT : MR. MLANGENI

FOR THE RESPONDENT : MR. WIMALARATNE

JUDGMENT
23/07/93

Sapire A.J.,

The applicant is the judgment creditor in proceedings instituted against ODI (Pty) Ltd to which I will refer to as the judgment debtor.

The proceedings are registered in this court under case no. 1544/92. The judgment in the applicant's favour is an amount of E286,278.75 plus interest. In execution of this judgment, the applicant caused process of this court in the form of a Garnishee Notice as provided for in rule 45 (13) (a) and (b) to be served on the Attorney-General representing the Government. The effect of this Notice would be to attach a debt alleged to be owing by the Government to the judgment debtor and requiring the Government to pay the same to the judgment creditor through the Attorney-General and the Sheriff.

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The Attorney-General on whom the Notice was served wrote to the judgment creditor's attorney disputing the Government's liability or any obligation to effect payment in terms of the Notice giving his reason that the debt sought to be attached represents money due from the Government to the judgment debtor.

The Attorney-General referred to the cases of Ex-parte Venter 1940 TPD 286 and Whitecross versus Margolius 1952 (4) S.A. page 183 in support of the attitude adopted by him.

In answer to this, the judgment creditor through its Attorney, issued a further notice which is the foundation of this present application. I was told that this is a case to test whether garnishee proceedings in respect of debts owing by the Government, to a judgment debtor may competently be taken by the judgment creditor.

The rule providing for garnishee proceedings is, sub-rule 13 of rule 45. Nothing in the rule itself would exclude the Government as a garnishee being required to pay its debt, to the judgment debtor through the Sheriff to the judgment creditor .

In the course of argument for respondent, I was again referred to the two South African cases which I have mentioned earlier, as authority for the proposition, that the Government can not figure as a garnishee. Indeed if these cases are correct, the application must be dismissed.

In the first of these cases, His Lordship Mr. Justice Murray held that the debts owing by the Government could not be garnisheed. He based his reasons on the wording of section 4 of the Crown Liabilities Act of 1910 which then governed the position in what was then the Union of South Africa. That Act has of course been replaced by later legislation. But in Swaziland, there is corresponding legislation in much the same terms as the Crown Liabilities Act of 1910. This Legislation is the Government Liabilities Act No. 2/69 section 4 of which corresponds mutatis mutandis with the corresponding section in the previous Legislation in the Union of South Africa.

It would therefore be proper for me to have regard to the South African decisions and to examine the reasons for those judgments, and if pursuaded thereby to rule in accordance therewith, in this case.

On closer examination of the wording of rule 45 (13) and section 4 of the Government Liabilities Act required, I have come to a different conclusion from that reached in Venter's case and which was followed in Whitecross's case.

Section 4 of the Government Liabilities Act to which I will for convenience refer to as the Act, firstly prohibits the issue against the defendant or respondent,(i.e. the Government) in any such action or proceedings referred to in section 2, of any execution or attachment in process relevant thereto.

In the present case the Government is not a defendant or respondent in proceedings to which section 2 refers. The applicant is not seeking to enforce a contractual claim it has against the Government, nor does the applicant's case arise from any wrong committed by a servant of the Government. These are the types of action which are referred to in section 2 of the Act.

The Section also prohibits any execution or attachment or process in the nature thereof against the property of the government. A debt owing by the government to the judgment debtor is however, not property of the government. The debt is an asset of the judgment debtor which in my view is liable to execution in the same way as any other debt, owing by a party other than the government.

I am therefore constrained to differ from the pronouncement of Murray J. that garnishee proceedings are process in the nature of execution or attachment which in terms of section 4 Act 1/1910 of the Union of South Africa could not have issued against the defendant in that case namely " His Majesty or his government in the Union or against any property of His Majesty". The basic misconception is to regard the debt which is the subject matter of the garnishee order, as government property, which I have observed it is not.
not.

It was argued that the money which is to be paid in satisfaction of the debt, before it is paid, is government property. But the money is not what is being attached. On reading the garnishee notice, it is clear that what is attached is the debt, and the garnishee is instructed to pay this debt not to the judgment debtor but to the judgment creditor.

Execution of a judgment implies of necessity that a seizure of assets of the judgment debtor takes place, a forced sale thereof, and the application of the proceeds of such sale to the satisfaction of the judgment creditor's claim.

The wording of sub-rule 13(a) and a notice issued terms of its provisions bear out the interpretation which I have indicated I intend to follow. The notice does not purport to attach any property of the government. It attaches the debt, which is the property of the judgment debtor and merely instructs the debtor of the judgment debtor (i.e.the Government) to discharge its obligation, not by payment to the judgment debtor, but by payment to the judgment creditor.

Rule 45 deals with the attachment in execution of property of the judgment debtor in general. Sub-rule 13 of that rule deals specifically with such property which is an incorporeal, comprising a debt owing to the judgment debtor and permits the attachment thereof. The rule goes on to describe how the attachment for the judgment debtor's property is effected, namely by notice to the garnishee, requiring the garnishee to discharge the obligation by payment to the Sheriff for the account of the judgment creditor.

The issue of such notice does not constitute execution on, or attachment of, government property or process of a like nature. It does not involve the seizure of government property to be realized to satisfy a debt owned by the government to the judgment creditor.

In White Cross and Margolius 1952 (4) S.A. the correctness of the decision in Venter's case was assumed without any apparent critical examination of the reasons upon which the decision in the earlier case was arrived at. I do not regard Whitecross's case as added weight to the precedent of Venter's case.

In the result, the contentions advanced by the judgment creditor are upheld, and the garnishee is directed to discharge its debt to the judgment debtor by payment of so much thereof as is required to satisfy the judgment creditor's judgment. Such payment is to be made to the Sheriff or his deputy or to be applied in payment of the judgment in favour of the judgment creditor.

The parties have agreed that there should be no order as to costs.

A.J. SAPIRE