Case No 51/96

THE SUPREME COURT OF APPEAL OF
SOUTH AFRICA

In the matter between:

WARD, JOHN STANLEY	First Appellant
ALLEN, NICHOLAS CHARLES	Second Appellant
and	
SUIT, GORDON	First Respondent
GURR, ROBERT EDWIN	Second Respondent
THE MASTER OF THE SUPREME COURT	
(TRANSVAAL PROVINCIAL DIVISION)	Third Respondent
In re:	
GURR, ROBERT EDWIN	Applicant
and	
ZAMBIA AIRWAYS CORPORATION LIMITED	Respondent

Coram:	Mahomed.CJ, Eksteen, Scott, Zulman et Stretcher JJA
Heard:	16 March 1998
Delivered:	23 March 1998

JUDGMENT

SCOTT JA/...

SCOTT JA

Zambia Airways Corporation Ltd ('the company') was incorporated in Zambia in February 1980 and thereafter carried on business as the country's national airline. The company's aircraft flew to and from some 31 countries including South Africa where it established offices in Johannesburg. As an 'external company' within the meaning of s 1 of the Companies Act 61 of 1973 ('the Act') it was obliged in terms of s 322 of the Act to register as such and on 11 March 1991 was issued with a certificate of registration by the Registrar of Companies. The company's financial position deteriorated and on 4 December 1994 at Lusaka, Zambia, its shareholders, acting in terms of the Companies Act of Zambia, resolved that the company be voluntarily wound-up with immediate effect. On 9 December 1994 and by virtue of a further resolution the two appellants were appointed as joint liquidators. On 31 January 1995 the second

respondent, who was employed by the company as a sales manager in Johannesburg and who had a claim against it for 'severance pay', launched an application in the Witwatersrand Local Division for the compulsory winding-up of the company. The application was founded on s 344 (g) of the Act (which I shall consider in more detail later in this judgment) and contained a full disclosure of the voluntary winding-up of the company in Zambia and the appointment of the appellants as joint liquidators. A provisional winding-up order was granted on 1 February 1995 which in the absence of opposition was made final on 28 February 1995. The first respondent was appointed provisional liquidator on 9 February 1995 and liquidator on 5 June 1995. The company has substantial assets in this country including immovable property and upon his appointment as provisional liquidator the first respondent immediately set about winding up the company's South African estate. The first meeting of creditors was held on 16 May 1995 and

the second on 18 July 1995. According to the first liquidation and distribution account prepared by the first respondent claims of local creditors proved at the second meeting amounted to R2 009 858,74 (of which R2 188,68 was the subject of secured or preferent claims) while the amount available for distribution was stated to be R706 046,29.

Six months after the granting of the provisional winding-up order in South Africa and on 2 August 1995 the appellants instituted motion proceedings in which they sought (stated briefly) an order:

(i) recognising their appointment as liquidators of the company on terms set out in the Notice of Motion, including the provision of security;

(ii) declaring that the appellants be empowered to administer the South African estate of the company in accordance with the terms of the Insolvency Act 24 of 1936, read with the Companies Act, subject to certain specified qualifications;

(iii) authorising the appellants to transfer any surplus assets or

funds from the Republic of South Africa with the consent of the Master;

(iv) setting aside the provisional and final orders of liquidation of the company granted by the court in South Africa as well as the first respondent's appointment as liquidator, and

(v) directing the first respondent to hand over all the assets of the company to the appellants and to account to the appellants for

his administration of the South African estate of the company.

The object of seeking the order was stated in the supporting affidavit to be 'to enable [the appellants] to collect the South African assets, reduce them to cash and administer the estate in South Africa so as to enable an expeditious and fair distribution of assets to the world-wide creditors of the company' as opposed to using the local assets 'exclusively to settle the claims of South African based creditors'.

The granting of the relief claimed was opposed by the first respondent and the matter was heard in the Witwatersrand Local Division by Levy

AJ, who, apart from ordering that the appellants be 'recognised as foreign

liquidators', dismissed the appellants' claims. The appellants were ordered to pay three-quarters of the first respondent's costs and the latter was ordered to pay one-quarter of the former's costs. With the leave of the Court a quo the appellants appeal to this Court. There is no cross-appeal.

The appointment of a liquidator to an external company in the country of its incorporation and the authority conferred by foreign legislation on the liquidator to deal with the assets of that company have no extra-territorial application. Such a liquidator, until he or she is recognised by a South African court, will accordingly have no power to deal with assets of the company situated in this country, regardless of whether those assets are movable or immovable; nor will creditors be precluded from attaching such assets and proceeding to execution. When an external company is being wound up in the country of its

incorporation a competent South African court will, however, on application and in the exercise of its discretion, grant an order recognising the foreign appointed liquidator and ordinarily by so doing declare the liquidator to be entitled to deal with local assets (subject, of course, to local law) as if those assets were situated in the country in question. Such an order will be founded not only upon considerations of comity , but also convenience and equity. (See Moolman v 1990 (1) SA 954 (A) at 959 D - 960 E; Re African Farms Ltd 1906 TS 373 at 377 382.) Indeed, quite apart from principles of international comity, the advantages of having one concursus creditorum are obvious. The object of a creditors' winding-up is to ensure a fair division of the company's property among the creditors according to their legal rights. Where there is both a local concursus and a foreign concursus it may well be that one group of creditors will be either

favoured or disadvantaged depending on the location of the company's assets.

Nonetheless, a court faced with an application for the recognition of a foreign liquidator with plenary powers has a wide discretion and will be particularly concerned to protect as far as possible the interests of local creditors. In appropriate cases, therefore, it will refuse to grant such recognition if there are circumstances which render it undesirable to do so. (See Re African Farms Ltd supra at 382; Ex parte B Z Stegmann 1902 TS 40 at 55.)

Had the appellants applied timeously for their recognition it may well be that the Court a quo would have granted the application, subject of course to the normal limitations aimed at the protection of local creditors. But they did not do so. Instead, they attempted to deal with local assets without first obtaining recognition. By the time the second respondent launched his application for a compulsory winding-up order, some 6 weeks had elapsed since the company's

9 local offices had been closed and the company had ceased to carry on business.

During this period a creditor had attached property belonging to the company.

A copy of the second respondent's application was served on the company on 31 January 1995. A copy of the provisional order was served on 20 February 1995. Nonetheless, the final winding-up order was granted without opposition. By the time the appellants finally applied for their recognition 5 months later, not only had the first respondent been appointed as liquidator but he had made considerable progress in the winding-up of the company's South African estate. In these circumstances, any order recognising the appellants as liquidators with power to deal with local assets would have been inconsistent with the final winding-up order granted on 28 February 1995 and the first respondent's subsequent appointment as liquidator with the powers conferred upon him in terms of the Act. This was appreciated by the appellants who, as I have indicated,

sought an order inter alia setting aside the final winding-up order and directing the first respondent to hand over all the assets of the company to them. I should mention that the limited recognition ultimately afforded by the Court a quo to the appellants went no further than acknowledging their existence and had no effect upon the winding-up order previously granted in favour of the first respondent. This was unacceptable to the appellants; hence the appeal.

In order to have the final winding-up order set aside the appellants were obliged to invoke the provisions of s 354 (1) of the Act. I shall assume without deciding that they had locus standi to do so. The section reads:

> '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.'

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 747; see also Joubert: LAWSA vol 4 First Reissue par 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 (0.) 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 109 F- 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 ut sit finis litium'. (Abdurahman v Estate Abdurahman, supra, at 875 G -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. (Cf Aubrey M Cramer Ltd v Wells NO,supra, at 305 H.)

In the present case the appellants were able to offer no explanation for their failure to intervene to oppose the granting of a final winding-up order in this country save possibly the volume of their work. Such an explanation, if it is one at all, is hardly satisfactory. As to their failure to apply for their recognition timeously and their attempt to deal with local assets without first seeking recognition, the only explanation offered was that they were ignorant of the South African law as to the recognition of foreign liquidators. This explanation, too, is unsatisfactory, particularly in so far as the delay is concerned. The application for

recognition was launched by the appellants early in August 1995, ie almost 8

months after the winding-up resolution and some 6 months after being informed of the local winding-up proceedings. As previously noted, by August 1995 considerable progress had been made with the local winding-up.

As far as the merits of the winding-up order are concerned, the argument advanced on behalf of the appellants was that the granting of the order was founded upon a misconception of the law which was of so serious a nature as to have justified the Court a quo, in the exercise of its discretion, coming to their assistance regardless of any remissness on their part and that its failure to do so, in all the circumstances, justified interference by this Court. I interpose that various other criticisms were levelled at the supporting affidavit in the liquidation proceedings. To my mind they were of little import and certainly not of a kind as to justify the granting of an order under s 354 of the Act. It is accordingly

unnecessary to say anything more about them. In addition, the appellants in their replying affidavit criticised certain aspects of the first respondent's winding-up of the company's South African estate. This attack was largely a response to the first respondent's criticism of the appellant's conduct. However, it was not the appellants' case that the first respondent should be removed from office or that the winding-up order be set aside on this ground and, as observed by the first appellant in his replying affidavit, the performance of the first respondent as liquidator was irrelevant to the central question in issue. I agree. The attack directed at the winding-up order which it was contended justified the Court a quo coming to the appellants' assistance involved the interpretation of s 344 (g) of the Act. In short, it was submitted that this section does not apply to an external company which was the subject of a voluntary or compulsory winding-up in the country in which it was incorporated.

Before elaborating upon this submission and the issues to which it

gives rise, it is necessary to make certain general observations regarding the section and its context in the Act. A competent South African court undoubtedly has jurisdiction to grant a winding-up order in respect of an external company. In terms of s 337 a reference to a company in Chapter XIV dealing with the winding-up of companies is to be construed as including a reference to an external company. It follows that the grounds upon which a court may wind up an external company in terms of s 344 are not limited to the grounds referred to in s 344 (g) which deals expressly with external companies. Section 344 (g) reads: 'A company may be wound up by the Court if -

> (g) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;'

The section contains three conditions or jurisdictional facts. These have been held

to be independent and not cumulative. (See Banque des Marchands de Moscou (Koupetschesky) (In liquidation) v Kindersley and Another [1950] 2 All ER 549 (AC) at 556 D - F where the court was concerned with a similarly worded provision, viz s 338 (1) of the English Companies Act 1929.) There was some debate in this Court as to the meaning to be attributed to the word 'dissolved' in the context of the first of the three conditions. In view of the conclusion to which I have come regarding the other two, I shall assume in favour of the appellants that 'dissolved' must be understood as having the meaning used in s 419 of the Act, viz the termination of the existence of the company as opposed to a winding-up. (For a contrary view, see the Banque des Marchands de Moscou case, supra, at 560 C - D.)

As to the second and third conditions, viz 'has ceased to carry on business' and 'is carrying on business only for the purpose of winding up its

affairs', counsel for the appellants submitted that these were to be construed as

relating only to an external company which was not in the process of being voluntarily or compulsarily wound up in the country of its incorporation. He contended that had the legislature intended to go so far as to authorise a winding-up order in the face of such a voluntary or compulsory winding-up, it would have

said so in express terms. I am unpersuaded that this construction of the section is justified. There is nothing in the language of the section to suggest a meaning other than the ordinary literal meaning of the words used; nor would there seem to be any other justification for importing into the section the limitation proposed by counsel. On the contrary, the very notion of a company carrying on business only for the purpose 'of winding-up its affairs' contemplates either a voluntary or compulsory winding-up. In the absence of both, the company would not be carrying on business for the limited purpose stated. If, of course, the compulsory

winding-up were local there would be no basis for a further order, but this would not be true in the case of a foreign order which, until recognised, has no application in this country. Once it is accepted that the third condition is not to be given the limited meaning suggested by counsel, it seems to me that there can be no justification for limiting the ordinary meaning of the second condition in this way. The same, I think, is true of the other grounds for granting a winding-up order referred to in s 344 which, as I have indicated, apply also to external companies.

The construction sought to be placed on s 344 (g) by appellants' counsel is furthermore in conflict with the construction placed on a similarly worded section in the English Companies Act of 1862 by the English courts. In terms of that section (ie s 199 (3)(a)) a court was empowered to wind up an 'unregistered company' whenever the company -

'— is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs.'

(The section appears to have been the fons et origo of section 344 (g).) The question arose in In re Commercial Bank of India (1868) Law Rep 6 Eq 517 whether an English court had jurisdiction in terms of s 199 of the 1862 Act to order the winding-up of an Indian company with assets in England which had ceased to carry on business and which had gone into voluntary winding-up in India but without steps being taken to proceed with the winding-up. Lord Romilly MR held that the court had jurisdiction and granted a winding-up order. Following In re Commercial Bank of India it was accepted in subsequent cases that a court had jurisdiction in terms of s 199 of the 1862 Act to grant a winding-up order notwithstanding that the company was being wound up in the country of its incorporation. The question which occasioned difficulty was not whether the court had jurisdiction in such cases but whether in all the circumstances the court

ought to exercise its discretion to grant an order and if so the nature of that order.

(See In re Matheson Brother Ltd (1884) 27 Ch D 225; In re Commercial Bank of South Australia(1886) 33 Ch D 174; In re the Federal Bank of Australia Ltd (1893) 62 LJ Ch 561 (CA). See also In re The Westland Gold-Mining Syndicate Ltd [1916] NZLR 169.)

It follows from the aforegoing that in my view a South African court has jurisdiction in terms of s 344 (g) of the Act to grant a winding-up order in respect of an external company notwithstanding that it is the subject of a voluntary or compulsory winding-up in the country of its incorporation. It follows, too, that the court which granted the winding-up order in the present case on 28 February 1995 had jurisdiction to do so. In the circumstances, there is no basis upon which this Court can interfere with the exercise by the Court a quo of its discretion to refuse to set aside the winding-up order in terms of s 354 (1) of the Act. The

appeal must therefore fail.

It is perhaps regrettable that there will be more than one concursus creditorum. But the appellants themselves are largely to blame for this state of affairs. However, the limited extent of the recognition afforded to them by the Court a quo will at least serve to confirm their standing to monitor the first respondent's winding-up of the company's South African estate and if needs be to take such action as lodging an objection to the latter's account.

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

Mahomed CJ)
Eksteen JA)
- Concur
Zulman JA) Streicher JA)

D G SCOTT