CASE NO. SA 4/94

IN THE SUPREME COURT OF NAMIBIA

OF THE HIGH COURT OF NAMIBIA

In the Civil Appeal of

4 NOV 1994
PRIVATE BAG 13179
WINDHOEK

TRANSNAMIB LIMITED

APLLICANT

REGISTRAR

VERSUS

IMCOR ZINC (PTY) LTD and MOLY-COPPER MINING AND EXPLOR D ATION COMPAN Y (SWA) LIMITE FIRST RESPON DENT INTERV ENING CREDIT OR SOUTH AFRICAN IRON & STEEL IN AL DU ST RI CORPORA TION LIMITED SECOND INTCREDITO ERVR ENI NG

CORAM: MAHOMED C.J., DUMBUTSHENA A.J.A, and LEON A.J.A,

JUDGMENT

LEON

A. the following order:

"J.

On 24 May 1994, Frank J. made

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2. No order as to cost's is made in respect of

1) *First Intervening Creditor's objection in limine to the locus standi of the Applicant.*

2) *First Intervening Creditor's application to strike out heard on 18 February 1994.*

3) *That the Respondent is placed under final liquidation.*

4) *That the costs of Transnamib's application and First Intervening Creditor's conditional counter-application is to be paid by First Intervening Creditor.*

5) *That no order as to costs is made with regard to Second Intervening Creditor's involvement in this matter.*

6) *That all cost orders made herein shall include the costs consequent upon the employment of two counsel."*

The parties shall hereinafter be referred to as TRANSNAMIB, IMCOR ZINC, MOLY-COPPER and ISCOR respectively.

Moly-Copper has appealed against the v/hole of the aforesaid judgment and order as well as against an earlier order by Frank J. dismissing the objection in limine by Moly-Copper that Transnajnib did not have locus

standi to move for a winding-up order. Moly-Copper submits that there should be substituted for the orders made by the Court a quo the following orders: -

7) The Rule Nisi is discharged and Transnamib and Iscor jointly and severally pay the costs of Moly-Copper.

8) ALTERNATIVELY TO PARAGRAPH 1

The appliction be adjourned and the costs so far incurred be reserved.

3. IN THE FURTHER ALTERNATIVE

Imcor Zinc be and is hereby placed under judicial management, with such order as to costs as may be appropriate.

4. IN THE FURTHER ALTERNATIVE

The matter be referred for the hearing of oral evidence on a date to be fixed by the Registrar on the question whether Imco Zinc is able to pay its debts.

5. In any event Iscor is ordered to pay all the costs of

this application including the costs of Moly-Copper and Transnamib on the attorney and client scale.

The earlier history of this application is briefly as follows:

On 15 December 1993, Transnamib brought an urgent applica tion to the High Court seeking a provisional order of

liquidation of Imcor Zinc. That order was granted by Frank J. on the 16th December 1993 and was returnable on 21st January 1994. On the latter date, Moly-Copper was granted leave to intervene in the application as the party holding 49% of the shares in Imcor Zinc and being a creditor of Imcor Zinc. It opposed the granting of a Final Order of Liquidation and also brought a counter-application for judicial management of Imcor Zinc in the event of its opposition to the Transnamib application not being successful. The return day of the provisional order of liquidation was then extended to 18th Feburary 1994 and on that day, Iscor, as creditor of Imcor Zinc and holding 51% of its shares, also applied for leave to intervene. In doing so, it supported the application of Transnamib and opposed the order for judicial management which v/as conditionally sought by Moly-Copper. Despite Moly-Copper's objection, Frank J. granted Iscor leave to intervene on 18th December 1994 and there is no appeal against the last order.

In its answering affidavit, Moly-Copper took the point in limine (without pleading over on the merits of the point) that ex facie its founding papers and annexures, Transnamib had no locus standi to seek payment from Imcor Zinc as it v/as a creditor of Iscor not of Imcor Zinc. This was so because the parties to the written agreements were ex facie Transnamib and Iscor and not Transnamib and Imcor Zinc.

Iscor thereupon filed a replying affidavit in which it dealt at length with the point in limine raised by Moly-Copper. Frank J. dismissed the point in limine but, in doing so, he had regard solely to the founding affidavit. He also granted an application by Moly-Copper to strike out those parts of the Transnamib replying affidavit which dealt with the matter raised in limine by Moly-Copper. In this latter regard, the learned Judge held that, as Moly-Copper had not pleaded over, there were no new facts on this issue which Transnamib had to meet in its reply.

The relevant facts relating to the point in limine as they appear from the founding affidavit are conveniently set out in the judgment of Frank J. as follows: -

" (a) Imcor has two shareholders, namely, Iscor with 51% of the shareholding and Moly-Copper with 49% of the shareholding.

(b) Iscor was entitled to nominate 3 directors of Imcor, one of whom would be the Chairperson of Imcor's Board. Moly-Copper was entitled to nominate two directors.

(c) On 7th January 1992, Iscor "on behalf of" Imcor,
entered into a written agreement with Transnamib.

A copy of this agreement is annexed and **ex facie** the agreement, the parties thereto were Iscor and Transnamib. No mention of Imcor is made in the agreement.

9) On 9 January 1992, Imcor applied for its credit facilities with Transnamib to be increased.

10) On 3rd February 1992, Iscor "in its afore mentioned" capacity, entered into a further written agreement with Transnamib. The "above-mentioned capacity" referred to the allegation that Iscor acted "on behalf of" and ex facie appears to be an agreement entered into between Iscor and Transnamib.

11) Transnamib rendered services in terms of the agreements.

12) Transnamib rendered monthly accounts for the

said services rendered to Imcor, who paid them.

(h) These payments continued up to 30th September 1993, in respect of the one agreement, and up to

23rd September 1993, in respect of the other agreement.

(i) Transnamib demanded payment of this amount from Imcor.

(j) On 9th December 1993, Imcor reacted to Transnamib' s demand in writing as follows:

> "We regret that we are unable to pay your claim of N$2 348 444,88 due to lack, of funds.
>
> There is litigation pending between the shareholders of Imcor Zinc (Pty) Limited and the Rosh Pinah Mine is effectively at a standstill."

The point raised by Moly-Copper in the Court below amounts to this. In terms of the written agreements, they were agreements between Transnamib and Iscor not Imcor Zinc. Because of the non-variation clauses in the agreements parol evidence was not admissible to show that Iscor was acting for an undisclosed principal, namely Imcor Zinc, in entering into the said agreements. And in its founding papers, Transnamib had failed to make out a case that the

situation in this matter is one to which the undisclosed principal doctrine applies. It is further claimed that, had the allegations which were made in the founding affidavit been made in a pleading, it would have been excipiable. Finally, it is submitted that, even though on the papers the probabilities favour the applicant, an application for a winding-up order is usually dismissed where the respondent is able to show that the indebtedness is disputed on bona fide and reasonable grounds. The question as to whether this approach known as the "Badenhorst Rule" should be adopted inflexibly was left open by the Appellate Division in Kail vs Decotex (Pty) Ltd. and Another, 1988(1) 943(A) at page 980 D-H.

The approach of the Court a quo may be summarised as follows. Ignoring the written agreements, it is clear from Imcor Zinc's own letter that it admits owing Transnamib a substantial amount of money but does not have funds to pay it. Until this happened, monthly accounts had been rendered to Imcor Zinc 'and paid by Imcor Zinc and, in its founding affidavit, Transnamib stated that Iscor was acting "on behalf of" Imcor Zinc in entering into the agreements. In these circumstances a prima facie case had been made that Imcor Zinc was an undisclosed principal and that Iscor was acting on its behalf. And it is clear from Imcor Zinc's subsequent conduct, that the principal disclosed

itself. The fact that a further party is added to the written agreements does not contradict the agreements as this does not amount to a variation of the written agreements. And the non-variation clause is thus irrelevant.

The Court found accordingly that Transnamib had established that it ws a creditor of Imcor Zinc in its founding affidavit and thus established its locus standi to apply for a liquidation order, and therefore rejected the objection in limine.

After the Court a **quo** had dismissed the point **in limine,** it extended the return day, granting to Moly-Copper and Iscor leave to file further papers.

Three days before the extended return day, Moly-Copper brought an application for a discovery order against Iscor v/hich was granted to a limited extent, but the Court marked its displeasure against what was found to be delaying tactics on the part of Moly-Copper by ordering it to pay the costs of Transnamib and Iscor.

When Moly-Copper filed an answering affidavit to the appli cation by Iscor, it then decided to use the opportunity to deal with the question as to whether or not Transnamib was

a creditor despite the fact that leave had not been sought or obtained to plead over to the Transnamib application.

Counsel for Transnamib then applied to strike out these paragraphs, alternatively to respond thereto.

The Court held that, as Moly-Copper had not pleaded over when it took the point in limine, it could only do so by obtaining the Court's leave to file an additional affidavit which had not been obtained and could not use its answering affidavit in the Iscor application as a second opportunity to supplement its answering affidavit in Transnamib's application. The learned Judge went on to say that, even if he was wrong, then it would only be fair to afford Transnamib the opportunity to respond thereto. And if those further facts were taken into account "there can be little doubt that Transnamib is indeed a creditor of Imcor Zinc". The reasons advanced by Moly-Copper for its denial of Transnamib's claim did not, in the main, seek to advance contrary facts but sought to cast doubt on it by way of inference. And the reasons advanced were entirely unper-suasive. They raised inferential, speculative and argumentative matters and could not be regarded as raising a bona fide and reasonable dispute.

The Court thus found that Transnamib was an unpaid creditor of Imcor Zinc and that the debt was unpaid because Imcor Zinc was unable to pay it. It was commercially insolvent. The Court found further on the basis of the expert evidence submitted by Moly-Copper (which was referred to as the "Price Report"), that on 30th June 1994 there would be at least R2.4 million owed by Imcor Zinc to Iscor which Imcor Zinc would be unable to pay. As far as Transnamib was concerned, it was irrelevant to its position whether Imcor Zinc's inability to pay was due to a dispute between the shareholders or to a lack of funds. Whatever the reason, it was unable to pay its debts and was "commercially insolvent" within the meaning of that term in Company Law.

With regard to the application for a judicial management order by Moly-Copper, the Court held that there v/as no reasonable probability of Imcor Zinc becoming a successful concern. The Court took this view because even on Moly-Copper's own version (i.e. the Price Report) Imcor Zinc would need a cash infusion of R12 million to trade out of its difficulties. It was assumed in that report that the R12 million would be forthcoming either from Iscor or from an "alternative financial institution". Iscor has made it plain that it will not provide such further funds and the alternative financial institution was never identified nor was' any affidavit put up from anyone willing to advance such a sum.

Further reasons were given by the Court a quo for the conclusion that there was no reasonable probability that Imcor Zinc would be able to become a successful concern. These included the conclusion that, even if R12 million was raised, it would take years rather than months for the company to trade itself out of trouble. This would be to the detriment of creditors whose claims would be stayed. The whole projection of Imcor Zinc trading itself out of difficulty was based upon assumptions as to future prices and costs which may turn out not to be correct. And the relationship between the shareholders was such that this could have a detrimental effect on the future of the company.

Having found that: -

13) Transnamib was a creditor;

14) Imcor Zinc was unable to pay Transnamib because it was commercially insolvent; and

15) There was no reasonable probability that Imcor Zinc would become a successful concern

the Court granted a final order of liquidation.

For substantially the same reasons as those given by the learned Judge a quo, I am firmly of the opinion that he was correct in all his findings.

However, I shall deal, albeit fairly briefly, with the arguments which were advanced on behalf of the appellant before this Court. In this regard Mr. Selvan argued the case relating to the point in limine while Mr. Soqqott argued the rest of the case.

The doctrine of the undisclosed principal was introduced into South African law in Lippert & Co. vs Desbats 1869 Buchanan 189 and in O'Learv vs Harbord (1888) 5 HCG 1 which were approved and followed by the Appellate Division in South Africa in Cullinan vs Noordkaaplandse Aartappel-kernmoerkwerkers Kooperasie Beperk 1972(1) SA 761(A) where it was held at p.768A that the doctrine has been adopoted into the South African legal system. This was not disputed by Counsel for the appellant.

Despite the argument to the contrary in the Court below and in the Heads of Argument, Mr. Selvan also correctly conceded that parol evidence is admissible to show that although a written agreement ostsensibly holds A liable as purchaser, he merely acted as an agent for B, an unnamed principal. (see e.g. O[1]Learv's case [supra]).

It was also contended in the Court a quo that the non-vari ation clauses in the agreements in question prevented evi-dence being led of an undisclosed principal as this would

amount to a variation of the written agreements. This argument is quite inconsistent with the decision in Muller en 'n Ander vs Pienaar 1968(3) SA 195(A) at p.204 E-H. It was there held that the fact that a further party is added to the written agreements does not contradict the agreements as this does not amount to a variation of the written agreements and therefore the usual "non-variation clause[11] is irrelevant. In this Court Mr. Selvan did not persist in this argument stating that he no longer relied upon this point. This was a wise concession.

Mr. Selvan confined his argument to the founding affidavit conceding, as he was bound to do, that if the point in limine failed, Transnamib was a creditor of Imcor Zinc. In my view this concession was properly made as no proper evidence to the contrary was given by Moly-Copper, raising a genuine dispute of fact.

I turn now to the founding affidavit. Mr. Selvan's first point bears on clauses 6 and 7 of the founding affidavit of Mr. Grove on behalf of Transnamib.

Clause 6 reads: -

> *"On 7 November 1991 the Operating Company entered into an agreement with the Applicant herein on behalf of the Respondent in terms whereof the Applicant inter alia agreed*

> *to undertake the road transportation of Respondent's ore (zinc and lead concentrates) . See in this regard a copy of this agreement which is attached hereto and marked "MVG1" together with a translation thereof marked "MVG2"."*

Similar allegations were made in clause 7 v/ith respect to a subsequent agreement entered into on 3rd February 1992.

It was contended on behalf of the appellant that the phrase "see in this regard" and the production of the agreements were wholly inconsistent with the existence of an undisclosed principal and were thus destructive of such a possibility. But the "see in this regard" was also referring to the terms of the agreement and not solely and exclusively to the parties thereto.

Furthermore Transnamib does not rely only on the agreements as a basis for its case that Iscor was acting on behalf of Imcor Zinc, but on all the facts alleged in its founding affidavit. As to that, Mr. Selvan submitted that payment by Imcor Zinc was a neutral factor as it may have been paying another's debt, nor could any or much weight be attached to the rendering of accounts. But the case goes even further. In response to a demand for payment, Imcor Zinc states that it is unable (not unwilling) to pay. If it were not liable for the debt, it is inconceivable that it would have written such a

letter. In my view, the

evidential material is sufficient to establish a prima facie case that Imcor Zinc was an undisclosed principal and that, from its subsequent conduct, it disclosed itself and ratified the contract. The learned Judge was perfectly correct in holding that the founding affidavit established a prima facie case that Transnamib was a creditor of Imcor Zinc and as such entitled to hold it liable. As the point in limine attacked only the founding affidavit, it follows that it was correctly dismissed.

The next question is whether Imcor Zinc is "commercially insolvent" within the meaning of that term in company law. At the time of the launching of the application for winding-up, Imcor Zinc owed Transnamib N$3, 127 116,97 in respect of road carrier and railway transportation services rendered. In response to a demand for that sum, Imcor Zinc stated that it was unable to pay it. The debt remains unpaid because of that inability. And so do other debts for the same reason. That, in law, is commercial insolvency.

The effect of the cases is that the words "unable to pay" in section 345 of the Company's Act refers to the inability of a company to meet current demands upon it for its day-to-day liabilities in the ordinary course of business, (see Rosenbach and Company (Ptv) Limited vs Singh's Bazaars

(Pty) Limited 1962(4) SA 593(D) at 597 C-D. In passing, it should be noted that in that case, it was also held that,

where there is due to an applicant a liquidated sum which has been demanded without success, that affords cogent evidence of the company*s inability to pay its debts.

Where a company is in a state of commercial insolvency, the great weight of authority is that generally speaking an unpaid creditor has a right ex debito iustitiae to a winding-up order against a company unable to pay its debts, (see Service Trade Supplies (Ptv) Limited vs Pasco and Sons (Ptv) Limited 1962(3) SA 424(T) at 428 D-F and the cases there cited.) That case was expressly approved by the Appellate Division in Sammel and Others vs President Brand G.M. Company Limited 1969(3) SA 629(A) at 662F.

As I understand the authorities, an unpaid creditor is entitled to choose his own form of execution one of which is a winding-up order. And where he does so and the company is in a state of commercial insolvency and in the absence of exceptional circumstances, the Court is ordinarily bound to grant a winding-up order. Essentially, it is not a discretionary matter. (see In re Camburn Petroleum Products Limited 1979(3) All ER 297(Ch) at 303 C-J; I.W*. L.R. at p. 93 G-H.)

There are no exceptional circumstances present in this case such as a majority of creditors being opposed to a winding-up. Indeed the continuing hostility between the two shareholders in this domestic company bodes ill for its future if it were not wound up.

In all the circumstances, the next question is whether Moly-Copper is able to prove (the onus being on it) a reasonable probability that, if Imcor Zinc is placed under judicial management, it will be able to pay its debts, meet its obligations and become a successful concern.

As judicial management is an extraordinary and special procedure, it should be granted sparingly and only if the Court is satisfied that both the requirements set out in section 427(1) of the Act are satisfied on the facts. Those requirements are: -

i) There is a reasonable probability that under judicial management the company will be able to meet its debts in full; and ii) That it is otherwise just and equitable that liquidation should be deferred, (see Bahnemann vs Fritzmore Exploration (Ptv) Limited 1963(2) SA 250(T) at 251A; Sammel's case (supra) at p.633A.

The difference between the words "probable" and "possible" is material, the latter being less certain than the former.

I am satisfied on the facts of this case that the require ment of probability has not been established.

Moly-Copper's case on the probabilities is based essentially on the Price report which is open to criticism in a number of material respects. These include the fact that Mr. Price is the person who is nominated by Moly-Copper as manager of the mine instead of Iscor. He is thus advancing his own cause, even if it is assumed in favour of Moly-Copper that he is an expert, properly so-called. The report itself is open to serious criticism. Not only is no account taken of interest but assumptions are made with regard to the payment of income tax even in the case of losses not profits. The report is also based on hearsay evidence with regard to the assumption that lead and silver prices will increase, which has no proper evidential foundation. The report also contains arithmetical errors.

However, even if the most generous attitude is adopted towards the Price report, there is no escape from the following statement which appears at page 765 of the record: -*"We anticipate a need for R12 million to fund creditors and working capital in the short term. This could either be done by Iscor or*

an alternative financial institution."

That is a bland, optimistic assumption verging on insouciance. Iscor has made it plain that it will not provide such funding and the "alternative financial institution" is not identified. If such an institution existed, it would hardly require one of the Labours of Hercules to obtain a supporting affidavit from it. And the lack of such an affidavit makes the assumption worthless.

I am satisfied for the above reasons and those given by the learned Judge a quo that the appellant failed to discharge the onus which rested upon it. Even the valiant Mr. Soggott admitted that he had "problems" in this regard.

In my judgment, the appeal must be dismissed, with costs, including the costs consequent upon the employment of two counsel.

LEON, A.J.A.

MAHOMED C.J. :

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DUMBUTSHENA A.J.A. :

DATE OF HEARING: 8 October 1994

DATE OF JUDGMEN T: 8 Decembe r 1994

FOR THE APPELLANT: R .L.	S C. e (w l it v h a hi n m, S D. . H.	S .C o . g an g d o A. t J. t Kr S au	t)

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Diekmann Associates