Case No 727/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BARLOWS TRACTOR COMPANY (PROPRIETARY) LIMITED Appellant

and

DAVID ARTHUR WALTER TOWNSEND Respondent

Coram: JOUBERT, NESTADT, F H GROSSKOPF, HARMS JJA et
VAN COLLER AJA

Date heard: 14 November 1995

Date delivered: 23 February 1996

JUDGMENT

NESTADT, JA:

The appellant ("Barlows") is a creditor of Townsend Plant Hire CC ("the corporation"). The respondent ("Townsend")

bound himself to Barlows as surety for the corporation's obligations. The corporation is in liquidation. Barlows is pursuing its claim against the insolvent estate of the corporation. Alleging that the manner in which Barlows has done so had prejudiced him as surety, Townsend brought an application in the Witwatersrand Local Division against Barlows for a declarator that he has been released from his obligations under the suretyship. For its part, Barlows, in addition to opposing the application, counter-applied for payment of (in round figures) R9.8m being the amount of its claim (as then formulated) against the corporation. The matter came before Cloete J. The learned judge granted the application and dismissed the counter-application. His judgment is reported (see Townsend v Barlows Tractor Co (Pty) Ltd and Another 1995(1) SA 159(W)).

This is an appeal from such decision. It is brought with the leave of the court a quo. The liquidator, who was cited as the second respondent in the court below, is not a party to the appeal. He abides the decision of this Court.

As I have indicated, the dispute between the parties arises from the way in which Barlows dealt with its claim against the corporation. It is a close corporation and as such subject to the provisions of the Close Corporations Act, 69 of 1984. Nevertheless (by virtue of sec 66(1) thereof, read with sec 339 as also secs 342(1) and 366(1) of the Companies Act, 61 of 1973), its liquidation and in particular the realization of its assets, the proof of claims of creditors, the preparation and lodging of accounts by the liquidator, and the application and distribution of its assets, is governed by the

Insolvency Act, 24 of 1936 (and by certain sections of the Companies Act itself). Hence the reference, in what follows, to a number of sections in these two Acts.

The application was a voluminous one. Nevertheless, the salient facts may be relatively briefly stated. They are the following:

(i) Barlows's claim against the corporation is for the balance of the purchase price of certain excavators, tractors and loaders ("the equipment") sold and delivered by it to the corporation from time to time prior to its liquidation. In terms of the series of written agreements ("the agreements") entered into between the parties, the purchase price was in each case payable over a period of time in successive monthly instalments;

ownership of the equipment remained vested in Barlows until payment of the full purchase price; and in the event of the corporation being placed under any order of liquidation, Barlows would be entitled to claim payment forthwith of the balance then outstanding. (ii) In terms of the suretyships (there were actually two, one dated 28 March 1988 and the other 10 August 1990), Townsend bound himself as surety and co-principal debtor; he renounced the benefits of cession of action; and he also indemnified Barlows "against any loss or damage which it may sustain for any reason whatsoever, irrespective of the validity and/or enforceability of the cause(s) of its claim(s) against the Debtor".

(iii) A final winding up order (based on an inability to pay its debts) was granted against the corporation on 28 January 1991. When this occurred the agreements were still current and the corporation was largely up to date with its monthly payments. Nevertheless, by reason of the acceleration clause referred to, the full balance of the purchase price then outstanding in terms of each agreement became due and payable.

(iv) The agreements constituted instalment sale transactions as defined in sec 1 of the Credit Agreements Act, 75 of 1980. Accordingly, on liquidation of the corporation and by reason of sec 84(1) of the Insolvency Act, 24 of 1936, ("sec 84(1)"), Barlows, though losing its

ownership in the equipment, acquired instead a hypothec over such equipment whereby the amount still due under the agreements became secured. Barlows was therefore a secured creditor. (v) By arrangement with the liquidator, Barlows, having recovered possession of the equipment, thereafter proceeded to realize it. This took place by private treaty. By the end of July 1992 Barlows had disposed of all the equipment. On 1 April 1993 it paid over the net proceeds to the liquidator. Whether the realization was one in terms of sec 83 of the Insolvency Act ("sec 83") and if so, what the effect of this is, are matters to which I return later.

(vi) In the meantime Barlows, in terms of sec 44(3) of the Insolvency Act ("sec 44(3)"), lodged its claim as a secured creditor against the estate. This took place on 12 December 1991. On 24 March 1992, the Master, in terms of sec 366(2) of the Companies Act, 61 of 1973, fixed 14 May 1992 as the date by which creditors of the corporation were to prove their claims. On that day a special meeting of creditors was held but was adjourned until 24 August 1992. Proof of Barlows's claim was held over till then. This was to enable it and certain other creditors to be interrogated in terms of sec 44(7) of the Insolvency Act. (vii) On 21 August 1992, however, there took place an event which played an important part in the reasoning of the

court a quo. On that date Barlows withdrew its claim from proof. It did so in terms of a letter which, after alleging that the proposed interrogation was an abuse of sec 44(7) and that creditors had no "legitimate interest" in the interrogation, stated:

> "In the circumstances, our client has been advised to withdraw its claim from proof. Consequently, this letter serves to inform you that our client's claim is withdrawn from proof and that our client proposes to institute an action against (the corporation) in the Supreme Court of South Africa, in which it will seek judgment in respect of its claim."

(viii) As will be seen, Barlows thereafter instituted its contemplated action. But before this happened, Townsend launched his application. This was on 23 November 1992. And on 26 November 1992 the liquidator lodged the first liquidation and distribution

account in the estate of the corporation with the Master. On 21 January 1993 it was amended in certain respects (not material for our purposes). Barlows was not reflected as a creditor. The account (wrongly) states that its claim was rejected (instead of withdrawn). The proceeds of the sale of the equipment, in the sum of R6,5m, are allocated to the free residue. (As a result of this Townsend is, as a member of the corporation, awarded R3,15m.) As at the date of the answering affidavit, the account had not yet lain for inspection. (ix) On 8 December 1992 Barlows (out of the Witwatersrand Local Division) issued summons against the liquidator. In its amended form, the corporation's indebtedness is quantified in the (reduced) sum of R7.2m. Barlows

alleges that it had elected to withdraw its claim from proof and proceed "by the instant action for the proof of its claims" and that it is a secured creditor. Judgment in the amount referred to is claimed, payable as to (i) R6.8m out of the proceeds of the realization of the equipment in accordance with sec 95(1) of the Insolvency Act, and (ii) the balance as a concurrent creditor in accordance with sec 83(12) of the Insolvency Act. We were told by counsel that the liquidator though defending the action has agreed, in the event of this appeal succeeding, to admit Barlows's secured and concurrent claims to proof. The action has therefore been postponed sine die.

It has rightly never been suggested that by withdrawing its claim from proof, Barlows abandoned it. Plainly, this was not the case. As I read Townsend's application, his complaint against Barlows was founded on the allegation that, having acquired possession of the equipment in terms of sec 84(1), Barlows was obliged to comply with the requirements of sec 83 and that it had failed to do so. The consequence of this, coupled with the withdrawal of its claim from proof at the meeting was, so it was said, that Barlows lost its security; it forewent its right to have its claim satisfied from the proceeds of the sale of the equipment; such proceeds would fall into the free residue; Barlows remained with a concurrent claim only. In the circumstances, Barlows was unable to cede to Townsend the benefit of its security "upon payment by me

under the deeds of suretyship"; there was (so it was then thought) no likelihood of a dividend accruing to concurrent creditors; he had therefore been prejudiced and was discharged from liability under the suretyships. Though not so stated, the implication is that when it came to him paying Barlows the full amount of its claim and thereafter seeking to exercise his right of recourse against the corporation in liquidation, he would not recover anything (as he otherwise would have with the benefit of the security).

Though expressing the view (at 166 B of the reported judgment) that had the procedure laid down in sec 83 been followed, Barlows would have been able to participate "in the distribution of the account already lodged" as a secured creditor, Cloete J does not seem to have made a definite finding that sec 83 applied. The

ground on which the learned judge upheld the contention that Barlows had precluded itself from giving Townsend a proper cession of actions and that he was in consequence released from his suretyship obligations, was a more basic one. It was that Barlows had followed what was described (at 166 C) as a "disastrous route" (ie the withdrawal of its claim from proof and the institution of an action instead). The reasoning was that though the proceeds of the sale of the equipment were included in the account which had already been lodged with the Master (165 J), Barlows could not "participate in, and (had) irrevocably lost the right to participate in" such account (165 H); accordingly its claim against the corporation was "worthless, or virtually worthless" (165 H); there was "nothing left on which a successful action establishing (Barlows's) claim...can

retrospectively operate" (163 G); this was (I presume) because Barlows was left with a concurrent claim only (which would not be satisfied).

The renunciation by a surety of the benefit of cession of actions does not disentitle him from having cession; the renunciation operates only to prevent the surety from delaying payment to the creditor by a dilatory exception; but he is entitled to cession of actions on or after full payment (Caney's The Law of Suretyship, 4th ed, 141). When Townsend brought his application, he had not paid Barlows. Indeed, he does not even allege that Barlows had demanded payment from him. On the contrary, it is clear that at this stage Barlows was looking to the corporation in liquidation for payment. A claim against Townsend only came in the counter-application. All that Townsend alleges in his founding affidavit is

that he had been told by a third party that Barlows maintained that he (Townsend) was liable to it under the suretyships and that Barlows "may in the future institute action against me". In these circumstances, I am not sure that the application disclosed a cause of action. Townsend, however, alleges that Barlows's potential claim against him was prejudicing him; he had to advise persons with whom he did business of it; it was like a "sword of Damocles hanging over (him)". Even so, it may be that the application was premature. However, in the view I take of the matter, it is not necessary to pursue this preliminary problem. I shall assume in favour of Townsend that he was entitled to bring his application when he did.

I have referred to sec 83. Broadly stated, it enables a

creditor himself to realize a security (in the form of movable property) held by him. Having done so and after he has paid over the proceeds to the trustee and proved a claim, he is entitled to payment out of such proceeds as a preferent creditor. He must, however, comply with certain conditions laid down in the section. Thus the sale must be by public auction and it must take place before the second meeting of creditors. In casu, this did not happen and, as I have said, it was Townsend's case that the realization by Barlows of the equipment having purportedly taken place pursuant to sec 83, it had lost its sec 84(1) hypothec and with it its secured claim. That both Barlows and the liquidator thought that the realization was in terms of sec 83, is clear. The correspondence between them shows this. Nevertheless, I think there is a lot to be said for the submission

advanced before us by Mr Rubens on behalf of Barlows that the liquidator in particular misconceived the position and that it was secs 386(2A) and (2B) of the Companies Act that applied. These sections empower the Master on the recommendation of the liquidator at an early stage in the liquidation to authorise the sale of property of the company. On this basis there was, of course, no need for Barlows to comply with sec 83. But the point is not of importance. Mr Farber for Townsend did not base his argument that Barlows had lost its secured claim on non-compliance with sec 83. The emphasis of the attack changed from an alleged improper realization of its security to an alleged improper proof of its claim.

The general principle is that the surety will be discharged if the creditor by his own act makes it impossible for himself to cede

his security to the surety (Wessels: Law of Contract in South Africa, vol 2, 2nd ed, para 4339; Caney, op cit, 140). It may be accepted therefore that if Barlows, by reason of the course it adopted regarding proof of its claim, lost its security, the appeal must fail. The issue is whether, as the court a quo found, Barlows did lose its security. In particular, the issue is whether Barlows can obtain satisfaction of its claim from the proceeds of the sale of the equipment; in other words whether Barlows can still share (as a secured creditor) in the first liquidation and distribution account (referred to in (viii) above). One way of establishing its secured claim was for Barlows to submit a claim for proof in the estate. The other was to institute legal proceedings to enforce its claim against the corporation in liquidation. As I have said, Barlows initially embarked on the

former course but then withdrew its claim from proof. The question that arises is whether the action which it then instituted was a competent procedure. This was not a point which appears to have arisen in the court a quo. But it is one which has now been raised on behalf of Townsend. The submission was that the action is not competent. Sec 44(3) was relied on. Read with sec 44(1), it provides for proof of liquidated claims against an insolvent estate, the cause of which arose before sequestration. According to the Erst proviso, the rejection of a claim "shall not debar the claimant from proving that claim at a subsequent meeting of creditors or from establishing his claim by an action at law, but subject to the provisions of sec 75". Sec 75(2) lays down time limits within which legal proceedings against an estate in respect of any liability which

arose before sequestration must be brought. The corresponding section in the Companies Act is sec 359(2). It reads:

> "(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.
>
> (b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs."

The argument was that once Barlows had submitted a claim for proof in terms of sec 44(3), it could not thereafter institute legal proceedings - unless the claim had been rejected; there had been no rejection; there had only been a withdrawal. In any event, so it was further said, the notice required by sec 359(2)(a) had not been given

and the action must be considered to have been abandoned in terms of sub-sec (b).

The basis of the argument is, of course, that Barlows's claim arose before liquidation. It is only in respect of such claims that sec 359(2) applies. Contrary to what Cloete J (at 162G) found, I think the corporation's debt is a pre-sequestration one. It is true that in the case of the majority of the agreements, instalments were up to date when liquidation intervened, and the full balance only became payable (pursuant to the acceleration clause) because of the liquidation itself. The claim was therefore not actually due at the date of liquidation. This, however, is not necessary (Mars: The Law of Insolvency in South Africa, 8th ed, 333). The cause of action did not have to be perfected. Nor does it matter that the security, in the

form of the hypothec, only arose on liquidation. The agreements having been concluded before liquidation, the cause of the claim (as to which see sec 44(1)) and the claim itself, on a proper interpretation of the sections in question, must be taken to have arisen before liquidation.

But even so, I do not think that the argument under consideration is sound. A creditor of a liquidated company has two courses open to him to recover his debt. One is to institute legal proceedings. The other is to prove his claim in the estate (Umbogintwini Land and Investment Co (Pty) Ltd (In Liquidation) v Barclays National Bank Ltd and Another 1987(4) SA 894(A) at 910A). The proviso to sec 44(3) deals with the remedies open to a creditor where, having submitted a claim for proof, it is rejected. He

may attempt to prove his claim at a subsequent meeting of creditors. Or he may institute action. But a declaration in the section that a rejection will not bar an action does not mean that a rejection is a prerequisite to an action. That is what the argument amounts to. There is no warrant for construing the proviso in this way. Much clearer language would be required to deprive a creditor, who has withdrawn his claim from proof before it has been rejected in terms of sec 44(3), of his common law right to enforce his claim by legal proceedings. That such a creditor retains the right which he initially had to sue, was, it seems to me, recognised in the Umbogintwini case. Under consideration was the meaning of sec 359(2). At 910 E-H Viljoen JA said:

> "Section 359 deals with the institution of legal proceedings if that is, at the stage of the initial election, the course decided

upon. That does not rule out the possibility that legal proceedings other than those contemplated in s 359(2) may, depending upon the vicissitudes following in the wake of the creditor's initial election to pursue his claim by proving it in the estate, be instituted at a later stage. In my view s 359(2)(a) is capable of one construction only. The obligation to give notice within a period of four weeks after the appointment of a liquidator is imposed upon the creditor who intends to institute legal proceedings forthwith. The creditor who intends to enforce his claim by proving it at a meeting of creditors of that estate is not hit by the provision at all. Had the Legislature intended to impose the obligation on a creditor who might at a later stage decide or be compelled to institute civil proceedings against the estate, it could easily have provided therefor in clear terms." (My emphasis.)

I can see no reason why "vicissitudes" is not capable of including the withdrawal of a claim from proof in terms of sec 44(3) in favour of the bringing of legal proceedings. Similarly, the reference to "a creditor who might at a later stage decide or be compelled to institute civil proceedings" shows that a rejection is not a sine qua non to a

change of mind by the creditor.

I have quoted from the Umbogintwini judgment at some length because it also bears on the second submission referred to, viz that the action was precluded by sec 359(2)(a) because Barlows had failed to give the liquidator the prescribed notice. In my opinion, what was said is destructive of the submission. Consider also what Viljoen JA goes on to say (at 910 H - 911 A) namely:

> "The provision [sec 359(2)] was designed, in my view, to afford the liquidator an opportunity, immediately after his appointment, to consider and assess, in the interests of the general body of creditors, the nature and validity of the claim or contemplated claim and how to deal with it - whether, for instance, to dispute or settle or acknowledge it. Cf Randfontein Extension Ltd v South Randfontein Mines Ltd and Others 1936 WLD 1 at 3. In the case of claims sought to be proved in the estate, the liquidator does not require such an opportunity. If the claim is rejected by the officer presiding in

> terms of s 44(3) of the Insolvency Act, the liquidator would be fully apprised and if disallowed by the Master in terms of s 45(3) he would be fully aware of the nature of the claim concerned because the Master acts on his report. Consequently, in neither case would he require three weeks' time within which to consider the claim."

Equally where, as in our matter, the creditor's claim was duly tendered for proof, the need for notice in terms of sec 359(2) falls away. The withdrawal of the claim would not detract from or undo the knowledge acquired of the claim by the liquidator (who, incidentally, is not even taking the point). The argument, if acceded to, would mean that in the vast majority of cases a creditor who withdrew his claim from proof would be unable to institute legal proceedings for by that time the four week period referred to in sec 359(2)(a) would have expired. This could not have been the legislature's intention.

To sum up so far, I find Barlows's action against the corporation in liquidation to be capable of establishing its claim. But will a judgment retrospectively result in Barlows ranking as a creditor in the account lodged by the liquidator on 26 November 1992? The problem, of course, stems from Barlows not having proved a claim within the time fixed by the Master in terms of sec 366(2) (see (vi) above) or by the time the account was lodged. According to sec 366(2) the Master may, on the application of the liquidator, fix a time or times within which creditors of the company are to prove their claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved.

On behalf of Barlows, Mr Rubens, presented a twofold

argument to overcome what may be called Barlows's late proof of claim. One submission was advanced on the authority of Trans-Drakensbere Bank Ltd and Another v The Master. Pietermaritzburs, and Another 1966(1) SA 821(N) (and especially, so it would seem, the passage at 823 G). It was that the Master could, in terms of sec 366(2) at any time prior to distribution under the account, extend the date fixed for the proof of claims and that if on the application of Barlows he did so, this would enable Barlows to share in an amended first account (as a secured creditor). The Trans-Drakensberg case dealt with sec 179(2) of the old Companies Act. This section is the predecessor to and corresponds with sec 366(2). It is, however, unnecessary to deal with the point. This is because of the view I take of counsel's second point.

The second argument was founded on sec 78(3) of the Insolvency Act. It provides:

> "If authorized thereto by the creditors or if no creditor has proved a claim against the estate, by the Master, the trustee may compromise or admit any claim against the estate, whether liquidated or unliquidated if proof thereof has been duly tendered at a meeting of creditors. When a claim has been so compromised or admitted, or when it has been settled by a judgment of a court, it shall be deemed to have been proved and admitted against the estate in the manner set forth in section forty-four, unless the creditor informs the trustee in writing within seven days of the compromise or admission or judgment that he abandons his claim: Provided that the preceding provisions of this sub-section shall not debar the trustee from appealing against such judgment, if authorized thereto by the creditors."

It was Barlows's case that in the event of it obtaining judgment, the deeming provision would apply; this would mean that its claim would be deemed to have been proved and admitted against the estate on 14 May 1992 ((v) above); and it would therefore be entitled to

rank as a secured creditor in the first account.

Counsel for Townsend did not dispute that sec 78(3) applied to the liquidation of a company. He did, however, dispute that it applied to Barlows's claim. It was submitted that even in the case of a claim settled by a judgment, sec 78(3) does not effect a retrospective deeming where no proof of claim has been tendered at a meeting of creditors. Reliance was placed on the decision to this effect in Cachalia v De Klerk, NO and Benjamin, NO 1952(4) SA 672(T). In the Umbogintwini case (at 910 D) the correctness of Cachalia was queried though, so it would seem, in a limited respect only. Before us, however, Mr Rubens submitted that it was fundamentally wrong. It was said that, properly interpreted, the section did not require a creditor who obtains a judgment to have

tendered his claim for proof at a meeting of creditors. The argument is not without merit. But for the reasons which follow I leave it at that. Subject to what is said later, I assume that Cachalia was correctly decided and that the deeming provision of sec 78(3) would only come into operation if Barlows's claim had been duly tendered for proof.

The second proviso to sec 44(3) states that if a creditor has twenty-four or more hours before the time advertised for the commencement of a meeting of creditors submitted to the officer who is to preside at that meeting the affidavit and other documents mentioned in sub-sec (4), he shall be deemed to have tendered proof of his claim at that meeting. It will be recalled that Barlows timeously submitted a claim against the estate ((iv) above). There

has been no suggestion that it was not in proper form. The deeming provision of sec 44(3) therefore applied. And it would relate to the 14 May 1992 meeting. But, it was argued, the subsequent withdrawal of the claim destroyed this. I do not agree. Nor do I agree that it was a "disastrous route". The withdrawal was not a simple or absolute one. Barlows did not thereby waive its right to proceed against the estate and be paid from the proceeds of the sale of the equipment. The withdrawal was a preparatory step to the institution of legal proceedings. In principle therefore, since the claim (though in a different form) remained, I do not see why its withdrawal from consideration at the special meeting should negate the fact that Barlows had submitted its claim for proof at such meeting. Suppose summons had been issued before the withdrawal. To have

maintained the claim in these circumstances would have served no real purpose. Its enforcement had moved to a different forum. Does it matter that in casu summons was issued after the withdrawal? I do not think so. Neither the liquidator nor any creditor has alleged that they have been misled by Barlows's actions. I am not sure that the sec 44(7) and (8) powers of interrogation could not still be used against Barlows on the basis that Barlows was a person "who wishes to prove...a claim". In any event, interrogation is hardly necessary seeing that the claim will (if defended) be ventilated in the trial court. The possibility of a creditor who, having withdrawn his claim, delays in instituting legal proceedings was raised; it was said that the winding-up of the estate would be held up and vigilant creditors prejudiced. But the danger would not be avoided by the

claim not being withdrawn. Moreover, the chances of this happening are somewhat fanciful. Such a creditor would run the risk of there being a distribution under the account and thus of him being unable to obtain payment of his claim.

But Mr Farber further argued that the deeming provision of sec 78(3) required that there should have been a rejection of the claim. What Dowling J said (at 677 F) in the Cachalia case supports counsel. I must, however, respectfully differ from the learned judge. In contrast to the 1916 Insolvency Act, the section in its present form omits any reference to a rejection of the claim. I cannot agree that this is not significant. When parliament considered it necessary to refer to a rejection of a claim, this was done (see the first proviso to sec 44(3)). In this regard Rumpff JA in Proksch v Die Meester en

Andere 1969(4) SA 567(A) at 589 A-B said:

> "Die verwysing na 'n vonnis van 'n hof in art 78(3) het nie betrekking op 'n vordering wat afgewys word luidens art 44(3) nie. In art 44(3) word uitdruklik bepaal dat die afwysing van 'n vordering die skuldeiser nie belet nie om sy vordering in 'n regsgeding te bewys."

The promotion of the object of sec 78(3) (referred to by Dowling J at 674 H) does not require that there should have been a rejection.

My conclusion is that in the event of Barlows obtaining judgment against the corporation in liquidation, such judgment will bring about a retrospective deeming under sec 78(3) so that Barlows will be entitled to rank as a secured creditor in the first account. The liquidator should, in framing such account, have made provision for such claim as a contingent liability. It follows that Townsend's contention that Barlows will be unable to give him a proper cession

of actions and that he has been discharged from the suretyships

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cannot be sustained. Irrespective of the effect of the indemnity to

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which I referred at the beginning of this judgment (and which, in the result, it is unnecessary to deal with), the application should have been dismissed.

It was common cause that in the event of the appeal succeeding, the order of the court a quo should be altered to make provision for the counter-application to be referred to trial on appropriate conditions.

The following order is made:

(1) The appeal succeeds with costs including the costs of two counsel.

(2) The order of the court a quo is set aside and the following

substituted:

"(i) The application is dismissed with costs including the costs of two counsel.

(ii) The counter-application is referred to trial. The first respondent's notice of motion in support of the counter-application is to stand as summons. The applicant is to file his plea in due course."

H H Nestadt
Judge of Appeal

Joubert, JA)
concur Van
Coller, AJA)

Case No 727/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

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DAVID ARTHUR WALTER TOWNSEND Respondent

CORAM: JOUBERT, NESTADT, F H GROSSKOPF, HARMS JJA et VAN COLLER AJA

HEARD: 14 NOVEMBER 1995

DELIVERED: 23 FEBRUARY 1996

J U D G M E N T

HARMS JA/

HARMS JA:

I agree with the order proposed by Nestadt JA. Some of my reasons differ from those set out in his judgment and I wish to state them shortly.

The issue which arises for determination is whether Barlows has, on some basis or other, lost its claim in terms of s 84 of the Insolvency Act as a secured creditor, and, in consequence, will be unable to cede to the surety its security after payment in full by the surety (Townsend). In support of his case counsel for Townsend ultimately[1] relied on s 359(2) and s 366(2) of the Companies Act.

1. S 359(2) of the Companies Act: Counsel contended that Barlows was barred from enforcing its claim against the corporation in liquidation : The requisite notice had not been given; consequently the proceedings are considered to have been abandoned.

S 359(2) applies only if the purpose of the

[1]It has to be noted that the argument on both sides before this Court differed materially from that presented to Cloete J.

proceedings is to enforce a claim "which arose before the commencement of the winding-up". Cloete J, in the court below, held that Barlows's claim arose after the liquidation of the corporation (at 1995 (1) SA 159 (W) 162 G-I) and that this provision and the cases dealing with it are accordingly not applicable. I assume that his reason for this conclusion was that, at the date of liquidation, all instalments due by the close corporation were up to date (see at p 160I-161A). Nestadt JA, on the other hand, holds that the claim arose before the relevant date, namely when the instalment sales transactions were concluded.

It is in this limited regard that I wish to express my respectful disagreement with both views. Barlows's claim arose, in my judgment, upon the grant of the final winding-up order, i e after "the commencement of the winding-up" (see s 348 of the Act). Prior to the final order Barlows's claim against the corporation was one for payment of the agreed instalments as they fall due. Upon breach Barlows could have

cancelled, reclaimed possession of the goods sold, and claimed damages. The "claim" changed in character upon liquidation – it became a statutory claim in terms of s 84 (read with s 83) of the Insolvency Act. Although the contracts are the source of the claim against the corporation in liquidation, they do not represent the claim. The present claim was only perfected when the final order was granted. Barlows lost its claim as owner and a new claim arose when it became a creditor with a statutory hypothec.

There is yet another reason why Townsend cannot rely on 359(2). If applicable, it provides a defence in the hands of the liquidator. The liquidator is not obliged to raise it. The defence is also not an absolute defence because the court may direct that the proceedings are not "considered" to have been abandoned. Unless and until a court has finally pronounced on this issue, Townsend cannot establish that the security is lost, that he has been prejudiced and that his obligations as surety are extinguished.

2. S 366(2) of the Companies Act: The second point raised on behalf of Townsend is based upon s 366(2) of the Companies Act. The following facts are in this connection relevant and are restated for ease of reference: [a} The Master, as he was entitled, fixed 14 May 1992 as the final day on which creditors of the corporation could prove their claims.

[b] A special meeting of creditors was convened for that day but was, due to the intervention of Townsend, unable to complete its work. In particular, Barlows's claim was not proved and in the event the meeting was adjourned to 24 August 1992 for that purpose.

[c] On 21 August 1992 Barlows withdrew its claim (see par (vii) of Nestadt JA's judgment).

[d] On 23 November 1992 Townsend launched his application for a declaratory order.

[e] On 26 November 1992 the first liquidation and distribution account was lodged.

[f] Barlows instituted action against the corporation in liquidation on 8 December 1992.

[g] The amended first liquidation and distribution account was lodged on 21 January 1993.

I turn then to s 366 and, more particularly ss (2). It states that if a creditor fails to prove his claims within the period fixed by the Master, he is "otherwise ... excluded from the benefit of any distribution under any account lodged with the Master before such debts are proved". The provision does not prevent a creditor from proving his claim after the date fixed by the Master. Nor does it disentitle a creditor of the benefit of a distribution under the next account lodged. He is only excluded from the benefit of a distribution under an account lodged before proof. Seeing that Townsend launched his application before any account had been lodged, his application was premature. As a general rule a cause of action must exist at the stage when proceedings are instituted. At that stage the first account had not been lodged and Barlows

was, in spite of the withdrawal of its claim, still entitled to prove a claim and share in the distribution under the account.

Apart from being premature, I am also of the view that Townsend's claim is otherwise misconceived. No distribution can take place in terms of the first account of 26 November 1992 since it was replaced by the amended account of 21 January 1993. The question is then whether Barlows is excluded from the benefit of a distribution under that account.

As presently framed, this account, in a preamble, refers to the pending action of Barlows. It fails to reflect that the claim is contingent and that Barlows also claims the proceeds of the sale of the goods hypothecated. Is it under these circumstances possible to distribute the said proceeds amongst unsecured creditors and members of the corporation? I think not. Such a course would be contrary to basic accounting principles. The account had to reflect the pending claim of Barlows as a charge against the proceeds of the sale.

Unless and until the action has finally been adjudicated, the liquidator is not entitled to show the proceeds as available for general distribution. The Master could not confirm the account in this form (something he has not done).

To state my views slightly differently: In view of the pending claim of Barlows, the proceeds were not available for distribution under the amended account. Those proceeds have to be kept available in the event of a successful action. Once Barlows has obtained judgment it may prove the judgment debt as a novated claim at a later meeting. (This does not mean that I agree with the conclusion in Cachalia that a post-liquidation judgment debt has still to be proved. As a matter of fact, I have serious reservations in this regard, but it is not necessary to decide the point.) In sum : the security (the proceeds of the sale) has not been shown to have been lost. To reach this conclusion I find it unnecessary to express any views on the provisions of s 78(3) and s 44(3) of the Insolvency Act.

L T C HARMS
JUDGE OF
APPEAL

F H GROSSKOPF, JA : Agrees