IN THE HIGH COURT OF SWAZILAND

Various Creditors

v

Divers Debtors

(14/08/98)

As in previous weeks there are a number of matters on the motion roll, which have been brought in terms of Rule 45(13)(h) of the Rules of this High Court of Swaziland.

The Rule provides that a debtor, against whom a judgment sounding in money has been given, and who has not paid the judgment debt, can be given notice to attend Court for an enquiry to be held into his financial position. The object of such enquiry is to determine whether the judgment debt can and should be paid by way of installments.

This rule was imported from a similar rule, (Rule 45 (12) (i)) which operated in the Supreme Court of South Africa (now known as the High court). The South African counterpart has been abrogated and removed from the Rules, so those Enquiries of this nature are no longer heard in the High Court of South Africa.

The validity of Rule 45(12)(i) was considered but not decided in Metropolitan Industrial Corporation v Hughes 1961 (1) SA 224 . The reasoning in the judgment was that as the effect of an order for periodical payment made consequent on an enquiry was not to convert a judgment ad pecuniam solvendam into one ad factum praestandum, the rule did not impinge on the substantive common law. The judge expressed the view, obiter, that had the effect of the rule been otherwise he may have held the rule to be ultra vires and invalid.

In many, if not most, cases in this court the rule has proved an ineffective waste of time and costs. Its only virtue, if such be a virtue, is to provide some sort of coercion on recalcitrant debtors. The coercion lies in permitting the creditor to summon the debtor to court and compel the production of documentary evidence of his financial position under pain of imprisonment for contempt for failing to answer or comply with the notice issued by the creditor. Indeed warrants of arrest have regularly been issued where the debtor fails to appear in response to a notice served upon him. There are relatively few cases where full Enquiries have been held and fewer still where orders have been made consequent thereon. The virtue of the rule lies that in many cases the debtor negotiates terms with the creditor extracurially albeit under threat of the proceedings. Failure to comply with the terms of the court order cannot be visited with contempt proceedings. The creditor may however once an order has been made proceed to attach a portion of the debtor's income by garnishee.

I have been concerned that this rule is an unwarranted and an unjustifiable intrusion upon the rights of the debtor. The effect of the rule is to create a new offence for which no sanction is to be found in the common law, namely that of failure to answer the notice issued by the creditor's attorney.

The notice under the rule calling the debtor to attend the enquiry is not issued as process of the court signed by the Registrar. Such notice is not a document of the Court (as is a summons writ or subpoena.). Failure to respond to the notice, by not attending court is not an offence or contempt as the order to attend court is not that of the court.

The rules of Court are made and promulgated by the Chief Justice in terms of Section 10(1) of the High Court Act Number 20 of 1954. The section provides that the

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Chief Justice may make rules of Court for regulating the proceedings of the High court, and without derogating from the general powers which are conferred, in particular with regard to matters specified in subsections. Not included among such matters is the introduction of a procedure unknown to the common law, which constitutes an infringement on the rights of persons to liberty and privacy. I have had the validity of the Rule argued in preference to deleting it, which I am empowered to do

United Reflective Converters (Pty) Ltd v Levine 1988 (4) SA 460 (W) is instructive, illustrating how a rule of court may be declared invalid if its provisions go beyond the powers conferred on the rule making authority. The headnote reads

"The Rules of the Supreme Court made by virtue of the provisions of s 43(2)(a) of the Supreme Court Act 59 of 1959 can only relate to matters regulating procedure.

It is a substantive rule of law that the noting of an appeal automatically suspends the operation of the order in question. Rule 49(11)(a) of the Uniform Rules of Court, where it refers to the noting of an appeal suspending the operation or execution of the order appealed against, merely restates the substantive law and regulates the procedure with which to apply the law. It is accordingly not invalid in this respect.

Rule 49(1 l)(a), save where it deals with appeals, goes beyond laying down a rule for the conduct of proceedings and purports to create a substantive rule of law, since there is no substantive rule of law that an application to vary or rescind an order or judgment suspends its operation, and there is no power in any Judge or the Appellate Division to review the order of another Judge. Consequently, the words 'or to rescind, correct, review or vary' as they appear in Rule 49(11)(a) are of no force or effect."

In KARPAKIS v MUTUAL & FEDERAL INSURANCE CO LTD 1991 (3) SA 489 (O) the limitation to the authority of the rules board was recognized, but the decision turned on whether the provision there considered touched on substantive or adjectival law.

The High Court has the inherent right to regulate its own procedure and to make provisions for the enforcement of its judgments, see Herbstein & Van Winsen Civil Practice of the Supreme Court of South Africa 4th Ed at p 33.

That does not mean that the Chief Justice may by rule of court, alter the substantive law and in particular create an offence of not attending court in response to a notice issued by a creditor or his attorney. Nor may the Chief Justice provide a method of execution unrecognized by the common law, which infringes on the rights of liberty

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making he debtors willful failure to attend punishable. Excluding these statutory exceptions the law does not permit civil arrest for debt, which is the effect of the rule. Nor does the law compel attendance of any person at an enquiry into his affairs at which he is obliged to produce his private documents, and to submit to examination under oath in relation thereto under pain of imprisonment for default.

In my view, Rule 45(13) is ultra vires and those proceedings, which have been taken in terms of this rule, are invalid. It follows that all pending applications presently before the Court made in terms of the rule are

dismissed.

This judgment is to be referred to the Court of Appeal in terms of Section 17 of Act 74/1954, for consideration at its forthcoming session or so soon thereafter as the matter may conveniently be heard. The Registrar is directed to place this judgment before the Appeal Court at its next sitting in September and to advise both the creditors' attorneys and Mr. Dunseith (who at the request of the court presented helpful argument), of the date on which the matter will be before the Court of Appeal.

I express appreciation to both counsel for the instructive submissions presented.

S.W. SAPIRE

CHIEF JUSTICE