IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

CASE NO. 17/97

In the matter between

ROBERT CRABTREE Appellant

and

BELL DEWAR & HALL INCORPORATED Respondent

Coram: Kotzé P

Schreiner JA

Browde JA

J U D G M E N T

BROWDE JA:

This appeal concerns a provisional order of liquidation which was granted to the Respondent against Tonkwane Estates Limited. That provisional order was returnable on 21 March 1997 on which date the return date was extended to 21 April 1997. It is common cause that it was intended by the parties to further extend the return day to a date which would be convenient for all concerned to argue before the High Court whether the provisional order should be made final. For a reason which appears to be unexplained the matter was

incorrectly enrolled for Friday 18 April 1997 but was removed, apparently by the Clerk of the Court, whose writing appears on the High Court cover stating that the matter is removed from the roll on that day. Nothing appears to turn on this. However, either on the Friday or some time during the weekend the Government declared a public holiday for Monday 21 April and consequently it was impossible for anyone to do anything about the return day of the rule nisi on that date. Subsequently however an application was made to the Acting Chief Justice which appears to have been heard on 16 May 1997.

The learned judge heard the arguments of Adv. Flynn on behalf of the Respondent in this appeal, of attorney Welile who appeared on behalf of the company under provisional liquidation and Mr Robert Crabtree who represented himself as one of the main creditors of the company. The learned judge dealt with the matter in terms of Rule 27(4) of the High Court Rules which provides that after a Rule Nisi has been discharged by default of appearance by the Applicant, the Court or a judge may revive the rule and direct that the rule so revived need not be served again. Finding that this rule put no limitations on the circumstances in which he was permitted to extend the rule and finding that the discharge of the rule on the 21 April 1997 was "purely fortuitous" Sapire A C J reinstated the rule and ordered that the return

day be the 30th May and that service of the reinstated rule was to be effected on the company, on the creditors who had shown an interest in the matter namely Mr and Mrs Crabtree and Mr Crabtree junior and that publication was to take place once in a daily newspaper and once in the Gazette.

It is against that order that this appeal has been brought on various grounds which were argued before us by Mr Crabtree junior. I do not intend to traverse in detail the argument placed before us both in writing and orally by Mr Crabtree but suffice it to say that he submitted that the learned judge erred in reinstating the rule for the following reasons, inter alia:

(i) application for the reinstatement of the rule was made informally and did not comply with Rule 6 of the High Court;

(ii) There was no explanation as to why the matter had been removed from the contested roll on 18 April
1997;

(iii) The learned judge erred in assuming that the Respondent firm of attorneys had locus standi to bring the application for the reinstatement of the rule;

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(iv) The rule which expired no longer existed and therefore the application became "a fully fledged application in which a final order of reinstatement was asked for and given".

In South Cape Corporation v Engineering Management Services 1977 (3) SA 534 Corbett J A (as he then was) at page 549 summarised the criteria for deciding whether an order made by a Court was interlocutory or not. He said -

"In a wide and general sense the term 'interlocutory' refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper' which do not."

In saying this the learned judge of appeal followed earlier authority such as Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (AD).

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It seems to me that the reinstatement of the rule and the extension thereof have in no way affected what might happen in the "main action" which is, of course, the return day of the Rule Nisi which is yet to be decided on appeal. The learned acting Chief Justice dealt with no matter which will have an effect on the main application although he assumed, without deciding it, that the Respondent had a valid claim "in wore than E100.00". He said that such claim was apparent on the papers as they stood but he in no way purported to judge the matter in the sense of making a final and definitive order in that regard.

I am therefore of the opinion that whether or not the application could properly be dealt with under Rule 27(4) the order made by the learned judge was purely interlocutory. That being so and as it is common cause that leave to appeal was not sought nor granted the appeal falls to be dismissed.

I would add, however, that in my judgment there is no merit whatsoever in this appeal. As I have stated it is common cause that it was intended by all the parties to extend the rule on the 21st of April and the fact that the unforeseen public holiday caused the matter to be dealt with by the learned acting Chief Justice some weeks later in no way

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prejudiced the parties. What Mr Crabtree has attempted to do is to raise matters of a technical nature in circumstances which were, in my opinion, correctly not countenanced by the Court a quo.

It has been suggested by Mr Flynn that we should make a special order as to costs because of what he called the "frivolous and vexatious" nature of the application. I do not think that in the circumstances of this case and particularly because the Crabtree family are appearing in person it would be proper to expect from them the judgment relating to purely technical matters which might be expected from a duly admitted practitioner.

In the result the appeal is dismissed with costs.

BROWDE J A

I agree,

KOTZé P

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I agree,

SCHREINER J A

DELIVERED AT MBABANE ON THE 19TH DAY OF MAY 1998.