IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

APPEAL CASE NO. 25/97

In the matter between

DAVID CRABTREE

ROBERT CRABTREE

TONKWANE ESTATES LIMITED Appellants

And

BELL DEWAR & HALL Respondents

Coram: Kotzé, J P

Schreiner J A

Browde J A

JUDGEMENT

BROWDE J A:

This is an appeal against an order of Sapire A C J (as he then was) confirming and making final a provisional order of liquidation against the company Tonkwane Estates Limited (now one of the Appellants and hereinafter referred to as "Tonkwane") at the instance of the Respondent ("BD&H").

The Appellants David and Robert Crabtree ("Robert") are Appellants in their own right since they are creditors of the company by virtue of their loan accounts, and it was Robert

who largely argued the matter on their behalf. His father, David Crabtree, also made certain submissions which I shall deal with later in this judgement.

In this regard it is pertinent to refer to Henochsberg on The Companies Act 4th ed. Vol. 2 p. 605 at which the following appears:

"Where a provisional winding - up order has been mask, the directors of the company, notwithstanding the effect upon their position as such of such order ... have residuary power to cause the company, without the co-operation of the provisional liquidator, if any, to take the necessary steps to oppose the grant of a final winding - up order ... and to appeal against the

grant of such order (O'Cornell Manthe & Partners Inc. v Vryheid Minerale (Edms) Bpk 1979 (1) SA 553 (T): Smulders v Namibia Diamond Mining Company (Pty) Ltd 1982 (1) SA 549 (SWA))".

The court a quo found:

(i) that the application for liquidation had been brought in terms of section 114 read with section 112(f) of the Companies Act No. 7 of 1912.

(ii) that BD&H's claim was one for reimbursement by Tonkwane of fees paid by BD&H to counsel who appeared for the company in arbitration proceedings.

(iii) that the quantum of the fees had been agreed upon between BD&H and counsel, the former acting on behalf and with the consent of Tonkwane represented by Robert.

(iv) that the facts that counsel were briefed at the request of the company represented by Robert and that there was an agreement relating to the fees were facts which were unchallenged on the papers before the court.

(v) that it was not necessary that a Bill of Costs relating to counsels' fees be taxed since although the dispute arbitrated upon arose in Swaziland the arbitration took place in South Africa and on the instructions given to BD&H South African counsel were briefed and an agreement with them entered into regarding the quantum of their fees.

(vi) Tonkwane was unable to pay its debts. The learned judge based this finding on letters written by Robert which are annexures "17" and "19" to BD&H's petition.

In Annexure "17", which was faxed to BD&H on 17 August 1996 the following statements were made by Robert namely:

(a) "Furthermore whilst we do have assets you were aware that we could not raise money on them and that the strange set of circumstances would only resolve itself once all our cases are over. (This is in fact one of the reasons why BD&H financed it) ".

(b) "We are doing our best to raise money, sell parts of the property, make the property more valuable by draining it etc. Lonrho company has today expressed interest in having part of it. All this will take some time ".

Annexure "19" which was also written on behalf of Tonkwane (seemingly by one or other of the Crabtrees) was addressed to a partner of BD&H on 2 September 1996. In discussing the claim of BD&H and the manner in which the company would pay for it the following appear:

(1) "We are trying to sell part of/all the property and there is interest and we are doing all things to expedite this. We are independently of this trying to raise finance on other assets".

(2) "We do understand BD&H wants payment asap. As someone has expressed interest in purchasing we must ask you to be patient. An official dispute could cause purchasers to wait in the belief that they could get it cheaper ".

(3) "I would appreciate it if you could DHL (which I understand to be courier) a copy of the entire Bill of the Jugmans case to me (that is the case that went to arbitration). The figure mentioned in the meeting on first principles appears to be too large. We cannot agree to the correctness of the figures mentioned until we are in a position to check them ".

There seems to be little doubt that those annexures indicate not only that BD&H had done work for which they were entitled to reimbursement - although the exact amount might have been subject to debate - but that the company was not in a position to pay its debt at that stage.

On those findings and in the exercise of his discretion the learned judge then granted the final order sought by BD&H.

The argument advanced by the appellants before us was lengthy and to a certain extent repetitive. However they are not qualified practitioners and cannot be criticized as they obviously went to a great deal of trouble and carried out extensive research in order to present their case as folly as they thought the matter required.

In this regard there is one statement in the judgement a quo on which I wish to comment. In dealing with Mr. Crabtree's reference to Section 183 of the Act the learned judge said:

"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 ".

The learned judge then went on to observe that while the Insolvency Act requires that a creditor applying for the registration of a debtor's estate must have a liquidated claim, the Companies Act has no such requirement and the creditors claim need not be liquidated and may even be "prospective or contingent".

It is not clear to me why the learned judge found it necessary to remark on Mr. Crabtree's omission. I believe that Sapire CJ must have been impressed, as were we, by the industry and application of Mr. Robert Crabtree. An omission of the kind alluded to by the learned judge did not, in the circumstances, warrant a rebuke and I feel satisfied that no rebuke of Mr. Crabtree was intended.

In what follows I shall attempt to deal with all the appellants' submissions although not necessarily in the order in which they were made:

1. In reply to the letter of demand giving notice in terms of Section 113 (a) of the Companies Act that failing payment of the sum alleged by BD&H to have been disbursed on behalf of Tonkwane at the latter's "specific request" an application would be made to the High Court to place Tonkwane into liquidation Robert stated inter alia:

1.1. "Any amounts that you may have disbursed are not yet due and payable ".

1.2 "You are in any event for various reasons not entitled to demand payment as you have done ".

1.3 "In addition to this the quantum is in dispute and has not been settled".

1.4 "BD&H is also in breach of its undertakings to us to finish the case ".

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There followed a request for BD&H to prepare "a proper account in the prescribed form in order that it can be taxed in due course if necessary" A full account appears to have been provided by BD&H but this did not satisfy the Appellants and Robert in his affidavit opposing the confirmation of the Rule Nisi stated that the law relating to legal Bills, as he put it, is that there is no claim in law until after the Bill has been properly taxed. In support of this submission he quoted the Bill of Costs Act No. 128 of 1899 which reads:

"No bill of costs in a lawsuit shall be claimable in law until after it has been properly taxed".

In this regard the learned judge a quo pointed out that the fees of the counsel who had been retained by BD&H on behalf of Tonkwane were expressly agreed upon and approved by the respondent. These allegations, which were contained in the petition, were not denied and the learned judge stated that the law of Swaziland does not require a Bill to be taxed for disbursements where the amount of such was agreed upon. Whether that be so or not, and I make no finding in regard thereto, I prefer to base this judgement on the view that I hold, namely, that the argument, fails because the claim against Tonkwane was not a claim on a bill of costs but for disbursements made on behalf of Tonkwane at the latter's instance and request. The mere fact that the disbursements were made to counsel appears to me to be irrelevant and once there was the undertaking by Tonkwane to reimburse BD&H for paying counsel the fees which had been agreed upon in advance, the claim is no different from a claim for any other disbursements which might have been agreed upon between the parties. No taxation is required in those circumstances.

2. The next submission of Robert with which I wish to deal is that BD&H had no locus standi to bring the application for winding - up of Tonkwane because its claim was not a liquidated claim. The basis of this argument was that the counsels' fees which made up the claim had not yet been taxed and allowed by the Registrar. Although there have been efforts on the papers filed by the

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Appellants to deny that BD&H was ever given a mandate by them to retain counsel on Tonkwane's behalf and to agree fees with such counsel a careful reading of the affidavits which were before the court shows that the learned judge was correct in stating that it was an undisputed fact that counsel were briefed and their fees ascertained and agreed to on the express instructions of Tonkwane represented by the two Crabtrees. Even if one makes allowances on the basis that the Crabtree family are laymen and perhaps did not realise that each allegation of fact in the petition should have been traversed in the affidavits in answer thereto, the Appellants have the insurmountable obstacle of dealing with Annexure "BDH73" at page 278 of the Record which is an "acknowledgement of correctness of account" signed by Robert. It reads,

"1. I have examined the accounts rendered to the company by Bell Dewar & Hall Inc. from time to time together with the relevant fee narrations and supporting documents, if any:

2. The balance owing to Bell Dewar & Hall Inc. by the company in respect of fees owing to them and disbursement incurred by them on the company's behalf up to and including 31 January 1996

is the sum of R417 399,44".

The acknowledgement was dated at Swaziland on the 16th of April 1996.

In the face of that acknowledgement Robert was hard put to seriously submit that BD&H had no mandate from Tonkwane and consequently it follows, in the absence of a genuine denial, that for the disbursements made to counsel by BD&H on behalf of Tonkwane, BD&H has at least a contingent claim against Tonkwane. That being so I agree with the learned judge a quo that section 114 of the Companies Act No. 7 of 1912 which provides that the application for liquidation may be brought by " any creditor or creditors (including any contingent or prospective creditor or creditors)" means that the claim does not have to be due or liquid or for any minimum amount. I therefore have come to

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the conclusion that on this aspect of the case Sapire CJ's judgement is correct both in fact and in law.

3. Robert submitted before us that the Respondent's petition was totally defective because it is clear that the precise amount owing by Tonkwane has not been ascertained. In this regard Mr. Flynn, who appeared for BD&H, pointed to the following:

(i) In paragraph 11.7 of the petition the following was stated under oath by the deponent for BD&H:

"On the 24 August 1995 Mitchell addressed a letter to the Respondent setting out the Petitioners statement of account at that time. A copy of the letter is annexed marked BDH9. The letter sets out the costs of counsel, which had been agreed prior to the hearing, your Petitioners fees and miscellaneous disbursements which your Petitioners had made on behalf
of the Respondent..... The quantum of the account was never queried by the Respondent...."

(ii) That although in his argument before us Robert stated that the company had not received statements of account this could not be true because of the acknowledgement of correctness of account in which he stated, as I have as I have already said above, but which I repeat for convenience.

"1. I have examined the accounts rendered to the company by Bell Dewar & Hall Inc. from time to time together with the relevant fee narration and supporting documents, if any:

2. The balance owing to Bell Dewar & Hall Inc. by the company in respect of fees owing to them and disbursements incurred by them on the companies behalf up to and including 31 January 1996 is the sum of R417 399,44"

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(iii) The petition sets out in considerable detail the discussions between representatives of BD&H on the one hand and the Crabtrees on behalf of Tonkwane on the other, during the course of which an agreement was arrived at and signed by Robert on 24 January 1996. The agreement contains, inter alia, an acknowledgement that;

"BD&H rendered certain professional services and incurred disbursements for and on behalf of Tonkwane in respect of these proceedings (the arbitration), which amounts are presently outstanding by Tonkwane to BD&H;

In order for BD&H to render additional services and incur additional disbursements it requires security in the sum of R1 250 000,00 to be furnished by Tonkwane to BD&H.

The sum advanced shall be repayable on seven days written notice by BD&H provided that notice shall not be given prior to the conclusion of argument on the merits of the proceedings by Tonkwane's legal representatives,

Notwithstanding anything contained in this paragraph BD&H shall be entitled to give notice at any time after 15 July 1996 ".

This agreement was not signed by BD&H. It is alleged on oath that was due to an oversight. Although the Crabtrees have stated in strong terms that was a dishonest statement and that BD&H refused to sign the agreement I accept BD&H's explanation without hesitation. There is no reason that I can see, nor has any been suggested, why BD&H should deliberately not sign an agreement which is in their favour and makes provision for their obtaining security for a very large outlay on their part. That outlay was set out in detail in subsequent statements and I refer

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specifically to Annexure AM8 to Mr. Mitchell's supplementary affidavit which shows a balance due to BD&H of R933 649, 17 but which Mitchell acknowledges is subject to adjustment. The Appellants have clutched at this and submitted that until the precise figure is known the Respondent has no locus standi to bring a petition for liquidation. There is no substance in this submission. The Companies Act endows with locus standi any creditor including a contingent or prospective creditor. The history of the legislation relating to companies and the interpretation of the terms "contingent" and "prospective" are comprehensively dealt with by Trengove J (as he then was) in Gillis Mason Construction Co v Overvaal Crushers 1971 (1) SA 524. In that case the learned judge at page 528 said.

"As I see it the insured is regarded as a contingent or prospective creditor of the company because he has a contingent or prospective claim arising from an existing vinculum juris. Similarly a person who has a valid claim for damages for breach of contract against a company also has a claim which arises from an existing vinculum juris and this claim is prospective or contingent in the sense that the exact extent of the loss still has to be determined. The mere fact that a claim may still be unliquidated, at the time of the filing of a winding up petition, should not in itself disqualify such an applicant from petitioning for winding up". (The underlining is mine).

In the present case the position is an a fortiori one, since the amount due to BD&H is much clearer than would be the case were it a plaintiff in an action for damages for breach of contract against Tonkwane.

There is one further point on this aspect of the case which needs comment. The detailed account of the meetings between Tonkwane and BD&H, and the discussions concerning the amounts owing by Tonkwane have elicited no detailed reply from the company. The Crabtrees have in the main

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contented themselves with bare denials. This, in the circumstances, is insufficient to create a dispute of fact. In the celebrated case of Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 Murray A J P (as he then was) said:

"While it may well be, once a genuine dispute of fact has been shown to exist, that a respondent should not be compelled to set out his full evidence in his replying affidavits, a bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicants right to secure relief by motion proceedings an appropriate cases" (The underlining is mine)

This dictum has been followed in numerous cases one of which was Soffiantini v Mould 1956 (4) SA 150 in which the learned judge said:

"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device"

To sum up on this point, therefore, I am of the view that BD&H established that it had locus standi to bring the application. Even although the exact amount might be in dispute BD&H is clearly a contingent creditor at least and was consequently entitled to bring the application which it did. Its exact claim will no doubt be investigated by the liquidator in due course but on the papers and particularly having regard to the annexures to which I have already referred it seems that the claim for reimbursement of counsels' fees alone represents a very large sum.

4. The further point made by the Appellants is that it had not been proved that Tonkwane was unable to pay its debts. I think I have already dealt

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with this aspect of the case by reference to Annexures "17" and "19" to the petition which clearly show, in my judgement, that when they were written, namely in August 1996, shortly before the petition was launched, Tonkwane was insolvent and its liabilities exceeded its assets.

On 13 February 1997 Robert wrote to the provisional liquidators and attached to his letter a schedule showing the position of the company. That is now before us and it demonstrates that the only asset of the company is Farm 1287 (incorrectly referred to in the letter as 1278) which, so it is contended in the letter, is valued at E3-8m. The only valuation before us however is that of Murdoch Green Partnership (Swaziland) who apparently carried out a valuation in about September 1995 on the instructions of Tonkwane. That valuation was E3.0m and there appears to be no valid reason to suggest that more than that figure could have been obtained for the farm at the time that the petition was launched. The other assets are a "contingent asset" being the balance of costs that "may be awarded in the arbitration case 1616/92 ". We know however that the case was lost by Tonkwane and that an award of costs was made against it and not in its favour. That would seriously affect the financial position of Tonkwane. The only other alleged asset is "a contingent claim against BD&H for breach of agreement and interference in arbitration". That has not been quantified and cannot therefore be taken into account in an assessment of the solvency or otherwise of Tonkwane. Quite apart from the liabilities which are shown in the letter to which I have referred there is a statement under oath from Robert to the effect that the total value of claims that his family has against Tonkwane is approximately E6.5m made up apparently, by claims of El 635 000,00 enuring to each of David, Robert and Mrs. Crabtree Snr. I am satisfied, therefore, that it has been shown on a balance of probabilities, that Tonkwane was insolvent at the time that the petition for liquidation was brought before the court. The admissions of Robert already referred to coupled with the figures given to the liquidators fully justified the learned judge's findings that "the Respondent (i.e. Tonkwane) palpably does not have funds to pay the amount owing by it"

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5. A further point raised by the Crabtrees was that BD&H Inc. (by this is meant no doubt the

practitioners in the firm) mere not admitted to practice in Swaziland and therefore could not lawfully claim fees in this country for professional work done by them. For this proposition they rely on various provisions of The Legal Practitioners Act 1964. They submit that although the arbitration proceedings took place in South Africa they are a nullity because, as I understand the argument, the local firm of Robinson, Bertram whom Tonkwane admittedly engaged to represent it, unlawfully gave the mandate to BD&H who in turn briefed counsel not admitted in Swaziland. I make no comment on the alleged nullity of the arbitration proceedings but view as a non sequitur that because they were a nullity the counsel who were briefed to appear and did so, are not entitled to be paid their agreed fees. In my judgement there is no substance in that submission.

6. Then it was submitted by the Appellant that it had not been shown that the liquidation of Tonkwane would be in the interest of the general body of creditors. In this respect there is obvious confusion with the Insolvency Act since the Companies Act stipulates no such requirement.

Mr. David Crabtree suggested in his address to us that the proper course for the Respondent firm would have been to sue for the repayment of the disbursements by action. He predicted that the route chosen by BD&H will inevitably lead to long delay and that they would be kept out of their money into the indefinite future. However that may be BD&H were entitled to take the route they chose and if the dire consequences follow as threatened by Mr. Crabtree then so be it.

It follows from what I have said that in my opinion BD&H had the necessary locus standi to bring the application, that the evidence showed that the company could not pay its

debts and that the learned judge, therefore, was justified in exercising his discretion by granting a final order.

The appeal is dismissed with costs.

BROWDE, J A

I agree

KOTZé, P

I agree

SCHREINER, J A

Delivered at Mbabane this ..1th.....day of October 1998