CASE NO. 79/95
251/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

1. RECEIVER OF REVENUE, PORT ELIZABETH Appellant

and

A JEEVA AND 10 OTHERS Respondents

2. D J KLERCK NO AND 2 OTHERS Appellants

and

A JEEVA AND 10 OTHERS Respondents

CORAM: BOTHA, HEFER, F H GROSSKOPF, HARMS, JJA et
ZULMAN, AJA

DATE HEARD: 16 FEBRUARY 1996

DATE DELIVERED: 29 FEBRUARY 1996

J U D G M E N T

HARMS JA/

HARMS JA:

Two companies, Spirvin Bottling Co (Pty) Ltd ("Spirvin") and Theunsus Transport (Pty) Ltd ("Theunsus"), were liquidated at the instance of the Commissioner for Inland Revenue. The appellants Klerck and Louw were appointed by the Master of the Supreme Court, Grahamstown as joint liquidators of Spirvin, and the appellants Louw and Cooper of Theunsus. (I shall refer to these three appellants as the "liquidators".) At the request of the other appellant, the Receiver of Revenue, Port Elizabeth, ("the Receiver") the liquidators approached the Master for leave to hold a commission of inquiry in terms of s 418 (read with s 417) of the Companies Act 61 of 1973 into the affairs of the two companies. The Master obliged, appointed a Senior Counsel as Commissioner, circumscribed his powers and duties and ordered provisionally that the costs of the holding of the inquiry be borne by the Receiver.

The ostensible reasons for this costs order, which was made pursuant to s 417(6), were that the Receiver was the only creditor who had proved a claim against either company in liquidation and that the companies had no assets. His claims are preferent claims for income tax, sales tax, interest and penalties. In the case of Spirvin, they amount to about R50 million and in the instance of Theunsus, approximately R446 000.

The first respondent had been the managing director of and a shareholder in both companies and the second, third, fourth and fifth respondents shareholders and/or directors of one or the other company. They all had resigned their directorships and disposed of their shares before the commencement of the liquidation process in somewhat suspicious circumstances. The other respondents consisted of the external auditor, the internal accountant, the maintenance foreman and the transport manager of Spirvin and, finally, the spouses of the second and fifth

respondents. In short and in the words of Jones J (in the court of first instance):

> "They [the respondents] are no longer directors or shareholders of the companies in liquidation, having withdrawn from the companies before commencement of the winding-up proceedings. They are not creditors. They accordingly do not have sufficient interest in the liquidation of the companies to entitle them to object to the way in which the joint liquidators do their job. They are persons against whom a claim may be made by the joint liquidators in due course. They are potential defendants in legal proceedings which are contemplated by the joint liquidators and a creditor in liquidation."

All the respondents were subpoenaed by the Commissioner to appear before him and testify concerning all matters relating to the trade* dealings, business affairs, property and assets of the companies. This gave rise to an application by the respondents against the Receiver for an order granting them access to all the information in his possession relating to the companies,

and for an order against Spirvin's liquidators interdicting them from proceeding with the inquiry until such time as the Receiver had complied with the order against him. This application was opposed by the Receiver and the liquidators but it was partially successful. The judgment is reported (Jeeva v Receiver of Revenue, fort Elizabeth 1995 (2) SA 433 (SE)). The correctness of that judgment is not the subject of the present appeal.

At the opening of the subsequent commission hearing, an application was made on behalf of the former directors and shareholders to the Commissioner to allow their counsel to sit in during the proceedings and to address questions to witnesses. The request was refused and this ruling has also not been put in issue and stands.

On the following day all the respondents launched an urgent application for an order setting aside all notices and subpoenas issued by the Commissioner and declaring that the present respondents are not obliged to

submit to any interrogation by the liquidators. The application was granted by Jones J in the South East Cape Local Division in the following terms:

> "1. setting aside all notices and subpoenas issued by the [Commissioner] at the instance and request of the [liquidators] in terms of sections 417 and 418 of the Companies Act, No 61 of 1973, as amended, for the inquiry called by them for the period 28 September 1994 to 7 October 1994;
>
> 2. interdicting and restraining the [liquidators] from examining or cross-examining any witnesses called upon to attend the inquiry, or any continuation of such inquiry, in consequence of such notices or subpoenas;
>
> 3. declaring that the [present respondents] are not obliged to submit to any interrogation by the [liquidators] at any inquiry or meeting held in terms of the Companies Act;
>
> 4. requiring the [liquidators and the Receiver] to pay the costs of this application jointly and severally, the one paying the other to be absolved, such costs to include the costs of two

counsel."

An appeal to the Full Court, Eastern Cape Division (Zietsman JP, Jansen and Leach JJ) was unsuccessful. The matter is now before us consequent upon the grant of special leave to appeal. (There are formally two appeals before us, but materially only one. The reason for the anomaly is that the Receiver and the liquidators prosecuted their appeals at different times. Nothing turns on this.)

The basis for the relief sought as set out in the founding affidavit was that the liquidators had sided with the Receiver against the respondents, had failed to maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up of the company and have created the impression of bias against the respondents. The facts relied upon were: The Deputy State Attorney was acting for both the liquidators and the Receiver; one set of counsel was briefed to act on

behalf of both parties; the liquidators had unnecessarily made common cause with the Receiver during the discovery application; they were investigating all avenues to discover grounds on which the former directors and shareholders could be held personally liable for the claim of the Receiver; and lastly, the inquiry was requested by the Receiver and the liquidators made the machinery of the Act available to the Receiver in order to pursue his own interests.

Against this factual background I turn to s 418 (read with s 417) of the Act. It provides, in summary and as far as is relevant for present purposes, that application may be made to the Master for an examination or inquiry relating to the affairs of a company in liquidation due to its inability to pay its debts. The Master may, for that purpose, appoint a commissioner. The commissioner may summon witnesses and require the production of documents. The liquidator or any creditor, member or contributory of

the company may be represented at the inquiry and is entitled to interrogate any witness. Any person summoned is entitled to legal representation and to a copy of the record of his evidence. A witness is required to answer any question put to him even if the answer may tend to incriminate him. However, the commissioner is obliged to disallow any irrelevant question or one that will, in his opinion, prolong the interrogation unnecessarily.

Jones J, although conscious of the fact that he was not called upon to decide the constitutionality of these provisions, went out of his way to describe them as draconian and as "unquestionably a negation of the ordinary civil liberties enjoyed by all members of a democratic society". This premise, I fear, coloured his whole judgment. In the event his approach was shown to be incorrect (Ferreira v Levin NO 1996 (l) BCLR l (CC)). In that case the Constitutional Court considered these provisions in some depth and concluded by declaring s

417(2)(b) in part unconstitutional. The effect of the declaration is that incriminating answers given at an inquiry may no longer be used against the witness in criminal proceedings against such person (at par [157]) -a fear not alluded to by the respondents in the founding affidavits. More important for the purpose of this judgment is Ackermann J's lucid analysis of the statutory purpose and reasonableness of these sections (at par [122] to [126]). It would amount to supererogation if I were to quote or attempt to restate what the learned Judge had to say on the subject.

There is an oft-quoted passage from In re Contract Corporation (Gooch's case; [1871-1872] 7 Ch App 207 at 211 which reads:

> "In truth, it is of the utmost importance that the liquidator should, as the officer of the Court, maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up. He should have no leaning for or against any individual whatever. It is his duty to the whole

> body of shareholders, and to the whole body of creditors, and to the Court, to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court. And it is for the Judge to see that he does his duty in this respect."

With this statement as lodestar, Thring J in James v Magistrate, Wynberg, and Others 1995 (1) SA 1 (C) at 14G-I formulated this principle:

> "It seems to me that a party who has an interest in the winding-up of a company or a close corporation, whether as a member or as a creditor, is entitled to expect, especially where there exists an acrimonious dispute between himself and another interested party, that the liquidator who is seized with the winding-up will strictly observe the requirements of procedural and, a fortiori, also of substantive fairness and, moreover, that he will be seen to be doing so. The liquidator will be incapable of observing those requirements or of being seen to be doing so if his independence or impartiality has been compromised, or

> if it appears to an independent, informed and reasonable observer to have been compromised. See, in this regard, Scnulte v Van der Berg and Others NNO 1991 (3) SA 717 (C) at 720G-721C, Mönnig and Otners v Council of Review and Otners 1989 (4) SA 866 (C) at 881D and 8811 and, on appeal, sub nom Council of Review, Soutn African Defence force, and Otners v Mönnig and Otners 1992 (3) SA 482 (A) at 49ID."

The learned Judge in the James case applied this principle by interdicting a liquidator from examining a creditor and sole member of a close corporation on the ground of perceived bias, the case being that the liquidator had sided with another creditor. Jones J, in the present case, as well as the Full Court, accepted the correctness of the James principle and found it to be applicable to the facts of the present case.

It was recognised by Thring J in the James case (at 13E-I) that it is probably wrong to call a liquidator an officer of the court — whatever that term may mean (see the illuminating article by Cilliers and Lutz, The

development and significance of tne title "officer of tne court", 1995 THRHR 603). It does also not assist in the present inquiry to state (in the words of Jones J) that he stands in a position akin to an officer of the court. Officers of the court, such as advocates, attorneys and curators ad litem, are sometimes entitled to their bias. Bias against an adversary in litigation or proposed litigation has, as far as I know, never disqualified an officer of the court from acting in a case. The fact that a liquidator stands in a fiduciary relationship to the company in liquidation, the body of creditors as a whole and the body of members or contributors (James case at 13I-14B) is also of no relevance in the present context. The respondents do not fall within any one of these categories. In any event, the fact that a liquidator has fiduciary duties towards, say, creditors does not mean that he can always be evenhanded. He is obliged, should the occasion arise, to dispute a creditor's claim or to impeach

a transaction between a creditor and the company. I do not accept as a general proposition that in such circumstances the relevant creditor can object to an examination or litigation on the ground of the liquidator's perceived bias.

What then is the right of the respondents that is infringed by the possible bias of the liquidators? According to Jones J it is the right to be treated fairly at a quasi-judicial inquiry. It seems that in the James case (at 16G) it was seen as the right not to be subjected to oppressive or vexatious interrogation.

It appears to me that the true nature of the s 418 inquiry was misconceived by both courts. The Commissioner, against whom no complaint has been laid, is the person who conducts the inquiry. It is he who has to act in a quasi-judicial capacity. He has the main duty to examine the witnesses. He has to regulate and control the interrogation. Should he fail in his duty to apply the

procedural fairness appropriate to this forum, an aggrieved party may approach the court for suitable relief (Schulte v Van der Berg and Others NNO 1991 (3) SA 717 (C)).

Contrary to what Thring J held, the position of the liquidator is quite different. He, in this context, acts in neither an administrative nor quasi-judicial capacity. He is not in a position of authority vis-a-vis the witness. He does not determine or affect any of his rights. He simply represents the company in liquidation at the inquiry. He is, or may be, an adversary of the witness. As adversary he can have no higher duty towards his opponent than any other litigant has. The authorities relied upon by Thring J (at 14I) deal with the position of a presiding officer and not with someone in the position of a liquidator.

As noted, a creditor is also entitled to interrogate any witness at the inquiry. The creditor may be biased or unbiased. He may join forces with another

creditor. Acrimony between creditor and witness may exist. The witness will nevertheless have to answer all relevant questions. I fail to see why, in similar circumstances, the liquidator may not proceed with the examination because of a similar acrimony or bias. The liquidator has to comply with the lawful instructions of the body of creditors. The fact that there is one creditor only, does not affect his duty.

I therefore conclude that bias or perceived bias on the part of the liquidators does not infringe any right of the respondents and that the relief granted was not competent. It is consequently unnecessary to consider whether the respondents have factually made out their case.

In the result the appeal is upheld with costs. The order of the court a guo is set aside and replaced by an order upholding the appeal from the South Eastern Cape Division with costs and replacing its order with an order dismissing the application with costs. All costs orders

include the costs of two counsel.

L T C HARMS JUDGE
OF APPEAL

BOTHA, JA )
HEFER, JA ) AGREE
F H GROSSKOPF, JA )
ZULMAN, AJA )