158/87

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ROY EDWARD BRIAN KALIL ..... Appellant

and

DECOTEX (PROPRIETARY) LIMITED ..... First respondent

and

CHARLES BECKER ..... Second respondent.

CORAM: CORBETT, VILJOEN, SMALBERGER, NESTADT, JJA et STEYN AJA.

DATE OF HEARING: 5th November 1987

DATE OF JUDGMENT: 3 December 1987

J U D G M E N T

CORBETT JA:

The appellant applied to the Witwatersrand Local Division for the winding up of a company known as Decotex (Proprietary) Limited ("Decotex"). He applied in

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two different capacities and upon two separate grounds: (i) in his capacity as a shareholder of Decotex on the ground that it was just and equitable that the company be wound up; and (ii) in his capacity as a loan creditor of Decotex on the ground that the company was unable to pay its debts. He cited Decotex as first respondent and one Charles Becker as second respondent. Second respondent is the registered holder of two of the four issued shares in Decotex, the other two being registered in the name of the appellant. The directors of Decotex are appellant and second respondent. The application which was filed on 2 January 1986 was opposed by second respondent in his personal capacity and on behalf of Decotex.

When the matter came before Grosskopf J the appellant asked for a provisional order of winding up. Having heard argument, the learned Judge dismissed the application with costs. With leave of the Court a quo

/ appellant.....

appellant now appeals to this Court against the whole of the judgment and order of Grosskopf J. At the hearing before us, however, respondents' counsel argued in limine that no appeal lay against the order of the Court a quo. This was disputed by appellant's counsel. It is the first matter which I must consider.

I might mention that this point in regard to appealability was not raised at the stage of the application for leave to appeal, which was opposed by the respondents. Counsel admitted that the point had only occurred to him later.

Respondents' argument on appealability turns on whether the provisions of sec 150 of the Insolvency Act 24 of 1936 as amended ("the Insolvency Act") are made applicable to orders granting or refusing the winding up of a company which is unable to pay its debts by reason of the provisions of sec 339 of the Companies Act 61 of

1973 as amended ("the 1973 Companies Act"). The relevant portions of sec 150 read:

> "(1) Any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may appeal against such order.
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> .....
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> (5) There shall be no appeal against any Order made by the court in terms of this Act, except as provided in this section."

And sec 339 provides:

> "In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act."

It is cardinal to the respondents' argument that the opening words of sec 339, viz: "In the winding-up of a company .....", be read as referring not only to (a) the process of liquidation which commences once an order of winding up has been granted, but also to (b) the legal proceedings which lead to the grant or refusal of

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such an order. In my view, the words in question refer to (a), but not to (b). It seems to me that the ordinary meaning of the words "winding-up of a company" impel one to this conclusion. They refer to the liquidation of the company, not to the legal proceedings giving rise to the liquidation order; and, a fortiori, not to proceedings giving rise to the refusal of a liquidation order. In the case of Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schiffscommerz Aussenhandelsbetrieb Der VFB Schiffbau Intervening 1979 (4) SA 745 (N) James JP, delivering the judgment of the Full Bench of the Natal Provincial Division (Van Heerden and Milne JJ concurring) stated (at 750 B-C)

> "Section 339 lays down that the provisions of the Insolvency Act only apply in the winding-up and that stage is only reached when the order to wind up has been granted in terms of the Companies Act".

He went on further to hold that the 1973 Companies Act itself did not prohibit an appeal against an order

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refusing an application to wind up; that consequently the right to appeal was governed by the Supreme Court Act 59 of 1959; that an application for winding up was a civil proceeding and, in the absence of any specific limitation, a judgment or order made in such a proceeding was appealable; and that, in the case before the Court, there being no such specific limitation, the order refusing an application to wind up was appealable. (The reference to a "specific limitation" arose from the provisions of sec 20(2)(c) of Act 59 of 1959, in the original form, to which I shall make further reference later). I am in full agreement with what was stated and held in the Lawclaims case in regard to the interpretation of sec 339 and the appealability of a decision refusing a winding up order. Naturally this must now be read subject to the requirements relating to leave to appeal as laid down by sec 20 of the Supreme Court Act in its

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present form, ie as amended by sec 7 of the Appeals Amendment Act 105 of 1982. (See also the remarks (obiter) of Smuts J, with whom Klopper JP and Erasmus J concurred, in Du Plooy and Another v Onus (Edms) Beperk and Two Others 1981 (1) PH E2.)

In the course of his argument respondents' counsel referred to sec 348 of the 1973 Companies Act which provides as follows:

> "A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up".

He conceded, however, in view of the authority of Vermeulen and Another v C C Bauermeister (Edms) Bpk and Others 1982 (4) SA 159 (T), that since no winding up order was in fact made in this case, sec 348 did not come into operation. Nevertheless, in my view, the provisions of sec 348 tend to controvert, rather than advance, the argument of res-

pondents' counsel. The purpose and effect of sec 348 was considered by the Full Bench of the Transvaal Provincial Division in Vermeulen's case (supra) at pp 161 F - 162 B. Clearly the effect of the section is to antedate, by means of a deeming provision, the commencement of a winding up by the Court to the time of the presentation of the application for winding up. And, in my opinion, the time from which the commencement of winding up was intended to be antedated by this deeming provision was the date of the grant of the winding up order. It seems implicit in this that the Legislature regarded a winding up as ordinarily commencing with the order for winding up.

Respondents' counsel placed considerable reliance on the English case of In re A I Levy (Holdings) Ltd 1964 Ch. 19 as authority for the proposition that the words "In the winding-up....." in sec 339 included the

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legal proceedings leading to the grant, or refusal, of the winding up order. I have read the case carefully. It deals with sec 227 of the English Companies Act of 1948 and the question as to when the Court may exercise the jurisdiction granted to it by that section. Section 227 and sec 339 of the 1973 Companies Act are not in pari materia and I do not find the decision to be of any assistance in resolving the question now under consideration.

In Rex v City Silk Emporium (Pty) Ltd and Meer 1950 (1) SA 825 (GWL) the question arose as to whether a company which was under provisional liquidation and was unable to pay its debts was indictable for certain offences under the Insolvency Act. The State relied upon sec 182 of the Companies Act 46 of 1926 ("the 1926 Companies Act"), which was the predecessor

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of sec 339. The Court held that the State was not entitled to rely on sec 182 since (at p 834) —

> ".... the section is merely administrative. It provides that the law relating to insolvent estates is to apply to the process of winding up a company ....."
> (My emphasis.)

This decision was followed in R v Schreuder 1957 (4) SA 27 (O) and Cooper and Cooper v Ebrahim 1959 (4) SA 27 (T). It may be that the use of the words "merely administrative" in this dictum placed too confined a construction on the effect of sec 182 (see the discussion of these cases and of another in which the dictum was applied in a civil matter, viz Ex parte Mallac: In re L D De Marigny (Pty) Ltd (In Liq.): De Charmoy Estates (Pty) Ltd Intervening 1960 (2) SA 187 (D), by Colman J in Woodley v Guardian Assurance Co

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was because the right of appeal in winding up applications had been placed on the same footing as that in sequestration applications by virtue of sec 339.

This argument is, in my view, not well founded. A provision in terms virtually identical to sec 159 of the 1926 Companies Act was to be found in sec 155 of the Companies Act 1909 (Tvl); and a provision in substantially similar terms was to be found in sec 195 of the Companies Act 1892 (Cape). It appears from Collier v Redler and Another 1923 AD 640 that this latter section was taken over almost verbatim from sec 124 of the English Companies Act 1862 "without.... proper consideration" (see pp 645, 652). In Collier's case this Court held that no appeal lay as of right against a winding up order granted by two judges of the Cape Provincial Division inasmuch as a petition for the winding up of a company was not a "civil suit or action" within the meaning of sec 50

of the Charter of Justice of the Cape of Good Hope, read with sec 104 of the South Africa Act, 1909. In coming to this conclusion the Court adopted the general interpretation placed upon these words in Gillingham v Transvaalsche Koelkamers Beperkt 1908 TS 964, which had to do with the appealability of a sequestration order. For the reasons to be found at pages 645 and 652 of the report this Court held in Collier's case that sec 195 of the Companies Act 1892 (Cape) did not assist the applicant on the question of appealability and indeed Kotzé JA remarked apropos thereof (at p 652):

> "It is also remarkable that the introduction of this unnecessary section should have escaped the notice of the legal mind in both Houses of the Legislature".

Sec 159 was nevertheless included in the 1926 Companies Act. Whether the Legislature considered that this would result in a winding up order becoming appeal-

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of SA Ltd 1976 (1) SA 758 (W)), but it seems to me that the interpretation that the relevant words in sec 182 ("In the case of every winding-up of a company....") referred to "the process of winding up" is consistent with the meaning which I have placed upon the corresponding words in sec 339. I should add that there are differences in the wording of secs 182 and 339, but none of these appears to me to have any bearing upon the question presently being discussed.

Respondent's counsel also referred to sec 159 of the 1926 Companies Act, which read:

> "An appeal from any order or decision made or given for or in the winding-up of a company by the Court under this Act shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction".

He drew attention to the fact that there was no equivalent provision in the 1973 Companies Act and he argued that this

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able as of right or whether its inclusion was simply an instance of legislative inertia is uncertain. At all events, the decision in Collier's case as to the meaning of "civil suit or action" having been followed in a number of cases coming before this Court (see Collett v Priest 1931 AD 290 and the cases there cited; Lebedina v Haskel and Another 1932 AD 354; Dreyer and MacDuff v New Marsfield Collieries Ltd 1935 AD 318), in 1935 the Legislature stepped in and enacted that for the purpose of determining whether an appeal lay from any order or judgment of a Judge or court the words "civil case" or "civil suit" or "civil action" in any law should, subject to the provisions of any law which specially limited the right of appeal in any particular matter, be deemed to include "any civil proceedings whatsoever" (see sec 3(c) of Act 1 of 1911, introduced by sec 106 of Act 46 of 1935). As pointed out in Service Trade Supplies (Pty) Ltd v Dasco and

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Sons (Pty) Ltd 1962 (3) SA 424 (T), at p 425 E, this enactment "considerably enlarged the range of appealable orders". Furthermore, this enlargement was maintained in sec 20 of the Supreme Court Act 59 of 1959, which replaced the earlier legislation dealing with appeals in civil matters (see Dasco's case, supra, at p 425 F-H). The result was that the former limitation on appealability inherent in the words "civil suit or action" disappeared.

In the circumstances, sec 159 of the 1926 Companies Act, considered "unnecessary" in 1923 (see the quoted remarks of Kotzé JA in Collier's case supra), became redundant, since an application for the winding up of a company was clearly a "civil proceeding" (Dasco's case, supra; cf. Mahomed v Kazi's Agencies (Pty) Ltd and Others 1949 (1) SA 1162 (N), at p 1166). The only problem which remained was, whether in the light of sec 159 - which referred only to "an order or decision made or given for or

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in the winding-up of a company" - an appeal lay against an order refusing an application for winding up. This was the question which arose in Dasco's case, supra, the problem being whether sec 159, because it did not specifically include an order refusing a winding up, should be construed as specifically excluding it and as thus constituting a provision which "specifically limits" the right of appeal (see sec 20(2)(c) of Act 59 of 1959, as originally enacted). In Dasco's case the Full Bench of the Transvaal Provincial Division, following the Full Bench of the Natal Provincial Division in Mahomed v Kazi's Agencies (Pty) Ltd and Others, supra, held that sec 159 did not so limit the right of appeal against an order refusing a winding up and that such an order was appealable (see pp 426 A - 427 A).

This being the state of the law at the time when the 1973 Companies Act was passed, it seems to me

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that the most probable reason why sec 159, or a similar provision, was not incorporated in the new Act was that it had proved to be redundant. All orders made in winding up applications, including orders refusing a winding up, constituted orders in civil proceedings, in terms of sec 20 of the Supreme Court Act, and there was consequently no need for a special provision in the 1973 Companies Act relating to appeals. Moreover, this being the state of the law at the time, it seems probable that, had the Legislature wished to limit the right of appeal in winding up applications, it would have done so more explicitly than by the mere omission from the 1973 Companies Act of sec 159 of the 1926 Companies Act (or a like provision).

For these reasons, I hold that, the requisite leave having been given, the order of the Court a quo dismissing the application for a provisional order of liquidation is appealable in this Court. Respondents'

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point *in limine*, which if successful would have led to the appeal being struck off the roll, is therefore dismissed with costs.

I turn now to the merits of the appeal. The undisputed facts, as they appear from the affidavits filed are shortly as follows. The appellant is an interior decorator and designer. Decotex was incorporated on 9 February 1982 and has at all times carried on business in Johannesburg as an interior decorator and supplier of goods to the interior decorating and retail trade under the trading style of "Clothworks". It initially operated a shop in Norwood and a factory in Doornfontein. The first share-holders in Decotex were appellant and one Demitri Theophano-poulos, appellant holding three and Theophanopoulos one of the four issued shares.

Decotex acquired from a French textile manufac-turing firm, referred to in the papers as Texunion, an

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exclusive licence entitling it to import and deal within the Republic of South Africa in the designs and fabrics produced by Texunion. Imported fabrics were made up into finished products in the factory and the shop dealt in the main with the retail trade. Decotex also acquired certain other licences relating to printing designs.

In about June 1983 second respondent learned through an intermediary, one Cyril Graff, that Theophanopoulos wished to sell his interest in Decotex and that appellant was looking for someone to take his place. Second respondent, together with his father and his two brothers, were shareholders in a company known as Heidi Bee (Proprietary) Limited ("Heidi Bee"), which carried on business in Johannesburg as interior decorators in competition with Decotex. It was put to second respondent by Graff that, for various reasons, it would be to his advantage, or that of Heidi Bee, to take over Theophanopoulos's

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interest in Decotex. A meeting was arranged between appellant and second respondent and negotiations ensued. On 23 September 1983 two agreements were signed. The first, a tripartite agreement between appellant, Theophanopoulos and second respondent, provided that Theophanopoulos would sell his one share in Decotex and his loan claim against Decotex, amounting to about R15 000, to second respondent and that appellant would sell one of his shares to second respondent. Thus the effect of this agreement, when implemented, would be that appellant and second respondent would each hold two shares in the company and second respondent would become a loan creditor of the company. The second agreement, entered into between appellant and second respondent, was a shareholders agreement regulating the legal relationship between the parties inter se as shareholders in Decotex. Each of these agreements was made conditional on the other being executed. The agreements were implemented.

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At the time when these agreements were concluded the financial position of Decotex was not particularly healthy. Second respondent avers that it was then in insolvent circumstances, but this is denied by appellant. At all events it is clear that its first year of trading (which ended on 28 February 1983) produced a revenue loss of R19 923 and that it badly needed an injection of working capital to enable it to conduct business on a profitable basis. In terms of the shareholders agreement of 23 September 1983 second respondent undertook to procure credit facilities for Decotex in the sum of not less than R100 000, by way of overdraft facilities for not less than R40 000 and by way of shipping and confirming facilities for not less than R60 000. In pursuance of the agreement second respondent arranged credit facilities which were actually in excess of these amounts. Appellant and second respondent (and two other Beckers) stood surety for these liabilities.

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During the 1985 financial year, despite cash flow problems and the need for additional credit facilities, there appeared to be improvement and second respondent was convinced of the profitability of the business. He accordingly sought to devise a merger between Decotex and Heidi Bee. To this end a meeting was arranged at the home of a certain Gerald Sacks. For various reasons appellant decided that such a merger would not be in his or Decotex's interests and rejected the proposal. It is not clear exactly when this meeting took place. It seems probable that it was early in 1985.

During March 1985 the auditor for Decotex, a Mr Braude, produced a draft trial balance for the financial year ended 28 February 1985, which showed a net profit of R36 320. The figures used to produce this profit included stock in hand to the value of R206 660. This figure was arrived at on the basis of a physical stock-

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The shareholders agreement also provided that appellant was to be the managing director of the company and was to be responsible for the day-to-day running of its business. There is a dispute as to the actual extent of second respondent's active participation in the business when the agreement was implemented, but nothing turns on this. Second respondent avers that from reports received from time to time from appellant and his wife (who was also employed in the business) it appeared that profits were being made. This is not disputed. In spite of this the annual accounts for the year ended 29 February 1984 showed a trading loss of R10 236. Second respondent says that he was surprised by this, but after discussing the matter with appellant he was convinced that there would be higher profits in the 1985 trading period. This is denied by appellant, but it is common cause that they were both optimistic about the year to come.

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taking conducted by the appellant. Second respondent was not satisfied with this stock figure, contending that the stock had been over-valued and that were it valued at a realistic figure the trial balance would show a loss and not a profit. There are various disputes on the papers in this connection, but it seems to be common cause that owing to second respondent's dissatisfaction with this stock figure the appellant agreed to write down the value of certain stock items. It was also agreed that certain of the "slow-moving" stock be sold at cost in order to improve the liquidity of the business.

At this stage the respective versions of appellant and respondent begin to diverge markedly and since this represents the core of the dispute between the parties I shall attempt to summarize separately what each has to say.

The appellant alleges that after the break-down of the merger talks early in 1985 second respondent —

/ " ....made.....

> ".....made up his mind to push me out of the business completely and to take it over for himself and his family".

In about April 1985 he was told by second respondent that the latter and his family desired to merge the activities of Decotex with those of Heidi Bee and required that all the stock in the shop be moved to Heidi Bee's premises. He agreed to accept these requirements because at that stage Heidi Bee had invested considerable funds in Decotex and he was reluctant to bring about a confrontation which would lead to the withdrawal of these funds and the resultant paralysis of the business. The stock was accordingly moved over. At the same time the plant and equipment at Decotex's factory was also moved to the premises of Heidi Bee and the fittings and fixtures of Decotex's shop were taken to the second respondent's residence.

Shortly after Decotex's stock had been moved to the premises of Heidi Bee second respondent informed appellant

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that Heidi Bee was going to retain 40% of the selling price of all stock sold by Heidi Bee on behalf of Decotex. Appellant did not agree to this, but second respondent said that he was going ahead and appellant could do as he pleased. Shortly thereafter, in about June 1985, appellant was told by second respondent that his services with Decotex were no longer required as there was no room for him in the business. His employment was summarily terminated.

Appellant further alleges that the stock of Decotex has now been totally integrated with the stock of Heidi Bee and that it will be extremely difficult for anybody to work out the prices at which such stock has been realized by Heidi Bee. As a result of the conduct of second respondent, so it is alleged, a company which was solvent as at 28 February 1985 is now clearly insolvent and unable to pay its debts. Appellant's loan account, which as at 28 February 1985 amounted to R46 628 is irrecoverable.

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Moreover, it is contended, second respondent and his family have succeeded in preferring themselves and will continue to do so. They have made a profit through Heidi Bee disposing of Decotex's stock at a profit of 40%, which profit should have accrued to Decotex.

According to appellant "the Beckers" (meaning second respondent and the other members of his family) have copied and continue to copy Texunion's designs and fabrics and are dealing with the same in breach of Texunion's rights, thereby endangering Decotex's sole franchise.

Appellant contends that it is just and equitable that Decotex/be wound up —

(a) so that an investigation can be made into the affairs of Decotex with a view to ascertaining what has become of Decotex's assets, particularly its stock, and what amounts are owed to Decotex by Heidi Bee;

/ (b) because, ...

(b) because, owing to the actions of second respondent, appellant no longer trusts second respondent or has any faith or confidence in him;

(c) because there is a deadlock between appellant and second respondent, the sole directors and equal shareholders in the company, with the result that no proper decisions can be made for Decotex and it cannot be properly administered;

(d) because second respondent has breached the shareholders agreement by terminating appellant's employment by the company; and

(e) because there is tension and friction between appellant and second respondent.

So much for the appellant's case.

Second respondent's version is that after it had been agreed that the "slow-moving" stock be disposed

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of appellant did not appear to make any practical effort in this regard and Decotex's financial position became more and more critical. Decotex was unable to meet its commitments and he (second respondent) refused to guarantee any additional financial facilities. A meeting was accordingly called and this took place over the Easter weekend in April 1985 at the home of Graff. The persons present at the meeting were appellant, appellant's wife, Graff, Braude, one Isaac Gever, an alternate financial director of Heidi Bee, second respondent's father, his brothers, Alan Becker and Brian Becker, and second respondent himself. According to second respondent, it was common cause at the meeting that Decotex was insolvent to the extent of about R65 000 and that it could not carry on trading. Second respondent's attitude was that there were two alternatives: either Decotex should be wound up or it should be taken over by Heidi Bee. Second respondent was against the

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first alternative as he did not wish to be associated with a company which was placed in liquidation. The alternative suggestion was fully discussed and eventually an agreement was reached to which the appellant subscribed. The terms of the agreement were as follows:

(1) That Heidi Bee would purchase all Decotex's stock, it would sell the stock at best and retain for itself as its profit and to cover overheads a figure which would be equal to a 40% mark-up on the cost price;

(2) that Heidi Bee would purchase Decotex's motor vehicles, plant and machinery at book value, less depreciation, and take over motor vehicles which were on lease and assume liability for the leasing instalments;

(3) that appellant and respondent would transfer their shareholdings in Decotex to Heidi Bee and

/ would.....

would cede their loan claims against Decotex to Heidi Bee;

(4) that second respondent would "procure" Heidi Bee to pay all Decotex's outstanding liabilities, including the bank, shippers and other creditors, but excluding the shareholders' loan claims;

(5) that Heidi Bee would employ appellant on the same terms and conditions as the appellant's employment with Decotex;

(6) that appellant would be entitled to purchase 20% of the share capital in Heidi Bee and that the shareholders in Heidi Bee agreed to sell such shares to appellant at book value as at 28 February 1985, such shares to be paid for in cash; this right to purchase being conditional upon appellant agreeing to be employed by Heidi Bee and the appellant binding

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himself as surety and co-principal debtor with the other directors of the company in favour of those creditors whose claims the other directors had guaranteed;

(7) that appellant would be appointed a director of Heidi Bee when he purchased the shares in terms of (6) above; and

(8) that the net purchase price of stock sold by Heidi Bee would be set off against the moneys which Heidi Bee would disburse on behalf of Decotex and, if there was a surplus, this would be appropriated pro rata to the shareholders' loan claims.

(For convenience I shall refer to this as the "Easter agreement".)

According to second respondent the licences relating to printing designs held by Decotex and the

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trade name "Clothworks" were extensively discussed during the negotiations leading up to the conclusion of the Easter agreement. In the result, however, this matter became academic since, in terms of the agreement, Heidi Bee was to become sole shareholder of Decotex and thus would either use the licences and the trade name in its own trading with the consent of Decotex or permit Decotex to use the same in its own trading operations. Another matter discussed at length was the losses sustained by Decotex. These constituted an "asset" of Decotex in that a tax saving could be achieved thereby. It was contemplated that Heidi Bee would cause profitable transactions to be put through Decotex and the profits thus achieved would enable Decotex to repay shareholders' loans which were ceded to Heidi Bee.

Second respondent further avers that the Easter agreement was duly implemented. Stock, plant and machinery

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of Decotex were physically transferred to the premises of Heidi Bee. This was personally supervised by appellant, who prepared lists of the stock so transferred. Appellant and the staff of Decotex entered the employ of Heidi Bee. And in this connection second respondent attached to his affidavit copies of paid cheques to show that for the months of May, June and July 1985 appellant's salary had been paid by Heidi Bee. Also attached were documents, paid cheques and an income tax form, to show that Mrs E Ferney-Hough, the factory manageress of Decotex, entered the employ of Heidi Bee in May 1985 and remained so employed until 13 December 1985. Second respondent and his family, through Heidi Bee, paid all Decotex's creditors, apart from the shareholders' loan claims, and in the process an amount of R181 016 was disbursed. The net purchase price of stock sold by Heidi Bee over the period 30 April 1985 to February 1986 turned out to be R56 773. Second respondent estimates that when all the merchandise which

Heidi Bee took over from Decotex is sold, Heidi Bee will have suffered a shortfall in the repayment of its disbursements of approximately R100 000.

As a result of the Easter agreement the wholesale and manufacturing side of Decotex's business came to an end and only the retail shop continued to operate. Early on it became apparent that this part of the business was also sustaining losses. It was thereupon agreed between appellant and second respondent that the retail business would be closed as at the end of July 1985. Although appellant continued to be employed by Heidi Bee it became apparent to second respondent that he had lost his enthusiasm for the business and at the end of July he tendered his resignation with immediate effect.

In the circumstances second respondent denies that Heidi Bee has in any way misappropriated the stock of Decotex; or so arranged matters that he and his family

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will be preferred; or that Heidi Bee is unlawfully using the licensed designs and fabrics to which Decotex is entitled; or that appellant was wrongfully dismissed; or that it is just and equitable that Decotex be wound up. Second respondent avers that Decotex "....is presently a shell of a company and does not conduct any business whatsoever". Decotex's creditors have been paid in full and no preference has been given to any particular creditor.

During September 1985 appellant made an appointment to meet second respondent. There is a dispute as to what transpired at this meeting. It is common cause, however, that appellant was accompanied by his attorney and that at the meeting the latter asked second respondent what compensation he was prepared to pay for having, as it was put, dispossessed appellant of his shares and loan account. According to second respondent he asked on what basis appellant thought he was entitled to compen-

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sation, but neither appellant nor his attorney was able to indicate any such basis.

After and as a result of these discussions second respondent, according to him, became concerned about the fact that there was no written record of the Easter agreement. He considered that it was of practical importance to have such a record, particularly in regard to Decotex's stock and the basis upon which the purchase price of that stock was to be determined. He was also aware that when a company disposes of its major asset a resolution of shareholders is necessary. (Presumably he had in mind sec 228 of the 1973 Companies Act.) Accordingly on 21 November 1985 notice was given of a general meeting of the shareholders of the company to be held on 6 January 1986 for the purpose of considering the following general resolution:

> "1. That the company confirm and ratify the Agreement of Sale in which the company sold its Plant and Machinery and its Stock
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situated at KAHNS CORNER; and OLGA BUILDINGS, 119 President Street, Johannesburg to Heidi Bee (Proprietary) Limited (Heidi Bee), as at 30 April 1985. The purchase consideration is to be determined in the following manner.

a. Plant and Machinery - at the book value thereof as at 30 April 1985.

b. The stock at the realisable value thereof by Heidi Bee less its normal gross percentage mark up of 40% (forty percentum).

c. Payment for the aforesaid goods shall be made by way of set-off against such monies which the company owes to Heidi Bee or such monies as Heidi Bee may be called upon to pay to or on behalf of the company."

Although, according to second respondent, appellant's shares in Decotex had been ceded to Heidi Bee, they had never been transferred. Appellant accordingly remained a registered shareholder in Decotex. Notice of the proposed meeting on 6 January 1986 was given to him. His response was to institute the application for winding up.

/ According.....

According to appellant (as averred in his replying affidavit) the meeting was held on 16 January 1986. His attorney, Mr Melamed, attended on his behalf, as his proxy holder. Also present were second respondent and the auditor, Braude. Appellant's attorney voted against the resolution and it was, therefore, not carried. Appellant says, with reference to the meeting at which this draft resolution was considered, that —

> "[i]t is significant that at this meeting neither the Second Respondent nor BRAUDE adopted the attitude to the said MELAMED that my shares had been acquired by HEIDI BEE or that I was not a shareholder".

Finally, I would add that in his replying affidavit the appellant flatly denied that any agreement had been concluded at any time between the parties along the lines of the Easter agreement. According to him "a great deal of discussion took place on a great many issues", but no final agreement was reached. He described the alleged

terms in regard to the set off of the purchase price of stock sold by Heidi Bee against disbursements by Heidi Bee (see para 8 above) as a "fabrication" on the part of second respondent.

Near the beginning of his judgment the Judge a quo stated —

> "There are many disputes of fact, but it is common cause that the only real issue which has to be decided at this stage, is whether the applicant has locus standi to apply for the winding up of the first respondent. This point has to be resolved at the outset".

The learned Judge proceeded to consider the question of the appellant's locus standi and came to the conclusion that he had not established prima facie that he had locus standi, either on the basis of a shareholder or as a creditor. He accordingly dismissed the application with costs.

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On appeal before us appellant challenged these findings on locus standi. I shall deal first with appellant's position as a shareholder in Decotex and then with his claim to be a creditor of Decotex.

It is common cause that when the application was launched in the Court a quo the appellant was still shown in the share register of Decotex to be the holder of the two shares held by him immediately prior to the Easter agreement. Prima facie, therefore, he remained a member of the company (sec 109 of the 1973 Companies Act). The Court is, however, entitled to go behind the register in order to ascertain the identity of the true owner (see Randfontein Estates Ltd v The Master 1909 TS 978, at pp 981-2; Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others 1980 (2) SA 175 (T), at p 181 G-H). Moreover, I shall accept, as was argued on behalf of second respondent, that the ownership in

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shares can be transferred by way of a contract of cession, provided that there is the necessary intention to pass ownership, and that there is no need for the delivery of the relevant share certificates (see Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others, supra, at p 180 F-H, but cf judgment on appeal at 1983 (1) SA 276 (A), at p 288 C-E). It is second respondent's case that the Easter agreement constituted such a contract of cession and that as a result thereof appellant parted with the ownership of his shares in Decotex and, therefore, was no longer a member of the company when the winding up application was made. As I have indicated, the conclusion of the Easter agreement is a hotly contested factual issue on the affidavits, it being appellant's case that no such agreement was ever reached and that he never ceded his shares.

The Court a quo assumed for the purposes of the

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application that appellant never ceded his shares and remained the beneficial owner thereof throughout. It nevertheless came to the conclusion that, inasmuch as the shares held by appellant were fully paid up and Decotex was insolvent, appellant had no tangible interest in the liquidation of the company and consequently had no locus standi to make the application.

Much of the argument on appeal centred on this requirement of a tangible interest and on the further question as to whether it related to the applicant's locus standi or was relevant rather to the question as to whether or not the Court, in the exercise of the discretion which it has in terms of sec 347(1), should make an order of winding up.

In Burkhardt v Black Sands Reduction Co of SA Ltd 1910 WLD 244 application was made for the winding up of the respondent company on the ground that 75% of its paid-up

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share capital had been lost or become useless for the purposes of its business. The applicant was the holder of 30 fully-paid shares. Respondent objected to the application on the ground that the applicant would have no substantial dividend accruing to him in the liquidation and contended that the application should be refused on that ground. The Court (at p 246) referred to the following remarks of Jessel MR in the English case of In re Rica Gold Washing Company (1879) 11 Ch D 36, at pp 42-3:

> "Now I will say a word or two on the law as regards the position of a Petitioner holding fully paid-up shares. He is not liable to contribute anything towards the assets of the company, and if he has any interest at all, it must be that after full payment of all the debts and liabilities of the company there will remain a surplus divisible among the shareholders of sufficient value to authorize him to present a petition. That being his position, and the rule being that the Petitioner must succeed upon allegations which are proved, of course the Petitioner must shew the Court by sufficient allegation

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> that he has a sufficient interest to entitle him to ask for the winding-up of the company. I say 'a sufficient interest', for the mere allegation of a surplus or of a probable surplus will not be sufficient. He must shew what I may call a tangible interest. I am not going to lay down any rule as to what that must be, but if he shewed only that there was such a surplus as, on being fairly divided, irrespective of the costs of the winding-up, would give him £5, I should say that would not be sufficient to induce the Court to interfere in his behalf."

Accepting this principle the Court in Burkhardt's case held that, since the most that the applicant would receive by way of a liquidation dividend would be £3 or £4, he had no such tangible interest as to entitle him to a winding up order. The learned Judge expressed the feeling that the applicant had some ulterior motive and that the application was not bona fide. He refused to make an order. Similar decisions were reached in Williams v Williams & Co Ltd 1914 EDL 129; Fraser v Warmbaths Cotton Estates Ltd 1926 WLD 110. These cases appear to

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establish the principle that an applicant for the winding up of a company must allege and prove, at least to the extent of a prima facie case, that there are assets of the company of such amount as will give him a tangible share in the event of the winding up (see Fraser's case, supra, at p 112).

On the other hand in Clark and Plummer v John Clark Limited 1924 TPD 363, Tindall J doubted (atp 367) —

> ".... whether it was intended in the English cases to lay down that under no circumstances is the holder of fully-paid shares entitled to petition for winding-up unless he proves that there will be assets available for distribution in the winding-up";

and stated further (at p 368):

> "There seems to me no justification for laying down generally that a holder of fully paid shares has no locus standi to present a petition for winding-up unless he shows a probability of a surplus on liquidation. To lay that down would be directly in conflict with sec

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> 114 of Act 31 of 1909. In none of the cases quoted were the facts the same as in the present application. There may be circumstances, such for example as those in the cases quoted, where the Court will not come to the assistance of a shareholder unless he shows the tangible interest referred to. But in this case...."

(Sec 114 of the Companies Act 31 of 1909 (Tvl) referred to above, is the section which prescribed the various parties who might present an application for winding up; cf. sec 346 of the 1973 Companies Act.) It was no doubt the judgment in Clark's case, supra, which led Dowling J to remark, apropos this principle —

> "I should add that the authority is not all one way, there is authority in our Courts to the effect that it cannot be laid down as a hard and fast rule that a petitioning contributory must necessarily show a tangible interest".

(See Markus v Universale Produkte (Edms) Bpk 1962 (3) SA 242 (W) at p 243 E.) The point has never been considered, so far as I am aware, by this Court.

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The position in England was reviewed relatively recently by Oliver J in the case of In re Chesterfield Catering Co Ltd [1977] Ch 373. In that case the Court came to the following conclusions, which are relevant for present purposes:

(i) that the rule stated in Re Rica Gold Washing Co, supra, had been established and followed for close on 100 years, despite the fact that in terms of the Companies Act 1948 there was nothing in sec 222 or 224 which stated in terms that a contributory can present a petition only if there are likely to be surplus assets available for distribution to shareholders and despite the fact that sec 225 (1) of the Act (first introduced in the Companies Act of 1908) directs the court not to refuse a petition on the ground only that the company has no assets; and that in the circumstances it was too late for a departure from the rule (see p 378 C-G);

/ (ii) that.....

(ii) that the rule related to the locus standi of the petitioning contributory (see pp 379 F, 380 D, 381 C);

(iii) that the only exception to the rule was where the petitioner's inability to prove his locus standi was due to the company's own default in providing him with information to which, as a member, he was entitled (see p 379 F);

(iv) that the tangible interest of the fully paid shareholder had not necessarily and in all cases to be restricted to the existence or prospective existence of a surplus available for distribution amongst shareholders; cf, for example, the interest of a fully paid shareholder who petitioned on the ground that the number of members of the company had fallen below the statutory minimum; or the interest of a fully paid shareholder in an

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unlimited company (see pp 379 H - 380 C); and

(v) that sufficient interest (or tangible interest) nevertheless meant an interest by virtue of the petitioner's membership of the company and not some private advantage unconnected with such membership:

> "In order to establish his locus standi to petition a fully paid shareholder must, as it seems to me, show that he will, as a member of the company, achieve some advantage, or avoid or minimise some disadvantage, which would accrue to him by virtue of his membership of the company."

(see p 380 D-G).

To sum up the position, it seems clear that what I shall for convenience call "the tangible interest rule" was introduced into our practice under the influence of English law and particularly the decision in Re Rica Gold Washing Co, supra; that in our practice the rule has not been as consistently applied as in the English practice and cannot be said to be firmly entrenched;

that there is no decision of this Court in regard to the rule; and that even in England the rule is not an inflexible one and the concept of a tangible interest is not restricted to the prospect of a surplus of assets on winding up.

In Henochsberg on the Companies Act, 4th ed, Vol 2, at p 601 the learned editors suggest that the position in our law may be stated as follows:

> "There is nothing in s 346, or elsewhere in the Act, which qualifies a member's right to apply for winding-up by reference to whether or not he can show an interest in the winding-up; and that accordingly where his shares are fully paid-up, he nevertheless has locus standi to apply even if there would be no surplus after payment of the debts because the company is actually insolvent. He cannot, however, apply on the ground that the company is unable to pay its debts (s 346 (2)). In an application on any of the grounds upon which he can apply, ie those set out in s 344 (b), (c), (d), (e) and (h), the winding-up may be contrary to the wishes of other members. It is at the level of the Court's exercise

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> of its discretion whether or not to wind up where the members are not ad idem on the destruction of the company at the time of the application that the interest, if any, of the applicant qua member in the winding-up is material. If the company is actually insolvent, so that the applicant as a holder of the fully paid-up shares can have no interest in the winding-up (his capital is lost and he cannot be required to contribute), the Court may on that ground refuse the application where the other members seek an opportunity to preserve the life of the company, eg by investing further capital so as to enable it to pay its debts or by establishing a compromise with its creditors under s 311. As pointed out by Tindall J in the Clark case supra '[t]here may be circumstances .... where the Court will not come to the assistance of a shareholder' who has no tangible interest in the winding-up."

Without necessarily endorsing every statement made in the passage quoted, I am in general agreement with this approach as to the practice to be adopted in our courts. It seems to me that the element of a tangible interest should not be made a sine qua non of the locus standi of a shareholder who applies for the winding up of a

company, but should rather be regarded as a factor to be taken into account by the court when deciding, in the exercise of its discretion, whether or not to grant a winding up order. And, depending on the circumstances, the absence of such a tangible interest may well prove a decisive factor in the exercise of the court's discretion. Furthermore, I do not think that the concept of a tangible interest should be restricted to the prospect of a surplus of assets upon liquidation. Here I am in general, and respectful, agreement with the approach of Oliver J in the Chesterfield case, supra, as outlined in paras (iv) and (v) above.

This was clearly not the approach of the Court a quo. It appears to have equated tangible interest with the prospect of a surplus on winding up and to have treated it as an essential requirement relating to locus standi. It did not, in my view, purport to exercise any discretion. In non-suiting the appellant, in his

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capacity as member of the company, on these grounds the Court a quo therefore erred. This Court must, accordingly, consider this aspect of the matter afresh.

This conclusion does not, however, bring to an end the question of appellant's locus standi as a member for, as I have indicated, the continuance of his membership of Decotex after Easter 1985 is a hotly disputed issue on the papers. Appellant's attitude is that no agreement was concluded over the Easter weekend, or at any other time, in regard to the disposal of his shares to Heidi Bee and that he was the registered and beneficial shareholder as at the time when the application for winding up was launched. Second respondent's attitude is that in terms of the Easter agreement appellant ceded his shares to Heidi Bee and that consequently as at the time when appellant made the application, he no longer owned the shares, even though they may still have been registered in his name.

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Before us appellant's counsel sought to argue that the relevant terms of the Easter agreement, as set forth in the opposing affidavit of second respondent amounted to no more than an agreement to cede, as distinct from a cession; and that, therefore, ownership in the shares had not passed to Heidi Bee. I do not think that this argument, founded as it is upon the fine distinction between an agreement to cede and a cession, can be sustained. Reading the opposing affidavit in its entirety, I am of the view that the substantial averment is that it was agreed that appellant cede his shares to Heidi Bee and as a result Heidi Bee became the owner thereof.

One comes back, therefore, to the Easter agreement and the factual dispute as to whether or not it was concluded. This dispute is also of fundamental relevance to two other aspects of the case. Firstly, appellant's locus standi as a creditor depends upon

whether or not the agreement was concluded. It is now conceded by appellant that his only claim to be a creditor of Decotex as at the time when the application for winding up was made is based upon his loan account, which according to the trial balance as at 28 February 1985 then stood at R46 628. In terms of the Easter agreement this loan account was also ceded to Heidi Bee. It follows that if second respondent's version in regard to this agreement and its implementation is correct, the appellant had no status as a creditor of Decotex when he launched his application. Secondly, the Easter agreement and its implementation would seem, prima facie, to provide a satisfactory answer to appellant's various complaints in regard to the conduct of Heidi Bee and the Becker family in relation to Decotex and its assets; and would seem to controvert the averment that it is just and equitable that the company be wound up.

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It is thus obvious that the existence or non-existence of the Easter agreement is a crucial issue in this matter. Having carefully considered this issue I do not think that there is a preponderance of probabilities either way on the affidavits. There are certain probabilities favouring second respondent's allegation that such an agreement was concluded, such as, for instance, (i) the undisputed evidence showing the take-over of the business of Decotex by Heidi Bee, including the transfer of stock and other assets, the use of licences, the apparent employment by Heidi Bee of former employees of Decotex and so on, which seems to be more readily explicable on the basis of the Easter agreement than any other; (ii) the fact that it is common cause that negotiations with a view to such an agreement did take place; (iii) the fact that second respondent's version of what occurred at the Easter discussions is confirmed

by the other persons present (apart from appellant), including the company's auditor; (iv) the reasons advanced by Heidi Bee for wanting to take over Decotex - including the tax advantages of its assessed loss - which sound plausible; (v) the advance by Heidi Bee of a large sum of money to Decotex, viz R181 016, which seems more probable in the context of an agreement such as the Easter agreement than otherwise; and (vi) the talks in September 1985 concerning compensation for appellant's shares and loan account. Against this there are a number of factors favouring appellant's averment that no such agreement was concluded, such as for example (a) the fact that there is no written record of the agreement; (b) the fact that there is apparently no other documentary evidence in the records of either Decotex or Heidi Bee to substantiate the conclusion of such an agreement; (c) the fact that no attempt was apparently made, prior

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to the dispute arising between the parties, to arrange for the transfer of the shares held by appellant and second respondent to Heidi Bee; (d) the fact that some, at any rate, of the developments after the Easter week-end might be explicable on the basis of a "rationalization" of the operations of Decotex and Heidi Bee; and (e) the fact that the draft resolution in the notice of 21 November 1985 contained no reference to a cession of shares and loan accounts. But I cannot say that the one set of probabilities preponderantly outweighs the other.

The question then arises: how should the court deal with an opposed application for a provisional winding up order where the affidavits reveal fundamental and crucial disputes of fact and there is no preponderance of probability, either way, on the papers?

As was pointed out by Margo J in Wackrill v

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Sandton International Removals (Pty) Ltd and Others 1984 (1) SA 282 (W) at p 285 B-D, the procedure in winding up applications of granting a provisional order of winding up and a rule nisi calling on all persons concerned to show cause why a final order should not be granted, though not laid down in the 1973 Companies Act (or any of its predecessors), is well established in our practice. (See also Henochsberg, op cit, p 604.) Normally the application for a provisional order is made on notice to the company and possibly certain other interested parties and this may lead to the application being opposed and to affidavits in support of the opposition and affidavits in reply being filed. This, in turn, may bring in train fundamental disputes of fact, as in the present case.

It has been held in a number of cases that an applicant for a provisional order of liquidation need

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only make out a prima facie case; and that the general approach of the court in deciding whether to grant the application should be similar to that suggested by Trollip J, in relation to provisional orders of sequestration, in the case of Provincial Building Society of South Africa v Du Bois 1966 (3) SA 76 (W) — see eg Prudential Shippers SA Ltd v Tempest Clothing Co Ltd and Others 1976 (2) SA 856 (W), at p 867 A - C; Erasmus v Pentamed Investments (Pty) Ltd 1982 (1) SA 178 (W); Wackrill v Sandton International Removals (Pty) Ltd and Others, supra, at p 285 G.

The use of the words "prima facie case" in this context is somewhat anomalous as this term is normally used to denote the quantum of proof required of a party upon whom the onus rests, in the absence of rebutting evidence, in certain situations, eg where at the end of the plaintiff's case the defendant applies

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for absolution from the instance; or where the defendant closes his case without calling rebutting evidence; or in a criminal case where the defence asks for the discharge of the accused at the conclusion of the State case; or where an accused has not given evidence and the question arises as to whether there was sufficient evidence led by the State to call for an answer from him; or where in proceedings instituted on notice of motion the respondent takes the preliminary objection that the application does not make out a prima facie case for the relief claimed. The determination of the question as to whether the evidence adduced by the party bearing the onus constitutes a prima facie case is thus undertaken purely on a consideration of that evidence and without regard to any evidence which may be, or may have been, adduced in rebuttal.

Where the application for a provisional order

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of winding up is not opposed or where, though it is opposed, no factual disputes are raised in the opposing affidavits, the concept of the applicant, upon whom the onus lies, having to establish a prima facie case for the liquidation of the company seems wholly appropriate; but not so where the application is opposed and real and fundamental factual issues arise on the affidavits, for it can hardly be suggested that in such a case the court should decide whether or not to grant an order without reference to respondent's rebutting evidence.

Guidance on what is meant by a prima facie case in such circumstances is, however, to be found in the aforementioned judgment of Trollip J in the Provincial Building Society case, supra, which, as I have indicated, though dealing with sequestration proceedings, has been treated by our courts as being definitive of the approach in winding up applications.

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In the Provincial Building Society case the issue arose as to whether the respondent was insolvent or not. Respondent's counsel conceded that the affidavits showed, on a balance of probabilities, that the respondent was insolvent, but he argued that viva voce evidence might disturb that balance and applied for an order for the hearing of such evidence. Trollip J referred to the fact that in terms of sec 10 of the Insolvency Act 24 of 1936 an applicant for a provisional order of sequestration need only establish a prima facie case of insolvency and continued (at p 78 E) —

> "As it has been rightly conceded in this case that the balance of probabilities is in favour of the applicants, I think it follows that they have established prima facie that the respondent is insolvent".

He then proceeded to consider the question as to whether the respondent was entitled to an order for the hearing of viva voce evidence in order to try to disturb that

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prima facie case. He referred, inter alia, to the well-known case of Mahomed v Malk 1930 TPD 615, which enunciated certain rules relating to the hearing of viva voce evidence in insolvency proceedings, but concluded that because of changes in the wording of sec 10 of the Insolvency Act of 1936, as compared with the corresponding section in the previous Insolvency Act 32 of 1916 (in relation to which Mahomed v Malk was decided), these rules did not apply to applications for provisional orders of sequestration, but only to the final order stage (see pp 78 G - 79 H). He further concluded that at the stage of an application for a provisional order of sequestration the court should permit the hearing of viva voce evidence only in exceptional circumstances (p 80 A). He continued (at p 80 B-F):

> "My reasons for expressing that view are that firstly, the whole procedure at this initial stage is designed to afford the creditor a simple and speedy remedy for preserving the debtor's

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estate and enforcing his claim; in this regard it is noteworthy that no provision is even made for the debtor to be served with the petition; and if the facility of viva voce evidence was generally to be accorded to the debtor at this stage, it might well prolong the proceedings unduly and thus stultify the whole object of the procedure. Cf., e.g. Weinder Properties (Pty) Ltd v Gutstein, 1952 (4) SA 265 (C) at p 274; Extension Investments (Pty) Ltd v Ampro Holdings (Pty) Ltd, 1961 (3) SA 429 (W), which, although they refer to the procedure of provisional sentence, are also apposite to this present point. Secondly, the Act contemplates, as pointed out above, that at this stage the matter should ordinarily be disposed of on the petition and affidavits (cf too Daitsch and Another v Osrin and Another, 1950 (2) SA 343 (C) at p 346). Thirdly, generally the hearing of oral evidence at an interlocutory or interim stage of any proceedings is inappropriate because it might involve giving findings on credibility and otherwise prejudging issues which properly belong to the Court of final instance (Zondo v Union & National & General Assurance Co of SA Ltd, 1954 (3) SA 541 (W)).

I am not unmindful in arriving at the above conclusions that the granting of a provisional order can have serious consequences to the debtor, but that consideration is offset by the facts that

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> the Court must first be satisfied that a prima facie case has been made out; that even then it has a discretion to grant or refuse an order; and that in any event in exceptional circumstances it can hear viva voce evidence on any relevant aspect of the matter.

As appears from the above, the Provincial Building Society case, supra, dealt specifically with the situation where the balance of probabilities on the affidavits favoured the applicant. The learned Judge's view as to the position where this is not so is, however, to be gleaned from another portion of the judgment. After mentioning a number of cases in which the "new wording" of sec 10 of the 1936 Act had been overlooked and which consequently were not a "safe guide", Trollip J stated (at p 81 A-B):

> "The same applies to Ex parte Berson, Levy & Kagan v Berson, 1938 WLD 107, and Silver Trade Supplies (Pty) Ltd v Valley, 1961 (4) SA 70 (W), in which the applicant's claim was also disputed. In the former case, the Court found that the balance of probabilities was against the applicant and refused to order viva voce evidence and dismissed the petition, and in the

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> latter the Court found that there was no balance of probabilities either way and also refused to order viva voce evidence but made a special order postponing the hearing. In the result, therefore, both decisions were correct and can be justified on the basis that the Court was not of the opinion that the petitioning creditor had prima facie established his claim against the debtor in terms of sec 10 (a)."

This judgment would thus appear to lay down that in an opposed application for a provisional order of sequestration the necessary prima facie case is established only when the applicant can show that on a consideration of all the affidavits filed a case for sequestration has been established on a balance of probabilities; and that, where the applicant does show this, an application by the respondent for the matter to be referred to viva voce evidence (in order to endeavour to disturb this balance) will, save in exceptional circumstances, not be granted. The learned Judge would

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also seem to have expressed the view, obiter, that where on the affidavits the balance of probabilities is against the applicant or where there is no balance either way, no prima facie case is established and the court should refuse to order viva voce evidence.

In applying this general approach to applications for a provisional order of winding up it must be borne in mind that there are certain differences between the two procedures. A winding up, for example, may be obtained on grounds other than the insolvency of the company. Moreover, sec 347 of the 1973 Companies Act does not contain wording similar to sec 10 of the Insolvency Act of 1936, which requires merely a prima facie case when a provisional order is sought. While, therefore, it seems logical and desirable that similar approaches be adopted when provisional orders are sought either for the sequestration of an individual or the winding up of a company, I do not think that in regard to the latter

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the court is bound slavishly to follow practices evolved in sequestration proceedings. The court has an inherent power to order its own procedures (see Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A), at p 754 G-H) and it does so having regard generally to the fair and expeditious administration of justice. I proceed now to indicate, so far as may be necessary or desirable, what in my view the approach should be in applications for a provisional order of winding up. And here I may mention that, so far as I am aware, there is no decision of this Court upon these matters.

Although, as I have indicated, the term "prima facie case" seems somewhat inappropriate in instances where the application for a provisional order of winding up is opposed and there are real and fundamental disputes on the affidavits, it has been used for some years in this context and there seems to be no reason why it should

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not continue to be so used provided that it is understood as denoting a balance of probabilities on all the affidavits, as explained above.

Where on the affidavits there is a prima facie case (ie a balance of probabilities) in favour of the applicant, then, in my view, a provisional order of winding up should normally be granted and, save in exceptional circumstances, the court should not accede to an application by the respondent that the matter be referred to the hearing of viva voce evidence. This does no lasting injustice to the respondent for he will on the return day generally be given the opportunity, in a proper case and where he asks for an order to that effect, to present oral evidence on disputed issues. As it was put in the Wackrill case, supra, (at pp 285 H - 286 A) —

> "Ordinarily the consequences of a final winding-up order are drastic indeed, and it could not have been intended that proof of all the alle-
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> gations necessary for such an order should be anything less than that required generally in civil cases, that is proof on a clear balance of probabilities, with the admission of viva voce evidence, where that may be necessary, to resolve material disputes on the affidavits. That also appears to be the standard of proof required for a final sequestration order in terms of s 12 of the Insolvency Act 24 of 1936, according to which the Court must be 'satisfied' that the petitioning creditor has established the elements of his case."

Where, on the other hand, the affidavits in an opposed application for a provisional order of winding up do not reveal a balance of probabilities in favour of the applicant, then clearly no prima facie case is established and a provisional order cannot at that stage be granted. The applicant may, however, apply for an order referring the matter for the hearing of oral evidence in order to try to establish a balance of probabilities in his favour. It seems to me that in these circumstances the Court should have a discretion to allow

the hearing of oral evidence in an appropriate case. The alternative, viz refusal of the provisional order of winding up, represents a final decision against the applicant and, if such a decision is always made purely on the affidavits, injustice may be done to the applicant. (Cf. the general reluctance of the court in motion proceedings to decide finally genuine and fundamental disputes of fact purely on the basis of probabilities disclosed in contradictory affidavits: see Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO 1978 (4) SA 281 (A), at pp 294 D - 295 A, 299 H - 300 A.) Naturally in exercising this discretion the court should be guided to a large extent by the prospects of viva voce evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the court would be more inclined to allow the hearing of oral evidence than if the balance were against the

applicant. And the more the scales are depressed against the applicant the less likely the court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent. The case of Emphy and Another v Pacer Properties (Pty) Ltd 1979 (3) SA 363 (D) represents an instance where the Court, unable to resolve the disputed issues arising on an application for a provisional order of winding up, referred the matter for the hearing of oral evidence. As I read the judgment, the learned Judge appears to have found no preponderance of probabilities either way.

As in the present case, the disputes which arise on the affidavits may relate to the locus standi of the applicant, either as a member or creditor, or as to whether proper grounds for winding up have been

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established. In regard to locus standi as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the court will refuse a winding up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds. Though not always formulated in exactly the same terms this rule appears from decisions such as Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T), at p 347 H - 348 B; McLeod v Gesade Holdings (Pty) Ltd 1958 (3) SA 672 (W), at p 678 E; Gillis-Mason Construction Co (Pty) Ltd v

Overvaal Crushers (Pty) Ltd 1971 (1) SA 524 (T), at p 529 A-D; Meyer NO v Bree Holdings (Pty) Ltd 1972 (3) 353 (T), at p 354 C - 355 B; Walter McNaughtan (Pty) Ltd v Impala Caravans (Pty) Ltd 1976 (1) SA 189 (W), at p 191 E-H; Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others, supra, at p 867 E-F; Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd (United Dress Fabrics (Pty) Ltd and Another Intervening) 1978 (1) SA 70 (D) at p 72 A-E; and Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd: Machanick Steel & Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd 1979 (1) SA 265 (W), at p 269 A-D. For convenience I shall refer to this as the Badenhorst-rule. This rule would tend to cut across the general approach to applications for a provisional order of winding up which I have outlined above as it is conceivable that the situation might arise that the applicant could show a balance of probabilities in his favour on the affidavits, while

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at the same time the respondent established that its indebtedness to the applicant was disputed on bona fide and reasonable grounds. Whether the Badenhorst-rule should be accepted then as an exception to the general approach relating specifically to the locus standi of an applicant as a creditor, and the further question as to whether it should be applied inflexibly or only when it appears that the applicant is in effect abusing the winding up procedure by using it as a means of putting pressure on the company to pay a debt which is bona fide disputed (see the English case of Mann and Another v Goldstein and Another [1968] 2 All ER 769, at p 775 C-D) need not, however, be decided in this case. The point was not argued before us and, as I shall show, it seems to me that for various reasons the Badenhorst-rule should not be applied here.

I return now to the facts of the present case.

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As I have shown, the issue as to whether the appellant had locus standi, either as shareholder or as creditor, to bring the application, as also the merits of the application, are vitally dependent upon how certain factual disputes, principally as to whether or not the Easter agreement was concluded, are resolved. The probabilities in regard to the Easter agreement are, in my view, evenly balanced. No prima facie case (in the above-described sense) on these issues was thus established; and consequently the Court a quo could not grant a provisional order of winding up. Before us it was argued on appellant's behalf that the Court a quo ought to have referred the matter for the hearing of viva voce evidence and appellant's counsel submitted to us a draft order to this effect. In answer to an enquiry from this Court as to whether an application for the hearing of viva voce evidence had been made to the Court a quo

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appellant's counsel stated that appellant did ask, in the alternative and in the event of the Court a quo not being prepared to grant a provisional winding up order, that the matter be referred for the hearing of oral evidence. It appears from information subsequently placed before us, on the initiative of respondents, that respondent's counsel states that he, too, asked the Judge a quo for the matter to be referred to evidence, as an alternative to an order for the dismissal of the application. Junior counsel for appellant, who appeared in the Court a quo, is unable to recall this, but does not appear to dispute its correctness.

It has been held in a number of cases that an application to refer a matter to evidence should be made at the outset and not after argument on the merits (see Di Meo v Capri Restaurant 1961 (4) SA 614 (N), at pp 615 H - 616 A; De Beers Industrial Diamond Division (Pty) / Ltd .....

Ltd v Ishizuka 1980 (2) SA 191 (T), at pp 204 C - 206 D; Spie Batignolles Société Anonyme v Van Niekerk: In re Van Niekerk v S A Yster en Staal Industriële Korporasie Bpk en Andere 1980 (2) SA 441 (NC), at p 448 E-G; Erasmus v Pentamed Investments (Pty) Ltd, supra, at p 180 H; Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd 1981 (4) SA 175 (N), at p 179 B-E; cf Klep Valves (Pty) Ltd v Saunders Valve Co Ltd 1987 (2) SA 1 (A), at p 24 I - 25 D). This is no doubt a salutary general rule, but I do not regard it as an inflexible one. I am inclined to agree with the following remarks of Didcott J in the Hymie Tucker case, supra (at p 179 D):

> "One can conceive of cases on the other hand, exceptional perhaps, ... when to ask the Court to decide the issues without oral evidence if it can, and to permit such if it cannot, may be more convenient to it as well as the litigants. Much depends on the particular enquiry and its scope".

At the end of his judgment the Judge a quo stated

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the following:

> "In view of the disputes of fact which cannot be resolved in the application proceedings the applicant has in my opinion not established prima facie that he has locus standi, either on the basis of a shareholder or as a creditor."

This would seem to amount to a refusal of the application for the hearing of viva voce evidence, but it is not clear to me upon what grounds the learned Judge came to his decision. It would seem that he took the view that if an applicant fails to establish prima facie (ie on a balance of probabilities) on the papers that he has locus standi, there is no room for a reference to viva voce evidence. Leaving aside for a moment the appellant's locus standi as a creditor, it seems to me that locus standi may be one of the very issues which in a particular case will have to be thrashed out by viva voce evidence in order to determine whether an applicant has a prima facie case and is therefore entitled

to a provisional order of winding up. In the application of the general approach which I have outlined above there is no difference between issues relating to locus standi and other issues arising in the application. The approach of the Judge a quo would appear, therefore, to have been erroneous.

In view of my finding that the probabilities on the disputed issues are evenly balanced, this is the type of case where the court would normally be inclined to accede to an application by the applicant for the hearing of viva voce evidence. On the facts of this particular case I do not think that the fact that appellant did not ask in limine in the Court below that the matter be referred to oral evidence should constitute a fatal obstacle. The argument about locus standi seems to have been regarded by the Judge a quo as in the nature of a preliminary point to be decided at the outset. If it could have

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been correctly decided adversely to the appellant, that would have been an end to the matter; and that in fact is how the learned Judge saw the position. In the circumstances it seems to me that the convenience of the parties and the Court was served by adducing argument as to locus standi first and making the application for remittal for oral evidence on the disputed issues only in the alternative. It would seem, too, that in the event of the Court not dismissing the application respondents themselves would have favoured a reference to viva voce evidence, certainly in preference to the grant of a provisional order.

For these reasons, I am of the opinion that this Court, exercising the discretion which was vested in the Court a quo, should allow the application to refer the matter for the hearing of viva voce evidence on the disputed issues. The one further point which arises in this connection is whether such referral should include the issue as to appellant's locus standi as a creditor

/ or .....

or whether, applying the Badenhorst-rule, this should be excluded. In my opinion, it should be included. Even though it might be said that Decotex's indebtedness to the appellant is disputed on bona fide and reasonable grounds, there are several reasons why in this case the Badenhorst-rule should not be applied. It is not disputed that Decotex was originally indebted to the appellant by way of his loan account. The dispute is whether this indebtedness has been eliminated by cession in terms of the Easter agreement. This is hardly a case of a creditor seeking to enforce a disputed debt by winding up proceedings and thereby abusing the court process. Moreover, since the matter is being referred to oral evidence on the issues of appellant's locus standi as a member and the merits of the application, which are also dependent on the existence or non-existence of the Easter agreement, it seems to me that it would be the height of technicality to deny appellant the opportunity of establishing

by the same evidence his locus standi as a creditor.

For these reasons I have come to the conclusion that the appeal should be allowed and the order of the Court a quo set aside in order to permit the matter to be referred for the hearing of oral evidence under Rule 6(5)(g) of the Uniform Rules of Court. The draft order submitted by appellant's counsel, which appears to be based upon the form adopted in Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W), vide pp 396 G - 397 B, is in order and will be adopted, subject to minor amendment.

As to costs, the appellant has been substantially successful on appeal. The order of the Court a quo dismissing the application will be set aside and in its place there will be substituted an order referring the matter for the hearing of oral evidence. It is true that the respondents' counsel suggested oral

evidence in the Court a quo, but this was only as an alternative to a main argument that the application should be dismissed because appellant had no locus standi, either as a member or as a creditor, and only in the event of this main argument failing. Before this Court the same attitude was adopted. Accordingly I am of the opinion that appellant is entitled to his costs of appeal. Furthermore, it seems to me that the costs should be paid by second respondent. Substantially this case is a dispute between appellant and second respondent and, if it is ultimately established that the appellant's version of the facts is correct, then there would appear to be no basis upon which second respondent could claim to act on behalf of Decotex in opposing the application. In regard to the costs in the Court a quo, these in my view should stand over for determination by the Court which hears the matter, when oral evidence is led.

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The following order is made:

(1) The appeal is allowed and the order of the Court a quo is altered to read:

"(a) The application is postponed to a date to be arranged with the Registrar of the Supreme Court (Witwatersrand Local Division) for the hearing of viva voce evidence.

(b) The issues to be resolved at such hearing are:

(i) Whether or not the appellant is a creditor of the first respondent.

(ii) Whether or not the appellant is a member of, or beneficial shareholder of 50% of the issued shares in, the first respondent.

(c) The evidence to be adduced at the aforesaid hearing shall be that of any witnesses whom the parties or either of them may elect to call, subject however to what is provided below.

/ (d) Save.....

(d) Save in the case of any persons who have already deposed to affidavits in these proceedings, neither party shall be entitled to call any person as a witness unless —

(i) it has served on the other party at least fourteen days before the date appointed for the hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or

(ii) the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

(e) Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

(f) The fact that a party has served a statement or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

/ (g) Within.....

(g) Within forty-five days of the making of this order, each of the parties shall make discovery on oath, of all documents relating to the issues referred to above, which documents are, or have at any time been, in the possession or under control of such party.

(h) Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that rule with regard to the inspection and production of documents discovered shall be operative.

(i) The costs of the hearing of the application before Grosskopf J are to be determined by the Court which hears the postponed application".

(2) Second respondent is to pay the costs of appeal (which include the costs of the point in limine), such costs to be based upon the employment of two counsel.

M M CORBETT.

VILJOEN JA)
SMALBERGER JA)
NESTADT JA) CONCUR.
STEYN AJA)