IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 103/03

In the matter between:

MEEG BANK LIMITED	Appellant

and

JOHN EDWARD STUART WAYMARK	1st Respondent
XOLANI MBANGXA	2nd Respondent
MZIMTSHA VIZIA NKONKI	3rd Respondent

<u>CORAM</u>: **MPATI DP, FARLAM, CAMERON, MTHIYANE JJA and SOUTHWOOD AJA**

<u>HEARD</u>: **12 MARCH 2004**

<u>DELIVERED</u>: **26 MARCH 2004**

Subject: Dissolution of a corporation by proclamation in terms of s 13 of Transkei Corporations Act 10 of 1976 as amended – status of subsequent general notice correcting omission in such proclamation.

JUDGMENT

<u>MPATI DP:</u>

[1] This appeal concerns the date on which the Premier of the Eastern

Cape dissolved the Magwa Tea Corporation ('the Corporation'). On 10 July 1997 the Premier of the Eastern Cape issued Proclamation No 9, published in Extraordinary Provincial Gazette No 248 of that date, in terms of which he dissolved the Corporation and appointed the three respondents as joint liquidators. On 1 December 1997 the Premier issued General Notice No 157 ('the General Notice'), published in Provincial Gazette No 282 of that date, which provided that: 'Due to an error, Proclamation No 9 which was published in Provincial Gazette No 248 dated 10 July 1997, is hereby replaced.' In terms of the General Notice the Corporation was dissolved 'with effect from date hereof'. The issue in this appeal is whether the Corporation was dissolved on 10 July 1997 or 1 December 1997.

[2] It is common cause that appellant ('Meeg Bank') (formerly the Bank of Transkei), had an agreement with the Corporation in terms of which the Corporation operated a current banking account with it. During March 2000 the respondents (as plaintiffs) issued summons against the appellant for payment of the sum of R2 246 119.03 which was the credit balance in the Corporation's account with Meeg Bank as at 10 July 1997, and a further amount of R4 530 830.49 alleged to have been deposited into the Corporation's account after 10 July 1997. In its plea Meeg Bank admitted

that the first amount was the credit balance of the Corporation as at 10 July 1997. It also pleaded that a total amount of R4 511 325.17 had been deposited into such account subsequently. However, Meeg Bank denied liability and pleaded that the Corporation was dissolved on 1 December 1997 and that it was therefore entitled, before that date, to pay out cheques and to honour debit orders presented to it and to receive the deposits which it in fact received. It counterclaimed for payment of the value of certain cheques which, having been deposited into the Corporation's account, had been stopped on the instructions of the respondents ('the liquidators'), and which allegedly caused Meeg Bank to suffer damages in the sum of R445 854.95.

[3] When the matter came before Pakade J in the court *a quo* the learned judge granted an order, in terms of Rule 33(4) of the Uniform Rules and by agreement between the parties, that the preliminary issue of the date of dissolution of the Corporation be decided first. He found that the Corporation was dissolved on the former date and that 'the repealed Proclamation No 9 was in force until the second Proclamation (No 157) came into operation on 1 December 1997'. The learned judge held that: 'To give a different interpretation would lead to an absurdity so glaring' as

could never have been contemplated by the Premier. The judgment is reported in 2003 (4) SA 114 (Tk). Meeg Bank appeals with leave of the court *a quo*.

[4] The power to dissolve the Corporation is conferred upon the Premier by s 13 of the Transkei Corporations Act 10 of 1976 ('the Act'), as amended by the Corporations Transitional Provisions Act (Eastern Cape) 12 of 1995. Section 13 reads:

'Dissolution of corporations

13(1) The Premier may, by proclamation in the *Provincial Gazette*, dissolve the development corporation or a corporation.

(2) The Premier in such proclamation:

(a) shall regulate all matters resulting from such dissolution including assets, liabilities, rights and obligations of such corporations;

(b) may in so doing prescribe that certain provisions of the Companies Act, 1973 (Act No 61 of 1973), and the Insolvency Act, 1936 (Act No 24 of 1936), shall with or without modification apply to such dissolution *mutatis mutandis*; and

(c) may assign the powers and functions exercised by officials and appointees under the Acts referred to in paragraph (*b*) to any other person whom he or she considers appropriate in the circumstances.

(3) The Premier shall submit such proclamation to the Provincial Legislature within

30 days of such dissolution.

(4) The registrar of companies shall enter the dissolution in his or her registers.'

[5] Meeg Bank's contention is, in essence, that Proclamation No 9 was fatally defective and thus invalid and of no force and effect, because the Premier failed to regulate 'all matters resulting' from the purported dissolution of the Corporation on 10 July 1997 as he was obliged to do in terms of s 13(2)(a) of the Corporations Act. As did the court *a quo*, counsel for the appellant referred to the General Notice of 1 December 1997 as a proclamation (hence the reference to 'the second Proclamation' in the judgment of the court *a quo*).

[6] On the front page of the Extraordinary Provincial Gazette appears the sub-heading: 'PROCLAMATIONS' between double tram lines. The first page of Proclamation No 9 is headed:

'**PROCLAMATION**

by the

Premier of the Province of the Eastern Cape

No 9

DISSOLUTION OF MAGWA TEA CORPORATION UNDER SECTION 13 OF THE CORPORATIONS ACT, 1985 (ACT No 10 of 1985) (TRANSKEI).'

[7] By contrast, the cover page of the Provincial Gazette of 1 December 1997 bears the sub-heading: ‘GENERAL NOTICE’ between double tram lines with its number, No 157 printed on the left, below the lower tram lines. The second page is then headed as follows:

‘CORRECTION NOTICE

Due to an error, Proclamation No 9 which was published in Provincial Gazette No 248 dated 10 July 1997, is hereby replaced by the following:

PROCLAMATION

by the

Premier of the Province of the Eastern Cape

DISSOLUTION OF MAGWA TEA CORPORATION UNDER SECTION 13 OF THE CORPORATIONS ACT, 1985 (ACT No 10 of 1985) (TRANSKEI).’

The General Notice has no proclamation number. The rest of the document contains provisions identical to those in Proclamation No 9, as well as paragraphs 2.2 to 2.7, which were omitted from Proclamation No 9. These are some of the general provisions decreed by the Premier to apply to the dissolution and winding-up of the Corporation. Counsel for Meeg Bank contended that it is the omission of these paragraphs which renders Proclamation No 9 invalid and of no force and effect. He argued that these paragraphs (or at least some of them) contain powers without which the liquidators would not have been able properly to perform their functions.

These paragraphs read:

‘2.2 The liquidators are authorised to collect any outstanding debts due to the Corporation in liquidation, and for the purpose thereof either to sell or compound any of these debts for such sum and on such terms and conditions as they in their discretion may deem fit, or to abandon any claim which they, in their discretion may deem appropriate and that all legal costs so incurred shall be costs of the estate.

2.3 The liquidators are authorised to employ auditors to investigate and write up the books of the Corporation to the date of liquidation and to produce an audited balance sheet as at that date, and to complete any necessary income tax and other Government returns and that all costs so incurred shall be costs in the liquidation of the Corporation.

2.4 The liquidators are authorised to dispose [of] the movable and immovable assets of the Corporation by public auction, private treaty or public tender and the mode of sale for any one or more of the assets shall be determined by the liquidators and all costs incurred in relation thereto shall be costs of administration.

2.5 Costs incurred for the use of a recording machine where the Government does not provide this service without costs, the costs incurred herein and the costs to obtain copies of such court records shall be allowed against the estate as costs of administration.

2.6 The liquidators are authorised and empowered in their discretion to hold an enquiry into the formation and affairs of the Corporation, and/or any matter relating thereto, should they deem it to be in the interest of creditors, and to

employ attorneys and/or counsel and/or recording agents, to assist in the said enquiry, and to summons any person whom they deem necessary to be present at the enquiry; all costs so incurred to be costs of administration.

2.7 The liquidators are authorised and empowered to investigate any apparent voidable and/or undue preference and/or any dispositions of property, and to take any steps which they in their discretion may deem necessary, including the instituting of legal action and the employment of attorneys and/or counsel, to have these set aside and to proceed to the final end or determination of any such legal action or to abandon same at any time as they in their discretion may deem appropriate and that all costs incurred in terms hereof shall be treated as administration costs.'

[8] When the omission came to his attention, so the argument went, the Premier 'replaced' Proclamation No 9 with the second Proclamation and dissolved the Corporation with effect from the date of the second Proclamation. When it was pointed out to counsel that the Provincial Gazette of 1 December 1997 contains what is referred to therein as a 'General Notice' he submitted that the Premier intended to issue both a general notice informing the public of the dissolution, and a Proclamation in terms of which the dissolution was to take effect on that date.

[9] I do not agree that the Premier intended to issue a second

Proclamation dissolving the Corporation a second time. I say this for the following reasons. Proclamation No 9 appeared in Provincial Gazette No 248 of 10 July 1997 together with two other Proclamations. The first was Proclamation No 8 by which the Premier dissolved the Ciskei Agricultural Corporation with effect from 10 July 1997. The second was Proclamation No 9 and the third was Proclamation No 10 in terms of which the Transkei Agricultural Corporation was dissolved with effect from 10 July 1997. Both Proclamations No 8 and No 10 are identical to Proclamation No 9, but contain paragraphs 2.2 to 2.7 which do not appear in Proclamation No 9. In Proclamation No 9 paragraph 2.1 is followed by paragraph 2.8, a clear indication, in my view, that the Premier had intended to include paragraphs 2.2 to 2.7 in Proclamation No 9, and that the paragraphs were erroneously omitted by the printers. The General Notice was obviously intended to correct this error. This is clear from the heading 'CORRECTION NOTICE'.

[10] The provision in Proclamation No 9 in terms of which the Corporation was dissolved reads:

'Under the powers vested in me by section 13 of the Corporations Act, 1985 (Act No 10 of 1985) (Transkei), as amended by section 19 of the Corporations Transitional Provisions Act, 1995 (Eastern Cape) (Act No 12 of 1995), I, Makhenkesi Arnold Stofile, Premier of the Province of the Eastern Cape, hereby –

(a) after consultation with the Minister of Public Enterprises, dissolve the Magwa Tea Corporation (the Corporation) with effect from the date hereof;

. . . .’

The same provision in exactly the same terms is repeated in the General Notice. It is on the basis of the words: ‘with effect from the date hereof’ that counsel argued that the Corporation was dissolved on 1 December 1997. If the Premier had merely wished to insert paragraphs 2.2 to 2.7 into Proclamation No 9, so counsel submitted, he could easily have done so by stating as much. Instead, he included the contents of the whole of Proclamation No 9 into the General Notice, a clear indication, counsel argued, that Proclamation No 9 was replaced by the later publication and is now no more.

[11] In my view, the argument overlooks the provisions of s 13 of the Corporations Act which empowers the Premier to dissolve a corporation ‘by Proclamation’ (s 13(1)) and to regulate all matters resulting from such dissolution ‘in such proclamation’ (s 13(2)). It is clear, therefore, that the regulation of all matters resulting from such dissolution must be contained in the proclamation which dissolves such corporation. It was clearly with this requirement in mind that the Premier reproduced the whole of Proclamation No 9 in the General Notice. The content of the General

Notice confirms that it is not a Proclamation. Proclamations are designated as such and are numbered. The General Notice did not purport to withdraw or annul Proclamation No 9 (assuming that it could do so), which shows that the Premier considered Proclamation No 9 to have been valid and of full force and effect when he issued the 'Correction Notice' contained in the General Notice. To hold otherwise would create an untenable situation. The liquidators may have done things pursuant to their appointment which would be rendered invalid if the notice has the effect of postponing the date of dissolution to 1 December 1997. Such a situation could result in claims against them, something the Premier could never have intended. It follows that the General Notice of 1 December 1997 is not a proclamation dissolving a corporation, or, indeed, a proclamation at all.

[12] Section 13(1) of the Corporations Act is very clear: the act of dissolving a corporation <u>must</u> be by proclamation. The section does not say that a corporation may also be dissolved by way of a 'correction notice' contained in a general notice, which is in fact what was published under the General Notice. In the context of this case, the word 'replaced' in the General Notice must be read to mean that the content of Proclamation No

9 is now as appears in the 'Correction Notice'. Such an interpretation results in no absurdity. I agree, therefore, with the court *a quo* that the Corporation was dissolved on 10 July 1997. This conclusion effectively disposes of the appeal.

[13] Counsel for the appellant submitted, however, as I have mentioned above, that the omission of paragraphs 2.2 to 2.7 of the general provisions from Proclamation No 9 rendered the Proclamation invalid. Counsel limited himself to paragraphs 2.2, 2.4 and 2.6 in his argument on this issue. These general provisions have been set out in paragraph 7 above.

[14] As to paragraph 2.2, counsel submitted that there are three aspects relating to debts due to the Corporation which the liquidators are given power to deal with in their discretion. These are the power to sell or compound any of such debts for such sum and on such terms and conditions as the liquidators in their discretion may deem fit, or to abandon any claim for payment of a debt. These powers, argued counsel, are necessary for the proper performance by the liquidators of their duties. They are not contained in the Insolvency Act 24 of 1936 and their omission in Proclamation No 9 means that not all matters resulting from the dissolution of the Corporation have been regulated in the proclamation as

required by s 13(2)(a) of the Corporations Act. By reason of the word 'shall', counsel submitted, the provisions of the subsection are peremptory and therefore exact compliance is called for.

[15] I do not find it necessary to deal in any detail with the issue whether s 13(2)(a) of the Corporations Act is peremptory or directory. Suffice it to say that not all provisions that contain the word 'shall' are peremptory. Whether a provision is peremptory or directory may very well depend on the scope and purpose of the legislation at issue. (*Nkisimane and others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434E; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) para [13].) The purpose of s 13(2) of the Corporations Act is, in my view, to ensure the proper and efficient winding-up of a corporation. Counsel in any event conceded in the end that Proclamation No 9 would be devoid of legal effect only if the extent of its compliance with the provisions of s 13(2)(a) of the Corporations Act was insubstantial.

[16] Counsel's submission that not all matters resulting from the Corporation's dissolution were regulated in Proclamation No 9 was premised on an argument that the powers conferred on a liquidator by the provisions of s 386(4) of the Companies Act 61 of 1973 ('the Companies

Act') are not available to the liquidators, because such powers can be exercised only if the Corporation was in a winding-up by the court, in a creditors' voluntary winding-up, or in a members' voluntary winding-up (s 386(3)). (The Premier has made a number of the provisions of the Companies Act applicable in the winding-up.) This submission overlooks the provisions of paragraph (c)(v) of Proclamation No 9, which decrees that the liquidators 'shall exercise, *mutatis mutandis*, the same powers as those mentioned in section 386 of the Companies Act . . .'. The phrase *mutatis mutandis* has been interpreted to mean 'with the necessary changes'. (See *Touriel v Minister of Internal Affairs, Southern Rhodesia* 1946 AD 535 at 545.) The provisions of s 386 are therefore applicable in this matter with whatever changes are necessary, unless there are factors which render them inapplicable. That raised by counsel is not one of them.

[17] Section 386(4)(h) of the Companies Act confers upon a liquidator the power to sell any movable and immovable property of the company (in liquidation) by public auction, public tender or private contract. The same power is conferred by paragraph 2.4 of Proclamation No 9 (as inserted by the correction notice). As to paragraph 2.6 of the general provisions the authority given to the liquidators, in their discretion, to hold an enquiry into

the formation and affairs of the Corporation is not strictly necessary for the proper and efficient winding-up of the Corporation. So too the discretion to sell or compound debts due to the Corporation or to abandon any claim. The power to exercise a discretion in doing these things is merely additional so as to circumvent the need to obtain directions from eg creditors or a court. The absence of these powers would not have incapacitated the liquidators in the winding-up of the Corporation. Paragraph (d) of Proclamation No 9 prescribes that in the winding-up of the Corporation the provisions of the law relating to insolvency shall in so far as they are applicable be applied *mutatis mutandis* in respect of any matter not specifically provided for. The omission of paragraphs 2.2 to 2.7 from Proclamation No 9 was accordingly not fatal and did not render the Proclamation invalid.

[18] The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

L MPATI DP

CONCUR:

FARLAM JA

CAMERON JA
MTHIYANE JA
SOUTHWOOD AJA