264/74

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

BERNARD MALCOLM CLIFFORD ..... Appellant

versus

THE STATE ..... Respondent.

Coram: Wessels, Corbett et Hofmeyr, JJ.A.

Date of hearing: 21 November 1975

Date of judgment: 28 November 1975

J U D G M E N T

CORBETT, J.A.:

The appellant was convicted in the regional magistrates' court for the Transvaal region of a contravention of section 137(a) of the Insolvency Act 24 of 1936 and sentenced to six months imprisonment. He appealed to the Transvaal Provincial Division against both conviction and sentence.

On/.....

On appeal that Court dismissed the appeal against the conviction but reduced the sentence by suspending three of the six months imposed on appropriate conditions. With leave of the Court a quo appellant now appeals to this Court against both conviction and sentence. I shall deal first with the conviction.

Section 137(a) provides that a person shall be guilty of an offence, punishable by imprisonment for a period not exceeding one year —

> "if, during the sequestration of his estate, he obtains crêdit to an amount exceeding ten pounds without previously informing the person from whom he obtains credit that he is an insolvent, unless he proves that such person had knowledge of that fact;"

The gravamen of the charge against appellant - to which he pleaded not guilty before the regional magistrate - was that on 2 March 1970 he, while an unrehabilitated insolvent, obtained credit in an amount of R2 800 from one Jose Viana (whom I shall call "the complainant") without previously having informed the complainant that he (appellant) was insolvent. The charge arose from an agreement entered

into/.....

into between the appellant and the complainant during March 1970, in terms of which the complainant undertook to perform certain work - mainly the supplying and fitting of cupboards, doors, a dressing-table, a headboard, two wardrobes, skirtings and pelmets - upon a house situated in Parkhill Gardens, Germiston, which was in the course of construction. The agreement was reduced to writing. This took the form of a written quotation, dated 2 March 1970, which was addressed to the appellant and was accepted by him by means of a written and signed acceptance at the foot thereof. This document, after setting out in detail the work to be done by the complainant in respect of the various rooms in the house and stating a total contract price of R2 800, concludes as follows:

"TERMS OF PAYMENT.

On completion of fitting of all doors, pelmets and skirting, payment of R700.00
(Seven Hundred Rand only)

On completion of cupboard in the main bedroom, three small bedrooms and laundry, payment of..... R700.00
(Seven Hundred Rand only)

Balance of R1,400.00
(One Thousand Four Hundred Rand only)
on completion of total work undertaken."

The conclusion of this agreement (which constituted Exhibit "A" at the trial) was never in issue. It was also common cause, or not seriously disputed:

(1) That during the relevant period the house in question and the land upon which it was being erected belonged to appellant's brother, one P.G. Clifford. The latter purchased the property as a speculative venture in 1969 and eventually sold it in 1973. He originally employed a building contractor to erect the house but, on becoming dissatisfied with the work being done, he dismissed the contractor and decided to complete the work as an owner/builder. Because appellant lived in Germiston and P.G. Clifford in Krugersdorp it was arranged between them that appellant would manage and supervise the building operations for a monthly fee.

(2) That, in pursuance of the contract (Exhibit "A"), the complainant supplied and fitted certain of the items listed in the contract but did not com-

plete the contract work. There is a dispute as to how close he came to completion. According to the complainant himself, he performed the whole contract, except for supplying and fitting two wardrobes, the headboard and the dressing-table. He stopped work because of failure to pay the contract price. According to the appellant, on the other hand, the complainant was dilatory, failed to complete the major portion of the work and was fully compensated for what he did. Work on the contract ceased during 1970.

(3) That two payments, one of R600 and one of R500, were made in respect of the contract price. This total amount of R1 100 was, according to the complainant, wholly inadequate to compensate him for the work he did. Appellant avers that the amount was considerably in excess of what was due to the complainant for the work actually completed. P.G. Clifford provided the funds from which these payments were made. The evidence does not fix the dates of these payments with

any precision but they must have occurred during 1970.

(4) That at all material times appellant was an insolvent. He was sequestrated on 20 October 1959 and by 9 August 1973 had not been rehabilitated.

(5) That appellant did not "previously inform" the complainant of his insolvency; nor did the complainant have any knowledge of that fact at the time of this transaction. Subsequently, the complainant sued the appellant for the balance owing under the contract and obtained judgment by default. When it was sought to execute upon this judgment it was ascertained for the first time that the appellant was an unrehabilitated insolvent.

In view of what was made common cause, the sole issue at the trial was whether the appellant had obtained credit to an amount in excess of R20 (viz. R2 800) from the complainant. Appellant's defence was that he had not obtained credit because (i) he had contracted with the

complainant not as a principal but as agent on behalf of his brother; and (ii) the contract itself did not involve an obtaining of credit by the party for whom the work was to have been done by the complainant. The magistrate held against the appellant on both these points, as also did the Court a quo. In this Court appellant's counsel - rightly in my view - confined his argument to point (ii) above.

The argument advanced was essentially this: (a) that the words "obtains credit" in section 137(a) refer only to the situation where an insolvent person obtains additional time for, or a deferment of, the payment of a debt which has become due; (b) that in the present case the contract was an indivisible one and consequently, had the parties not specified a time for payment, the full contract price would have become payable only on completion of the work; (c) that the two instalment payments of R700 each actually anticipated the "due" date of the debt, while the final payment of R1 400 coincided therewith; and (d) that, accordingly there had not been a giving or obtaining of credit.

Step (a) in this line of argument, as stated above, seems fallible and tends to beg the question in a case where the obtaining of credit is based upon the original terms of the contract (as opposed to some indulgence as to payment subsequently granted) inasmuch as the due date of the debt will be that fixed by the terms of the contract. Thus, to take a simple example, if the parties to the sale of a movable agree that payment of the purchase price shall take place one month after delivery, there is manifestly an obtaining of credit by the purchaser with reference to the payment of the purchase price; yet upon an application of the definition contained in step (a) there would be no deferment of the due date of payment as fixed by the terms of the contract. Upon enquiry from the Court, however, appellant's counsel explained that what was contemplated under step (a) was not the due date of the debt as fixed by the terms of the contract but the due date as it would have been according to the common law. (For brevity of future reference I shall call this the "common law test"). Accordingly, again using the previous example, since in a contract of sale of a movable

payment/....

payment and delivery must at common law be made pari passu, the contractual term allowing of payment one month after delivery would amount to an obtaining of credit.

While there can be little doubt that the deferment of the obligation to pay a debt after the time when the debt would otherwise have become due at common law, would often amount to an obtaining of credit — this would certainly be so in the case of the obligation to pay the purchase price of a movable — the crucial questions raised by counsel's argument are whether, for the purposes of section 137(a), the obtaining of credit must be confined to such instances and whether the postponement of payment after the "due" date at common law is the real touchstone for determining whether credit has been obtained or not. Before examining these questions in depth, I propose to consider how section 137(a) and other similar provisions have been interpreted in the past.

The previous Insolvency Act, No. 32 of 1916, as amended, contained a provision, viz. section 14(a), almost

identical/.....

identical to section 137(a) of the present Act. Section 141(a) was introduced by amendment in 1926 (see section 55 of Act 29 of 1926) and replaced and amended a similar provision in the original 1916 Act (section 141(1)). The provision appears to have been modelled on an enactment to the same general effect contained in the English Bankruptcy Act of 1914 (section 155(a)) and its predecessor (see section 31 of the Bankruptcy Act of 1883). Although there are variations in the language employed in these different sections, they all have the same general import and all contain the key words "obtains credit". Consequently decisions of our courts on the previous section 141(a) may be regarded as authoritative in the interpretation of section 137(a) and, more particularly, of the words "obtains credit"; and, in addition, some assistance, of a persuasive character, may be derived from certain decisions of the English courts in which the meaning of these words in the corresponding sections of the English legislation has been considered.

In this connection it is of some interest to note that this

Court and the Court of Appeal in England reached the same conclusion in regard to the question as to whether an insolvent (bankrupt) contravenes the section where he obtains from the same creditor a number of separate credits on different occasions each of which is less than the statutory amount but which in their aggregate exceed this amount (see R v Abramoff 1956 (3) SA 394 (AD) and R v Hartley [1972] 2 QB 1).

The first decision of this Court on the meaning of the words "obtains credit" (appearing as they did in section 141(1) of the 1916 Act) is Findlay and Sullivan v Brown and Co (1926 AD 272). There the question arose as to the validity of a loan agreement entered into by an insolvent subject to a condition that it be secured by a bond over certain movable assets. It was argued that the transaction was not hit by section 141(1) because security was given. In dealing with this argument INNES CJ stated (at pp. 275-5):

"But/.....

> "But then it was suggested that Gerrard had not obtained credit within the meaning of the section. Mr Fischer drew no distinction between obtaining goods and obtaining money on credit, and rightly so. For an overdraft at a bank would constitute a credit transaction just as much as the purchase of mealies or other articles on credit. He distinguished this case because security was agreed to be given. The fact that the borrower undertook to pass a bond made the transaction something other than an obtaining of credit. But the fact remains that credit was obtained; the money was to be repaid in the future. When security is given the personal equation becomes less important, but it is never irrelevant. The borrower is trusted; and it would certainly affect the mind of the lender if he knew that he was asked to advance money to an unrehabilitated insolvent, even though the latter offered to find security."

The meaning of "obtains credit" (this time in section 141 (a) of the 1916 Act) was again considered by this Court in Rex v Stapelberg (1935 AD 1). The insolvent had purchased two cows for prices in excess of the statutory amount (which was then £10), and had taken delivery thereof, upon the terms that the purchase price was to be paid in instalments and that the cows were to remain the property of the seller until the whole amount was paid. The insolvent defaulted on

his payments. It was contended on appellant's behalf that the section had not been contravened because no property in the cows passed. In rejecting this argument, WESSELS, CJ, stated (at p. 3):

> "The gravamen of the charge is obtaining credit without the insolvent informing the person from whom it was obtained that he was insolvent. What is the meaning of 'obtaining credit' ? The accused obtained the cows and used them and their milk. The seller of the cows trusted him to pay him after a certain time more than £10 for the cows. That was obtaining credit. The fact that the cows were handed over with the condition that accused should pay for them in future means that the seller trusted the person to whom he gave possession and thus the latter obtained credit."

This passage from the judgment of WESSELS, CJ, was cited by SCHREINER, JA, in R v Kruger (1956 (2) SA 201 (AD), at p. 205). The learned Judge of Appeal then proceeded to remark:

> "The Court had been referred to two English cases, R v Peters, 16 C.C.C. 36, and R v Juby, 16 C.C.C. 160, where a similar provision had been considered. From those cases and from Stapelberg's case itself it appears that, in cases falling under sections prohibiting an unrehabilitated insolvent from obtaining credit

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> from persons ignorant of his status, the court is less concerned with the terms of the contract between the parties than with the fact that the insolvent is entrusted by the other party with his property when the latter would presumably not have parted with possession had he known of the insolvency."

The significance of the fact that the insolvent is entrusted by the other party with the latter's property for a substantial period of time before he (the insolvent) is required to pay for them, when determining whether the insolvent has obtained credit, was emphasized by COLERIDGE, CJ, in The Queen v Peters ((1886) 16 Q.B.D. 636), one of the English cases mentioned by SCHREINER, JA, above. It dealt with section 31 of the Bankruptcy Act of 1883. In his judgment COLERIDGE, CJ, referred, inter alia, to dictionary meanings of the word "credit" and particularly to Webster's definition thereof as "trust, the transfer of goods in confidence of future payment". To this might be added the following meaning of "credit" given (under paragraph 9) in the Oxford Dictionary:

"Trust/....

> "Trust or confidence in a buyer's ability and intention to pay at some future time, exhibited by entrusting him with goods, etc. without present payment."

(See also Rex v Fourie 1946 CPD 833, where The Queen v Peters, supra, is relied upon). Most of these cases were referred to in R v Jacobson (1960 (2) SA 437 (T)), in which it was held that an insolvent who took goods on appro. for a week, the arrangement being that at the end of the week he should return them or pay for them, obtained credit within the meaning of section 137(a). KUPER, J, delivering the judgment of the Court stated (at p. 441) -

> "The appellant was entrusted with possession of the goods for one week and for the reasons I have already given it seems to me to follow from Stapelberg's case and Kruger's case that the appellant received credit at the date he took possession of the goods."

The case of The Queen v Peters (supra) was also referred to in a decision of the High Court of Australia (Herbert v The King (1941) 64 CLR 461), which concerned a provision in the Australian Bankruptcy Act 1924-1933 relating to the obtaining of credit by an insolvent by means of fraud. The argument was raised that the section

did not apply to a loan of money but was confined to debts incurred in respect of goods sold or services rendered. The argument was rejected by the Court. McTIERNAN, J, stated in the course of his judgment (at p. 467):

> "In commercial and financial affairs the word 'credit' may signify the financial arrangement in a transaction or the reputation for solvency and honesty which entitles a person desirous of incurring a debt or liability to do so on the terms that payment is to be deferred. In its former meaning it includes the delivery of goods or the advancing of money with the trust that the debtor will have the means to pay and will pay at a future date."

And WILLIAMS, J, remarked (at p. 468):

> "..... it appears to me that the real question for the prospective creditor to decide is whether or not he can trust the intending debtor to satisfy the debt or liability on its due date. Such a debt or liability could be incurred just as easily as a result of a loan as it could be in respect of goods sold and delivered or services rendered. Indeed, the contract of service resembles a loan in this respect, because it usually involves the giving of some credit, as services are almost universally rendered before they are paid for, whereas in the case of a sale of goods the delivery and payment, are often simultaneous."

In accordance with this general approach it has been held that a person also "obtains credit" where he orders a meal in a restaurant on the understanding that he will pay after consuming the food (see R v Jones (1898) 1 QB 119; see also Fisher v Raven 1964 AC 210, 232); or hires a furnished house or room upon the terms that he will in future pay a monthly or weekly rental (R v Smith (1915) 11 CAR 81; R v Hartley, supra).

Having regard to these various decisions, I am of the opinion that, in general, an insolvent "obtains credit", within the meaning of these words in section 137(a) of the Insolvency Act, where he enters into a transaction with another person in terms whereof such other person entrusts the insolvent with his property upon an undertaking by the insolvent to pay or (in the case of a loan) repay a sum of money at some time substantially in the future. The concept underlying the section is that the other person would presumably not have parted with his property on those terms had he known of the insolvency. This is not intended to be a closely

defined or an exhaustive statement of the position. There may be other cases of obtaining credit which would not fall within its terms; but it is a sufficient statement for the purposes of this case. Moreover, it is not necessary, in this instance, to define the limits of substantiality or to consider whether the deferment of obligations on the part of the insolvent other than the payment of money, e.g., for the performance of services or the delivery of goods, could also constitute an obtaining of credit.

I now return to the argument of appellant's counsel. I shall assume in appellant's favour that the contract in question was indivisible and was a locatio conductio operis, and not a sale. In my view, however, the argument fails in that what I have termed the "common law test" is not an appropriate or correct one for determining whether an insolvent obtains credit under section 137 (a). A moment's reflection shows that it comes into conflict with many of the decisions which have been referred to above. There is no

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doubt, for example, that an insolvent who borrows money, whatever the terms as to repayment may be, obtains credit. A loan is repayable either on the date fixed by the contract or, in the absence of such a term, on demand after the lapse of a reasonable time. In so far as it might be contended that the latter was the "due date" at common law, it is clear that even in such a case credit would be obtained and a comparison between that "due date" and any "due date" fixed by the terms of the contract of loan could not provide a test as to whether credit had been obtained or not. In fact credit would be obtained the moment the money was advanced and dates of repayment would be irrelevant. A similar situation arises, for example, in the case of the hire of accommodation or property. In the absence of a special contractual term the rental is payable at the end of the lease period. If that be regarded as the "due date" at common law, the test breaks down again for, on the authorities, credit would be obtained even if the rental were payable on this "due date". For these reasons I cannot accept the common law test and the argument which appellant's counsel sought to found upon it.

Applying/....

Applying what I consider to be the true meaning of the words "obtains credit" - as stated above - to the facts of this case, I am of the opinion that appellant did obtain credit from the complainant under the contract (exhibit "A"). The complainant parted with his property, in the form of the items of furniture and joinery to be supplied and fitted by him. The complainant parted therewith and entrusted it to the appellant upon the appellant's undertaking to pay therefor at some time substantially in the future. In addition, and also in consideration of future payment, he furnished his services in the fitting of the items; and, once fitted, they would no doubt in many instances, e.g., in the case of doors, skirtings and pelmets, have adhered to and become part of the house into which they were built. It is true that, in the absence of the special terms as to payment contained in the contract, the full contract price might only have been payable on completion of all the work but this, as I have indicated, is not the true test. Nor does the fact that two payments of R700 each

actually anticipated the date of completion assist the appellant because it is clear that those amounts would only have been payable some substantial time after the supply and fitting of the items to which they appear to relate.

For these reasons I am of the opinion that the appellant did obtain credit in excess of R20 and that, therefore, he was correctly convicted of a contravention of section 137(a) of the Insolvency Act.

I come now to the question of sentence. In the Court below it was held that the magistrate had misdirected himself on the question of sentence and that, therefore, the Court was free to reconsider the matter and impose sentence afresh. This it proceeded to do. In this Court appellant's counsel was not able to point to any misdirection by the Court a quo but submitted that the sentence of six months imprisonment, with three suspended, which that Court imposed, was disturbingly or startlingly inappropriate.

At the time of his conviction the appellant was

37 years of age. He had one previous conviction. On 28 April 1967 he was convicted on two counts of dealing in unwrought gold, the value of the gold being R23,44 and R933,94, and was sentenced to a fine of R50 (or 25 days' imprisonment) on the first count and a fine of R500 (or 250 days' imprisonment) and 1 year's imprisonment, suspended on conditions, on the second count. In evidence appellant admitted that he was aware of the fact that, as an insolvent, he ought to inform his creditors before incurring debts. It is true that there is no evidence to indicate that he received any direct benefit from the contract. The items fitted by the complainant in terms of the contract enured to the benefit of the owner of the house, P.G. Clifford. On the other hand, the appellant occupied the house as a tenant from some time in 1970 and was still living there at the date of the trial. It was also submitted in argument that the complainant suffered no real prejudice in that P.G. Clifford, who in reality was the person for whom the contract was performed and who paid

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the R1 100, was in a financial position to pay. While there is some force in this point, it must be remembered that the person with whom the complainant contracted - and, therefore, the only person against whom he would be able to enforce a contractual claim - was the appellant, an insolvent. And, in my view, it is not a complete answer to say that he might have had some claim based on enrichment against P.G. Clifford. In fact, when the complainant did seek to enforce his claim by legal action against the appellant, the latter filed pleadings defending the case on various grounds on the basis that he was the true contracting party and, incidentally, not revealing that he was insolvent. In fact, it was only after execution had been levied and the complainant had fruitlessly incurred legal costs amounting to R800 that this latter fact became revealed to him.

Some measure of how seriously the law-giver regards a contravention of section 137(a) is provided by the fact that no provision is made for a fine and that a

sentence of imprisonment of up to a year is the penalty laid down. Taking this into account, together with all the salient features of the case - the person of the appellant, his previous conviction for an offence involving dishonesty, the amount of credit obtained and his conduct in relation to this transaction generally - I am unable to say that the sentence imposed by the Court a quo is startlingly inappropriate.

Finally, I should mention that appellant failed timeously to serve and file the record in this matter, in accordance with the Rules. Application was made for condonation. This was not opposed by the State. Having regard to the facts revealed in the application for condonation, the attitude of the State and the points raised by the appeal, it seems to me that this is a proper case for condonation and accordingly the matter has been dealt with as on appeal.

The appeal against both conviction and sentence is dismissed.

WESSELS, J.A.)
HOFMEYR, J.A.) Concur.

M.M. CORBETT