CASE NO. A.252/93

IN THE HIGH COURT OF NAMIBIA

In the matter between

TRANSNAMIB LTD. **APPLICANT**

versus **RESPONDENT**

IMCOR ZINC (PROPRIETARY) LTD.

and

MOLY-COPPER MINING AND EXPLORATION COMPANY (SKA) LIMITED **FIRST INTERVENING CREDITOR**

SOUTH AFRICAN IRON AND STEEL **SECOND INTERVENING CREDITOR**

CORAM: FRANK, J.

Heard on:

JUDGMENT

FRANK, J.: **I** have already issued an order in this application on 4 March 1994. What follows are my reasons for issuing that order.

This is an application by the first intervening creditor seeking a discovery order against the second intervening

creditor in the following terms:

> "In terms of Rule 35(1) of the Rules of court read with Rule 35(13) thereof the second intervening creditor ("Iscor") is hereby ordered to make discovery on oath of all documents relating to any matter in question in this application and to produce such for inspection by the First Intervening Creditor."

The background to this application is briefly as follows. Respondent was placed under provisional liquidation by the the applicant. First Intervening Creditor was granted leave to intervene being a creditor and a 49% shareholder of the Respondent. First intervening creditor filed affidavits and also filed simultaneously with its papers opposing a final liquidation order a conditional counter application seeking a judicial management order. At this stage the second intervening creditor who is the 51% shareholder and also a creditor of Respondent sought to and was granted leave to intervene. At the time the second intervening creditor was granted leave to intervene an order was also made putting the various parties on terms as to the filing of further affidavits and the rule was extended. Granting the discovery sought by first intervening creditor would necessitate a further extension of the Rule and new directions as to the filing of affidavits. According to the first intervening creditor the documents were necessary to answer/reply to the affidavit of second intervening creditor. I must also mention here that after the provisional liquidation order was granted second intervening creditor entered into an agreement with the provisional

liquidators to operate the mine in question for its own account.

From Rule 35(13) itself it is clear that the count has a discretion to order discovery in application proceedings. In this regard the following was stated in Moulded Components v Coucourakis and Another 1979(2) SA 457 (W) at 470 D:

> "The Court has a discretion in relation to orders to be granted, pertaining to discovery ..... In application proceedings we know that discovery is a very, very rare and unusual procedure to be used and I have no doubt that that is a sound practise and it is only an exceptional circumstances, in my view, that discovery should be ordered in application proceedings."

Mr Swersky SC who appeared on behalf of the first intervening creditor submitted that Botha, J. went to far in stating what is set out above and that there was no justification in the Rules to suggest such a view. He also submitted that this present application could not be treated on par with other applications as liquidations must be initiated by way of application.

Although it may appear at first blush that Botha, J. was overstating the position I am of the view that if his remarks is seen in context they set out the position correctly in respect of any kind of application. Clearly the reference to discovery being "a very, very rare and unusual procedure" refers to the stage where the application

is not yet ripe for hearing and cannot refer to the stage where applications are referred to for oral evidence pursuant to the provisions of Rule 6(5)(g) where discovery orders are frequently made. Although it is stated that discovery orders will only be made in "exceptional circumstances" it is abundantly clear that a Court has a discretion to issue such orders and "exceptional circumstances" will differ from case to case. The fact that an application (and not an action) was brought because this is prescribed may amount to such an exceptional circumstance either in its own or taken together with other relevant factors. I think the essence that Botha, J. sought to convey was that such orders were not merely for the asking and because the matter could be referred to for oral evidence if there were genuine disputes one should be careful not to allow litigants to abuse this rule. Thus one must be sure that there is at least a reasonable possibility that the documents sought would either narrow down the disputes or eliminate such disputes and not open up disputes on peripheral matters or are to be used in an attempt to create a dispute or to confuse existing disputes. After all if there are genuine disputes this will be referred to oral evidence with the necessary order relating to the discovery of documents. In this sense clearly there must be exceptional circumstances justifying a discovery of documents at an interim stage.

In my view the same considerations apply to a liquidation application. A person opposing such an order must know and be in a position to state the basis upon which he opposes

such an order. It cannot be tolerated that a litigant approach a Court on a basis that the order is being opposed but no reasons for such opposition can be formulated until documentation has been made available. Clearly this differs totally from the position of a litigant who approaches Court stating "This is my position and document "A" will prove it.• if the other party is obliged to discover it.

First intervening creditor has been a shareholder of respondent since 1974 and was presented on the board of Respondent continuously since that date. Annual statements must have been prepared and to now seek discovery of all documents relating to the financial statement of 30 June 1993 is unacceptable. If the June 1993 statement is faulty the first intervening creditor should be able to point out where the faults is. If prior statements were faulty, first intervening creditor should through it's director on the Board of Respondent or as shareholder have taken steps. It cannot now as respondent faces liquidation seek to what would amount to audit for the last nearly twenty years. The same reasoning applies to the loan account of second intervening creditor in Respondent. The existence of the loan account has never seriously been challenged but now suddenly the deponent on behalf of first intervening creditor states "I am also concerned to know how Iscor's loan accounts have been computed ..." If the loan account has been wrongly computed this can be stated together with the reasons for this and what the amount should be. In any event it was more or less conceded that documents were not really needed by first intervening

creditor with regard to the liquidation application contrary to the application for judicial management:

> "Moly Copper submits that discovery of such documents is necessary in order that justice be done and without such discovery it is hamstrung in the presentment of its case, particularly in regard to its prayer for Imcor Zinc to be placed under a judicial management order. (My underlining).

Mrs Lidchi who deposed to the affidavit launching this application on behalf of First Intervening Creditor was at all relevant times hereto a director of respondent. As such she received documents containing financial matters virtually up to the date upon which the provisional liquidation order was granted. Subsequent to this she received no information. As mentioned above second intervening creditor has since that date by agreement with the provisional liquidators been operating the mine for their own account.

It is clear that what pre-empted the current liquidation proceedings is second intervening creditor's decision not to finance the Respondent any further. It is this financing that led to the loan account which has already been referred to and the question whether the second intervening creditor had to continue to finance Respondent in terms of a shareholders agreement already led to a court case which is currently on appeal. First intervening creditor maintains that the mine is viable and the only problem is that the second intervening creditor is forcing the present

liquidation proceedings to get out of a shareholders agreement the terms whereof they consider to be to their disadvantage. Second intervening creditor maintains that the mine will never be able to trade out of it * s difficulties as long as it must pay royalties as stipulated in the shareholders agreement and service the interest on the aforesaid loan account.

To make out a case for judicial management it must be shown that there is a reasonable probability that the Respondent will be enabled to pay it's debts and become a successful concern. A viability study in this regard was undertaken on behalf of second intervening creditor. In my view this document is of importance as it will tend to establish or destroy one of the important factors relating to the judicial management application. If the mine is not viable without having to pay loan accounts and royalties there would be no basis for a judicial management order. Conversely if the mine is viable without the above constraints then the only considerations that arise are of a different and more complex nature and will inter alia include the extent of the profitability, the time span in which the mine will become or remain profitable, the servicing and repaying of loan accounts, the ranking of creditors, the relationship between the shareholders and the further financing of the mine. Clearly to come to any sort of informed decision in this regard the financial position of respondent after the provisional liquidation order is of importance as this will show respondent operating at it's optimum. These statements were not available to first

intervening creditor and will be to the point as far as their case is concerned when they need to respond to the allegations made by second intervening creditor based on these statements.

In short the viability study and the financial statements subsequent to the provisional liquidation order may in themselves contain the whole answer to the present dispute and thus curtail the dispute tremendously and should therefor be made available to the first intervening creditor.

Both second intervening creditor and applicant opposed the relief sought on various grounds. I now deal with their specific objections and although they were not all successful they did have a bearing on the costs order I made.

While it is true that directions were given on 18 February 1994 as to the filing of further affidavits this can be altered if need be (Wallach v Lew Geffin Estates CC 1993(3) SA 258 (A). At the time the directions were given Mr Swersky SC informed the Court that first intervening creditor intended consulting experts. It is clear from the papers filed in the present matter that it was indeed only after experts were consulted that the need for discovery arose. If this is taken into account the application was not launched unduly late and nor was the urgency created by the first intervening creditor.

When regard is had to the order sought in respect of the discovery it is clear that it is very wide. First intervening creditor should have foreseen that there were no prospect of getting such an order and that such an order would have the effect of the liquidation application not being heard for quite some time. The parties opposing the discovery maintained that this was the specific strategy so as to postpone the f inalisation of the liquidation to a date after the appeal relating to the further funding of respondent had been dealt with. Coupled with this is the fact that second respondent was not approached prior to the launching of this application to agree to discover certain documents. It seems to me that first intervening creditor decided to take a chance and ask for as wide relief as possible and see what it could get. Clearly on this basis it would have served no purpose to approach second intervening creditor as it was sure to refuse such a request. A reasonable request on the other hand might have been conceded to but this would not lead to any delay or as long a delay. Thus an order was sought in the widest and vaguest term imaginable. It is this abuse of the Rules which in my view entitled applicant to also oppose the discovery sought even though it was not directly involved. The amount due to applicant is undisputed and to cause further delays without good reason is to the prejudice of applicant. The fact that that first intervening creditor was unsuccessful in their attempt to cause a substantial delay is neither here nor there as this is what was intended.

In order to obtain a as wide as possible discovery order Mrs Lidch; decided not to play open cards with the Court. According to her "Hardly any financial records have been made available to me from 1st July 1993 up to 15th December This turned out to be a grave exaggeration. She was present at quarterly board meetings where financial matters were discussed at great length with the necessary documentation at hand. She was further furnished with monthly management reports and royalty calculations. The monthly management reports contained detailed information relating to, inter alia. production, stocks, mining activities, costs and projections. It is thus clear that first intervening creditor was provided with all the necessary documentation over the years and up to the provisional liquidation that it needed to respond to the allegations pertaining to respondent in this regard. The fact that first intervening creditor took no steps as shareholder and with a director on the Board of Respondent to have the accounts rectified where second intervening creditor did not agree to this (if indeed there was such an occasion) has already been dealt with.

From the above it's clear that the first intervening creditor overshot its mark in the order it sought and also tried to mislead the Court as to the extent of the financial information it had at hand. In addition it was seeking an indulgence and although it was successful to a limited extent this did not detract from the facts set out above and its ulterior motive to cause further delay and I decided that the costs had to born by first intervening creditor.

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