IN THE HIGH COURT OF SWAZILAND

(HELD AT MBABANE)

CIVIL CASE NO.: 3363/04

In the matter between

TWK AGRICULTURE LIMITED **Applicant**

and

SIMUNYE CATTLE COMPANY LIMITED **Respondent**

and

SWAZILAND MEAT INDUSTRIES LIMITED **Intervening Party**

HEARD ON: 23rd JANUARY 2006

JUDGMENT DELIVERED ON: 1st FEBRUARY 2006

CORAM: P.Z. EBERSOHN J.

FOR APPLICANT: ADV. R. WISE SC. INSTRUCTED BY CURRBE & SIBANDZE

FOR RESPONDENT: NO APPEARANCE

FOR INTERVENING PARTY: ADV. P. FLYNN INSTRUCTED BY KEMP THOMSON INC.

JUDGMENT

EBERSOHN J:

[1] The applicant applied by way of a petition for the liquidation of the respondent. The affairs of companies are regulated in Swaziland by the **Companies Act,** No. 7 of 1912 **("the Act").**

[2] The petition was issued by the Registrar of this Court on the 25th October 2004 and it was set down for hearing by this Court on the 29th October 2005.

[3] The prayers are set out as follows in the petition

> **"1. That a final order or winding-up of the respondent, SIMUNYE CATTLE COMPANY (PTY) LTD, be and is hereby granted;**
>
> **2. That Brian St Clair Cooper be and is hereby appointed as liquidator** of **the respondent with such powers and obligations as are provided in the Companies Act and subject to the directions of the Master** of **the High Court.**
>
> **<u>ALTERNATIVELY</u> to 1. and 2. above:**
>
> **4. That a provisional order of winding-up of the respondent SIMUNYE CATTLE COMPANY (PTY) LTD. be and is hereby granted;**
>
> **4. That Brian St. Clair Cooper be and is hereby appointed as liquidator of the respondent with such powers and obligations as are provided in the Companies Act and subject to the directions of the Master of the High Court.**
>
> **5. That the costs of this petition be costs in the liquidation.**
>
> **6. Granting the petitioner further and/or alternative relief."**

[4] The Intervening Party applied on an urgent basis for leave to intervene. It was the attitude of the Intervening Party:

1. that an unusual order appointing a foreign liquidator was sought without alleging any reasons which would justify same and that the order was sought with only a letter of consent of the intended liquidator being placed before the Court without a verifying affidavit by the proposed liquidator;

2. it opposed the applicant's application for a final order on 4 day's notice and was of the view that a provisional order should be granted so that meetings of creditors could be held in terms of section 189 of the Act so that the wishes of the creditors could be ascertained and that a possible solution to the matter could be found;

c) that Kubla Quashie should instead be appointed liquidator.

[5] Leave was granted to the Intervening Party to intervene.

[6] It is clear that section 112(f) of the Act is applicable as the respondent is unable to pay its debts.

[7] Section 118(1) of the Act reads as follows:

> **"(1) On hearing the petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it deems just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."**

[8] Section 125 of the Act reads, inter alia

> **" (1) For the purpose of conducting the proceedings in winding-up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a liquidator or liquidators.**
>
> **(2) The Court may make such appointment provisionally at any time after the presentation of a petition and before the making of an order for winding-up.**
>
> **(3) If a provisional liquidator is appointed before the making of a winding-up order, any fit person may be appointed.**
>
> **(4) On a winding-up order being made all the property of the company shall be deemed to be in the study or control of the Master until a liquidator is appointed and is capable of acting as such.**
>
> **(5) A person shall not be capable of acting as liquidator until he has notified his appointment to the Registrar and found security to the satisfaction of the Master.**
>
> **(6) If more that one liquidator is appointed by the Court, the Court shall declare whether any act by this Act required or authorised to be done by the liquidator is to be done by all or any one or more of the persons appointed.**
>
> **(7) A liquidator appointed by the Court may, with the leave of the Court, resign, or, on cause shown, be removed by the Court.**
>
> **(8) A vacancy in the office of liquidator appointed by the Court shall be filled by the Court, and the property of the company shall be deemed to be in the custody or control of the Master during the vacancy if there is no liquidator remaining."**

[9] On the 29th October 2004 the matter was postponed to a date to be arranged with the

Registrar with costs being reserved.

[10] On the arranged date namely the 3rd December 2004, the matter was postponed to a date to be arranged with the Registrar with costs being reserved again.

[11] The matter came before me on the 24th January 2006 and why there was the long delay is not clear to me.

[12] I was informed at the hearing on the 24th January 2005, that the Intervening Party's attorneys Kemp Thompson served a letter on the applicant's attorney on Friday the 20th January 2006 which letter reads as follows:

> **RE: SMI/TWK/SIMUNYE CATTLE COMPANY**
>
> **1. Reference is made to the above matter, the hearing which has been set down for Monday, 23rd January.**
>
> **2. Before attending the hearing we wish to place the following on record:**
>
> **2.1. At the time of filing our papers there were a number of issues raised, namely:-**
>
> **2.1.1. The question of the manner in which the Plaintiff sought to have a foreign Liquidator appointed.**
>
> **2.1.2. The question of whether relief should be granted in the form in which it was sought, when there was a clear possibility of a settlement. In this regard, it is relevant to record the following:-**
>
> **2.1.2.1 In February 2005, Thys Cronje Attorneys forwarded us a letter requesting our Client's settlement proposal by the 15th March, 2005.**
>
> **2.1.2.2. On the 14th March, 2005 we forwarded our Client's proposal.**
>
> **2.1.2.3. The above proposal was rejected without any explanation or offer of negotiation.**
>
> **2.1.3. We did not, in our papers, oppose the order but proposed the form in which the order should take.**
>
> **3. All our Client's efforts to resolve this matter have proved fruitless.**
>
> **4. We confirm that we do not intend opposing the liquidation, but will make submissions in regard to an appropriate costs order.**

5. Withdrawal of our Client's opposition should not be construed as an admission and/or waiver of any of its rights, in respect of the issues, which form the subject matter relating to the action undertaken in High Court Case No. 4263/05.

6. All our Client's rights herein are strictly reserved."

[13] On the 24th January 2006 Mr. Wise appeared for the applicant and Mr. Flynn appeared for the Intervening Party and there was no appearance for the respondent.

[14] It was common cause between the parties that there should be a winding-up order. Mr. Wise argued that it should be a final winding-up order but Mr. Flynn, however, submitted that it should be a provisional order with a return day and with publication in the press and the Gazette.

[15] I am not prepared to grant a final order at this stage as I am not satisfied that all the creditors of the respondent are aware of the application and they must be informed of the application and of the provisional order I propose to grant by the publishing of the provisional order in the press.

[16] With regard to costs Mr. Wise argued that the Intervening Party should pay the costs occasioned by the intervention of the Intervening Party in the proceedings and Mr. Flynn argued that the applicant should be awarded costs which costs did not include counsel's fees as it was, so went his argument, clear that there should be a winding-up of the respondent and that the argument before me would only be about costs and that that could have been dealt with by an attorney.

[17] Mr. Wise responded by stating that he was briefed and that he was entitled to his fees on brief despite the letter of the 20th January 2006 by Kemp Thomson.

[18] Mr. Wise also argued that in the present case the costs in issue ought properly to be divided into two categories. The first are the costs incidental to the bringing of the petition for the winding-up application. The second are the costs caused by, and which are incidental to, the intervention by the Intervening Party and its initial opposition to the order sought by the petitioner being granted.

[19] I am not prepared to order any costs against the Intervening Party as the Intervening Party was entitled to intervene in the matter in view of the fact that the applicant asked for a final order

on 4 day's notice without notice to the creditors of the respondent and the applicant's failure to comply with the provisions of the Act with regard to the proposed liquidator and the Intervening Party, in fact, greatly assisted not only this court to come to a considered decision but it also assisted the applicant in curing the defects in its papers.

[20] I, accordingly, will not order any costs against the Intervening Party and, instead, will make the costs aspect part of the rule I intend to issue. If the rule is discharged and there is not a winding-up of the respondent the applicant and the Intervening Party will each have to pay its own costs.

[21] The applicant asked for the appointment of one Brian St. Clair Cooper as liquidator. The Intervening party asked that one Kobla Quashie be appointed.

[22] The applicant did not comply with the provisions of the Act in this regard and did not put the relevant facts about Mr. Cooper before the court in its founding papers. After the Intervening Party pointed out the material defects in the applicant's papers the applicant put the necessary information before the court in its replying papers.

[23] The appointment of a liquidator or liquidators is in the discretion of this court. In vioew of the peculiar facts of the matter I am of the opinion that there must be a joint appointment to serve the interests of the respondent and of the creditors and intend appointing Mr. Cooper and Mr. Quashie jointly and in terms of the provisions of section 125(6) of the Act I will order that any act by the Act required or authorised to be done by the liquidators is to be done by the liquidators jointly by both of them.

[24] I accordingly make the following order:

> 1. A provisional order of winding-up of the respondent, be and is hereby granted, returnable on the 3rd March 2006 and this Order is to be published in the Times and Observer newspapers and in the Government Gazette on or before the 24th February 2006.
>
> 2. Kubla Quashie and Brian St. Clair Cooper are appointed joint liquidators of the estate of the respondent with such powers and obligations as are provided in the Companies Act

and subject to the directions of the Master of the High Court, and it is ordered that any act by the Companies Act required or authorised to be done by the liquidators, is to be done by the liquidators jointly by both of them.

3. The costs of the applicant and of the Intervening Party both on the opposed scale, which costs shall include the fees of counsel of both the applicant and the Intervening Party, which fees are hereby certified in terms of Rule 68(2), shall be costs in the liquidation and is to include the costs of the 29th October 2004, the 3rd December 2004 and of the 24th January 2006.

P.Z. EBERSOHN

JUDGE OF THE HIGH COURT