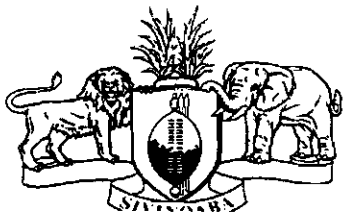

SWAZILAND HIGH COURT

Ndlovu Sphiwe Nellie (born Dlamini)
Plaintiff

K.K. Investments (Pty) Ltd
Defendant

Civ. Trial No. 2850/2000

Coram — Sapire, CJ

For Plaintiff — Mr. S. Simelane
For Defendant — Mr. P. Flynn

JUDGMENT
(20/11/2000)

This is an application made for the winding up of the respondent.

The respondent company is a company carrying on a family business and the petitioner and one Ndlovu her husband are the principal parties interested in it. There are other shareholders. They seem to play no part in the present application..

The applicant and her husband are now at arms length and the marriage between them is about to be the subject matter of a contested matrimonial action. The ultimate end of this will probably be that the parties will be divorced. But this is not necessarily so.

Section 114(1) of the act provides that an application to the court for the winding up of a company shall be by petition presented subject to the provisions of this section by the company, or by any creditor or creditors including any contingent or prospective creditors, contributory or contributories, or by all or any of those persons together or separately, provided that the contributory shall not be entitled to present a petition for the winding up a company unless the number is reduced in a

case of a private company to below two. The point about this is that it must be shown first of all that the applicant is a contributory. The act does not envisage a shareholder being entitled to present the petition. This right is that of a creditor or prospective creditor or the company itself or a contributory and in order to show that there is a contributory the applicant would have to show that there is an unpaid amount of a share capital owing in respect of the shares held by her so that on liquidation there could be a call to be made on her to make payment on that part of the share capital. Nothing is said in the petition about any unpaid potion of the share capital and by reason of that alone the applicant must fail, as she is not shown to be a creditor.

The second problem facing the applicant is that she claims to be married in community of property. This is her allegation and in support of this a copy of the marriage certificate between herself and Mr. Ndlovu has been placed before the court. It appears that no contract of any nature was entered into by the parties before the marriage. Section 24 of the Marriage Act says that the consequences flowing from marriages in terms of this Act shall be in accordance with common law as varied from time to time by any law, unless both parties to the marriage are Africans. Both parties in this case by definition are Africans, in which case subject to the terms of Section 25 the right of power of the husband and the proprietary rights of disposal shall be governed by Swazi Law and custom.

Section 25 provides for the variation of the consequences of the marriage provided that both parties of the marriage are Africans the consequences flowing from the marriage are to be governed by the law and custom applicable to them unless prior to the finalisation of the marriage parties agree that the consequences flowing from the marriage are to be governed by Common law and if the parties agree that the consequences flowing from the marriage are to be governed by common law the marriage officer shall endorse on the original marriage register the fact of the agreement the production of the marriage certificate, original marriage register or duplicate marriage register so endorsed shall be prima facae evidence of that fact unless the contrary is proved. This means that in the present circumstances these parties are, in the absence of any proof of endorsement, presumed to be married according to Swazi Law and Custom.

That in itself raises another question because the question of Swazi Law and Custom on these points is not a matter of law but a matter of fact and has to be proved by evidence in each case. In the absence of such evidence the court will assume that the provisions of Swazi law in relation to this are the same as the common law which means that the parties were married in community of property and without the exclusion of the marital of power. This being so the applicant prima facae has no locus standi This militates against the granting of a provisional order in this matter

I turn to the question of whether even if a case had been made out in terms of the act for liquidation on the grounds that it was just and equitable whether the court's discretion should be exercised in favour of a provisional liquidation. If some "oppression" is being practiced by the company on its minority shareholder it still has to be shown that such oppression, if any, is to thee prejudice of the joint estate, or to the estate of the parties.

In this case it cannot be said that it is just an equitable that a healthy and viable company should be placed on liquidation pending the outcome of a divorce action because at the end of the day there would be a division of the parties assets in accordance with the law applicable to the marriage. If a healthy and viable company is put into liquidation all that will happen is that both parties will be prejudiced. If the company continues to operate it will be to the benefit of both parties. It must be borne in mind that the applicant is still the director of the company and certainly no alienation of any assets could take place without a resolution of the directors and any meeting of the directors in which such a resolution was proposed would have to be advised to the applicant and she would be able to have her say. Her interests are in this way well protected.

All in all it is not possible for an order to be made as sought by the applicant and the petition is dismissed with costs.

SAPIRE, CJ