BELL DEWAR AND HALL INCORPORATED

v

TONKWANE ESTATES LIMITED
Case No. 1338/96

Coram Sapire ACJ

This is the extended return day of a provisional order for the compulsory winding up of the respondent on the grounds that it is unable to pay its debts. The applicant is a corporate firm of attorneys which practices in Johannesburg. The respondent is a company incorporated and registered according to the laws of the Kingdom of Swaziland, where it is the owner of immovable property.

The application for winding up is made under the provisions of Section 114 read with the provisions of Section 112 (f) of the Companies Act, No 7 of 1912. Such an application may be made by any creditor of the company, actual, contingent or prospective. Alleging itself to be such a creditor, and that the respondent was unable to pay its debts, the applicant petitioned this court for the winding up of the respondent in December 1996. On this application a provisional order was made. On the return day, not only did the Respondent itself appear to show cause why a final order should not be made, but it was joined and supported in this opposition by Robert, David and Solveig Crabtree, individuals who claim to be creditors of the Respondent. The Crabtree family comprises father mother and son, each of whom has a loan account in excess of one million Emalangeni

On the on return date of the provisional order the matter was postponed for argument and the rule was extended. The day appointed for the hearing was however on short notice proclaimed a public holiday, and the court did not sit. The provisional order therefor lapsed, but was reinstated notwithstanding spirited opposition from the repondent and the intervening creditors. The reasons for reinstatement were given at the time.

On the 13th June and 4th July argument on the opposition to the confimation of the provisional order of winding up was heard. The respondent company was represented by an attorney. No meaningful reasons or argument was advanced on behalf of the respondent. It was from Robert Crabtree that the substance of the opposition came. David Crabtree adopted his arguments and did no more than place a different emphasis on certain aspects thereof.

The points raised by Robert Crabtree were set out in written heads of argument on which he elaborated at some length.

The first point stated in the heads of argument was related to the filing of affidavits. As the affidavit of Mitchell, filed by the Applicant out of time was withdrawn and not referred further referred to little turned on this aspect of the matter

It was further argued that as the Respondent and the intervening creditors had noted an appeal against my order reinstating the provisional order after it had lapsed the court should not grant a final order pending a judgment on the appeal. It is doubtful whether an appeal lies against such order, but the notice of appeal does not in any event suspend the order against which the appeal is directed. There is therefor little substance in this argument.

The argument then turned to the validity and liquidity of the petitiioner's claim. The Petitioner is a corpoarte firm of attorneys practicing in Johannesburg. The claim against the respondent in respect of which it claims to be a creditor is for reinbursement of amounts paid on respondent's behalf . These disbursments are mainly counsels' fees. Counsel were briefed by the applicant to advise, consult with, and represent, the Respondent in connection with Arbitration proceedings. Although there was a feeble suggestion that the Applicant was not authorised or mandated to incur these expenses on Respondent's behalf, this is negatived by the bond passed by the Respondent to secure the debt arising from this very cause of action a copy of which is attached to the petition.

Robert Crabtree then submitted that the applicant had not shown itself to have locus standi to bring this application for winding up of the Respondent because its alleged claim was not a liquidated claim.The basis of this argument was that the counsels' fees which made up the claim had not been taxed and allowed by the registrar. The argument overlooks that undisputed fact that counsel were briefed and their fees ascertained and agreed to on the express instructions of the Respondent which was represented by the very same David and Robert Crabtree who now appeared and disputed the claim.

This argument cannot be maintained for a futher reason. Section 114 of the Companies Act no 7/1912 under the provisions of which this petition was presented provides that the application may be made by "any creditor or creditors (including any contingent or prospective creditor or creditors)". There is no requirement that the claim must be due, or liquid or of any minimum amount.

Mr Crabtree did refer me to part of the provisions of Section 183 of the Companies Act.

In terms of this section the provisions of the insolvency law for the time being are to be applied in respect of any matter "not specially provided for in this act". In advancing his argument Mr Crabtree did not deal with or even mention these vital words. This conduct, coming from advocate or attorney would be most improper He went on to argue that as the Insolvency Act prescribes that any creditor applying for the sequestration of a debtor's estate must have a liquidated claim the same applies to a creditor who applies for the winding up of a company

The Companies Act as we have seen has no requirement that the petitioning creditor's claim must be liquid and may be prospective or contingent. The qualifications for a petitioning creditor, as dealt with in the Companies act are not affected by the provisions of the Insolveny Act.The applicant meets these reqirements.

The next submission was that because the applicants claim was one for legal fees the amount was not claimable until the bill had been taxed.In making this submission reliance was placed on the provisions of t.he Bills of Costs Act Again Mr crabtree has overlooked that his mandate to the applicant is governed by the law of the Republic of South Africa. The respondent engaged Applicant's services not as attorneys of this court, but as South African

professionals who were instructed to brief South African Advocates. The fees of the South African advocates were expressly agreed and approved by the respondent as appears from paragraph 11 of the petition. These allegations are not denied. Neither according the law of the Republic of South Africa nor that of the Kingdom of Swaziland is it neccessary to tax a bill for disbursments where the amount of such was agreed upon The fact that the advocates were to represent the respondent in arbitration proceedings in which a dispute arising in Swaziland was to be determined according to Swaziland law, is irrelevant The Arbitration was in any event , so I was given to understand was conducted in Johannesburg.