IN THE SWAZILAND COURT OF APPEAL

HELD AT MBABANE CASE NO. 4/85

In the matter between

JOSEA POTGIETER Applicant

and

LEWIS KLOPPER 1st Respondent

THE MASTER Of THE HIGH COURT 2nd Respondent

THE REGISTRAR OF THE HIGH COURT 3rd Respondent

THE REGISTRAR Or MINING TITLES 4th Respondent

CORAM:

I.A. MaISELS J.P.

I. ISAACS J.A.

N. HANNAH C.J.

COUNSEL:

R. K. R. ZEISS S.C.

with him EBERSOHN for Applicant

R.H. ZULMAN S.C.

with him P.E. FLYNN for 1st Respondent

JUDGMENT

MAISELS J.P.

At the conclusion of argument in this application the Court ordered that it be dismissed with costs, including those consequent upon the employment of two counsel, the costs to be taxed on the scale as between attorney and client. It was seated that reasons would be given later. These now follow.

This matter came before us by way of an application for an extension of time within which to lodge the Record of an Appeal which the Applicant noted on the 28rd August 1985 against the Judgment of Dunn A.J. given on the 21st August 1985. By this Judgment Dunn a. J. discharged, with an appropriate order as to costs, a Rule Nisi granted by him Ex Parte at the instance of the Applicant on the 13th July 1985. The Rule granted reads as follows:

"That a rule nisi do issue, calling upon Respondent to show cause (if any) before the above Honourable Court on WEDNESDAY, the 31st JULY 1985, at 9.00a.m. in the forenoon or so soon thereafter as counsel may be heard:

a) Why the orders of Court issued by the above Honourable Court in Case No. 812/85 on the 14th December, 1984 giving recognition to first Respondenc in terms of Section 4 of Act No. 51 of 1932 (the "Act") as an external trustee in the insolvent Estates of JACOBUS PETRUS BOTHA and MARIA MAGDALENA BOTHA should not be declared null and void, alternatively why the said orders of Court should not be rescinded or set aside;

b) Why the certificates of appointment as External Trustee issued by 2nd Respondent to 1st Respondent on the 21st January 1985 in respect of the aforesaid insolvent estates in terms of Act No. 51 of 1932 should not be declared null and void alternatively why they should not be rescinded or set aside;

c) Why the notice issued in terms of Section 152(2) of Act No. 81 of 1955 in the insolvent estate of JACOBUS PETRUS BOTHA calling upon Applicant to appear before Second Respondent on 15th July 1985 and 16th July 1985 should not be declared to be null and void alternatively why it should not
be rescinded or sec aside;

d) Why the 2nd Respondent should not be interdicted from cunducting any enquiry in terms of Ace No. 81/55 in the insolvent estate of JACOBUS PETRUS BOTHA and MARIA MAGDALENA BOTHA;

e) Why the 1st Respondent; should not be granted such further or alternative relief as to the above Honourable Court may deem meet."

In addition on application by first respondent's counsel Dunn A.J. ordered the deletion of his reference to Section 4(1) of the Act from the Orders granting recognition of the first respondent in Swaziland as Trustee in the Insolvent Estates in question.

There has been placed before this Court not only the Record of the proceedings in the High Court in the matter to which I have referred and which is relevant to the application now under consideration, but also records of three matters in which the first respondent, having been appointed a provisional trustee in the Insolvent Estates of the persons mentioned in sub-paragraph a) by Order of the Transvaal Provincial Division applied successfully to the High Court for his recognition as a trustee in Swaziland of the Insolvent Estates of these persons.

In view of the Judgment given by Dunn A.J. and his succinct statement of ail facts relevant to the present application, I find it difficult to understand what purpose has been served by the inclusion of the additional three records. They run from pages 125 to 208 of the Record now before us. It is also, perhaps, not inappropriate to mention at this stage that the first respondent's filing notice and answering affidavit together with annexures run from page 54 to page 68.

In addition, the Master filed a short report. The rest of the Record, which totals in all 124 pages consists of the founding affidavit by applicant, as well as his replying affidavit and a large number

of annexures which appear to me to be of no relevance to the matter in issue.

There is one further observation that I consider should be placed on record, and that is that the attorneys for the applicant and the first respondent were advised by the Registrar of this Court that the Court would require full argument, so that if leave was granted the appeal would De dealt with at the same time. A lengthy affidavit explaining the delay in complying with the Kales ox' Court with regard to the filing of the Record and with regard to the prospects of success on appeal has been filed by the applicant's attorney. There has also been filed a lengthy reply by the respondent's attorney to this affidavit, as well as further replying affidavits by the applicant and his attorney. In addition, for reasons quite inexplicable to me, the first two affidavits have been repeated in a thick volume filed by the applicant's attorney. In view of the conclusion at which I have arrived, it is unnecessary to consider the question as to whether the delay as such was justified. What I consider has to be dealt with is whether the applicant has shown some reasonable prospects of success on appeal. In an affidavit filed by the applicant's attorney he states that the prospects "are extremely good" and "in regard thereto I respectfully make reference to the grounds of appeal filed of record at pages 121 to 124 of the Record of Appeal." I assume in favour of the applicant that this statement applies equally to the grounds of Appeal as amended by a late Notice of Motion to amend dated 15th May 1986.

It is in my opinion not necessary that there should be "extremely good" prospects of success. It is sufficient if there are some reasonable or fair prospects of success on appeal, and I approach this case on that basis, which is one that has been adopted on numerous occasions in this Court, and in the Courts of South Africa.

Finbro Furnishers v Registrar of Deeds 1985 (4) SA 773 at 789 cited by the applicant does not in any way depart from this approach.

It is clear from the facts set out in the judgment of the Court a quo that the estates of both Bothas were placed under sequestration, and that the first respondent was appointed provisional trustee in both estates. Apparently, the husband or ex-husband, Jacobus Petrus Botha, was declared insolvent by an Order of the Transvaal Provincial Division in October 1984, and the first respondent having been appointed by the Master of the Supreme Court of South Africa, provisional trustee, successfully made application to the High Court for his recognition as a trustee.

The order sought by the first respondent was that his appointment "in terms of the Law of the Republic of South Africa as trustee of the Insolvent Estate of Jacobus Petrus Botha on the terms set out herein, is recognised within the Kingdom of Swaziland until this recognition is withdrawn by an Order of this Court". Dunn A.J. in granting this application added that the recognition of the first respondent as trustee was in term3 of Section 4(1) of the Act. The Order of the Transvaal Provincial Division of South Africa sequestrating Jacobus Petrus Botha's Estate was set aside by that Court in November 1984, and a fresh order of sequestration was made against him, the first respondent again being appointed provisional

trustee. He applied to the High Court for recognition as he had done in the case of the sequestration of Mrs. Maria Magdalena Botha. In the light of the Order of Recognition granted in the first application made in October 1984, the subsequent applications for recognition were understandably made under the Act, because of the words added by Dunn A.J. to the order sought in the first applications made by the first respondent for recognition. The application to the High Court to set aside the latter two orders, apart from certain quite irrelevant paragraphs in the

founding affidavit of the applicant, was based upon the allegation that it was a condition precedent under Section 3 of the Act that the Act was to apply to external trustees with effect from the date of the publication by the Minister in the Gazette of a notice declaring that there is in force in the country in question due provision for the recognition of letters of appointment of trustees in insolvency and liquidations granted by the competent authorities in Swaziland. The applicant alleged that his enquiries revealed, and this is accepted as common cause, that there had been no such notice. Consequently the applicant, having received advice from his counsel and attorneys, and acting on that advice, submitted that the order granted, as it was based on Section 4(1) of the Act, was null and void. The reason for bringing the application to set aside the orders of recognition granted by Dunn A.J. was that the Master had issued on the 5th July 1985 a Notice under the Insolvency Act, No. 81/1955 requiring the applicant to appear before him on the 15th July 1985 in order to furnish the information and/or testify in regard to matters within the applicant's knowledge concerning the Estate of Jacobus Petrus Botha.

In paragraph 32 of the founding affidavit the applicant states:

Although I have no reason to fear the proposed interrogation, such interrogation nevertheless would De humiliating and would constitute a severe and massive intrusion into my privacy and personal dignity, having particular regard to the public office which I hold as senator of the parliament of Swaziland. Should the Court uphold my aforesaid views of the law I naturally have no intention to submit to this kind of indignity".

I think it right to comment that the fact that the applicant is a senator of the parliament of Swaziland, is entirely irrelevant. He is not above the Law, and is subject to the same treatment by the Courts and the Master performing their respective duties as any other citizen of Swaziland. There is no reason to believe that the first respondent who doubtlessly was responsible for the notice issued by the Master requiring the applicant to appear before the latter in connection with the dealings with the insolvent Jacobus Petrus Botha, was not entirely bona fide. Indeed, a reading of the applicant's founding affidavit seems to me in Itself to cry out for his examination under the Insolvency Act. Section 18 of the Act reads: "Nothing in this Act shall be deemed to deprive the High Court of any jurisdiction which it may have before the commencement of this Act to recognise for the purposes of the administration of any assets within Swaziland any person appointed by a competent authority outside Swaziland to be a trustee of a bankrupt or insolvent estate or the liquidator of a company."

The learned Judge a quo in amending his Orders referred to and followed a decision by Roper A.J. (as he then was) sitting in the High Court of Swaziland in Ex Parte Groenewould N.O. 1963-1969 S. L. R. 65 that:

"this Court like the Superior Courts of all British Dominions, has common law jurisdiction to recognise, on grounds of comity, liquidators and trustees appointed in foreign civilised countries." Roper A.J. relied on the decision in Re African Farms Limited 1906 T.S. 373.

The decision in that case was given by a Full Court of the Transvaal Supreme Court consisting of innes C.J., Smith J. and Curlewis J., a court of considerable standing.

Although Ex parte Groenewould was a decision given by Mr. Justice Roper as an Acting Judge, I think it proper to state that for many years he had been Attorney General of what was then known as the High Commission Territories of Swaziland, Basutoland and Bechuanaland. He of course practised at the Bar in South Africa while holding this post of Attorney General. He was appointed

and served as a Judge of the Transvaal Provincial Division of the Supreme Court of South Africa. Upon his retirement from that Court, he acted as a Judge of the High Court of Swaziland and as a member of the Court of Appeal which functioned at chat time over all the countries I have mentioned. When they became independent Mr. Justice Roper became the first President of the separate Courts of Appeal of Swaziland, Lesotho (formerly Basutoland) and Botswana (formerly Bechuanaland), which position he held with distinction until he decided to retire. I had the privilege of appearing before him when he was a Judge of the Transvaal Provincial Division and of being a member of the three Appeal Courts over which he presided. If I may respectfully say so, his wise and great legal knowledge was apparent to all.

I entertain no doubt that the Judgment of Roper A.J. in Groenewould's case supra, was correct and that Dunn A.J. rightly followed it.

The order given by Roper A.J. was designed to meet the exigencies of that case. Mr. Zeiss's attempt to distinguish Groenewould's is, in my opinion, without merit as is his reference to a large number of other cases.

The reference in the Order to Section 4(1) of the Act was really superfluous and was made in error. Dunn A.J. had power to amend it by deletion of that reference under Rule 42 of the Rules of the High Court and at Common Law of Firestone (SA) Ltd. v Genturico A.G.

1977 (4) S.A. 298 at 307 C - F (A.D.).

I am quite unable to fathom any possible prejudice to the applicant by the deletion of these words from the orders originally granted by Dunn A.J. I should add that in my opinion, even if there were no Section 18 in the Act, in the absence of legislation to the contrary common law would still apply. Mr. Zeiss contended "that a judicial officer in civil proceedings must adjudicate and resolve the issues raised in an ex parte application launched on notice of motion within the confines made out by the applicant in his notice of motion and founding papers, must confine his enquiry to such issues and cannot have regard to extraneous issues (such as where the application is bad in law because it is brought in terms of a statute which is inoperative in regard to the issues raised in the application but might be good in law had it been brought under the common law instead)."

In support of this statement he cited Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635 F - 636 F. That was a case in which it was sought to rely upon different facts and the Court there held that it was improper to dispute an issue of face not raised on the papers. In this case the fact of the respondent's appointment in the Transvaal is undisputed, and failure in his applications for recognition expressly to rely on the Common Law is legally irrelevant; of de Jager and Others v Farah & Nestadt 1947 (4) SA 28 (W) at 36 Allied Electric (Pty) Ltd. v Meyer and Another 1979 (4) SA 325 at 334 and 335 (W).

Moreover, the question of a mistake of law can be raised for the first time on Appeal and even if the mistake of law arose as a result of a concession by counsel in the Court a quo. In this case, there was a mistake of law and there is no doubt that if Dunn A.J. had not deleted the reference to Section 4 of the Act this Court could and would have done so; of Lipschitz NO v UDC Bank Ltd.

1979 (1) SA 789 at 801 (f - g) (A) de Beers Holdings v Commissioner for Inland Revenue 1986 (1) SA 8 at 83 (A) Paddock Motor Co. v Igersund 1976 (3) 18 at 23 (A) van Niekerk v van Niekerk

1963 (1) 505 at 510 and 511 (A).

Mr. Zeiss also contended that had the application initially been Drought in terms of the Common Law and had the Court a quo been aware of its discretion to define the powers of the Master and the Trustee, and had the Court exercised its discretion judicially on the evidence placed before it and with due regard to the law as allegedly settled by the

numerous cases cited by him, it is not unlikely that the Court would have the powers of the first respondent defined in a manner which would not have included the power to hold secret enquiries. In addition, so Mr. Zeiss stated, it would have been necessary to give the applicant, as an interested party, notice of the application. The argument then proceeded that as none of the aforesaid had occurred the appellant was, it was submitted, irreparably prejudiced. These submissions are devoid of any substance.

It is the Master and not the first respondent who determines what enquiries are to be held. if the Master determines to hold a secret enquiry ex hypothesi he does not notify the person whom it is proposed to examine of the facts which have been placed at his disposal. I find the objection to the holding of a secret enquiry somewhat extraordinary having regard to the applicant's protestations in his original application of the humiliation which he would have to undergo were he to be examined. As to the submission based on pure speculation that the Court a quo might have limited the Master's discretion to hold secret enquiries, this, if possible, has even less substance than most, if not all, of Mr. Zeiss's submissions.

Then there is a further submission by Mr. Zeiss that the Gourt a quo erred by holding that Act 51 of 1932 had not come into force at all. His submission had the merit of stating "if such be the finding of the Court a quo". This is an astonishing submission. It is absolutely clear that it was because there had not been a proclamation under Section 3 of the Act that Section 4 (1) of the Act did not come into operation. There is no ambiguity in this regard, as suggested by Mr. Zeiss, in the judgment a quo. When Dunn A.J. stated in the Court a quo that "the form and not the substance of the orders which is in issue" and "the application of the 13th July 1985 (the

one in casa) appears to me to have been unduly technical" I am in entire agreement with him. There is no foundation Tor the submission that Dunn A.J. exercised his discretion wrongly or "unjudicially" (sic), by deleting the reference to Section 4(1) from the Orders of Court of the 14th December 1984.

I have, I hope, considered the many points raised by Mr. Zeiss in the grounds of appeal as amended and in his argument before us. Regretfully I have to state that not one of these points is of any real substance nor is the cumulative effect of any of these points of any substance. The main, and really the only thrust of the various points raised by him was that the orders granted by Dunn A.J. giving recognition to the first respondent were null and void because they were granted under Section 4 (1) of the Act.

In my judgment the addition of these words was patently in error, and was superfluous. The respondent could have relied on Section 18 of the Act as well as the Common Law, and I consider that Dunn A.J. correctly deleted the reference to Section 4 (1) of the Act when he discharged the Rule.

In an alternative to the large number of points raised in the Notice of Appeal it is submitted, and was submitted in this Court, that Dunn A.J. erred by not holding:

"that at the very least the Applicant was entitled to the costs of the application up to and including the cost of the hearing on 31st July 1985 (including the costs of two counsel) until the amendment of the orders of court granted on 14th December 1984 by the deletion therefrom of the reference to section 4 (1) of Act No.

51/1932 was applied for from the Bar."

13

There is even less substance in this point than in the other points raised by Mr. Zeiss.

In Vitorakis v Wolf 1973 (3) SA 928 (T) Coetzee J said that Courts generally strive to assist litigants to get to grips as inexpensively and expeditiously as possible without enforcing sheer formality, whenever this is only calculated to produce litiscrescence devoid of real legal content, or procedural advantages, such as greater clarification of issues. I respectfully agree with these remarks. See too Holzman N O and Another v Knights Engineering and Precision Works Ltd. 1979 (2) SA 784 at 797.

The application made by the applicant to the High Court as well as the application to this Court is one which in my opinion was calculated to produce litigation and an increase of litigation devoid of any legal concent. It was a calculated endeavour to avoid, if at all possible, the examination of the applicant before the Master, an examination which in my opinion should no longer be delayed.

In my judgment, there are no prospects of success on appeal, and the application consequently fails.

As to costs Mr. Zulman for the first respondent asked the Court to dismiss the application with costs to be taxed on an attorney and own client basis.(The underlining is mine). That this is a competent order that may be made by a court seems clear of Nel v Waterberg Landbou Ko-op 1946 AD 597. However, I consider that this type of order should only be made in cases where the conduct of the offending party has been of such an extremely fraudulent or disgraceful nature that an award of attorney and client costs would not meet the justice of the case.

14

In the present matter I am however satisfied that the application is vexatious, of no substance, and was deliberately designed, as was the application before Dunn A.J., in order to avoid the applicant being examined before the Master. In addition, as i have mentioned above, the record before us has been burdened considerably with unnecessary documentation. The Court's displeasure of this conduct should and can, in my opinion, be marked by an order that the applicant pay the costs of this application on an attorney and client basis.

The application is dismissed with costs, these costs to include those consequent upon the employment of two counsel, and to be taxed as between attorney and client.

I.A. MAISELS PRESIDENT,

COURT OF APPEAL

I. ISACCS

JUDGE OF APPEAL

N. HANNAH

CHIEF JUSTICE

/ KF