REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case Number : 119 / 02

In the matter between

L N SACKSTEIN NO [in his capacity as liquidator of Tsumeb Corporation Limited (in liquidation)] **Appellant**

and

PROUDFOOT SA (PTY) LIMITED **Respondent**

Composition of the Court : **OLIVIER, BRAND, CONRADIE JJA; HEHER and LEWIS AJJA**

Date of hearing : **22 NOVEMBER 2002**

Date of delivery : **7 MARCH 2003**

SUMMARY

Liquidation of external company - powers of South African liquidator to impeach dispositions having their origin in a foreign country.

J U D G M E N T

OLIVIER JA

[1] The present appeal deals with the powers of the liquidator of an external company registered in South Africa to impeach transactions having their origin in a foreign country.

[2] Tsumeb Corporation Limited ('Tsumeb') was incorporated as a company in the Republic of Namibia. It is registered as an external company in the RSA under the same name in accordance with the provisions of s 323 of the South African Companies Act 61 of 1973 ('the Companies Act') and with a registered office in Johannesburg. For the sake of clarity I will refer to the external company registered in Johannesburg as 'Tsumeb SA'. It was, therefore, at all relevant times a body corporate in the RSA liable to be wound up as such

under the provisions of the Companies Act and otherwise subject to the provisions of that Act.

[3] Proudfoot SA (Pty) Ltd ('the Defendant') is a company duly incorporated and registered according to the laws of the RSA, which carried on business as industrial consultants specialising in productivity and quality management and with principal place of business in Johannesburg.

[4] During or about October 1997 Tsumeb concluded a contract with the Defendant in Namibia in terms of which the Defendant undertook to render certain services to the former in Namibia. In return for rendering those services the Defendant was to be paid a total amount of R10 million in fixed weekly instalments. It is common cause that by 29 July 1998 Tsumeb had made payments totalling R5 708 957,00 to the Defendant.

[5] According to a statement of facts agreed upon by the parties, it is also common cause that:

1 Tsumeb was placed under provisional liquidation by an order of the High Court of Namibia on 29 April 1998 and a final winding up order was granted by that court on 12 March 1999 (the 'Namibian liquidation order'). The provisional liquidators were appointed on 29 April 1998 and the liquidators on 26 May 1999.

2 On 29 July 1998 Tsumeb SA was also placed in provisional liquidation by an order of the High Court of South Africa (Witwatersrand Local Division). A final winding up order was granted on 16 March 1999 (the 'South African liquidation order').

3 The liquidators appointed in Namibia pursuant to the Namibian liquidation did not seek an order in South Africa for their

recognition as liquidators to wind up the affairs of Tsumeb SA in South Africa.

4 Mr Leslie Neil Sackstein was appointed as provisional liquidator of Tsumeb SA on 11 August 1998 in terms of the South African provisional liquidation order and as liquidator on 27 May 1999 in terms of the final order.

5 On 3 November 1999 the Defendant proved a claim at a meeting of creditors of Tsumeb in Namibia in terms of the relevant Namibian legislation. The claim so proved was for the balance said to be owing to the Defendant by Tsumeb under the contract between those parties *ie* taking into account the payments already made by Tsumeb to the Defendant. These payments are the subject of the present proceedings in South Africa.

6 The Namibian High Court on 10 March 2000 sanctioned a scheme of arrangement offered by Ongopolo Mining and Processing Limited ('the scheme of arrangement') in terms of section 311 of the Companies Act, Namibia, and discharged the Namibian liquidation order on that date. The order was duly registered with the Registrar of Companies in terms of the Namibian Companies Act. The liquidators appointed in Namibia were discharged from office on 10 March 2000 and their statutory powers terminated on that date.

[6] Subsequent to the discharge of the liquidation order of Tsumeb in Namibia on 10 March 2000, Mr Sackstein, as liquidator of Tsumeb SA, instituted action in the Witwatersrand Local Division of the High Court against the Defendant for recovery of the amount mentioned above. He averred that each of the payments made by Tsumeb to

the Defendant was made at a time when the liabilities of Tsumeb exceeded the value of its assets, and that the effect of all of those payments was to prefer the Defendant above the other creditors of Tsumeb. He alleged that by virtue of the provisions of ss 29 (1) and 30 of the South African Insolvency Act, 24 of 1936 ('the Insolvency Act') as read with s 340 of the Companies Act, the Defendant is obliged to repay the aforesaid amount to him in his capacity as liquidator.

[7] To this claim the Defendant pleaded that the payments made by Tsumeb to the Defendant were dispositions by 'Tsumeb Namibia' of its assets. The Plea continued:

> '4.2 Tsumeb Namibia's assets exceeded the value of its liabilities and Tsumeb Namibia was able to pay its debts at the time of institution of the action, Tsumeb Namibia having been discharged from liquidation on 10 March 2000 by Order of the Namibian High Court.

4.3 *Alternatively*, the Defendant denies that Tsumeb's liabilities exceeded the value of its assets and that Tsumeb was unable to pay its debts at the time of institution of the action or at any other material time.

4.4 In the premises Sackstein as Liquidator of Tsumeb is precluded from relying on the provisions of Sections 29 (1) and 30 of the Insolvency Act 24 of 1936 read with Section 340 of the Companies Act.

4.5 *Further alternatively*, the Defendant pleads that in the event of it being found that payment of amounts totalling R5 708 957,00 were made at a time when the liabilities of Tsumeb Namibia *alternatively* Tsumeb exceeded the value of its assets and that Tsumeb Namibia *alternatively* Tsumeb was unable to pay its debts, and that the effect of the payment of R2 637 927,00 was to prefer the Defendant above the other creditors of Tsumeb Namibia *alternatively* Tsumeb (all of which is denied) -

4.5.1 the payments made by Tsumeb Namibia were dispositions of its assets;

4.5.2 Sackstein as the Liquidator of Tsumeb has no jurisdiction or power to seek to set aside dispositions by Tsumeb Namibia of its assets; ...'.

[8] The parties agreed that if the Plaintiff's contentions were upheld paragraphs 4.4 and 4.5.2 of the Plea should be struck out and the Defendant should be ordered to pay the costs consequent upon the

preparation and argument of the stated case, such costs to include those consequent upon the employment of two counsel. If the Defendant's contentions were upheld the claim set out in paragraphs 3 to 8 of the particulars of claim should be struck out and the Plaintiff ordered to pay the costs consequent upon the preparation and argument of the stated case, such costs to include those consequent upon the employment of two counsel.

[9] At the beginning of the argument before Blieden J in the court *a quo*, the parties further agreed that the payments made by Tsumeb to the Defendant were by way of credit transfers from Tsumeb's banking account in Namibia to the Defendant's account in South Africa.

[10] The issue is whether or not Sackstein, on the given facts, had the power to institute and prosecute the claim based on the

impeachment provisions of ss 29 and 30 of the Insolvency Act as read with s 340 of the Companies Act.

[11] The court *a quo* decided against Sackstein, in essence holding that the dispositions occurred in Namibia and, accordingly, that the South African liquidator had no powers in respect thereto.

[12] There are three preliminary matters that are relevant to the outcome of this appeal that should be noted.

[13] The first is that it is common cause, but essential to emphasise, that the company Tsumeb Corporation Limited, registered as such in Namibia, subsequently obtained registration as an external company under the same name in the RSA in terms of s 322 of the Companies Act, and not under s 335 of that Act. In such a case, s 323 provides that

> ' ... the external company shall be a body corporate in the Republic subject to the applicable provisions of the Act.'

An external company may be wound up by the Court like a domestic company, because s 337 of the Companies Act defines a company as including an external company.

From this it follows that an external company registered as such in the RSA may be liquidated as if it were an independent entity even if the foreign company to which it is 'related' is not liquidated or dissolved, and *vice versa:* if Tsumeb was liquidated or dissolved in Namibia, Tsumeb SA could carry on its business here and could not be wound up unless the grounds for winding up specified in s 344 were proved to be present.

[14] Secondly, as clearly appears from the judgment of this Court in *Ward v Smit and Others : In re Gurr v Zambia Airways Corporation*

Ltd 1998 (3) SA 175 (SCA) at 183 H - I, there may be two simultaneous and concurrent liquidation processes in respect of the company, one in its original country of incorporation (in this instance Namibia) and another in the country in which it is registered as an external company (here South Africa). In such a case each liquidator may deal independently with the assets and liabilities of the company in respect of which he or she is liquidator (*Ward v Smit, supra* at 184 A - B).

Consequently, in the present case, the withdrawal of the Namibian liquidation process could not *per se* affect the South African process. If, in the Namibian process, certain compromises were reached or claims waived (as is alleged in the pleadings), the Defendant would obviously be entitled to rely on such defences if the dispute is to be continued. The question now under consideration is

whether the claim by Mr Sackstein can pass the first hurdle, *viz* his powers to institute the claim.

[15] Thirdly, it must be accepted that the registration in the RSA of an external company does not result in there being two separate legal *personae*, registered respectively in two countries (see *Wiseman v Ace Table Soccer (Pty) Ltd* 1991 (4) SA 171 (W) at 173 E; *Ward v Smit and Others : in re Gurr v Zambia Airways Corporation Ltd*, *supra*; C F Forsyth, *Private International Law*, (1996) 3 ed, at 182 n 280). There is only one legal *persona*, registered in two countries.

The consequence of this situation can obviously lead to seemingly irreconcilable conflicts of authority and powers between two simultaneous and concurrent liquidators, and hence to difficult legal and commercial problems. In cases of dual registration, a

principle of demarcation in the event of a dispute between the liquidators will have to be developed.

In the present case, the problem does not present itself as a conflict between two liquidators. The question is merely whether Mr Sackstein has the power under our law to impeach the dispositions now under discussion.

[16] The crux of the Defendant's case is that the South African liquidator, in relying on sections 29 (1) and 30 of the Insolvency Act, is only empowered to set aside dispositions by the company in liquidation of its property, but only if the disposition related to property in the Republic of South Africa. If the disposition occurred in respect of property situate outside the RSA, a South African liquidator is powerless to impeach it. In the present case, so it was argued, the disposition when it was effected occurred in respect of property not in

the RSA but situate in Namibia. The Appellant's *riposte* is that he derives his powers to impeach a disposition from ss 29 (1) and 30 (1) of the Insolvency Act and s 391 of the Companies Act, and that the limitation on his powers, sought to be found by the Defendant in the definition of 'property' in s 2 of the Insolvency Act, does not, on a proper interpretation of the relevant sections, exist.

[17] Sec 29 (1) of the Insolvency Act reads as follows:

> '29 (1) Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.'

Section 30 (1) reads:

> '30 (1) If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition.'

It is thus correct, as the Defendant argued, that the attack on a disposition is always connected to a disposition of property.

[18] Property is defined in s 2 of the Insolvency Act as follows:

> ' ..."property" means movable or immovable property wherever situate within the Republic ...'

Taken literally, these provisions appear to support the Defendant's argument that Mr Sackstein is not empowered to impeach the transactions by Tsumeb of its property in Namibia, even though the Defendant may be subject to the jurisdiction of the court which appointed Mr Sackstein as liquidator.

[19] On behalf of Mr Sackstein it was argued that the words in s 2 on which the Defendant relies, should not be given its literal meaning.

Reference was made to the view of Mars, *The Law of Insolvency in South Africa*, [1988] 8th ed. by E de la Rey, at 176, *viz*:

> 'The definition of property contained in the Act suggests at first sight that only assets situated within the Republic of South Africa pass on insolvency to the insolvent's trustee, but it seems that the true intention of the legislature in defining property as it did was rather to extend the operation of a sequestration order beyond the territorial limits of the particular division of the Supreme Court granting it, than to narrow it. Consequently, it seems that the common law must still be applied in deciding the extent to which the insolvent's assets, which are situated in a foreign country, pass to his trustee.'

[20] I consider the explanation by Mars to be correct. Such an interpretation of s 2 of the Insolvency Act would accord with s 391 of the Companies Act, which reads as follows:

> 'A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as

> they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled to it'

[21] In the result, the words 'wherever situate within the Republic' in the definition of 'property' in s 2 of the Insolvency Act, can be ignored as far as proceedings for setting aside dispositions by virtue of the Insolvency Act are concerned.

[22] In terms of s 391 of the Companies Act it is the duty of the liquidator ' ... forthwith to recover and reduce into possession' all such assets and property. This means that the liquidator must take all steps necessary to fulfil the prescribed duty. In the case of voidable transactions, he must take the steps that are necessary for the impeachment of the transaction. This he can do in the Republic of South Africa, irrespective of where the property is situate. If he succeeds in impeaching the transaction, and if the property is in fact

situate outside the Republic, he has by virtue of the common law (see *Re Estate Morris* 1907 TS 657 at 666 in respect of movables and *Ex parte Stegmann* 1902 TS 40 at 52 in respect of immovables) no extra-territorial powers of recovering such property in a foreign country. The correct procedure is then to seek the recognition of the court order obtained in South Africa, setting the transaction aside, in the applicable foreign country (see *Ex parte Stegmann*, *supra*, at 52).

[23] There is authority for the view that impeaching a transaction and the subsequent vindication of the property concerned are two distinct steps in the process of recovery of the relevant assets.

In the matter of *In re Leslie Engineers Co Ltd (In liquidation)* [1976] 1 Weekly Law Reports 292, Oliver J, in the Chancery Division, had to deal with an application by a liquidator to have declared void two payments made by the company after the commencement of the

winding up of the company. Section 227 of the English Companies Act of 1948 at the time read as follows:

> 'In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.'

On behalf of the liquidator it was argued that if the disposition is voided, the liquidator acquires the right to recover the property. Oliver J at 298 B - D found this argument too wide:

> 'Now, it must be remembered that the invalidation of a disposition of the company's property and the recovery of the property disposed of, are two logically distinct matters. Section 227 says nothing about recovery; it merely avoids dispositions ... What is the appropriate remedy in respect of the invalidated disposition is a matter not regulated by the statue and that has to be determined by the general law ...'

[24] In *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and Another* 1980 (4) SA 669 (SWA) Lichtenberg J at 678 A - B pointed

out that s 227 of the English Companies Act has its counterpart in s 341 of the South African Companies Act. Similar to the English provision, s 341 (2) of our Companies Act gives the court a discretion not to declare a disposition made after the commencement of winding up proceedings void. On the facts the learned judge refused to exercise his discretion not to invalidate the 'void' disposition (at 680 G). The question then arose: can the first defendant who had received the benefit of the void payment by the company in liquidation, be ordered to repay same to the liquidator? It is in this connection that the learned judge following *Leslie Engineers* remarked, at 680 H, that s 341 (2) of the Companies Act says nothing about the recovery of the void disposition but merely avoids the disposition itself. That is, as I have pointed out, also the position under s 227 of the English Companies Act.

[25] The essence of the Appellant's case then is that the invalidation part of the process is not governed by the provisions relating to recovery of the property disposed of. The invalidation part is purely an administrative process, governed by the ordinary rules pertaining to the jurisdiction of the court. In the present matter the court *a quo* issued the winding up order, the liquidator was duly and lawfully appointed, and the Defendant is domiciled within the area of jurisdiction of the court *a quo*. That court is endowed with jurisdiction to entertain the impeachment process.

[26] This conclusion must not be read to mean that the South African liquidator of an external company is obliged to institute impeachment procedures in a South African court where the property concerned is in a foreign country. The effect of this judgment is that the liquidator has a choice, either to proceed under s 391 of the

Companies Act or to follow the procedure whereby his appointment as liquidator is recognised by the courts of the foreign country concerned, and to prosecute the impeachment and recovery processes in that country.

[27] In the event the appeal succeeds with costs. The judgment of the court *a quo* is set aside and paragraphs 4.4 and 4.5.2 of the Plea are struck out. The Defendant is ordered to pay the costs of the action in the court *a quo* and the costs of the appeal including the costs consequent upon the preparation of the stated case. In both the court *a quo* and this Court the costs awarded include those consequent upon the employment of two counsel.

P J J OLIVIER JA

CONCURRING:

BRAND JA

CONRADIE JA

HEHER AJA

LEWIS AJA