IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL NO.29/99

IN THE MATTER BETWEEN:

SWAZI PLASTIC INDUSTRIES LIMITED APPELLANT

VS

PHILLIP FOURIE N.O. 1st RESPONDENT

PHILIPPUS GIOVANNI TORRE N.O. 2nd RESPONDENT

PAUL DANEEL KRUGER N.O. 3rd RESPONDENT

In their capacity as the joint liquidators of FOX PACKING CLOSE CORPORATION

CORAM

BROWDE, J.A.

VAN DEN HEEVER, J.A.

SHEARER, J.A.

FOR THE APPELLANT : MR MAGAGULA

FOR THE RESPONDENTS : MR. FLYNN

JUDGMENT Van den Heever J. A

A South African close corporation, Fox Packing CC, of which a South African citizen, a Mr Scholtz, is the sole shareholder and director, owes the appellant E161 850-92 in respect of goods sold and delivered. The appellant obtained an order authorising attachment, ad fundandam et confirmandam jurisdictionem, of a track and trailer which were in Swaziland. Then summons was served by edictal citation, on the 19th October 1998, at the premises of the Close Corporation in the Transvaal. The appellant received a letter from the second respondent informing it that Fox Packing ("the CC") had been provisionally liquidated on the 13th October, and the three respondents appointed joint liquidators by the Master of the Transvaal High Court. They had been told of the appellant's attachment of assets of the CC. He asked for a list of the assets so attached. One of the vehicles, he said, "is subject to an instalment sale with Wesbank." He imperiously advised the appellant "that you are under no circumstances allowed to dispose of the assets and that these assets should be made available to ourselves for collection and return to the close corporation in liquidation in order for it to be sold for the benefit of all creditors"

The appellant's attorneys contacted Wesbank, and then informed the second respondent ("Torre") that according to Wesbank the attached goods were not subject to an instalment sale agreement as he had averred. They pointed out that a South African liquidation order is not, without more, effective in the Kingdom of Swaziland; and that the appellant would proceed with the action it had instituted.

That action was not opposed. The appellant was granted default judgment in the High Court

here, and took out a writ of execution. Torre was told that unless the judgment debt was paid, the appellant would soon sell the vehicles in execution, repeating that Wesbank had informed the appellant that neither of those is subject to an instalment sale agreement as Torre had claimed. The respondent reacted almost a month later: their attorneys wrote that the liquidators had been advised to apply to the Swaziland court for recognition of their appointment if the appellant was not prepared to hand over the vehicles. That was on the 18th December 1998. On the 7th of January 1999 this was followed by another letter:

"Please take note that unless we receive confirmation that your client is prepared to hand over the vehicles attached by close of business on the 8th of January 1999 unconditionally, an application for the validation of my clients appointment will be launched next week on an urgent basis"

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The appellant in effect replied that its attitude remained constant (I paraphrase): that unless the respondents took steps within one month to acquire the right to give orders here, the appellant would ignore those purported to have been given, and would execute upon its writ.

An application was then launched by the liquidators in the High Court of Swaziland for an order that their appointment in the RSA be recognised here on many terms set out in the lengthy Notice of Motion.

The founding affidavit was deposed to by the first respondent. He testified or annexed documents indicating inter alia

1. That his preliminary investigations indicate that the CC has assets and creditors in Swaziland as well as in the RSA. (emphasis added)
2. The respondents have ascertained that the assets (again emphasis added) in Swaziland attached by the appellant are subject to an instalment sale agreement. No details are given.
3. In terms of South African law, the administration of close corporations in liquidation is effected mutatis mutandis in terms of the Insolvency Act, number 24 of 1936 of the RSA, a copy of which is annexed, the provisions in regard to instalment sale agreements also being dealt with by an alleged expert in South African insolvency law.
4. The matter is urgent by reason of the appellant's "refusal to accede to our reasonable requests,"
5. The provisional order of liquidation had since been made absolute.
6. The application papers would be served on the appellant's attorneys.

The appellant sought leave to intervene, filing an affidavit which is in effect also an opposing affidavit in the respondents' application. This was deposed to by the appellant's financial manager, Mr Nell. Most of the pre-history set out above appears from this.

He criticises the respondents' unexplained delay in applying for recognition; the lacunae as well as the flaws in their papers; their flagrant disregard of the laws of Swaziland, and of the interests of a/the, creditor(s) here. If, as appears to be the position, there are no other

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creditors in Swaziland, none can be prejudiced by non-recognition of the respondents and consequent absence of liquidation proceedings in Swaziland. He contests the respondents' claim that the costs of their application should be taxed on the scale as between attorney and own client and be costs in the administration. He urges that the court dismiss their application, with costs in the appellant's favour on the attorney and own client scale.

An answering affidavit by Fourie followed. The respondents did not oppose the prayer for

leave to intervene. They recognised that they had been at fault in "overlooking" the provisions of the Recognition of External Trustees and Liquidators Act No.51 of 1932 ("the Act") "of which we were not aware," and prayed for leave to amend and supplement, and so rectify, their application and the relief sought, accepting that the appellant would be entitled to file further papers in response. Fourie seeks to make light of the deficiencies in their original papers, even suggesting that "if there had been a genuine dispute about whether we are indeed duly appointed it would have been a simple matter for the intervening creditor or its attorneys to have addressed enquiries to the Master in Pretoria"; thus overlooking its own obligation which in terms of section 4(1) of the Act was to produce to the court "the letter of appointment of such external liquidator." Fourie had preceded this suggestion with the allegation that "we shall arrange for our counsel at the hearing to be in possession of a certified copy, or a duplicate original if we can obtain one from the Master. Such document will therefore be available for inspection at the hearing."

The Master's certificate of appointment annexed to Fourie's founding affidavit is not correct. It was signed on 27 October 1998, before the Transvaal rule nisi had been confirmed, and certifies that the respondents were appointed (final) liquidators of the CC, that having been (finally) liquidated on 13 October. The Afrikaans version of the final order of the TPD is dated 15 December. What Fourie certified as being a correct English version is dated 13 October. Neither of the counsel who appeared before us mentioned these errors. I do so since they appear to be a further indication that the respondents were hardly meticulous in their attempted dealing with the Swaziland assets and liabilities.

Fourie's admission that "if the vehicles had been handed over, they would have been sold under the supervision of the Master in Pretoria in South Africa" underlines his earlier admission that the liquidators had no appreciation of the fact that the order of a foreign court does not arm a liquidator there with an iota of authority in Swaziland - even less, enable it to

ignore a final judgment and writ of the High Court of this country. Nor did they appreciate that obtaining recognition - and so power - here, is not a formality but depended on the discretion of this court being exercised favourably to them.

Fourie advances a good deal of exculpatory argument, much of which is self contradictory -for example that "we at all times intended following due process of law." He had admitted that they were initially unaware as to what that is in Swaziland, and admits that Nell's affidavit alerted the respondents to mistakes made. Lacunae pointed out by Nell were not filled. Having spoken of Swaziland creditors, and Nell having displayed a justified interest in whether there are others, Fourie merely says "we cannot vouch for the existence of other creditors in Swaziland, and have not been able to verify our information in that regard. We do not know whether our information was accurate or not".

Just that. Not a word whether "our information" suggested a "yes" or "no" answer or what the CC's books or perhaps discussion with its sole shareholder Scholtz, indicated. We learn Scholtz's name as being such, from an instalment sale agreement between Wesbank and the CC which Fourie annexed to his affidavit. His undertaking to "attempt to obtain a verifying affidavit from Wesbank before the hearing together with a better copy of the agreement" was not fulfilled. The agreement itself raises more questions than it answers, and, standing alone, hardly justifies the confident conclusion that the earlier confusion "has now been resolved, and it is clear that the track which has the engine is subject to an instalment sale agreement and that the trailer is not." The agreement relates to

"1 x 1996 Hino Longdistance Fueltank Engine No. VT 01012SA010788A Chassis No. AHHSHA43 KXXX 10228 REG NO....." - and there is a glaring blank.

What the appellant had attached and proposed selling in execution is described as "1 Toyota Hino 35.243 Truck Bearing Registration Number DBZ 592N."

There is no suggestion that those attached in Swaziland were the only heavy duty vehicles belonging to the CC, nor can I read in the extremely blurred copy of the agreement which forms part of my record, any reservation of ownership in the vehicle to either Wesbank or the

seller — "Sharon Hoffinan-Gray" according to the document. The respondents nowhere allege such a term in their affidavits.

Fourie disputed the appellant's own claim to costs, and challenged Nell's objection to the scale of own costs which the respondents wanted ordered to be costs in the administration.

As regards the appellant, Fourie says "since we have not opposed the intervention application, we deny that there is any basis to award costs against us in favour of the intervening creditor, let alone on the attorney and own scale" (sic) but he accepts that the intervening creditor was entitled to draw the defects in the application to the attention of the court. The respondents accept that the appellant's costs, "up to the stage of filing its intervention papers" may be costs in the cause "payable as costs in the administration from the proceeds of the local assets" (emphasis added).

That could notionally prejudice the appellant and other Swaziland creditors, if any, in comparison with South African creditors who would not have to bear their share of costs occasioned by the respondents' errors here while sharing equally in the proceeds of the local assets.

In the next paragraph Fourie says that "we submit that after receipt of this affidavit there will be no ground for the intervening creditor to persist in opposing the main application and if it should continue to do so, and be unsuccessful, it will be proper to order all costs of and consequent upon such opposition to be paid by the intervening creditor."

Fourie annexes a draft, which differs from his original one, setting out the content of the order which respondents now seek, as follows:

1. "1. That the appointment of Phillip Fourie, Philippus Giovanni Torre and Paul Daneel Kruger, in terms of the law of the Republic of South Africa, as the joint liquidators of the insolvent estate of Fax Packing CC, on the terms set out herein, are recognised within the Kingdom of Swaziland until this recognition is withdrawn by an Order of this Court;

2. That after complying with Section 5 (1) of Act 51 of 1932 the applicants shall by virtue of this recognition be empowered to administer the said estate in respect of all assets and interests of the said insolvent or of its estate which are situated within the Kingdom of Swaziland, subject to the laws of Swaziland.

3. That the rights defined by the insolvency Act 81 of 1955, in favour of the Master, a creditor, and an insolvent in regard to the filing of inventories, meetings of creditors, proof, administration and rejection of claims, sale of assets, plans of distribution, trustee's accounts, and distribution of proceeds and the rights and duties of a trustee in regard to those matters as defined by the Insolvency Act, Act 81 of 1955, shall, until this order is amended mutatis mutandis exist in relation to the said administration as if the said Act applied thereto pursuant to a winding-up order granted by this Court on 13 October 1998, provided that;

3.1 the rights and duties relating to the election and appointment of a trustee or liquidator will not apply;

3.2 The costs of this application be taxed on the scale as between attorney and client and such amounts as would have been payable to the Master under the law of the Kingdom of Swaziland if the estate had been sequestrated under such law and any additional costs and charges of the Master for giving effect to this order, will be costs of administration;

3.3 Only local creditors as defined in section 2 of The Recognition of External Trustees and Liquidators Act 51 of 1932 shall by virtue of this order acquire any right to prove claims at meetings of creditors in terms of section 6 of the said Act;

3.4 the rights and duties defined by Section 70 of the Insolvency Act, Act 81 or 1955, shall exist in relation to the administration;

3.5 any assets, and furthermore any funds, remaining after payment of all amounts due in respect of the aforementioned charges, costs and proved claims, may be transferred from the Kingdom of Swaziland only with the written permission of the Master of this Court.

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4. That this order shall be published in the Government Gazette and once in the Swaziland Observer."

In regard to the respondents' prayer relating to the scale of its own costs, Fourie's affidavit amounts to the contention that the general body of creditors is invariably liable for costs, even additional costs occasioned because the liquidators have not done their homework: he says "it is well recognised that when trustees incur legal expenses in the administration of an estate, the full amount of the costs is chargeable against the estate, on the attorney and client scale. If it were otherwise, it would mean that legal practitioners must give legal services at a discount to insolvent estates, or that the trustee must personally pay the shortfall. That has never been the law."

The last sentence was ill-considered. Costs are not a matter of law, but have always been one within the discretion of the court, just as the recognition of foreign trustees or liquidators here was not a legal formality but one of discretion, which depends on the circumstances of each case. The respondents do not accept, as already commented on, that what is sauce for the goose should be sauce for the gander. South African creditors are to share equally with local creditors in the local assets but not in the local liabilities.

Nell's replying affidavit consists largely of argument to counter the argument and excuses advanced by Fourie. He has no quarrel with the content of the draft order now sought, save as regards paragraph 3.2, should recognition be granted. He opposes such grant. No satisfactory explanation of the delay in seeking recognition had been given. It was due to the respondents "attempting to resolve the matter informally" - Fourie's words - by acting in circumvention of the Recognition Act. And when they were ultimately pushed into "complying" with the statute, their papers were faulty, which made intervention by the appellant necessary. He asked that the appellant be given leave to intervene the liquidators' application for recognition be dismissed

- the liquidators be ordered jointly and severally to personally pay the appellant's costs in both their application for recognition and that of the appellant for leave to intervene.

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The ex tempore judgement of the court a quo is short enough to be quoted in full:

".....This is an application in which the Applicants seek recognition as the Joint Liquidators of what is described as Fox Packaging Close Corporation.

In my view the comity of economic procedures requires me to recognise the appointment of these persons as the governing body of Fox Packaging Close Corporation. I wish to draw a distinction between an insolvent estate and a company or a Close Corporation in Liquidation. When an individual's estate is sequestrated that person loses status in the country in which the sequestration order is made. This is not the same with a company which retains its corporate identity and a corporate identity which I may say only exists by reason of the provisions of a foreign act.

For that reason I have decided to recognise the appointment of these persons and they shall be entitled for the purposes for the administration of the company to be recognised as the mind and administrators of the company. It does not seem to me that such persons are answerable to the Master in Swaziland because the company is not a Swazi company and the Master has no jurisdiction over the matter at all and the administration of the company must be conducted in accordance with South African law and subject to the supervision of the Master of the High Court in South Africa."

This ignores the draft order setting out what the respondents had asked for. They got far more than that but at no stage abandoned any part of what they had been given.

The appeal promptly noted has two legs: the court had erred in finding the appointment of the respondents desirable; and the court had erred in law by directing that the liquidation be regulated by South African law.

It is common cause that the Act (31 of 1932) does not automatically apply to the facts of the present case. The prerequisite for that posed in section 3 is lacking: there has been no notice published in the Gazette by the Prime Minister that the RSA recognizes in its own territory proper Swaziland letters of appointment of trustees in insolvency and liquidators.

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It is trite law, despite the respondents' having initially been unaware of this, that the court of one independent country cannot purport to authorize one of its officers to intrude within the jurisdiction of another independent country to act, not only in disregard of but in direct conflict with, the valid legal proceedings of that other country. The decisions are legion. A recent case cited before us is Ward and Another v Smith and others: In re Gurr v Zambia Airways Corporation Ltd.. 1998 (3) S.A. 175 (SCA) at 179 D - G. The principle is crisply phrased in a quotation in Commissioner of Taxes. Federation of Rhodesia v McFarland. 1965 (1) S. A. L. R. 470 at 473 D - E and more particulary at G - H;

"The first and foremost restriction imposed by international law upon a State is that, failing the existence of a permissive rule to the contrary, it may not exercise its powers in any form in the territory of another State. In this sense jurisdiction is territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or a convention"

The Ward case in the passage referred to also repeats a commonplace: recognition of an external trustee or liquidation does not empower him to bring with him and apply here the law of his own country. His administration consequent upon recognition is subject to local law.

Since there is no automatic reciprocity between Swaziland and South Africa as envisaged by section 3 of the Act, the respondents were obliged to approach the High Court here for recognition. No argument was advanced as to the effect of section 18 of the Recognition Act so that it is unnecessary to decide whether and when it enables a local court to deprive local citizens of material (as district perhaps from procedural) rights available to them in terms of the law of Swaziland. The facts outlined earlier and draft order sought, quoted above, make it clear that the respondents' application was brought as prescribed by the legislature in section 4 of the Act. By reason of the provisions of subsection (1), both the ruling of the court a quo

as to the law to be applied by the respondents, and the grounds advanced on which that was based, conflict with the will of the Legislature. Section 4(1) reads:

"The High Court may order the recognition within Swaziland of any external trustee or... .liquidator who has specified in writing a place in Swaziland as domicilium citandi on production to it of the letter of appointment of such external trustee or

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liquidator and thereupon the property in Swaziland of the bankrupt, insolvent or company in liquidation in respect of which the letter of appointment was made shall vest in such external trustee or liquidator as though such property were the property of an insolvent estate sequestrated or company placed in liquidation by order of a competent court in Swaziland but subject to the provision of this Act" (emphasis added)

No distinction is drawn between the position of an individual and a corporate entity, and the manner of administration of local assets to be adopted is then set out in the sections which follow. The prescripts seem to be based to a large extent on the order devised by Innes CJ in Re African Farms Ltd.. 1906 TS 373 to protect the interests of local creditors. In that matter Smith J at page 391 drew no distinction between trustees and liquidators for the purpose of recognition, nor could counsel refer us to any decided case which supported the reasoning of the court a quo. No grounds were advanced or exist, on these papers, why the law of Swaziland should be pushed under the carpet and that of the RSA applied; which would leave the local creditor or creditors at the mercy of liquidators who file security in a foreign jurisdiction, take the local assets away leaving nothing here but a name and an address.

The appellant had objected to not only the content of par. 3.2. of the draft order proposed by the respondents, and so much of the order of the court a quo as related to the law to be applied, but alsa to the very grant of recognition. Its main argument was based on the respondents' delay in seeking recognition despite being warned early on what the law required of them.

I do not think that delay by itself is sufficient to thwart an application for recognition, which is rooted in considerations of comity between nations and fairness. At the beginning of this century already Innes C.J. in the African Farms case recognised (at p.382) that it would be unfair to permit local assets to be left beyond the reach of foreign liquidators "at the mercy of the first creditor who can manage to secure a writ of execution"

And Smith J. A expressed the opinion in the same matter (p.392-3) that the tendency is to extend recognition, with a view not only to fairness in an individual matter here and now, but to reciprocal good neighbourliness in case of need in future:

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"I wish to add that.....there should be reciprocity in such matters as the present, and that if it were made to appear to us that a foreign court declined to recognize the appointment of a liquidator made by us we should decline to recognize a similar appointment made by it"

See too Moolman v Builders and Developers (Ptv) Ltd. 1990 (1) S.A. 954 (A), 961 D - I,

There is nothing on the papers to show that any "grave prejudice" which should have weighed with the court was occasioned to any creditor in this country by the respondents' delay. (Ex parte liquidator: Shell Company of Rhodesia Limited. 1964 (2) S.A. 223 (SR), 224H.

It follows that in my view the appeal should succeed to the extent that so much of the order of the court a quo as directs that South African law is to apply should be set aside. There is no provision in Swaziland regarding Close Corporations. Where this one has but a single

shareholder it is in my view appropriate that the local estate be dealt with as though the CC were an insolvent sequestrated by order of the High Court of Swaziland. The parties are ad idem on that score, as the draft order shows.

The appellant's objection to recognition of the respondents on terms which include their par.3.2 also appears to me to be justified, because the respondents have incurred unnecessary costs which should not burden the local creditors). In terms of the Recognition Act costs of sequestration in Swaziland, and costs of sequestration in South Africa do not fall within a common pool although in the final result that may perhaps make little if any difference to the dividend which concurrent creditors ultimately receive.

It is not the function of this court to give the respondents advice as regards their administration of the estate of the CC here in Swaziland. It may well be a somewhat more complex matter than had they been permitted to subject the local creditor(s) and the two attached vehicles to the exclusive jurisdiction of the TPD, particularly if there is indeed a valid reservation of ownership in regard to the truck and/or trailer attached. If the respondents do not become au fait with, and apply properly, applicable Swaziland Law, no doubt their actions and/or account will be appropriately challenged.

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Finally, the question of costs.

Since the appellant achieved substantial success on appeal, it is entitled to its costs I can think of no reason why those costs should not be on the scale of attorney and client, and be ordered to be part of the costs of administration. The intervention to oppose was in not only the appellant's own interests, but also those of potential other creditors here and in defence of legal principle and local jurisdiction.

No order was made in the court a quo in relation to the costs of the application, presumably on the basis that the respondents would recover theirs in the Transvaal, and the appellant had failed as regards its insistence that the laws of Swaziland were to apply should recognition be granted. I do not think the creditors should be burdened with costs unnecessarily caused by the respondents. Whether they will be enabled to claim, and be allowed any balance in the Transvaal is not a matter in regard to which this court has jurisdiction and should therefore concern itself.

The appeal is allowed and the order of the court a quo set aside save in regard to the recognition within the Kingdom of Swaziland of the respondents as joint liquidators in the insolvent estate of Fox Packing CC, which is confirmed in so far as that may be necessary.
The following terms are to govern such recognition:

1. The respondents are to comply with the prerequisites specified in section 4(1) of the Recognition Act No. 51 of 1932 in so far as they may not already have done so
2. The further provisions of that section, and sections 5 to 17 shall apply to their administration as though they were trustees in respect of an insolvent estate.

2. The appellant's costs of appeal and of opposing the respondents' application, on the scale of attorney and client, shall be costs in the administration; as also the costs of the respondents on the same scale in bringing that application, but on the basis of its having been unopposed.

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4. This order shall be published in the Government Gazette and once in the Swaziland Observer.

VAN DEN HEEVER J. A.

I agree BROWDE J. A.

I agree SHEARER J. A,

Delivered in open Court this . .3rd.....day of December 1999