IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

WYNAND THEUNIS JACOBUS MOOLMAN — APPELLANT

and

BUILDERS & DEVELOPERS (PTY) LIMITED
(in provisional liquidation) — RESPONDENT

ANDREW JOOSTE — INTERVENING PARTY

CORAM : JOUBERT, HEFER, STEYN, KUMLEBEN JJA et FRIEDMAN AJA.

HEARD : 24 NOVEMBER 1989.

DELIVERED : 1 DESEMBER 1989.

JUDGMENT BY J J F HEFER JA

HEFER JA :

This appeal is directed at an order made by MULLINS J In the South Eastern Cape Local Division discharging a rule nisi which he had earlier granted at the instance of the present appellant. How this came about appears from what follows.

During October 1987 Builders & Developers (Pty) Ltd, a company incorporated in the Republic of Transkei, was placed under provisional liquidation by order of the General Division of the Supreme Court of that country. The appellant was appointed as provisional liquidator. Shortly after his appointment he obtained an order from the same court authorising an examination in terms of

sec 417 and appointing a commissioner in terms of sec 418 of the Transkeian Companies Act 61 of 1973. The examination commenced in Transkei and the commission then convened in Port Elizabeth for the purpose of interrogating certain persons residing in that city. Among them were Mr A Jooste (the sole director and major shareholder of the company) and Mr G H Visser and Mrs Scott (to whom Jooste had paid large amounts of money shortly before the provisional liquidation of the company by means of cheques drawn on its bank account). Jooste and Viiser objected to the interrogation on the grounds that the commissioner had no jurisdiction in South Africa and that they were not compelled to appear and were not obliged to submit to interrogation.

The result of the objection was an ex parte application which the appellant brought in the court a quo for an order recognising (1) his appointment as provisional liquidator and (2) the order of the Transkeian court relating to the appointment of the commissioner. MULLINS J, before whom the application came, granted a rule nisi calling upon "the Respondent" (although no respondent was cited) to show cause, if any, why there should not be an order:

> " (a) Recognising the appointment of the applicant (in terms of the laws of the Republic of Transkei)as provisional Liquidator in the insolvent estate Builders and Developers (Pty) Ltd (in Liquidation) on the terms set out herein, within the Republic of South Africa until such recognition is withdrawn

by order of this Court.

(b) Directing that the applicant provide security to the satisfaction of the Master of this Honourable Court for the proper performance of his administration by virtue of this order and for the hereinmentioned Master's costs and charges;

(c) Declaring that thereafter the applicant shall by virtue of this recognition be empowered to administer the said estate in respect of all assets of the said estate which are situated within the Republic of South Africa;

(d) The rights defined by the Insolvency Act 24 of 1936 read together with the Companies Act 61 of 1973 as amended in favour of the Master, a creditor, and a company being wound up, in regard to meetings of creditors, proof, admission and rejection of claims, sale of assets, plans of distribution of proceeds,and the rights and duties of a liquidator in regard to those matters

as defined in the Acts as aforesaid shall, until this order is amended, mutatis mutandis, exist in relation to the said administration as if the said Acts applied thereto pursuant to a provisional winding up order granted by this Court on 8 October 1987 provided that:

(i) The rights and duties relating to the election and appointment of a liquidator will not apply;

(ii) The requirements relating to the filing of inventories shall not apply;

(iii) The costs of this application taxed on the scale as between attorney and client and such amounts as would have been payable to the Master under the law of the Republic of South Africa if the Company had been wound up under such law and any additional costs and charges of the Master for giving effect to this order will be costs of administration;

(iv) The rights and duties defined by Section 70 of the Insolvency Act 24 of 1936, read with section 394 of the Companies Act No. 16 of 1973 shall exist in relation to the administration;

(v) Any assets and furthermore any funds remaining after the payment of all amounts due in respect of the aforementioned charges, costs and proved claims, may be transferred from the Republic of South Africa to the Republic of Transkei only with the written permission of the Master of this Court."

(It will be noticed that no provision is made in the rule for the recognition of the commissioner. MULLINS J was apparently not prepared to include such a provision. He did, however, grant the appellant leave to apply on the

return date for the other relief sought in the notice of motion).

On the extended return date Jooste sought, and was apparently granted, leave to intervene in the proceedings and opposed the confirmation of the rule mainly on the grounds which he and Visser had earlier raised before the commissioner. His opposition was successful: MULLINS J discharged the rule and directed the appellant to pay Jooste's costs. Subsequently he granted the appellant leave to appeal to this court.

The court a quo's reasons for discharging the rule may briefly be stated as follows:

1. The sole purpose of the application was "to enable

the said enquiry to continue its work in Port Elizabeth, and to enable the commissioner to interrogate persons who are subject to the jurisdiction of this court".

2. Although it was necessary to interrogate Jooste and the other persons referred to earlier since it was clear to the court "that payments were made to them which might be voidable dispositions, and that they could provide useful and indeed vital information regarding the affairs of the respondent company", the court has no power to grant recognition to a foreign liquidator merely for the purpose of enabling him to enquire locally

into the affairs of the company. In his judgment MULLINS J said:

> "As I understand the position therefore, while comity extends to affording a foreign trustee or liquidator the opportunity of recovering assets within our jurisdiction, there is no basis for affording him other powers or functions which he may have within the area of jurisdiction of the country in which he was appointed. There may be sound arguments in favour of granting an application such as the present one, but there must be some authority therefor. Such authority is not to be found either in our statute law, or in our common law either directly or as an extension of recognition orders which have been granted in the past."

The argument presented to this court on Jooste's behalf followed mainly the lines of the court a quo's judgment. On appellant's behalf it was contended that

the absence from the court's jurisdiction of property falling to be recovered and dealt with in the process of liquidation does not preclude a court from granting a recognition order. Enquiring into the affairs of a company with a view to the possible discovery of assets and impeachable transactions - so the argument went - forms part of the functions of a liquidator just as much as the actual recovery of assets does; there is no reason to withhold, in connection with the former part of his functions, recognition which can be, and has often in the past been, granted to foreign liquidators in connection with the latter part.

Before considering the merits of these contentions

it is necessary to state that the company to which the appeal relates, has no established place of business in South Africa and is not an "external company" as defined in sec 1 of the South African Companies Act 61 of 1973. The provisions of the South African Act regulating the winding-up of companies in this country do accordingly not apply and do not assist the appellant in the performance of his functions. He derives his authority entirely from his appointment in a foreign country and is precluded from exercising the statutory powers of a locally appointed provisional liquidator. The commissioner appointed by the Transkeian court is in the same position; although he is at liberty to conduct the examination at

a venue in South Africa and to examine witnesses who are prepared to submit to interrogation, there is no means by which he, or any one else, can compel their attendance or oblige them to submit to interrogation if they are not prepared to do so. It is clear therefore that neither the appellant nor the commissioner will be able to perform their functions in South Africa without the "active assistance of the court" which is what a recognition order entails (Re African Farms Ltd 1906 TS 373 at 377).

Apart from the practical frustration of their functions that the lack of recognition brings about, it must be borne in mind, that it is a well-recognised principle that

> "where a foreign representative, such as an executor, liquidator, or receiver, wishes to deal with assets in this country in his representative capacity and by virtue of his foreign authorisation he must first be recognised in his appointment by a Court of Law or person of competent jurisdiction in South Africa before he is entitled to act" (per WATERMEYER J in Liquidator Rhodesian Plastics (Pvt) Ltd v Elvinco Plastic Products (Pty) Ltd 1959(1) S A (C) at 869 C-D).

The operation of this principle is illustrated by the case of Zinn, N O v Westminister Bank, Ltd 1936 A D 89 in which this court held that an English administrator was not entitled to issue summons for the payment of money in a South African court without first obtaining recognition. As STRATFORD JA said at 99,

> ".... when a foreign representative, whatever name he may be given elsewhere, claims

> property in this country, by virtue of his foreign authorization, he requires recognition by a Court of law 'or person of competent jurisdiction in South Africa'. "

It is for this reason that recognition orders have been sought and granted, not only in respect of locally situated immovables (where the practical need for recognition is obvious), but in many cases also in respect of movables (see eg Leslie's Trustee v Leslie 1903 TS 839; Ex parte Sewell's Curator 1906 TS 195; In Re Melliar, Smith & Co, Ex parte Hooper 1922 C P D 116), and even in respect of incorporeals (see eg Re Estate Campbell 1905 TS 28 where recognition was granted to an English receiver whose sole duty it was to collect outstanding debts in South Africa).

From this it follows (1) that the appellant requires recognition before he is entitled to deal with any property of the company in this country, and (2) that, without recognition, any claim that he may decide to bring in respect of the payments to Mr Visser and Mrs Scott will not be entertained by a South African court.

The complicating features of the present case are that, apart from a possible claim in respect of these payments or other property that may be discovered as a result of the enquiry, the company has no property in South Africa; and that the immediate purpose for which recognition was sought from the court a quo was to enable the commissioner to continue the enquiry here. In the

African Farms case (supra) at 377 INNES CJ said that the recognition of a liquidator is in effect a declaration that he is entitled to deal with local assets in the same way as if they were within the jurisdiction of the courts of the country where he was appointed (subject, of course, to the requirements of the local law). Relying on this dictum Jooste's counsel submitted that a recognition order can be granted for no other purpose than to enable a foreign representative to deal with assets within the court's jurisdiction and, in particular, that it cannot in the present case be granted for the purpose of enabling the commissioner to continue his work. For the reasons which follow I do not agree.

Appellant's counsel is plainly correct in his submission that to enquire into the company's affairs forms part of a liquidator's functions just as much as reducing the assets of the company into his possession and dealing with them in the prescribed manner does. In performing the former part of his functions he exercises an ancillary power without which the second part cannot properly be performed. It is only by enquiring that he is able to determine what is and what is not the property of the company, or who is and who is not a creditor or contributory. It is, moreover, obviously in the interest of creditors that doubtful claims which the company may have against outsiders be properly investigated

before being pursued and that claims against the company also be properly investigated before they are admitted or rejected. It is for such reasons that both the South African and the Transkeian Companies Act contain elaborate provisions relating to the interrogation of directors and other persons at meetings of creditors or by a commissioner (cf the remarks in Pretorius and Others v Marais and Others 1981(1) S A 1051 (A) at 1063H-1064A). A liquidator would be failing in his duty if he were to neglect making use , whenever the need to do so arises, of the machinery provided by the Acts.

In any event I consider it entirely unrealistic to take account of the immediate but not of the ultimate

purpose for which recognition is being sought. In his supporting and replying affidavits the appellant made it clear that his sightswere trained on the amounts paid to Mr Visser and Mrs Scott, which in total amount to more than R400 000. Appellant's ultimate aim being the recovery of the company's assets(for which purpose the enquiry is a preliminary but well-advised step),there can in my view be no question about the court's power to grant the appellant and the commissioner recognition.

The grant or refusal of recognition to a foreign representative is a matter for the court's discretion (Ex parte B Z Stegmann 1902 TS 40 at 48, 53). But, by

adopting the attitude that he had no power to grant recognition in a case like the present one, MULLINS J precluded himself from exercising his discretion. We have not been asked to remit the matter in order to allow him to do so and what remains, is to consider whether it should have been exercised in appellant's favour and, if so, whether any conditions should be attached to prevent prejudice to local interested parties (Re African Farms, Ltd (supra) at 377).

As explained in the Stegmann case (supra) at 52 recognition is granted solely on grounds of comity and convenience. What counts in the appellant's favour is, firstly, that the Transkeian and South African law

relating to the winding up of companies is practically identical; secondly, that there is an historic bond and a large measure of interdependence and co-operation between the two countries which comity requires be recognised; thirdly, that the matters to be investigated by the commissioner are of such a nature that they plainly require to be examined; fourthly, that it appears to be in the interests of all concerned that there should be an enquiry before the costly procedure of resorting to the courts is adopted. Jooste's counsel pressed upon us the inconvenience and expense that an enquiry will envolve. He also submitted that it would constitute an unfair advantage to the appellant as a prospective

litigant if he were in effect to be enabled to gather information from and to interrogate the very people against whom action is contemplated. Considering,however, that Jooste alleges in his opposing affidavit that the payments to Mr Visser and Mrs Scott are not impeachable the enquiry may well induce the appellant not to proceed against them. It will, therefore, not necessarily be a disadvantage. But even if it is, it is clear that, had the appellant been appointed in South Africa and had the company been incorporated and placed under liquidation in this country, Jooste and the other persons concerned would have suffered the same disadvantage by virtue of our own legislation. The parties should not, in my judgment, be treated differently merely because the appellant happens to be a foreigner. In my view , his application for recognition should have been granted. I do not consider it necessary to attach any conditions to the recognition apart from those mentioned in the rule

nisi and paragraph 6 of the notice of motion.

Before the appropriate order is made, it is necessary to revert to the rule nisi. I mentioned earlier that it contains no provision for the recognition of the commissioner's appointment and that leave was granted to the appellant to apply on the return date for the relief sought in this regard in paragraph 6 of the notice of motion. On the extended return date the appellant in fact did so apply and, had the rule been confirmed (as it should), the further relief should also have been granted. This explains the form of the order that I am about to make.

The result is that the appeal is upheld with

costs, including the costs of two counsel. The order of the court a quo is set aside. Substituted for it is the following order:

"1. Paragraph 1 of the rule nisi dated 6 January 1988 is confirmed.

2. A further order is granted in terms of paragraph 6 of the notice of motion.

3(a). The costs of the application shall be paid by the applicant on the basis of an unopposed application.

(b). Applicant's costs occasioned by the opposition to the application and those pertaining to the application for leave to intervene shall be paid by Andrew Jooste, the intervening party."

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J J F HEFER JA.

JOUBERT JA)
STEYN JA) CONCUR.
KUMLEBEN JA)
FRIEDMAN AJA)