



REPUBLIC OF SOUTH AFRICA

***THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

Reportable
Case Number : 324 / 04

In the matter between

THE COMMISSIONER OF SOUTH AFRICAN
REVENUE SERVICES

APPELLANT

and

STAND TWO NINE NOUGHT WYNBERG (PTY) LTD
JOHANNES FREDERICK KLOPPER N O
MASTER OF THE HIGH COURT OF SOUTH AFRICA

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

Coram : HOWIE P, BRAND, NUGENT, CONRADIE and VAN HEERDEN JJA

Date of hearing : 19 MAY 2005

Date of delivery : 31 MAY 2005

SUMMARY

A liquidator of a company cannot agree with a debtor of the company to pay a debt direct to a creditor of the company if doing so would subvert the scheme of distribution laid down in the Insolvency Act 24 of 1936.

J U D G M E N T

CONRADIE JA

[1] Inability to pay its debts led to the winding up of Super Diamond Computers (Pty) Ltd (Super Diamond) at the instance of the respondent who was the first respondent in the court *a quo*. Among Super Diamond's debts was R600 273.40 due to the respondent for arrear rent. Super Diamond also owed the appellant R515 702.52 in unpaid tax. Soon after the liquidation it was discovered that Super Diamond had no money left because an associated company, MMW Technologies (Pty) Ltd (MMW), had 'taken over' its assets without paying for them.

[2] The liquidator, the second respondent in the court *a quo*, convened an enquiry in terms of ss 417 and 418 of the Companies Act 61 of 1973 to investigate the taking of the assets. On the day the enquiry was to start, and before any creditor had proved a claim, MMW agreed by way of settling the matter to pay to Super Diamond an amount of R678 000 in respect of the respondent's claim as well as the costs of the liquidation and, moreover, to pay every other creditor who should in due course prove a claim.

[3] In terms of the arrangement MMW paid R710 377.86 to Super Diamond's liquidator so that he might settle the respondent's claim and costs. Then the appellant and another, small, creditor proved their claims against

Super Diamond. When MMW showed itself unable to pay these debts it was in turn wound up. Its creditors received nothing.

[4] The liquidation and distribution account drawn by the liquidator naturally reflected the debt collected from MMW. The plan of distribution entailed first paying the appellant's preferent claim¹ and then the claims of the two concurrent creditors, one of which was the small creditor and the other the respondent.

[5] The latter objected to the account, contending that the money paid by MMW had been earmarked for the payment of its debt and should, despite the appellant's preferent claim, be paid to it. The Master (the second respondent in the court *a quo*) dismissed the objection. The respondent then applied to the court below for an order that it was entitled to have this money paid directly to it and that the liquidator's account should be amended to exclude it altogether. There was also an alternative claim which was not granted and is of no importance now.

[6] The appellant was, on his application, in December 2003 joined as an additional respondent. In May 2004, despite opposition by the liquidator, the Master and the Revenue, the court granted an order for the main relief sought by

¹ A preference conferred by s 99(1)(cD) of the Insolvency Act 24 of 1936.

the respondent. It gave the appellant leave to appeal to this court. The Master and the liquidator are not parties to the appeal.

[7] The agreement between MMW and Super Diamond reads as follows:

- 1 MMW will pay to Super Diamond the sum of R528 000.00 by no later than 2 June 2000. If this payment is not made by 2 June 2000 then this settlement will lapse and be of no force or effect.
- 2 The aforesaid payment is [in] full and final settlement of the claim which Super Diamond had against MMW for the sum of approximately R7.1 million.
- 3 Super Diamond will utilize the foresaid payment and the payment of R250 000.00 which MMW has already paid to Super Diamond to settle:
 - 1 the claim of Stand Two Nine Nought Wynberg (Pty) Ltd in the sum of R678 000.00;
 - 2 the costs of administering the estate and the costs of the enquiry in the sum of R100 000.00.
- 4 MMW indemnifies Super Diamond against any and all further claims which may be proved against Super Diamond.
- 5 Super Diamond undertakes on receipt of any further claims against Super Diamond, to submit such claim to MMW on receipt thereof to enable MMW to oppose the proof of such claim.

6 Should any further claims be proved against Super Diamond then MMW will pay to Super Diamond the amount of such proved claim within 7 days of written notification thereof.’

[8] The proposition that a debtor of an insolvent estate might arrange with its trustee or liquidator to pay the claim of a particular estate creditor is an unusual one. Giving effect to such an arrangement would enable the parties to subvert the scheme of distribution laid down by the Insolvency Act 24 of 1936.

[9] In terms of s 391 read with s 342 of the Companies Act 61 of 1973 it is a liquidator’s duty to recover and reduce into possession all the assets and property of the company, to realize them and apply the proceeds in satisfaction of the costs of winding up; and, if there is a residue, to distribute it to the creditors entitled thereto in the order of preference and manner set out in ss 95 – 104 of the Insolvency Act.

[10] None of this was contentious before us. It was, however, urged by counsel for the respondent that a liquidator may nevertheless act as agent for a creditor and on behalf of such creditor receive money and make payment to it other than in accordance with the Insolvency Act; that, he argued, is what happened in this case.

[11] An assumption vital to the validity of the settlement agreement was that MMW would see to it that all Super Diamond’s liabilities were settled. It would

do this by immediately paying the first respondent's claim and thereafter paying the claims of whichever other creditors might prove claims. As long as MMW honoured its obligations the agreement could be validly performed. As soon as it did not, however, performance of the agreement would offend against the Insolvency Act and for that reason be unlawful.

[12] When MMW failed to honour its obligations Super Diamond remained insolvent and the liquidator became obliged to wind up its insolvent estate according to the dictates of the Insolvency Act. Whatever mandate he may have received from the respondent and whatever agreement he may have concluded on behalf of Super Diamond had to yield to his statutory duty to recover and reduce into possession all Super Diamond's assets and distribute the proceeds according to law.

[13] *Jankelow v Binder, Gering and Co* 1927 TPD 364 was a case in which a debtor assigned his estate for the benefit of his creditors and then by way of a settlement amounting to ten shillings in the pound bought back the estate from the assignee. A creditor who had not proved a claim contended that it could sue on the contract between the debtor, the appellant, and the assignee. At page 370 Greenberg J says this:

'The contract, as I have said, being in terms one between the assignee and the appellant, the question to be decided is whether there is any principle which entitled a third party to sue on that contract. Mr *Rosenberg*, for the respondent, has contended that he has that right, firstly,

because the assignee was acting as agent for all the creditors, including the respondent, and, secondly, because even if he was not acting as agent he was making a contract for the benefit of the creditors which the creditors individually can accept. With regard to the first contention, I know of no authority which says that an assignee or a trustee is the agent of the creditors. In some respects his position is analogous to that of an agent, but there are numerous other respects in which it is clear that he is not an agent; e g he is not subject to their individual instructions; in certain cases he can go against the instructions and wishes of a certain portion of them. So that contention must be rejected.'

[14] Even if the liquidator was the respondent's agent, a proposition which is by no means free from doubt, he could, as appears from the passage above, only comply with instructions from the respondent to act in its particular interests as long as his duty as agent did not conflict with his duty to the estate or its other creditors. It is trite that no agent may assume conflicting duties on behalf of different principals; when it appeared that Super Diamond would not with MMW's assistance be able to pay its debts it became the liquidator's overriding duty to safeguard the integrity of the *concursum creditorum*. Since this is what he did in framing his distribution account, the application was without merit.

[15] The appeal succeeds with costs. The order of the court *a quo* is replaced by an order reading:

'The application is dismissed with costs.'

**J H CONRADIE
JUDGE OF APPEAL**

CONCURRING:

**HOWIE P
BRAND JA
NUGENT JA
VAN HEERDEN JA**