IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.

In the matter between:

VARIOUS CREDITORS

And

DIVERS DEBTORS

CORAM : LEON J A

: STEYN J A

: TEBBUTT J A

FOR THE APPELLANTS : MR. FLYNN

FOR THE DEFENDANTS : MR. DUNSEITH

JUDGEMENT

Leon J A:

This case has been referred to this Court by the Chief Justice in terms of Section 17 of Act 74 of 1956.

Concerned about the effect of certain matters on the motion court roll which had been brought in terms of Rule 45(13) (h) (sic) of the Rules of the High Court of Swaziland the learned Chief Justice considered Rule 45(13) and in a written judgement dated 14th August 1998 held that Rule 45(13) is ultra vires and that those proceedings which have been taken in terms of the Rule are invalid. It followed that all pending applications presently before the High Court in terms of the Rule were dismissed.

The relevant Rule in question is not Rule 45(13) (h) but Rule 45(13) (i). The Rule provides that a debtor, against whom a judgement sounding in money has been given, and who has not paid the judgment debt, can be given notice by the judgement creditor to attend the 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 instalments.

It is pointed out by the Chief Justice that this Rule was imported from a similar Rule which operated in the Supreme Court of South Africa (Rule 45(12)(i)) but that the latter Rule has been abrogated and removed from the Rules, so that those enquiries are no longer held in what is now the High Court of South Africa.

Having expressed the view that in many, if not most cases, the Rule has proved to be an

ineffective waste of time and money and that its only virtue, if it be a virtue, is to provide some sort of coercion on recalcitrant debtors, the Chief Justice goes on to say:

"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 subsequent thereon. The virtue of the Rule lies in the fact 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..." (this is so because the notice calling upon the debtor to attend the enquiry is not a process of the court signed by the Registrar.)

The judgement refers to the fact that the Rules of Court are made and promulgated by the Chief Justice in terms of Section 10(1) of the High Court Act No.20 of 1954. That provides for the Chief Justice making Rules of Court for regulating the proceedings of the High Court but, according to the judgement, neither the Rule nor any of its sub-sections include the introduction of a procedure unknown to the common law "which constitutes an infringement on the rights of persons to liberty and privacy."

Reference is made in the judgement to the case of UNITED REFLECTIVE CONVERTERS (PTY) LTD VS LEVINE 1988(4) SA460 (W) which is to the effect that a Rule of Court may be declared invalid if its provisions go beyond the powers conferred on

the rulemaking authorities e.g. where it goes beyond a Rule regulating procedure but purports to create a substantive law.

It was held by the learned Chief Justice that he cannot, 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 he provide a method of execution unrecognised by the common law, which impinges on the rights of liberty making the debtor's wilful failure punishable by imprisonment. The common law does not permit civil arrest for a debt which, he felt, is the effect of the Rule. Nor does the common law compel the 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 short, the learned Chief Justice held that Rule 45(13) was ultra vires because: -

i) It did not regulate merely procedure but introduced substantive law.

ii) The substantive law introduced by the Rule was not in conformity with the common law.

It would seem that the learned Chief Justice in holding Rule 45(13) to be ultra vires struck down the whole of that Rule, thus also declaring per incuriam Rule 45(13) a - g to be ultra vires. There is no basis for such a conclusion. The real attack was on Rule 45(13) (h)-(k) which provide:-

"h) Whenever a court gives judgment for payment of a sum of money against a party (hereinafter called "the debtor") the court may forthwith investigate whether the debtor is able to satisfy the judgement and for that purpose may require the debtor's attendance to give evidence on oath,

and to produce such documents as the court may direct, and allow the judgement creditor to adduce such evidence as the court may think fit.

i) Whenever a return has been made to a writ of execution, that the officer charged with the execution has been unable to find sufficient property subject to attachment to satisfy the amount of the writ or whenever a judgement debt remains wholly or in part unsatisfied after the expiration of twenty-one days from the date of the judgment, the judgement creditor may by notice call upon the judgement debtor or, where the judgement debtor is a body corporate, any director, manager, secretary or other similar officer thereof, or any person purporting to act in any such capacity, to appear before the

court on a day fixed by such notice, and to produce such documents as may reasonably be necessary, in order that the court may investigate the financial position of the judgment debtor.

j) Any such person who, having been served with such notice under paragraph (i) fails without good cause to appear, may be personally attached for contempt of court; and whenever such person appears pursuant to such notice the court may proceed as set fourth (sic) in paragraph (h).

k) Whenever the court is of opinion that the debtor is able to satisfy a debt by instalments out of his earnings, it may make an order for payment of such debt by instalments."

Before us, Mr. Flynn appeared for the appellant while Mr. Dunseith appeared as amicus curiae and we are indebted to him for having undertaken this task and to both Counsel for their assistance.

Both Counsel submitted that the learned Chief Justice had misconstrued the nature and purpose of the financial enquiry provided for in Rules 45(13) (h)-(k). It was contended that the relevant sub-rules provide for a procedure in terms of which the Court may forthwith investigate whether a debtor is able to satisfy a money judgement and the Court may require the debtor's attendance to give evidence on oath and to produce such documents as the Court may direct. It was urged that sub-rule (h) is a procedural rule which enables the court to hear evidence of both the debtor and the judgement creditor prior to exercising its discretion in terms of Rule 45(13) (k) to make an order for the payment of the debt by instalments where the Court is of the opinion that the debtor is able to satisfy that debt by instalments out of his earnings. It was further contended that Rule 45(13)(i) is also a procedural rule in terms of which the judgment creditor may secure the attendance of the debtor in order that the Court may investigate his financial position in circumstances where insufficient property subject to attachment has been found on execution.

Subject to the question as to whether the Court has power to imprison the debtor for contempt of court under sub-rule (j), which I shall consider later herein, there is abundant authority which supports the submissions made by counsel that the rest of Rule 45(13) is not ultra vires, and in particular Rules 45(13) (h) - (k).

In GOUWS VS THEOLOGO AND ANOTHER 1980(2) SA 304 it was pointed out by Nicholas J (as he then was) at page 305-6 that at common law, the Court has a discretion whether or not to sanction the attachment of earnings and as to the extent to which earnings may be attached. The learned Judged stated that Rule 45(12)(j), which is the equivalent of Swaziland Rule 45(13)(i), provides the procedure whereby the Court may exercise its discretion to make an order for payment of a judgement debt by instalments out of the debtor's earnings and for the attachment

thereof. It was held that Rule 45(12)(j) enshrined the Court's common law discretion in express terms. It prescribes the common law procedure whereby the common law discretion of the Court may be invoked. (See also A & H JOPSON INVESTMENTS (PTY) LTD VS PRINSLOO 1960(4) SA293 (E) at 296C. SHAW AND BOSMAN VS TATHAM 1912 WLD 75.

In FOLEY VS TAYLOR AND ANOTHER 1971(4) SA515 (D) Miller J said this at page 517(h):-

"The circumstance that under the common law it was necessary to apply to Court for leave to execute the debtor's salary in the hands of his employer does not take that debt out of the category of movables subject to attachment; it reflects a procedural step calculated to give a measure of protection to the unfortunate debtor who might otherwise be left destitute and unable to support his own life or that of his dependants."

That case, Gouws' case (supra) and NORWICH UNION FIRE INSURANCE SOCIETY LIMITED VS MANKOWITZ 1966(3) SA573 (E) AT 575A show, as was correctly contended, that the Rule's primary purpose is to protect the debtor's rights.

Subject again to the possible qualification relating to the imprisonment of the debtor the learned Chief Justice was therefore not correct in holding that the Rule is an "unwarranted and an unjustifiable intrusion upon the rights of the debtors."

I turn now to consider the question of whether the High Court has power to imprison a judgement debtor for contempt of court by reason of his failure, when able to do so, to pay a judgement debt of a commercial character which the Court ordered him to pay in specified instalments, on specified dates, at a specified time, to a specified person.

In HOFMEYER VS FOURIE 1975(2) SA590© the Court considered the provisions of the then Rule 45(12)(i) of the Rules of Court which then prevailed in South Africa. In a fully considered judgment Baker J, with respect, analysed all the authorities on this topic admirably and exhaustively.

The relevant part of the headnote reads as follows: -

An unsatisfied judgement ad pecuniam solvendam does not become a judgement ad factum praestandum after the application of the procedure provided by Rule of Court 45(12) to it. In each of two applications the applicant had an unsatisfied judgement which the Respondent debtor had been ordered, after an enquiry under Rule of Court 45(12) to repay at a specified rate per month on a specified date at the office of a specified person. No payments were made and applications were made to commit the debtor for contempt of court for failing to comply with an order ad factum praestandum.

Held, that the orders were ad pecuniam solvendam. Held, therefore, that the Court was precluded form granting the order.

In the course of his judgement Baker J drew a distinction between matrimonial cases and ancillaries thereof and other cases. In the former class of case the Courts have committed a defendant to prison for contempt who has failed to obey an order to pay money. (See the cases collected in the judgement from page 594B - 597D). Such an order has also been granted where a defaulting executor was ordered to pay costs de bonis propriis, for such an order was said to be in the nature of a penalty against the executor MASTER, SUPREME COURT VS YATES NO (1910)) 20 C. T. R. 25; ASSISTANT MASTER VS VAN BLERK, 1934 G. W. L. D.79.

Baker J goes on to say (at page 597 f - g): -

"The fact is that the practice has never been applied to disobedience of money judgements other than those mentioned above. Apart from those cases, committal has up to now (with two exceptions mentioned directly) has been granted only in cases where the disobedience was of an order ad factum praestandum in the recognised sense."

6

Baker J concludes (at page 598 in fine - page 599D) that the matter was disposed of by the Full Bench of the Transvaal in METROPOLITAN INDUSTRIAL CORPORATION (PTY) LTD VS HUGHES 1969(1) SA224 (T) where Colman J said this at page 227: -

"Mr. Lewis, in urging us to follow the first of these four cases, argued that although a simple order to pay a sum of money is an order ad pecuniam solvendam, it is converted into an order ad factum praestandum when in pursuance of an enquiry under Rule 45(12)(j) or in pursuance of an agreement made when that Rule has been invoked, the Court orders that the debt be paid in instalments. That argument was fundamental to his claim for relief because it is well settled that a committal for contempt of court by reason of a failure to comply with an order of court is proper only when that order was ad factum praestandum. It was not argued, and indeed it was not possible to argue in the face of ample authority, that the remedy of contempt proceedings is available to a creditor when the order in his favour is an order ad pecuniam solvendam...

"There is thus a great weight of authority against the view that an order of Court directing the payment of money (whether it be made after a judicial investigation or by consent) is an order ad factum praestandum merely by reason of the fact that it provides for a series of payments on specified dates. An order whereunder the common law obligation to maintain is to be carried out by means of periodical payments of money is of that character, but an order to discharge a commercial debt by instalments is an order ad pecuniam solvendam and a breach thereof cannot be penalised by an order for imprisonment for contempt of Court."

The first question to be determined therefore is whether any part of Rule 45(13) provides for imprisonment for a breach of an order ad pecuniam solvendam. If so, that part of the Rule will be ultra vires.

If the effect of those sub-rules or any of them is to order the imprisonment of a debtor for non-payment of a debt it would, save in matrimonial cases, be ultra vires.

The first question then is whether that is the effect of the sub-rules or any of them. I think not.

The attachment for contempt of court is provided for in Rule 45(13) (j) but that only arises where the debtor fails without good cause to appear in court in response to a notice issued by the judgment creditor under Rule 45(13) (i).

7

However Rule 45(13) (j) raises another question.

The sub-rule provides for the imprisonment of a debtor where he fails to respond to a notice issued not by the Court but by the judgement creditor. Because the notice is not issued by the Court at all, I am unable to see upon what basis it can be held that the debtor can be in contempt

of Court. He is in contempt of the notice. In my view therefore, that part of sub-rule (j) which provides for the personal attachment of the debtor for contempt of Court is ultra vires. This conclusion is supported by the following remarks of Greenberg J in HANKIN VS HANKIN 1932 WLD 190 at 192.

"In the present case proceedings for contempt would lie if the order for maintanance was one in which the Court by its own motion imposed upon the respondent the obligation, and probably the same would apply where the Court had the power to do so but made the Order on an agreement between the parties."

The emphasis was placed upon orders by the Court, and in DAVIDSON VS DAVIDSON 1926 WLD 33 at page 34 the same learned Judge said this: -

"the test whether an order for committal should be made is whether the order sought to be enforced is an order ad factum praestandum." (See also HOFMEYER VS FOURIE (SUPRA) AT PAGE 596 B - C)

In the present case sub-rule (j) provides for committal where an Order of Court is not involved at all; merely a notice by the judgement creditor.

When this difficulty was put to Mr. Flynn and Mr. Dunseith by the Court they both correctly conceded that the following part of sub-rule (j) is ultra vires.

"Any such person who, having been served with such notice under paragraph (i) fails without good cause to appear may be personally attached for contempt of court."

The remainder of sub-rule (j) which is clearly severable from the offending part is not ultra vires. It reads:-

"and whenever such person appears pursuant to such notice the Court may proceed as set fourth (sic) in paragraph (h)."

In my view the appeal must be allowed save to the extent that, as stated above, the aforesaid part of sub-rule (j) of Rule 45(13) is declared ultra vires. The rest of Rule 45(13) is declared