

IN THE HIGH COURT OF SWAZILAND

JAMES ROBERT GALLOWAY N.O. Applicant

vs

PROTON TRADING (PTY) LTD Respondent

Case No. 920/96

Coram S.W. Sapire

For Plaintiff Adv. Kades

For Respondent Adv. Fine

JUDGMENT

(8/10/97)

This was an application made by James Robert Galloway in his capacity as the provisional liquidator of BAC Food Distributors (Proprietary) Limited. The applicant was appointed to his office by the Master of the Supreme Court Transvaal Provincial Division as the company is a South African Company.

In his application the applicant sought the provisional liquidation of the respondent.

The matter first came before the Court on 16th April, 1996 when it was postponed to the 18th April and the respondent was given up until 17th April to file an Affidavit. It was further ordered that pending the hearing of the matter the respondent was to be interdicted from disposing off or alienating any of its assets.

After the Court hearing on the 16th of April the applicant went to the premises of the respondent to investigate what stocks were in fact held by the respondent. The respondent and its representatives did not arrive at the premises until sometime later and it was discovered that there were in fact no stocks at all.

Following on the filing of the affidavit by the respondent the matter was once again

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heard on the 18th of April when the application was dismissed and costs reserved. The parties were given permission to file affidavits as they may consider necessary and to set the matter down for an order as to costs. The matter then reappeared on the role 19th July when it was postponed by consent.

Finally on the 19th September the matter was again placed on the roll. Both parties had filed affidavits concerning matters which they thought relevant to the question as to who should pay the costs of the abortive application.

The normal rule is of course that the successful party in Court proceedings is entitled to his costs. It was suggested by the applicant, i.e. Galloway, that notwithstanding the fact he was constrained to abandon the application, he should, because of the conduct of the respondent who set out the

affidavit, not be obliged to pay the costs.

I have carefully considered the matters raised by him in the affidavit and the replies thereto by the respondent and have come to the conclusion that there is no reason why the usual order following on the dismissal of the application or its failure should not follow in this case.

Nothing has been shown which could remotely be considered as an invitation by the respondent for an application of this nature. It also seems to me that the applicant was precipitate in making this application. This is because the demand was sent on one day and the following day or shortly thereafter the application was made.

On the papers as they stood the applicant did not make out a case for relief sought.

The respondent on the other hand seeks a special order as to costs and asks that the costs be paid by the applicant on the scale appropriate to attorney and client. This is an extraordinary order made only in special circumstances and is not appropriate where the only offence is the bringing of what turns out to be an insupportable case. It seems that the applicant in good faith had reason to believe that the application of this nature was necessary in the administration by him of the company of which he is now the provisional liquidator. I do not see any malpractice in bringing of the application notwithstanding that it has failed.

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In the circumstances I order that the applicant for liquidation pay the respondent's costs following on the dismissal of the application.

S.W. SAPIRE

ACTING CHIEF JUSTICE