IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO. CACLB-129-11
HIGH COURT CIVIL CASE NO. MAHLB-000818-10

In the matter between:

CHRISTOPHER JOHN BRAY N.O. **APPELLANT**

and

BOTSWANA POWER CORPORATION **RESPONDENT**

Adv. S. Vivian (with Mr J. Bookbinder) for the Appellant
Adv. C.J. McAslin (with Mr S.A. Ziga and Mr M.J. Tafa) for the Respondent

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J U D G M E N T

CORAM: KIRBY J.P.
McNALLY J.A.
FOXCROFT J.A.

KIRBY J.P.

1. This appeal concerns the interpretation of section 433 of the Companies Act Cap 42.01, and Bye-law 7(4) of the Botswana Power Corporation (Electricity) Bye-laws S.I. 123/1979, promulgated under section 28 of the Botswana Power Corporation Act Cap 74:01.

2. It arises from a claim for arrear electricity charges amounting to P2,724,303-86 raised by the Botswana Power Corporation (the respondent) against the liiquidator (in his official capacity) of the insolvent

estates of two companies in liquidation, Ramotswa Steel and Iron Company (Pty) Ltd, and Tswana Steel and Iron Company (Pty) Ltd, who may be considered as a single entity for present purposes. Although the bill was run up in relation to a number of properties, this too may be considered as a single bill for purposes of argument. The appellant is the Liquidator.

3. In the Court below the appellant sought a declaration in terms of section 425(1) of the Companies Act that the respondent is a concurrent creditor and not a preferent creditor of the companies in liquidation, and a direction that the Liquidation and Distribution Account be finalized on that basis.

4. The application was opposed, and the parties agreed to proceed by way of a stated case in terms of Order 35 of the High Court Rules. By Rule 1(3) of that Order the facts and documents referred to in the stated case and no others are to be considered by the Court in reaching its decision. It was for that reason that an application by the appellant to add to the mix evidence of the transfer of a property which occurred subsequent to the stating of the case was refused at the outset of the appeal.

THE STATED CASE

5. The facts upon which Makwade J. was asked to rule in the Court below, stated briefly, were as follows, using the language of the stated case itself:

(1) The insolvent companies were placed in liquidation on 31st August 2009.

(2) At that date they owed the respondent P2,724,303-86 flowing from contracts for the supply of electricity.

(3) During the course of winding up the companies, the appellant concluded an agreement with Easely Enterprises (Pty) Ltd ("Easely") for the sale of their assets, including the leases of the properties on which their business had been conducted and to which the respondent had supplied electricity.

(4) The transfer of the properties was approved by the Malete Land Board.

(5) In terms of the Sale Agreement Easely was permitted to rehabilitate the plant on the properties prior to commencing production, and it required electricity to do so.

(6) Easely contracted with the respondent to supply electricity to the properties on condition that security was provided by Easely for payment of the companies' arrears, pending determination by the Courts of the status of the respondent's claim.

(7) The respondent provided a power connection to Easely, but disconnected this when the security was not forthcoming.

(8) The respondent claims that it is a preferent creditor, entitled to refuse an electricity connection to the appellant or any prospective purchaser, in terms of section 433 of the Companies Act and Bye-law 7(4) of the Bye-Laws, until its claim has been met in full.

(9) The respondent reconnected the electricity to the properties after the Liquidator (the appellant) transferred the full sum of P2,724,909 as security, to be held in escrow by Minchin and Kelly, attorneys, pending determination by the Court of the respondent's creditor status.

6. The documents annexed for consideration were the liquidation order, the sale agreement (assets to Easely), the Malete Land Board approval, and a letter from the appellant to the respondent through its attorneys, requesting reconnection of Easely's power supply and confirming that he (the liquidator) would provide the required cash security. No copies of the applications submitted, or of the supply contracts between the respondent and Easely were supplied, so the conditions of these remain unknown, as do the persons who made the applications. There was no background material supplied either, to assist the Court in interpreting the clauses of the Companies Act and of the Bye-Laws, under debate.

7. The Sale Agreement does reveal, however, that Easely was only prepared to purchase the assets on condition that the appellant guaranteed it a supply of electricity from the respondent, and took responsibility for settling any controversy over the unpaid accounts. The warranty, which was expressed as being so material as to have induced Easely to enter into the contract, was couched as follows:

> *"The seller warrants …. that (it) will ensure that there are no hindrances for the supply of electricity by the Botswana Power Corporation to the purchaser by the payment date, and the case*

> *between the Botswana Power Corporation and the Liquidator will have no bearing whatsoever on the buyer, and any repercussions by the Botswana Power Corporation, due to unpaid accounts will be solved solely by the seller."*

8. The letter from the Malete Land Board revealed that although the transfer had been approved by the Board, the existing "Title Deed" (lease) would have to be cancelled, and a new agreement would need to be entered into by Easely. As Easely was not a citizen company, the Minister's consent would be required.

9. The letter to Armstrongs, the respondent's attorneys, is dated 14th October 2010 well after the contractual payment date for the assets, which was 31st July 2010, and contains a proposal that a Banker's undertaking be given pending transfer of the properties, after which the Bank would pay the cash amount of the arrear electricity charges into an escrow account. It continued as follows:

> *"This arrangement would enable the buyer to rehabilitate the plants and make other preparations for the start of production. <u>It is our request that BPC should reconnect power to the new company</u> provided it has met the requirements for BPC as we believe that your client's interests are protected in our view this will enable the transaction to proceed."* (my emphasis)

10. The stated case then set out the arguments of each of the parties, before asking the Court to determine two questions:

(a) "Whether the respondent is a preferred creditor of the insolvent estate of the companies in terms of the provisions of section 7(4) of the Bye-Laws read with section 433 of the Companies Act.

(b) Whether the respondent is entitled to invoke section 7(4) of the Bye-Laws and refuse to connect electricity to the premises of the applicant [now the appellant] until its claim is satisfied."

11. The appellant has attempted both in its Heads of Argument and in the application referred to at the outset of this judgment, to in effect alter the questions after the event by the replacement of the words "the applicant" in Question (b) with the words "Easely Enterprises". That is not permissible. Makhwade J. was asked to rule on specific questions, and this appeal is against his answer to those questions.

12. The learned Judge a quo held that:

(a) Section 433 of the Companies Act applied to essential services including electricity. If the liquidator applied for such services, which he was not obliged to do, he then had to pay for past services too, and the costs incurred in doing so would be "a cost in the winding up" in terms of section 433(4). The full amount paid then became a preferred claim.

(b) In the present case it was Easely and not the Liquidator who applied for reconnection of the supply. The question of preference did not arise, so that the respondent's claim for arrears remained a concurrent claim with other creditors of the insolvent estate.

(c) Bye-Law 7 did not deal with the order of preference in claims against liquidated companies. It differentiated between a supply to an installation, and a supply to the owner of the property.

(d) While the respondent could not claim payment from a subsequent purchaser, the bye-law placed an onus upon an owner who passes title to ensure, for the benefit of the purchaser, that the debts due to the corporation are cleared.

(e) The respondent is entitled to refuse a supply of electricity through an installation to any person (including a new owner) until past debts are cleared.

13. Makhwade J. accordingly answered the questions as follows:

- first, the respondent is not a preferred creditor in terms of Bye-Law 7(4) as read with section 433 of the Companies Act;

- second, the respondent is entitled to invoke the provisions of Bye-Law 7(4) and refuse connection until its claim is satisfied.

14. The appellant, being dissatisfied with the answer on the second question, appeals against that answer. The respondent is also dissatisfied, in its case with the answer to the first question, and it cross-appeals against that answer. Those are the two appeals before us.

<u>SECTION 433 OF THE COMPANIES ACT</u>

15. When the new Companies Act, No. 32 of 2003, which was brought into force on 3rd July 2007, was promulgated, it introduced section 433 as a new provision. The previous Act had no equivalent. Section 433 appears alongside the marginal note "<u>Refusal to supply essential services prohibited</u>" and provides as follows, insofar as it is relevant to these proceedings:

"433(1) For the purposes of this section, an 'essential service' means –

(a) The retail supply of electricity.

(b) ____
} (immaterial)
(c) ____

(2) (immaterial)

(3) Notwithstanding the provisions of any other act or contract, a supplier of an essential service may –

(a) refuse to supply the service to a liquidator, or to a company in liquidation, by reason of the company's default in paying charges due for the service in relation to a period before the commencement of the liquidation,

(b) make it a condition of the supply of the service to a liquidator, or to a company in liquidation, that payment be made of outstanding charges due for the service in relation to a period before the commencement of the liquidation, or,

(c) make it a condition of the supply of the service to a company in liquidation that the liquidator personally guarantees payment of the charges that would be incurred for the supply of the service.

(4) The charges incurred by a liquidator for the supply of an essential service are a cost in the winding up for the purposes of section 460."

16. There are two curious feature of section 433. First, the marginal note appears to be to the opposite effect. It states that refusal to supply essential services is prohibited, yet the section proceeds to authorize such

a refusal in specific terms. Second, as counsel has pointed out, the section repeats, virtually verbatim, section 275 of the New Zealand Companies Act 105/1993. The only difference is that in our Act, section 433(3) provides at the outset that "*a supplier of an essential service may* __" In the New Zealand Act, where the wording of the subsections is otherwise identical, subsection (3) commences with the words "*Notwithstanding the provisions of any other Act or contract, a supplier of an essential service must not* __."

17. It is precisely to the opposite effect. It is unusual that a legal draftsperson would replicate a precedent section for the purposes of conveying a principle which is to the opposite effect.

18. It would be easy to conclude that there was an error in drafting, by omission of the word "not" after the word "may" in subsection 3(1), but for a number of factors. First, in terms of section 9 of the Interpretation Act Cap 01:04 (unlike section 7 which refers to Titles and Preambles) marginal notes placed at the side of any provision are intended for convenience of reference only and do not form part of the enactment. Second, I have checked the original Government Gazette where the Act was published, and the section is no different, and thirdly, the section has

remained unamended for over nine years since its publication, either by Parliament or by the Law Revision Commissioner.

19. The section must accordingly be interpreted as it appears, namely as a provision to ensure that the suppliers of essential services are not, as far as is possible, prejudiced by the liquidation of companies to which they have provided these services. Its purpose is not, as was the case in New Zealand, to prevent such suppliers, who are often monopolies, from using embargo provisions in bye-laws or in supply contracts to gain the status of preferred creditors, at the expense of other creditors. See **HARDLY vs FATUPAITO & McCLOY CIV-2008-8585 AUCKLAND REGISTRY** (embargo provisions authorize the refusal of new supplies of services to premises which have changed hands until old debt has been discharged, such as a provision preventing the transfer of land until arrear rates have been paid).

20. There is no history in Botswana, as far as we are aware, of suppliers of essential services abusing their position to obtain unfair advantages over other creditors in liquidations, so as to necessitate such a change. Rather, the suppliers of essential services perform a vital public function, and it is not surprising that they should be singled out for special protection on the insolvency of their clients, as has been done in section 433.

21. In terms of section 460(1) of the Companies Act,

> *"In every winding up of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding up and of the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvent estates, and the provisions of the said law relating to contributions from creditors shall apply."* (my emphasis)

22. This refers to the Insolvency Act Cap 42:04, and also to the common law, in matters not covered by that Act. Preferent claims covered under the Insolvency Act are set out in sections 82 to 86 and include funeral expenses, costs of sequestration, costs of execution, servant's wages and taxes on income. They do not include claims based on executory contracts, such as those for the supply of services, which are normally dealt with on common law principles. These are well-stated by VIVIER J.A. in **NEDCOR INVESTMENT BANK vs PRETORIA BELGRAVE HOTEL (PTY) LTD 2003 (5) SA 189 at 192** as follows:

> "*The legal principles applicable to the effect of insolvency on executory contracts such as the present, that is those in which one or the other, or all the obligations undertaken remain unfulfilled, are clear and appear from decisions such as Bryant & Flanagan (Pty) Ltd v Muller and Another NNO 1977 (1) SA 800 (N) at 804F – 805G, which was confirmed on appeal in Bryant & Flanagan (Pty) Ltd v Muller and Another NNO 1978 (2) SA 807 (A), and Du Plessis and Another NNO v Rolfes Ltd 1997 (2) SA 354 (A). A trustee in insolvency, and thus a liquidator of a company in liquidation, is invested with a discretion whether to abide by or terminate an executory contract not specifically provided for in the Insolvency Act which had been concluded by the company in liquidation before its liquidation. Such an agreement does not terminate automatically on the company being placed in liquidation. The liquidator must make his election within a reasonable time. Should*

> *he elect to abide by the agreement the liquidator steps into the shoes of the company in liquidation and is obliged to the other party to the agreement to whatever counter-prestation is required of the company in terms of the agreement. Once the liquidator has accepted the benefits of the contract, he cannot limit the other party to a concurrent claim against the free residue of the estate for anything reciprocally due to it. <u>The other party's claim then lies against the trustee who must meet it as an expense incurred in the estate's administration</u> since his decision to abide by the contract is reached for the purpose of his administration of the estate*." (my emphasis)

23. The new section 433 singles out contracts for the supply of essential services for specific treatment. It does not apply to other contracts, whether executory or not. So to ascertain the mischief the section was intended to cure, or the benefit it was intended to confer, regard must be had to the differences now contained in the section, as compared to the common law position, because there is a presumption that in enacting new laws the legislature intends no displacement of the common law or of the existing law unless the new provisions make that intention plain. See **MEDICAL RESCUE INTERNATIONAL vs THE ATTORNEY GENERAL (2006) 1 BLR 516 at 522-3 CA** (full bench).

24. It seems to me that section 433 does far more than to reproduce in the case of suppliers of essential services, the common law rules relating to executory contracts. When faced with a request by the liquidator of a company to supply say, electricity, the supplier of the essential service has three options,

- It may (by s.433(3)(a)), refuse to supply, because of historic default by the company; or

- It may (by s.433(3)(b)) make it a condition of such supply, that historic debts are settled; or

- It may (by s.433(3)(c)) insist on a personal guarantee of payment by the liquidator before supplying the service.

25. The first two options do not apply only to executory contracts on which payments remain owing. They may equally apply to debt still owed on supply contracts which have been previously cancelled for non-payment. The reference is to a period, not the period, prior to liquidation. So, to that extent, the rights of suppliers of essential services have been enhanced over what was available in terms of the common law. Since the liquidator has an election whether or not to incur the cost of settling historic debt as the price for a present supply, any payments he chooses to make are "charges incurred for the supply of an essential service" and are thus a cost in the winding up in terms of section 433(4) as read with section 460 of the Act. They are accordingly to be paid in preference to other creditors. Makhwade J. was correct to hold as he did, that

> *"The amount paid by the liquidator both for supply before and during the liquidation, would then be a cost in the winding up for the purposes of section 460."*

26. In exercising his discretion, the liquidator will act in the best interests of the general body of the creditors, as is his fiduciary duty. It may, for example, be in the best interests of the creditors to keep a going concern

operative, which requires electricity, or a guaranteed supply of electric power may be necessary, as in this case, to render a fixed plant saleable. Easely was prepared to pay P10 million for the assets, but only if the liquidator could warrant that there would be no problems with the supply of power. This he could only do by promising (albeit conditionally on a court decision) that historic debt owed to the respondent would be paid, and by putting up cash security for this.

27. Secondly, unlike under the common law relating to executory contracts, a supply either to the liquidator, or to the company in liquidation, qualifies to be made subject to payment of historic debt due by the company in liquidation. In the case of an executory contract under the common law, it is only the company in liquidation (represented by the liquidator) which has the option of abiding by or repudiating its ongoing contracts. Under section 433(3)(a) and (b) it is also the liquidator, in a different capacity, who has that option. Since he will obviously not require the supply for himself personally, it must perforce be for the benefit of some third party, for whom he must act, because only he has power over the premises and plant of the liquidated company. Examples of such third party might be an independent contractor hired to keep a business or plant well maintained and operating to keep it saleable, in a long-running

liquidation; or it might be, as here, to secure a supply to a purchaser or prospective purchaser of assets sold during the course of a liquidation.

28. I do not agree with counsel for the appellant that the words "supply of the service to a liquidator" must be taken too literally. That would not make good sense. He does not seek the electricity personally. The supply of the service "to the liquidator" is used here in the sense of "on the application of the liquidator" or "at the request of the liquidator." In terms of certain of the bye-laws, it is only the liquidator, qua owner, who can apply for the service while the liquidation is proceeding (e.g. applying for reinstatement of a connection in terms of bye-law 7(1)). When the liquidator makes such an application at the request of or for the benefit of a prospective purchaser the service will be provided "to" the liquidator, but "for" the purchaser. The use of such wording is not new. So, for example, in **WOYCIEH vs TABANKULU VILLAGE MANAGEMENT BOARD 1935 EDL 86**, it was held, in relation to water, that "supplied" meant "provided" or "supplied" to a person whether it is he that uses it or not. See also in relation to electricity supplies **VIRGINIA LAND AND ESTATE CO. LTD vs VIRGINIA VILLAGE BOARD OF MANAGEMENT 1961(1) SA 167(O) at 171** where De Villiers J. held that "electricity is supplied when it has been made available." There are many instances in the criminal law as well, where the expression "supply to" has been

interpreted in a similar way. So drugs or alcohol may be supplied "to" one person, but for use by another person. See for example **S vs WOLTERS 1963(4) SA 142(N)**; **STATE vs MNGADI 1965(1) SA 130(N)**.

29. It follows that Makhwade J. erred when he found against the respondent on the first question, on the sole ground that

> *"on the factual circumstances of the case, the liquidator did not apply for the service. The service was applied for by the purchaser."*

30. He reached that conclusion because of the averment in the stated case that "Easely Enterprises entered into a contract with the respondent for the supply of electricity to the properties." Such a conclusion is certainly not a necessary one. Far more probable is the conclusion that it is the liquidator who applied for a connection to his prospective purchaser, since he was still the registered owner (for the insolvent estate) of the properties, and by Bye-law 7(1) it is only the owner who can apply for an electrical connection. This is borne out, too, by the exhibited letter, in which the liquidator specifically states in writing under his own signature, to the respondent's attorneys, that "It is our request that the BPC should reconnect power to the new company." I hold that in the sense described above, an electricity service was supplied to the liquidator on the condition set out in section 344(3)(b), namely that the historic debt should be paid as part of the costs of winding up .

31. The cross-appeal therefore succeeds to the extent that the Judge *a quo*'s answer to the first question is to be set aside, and replaced by an affirmative reply, so that the respondent is a preferred creditor in terms of section 433 for the whole sum of P2,724,303-86. This section need not, in my judgment be read with Bye-Law 7(4), which I will deal with separately.

<u>BYE-LAW 7(4)</u>

32. The second question to be answered by Makhwade J. on the case stated was

> *"whether the respondent is entitled to invoke Bye-law 7(4) and refuse to connect electricity to the premises of the applicant (now the appellant) until its claim is satisfied."*

This question was answered in the affirmative, and it is against that finding that the appellant appeals.

33. The Botswana Power Corporation is a statutory body established under its own Act of Parliament, being Cap 74:01 of the Laws of Botswana. Its function is stated in section 13(1) as being

> *"the generation, transmission, supply and distribution of electricity in areas approved by the Minister in terms of legislation relating to the supply of electricity."*

34. In terms of the retail supply of electricity to the general public, the Corporation at present enjoys a virtual monopoly in Botswana. The importance of the supply of this essential service is recognized in section 16, which gives the Minister the power to give the Corporation such general or special instructions as to the performance of this function as are necessary as a matter of public policy. It is also required by section 17 to conduct its affairs on sound commercial lines.

35. As the public authority responsible for the supply of power, the Corporation has a general duty to supply power to members of the public who need this insofar as its resources permit, and on commercially sensible terms. It is in this context that its Bye-laws, promulgated by Statutory Instrument 130 of 1975 under powers conferred by section 28 of the Act, must be applied and construed.

36. The Bye-laws set out the detailed conditions in terms of which electricity will be supplied to the public. In brief, an electrical service connection to fixed premises is to be made by the Corporation on the application of the owner of the premises (Bye-Law 7(1)). "Owner" is defined in Bye-law 2, and

> *"includes the registered owner of the land or premises, or his authorized agent, or any person receiving the rent or profits issuing therefrom or who would receive such rent or profits, if such land or*

premises were let, whether on his own account or as agent for any person entitled thereto or interested therein."

37. The service connection, however, is, by Bye-law 7(2), to be paid for by the consumer, who may be the owner or some other person, before electricity is supplied through the connection. "Consumer" is defined, also in Bye-law 2, as

> *"any person who has entered into a consumer's agreement with the Corporation for the supply to him of electricity."*

38. Bye-law 4(5) permits the Corporation to decide whether to enter into a consumer's agreement with the owner of the premises or with the occupier of the premises. It will only do so after any earlier consumer's agreement relating to the premises has been cancelled, and the new consumer will be responsible to pay for electricity consumed after the taking of a meter reading when the earlier agreement is terminated (Bye-law 5). Electricity is supplied through a meter to the consumer's installation, which is its internal reticulation downstream of the meter.

39. The Corporation protects itself against defaults in payment for electricity consumed (which is to be billed monthly in terms of Bye-law 23), by obliging the consumer to pay an advance deposit equivalent to two months consumption (Bye-law 18). If bills are not paid on due date, the supply may be discontinued or the contract may be terminated (Bye-law

23(4). Additional protection, in the event of the insolvency of the consumer, is provided by section 433 of the Companies Act, dealt with above.

40. Limited protection is also provided by Bye-law 39, which lays down that

> *"The owner and the consumer shall be jointly and severally liable for compliance with any financial obligation or other requirement imposed on them in the alternative by these bye-laws."*

41. The protection is limited because it applies only where the obligation is imposed on the owner and the consumer "in the alternative." It is only Bye-laws 10(6) and 28 which impose obligations in this way. There is thus no joint and several liability, as both counsel appeared to believe (although they now concede their error) for the payment of the price for electricity supplies or installations. So successive owners are not responsible for payment of the bills of earlier owners, nor for the bills of their tenant consumers, and nor are owners or subsequent tenants responsible for the unpaid bills of earlier tenants, as is a common misconception.

42. That, then, is the background against which Bye-law 7(4), the subject of the second question, is to be interpreted.

43. Bye-law 7 provides as follows, in sub-sections 1 – 4. The other subsections are not relevant to the appeal

> *"7(1) The owner of the premises concerned shall make application for the installation or re-instatement of a service connection in a form prescribed by the Corporation.*
>
> *(2) A service connection shall be installed at the expense of the consumer and the cost thereof as determined by the Corporation shall be paid to the Corporation before supply is provided.*
>
> *(3) Every part of the service connection shall remain the property of the Corporation.*
>
> *(4) Notwithstanding that the service connection to an approved electrical installation may already have been completed, the Corporation may, in its absolute discretion, refuse to supply electricity to that installation until all sums due to the Corporation by the owner have been paid.*
>
> *(5) ______*
> *(6) ______ (immaterial)*
> *(7) ______*
> *(8) ______"*

44. In the present case, it is clear that the insolvent companies who were also the owners previously had a consumer's agreement with the respondent, under which they were allowed to run up an unpaid bill of P2,724,307-86. That this had at some stage been cancelled is also clear for two reasons. First, that the supply had been disconnected, so that a re-instatement of the service connection had to be sought by the owner under section 7(1) of the Bye-laws; and second, that a new consumer's agreement was entered into (subject to provision of security) between the Corporation

and Easely, as the occupier and prospective owner. This could not be done unless the old agreement had been terminated.

45. Under Bye-law 7(1) it is only the owner who may apply for reinstatement of a service connection. It is not in dispute that the companies in liquidation as represented by the liquidator were at all material times the registered owners of the premises in question. Easely, as the prospective purchaser, was awaiting ministerial consent and the execution of a new Land Board Lease before it could itself become the registered owner.

46. The argument was advanced that in fact Easely could be described as the owner, in terms of the rather confusing definition of 'owner' in the Bye-laws, because under the Sale Agreement it had assumed all risk and benefit in the premises from its date of occupation for the purposes of rehabilitating the plant. That argument cannot prevail. Firstly, the question posed concedes ownership, because it makes reference to "the applicant's premises." The applicant was the liquidator, acting in his official capacity. Secondly, in the context of Botswana land tenure, the definition is easily explained. The overwhelming majority of the land in Botswana is either State Land, vesting in the State in terms of the State Land Act Cap 32:01 or Tribal Land, vesting in the Land Boards under the Tribal Land Act Cap 32:02. Tenure is conferred on individuals either by

fixed period State grants in the case of State Land, or long leases in the case of Tribal Land. So it is the latter 'owners' in the limited sense of that word, who are the persons entitled to let out the land and to receive rentals from it, when their own rights have been registered at the Deeds Registry, in the case of State Land, or even before that in the case of Tribal Land, because Tribal Long Leases are not always registered, or may take some time to be so registered. At any one time each plot of land has only one owner, being the grantee, from the State, or the current long-lessee, from the Land Board. It cannot have been the intention of the legislature that sub-lessees too, or future owners could be included, since that would result in more than one owner for the purposes of the Bye-laws.

47. Under Bye-law 7(2) it is the consumer (and not the owner, unless they are the same person) who is liable to pay for the installation. Here the consumer is Easely, in terms of the consumer's agreement it has signed.

48. Under Bye-law 7(4) the Corporation may refuse to supply electricity to the installation on the premises until "all sums due to the Corporation by the owner" have been paid, the word 'owner' being used in the same sense throughout the Bye-law. In this case that means all sums due to the Corporation by the current owner, namely the insolvent companies, and

refers to sums due for past supply of electricity and any installation or other costs which may still be outstanding from when the insolvent companies were the consumer. It will not include costs of re-instatement, because those are payable by Easely, the new consumer.

49. This means that the second question, as framed, must also be answered in the affirmative and this aligns with the answer to the first question.

50. It must, however, be stressed that there can only be one owner of the premises at a time. Once the premises are transferred to Easely, Easely will be that owner, and a supply can only be refused to the installation in terms of Easely's consumer's agreement until all sums due by <u>Easely</u> as the present owner have been paid. The respondent will then be left with its preferential claim against the Estate for the arrears of P2,724,307-86 in terms of section 433 of the Companies Act. Easely has no liability for that.

51. So while the second question as posed must be answered in the affirmative, this will be so only for so long as the property remains "the premises of the applicant." The right to refuse a supply does not extend to a new owner of the premises, because the old debt will not then be due by the owner. This is not an embargo provision in the true sense of

that expression. It does not entitle the respondent to refuse a supply to all comers until an historic debt due by old consumers is settled.

52. For the above reasons we do not agree with Makhwade J. that Bye-law 7(4) places an onus upon an owner who passes title to ensure, for the benefit of the purchaser, that the debts are cleared. He is correct, though that there is no right of action enabling the Corporation to claim payment of somebody else's old debt from a new owner. Where the premises change hands, the Corporation remains with its right of action against the consumer who incurred the debt. It can minimize its risk by timeous meter reading, prompt billing, and expeditious cancellation or disconnection for non-payment when it is still covered by its two months deposit.

53. It is also clear that Bye-law 7(4) has no effect on the right of creditors in the event of the insolvency of the owner or consumer. It does not have the effect of creating a preference. It is only under section 433 of the Companies Act that the liquidator may make old power bills preferent should he elect to apply for a service connection during the liquidation.

Accordingly:

(1) The appeal is dismissed.

(2) The cross-appeal succeeds.

(3) The order of the Court below is modified to read:

> "(1) The respondent is a preferred creditor in terms of section 433 of the Companies Act.
>
> (2) The respondent is entitled to invoke Bye-law 7(4) and to refuse to connect electricity to the premises while these are owned by the applicant until its claim against the applicant is satisfied."

(4) The costs in the Court below and the costs of appeal are to be paid by the appellant.

DELIVERED IN OPEN COURT AT LOBATSE THIS 27TH DAY OF APRIL 2012.

I.S. KIRBY
JUDGE PRESIDENT

I AGREE

N.J. McNALLY
JUDGE OF APPEAL

I AGREE

J.G. FOXCROFT
JUDGE OF APPEAL