IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: A1358/05

DATE: 08/11/2007

UNREPORTABLE

IN THE MATTER BETWEEN

W K HOLDINGS (PTY) LTD — Appellant (Plaintiff *a quo*)

AND

M I SWARTZ N.O. — Respondent (Defendant *a quo*)

JUDGMENT

VAN DER MERWE, J

In this judgment the parties will be referred to as in the court *a quo*.

Dexcon Construction and Mining Services (Pty) Ltd ("Dexcon") was wound-up on 1 February 2000 by way of a members voluntary winding-up. The defendant was appointed as liquidator of Dexcon on 21 June 2000. The defendant continued the business of Dexcon, in particular the crushing and screening of rock for an entity known as Lafarge. As part of his duties to wind-up the affairs of Dexcon, the defendant, in his representative capacity, entered into an agreement with the plaintiff for the purchase by the plaintiff of certain crushing plant and equipment. Clause 6 of the contract provided that the plant and equipment were sold voetstoots. The contract included a further term, however, that the condition of the equipment would be the same as on date of viewing ie on 14 February 2000.

The plaintiff paid the purchase price. The crushing and screening equipment were delivered to the plaintiff during May 2000. The plaintiff contends that between the date of viewing of the goods on 14 February 2000 and the date of delivery thereof, it had been used to crush 98 911 tonnes of material, that the condition of the equipment on the date of delivery thereof was not the same as it was on 14 February 2000 and that the plaintiff had therefore suffered damages in an amount of R269 226,00.

The first liquidation and distribution account prepared by the defendant is dated

2 March 2001. This account was confirmed on 6 June 2001.

It is common cause that on 27 July 2001 Mr W Kusel, acting for the plaintiff, claimed a reduction of the purchase price from the defendant because of the alleged damages to the equipment. The defendant rejected this request in writing on 31 August 2001.

The plaintiff's attorney in a letter dated 18 March 2002 threatened with litigation if the dispute could not be resolved. The defendant's attorney replied on 10 April 2002 stating that any action instituted would be defended.

The defendant prepared a second and final liquidation and distribution account dated 8 August 2001 which was confirmed on 13 March 2002. It is common cause that after the rejection of the plaintiff's request for a reduction in the purchase price of the equipment the defendant did not make any provision for a possible claim for damages by the plaintiff in the second and final liquidation and distribution account. It is further common cause that the plaintiff did not lodge any objection against the account for the failure by the defendant to provide for such a possibility.

The confirmation of the liquidation and distribution account was advertised in the *Government Gazette* on 19 April 2002. By 23 July 2002 the defendant had made payment in accordance with the final liquidation and distribution account. It is common cause that Dexcon was unable to pay its debts.

During May 2003 the plaintiff issued summons against the defendant in his representative capacity claiming payment of the alleged damages in the amount of R269 226,00.

The defendant filed a special plea which reads as follows:

"1. The plaintiff relies upon a written contract, annexure 'A' to the particulars of claim for its cause of action against the defendant who is sued in his representative capacity as the liquidator of Dexcon Construction and Mining Services (Pty) Ltd (in liquidation) ('the company in liquidation').

2. The defendant, as the liquidator of the company in liquidation duly prepared the liquidation and distribution accounts as prescribed in the Insolvency Act, 24 of 1936 ('the Act'), which lay open for inspection in accordance with the provisions of the Act.

3. 0n or about 13 March 2002 the Master confirmed the accounts of the company in liquidation in accordance with the provisions of section 112 of the Act.

4. All dividends due under the account have been paid.

5. The defendant as liquidator is *functus officio* and the claim pleaded by the plaintiff against him in that representative capacity is not sustainable in law."

To this special plea the defendant filed a replication. In summary the following is alleged:

1. The defendant had furnished security to the Master of this court *qua* liquidator and any damages awarded would be recoverable from such security. (There is no merit in this contention and it was not proceeded with.)

2. The plaintiff's claim arose post-liquidation and therefore does not fall to be provided for in the liquidation and distribution account.

3. As a result the plaintiff is not entitled to a dividend in terms of such account because it is not a creditor of Dexcon prior to liquidation.

4. As the plaintiff's claim arose after the *concursus creditorum* and is against the defendant in his representative capacity for breach of contract, the defendant is not *functus officio*.

To this replication to the special plea the defendant filed a rejoinder which is to the following effect:

1. The security given by the defendant was given by him personally for any personal liability he may incur. (As stated this aspect need not be dealt with.)

2. The plaintiff should have recorded an objection to the second and final liquidation and distribution account but did not do so well knowing that:

2.1 it had been advised by the defendant by 31 August 2001 that its claim against Dexcon would be rejected;

2.2 it was aware that Dexcon was in liquidation and that its affairs wound be wound-up;

2.3 due and proper notice of the liquidation and distribution of the insolvent estate occurred in accordance with the relevant insolvency laws.

By agreement between the parties the court *a quo* separated the issues and only heard evidence and argument on the special plea referred to.

The defendant was the only witness. His evidence was not in dispute. The facts are therefore not in dispute. The appeal turns on legal issues only.

The court *a quo* dismissed the plaintiff's action with costs. The appeal to this court is with the leave of the court *a quo*. The notice of appeal need not be repeated herein.

I will later deal with the court *a quo*'s judgment in slightly more detail. At this stage I need only refer to the court *a quo*'s closing remarks which are as follows:

> "17. I agree with Mr Vetten that although the claim is a post-liquidation claim it is still part of the administration of the liquidator and therefore must be fully reflected in the liquidation and distribution account. Plaintiff had all the time in the world to object to the liquidation and distribution account, but failed to do so. Plaintiff therefore has only itself to blame on that score. No other grounds such as fraud or *iustus error* have been raised by the plaintiff.

18. That finally settles the whole issue. However, Mr Broster also submitted that an order given against the defendant may be recouped from the suretyship given to the Master for his proper administration of the estate. That deed of suretyship is, however, given in his personal capacity and there is no claim against the defendant in his personal capacity but only in his representative capacity as representing the company in liquidation, therefore that point cannot help the plaintiff.

19. No grounds have been put up as to why the liquidation and distribution account should be set aside and reopened. There is no allegation of misconduct on defendant's

part in his capacity as liquidator and plaintiff did not object to the confirmation of the liquidation and distribution account. Therefore plaintiff has not made out a case for payment of any amount by the defendant as cited. Therefore the special plea must succeed. The action is dismissed with costs."

It is common cause that the plaintiff's claim is an unliquidated post-liquidation claim. The claim is therefore part of the costs of liquidation, also referred to as the costs of administration. That is also common cause between the parties. I also accept as correct that the defendant must account for all monies received and distributed. What is the position if a liquidator, as the defendant *in casu*, refuses to agree to the validity and amount of an unliquidated post-liquidation claim for damages? Must such a plaintiff object to the liquidation and distribution account?

In my judgment the answer to this problem is simple.

It is common cause (and correctly so) between counsel for the parties that section 44 of the Insolvency Act, 24 of 1936 ("the Act") applies to the proof of claims in a liquidation process as *in casu* but not to the plaintiff's claim. The relevant part of section 44(1) of the Act reads as follows:

> "(1) Any person or the representative of any person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may, at any time before the final distribution of that estate in terms of section *one hundred and thirteen*, but subject to the provisions of section *one hundred and four*, prove that claim in the manner hereinafter provided:"

It is clear from the wording of the section that the plaintiff does not have a liquidated claim against Dexcon. The claim also did not arise before the liquidation of Dexcon. No other provision exists either in the Act or the Companies Act 61 of 1973 for the proof of post-liquidation claims. Such claims would either have to be accepted by the defendant (which he refused to do) or proved by a judgment of court (which the plaintiff endeavours to do).

See in respect of pre-liquidation claims *Umbogintwini Land and Investment Co (Pty) Ltd (in liquidation) v Barclays National Bank Ltd and Another* 1987 4 SA 894 (AD).

The position in respect of post-liquidation claims will therefore be as stated earlier: either the liquidator will have to accept the claim or the claimant will have to institute a court action.

It also appears that a post-liquidation creditor need not even prove a claim in the insolvent estate. See *Estate Ghislin v Fagan* 1925 CPD 206 where WATERMEYER J (as he then was) discussed three paragraphs in a defendant's plea and an exception thereto *inter alia* as follows at 209:

> "The paragraphs in question are certainly difficult to understand. At first sight it would appear that the defence which is being set up in those paragraphs is to the effect that the plaintiff was a creditor of the insolvent estate of Bergstedt, that he failed to prove any claim against the estate and failed to object to the liquidation account, and that consequently he was barred from making any claim against the defendant. The plaintiff was not, however, a creditor of the insolvent estate. His claim against Bergstedt arose after the sequestration of Bergstedt's estate and it would appear from secs 42(1) and 112(2b) of Act 32 of 1916, that such a claim is not one provable in the insolvent estate."

In *Barlows Tractor Co (Pty) Ltd v Townsend* 1996 2 SA 869 (AD) HARMS JA echoed the same sentiments at 885I in the following words:

> "(This does not mean that I agree with the conclusion in *Cachalia* that a post-liquidation judgment debt has still to be proved. As a matter of fact, I have

serious reservations in this regard, but it is not necessary to decide the point.)"

[The reference to *Cachalia* being *Cachalia v De Klerk, NO and Benjamin, NO* 1952 4 SA 672 (T).]

See also *Parity Insurance Co Ltd (in liquidation) v Hill* 1967 2 SA 551 (AD) at 558F where OGILVIE THOMPSON JA (as he then was) said that:

> "A distinction must be drawn between pre-liquidation and post-liquidation creditors. The latter are – subject to funds being available – entitled to be paid in full and in priority to the pre-liquidation creditors."

Pre-liquidation creditors, according to the judgment, cannot be paid prior to the confirmation of the final liquidation and distribution account. Payment to post-liquidation creditors is not dependent on the confirmation of any such account.

The court *a quo*'s reasoning in paragraph 17 of the judgment referred to above is therefore wrong. That did not finally settle the whole issue, as the learned judge said.

In coming to the conclusions referred to, the learned judge *a quo* relied on the judgments in *Kilroe-Daley v Barclays National Bank Ltd* 1984 4 SA 609 (A) at 627E-H and *Swift Trailer Co (Pty) Ltd v The Master and 0thers NNO* 1983 4 SA 781 (T) at 786A-G.

In my judgment the learned judge was wrong in relying on these two judgments as they clearly deal with the situation which arises where a pre-liquidation creditor has proved a claim in terms of section 44(1) of the Act and has not objected to the way in which that claim has been dealt with in the liquidation and distribution account. As stated by counsel for the plaintiff in his heads of argument, those cases are clear authority for the view that after confirmation of the liquidation and distribution account and payment of dividends in terms of the account, in the absence of fraud or *restitutio in integrum*, the court will not set aside or reopen the account at the instance of a pre-liquidation creditor. It was therefore not necessary for the court *a quo* to consider whether grounds were advanced for the setting aside of the account and the reopening thereof. It was never the case of the plaintiff to have the account reopened. It only wanted judgment in its favour.

In my judgment there is also no merit in the argument on behalf of the defendant that the reference in section 407 of the Companies Act, 61 of 1973, that "any person having an interest in the company being wound-up" may object to the liquidation and distribution account includes the plaintiff. If a post-liquidation creditor's claim is not provable no objection need be lodged.

As stated above it is common cause that the second and final liquidation and distribution account was confirmed on 6 June 2001 and that by 23 July 2002 payment had been made in terms of that account. It is not disputed that absent any statutory provision the plaintiff's claim would have prescribed on 22 May 2003. The effect of the court *a quo*'s judgment is that the plaintiff's claim would have been extinguished prior to the date of prescription. That cannot be. In my judgment this is a further indication that the court *a quo*'s conclusion is wrong.

0n behalf of the defendant it was argued that a judgment against the defendant at this stage would be a *brutum fulmen* and therefore nothing more than a nuisance to the defendant as nothing can be claimed from the creditors who have already been paid.

That that submission is wrong clearly appears from the judgments in *Bowman, De Wet and Du Plessis NNO and 0thers v Fidelity Bank Ltd* 1997 2 SA 35 (AD) at 43B-D and *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1994 3 SA 283 (AD) at 330A-G.

In my judgment the appeal must succeed. I propose the following orders:

1. The appeal succeeds with costs.
2. The court *a quo*'s order is set aside and the following is substituted therefor:

The defendant's special plea is dismissed with costs.

W J VAN DER MERWE
JUDGE OF THE HIGH COURT

I agree

W R C PRINSLOO
JUDGE OF THE HIGH COURT

I agree

K MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT

A1358-2005

HEARD ON:

FOR THE APPELLANT:
INSTRUCTED BY:
FOR THE RESPONDENT:
INSTRUCTED BY: