THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 141/05
Reportable

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**

CORAM : **MPATI DP, NAVSA, CONRADIE, CLOETE, HEHER JJA**

HEARD : **16 FEBRUARY 2006**

DELIVERED : **10 MARCH 2006**

Summary: Company – insolvency – time when company must be unable to pay all its debts in terms of s 340 (1) of the Companies Act, 61 of 1973. Restitution – cancellation – obligation to tender to return benefits received or explain lack of tender.

Neutral citation: This judgment may be referred to as *Sackstein NO v Proudfoot SA (Pty) Limited* [2006] SCA 9 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA:

INTRODUCTION

[1] The appellant is the liquidator in South Africa of Tsumeb Corporation Limited, a company incorporated in Namibia and registered as an external company in South Africa in terms of s 322 of the Companies Act, 61 of 1973. The company was placed under provisional liquidation in Namibia on 29 April 1998 and in South Africa on 29 July of the same year. In both countries the provisional orders were subsequently made final.

[2] The company was discharged from liquidation in Namibia in terms of an order of the High Court of Namibia. The order was granted on 10 March 2000 in consequence of a scheme of arrangement sanctioned by that court in terms of s 311 of the Namibian Companies Act. That section is in the same terms as s 311 of the South African Companies Act.

[3] On 14 April 2000 (i.e. subsequent to the order sanctioning the scheme of arrangement) the appellant commenced the action which is the subject matter of this appeal against the respondent, Proudfoot SA (Pty) Limited. The purpose of the action is to recover payments made by the company to the respondent under a contract for the provision of consultancy services by the respondent to the company during the period 1 December 1997 until 29 April 1998 when the company was placed under provisional liquidation in Namibia. The respondent was retained to advise the company as to its future viability and to implement a strategy to turn its fortunes around.

[4] The main claim brought by the appellant comprises two statutory claims, namely:

1. A claim in terms of s 29(1) of the Insolvency Act, 24 of 1936, in the amount of R2 637 927,00 in respect of payments made by the company to the respondent

within six months of the provisional liquidation of the company in South Africa at a time when the company's assets exceeded its liabilities and which had the effect of preferring the respondent above other creditors;

2. A claim of R2 637 927,00 in terms of the provisions of s 30(1) of the Insolvency Act in respect of payments made to the respondent from 1 December 1997 until 28 January 1998 on the basis that such payments were made by the company at a time when its assets exceeded its liabilities and with the intention of preferring the respondent above the company's other creditors.

In the alternative to the statutory claims, the appellant advanced a contractual claim for the recovery of the full amount of R5 275 854,00 paid by the company to the respondent from 1 December 1997 until 29 April 1998. The basis of the contractual claim, which contained an alternative, will be analysed in due course.

[5] The court below (Blieden J) dismissed all the claims[1] and granted leave to appeal to this court. The learned judge in his judgment ventured into the deep waters of cross-border insolvency law on issues not raised by counsel. I propose adopting an entirely different approach which has substantially the same outcome. I should perhaps add that the correctness of the decision of this court in earlier proceedings in this same matter, reported as *Sackstein NO v Proudfoot SA (Pty) Limited*[2], was not debated before us.

THE STATUTORY CLAIMS

[6] Sections 29 and 30 of the Insolvency Act only find application if the requirements of s 340(1) of the Companies Act have been met. That section provides:

'Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to

[1] *Sackstein v Proudfoot SA (Pty) Limited* [2005] JOL 14088 (W).
[2] 2003 (4) SA 348 (SCA).

pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.'

It is not disputed that until the sanction of the offer of compromise, s 340(1) applied and the appellant was entitled to institute action to impeach the payments made by the company to the respondent in terms of ss 29 and 30 of the Insolvency Act. But the action was instituted after the compromise was sanctioned and the compromise had a considerable impact on the solvency of the company. In view of the concession made on behalf of the appellant referred to in para [9] below, it is unnecessary to analyse the effect of the compromise in any detail.

[7] The crucial question which arises for decision is when a company must be unable to pay all its debts for the purposes of s 340(1). The appellant contended that if, as at the date of liquidation or at any time thereafter, a company is unable to pay all its debts, the liquidator may bring impeachment proceedings irrespective of the ability of the company to pay at the time the proceedings are instituted. The respondent contended that the company's inability to pay must exist at the time the impeachment proceedings are brought.

[8] In *Taylor and Steyn NNO v Koekemoer*[3], a case concerned with the stage at which the inability to pay had to be present (for the purposes of an interrogation in terms of s 415(1) of the Companies Act), Margo J writing for the full bench of the Transvaal said[4]:

'In my opinion, therefore, the expression in s 415(1), "a company which *is* being wound up and *is* unable to pay its debts", bears its ordinary meaning, namely a company which is unable to pay its debts at the time that the section is invoked by the liquidator or by a creditor who has proved a claim.'

The appellant's counsel submitted that this conclusion is wrong. It was, however, quoted with approval by this court in *Standard Bank of South Africa Limited v The*

[3] 1982 (1) SA 374 (T).
[4] At 379B.

Master and Others[5] (a case also concerned with s 415(1)). There can be no doubt that the same construction is applicable to the other sections of the Companies Act which contain the identical or a substantially similar phrase,[6] including s 340(1). Nienaber JA said in the *Standard Bank* case[7]:

'There would be no call, for instance, to conduct an examination of directors and others at an enquiry contemplated in ss 415 or 417 where the company which is being wound up is able to meet all its commitments'

and went on to quote[8] inter alia the following statement in the *Taylor and Steyn* decision[9]:

'Where a company being wound up is able to pay its debts, there is no need for those of the aforesaid provisions which are designed to facilitate recovery of assets and investigations thereanent.'

The same applies to impeachment proceedings under s 340(1).

[9] The appellant's counsel fairly and correctly conceded (as he had in the court *a quo*) that the appellant had not discharged the onus of proving that the company's inability to pay existed at the time the present action was instituted. That is the end of the statutory claims. The proper order would have been absolution from the instance and to this extent the order made by the court *a quo* must be amended.

CONTRACTUAL CLAIM

[10] The principal claim in contract was that because the respondent had materially breached the terms of the consultancy agreement with the appellant, the respondent was not entitled to recover the amounts paid to it in terms of that agreement and it was accordingly obliged to repay them. This is not a claim based on enrichment, as no allegation was made that the payments to the respondent were

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[5] 1999 (2) SA 257 (SCA) at 263B.
[6] See the *Standard Bank* case at 262B-D.
[7] At 262E-F.
[8] At 262G.
[9] At 377H.

made due to an excusable error on the part of the company, nor was it alleged that the respondent was enriched at the company's expense: *Willis Faber Enthoven (Pty) Limited v Receiver of Revenue*[10]; *McCarthy Retail Limited v Shortdistance Carriers CC*[11]. The evidence did not establish the basis for such a claim either. Nor is the claim one for restitution, as the appellant did not allege cancellation; and that omission must have been intentional, for it is the alternative claim only which contains such an allegation. Had cancellation been alleged, the claim would have suffered from the same deficiencies as the alternative claim to which I now turn.

[11] The alternative claim is clearly one for restitution following cancellation. This court said in *Extel Industrial (Pty) Limited and Another v Crown Mills (Pty) Limited*[12]:
'That a tender of restitution, or the explanation and excuse for its failure, is a requirement in proceedings for restitution is indeed trite.'
In the context of the contract between the company and the respondent, the appellant would have had to restore the benefits that the company received by way of a pecuniary substitution. But there is no tender for restitution. The submission by the appellant's counsel was that the consultancy services rendered by the respondent had been of no value to the company; but the evidence of Mr Neethling, who was the production manager of the company at the relevant time, established that, after the employment of the respondent, the company for the first time in quite a substantial period after it started its mining activities managed to mine to budget and its financial position improved. The contractual claims accordingly fall to be dismissed.

ORDER

[12] The following order is made:

1. The order of the court *a quo* is altered to read:

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[10] 1992 (4) SA 202 (A) especially at 224H-225A.
[11] 2001 (3) SA 482 (SCA) paras 15, 16 and 20.
[12] 1999 (2) SA 719 (SCA) at 732B-C.

1.1 There will be absolution from the instance in respect of the statutory claims.

1.2 The contractual claims are dismissed.

1.3 The appellant is ordered in his representative capacity to pay the respondent's costs, including the costs of two counsel.

2. Save as aforesaid the appeal is dismissed with costs, including the costs of two counsel.

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T D CLOETE
JUDGE OF APPEAL

Concur: Mpati DP
Navsa JA
Conradie JA
Heher JA