tion with a woman trader it is inconceivable that the maintenance order *pendente lite* can give her a separate estate.

The true position, in my view, is that the *locus standi* relates only to matrimonial actions and to obtaining such a maintenance order *pendente lite* for her immediate needs and that of her children. The enforcement of that order does not lie in the field of insolvency proceedings against her husband to sequestrate the joint estate. It is for this reason that the contempt of court proceedings are available in proper circumstances.

This problem has to some extent been dealt with by VAN WYK, J., in *Weinberg* v. *Weinberg*, 1958 (2) S.A. 618 (C). I quote from p. 621:

"In terms of sec. 10 (1) of Act 37 of 1953 an innocent spouse now has a statutory right to be awarded maintenance in certain circumstances in the event of divorce, and it seems to me clear that failure to comply with an order made in terms of the aforesaid section renders a spouse liable to prosecution for contravention of sec. 110 (1) of Act 46 of 1935. See *Rex* v. *Rudy*, 1956 (1) S.A. 382 (E). There is no provision in the aforesaid sections that liability terminates upon insolvency.

My view is, accordingly, that the maintenance order referred to above is still operative and the only question is whether the respondent's failure to comply therewith constitutes contempt of Court. It seems to me that an order for the maintenance of a divorced wife under the provisions of sec. 10 (1) of Act 37 of 1953 falls in the same category as maintenance orders for a separated wife or children. These orders are in effect orders *ad factum praestandum* and failure to comply therewith renders a respondent liable to contempt proceedings. See *Carrick* v. *Williams*, 1937 W.L.D. 76; 1938 T.P.D. 147; *Manley* v. *Manley*, 1941 C.P.D. 98.

Inasmuch as the respondent has failed to comply with the Court's aforesaid order to pay the applicant £50 per month, the *onus* rests upon him to satisfy the Court on a balance of probabilities that his failure is excusable. See *O'Reilly* v. *O'Reilly*, 1941 T.P.D. 52."

The application for sequestration must fail for lack of *locus standi* on the part of the applicant as the maintenance order *pendente lite* has not created an estate separate from the joint estate of the parties.

By reason of the foregoing it is not necessary to consider the alleged advantage to creditors.

In the result the application for sequestration is refused.

Applicant's Attorneys: *Sapirstein, Shapiro & Pokroy.*

LEIBOWITZ AND OTHERS v. SCHWARTZ AND OTHERS.

(TRANSVAAL PROVINCIAL DIVISION.)

1973. *July* 31; *August* 8. NICHOLAS, J.

Will.—Action to set aside.—One beneficiary a foreign state.—Cannot be joined as a defendant against its will.—Court giving notice in lieu thereof.—International law.—Foreign state cannot be joined as a defendant against its will.—Rule that all beneficiaries under a will must be joined as parties in proceedings to set it aside.—Such procedural rule must yield to principle of international law.—State to be given notice in lieu of joinder.

Where the principle of public international law that the courts of a country will not by their process make a foreign state a party to legal proceedings against its will conflicts with the principle that all beneficiaries under a will must be joined as defendants in an action wherein is claimed an order declaring that will invalid, it is the second principle which must give way.

Applicants were desirous of instituting an action for an order declaring that a will was null and void, the residuary heir under the will being the State of Israel. They now applied to sue certain of the beneficiaries under the will by edictal citation.

Held, as it was not possible for the State of Israel to be joined as a party, that the Court should direct that it be given notice of the proceedings, such being the next best thing.

Held, further, that if the State of Israel did not choose to apply to Court to be joined as a defendant, the Court would be obliged to adjudicate as best it could in its absence.

Application for leave to sue by edictal citation. The facts appear from the reasons for judgment.

R. J. Goldstone, for the applicant.

Cur. adv. vult.

Postea (August 8th).

NICHOLAS, J.: The applicants propose to institute an action for an order declaring *inter alia* that the will of the late Sarah Esther Leibowitz dated 20th November, 1969, is null and void. In this connection they apply to sue certain of the beneficiaries under the will by edictal citation. Ordinarily there would be no difficulty about that, but in this case there is a complication. The residuary heir under the will is the State of Israel. That circumstance gives rise to a conflict between two principles. The one is the principle of public international law that the courts of a country will not by their process make a foreign state a party to legal proceedings against its will. This immunity has been admitted in all civilised countries. (In South Africa, see *De Howorth* v. *The S.S. "India"*, 1921 C.P.D. 451; *Parkin* v. *Government of the Republique Democratique du Congo and Another*, 1971 (1) S.A. 259 (W)). The other principle is that all beneficiaries under a will must be joined as defendants in an action wherein is claimed an order declaring that will invalid (*Kethel* v. *Kethel's Estate*, 1949 (3) S.A. 598 (A.D.)).

Plainly, one of the two conflicting principles must yield, for otherwise the applicants would be deprived of their right to have the validity of the will judicially determined, and that would constitute an injustice which cannot be permitted. There can be no doubt in my view that it is the second principle which must give way. The first is founded on grave and weighty considerations of public policy, international law and comity. Although I do not minimize its importance in its general application, the second principle concerns a matter only of legal procedure. The Court has an

"inherent power to grant relief where an insistence upon exact compliance with a Rule of Court would result in substantial injustice to one of the parties". (*Moluele and Others* v. *Deschatelets, N.O.*, 1950 (2) S.A. 670 (T) at p. 676. See also *Matyeka* v. *Kaaber*, 1960 (4) S.A. 900 (T)). The Court must in my view similarly have power to grant relief where it is concerned not with a Rule of Court, but with a rule of practice—even in a case, it seems to me with great respect, where the rule of practice has been declared by the Appellate Division.

In the present case, it is not possible for the State of Israel to be joined as a defendant in the proposed action. In the circumstances, the Court is obliged to do the next best thing, and that is to direct that the State of Israel be given notice of the proceedings. If, having been given notice, it does not choose to apply to the Court to be joined as a defendant, the Court will be obliged to adjudicate as best it can in its absence. (Cf. *Rahimtoola* v. *Nizam of Hyderabad and Another*, 1958 A.C. 379 *per* LORD DENNING at pp. 420-421).

I make the following order:

1. (*a*) The applicants are granted leave to institute the action referred to in para. 1 of the notice of motion by edictal citation against the following persons as defendants:
   (i) Nelli Leibowitz of Arba Aratshof, No. 14, Tel Aviv, Israel.
   (ii) Leah Leibowitz of Arba Aratshof, No. 14, Tel Aviv, Israel.
   (iii) Molly Joffe of care of Ena Saunders, Apartment B49, 485, Pelham Road, New Rochelle, New York, United States of America.
   (iv) Hebrew University of Jerusalem, of Jerusalem, Israel.
   (*b*) Personal service is to be effected on the persons referred to in sub-paras. (i), (ii) and (iii). Service is to be effected on the Hebrew University of Jerusalem by service on its chief administrative officer.
2. Notice of the said action is to be given to the State of Israel by delivering to the Administrator-General, Department of Justice, Jerusalem, Israel, a copy of the edictal citation, of any declaration filed by the plaintiffs, and of a copy of this judgment.
3. The persons referred to in para. 1 (*a*) hereof are to deliver notice of intention to defend the said action (if any) within six weeks after the service upon them of the edictal citation.
4. The said action is to be instituted by the applicants within one month from the date of this order.

5. The costs of the application are reserved for determination in the action.

Applicants' Attorneys: *Friedland, Hart, Cooper & Novis.*

S. v. GROBLER.

(TRANSVAALSE PROVINSIALE AFDELING.)

1974. *Maart* 12, 22. THERON en TRENGOVE, RR.

**Strafreg.—Strafbare manslag.—Hysmasjiendrywer op die myne het aan die slaap geraak nadat hy die masjien in werking gestel het.—Hysmasjien gevolglik nie tot stop gebring en persone noodlottig beseer.—Veiligheidsapparaat het nie gefunksioneer nie maar beskuldigde moes geweet het dat persone se lewe in gevaar gestel is.—Sy nalatigheid nie die enigste nie maar die onmiddellike oorsaak.—Vonnis.—Nalatigheid in die omstandighede nie grof nie.—Boete opgelê saam met 'n opgeskorte vonnis van gevangenisstraf.*

Die appellant, 'n hysmasjiendrywer op 'n myn, is skuldig bevind aan strafbare manslag en tot drie jaar gevangenisstraf gevonnis, waarvan 18 maande opgeskort is, deurdat, ongeveer 5 vm. op 'n bepaalde oggend, hy 'n hysmasjien in werking gestel het om 'n hystrommel met 18 persone daarin vanaf skagoppervlakte 22 na die skagbank te vervoer en daarna, gedurende die drie minute wat dit sou geneem het, aan die slaap geraak het, met die gevolg dat hy versuim het om die hystrommel by die skagbank tot stop te bring, en die hystrommel het die skagbank verbygesteek en teen 'n hoë spoed met die skagtoringkop gebots. In die botsing is 16 persone noodlottig beseer. Uit die getuienis het dit geblyk egter dat, alhoewel die hysmasjien handgedrewe was, en nie outomaties nie, daar drie afsonderlike veiligheidsmeganismes of toestelle aangebring was om 'n oorhysing te voorkom en dat as hulle behoorlik gefunksioneer het, sou appellant se versuim om sy pligte na te kom nie noodlottige gevolge gehad het nie. In hoër beroep teen die skuldigbevinding en vonnis,

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**Criminal law.—Culpable homicide.—Lift operator on mines falling asleep after starting the lift.—Lift consequently not stopped and people fatally injured.—Safety apparatus not functioning but accused should have known that people's lives put in danger.—His negligence not the only cause but the proximate cause.—Sentence.—Negligence not gross in the circumstances.—Fine imposed together with a suspended sentence of imprisonment.*

The appellant, a lift operator on a mine, had been convicted of culpable homicide and sentenced to three years' imprisonment, of which 18 months had been suspended, in that, at about 5 a.m. on a specified morning, he had started a lift in order to convey a hoisting drum with 18 people in it from shaft surface 22 to the shaft head and thereafter fallen asleep, with the result that he failed to stop the hoisting drum at the shaft head, and the lift passed the shaft head and, collided at high speed with the top of the head gear. In the collision 16 people were fatally injured. From the evidence it appeared, however, that, although the elevator was hand-operated and not automatic, three independent safety mechanisms or apparatuses had been installed to prevent an overdrive and that if they had functioned properly appellant's failure to carry out his duties would not have had fatal consequences. In an appeal against the conviction and sentence,