THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NUMBER: 156/97

In the matter between:

STRIP MINING (PTY) LTD APPELLANT

In re:

NATAL COAL EXPLORATION COMPANY LTD (in liquidation)

RESPONDENT

KANGRA GROUP (PTY) LTD

and

BRIAN PATRICK WILLIAMS INTERVENING PARTIES

CORAM: HEFER, SMALBERGER, ZULMAN, PLEWMAN JJA find FARLAM AJA

DATE OF HEARING: 10 NOVEMBER 1998 DATE OF JUDGMENT: 26 NOVEMBER 1998

JUDGMENT

PLEWMAN ,JA

The question in this appeal is whether, in circumstances outlined below, the voluntary liquidation proceedings relating to a company should be set aside in terms of s 354(1) of the Companies Act No 61 of 1973 (the Act). The respondent in the proceedings is Natal Coal Exploration Company Limited (in liquidation). It will be referred to as "Natal Coal" or "the company" as the context requires.

The appellant is a close corporation Strip Mining. (It is cited as Strip Mining (Proprietary) Limited but nothing turns on this.) It will be referred to hereafter as Strip Mining. The appellant applied on motion in the Witwatersrand Local Division for a rule nisi calling upon all interested persons to show cause why the liquidation proceedings should not be set aside. On the return day the (by then) discharged liquidator and Kangra Group (Proprietary) Limited (Kangra) the sole shareholder in and therefore the holding company of Natal Coal were given leave to intervene in the proceedings and successfully opposed the application. The appeal is with the leave of the court a quo.

A chronology of the events must be given. On 15 October 1991 a special resolution in terms of s 349 of the Act to wind up Natal Coal was duly passed. A sworn statement by the directors, to the effect that the company had no debts, accompanied by an appropriate auditor's certificate, was filed in terms of s 350(l)(b)(ii) and the resolution was formally registered in terms of s 200 on 15 November 1991. This brought about a members voluntary winding-up effective as of that date. On 11 December 1991 a liquidator (the intervening party) was appointed and on 17 January 1992 notices advertising the winding-up and the appointment of the liquidator were published in the Government Gazette in terms of s 356(2) and s 375(5). The liquidator drew up a first and final liquidation and distribution account. On 16 April 1992 notice was published in the Government Gazette in accordance with s 406(3) that the account was lying open for inspection. On 19 June 1992 the account was confirmed by the Master in terms of s 408 and confirmation thereof was published in

accordance with s 409 (2) on 11 December 1992. Distribution in terms of the confirmed account was completed. On 18 January 1993 the Master issued a certificate in terms of s 385 to the effect that the liquidator had performed all the duties prescribed by the Act in relation to the winding-up.

Appellant's notice of motion is dated 25 June 1996. The rule was issued on 2 July 1996. At that date all that remained to be done in order to dissolve the company was the issue and transmission to the Registrar of Companies of a certificate in terms of s 419(1). Why this had not been done despite the lapse of more than 3 years is not explained in the affidavits but the result was that the company was still in existence when the rule was issued.

In the founding affidavit it is alleged that Strip Mining entered into a contract with Natal Coal on 1 May 1991 relating to mining coal of the Springlake colliery and that the contract was terminated on 2 March 1992 with effect from 30 April 1992 (as to which more must

presently be said). On 12 January 1993 Strip Mining served a combined summons on Natal Coal, citing it as if it had not been liquidated, and claiming R5 542 552,72 alleged to be an amount due in terms of the contract. It is said in the founding affidavit that the particulars of claim will have to be amended but no amendment has at any time been applied for. More importantly no notice in terms of s 359 was at any time given to the liquidator. Nor was any approach made to the court for an order directing the institution or continuation of the action. It is, however, on the basis of the claim as formulated in the particulars that appellant asserts a right to bring the application under the provisions of s 354(1) of the Act.

On 6 December 1996 the court a quo made an order dismissing the application with costs. It should have (or also have) discharged the rule but it is accepted by the parties that the order should be regarded as having had this effect. The court's grounds for refusing to confirm the rule included a finding that appellant had adduced

"insufficient proof of its entitlement to be regarded as a creditor and

also a finding that applicant's claim was "extremely vague" and did

not "(even) make out a prima facie case". In the notice of appeal all

these findings are challenged:

I will presently briefly outline the facts relied upon by appellant

for its allegation that it has a claim against Natal Coal and refer to the

dispute which exists in this regard. Before doing so it will assist if I

quote s 354(1). It provides as follows:

> "354. (1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit."

In the case of Ward and Another v Smit and Others: In re Gurr v

Zambia Airways Corporation Ltd 1998 (3) SA 175 (SCA) this Court

said of this section (per Scott JA at 180 G-181D):

"The language of the section is wide enough to afford the Court a discretion to set aside a winding-up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events. (Meskin Henochsberg on the Companies Act at 747; see also Joubert (ed) The Law of South Africa vol 4 first re-issue para 185 (M S Blackman).) In the case of the former, the onus on an applicant is such that generally speaking the order will be set aside only in exceptional circumstances. This has been emphasised by the Courts of various Provincial and Local Divisions not only in relation to s 354 and its predecessor (s 120 of Act 46 of 1926) but also in relation to s 149(2) of the Insolvency Act 24 of 1936 which affords a similar discretion to a Court to rescind or vary a sequestration order. (See Herbst v Hessels NO en Andere 1978 (2) SA 105 (T); Aubrey M Cramer Ltd v Wells NO 1965 (4) SA 304 (W); Abdurahman v Estate Abdurahman 1959 (1) SA 872 (C).) There is nothing in the section to suggest that the Court's discretionary power to set aside a winding-up order is confined to the common-law grounds for rescission. However, in the Herbst case supra, Eloff J expressed the view (at 109F–G) that no less would be expected of an applicant under the section than of an applicant who seeks to have a judgment set aside at common law. I think this must be correct. The object of the section is not to provide for a

> rehearing of the winding-up proceedings or for the Court to sit in appeal upon the merits of the judgment in respect of those proceedings. To construe the section otherwise would be to render virtually redundant the facilities available to interested parties to oppose winding-up proceedings and to appeal against the granting of a final order. It would also 'make a mockery of the principle of ut sit finis litium'. (Abdurahman v Estate Abdurahman (supra at 875G—H).) It follows that an applicant under the section must not only show that there are special or exceptional circumstances which justify the setting aside of the winding-up order; he or she is ordinarily required to furnish, in addition, a satisfactory explanation for not having opposed the granting of a final order or appealed against the order. Other relevant considerations would include the delay in bringing the application and the extent to which the winding-up had progressed. (Compare Aubrey M Cramer Ltd v Wells NO (supra at 305H).)"

It was necessary at the outset that appellant establish its locus standi

to invoke the section. In the circumstances of this case it could only

claim to have done so if it established, by the appropriate standard of

proof, that it is a "creditor" of Natal Coal.

Argument in the court a quo was directed, in the main, to the issue of whether s 408(c) read with s 355(2) - which serve as a bar to the re-opening of a confirmed account in a winding-up after a distribution has been made in terms thereof - posed an insuperable obstacle to appellant. Appellant's answer to that proposition was that what was sought in the application was not the re-opening of the account but the setting aside of the winding-up. This would call or have called for a consideration of the scheme of the Act as a whole.

On appeal the argument on appellant's behalf was confined to a different point namely whether an application in terms of s 354(1) required (only) that the court exercise its discretion to set aside a winding-up on the basis that the applicant had established "a prima facie case". The judgment in the Ward case (supra) posed an obvious problem and counsel's argument was that this decision relates to a

winding-up by the court - that is a compulsory winding-up - and not to a members voluntary winding-up where different considerations arise. It is this question which I now address.

The suggestion was that in the case of a winding-up order made by the court the court has been involved at various earlier stages of the proceedings. It would have been called upon to grant a provisional order and, on the return day and after service on known creditors, a final order. While this is true it does not seem to me to have any bearing on the standard of proof that is called for in relation to an order setting aside a winding-up. The only effect of the court initially granting a provisional order and thereafter having to confirm it is that there have been or were earlier stages in the proceedings at which properly founded objections to the winding-up could be raised. This may well render it less likely that recourse would be had to

s 354(1) but has, in my view, no relevance or bearing on the nature of the onus in an application under this section.

What appellant contended was that prima facie proof of appellant's case was all that was called for. The phrase prima facie proof is used in different senses - Marine & Trade Insurance Company Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37H-38B (per Jansen JA). The sense in which it was used by appellant's counsel is made clear in the heads of argument by the reference therein to Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd 1953 (3) SA 529 (W) and the quotation therefrom of the following (at 533 C-E):

> "……the requirement of a prima facie cause of action ... is satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities

> are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that [a remedy] should be refused ... on the ground here in question."

What was under consideration in the Bradbury case was the standard of proof demanded by a court in an application for an attachment to found jurisdiction. The phrase is also used in a similar sense in, for example, applications for a temporary interdict. Proof to this standard has long been considered sufficient in our courts in proceedings of this type which are in the nature of preliminary steps in proceedings. One reason is that in such preliminary enquiries account is taken of the possible injury which the grant or refusal of temporary relief will have on the parties respectively. However, fundamental to all these cases is the fact that such orders must necessarily be made in circumstances where no or no full investigation into the merits of the

case has been made. The order then defers the full inquiry to a later stage at which the normal standards of proof are adopted. At the later stage, even in such proceedings, the ultimate determination of matters in dispute is made on the basis of facts proved in the normal way - that is on a balance of probabilities. I see no parallel between applications for an attachment or an interdict and proceedings in terms of s 354(1).

In the present case the issue of the rule nisi has led to a staggered procedure similar to the two stage procedure adopted in a court winding-up. But nothing in s 354(1) suggests that a rule nisi procedure need necessarily be adopted and where it has (as in the present case) the stage at which appellant suggests the lesser standard of proof should be applied is the stage when a final determination of the issue is made. Even in the examples relied on by counsel, this has

always been on the basis of the normal onus.

There are also indications in the Act which run counter to counsel's submission. The provisions of s 355(2) and s 408(c) suggest very strongly that the legislature regarded the requirement for advertisement at the several stages already referred to as sufficient safeguard of the interests of third parties so as to justify a bar to intervention at a stage when interference will cause an unmanageable disruption of the process of winding-up. It is these circumstances which, no doubt, prompted Scott JA in the Ward case (supra) to suggest that the standard of proof would be that used in relation to an application to set aside a judgment - that is the normal onus.

There is also the wording of s 354(1) itself What is said is that there must be proof "to the satisfaction of the court". This phrase imposes the normal standard of proof of the facts which are to lead

the court to hold that the winding-up "ought" to be set aside. Nor should the anterior question of locus standi (proof that appellant is a creditor) be any different. In the present case the basis for claiming locus standi and the grounds for setting aside the winding-up are founded upon the same facts. Even if it were otherwise I can see no grounds for holding that locus standi can be divorced from the requirement of the section that it be established "to the satisfaction of the court" that the winding-up "ought" to be set aside. Why should one jurisdictional fact be viewed differently from another? Counsel's submission, in my view, also runs counter to the trend of established authority. In Kilroe-Daley v Barclays National Bank Ltd 1984 (4) SA 609 (A) Galgut AJA said as follows at p 626G-H:

> "We were referred to decisions in our Courts in which application was made to have the account of a liquidator (or trustee in insolvency) re-opened. The principle

> which runs through all these cases is that an applicant must show grounds for restitutio in intergrum such as justus error or dolus before a Court will order the reopening of a confirmed account. See SA Clay Industries Ltd v Katzenellenbogen NO and Another 1957 (1) SA 220 (W) at 223-224 and the cases there cited. See also Henochsberg On the Companies Act 3rd ed at 709."

This clearly envisages proof according to the normal standard. While this is said in relation to the re-opening of a liquidator's account the setting aside of the liquidation as a whole would, if anything, be an a fortiori case for the adoption of the normal civil onus. I conclude that in so far as the nature of the onus is concerned there is no distinction to be drawn between a voluntary and a compulsory winding-up.

Against this background I turn to the evidence adduced by the parties. Appellant contends that Natal Coal's liability to it arose in terms of the agreement between appellant and the company concluded in May 1991. It is said that a Mr I D Foster "purported to represent

the company"in concluding the contract. The contract, the appellant

further contends, was lawfully cancelled though its claim arose in terms thereof. It annexes a letter of cancellation. This is a letter from a company Twee-waters Fuel (Proprietary) Limited (Twee-waters). A word of explanation is necessary. Both Natal Coal and Twee-waters are subsidiaries of Kangra (which, in turn, is a subsidiary of Kangra Holdings (Proprietary) Ltd). After service of the combined summons, setting out Strip Mining's claim, (all these companies having the same registered address and all being administered by Kangra) Kangra's attorneys on 20 January 1993 wrote to appellant's attorneys to apprise them of Natal Coal's status; to inform them that the colliery which Foster managed belonged to Twee-waters, and to state (categorically) that Natal Coal had not entered into the alleged contract. There was, it must be accepted, some confusion engendered

in the affair by what Kangra states was the incorrect use of Natal Coal documents in certain exchanges with Springlake colliery. But despite the unequivocal denial that Natal Coal had entered into a contract and a tender of all the relevant records appellant (and appellant's attorneys) persisted in attempts to show by inference that Foster must have represented the company in concluding the contract. It was even made clear that Twee-waters was an active company and therefore available to be sued. Nonetheless the inferential case was pursued in the founding affidavits. Kangra's attitude and eventual answer must have been foreseen. In its affidavits Kangra strenuously repeated its earlier contentions and supplemented its answer with considerable supporting documentation including the financial statements of Natal Coal which reflect that it had no business activities in the relevant accounting period and an affidavit by Foster denying that he had

authority from Natal Coal to conclude any contracts on its behalf.

The allegations and counter allegations need not be recounted. Mr Gordon, who represented appellant, conceded that serious and irreconcilable disputes of fact exist on the papers and also that appellant did not, in the court a quo, seek an order in terms of Rule 6(5)(g) to resolve such disputes. He further conceded that the basic rule formulated in Plascon-Evans Paints Ltd v Van Riebeeck Paints 1984 (3) SA 623 (A) governed the situation with the result that, in essence, the affidavits of Kangra would have to form the material upon which the matter was decided. He further conceded that if it was held that appellant's case had to be established in accordance with the ordinary standard of proof the appeal could not succeed.

These concessions were fairly and properly made. It is accordingly unnecessary to consider a number of other difficulties

which seem to he in appellant's path. In particular it has become unnecessary to debate the operation of s 355(2) and s 408(c) which prohibit the re-opening of an account after a distribution in terms thereof has taken place. Another difficulty in the appeal arises from the provisions of s 359(2) in accordance with which appellant's failure to give notice of its intention to institute or to continue its action against the company has resulted, at least as matters presently stand, in the abandonment of that action. Happily the problems which would arise in relation to both these questions need not be debated.

It also becomes unnecessary to deal with how, in the circumstances, the court a quo should have exercised its discretion. It will suffice to say that the element of the lengthy and unexplained delay would have been a major factor. In the result the court a quo correctly held that appellant had not satisfactorily proved that it had

locus standi and, in any event, had not made out a case for the setting aside of the winding-up order.

Save for adding to the terms of the court a quo's order the words "and the rule is discharged" the appeal is dismissed with costs.

PLEWMAN JA

CONCUR:

HEFER JA)
SMALBERGER JA)
ZULMAN JA)
FARLAM AJA)