REPORTABLE

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case Number : 297 / 99

In the matter between

SUNNY SOUTH CANNERS (PTY) LIMITED	**Appellant**
and	
XOLANI MBANGXA	**First Respondent**
MZIMTSHA VIZIA NKONKI	**Second Respondent**
JOHN EDWARDS STUART WAYMARK NNO	**Third Respondent**

Composition of the Court : HEFER ADCJ; OLIVIER, and STREICHER JJA; MELUNSKY and BRAND AJJA

Date of hearing : 16 NOVEMBER 2000

Date of delivery : 28 NOVEMBER 2000

SUMMARY

Locus standi **of the liquidators of a corporation to launch liquidation proceedings against a debtor company; discretion of the court to grant a liquidation order.**

J U D G M E N T

PJJ OLIVIER

OLIVIER JA

[1] The appellant is a company incorporated in 1993 and which conducted business in the Eastern Cape as a pineapple canner until 15 December 1995 when it closed its doors never to operate again.

[2] The respondents are the joint liquidators of the Ciskei Agricultural Corporation ("the CAC") (in liquidation). The CAC was a juristic person created by statute, and was liquidated by Proclamation 248 of 1997 issued by the Premier of the Province of the Eastern Cape with effect from 10 July 1997 ("the Proclamation").

[3] In March 1999 the respondents launched an application against the appellant in the Eastern Cape Division of the High Court for an order liquidating it. The application was opposed by the appellant.

[4] On 24 June 1999 Van Rensburg J, at the conclusion of a thorough judgment, placed the appellant under provisional winding-up in the hands of the Master. On the extended return day, 12 August 1999, the rule *nisi* was made absolute by Brauns AJ.

[5] On the same date, Brauns AJ also granted leave to the appellant to appeal to this Court against the final liquidation order, but specifically also issued the following orders:

> "1 The appeal does not interrupt the liquidation.

2 The liquidators are authorised by the respondent to realise its assets in the course of the liquidation."

[6] The background to the relationship between the appellant and CAC is relevant to virtually all the issues in this matter. It is as follows:

(a) The CAC was established by the former Ciskei Government in 1983 with the object *inter alia*, of the promotion and development of the agricultural industry, in particular the production and sale of pineapples in the area.

(b) Prior to and during 1993 the CAC, in pursuance of its objects, developed large scale commercial pineapple farming operations know as *Pineapple Development Schemes* in terms of which a number of farms in the Peddie region of the Eastern Cape Province were administered, controlled and commercially developed by the CAC as a unit in the cyclical planting and reaping of pineapples.

(c) During 1993 CAC lost the main purchasers of its pineapples. If the CAC had to cease its commercial pineapple growing and marketing activities, it would have resulted in large scale job losses in the area, and the pineapple industry in the area would have suffered irreparable harm. It would also mean that the Ciskei Government would have had to fund the deficit of the CAC, at that time R 14 050 000,00, if it wished to ensure the survival of the CAC.

(d) In 1993 the appellant company was launched and negotiations were concluded between various parties involved to ensure the continued existence on a long term basis of the CAC's pineapple development scheme by securing a market for the CAC's pineapple crop.

(e) In the light of the negotiations, the following agreements, relevant to this matter, were entered into:

(1) A Fruit Supply Agreement between the CAC and the appellant, in terms of which the former would sell and supply the appellant with at least 30 000 tons of pineapples per year, for a period of five years, at an agreed price.

(2) An Agreement of Loan between the CAC and the appellant in terms of which the CAC lent and advanced an amount of R 3 100 000,00 to the appellant, for the purpose of providing operating capital to finance the production of canned fruit and extracted juices by the appellant.

(3) A guarantee by the CAC in favour of Appletiser South Africa (Pty) Ltd ("Appletiser") for the due performance by the appellant of its

obligations in terms of a contract of sale whereby it purchased a cannery from Appletiser.

(4) A guarantee by the Ciskei Government in favour of the Development Bank of South Africa for the repayment of a loan made by the bank to the CAC in order to facilitate the loan mentioned in paragraph 2 above.

[7] In its application for the liquidation of the appellant, the liquidators of the CAC relied on three claims, all originating from the aforesaid agreements, and breaches thereof by the appellant.

[8] The first claim is based on the **loan agreement**. The liquidators allege that the amount of R 3 100 000,00 was advanced by the CAC to the appellant as follows:

On 24 January 1994	R 1 000 000,00
On 8 March 1994	R 2 100 000,00

They alleged that, due to a failure by the appellant to honour the terms of the agreement, the full amount of the loan together with interest thereon, became due and payable. This amount stood at R 6 100 074,00 on 31 March 1996.

[9] The second claim is based on the **Fruit Supply Agreement**. The

liquidators alleged that during the period March to October 1994 CAC supplied pineapples to the appellant in accordance with the provisions of the said agreement and at a price, calculated in accordance therewith, of R 1 600 000,00. As the appellant was unable to pay this amount, a further agreement was entered into between the CAC and the appellant in October / November 1994, in terms whereof the said debt was converted into a loan repayable by the appellant to the CAC on demand. Despite due demand on 5 August 1998, the appellant failed to pay the said amount together with the agreed interest thereon at the rate of 14% per year from 31 March 1996.

[10] The third claim is likewise based on the **Fruit Supply Agreement**. The allegation is that the CAC continued to supply pineapples to the appellant during the period September to November 1995 in accordance with the provisions of the said contract. The purchase price, calculated in terms of the agreement, so it is alleged, amounts to R 789 178,93, which amount is due and payable.

[11] The liquidators thus averred that the appellant was indebted to the CAC as at 31 August 1998 in the sum of R 11 448 575,55, *i e* the amounts set out above together with interest thereon.

[12] In their application for the winding-up of the appellant, the liquidators relied on the following grounds, *viz*

12.1 that the appellant had suspended its business as contemplated in section 344 (c) of the Companies Act 61 of 73 for a period exceeding one year;

12.2 more than 75% of the appellant's issued share capital had been lost and become useless for its business within the meaning of section 344 (e) of the Companies Act;

12.3 the appellant is unable to pay its debts as envisaged in section 345 read with section 344 (f) of the Companies Act;

12.4 it is just and equitable within the meaning of section 344 (h) of the Companies Act that the appellant be wound up.

[13] The appellant, in its opposing affidavit

13.1 admitted that it had suspended its business operations for a period exceeding one year, but alleged that such suspension was caused by a breach of contract by the CAC;

13.2 disputed that more than 75% of its issued share capital had been lost and become useless for its business, alternatively such loss had been caused by the CAC's breach of contract;

13.3 denied that it was unable to pay its debts. It alleged that because the CAC breached its contract with the appellant, the appellant is not obliged to make any

payment whatsoever to the liquidators. Furthermore, it averred, it had a counterclaim for damages against the CAC (in liquidation) and the Government of the Republic of South Africa as a consequence of the said breach of contract, vastly exceeding in value the claims by the liquidators. It also put forward that at the very least it was entitled to a stay of the liquidation proceedings until such time as its claims had been adjudicated upon.

13.4 disputed that it will be just and equitable that the appellant be wound up.

[14] The allegations as to the breach of contract by the CAC, relied upon by the appellant, can be summarised as follows : The CAC was not able to sustain a supply of pineapples in accordance with the Fruit Supply Agreement. This was due mainly to its failure to apply such crop husbandry practices on its pineapple farms as are generally accepted, resulting in an unacceptable fruit mix with regard to quality, sizes and juice content. No fertiliser was applied to the crop and weeds and grass were encroaching on the pineapples. It also failed to plant new and additional pineapples to provide for future supply to the appellant in accordance with the terms of the agreement. As a result, it delivered pineapples of unacceptable quality and grades, and failed or refused to

deliver during the years ended 1994 /1995 the minimum quantity of 30 000 tons of pineapples. Consequently, the appellant cancelled the Fruit Supply Agreement on 30 November 1995, and had to close its factory on 15 December 1995.

[15] In July 1996 the appellant instituted action in the Ciskei Provincial Division against the CAC as first defendant, the Government of the Eastern Cape Province as second defendant (against whom the action was not proceeded with), and the Government of the Republic of South Africa as the third defendant ("the Ciskei case"). As against the CAC, the appellant alleged the breach of the Fruit Supply Agreement mentioned above, averred that it had suffered damage in the amount of R 105 011 000,00 as a consequence thereof, and claimed the payment of the said sum as damages.

[16] As against the Government of the Republic of South Africa, the appellant averred that a tacit agreement came into existence between itself and the Government of the Republic of Ciskei during or about October 1993 in terms of which the latter undertook that during the subsistence of the Fruit Supply Agreement it would provide the CAC annually with sufficient funds to enable it to meet its contractual

obligations towards the appellant in terms of the said agreement. According to the provisions of section 239 (3) of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the interim Constitution") the Government of the RSA assumed the debts and liabilities of the Government of the Ciskei, including those arising out of the alleged tacit agreement. Thereafter the said agreement was breached, in that the Government of the RSA failed to provide the CAC with sufficient funds to enable it to fulfil its contractual obligations towards the appellant. The CAC's breach of contract against the appellant, so it was averred, was a direct and foreseeable result of the Government's breach of the tacit contract. As a consequence, the appellant suffered damage in the amount of R 105 011 000,00. In the result, payment of said sum was claimed, *in solidum*, from the CAC and the RSA Government.

[17] After the liquidation of the CAC the liquidators in their official capacities as such, were substituted as plaintiffs in the action. The liquidators opposed the action, delivering a plea in which, in essence, the breach of contract on the part of the CAC was denied. This plea was served and filed of record on 16 September 1998. It will be remembered that the application by the liquidators to have the appellant liquidated was

launched early in March 1999, *i e* approximately 5½ months after they had delivered their plea in the appellant's action against them. The juxtaposition of the action and the application gave rise to some of the major disputes in this appeal, as will appear from what follows hereafter.

[18] Before I deal with the grounds advanced by the liquidators for the winding-up of the appellant, a preliminary point taken by the latter must be considered. The substance of the objection is that the application was fatally defective in that the liquidators failed to allege that they had the necessary authority, granted by the creditors of the CAC, or that they were acting on directions of the Master, in bringing the application.

[19] The liquidators, in response, submitted firstly, that on a proper interpretation, the provisions of the Proclamation authorised the liquidators to bring the application and, alternatively, that they were *as far as the appellant is concerned* entitled to launch the winding-up proceedings without the authority given by the creditors or by the Master.

[20] I will consider the relevant provisions of the Proclamation first. The point of departure must be that the CAC was not a company incorporated under the Companies Act. It was a unique entity, created by statute and "dissolved" by the Proclamation. The correct approach is

that the provisions of the Companies Act are not applicable, unless incorporated by the Proclamation.

[21] In the law relating to companies, the requirement that liquidators in order to litigate, must have a resolution of creditors to that effect, or directions by the Master, arises from section 386 (3) (a) which provides that

> "*(3) The liquidator of a company -*
>
> *(a) in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387; ... shall have the powers mentioned in subsection (4).*"

Section 386 (4) (a) reads as follows:

> "*(4) The powers referred to in subsection (3) are -*
>
> *(a) to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature, ...*"

[22] Were these provisions made applicable to the liquidators of the CAC (in liquidation) by the Proclamation? The Proclamation provides in paragraph (c) (v) that

> " ***... the liquidators shall exercise,*** **mutatis mutandis*****, the same powers as those mentioned in section 386 of the Companies Act, including those conferred under the Insolvency Act, 1936 ... on like terms to those***

> ***mentioned in section 386 (4) (g) of the said Act : Provided that the liquidators may dispose of the assets of the Corporation in a manner contemplated in section 386 (4) (h) of that Act without the consent of the Master or body of creditors if they deem it necessary in the interests of the Corporation.***"

[23] It follows, so the appellant's argument proceeded, that the requirement of authorisation by the creditors or the Master spelled out in the Companies Act was incorporated by paragraph (c) (v) of the Proclamation. The matter is, however, not as simple as it appears to be.

[24] Had paragraph (c) (v) of the Proclamation stood alone, there might have been some substance in the appellant's argument. But the Proclamation does not end at paragraph (c) (v). Paragraph (f) provides that

> *" ... the powers, terms, conditions and procedures set out in the Annexure hereto* ***shall*** *apply to the dissolution of CAC."* (My emphasis)

[25] Paragraph 2 of the Annexure reads as follows:

> *"The following general provisions shall apply in relation to the dissolution of the Corporation:*
>
> *2.1 The liquidators are authorised to engage the services of attorneys and / or counsel and / or shorthand writers for the purpose of -*
>
> *(i) taking any legal actions that may be considered necessary in the interest of the estate;*
>
> *(ii) instituting or defending any action in respect of any matter*

> *affecting the estate in any court of law;*
>
> *(iii) instituting an enquiry into the affairs of the estate, and / or any matter relating thereto."*

[26] Although paragraph 2 of the Annexure *prima facie* relates only to the employment of attorneys and counsel *etc*, it also, by necessary implication, authorises the taking of legal action and the institution of such action, as provided for in the paragraph. It follows, as was correctly conceded by counsel for the appellant, that paragraph 2.1 of the Annexure authorises the liquidators to take legal action and to institute proceedings without any further authorisation by creditors or the Master.

[27] But there seems to be a conflict, therefore, between paragraphs (c) (v) of the Proclamation itself and 2.1 of the Annexure. The conflict cannot be resolved so as to give full force and effect to both provisions. Counsel for the appellant submitted that paragraph 2.1 of the Annexure is subject to paragraph (c) (v) of the Proclamation. I do not agree : on a proper interpretation of both provisions and the Proclamation in its entirety the opposite is true. Paragraph (c) (v) is the general provision; paragraph 2.1 of the Annexure the special. By applying the maxim *generalia specialibus non derogant* to this case (see ***S v Hattingh*** 1978 (2) SA 826 (A) at 829 A - D) one must conclude that no authority from

creditors or the Master was required for the institution of the liquidation application, because such authority was given in paragraph 2.1 of the Annexure.

[28] The appellant's point *in limine* pertaining to the alleged lack of authority on the part of the liquidators cannot be upheld.

The exercise of the discretion by the court *a quo* to grant a liquidation order.

[29] The court *a quo* found, on the facts as they crystallised in the various affidavits and annexures, that

(a) the appellant had suspended its business as envisaged by section 344 (c) of the Companies Act, and that such suspension was indicative of an inability and a lack of intention on the part of the appellant to resume its business;

(b) it is probable that 75% of the issued share capital of the appellant had been lost, and if the appellant's claim for damages against the CAC (in liquidation) and the Government is not taken into consideration, it is both factually and commercially insolvent;

(c) as at 31 August 1998 the appellant owed the CAC R 11 448 575,55. There is a further claim against the appellant for R 801 651,76. The

appellant also failed to comply with the demand to pay its debts served by the liquidators on it on 5 August 1998 in terms of section 345 (1) (a) of the Companies Act. The appellant, if its claim for damages aforesaid is not taken into account, is factually hopelessly insolvent; it is by virtue of section 345 (1) (a) of the Companies Act also deemed to be insolvent;

(d) it is just and equitable that the appellant be wound-up in the hands of the Master of the Supreme Court because it has not traded for more than three years; there is little or no prospect of the appellant resuming its business in the future; it is in parlous financial circumstances and its plant and equipment are deteriorating all the time.

[30] The court found that there were, therefore, ample grounds for the liquidation of the appellant. This finding was not challenged in this Court.

[31] The appellant's case is simply that, notwithstanding the factual findings made by the court *a quo*, the court still had an overriding discretion under section 344 of the Companies Act, not to grant a winding-up order. This argument was raised and debated in the court *a quo*, but as far as the appellant is concerned, with no success. It

remains the main attack on the court *a quo* before us.

[32] On behalf of the appellant it is argued that the court *a quo* erred in the following respects:

[32.1] It failed to accord proper weight to the breach by the CAC of the Fruit Supply Agreement, and in particular its failure to supply the agreed quantities of pineapples to the appellant, which caused the appellant's financial difficulties;

[32.2] it failed to accord proper weight to the CAC's conduct of the litigation instituted by the appellant against the CAC and also, in that context, the launching of the liquidation proceedings, which is described by the appellant as an abuse of the process of the court;

[32.3] it failed to properly take into account the claim of the appellant against the liquidators and the RSA Government. Had that been done, so it was argued, the court would not have been able to find that the liquidation of the appellant was just and equitable.

I will deal with these points of criticism *seriatim.*

[33] The failure by the CAC to supply pineapples followed the appellant's failure to pay for previous supplies. This in turn was the result of the appellant (even on its own version) being under-capitalised

from the very start of its existence. The under-capitalisation which led to endemic cash flow problems resulted in the Loan Agreement in the amount of R3 100 00,00; the conversion of the appellant's debt of R 1 600 00,00 for pineapples supplied by the CAC during March to October 1994 to a loan, and the outstanding debt of R 789 178,93 for pineapples supplied during September to November 1995. The court *a quo* took all of these factors into account in deciding the issue in favour of the liquidator. I cannot fault its conclusion.

[34] As far as the conduct of the litigation and the abuse of the court's proceedings are concerned, it was argued by the appellant, with reference to the affidavits before the court *a quo,* that the CAC and the liquidators had unduly and deliberately delayed the finalisation of the appellant's action against the CAC and the RSA Government. The action was instituted in July 1996. After many delays, according to the appellant, caused by the CAC and the liquidators, a plea on behalf of the CAC was delivered on 15 September 1998. A trial date was then arranged. Only then was the application for liquidation launched. This shows, so the appellant argues, that the purpose of the liquidation proceedings was only to prevent the appellant's action against the

liquidators and the RSA Government from proceeding to trial in the ordinary course. The bringing of the application for liquidation, so it was submitted, was *mala fide* and an abuse of the process of the court.

[35] On behalf of the liquidators it was pointed out that the reasons for delays in the finalisation were fully explained in the replying affidavit. It deals *inter alia* with changes of attorneys and advocates.

[36] For the purposes of this judgment it is not necessary to set out the reasons for the delays in detail. Suffice it to say that the appellant has not asked leave to reply and gainsay the liquidator's explanations. Nor did it, in the heads of argument, argue that the explanations were untrue or that the changes of the legal team employed by the CAC and the liquidators were unreasonable, unjustified or frivolous. It must also be taken into account that the CAC itself was in a parlous financial position. What is more, the appellant was the *dominus litis* and could have prevented any undue delay by any of the defendants in the action. In the result, one cannot reasonably find that the delays amounted to an abuse of the process of the court or that they evince an improper motive.

[37] The institution of the liquidation proceedings after a trial date in the action had been obtained, is more worrisome. Reference was made by

counsel to a number of decisions dealing with similar or comparable cases. But in the end the question is a factual one : was the creditor who brought the liquidation application motivated by an improper motive?

[38] The court *a quo* held on the facts that the liquidators were not motivated by an improper motive. I agree. The liquidators had a claim exceeding R 11 million against the appellant which could not *bona fide* be disputed. The appellant had closed its business three years earlier. It had disposed of its moveable assets. Its only asset was a disputed claim against the liquidators and the RSA Government. There was no reason why it would proceed with the action for damages against the CAC, which had already been placed in liquidation. If the appellant were placed in liquidation, its liquidators could proceed with the action, if so advised. Liquidating the appellant cannot deprive the creditors of the appellant of any rights which they enjoyed prior to its liquidation. In the result, I fail to see how one can say that the liquidators intended to stifle the appellant's claim or that they acted *mala fide* or abused the process of the court.

[39] I finally turn to the complaint that the court *a quo* had not given proper weight to the claim for damages instituted by the appellant against

the CAC and the RSA Government. The argument is that if the claim is successful, the appellant will be solvent and able to pay its debts, including the claims of the liquidators. Consequently, so it was argued, the liquidation order should not have been granted; alternatively, the application should have been postponed until the action for damages had been finalised.

[40] If the claim against the liquidators is successful, it will have little effect on the solvency of the appellant. The dividend it will receive from the liquidators will fall far short of the liquidators' claims against the appellant. Had this been the only action, it was, realistically speaking, not a factor to be taken into account - especially if regard is had to the fact that the appellant's liquidators could, if so advised, still proceed with the action against the respondents.

[41] The only claim which can have a material effect on the appellant's solvency, is that against the RSA Government. The existence of that claim does not, in my view, stand in the way of winding up the appellant. As stated before, the liquidation of the appellant does not affect the claim. If successful, the appellant's members and creditors will enjoy every benefit and advantage to which they would have been entitled had the appellant not been

liquidated. The alleged existence of the claim is, therefore, at best for the appellant, a neutral factor.

[42] I am therefore not satisfied that the court *a quo* exercised its discretion improperly.

[43] In the result the appeal fails with costs, including the costs of two counsel.

P J J OLIVIER JA

CONCURRING :
HEFER ADCJ
STREICHER JA
MELUNSKY AJA
BRAND AJA