

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

Reportable

CASE NO: 344/2002

In the matter between :

NEDCOR INVESTMENT BANK

Appellant

and

PRETORIA BELGRAVE HOTEL (PTY) LTD

Respondent

Before: VIVIER, LEWIS JJA & SHONGWE AJA

Heard: 2 MAY 2003

Delivered: 27 MAY 2003

Summary: Effect of insolvency on executory contract where seller had performed in full and immovable property registered in company's name before liquidation.

J U D G M E N T

VIVIER JA

entered into a written agreement with Waterton Lakes Manufacturing (Pty) Ltd ('the company') in terms of which Belgrave sold to the company its hotel business, inclusive of its immovable property known as the remaining extent of Erf 3178 Pretoria, all movables and the hotel liquor licence as a going concern for the amount of R1 450 000,00. The purchase price was payable by a deposit of R1 050 000,00 secured by a first bond on the immovable property in favour of Syfrets Bank Limited and the balance of R400 000,00 on 31 December 1999 secured by a second bond in favour of Belgrave.

[2] Pursuant to the sale the deposit was paid, the movables were delivered and the immovable property was registered in the name of the company on 6 July 1998. The two bonds were registered and the company was given possession of the business.

for the winding-up of the company with the Registrar of the Court *a quo*. On 1 March 2000 the company was placed under final liquidation. At the first meeting of creditors held on 2 June 2000 Belgrave submitted a claim for the amount of R415 737,70 in respect of the outstanding balance of the purchase price and interest. The claim was duly admitted. In a letter dated 5 June 2000 the liquidator notified creditors that the assets vesting in the insolvent estate would be sold by public auction. In the event the whole property was sold for the amount of R450 000,00 plus R15 000,00 for the liquor licence.

[4] Belgrave subsequently brought an application in the Transvaal Provincial Division against the liquidator as first respondent, the Master as second respondent and Nedcor as third respondent for an order that its claim for the balance of the purchase price be paid as part of the costs of

to be costs in the administration. Nedcor was subsequently granted leave to appeal to this Court. The liquidator and the Master have taken no part in this appeal and abide the Court's judgment.

[5] The issue in the appeal is accordingly whether Belgrave's claim for the balance of the purchase price lies against the liquidator as an expense incurred in the estate's administration or whether Belgrave is to be regarded as a secured creditor ranking after Nedcor's first mortgage bond.

[6] 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 and Flanagan (Pty) Ltd v Muller and Another NNO* 1977 (1) SA 800 (N) at 804F-805G, which was confirmed on appeal in *Muller and*

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. The other party's claim then lies against the

administration of the estate.

[7] In the present case the liquidator's position as at the institution of *concursum creditorum* when the application for the winding-up of the company was presented to the Court, was essentially different from that faced by a liquidator in the usual kind of executory contracts, such as building contracts, where the liquidator has an election whether to continue to demand future performance or to terminate the contract. In the present case the immovable property had been registered in the company's name and the movables delivered to the company prior to the *concursum*. The property had vested in the company before the *concursum*. It had become part of the insolvent estate and had to be dealt with accordingly. The liquor licence was incidental to, and followed the fate of the other assets. There was no further

argued that the passing of the second bond constituted full performance of its obligations but it is not necessary to decide this point. In any event the delivery and transfer of the merx was not, in terms of the contract of sale, dependent on any reciprocal obligation on the part of the company to pay the outstanding balance of the purchase price. It was thus not necessary for the liquidator to pay such balance before selling the property. The balance of the purchase price was not yet due at the time of the *conkursus* and no right to cancel had accrued at *conkursus*. The liquidator could clearly not cancel the sale and insist on returning the merx and refuse to admit Belgrave as a creditor (cf *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 (1) SA 463 (W) at 471 E-F). It was her duty as liquidator to realize the assets in the estate

[8] It follows that the claim in respect of the balance of the purchase price was not an expense in the administration.

[9] In the result the appeal succeeds with cost. The order of the Court *a quo* is replaced with an order dismissing the application with costs.

VIVIER JA

LEWIS JA)
SHONGWE AJA) CONCUR