323/74

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between -

ANDRE PETERSE — Appellant

and

BERNARD HANS KRAMER, N.O. — Respondent

Coram: HOLMES, MULLER, DE VILLIERS, JJ.A.,

et JOUBERT, GALGUT, A.JJ.A.

Heard: 11 November 1976

Delivered: ~~23~~ November 1976

J U D G M E N T

HOLMES, J.A. :

This appeal concerns two special pleas unsuccessfully raised by the defendant (now appellant)

/ in the .....

in the Witwatersrand Local Division. In order to understand the sorry tangle it is necessary to set out the background -

(i) On 2 August 1965 a company named Brentwood Inry (Eiendoms) Beperk was incorporated. I shall refer to it as Brentwood.

(ii) On 12 September 1967 Brentwood was placed under a final winding-up order for inability to pay its debts.

(iii) On 8 December 1967 Maurice Joseph Chipkin was appointed by the Master as liquidator. He died after the prosecution of this appeal had been commenced, and the Master appointed Bernard Hans Kramer in his stead on 22 Septem= ber 1976. Most of the relevant events took place while the latter's predecessor was in office; but I shall for convenience use the term liquidator in relation to either of them, or when referring to the respondent, as the context may require.

(iv) The liquidator furnished security to the Master, in terms of section 124 (2) of the

/Companies .....

Companies Act, 1926, in the form of a bond for R500 by an insurance company.

(v) On 3 December 1969 an enquiry, which the liquidator had caused to be conducted at the second meeting of the creditors of Brentwood, was closed by the presiding magistrate.

(vi) On 15 April 1970 the liquidator submitted to the Master the first and final liquida= tion and contribution account in respect of Brentwood. According to the account only two concurrent claims were proved. The liquidator's covering letter stated, inter alia -

> "In submitting the account, and if it be duly passed and confirmed, this does not mean that my administra= tion of the estate will be concluded. It is possible that a prosecution will in due course take place against persons connected with the company, and the possibility of a Supreme Court action against Ster Films."

/(vii) On 17 .....

(vii) On 17 June 1970 the liquidator signed a verifying affidavit to such account.

(viii) On 16 October 1970 notice of the confirmation of the account was published.

(ix) On 23 November 1970 the liquidator wrote to the Master enclosing receipts for payments made, and referring to the notice of confirmation in the Gazette. The letter concluded, "Awaiting my letter of discharge, Yours faithfully".

(x) On 10 December 1970 the Master applied to the Transvaal Provincial Division for the dissolution of Brentwood in terms of section 154 of the Companies Act, 1926.

(xi) On 6 January 1971 the Master wrote to the liquidator -

> "As far as this office is concerned, your duties as liquidator appear to have been completed. A signed copy of this letter is enclosed for your sureties."

/(xii) Thereafter ....

(xii) Thereafter the liquidator notified the insurance company that it was released from its obligation in terms of the security bond.

(xiii) On 19 January 1971 the Transvaal Provincial Division granted an order dissolving Brentwood in terms of section 154 of the Companies Act, 1926, on the application by the Master.

(xiv) On 12 May 1971 the liquidator, ignorant of the dissolution, issued summons against Atlas Inry-Teater (Eiendoms) Beperk, averring a conspiracy between (a) Pieterse (the present appellant, who was a director of the Ster Group), and (b) a certain Gouws, and (c) a director of Brentwood, whereby they deprived Brentwood of its right to a certain property in 1965. The liquidator therefore claimed delivery of the property, alternatively damages in the sum of R216 000.

(xv) On 24 August 1971 the Court granted an amendment to the summons whereby (a) the prayer for specific performance was deleted, leaving the prayer for damages as the claim; and (b) Pieterse (the present appellant) was joined as a party.

/(xvi) On .....

(xvi) On 9 November 1971 the liquidator applied to the Court for an order declaring the dissolution of Brentwood to have been void. He explained that a certain Gouws, who had previously not been available as a witness for the purposes of the enquiry referred to in (v), supra, had now become available; and that he (the liquidator) had been advised to re-open the enquiry. He had interviewed the Master and was amazed to hear that Brentwood had been dissolved, particularly in view of the letter which the liquidator had written to the Master on 15 April 1970; see (vi), supra. The Master, in his affidavit, indicated that if he had been properly informed of the fact that the liquidator was still actively following up possible further assets, he would not have made the application for the dissolution of the company. The Master also raised the question of the need for fresh security to be furnished to him. The liquidator, in his replying affidavit, stated that a certain creditor had indemnified him in respect of all costs arising from this application and the proceedings already instituted.

/(xvii) On .....

(xvii) On 9 November 1971 the Court granted the liquidator's application for an order declaring the dissolution of Brentwood "to have been void".

(xviii) On 10 November 1971 the liquidator signed a fresh power of attorney authorising his attorneys "to institute action against the abovenamed Defendants".

(xix) On 12 November 1971 the liquidator purported to issue a combined summons against the appellant, as first defendant, and Atlas Ster Inry-Teater (Eiendoms) Beperk, as second defendant. The appellant contends that this was merely an amendment of the existing summons which was issued in May 1971, the amendment of which was authorised on 24 August 1971; see (xv), supra. The liquidator contends that it was a summons de novo. More about this anon.

(xx) Thereafter the parties spent the next seventy-five pages and eighteen months in requests for further particulars, and further and better particulars, and replies thereto, and pleas and special pleas, and more particulars.

(xxi) What is relevant at this stage is that the appellant raised two special pleas

First, that the liquidator was at all relevant times functus officio, because he was discharged by the Master from the office of liquidator on 6 January 1971. (See (xi), supra).

Second, that Brentwood was dissolved on 19 January 1971; and as thereafter the summons was issued on 12 May 1971, and the appellant joined as a party on 24 August 1971, all before the dissolution was declared void on 9 November 1971, the summons and all subsequent proceedings were a nullity.

(xxii) Eventually the matter came before the Court a quo for a decision under Rule 33 (4) on the issues raised in the two special pleas. In this regard the minutes of the pre-trial conference on 9 August 1974, at which each of the three litigants was represented by senior and junior counsel, include the following, inter alia -

"1. (a) It is agreed that the issues raised in the first defendant's first and second special pleas dated 21st June 1974 be decided separately from any other question and as a preliminary issue in terms of Rule 33 (4).

/(b) All .....

(b) All other issues in the matter are to be postponed and, if the special pleas should be dismissed, the matter may be reinstated for trial.

(c) If either the first or the second special plea is upheld, there shall be judgment for the defendants."

(xxiii) No evidence was led. The parties relied on the papers before the Court and certain admissions made at the pre-trial conference.

(xxiv) The Court a quo dismissed both of the special pleas; that decision is now before this Court.

THE RATIO IN THE COURT A QUO

As to the first special plea, the learned Judge discussed but did not specifically decide the question whether the liquidator was functus officio on the ground that he had been discharged from office by the Master's letter of 6 January 1971. The learned Judge took the view that, in the circumstances, the Court, in declaring

the dissolution to have been void, impliedly authorised the liquidator to proceed with the administration of the company; and he observed, "The fate of the applicant as liquidator will therefore hinge upon the fate of the company by virtue of the second special plea."

As to the second special plea, the learned Judge concluded that the liquidator, in bringing his application for the avoidance of the dissolution under section 191 (1), had misconceived his remedy because, in effect, he sought ratification for whatever had been done in the interval. The liquidator, continued the learned Judge, should, without recourse to section 191 (1), simply have applied for the setting aside of the dissolution on the ground of "error". That ground would have been that the Master would not have applied for the dissolution if he had been informed that the liquidator was still actively following up the matter of possible further assets; see the liquidator's letters in (vi) and (ix), supra. The judgment concluded -

"Taking into account the circumstances upon which the application was founded it seems to me, as I have said, that the whole object of the applicant was to obtain ratification of what had been done during the interval and to be able to proceed in a regular manner in the future. The Court, in granting the order, gave effect to that object."

In the result, the two special pleas were dismissed.

THE RATIO IN THIS COURT

1. As to the first special plea -

In my view the Master's letter of 6 January 1971 cannot be construed as a release of the liquidator. I say this for the following reasons -

(a) The Master himself, who raised no objection to the granting of the liquidator's appli= cation for the avoidance of the dissolution order, says (in his affidavit thereanent) "It is not practice to specifically discharge a Liquidator. The Estate papers are checked and if and when found to be in order,

/they .....

they are filed of record and a filing slip is issued: Annexure 'C' is such a filing slip." (Annexure "C" was the Master's letter of 6 January 1971). Furthermore, the liquidator said -

> "My invariable experience is that the Master does not dissolve a company until the lapse of two or three years from the date of the letter sent in the terms of Annexure 'C' hereto."

And later he said, "This is the first time in my long experience as a liquidator that dissolution has followed so shortly after confirmation of the account."

It may be that the foregoing practice grew up in order to keep the door open for a possible application under section 191 (1) which empowers a liquidator, among others, to apply, at any time within two years of the date of dissolution of a company, for an order declaring the dissolution to have been void. However, it is not necessary to speculate upon the origin of the practice.

/(b) The .....

(b) The said letter of 6 January 1971 was not expressed or intended to be a release of the liquidator under section 141 (1) of the Companies Act, 1926. Nor, indeed, were the formalities and procedures under that sub-section complied with. It reads -

> "When the liquidator of a company which is being wound up by the Court has realized all the assets of the company and has distributed a final dividend, if any, to the creditors, and adjusted the rights of the contributories among themselves, and made a final return, if any, to the contributories, he may apply to the Master for his release, and upon his giving by advertisement in the Gazette not less than three weeks' notice of his application prior to the date thereof to the Master, the Master shall take into consideration any objection which may be urged by any creditor, contri= butory or person interested against the release of the liquidator and upon considera= tion of the objection (if any) the Master may either grant or withhold the release."

/It will .....

It will be seen that the sub-section provides for an advertisement by the liquidator in the Gazette giving three weeks' notice of his application to the Master. And the latter shall take into consideration any objections from creditors, contributories or persons interested before giving his decision. Nothing of that sort happened in this case.

(c) Nor can it be said that the Master's letter of 6 January 1971 amounted to a release of the liquidator under section 145. That section enables the Master to permit liquida= tors to have leave of absence or to resign. Sub-section (2) provides for notice in the Gazette, The Master's letter cannot be accommodated under that section.

In the result the first special plea was unsound.

It may be that the liquidator, having discharged the insurance company from its obligation in the matter of security (see paragraph (xii) of the tabulation of facts, supra), is not capable of acting until he gives

/further.....

further security to the satisfaction of the Master; see section 124 (3) (c). But that is not a matter falling within the terms of the first special plea.

I turn now to the second special plea, the gist of which is that this action by the liquidators was a nullity because summons was issued in May 1971 at a time when Brentwood had already been dissolved by order of Court. In this Court, counsel for the respondent raised a new point for the first time in the long history of the case. He contended that the liquidator's summons which was issued on 12 November 1971 was a new summons, issued by authority of a new power of attorney dated 10 November 1971 (i.e., the day after the dissolution was avoided); that it was not an amended summons; and that the ensuing proceedings were unassailable because the dis= solution of Brentwood had already, on 9 November 1971, been declared to have been void. Counsel for the

/appellant.....

appellant resisted this contention. He argued that the summons of 12 November 1971 was but the continuation, in amended form, of the original summons issued on 12 May 1971 which was a nullity for the reason stated in the special plea, namely, that it was issued during the period of the dissolution of the company.

As to whether the summons of 12 November 1971 instituted proceedings de novo, I proceed to examine the arguments pro and con. Pointing to the summons of 12 November 1971 being a new summons, i.e., commencing proceedings de novo, are the following factors -

(a) It was issued on the authority of a fresh power of attorney (unnecessary in the case of an amended summons) signed on the day after the avoidance of the dissolution of Brentwood.

(b) It bore the rubber stamp of the registrar's office.

/(c) It bore .....

(c) It bore revenue stamps to the value of R3, required only for a new summons.

(d) It was signed by two counsel and an attorney, acting for the liquidator.

(e) It was served by the deputy sheriff it was said, (unnecessary, in the case of an amendment).

(f) There was no notice under Rule 28, which would have been necessary if it had been an amendment.

On the other hand, considerations pointing to the summons of 12 November 1971 being the amended continuation of the summons of 12 May 1971 are -

(i) Typed in capital letters at the top of the first page were the words "AMENDED SUMMONS". The copies served by the deputy sheriff were also so headed.

(ii) Also typed on the first page were "Case No. 3295/1971". That was the number of the summons issued on 12 May 1971.

/(iii) The .....

(iii) The fresh power of attorney executed on 10 November 1971 (see (xviii), supra), was also headed, "CASE NO. 3295/71".

(iv) The summons of 12 November 1971 was not signed by the registrar.

(v) On 24 August 1971 the court granted an amendment of the summons of May 1971, in the two respects indicated in paragraph (xv) of the tabulation of facts, supra. It was contended that the summons of 12 November 1971, headed "AMENDED SUMMONS" gave effect to the two amendments, granted on 24 August 1971, of the summons of 12 May 1971.

So there is something to be said for either view. However, what seems to me to tip the balance decisively is the fact that, at the pre-trial conference on 9 August 1974 (with all parties being represented by senior counsel) "the facts averred in paragraph 1 to 4 of the second special plea" were admitted on behalf of the liquidator. In order to examine what those facts are, I set out the appellant's second special plea in full -

/"1. On.....

"1. On or about the 19th January, 1971, the Transvaal Provincial Division of the Supreme Court issued an order in terms of paragraph 154 (1) of the Companies Act No. 46 of 1926 dissolving BRENTWOOD.

2. On or about the 12th day of May, 1971, the Plaintiff issued summons herein, which summons was served on the then only Defendant, the present Second Defendant.

3. On or about the 24th day of August, 1971, this Honourable Court granted an order at the suit of the Plaintiff in terms whereof, inter alia, the First Defendant was joined as such and ATLAS STER INRY-TEATER (EIENDOMS) BEPERK became the Second Defendant.

4. On or about the 9th November, 1971 and at the suit of the Plaintiff the Transvaal Provincial Division of the Supreme Court granted an order in terms of paragraph 191 (1) of Act 46 of 1926 declaring the dissolution of BRENTWOOD to have been void.

/5. In the .....

5. In the premises the First Defendant pleads that the summons and all subsequent proceedings in this action are a nullity and of no force and effect."

I stress paragraph 1, which avers the dissolution of Brentwood on 19 January 1971; and paragraph 2, which avers that on 12 May 1971 the Plaintiff issued summons herein; and paragraph 3, which refers to the order for the joinder of the appellant on 24 August 1961; and paragraph 4 which avers the avoidance of the dissolution of Brentwood; and the wording of paragraph 5 (although this was not admitted) which pleads that in the premises "the summons and all subsequent proceedings in this action are a nullity". (My italics). It is plain that "the summons" was the summons referred to in paragraph 2, dated 12 May 1971, which was issued during the period of dissolution.

/Nowhere .....

Nowhere in this protracted litigation, whether by replication or exception or argument in the Court a quo or otherwise, did the liquidator suggest that the special plea was misconceived on the ground that the action between the parties did not flow from the summons of 12 May 1971, but was a new action commenced de novo on 12 November 1971, after the avoidance of the dissolution of Brentwood. In particular, it is clear from the specific recital of the facts in the judgment of the Court a quo, and from the ratio, that that Court was never asked to consider whether the proceedings were commenced de novo in November 1971. In other words, for more than two years it was accepted on behalf of the liquidator that the special plea in question was directed at the validity of the litigation between the parties, commencing with the summons of 12 May 1971, in respect of which the appellant was joined on 24 August 1971. The suggestion that the litigation commenced de novo in November 1971 was raised for the first time in this Court;

/and in .....

and in my view it is defeated by a conspectus of all of the considerations referred to above.

On this view it is not necessary to discuss the question whether, if the appellant had attacked the absence of the registrar's signature under Rule 30, the Court, in its discretion, could have condoned it.

I proceed now to consider the question, arising out of the second special plea, what the effect was of the court's order declaring the dissolution of the company "to have been void". In other words, can it be said that that order had the effect of validating the summons which the liquidator issued on 12 May 1971, at the time when the company had already been dissolved by the court on 19 January 1971.

This is a matter of the interpretation of section 191 (1) of the Companies Act, 1926, which reads -

/"When .....

> "When a company has been dissolved, the Court may, at any time within two years of the date of the dissolution, on an application by the liquidator of the company, or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

In construing this provision one must guard against interpreting the words "to have been void" as though the sub-section ended there. Had that been the case, there might have been some justification for thinking that the effect of the order of avoidance was that de jure the dissolution had never happened, and that retrospective revival was thereby conferred on acts done on behalf of or against the company. This however, is not the case. The sub-section provides its own dictionary of meaning by clearly stating the effect of the order of avoidance, namely -

/"and .....

"and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved". (My italics).

That by no means confers retrospective revival of, for example, a summons issued by the liquidator on behalf of the company during the dissolution period. What the provision says and means is that, when the order of avoidance is made, thereupon certain proceedings may be taken. (Whether that would apply to the continuation of proceedings commenced before the dissolution, does not arise in the present case).

I am fortified in this view by the majority decision of the House of Lords in Morris v. Harris, 1927 A.C. 252. An identically worded section, (namely, section 223 of the English Act of 1908) was under consideration. Lord Sumner, with whom Viscount Dunedin agreed, observed at pages 257 to 258 -

/"The words .....

"The words 'to have been void', in s. 223, appear, it is true, so far as they go, to have some retrospective effect, and tend to some extent to support the respondent's argument. On the other hand, the remaining words, which define the order, point rather to a declaration removing a bar to such action as might otherwise have been taken, than to one validating past proceedings, taken since the dissolution through ignorance or disregard of it, and consequently invalid. The remaining words, 'and thereupon such proceedings may be taken, as might have been taken if the company had not been dissolved,' seem to me to point conclusively in the same direction. They describe an authority given to the parties concerned to do, 'thereupon' and accordingly thereafter, things which they might have done but obviously had not done theretofore, and, but for the order, could not have done after the dissolution. I think these words do not affect the validity or the contrary of steps taken during that interval. They must still depend on the facts existing and the rights arising before and independently of the order."

/Lord .....

Lord Blanesburgh agreed with that result, but arrived at it after considering certain correlative sections. However, after referring to the words "to have been void", he expressed his conclusion thus, at page 268 -

> "But the expository words which follow carefully and, as I think, advisedly refrain from adding that such an order is to have the effect of restoring to the company from the same moment, not its corporate existence only, but its corporate activity also. On the contrary, these expository words import, as I think, that it is only after the order has been made - it is 'thereupon' but not before - that any active consequences are to ensue."

Lord Wrenbury (dissenting in the company of Lord Shaw) dealt briefly with the point at page 263. He concluded, in fin., and over the page, that the effect of the order of avoidance was that the dissolution, although it existed, was a void dissolution, and therefore that a

/certain .....

certain step taken during it was good.

In my very respectful view the minority decision makes insufficient use of the valuable interpretative light cast on the sub-section by the words -

> "and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved".

Counsel for the respondent invited this Court to follow the minority view. I decline the invitation, on the grounds, with respect, of reason and interpre= tation. Nor does it seem to me that acceptance of the invitation is facilitated by the argument that in South Africa the Master applies for dissolution under section 154 (1) of the Act, as amended, whereas in England such duty lay with the liquidator. Nor can the invitation be accepted on the argument that, in the correlative section 420 of the South African Act 61 of 1973, the words following after "and thereupon" are

/limited .....

limited to proceedings against the company, thus giving rise, so it was submitted, to an inference that the Legislature intended in 1973 that proceedings started by the Company, and interrupted by the dissolution, could continue as if the dissolution had not taken place. It is not necessary to interpret the 1973 Act here, but I point out that in the present case the proceedings were instituted by the liquidator during the period of the dissolution.

Although Morris v. Harris, supra, was decided half a century ago, it still holds good in England. Thus, Gore Browne on Companies, forty-second edition, 1972 (as a matter of interest, the first edition was published in 1866), states at page 1082 -

> "An order under section 352 declaring the dissolution of a company 'to have been void' has the effect that all consequences flowing from such dissolution are themselves avoided.

/The .....

> The order will not, however, validate any purported corporate activity of the company carried out prior to the making of the order." (My italics).

The authority cited is Morris v. Harris, supra. Section 352, referred to, is the 1948 counterpart of section 223 of the prior legislation; and is very similar to section 191 (1) of the Companies Act, 1926, of South Africa.

Similarly, dealing with the effect of dissolution and avoidance, Halsbury's Laws of England (Fourth edition, 1974) Vol. 7, page 809, para 1448, states -

> "The dissolution puts an end to the existence of the company. Unless and until it has been set aside, it prevents any proceedings being taken against promoters, directors or officers of the company to recover money or property due or belonging to it or to prove a debt due from it. When the company is dissolved, the liquidator's statutory duty towards the creditors and contri= butories is gone ....."

/And .....

And at page 811, paragraph 1452 -

"The order makes the dissolution void ab initio ..... The company is, however, to be treated as having been restored to life but not to activity in the interval between the dissolution and the order avoiding the dissolution, and the court does not validate proceedings against the company taken between the date of dissolution and avoidance."

To sum up with regard to the second special plea, it cannot be said that the order avoiding the dissolution had the effect of reviving the proceedings which the liquidator had commenced during the period of the disso= lution.

I would add that there does not appear to me to be any basis for dismissing the second special plea on the footing that the application for the avoidance of the dissolution should not have been brought under section

/191 (1) .....

191 (1) but on the simple ground that the Master had obtained the dissolution order "in error" as suggested by the Court a quo. The resultant sub= mission by counsel for the respondent, namely, that thereby the dissolution was at all times invalid from its inception, cannot be upheld.

In the result, the second special plea should have been upheld.

On that footing, it was agreed at the pre-trial conference that there should be judgment for the defendants; see paragraph (xxii) (c) of the tabulation of facts at the commencement of this judgment.

Accordingly -

1. The appeal is allowed with costs, including those consequent upon the employment of two counsel.

/2. The .....

2. The order of the Court a quo is replaced by one reading as follows -

(a) The first defendant's first special plea is dismissed.

(b) The second special plea is upheld.

(c) Judgment in the action is entered in favour of the defendants, with costs, including those consequent upon the employment of two counsel.

G.N. HOLMES
JUDGE OF APPEAL

MULLER, J.A.)
DE VILLIERS, J.A.) ALL CONCUR
JOUBERT, A.J.A.)
GALGUT, A.J.A.)