

CASES DECIDED

IN THE

TRANSVAAL PROVINCIAL DIVISION.

S.A. LAW REPORTS (1915).

T.P.D. PART IV.

HILSE v. STANDARD TRADING CO., LTD.

1915. October 6. WESSELS and CURLEWIS, JJ.

Public Welfare and Moratorium Act, 1914, sec. 5.—Debtor solvent.—Inability to pay owing to war.—Explanation.—Discretion.—Conduct of debtor.

In order to obtain the benefit of sec. 5 of the Public Welfare and Moratorium Act, 1914, a debtor must satisfy the Court as to the manner in which the war is directly or indirectly the cause of his inability to pay his liabilities. In exercising its discretion under the section the Court is entitled to take into consideration the conduct of the debtor towards his creditors.

Appeal against a judgment by the A.R.M., Klerksdorp.

On being sued in the Court below for the amount of certain promissory notes and the price of goods sold and delivered the defendant sought to rely on the provisions of sec. 5 (1) of the Moratorium Act (1 of 1914, Special Session). The liability of the defendant incurred before the 4th August, 1914, was admitted.

The magistrate found that the defendant was solvent, but he held that the defendant had not proved that his inability to pay was directly or indirectly due to the war. He therefore gave judgment for the plaintiff. The defendant appealed.

The further facts appear from the judgment.

I. Grindley-Ferris, for the appellant: Although the *onus* of showing that the war is the direct or indirect cause of the appeal

lant's inability to pay his debts is on the appellant, he has discharged that *onus*. The appellant's evidence is to the effect that it is due to the war that he cannot pay his debts. That general evidence not being contradicted is sufficient. See *Jacobsohn v. Van der Westhuizen* (1915, C.P.D. 194).

C. E. Barry, for the respondent, was not called upon.

WESSELS, J.: The appellant, defendant in the Court below, was sued in the magistrate's court at Klerksdorp for a certain amount due by him to the respondent. He admitted the debt, but claimed that under the Moratorium Act, 1 of 1914 (Special Session), he was entitled to an extension of time in which to pay. He said that he had kept a hotel and bottle-store at Haartebeestfontein, and also had a postal contract between Klerksdorp and Korannafontein, but owing to the war his takings had become less than they were before, and his failure to pay was due to a deficiency from this source. The question is whether under these circumstances the defendant is entitled to demand an extension of time under sec. 5 of the Moratorium Act. That section says that during the existence of the present state of war, if a defendant in any suit proves to the satisfaction of the Court that he is solvent, but that as a result, direct or indirect, of the state of war he is unable to fulfil his obligations, the Court may in its discretion either grant an extension of time or make such other order as it thinks fit. Now a discretion of this kind is a judicial discretion; but the Court will be very loth to interfere with the discretion of the magistrate exercised under this Act, unless it were satisfied that the magistrate had completely erred in exercising his discretion. It is not enough for the debtor to say: "I am not able to pay my debts because my business has been indirectly affected by the war." As the magistrate points out in his judgment, if we were to allow a statement of that kind to weigh with us, every debtor in this country would be able to set up that plea, for there is very little doubt that, in an indirect though remote way, every person's business is bound to be affected by the fact that nearly the whole of Europe is involved in war. But the legislature did not mean that the Court was to take into consideration every remote contingency by which the position of the debtor may have been affected. What the legislature meant was that if a defendant could show that his inability to pay is owing to the war, either directly, because his whole business was with a country like Germany, which is now cut off from him through being

involved in war, and from which he formerly got all his credit, or indirectly because his particular line of business has been so hampered and cut into by the war that he cannot carry it on at a profit, the Court in its discretion can grant him an extension of time. But it is not enough for the defendant to say that his takings from the postal contract between Klerksdorp and Korannafontein have been less since there has been war in Europe than they were before, and that is why he is entitled to the consideration of the Court. The Court wishes to know how is the post between Klerksdorp and Korannafontein affected by the war; in what respect do persons travel less between Klerksdorp and Korannafontein now that there is a war in Europe than they did before? As far as the hotel business is concerned, the defendant does not suggest that the war has affected the consumption of liquor at Korannafontein, or the number of passengers who pass through that place. In these circumstances, the magistrate was perfectly justified in using his discretion as he did and in saying that this debtor had no right to claim the benefits of the Moratorium Act. But I go further. In exercising his discretion the magistrate was quite entitled to take into consideration the particular actions of the debtor, and to judge for himself whether he is a person who ought to be granted relief on account of the fact that he is involved in unfortunate circumstances. This particular debtor has shown so clearly that he has no consideration for his creditors whatsoever that the magistrate did very well not to extend the benefit of the Moratorium Act to him. The appeal must be dismissed with costs.

CURLEWIS, J.: I think the magistrate acted very wisely in refusing the appellant the benefit of the Moratorium Act. Quite apart from the fact that he has not shown how the existence of the present war has prevented him from meeting his liabilities and paying his way, it is clear from his own evidence that in March last he was being sued by certain creditors. He called a meeting of his creditors in April, and then said that if he got an extension he would be able to meet his obligations. They gave him five months' extension. He produced a statement of assets and liabilities showing that his assets exceeded his liabilities by something over £1,000. When he was sued by the respondent, and was questioned as to what had become of his assets, he admitted that he had parted with them. He says, in his evidence: "My creditors gave me time for five months, and the money collected in the mean-

time had to be paid into a trust account in the office (of Neser)." He also says: "I did not agree not to dispose of my assets." It clearly was the understanding that if he did dispose of his assets the money was to be paid into a trust account for the benefit of his creditors. What took place? In his statement of assets and liabilities he brought up "Lease for five years of the Transvaal Hotel, Hartebeestfontein, with general retail and bottle-store licence, £200." When asked about this, he said: "I have nothing to show for the £200 brought up in the list of assets." Subsequently it appeared from his evidence that he has transferred the licence free of charge. Then he brought up furniture to the value of £300. When questioned about this, he said: "I brought up an amount of £300 for furniture in my statement of assets to my creditors. A portion of that furniture belonged to Summers, and was sent back to him, but what the value of that furniture is I do not know." So, quite regardless of the interests of his creditors, he first deceives them by bringing up as an asset furniture worth £300, whereas all along, he now admits, portion of it belonged to Summers, and he has sent it back to him; and very callously, he says: "I do not know what the value of that furniture is." He also brought up £100 stock. Cross-examined he says: "I have nothing to show for the £100 stock shown in my assets list." He also brought up sixteen head of cattle, valued at £128. Questioned with regard to this, he said: "Of the sixteen head of cattle brought up in list marked 'B,' I have only three cows and calves left. The others I sold. The proceeds were not paid into Mr. Neser's office." So that he has disposed of hundreds of pounds worth of assets during the time his creditors were good enough to give him an extension of five months. He has not accounted for these assets in the manner he should have done—that is, paid over the money to a trust account in Mr. Neser's office; and, moreover, he is doing nothing at present for a living. He has given up his hotel and bottle-store business; he has given up the postal contract between Klerksdorp and Korannafontein, and the result of giving him the benefit of the Moratorium Act would be that he would go on living on his assets (for he is earning nothing), to the detriment of his creditors. Moreover, the few assets he has left—his horses, mules and cows—have, during the last few days, according to the evidence, been attached under two judgments obtained against him by other creditors. If we granted this application, the result would be that these assets would be sold in execution, and those creditors would

be preferred above the present creditor. It seems to me a clear case in which the debtor is not entitled to the benefit of the Moratorium Act.

Appellant's Attorneys: *Reitz & Pienaar*; Respondents' Attorneys: *Neser & Hopley*.

GAFOOR v. RAJACK.

1915. October 6. WESSELS and CURLEWIS, JJ.

Landlord and tenant.—Ejectment.—Action for recovery of rent.—No property found.—Proclamation 21 of 1902, sec. 25.

In an action for recovery of rent and for ejectment under sec. 25 of the Magistrate's Court Proclamation the summons alleged that the defendant had no property on the premises let or elsewhere against which execution could be levied. The only evidence led was to the effect that the defendant had no property on the premises. Held, on appeal, that in the absence of proof that the defendant had no property on the premises or elsewhere the magistrate could not grant an order for ejectment under the section.

Appeal from a decision of the A.R.M., Johannesburg.
The appellant sued the respondent for rent due in respect of certain premises, and the summons contained the allegation that "the defendant has no property or goods on the premises let nor has he any other property or goods within the knowledge of the plaintiff from which, by execution, could be obtained payment of the rent due and the costs of execution." The summons claimed an order of ejectment under sec. 25 of the Magistrate's Court Proclamation. The defendant was in default.

The only evidence before the Court was that of the plaintiff, who said: "Defendant has no property or goods on the premises."

The magistrate refused an order for ejectment on the ground that the evidence of the plaintiff was not sufficient to comply with the provisions of sec. 25 of the Proclamation. The plaintiff appealed.

A. Davis, for the appellant: The object of sec. 25 of the Magistrate's Court Proclamation is to obviate the necessity of a further appearance in Court in terms of sec. 23 of the Proclamation. The summons alleges that the defendant has no property anywhere, and