161/84

55/83

N v H

ALEXANDER ILIC and GERASIMOS PARGINOS

SMALBERGER, AJA :-

55/83

N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ALEXANDER ILIC — Appellant

and

GERASIMOS PARGINOS — Respondent

CORAM: WESSELS, AJA, JANSEN, CILLIé, JJA, et SMALBERGER, VIVIER, AJJA.

HEARD: 19 NOVEMBER 1984

DELIVERED: 30 NOVEMBER 1984

JUDGMENT

SMALBERGER, AJA :-

The respondent, in two separate actions which were consolidated for the purposes of trial, successfully sued the appellant in the Witwaters=

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rand Local Division for an aggregate amount of R60 000,00, plus interest and costs. The appellant now appeals against the whole of the order of the Court a quo. For the sake of convenience I shall refer to the parties as the plaintiff and the defendant respectively.

The plaintiff's claims against the defendant arose from the terms of a written agreement entered into between the parties on 4 October 1979 (the agreement). The defendant unsuccessfully raised a number of defences to the plaintiff's claims. Of these only one is being persisted in on appeal. It relates to the scope and effect of an offer of composition made by the defendant in terms of the provisions of section 119(1) of the Insolvency Act 24 of 1936 (the Act).

The defendant failed to lodge the appeal record timeously i.e. within the extended period agreed to by the plaintiff in terms of Appellate Division Rule 4 (c). He now seeks condonation of his failure to do so. It appears from the application for condonation that the defendant's attorney was under a misapprehension concerning the date on which the extended period expired. This caused him to lodge the appeal record two days late. On realising his failure to comply with the Rule in question the defendant's attorney immediately prepared and filed the application for condonation. The only basis for refusing condonation in the present matter would be an absence of reasonable prospects of success on appeal. I proceed therefore to consider the merits of the appeal.

It is necessary to set out briefly the circumstances giving rise to the plaintiff's actions. In terms of the agreement the plaintiff sold to the defendant certain assets together with a licence issued by the Meat Board for the manufacture, sale and distri= bution of certain meat products, for a purchase conside= ration of R60 000,00. The agreement provided for a deposit of R10 000,00 which was paid by means of a cheque drawn by the defendant in favour of the plaintiff's attorney or bearer. The balance of the purchase price was to be paid in monthly instalments of R1 000,00. On presentation in due course the cheque was dishonoured by non-payment, and the defendant failed to make any payments in respect of the balance of the purchase price.

On 15 January 1980 the plaintiff, as holder of the dishonoured cheque, instituted action for provisional sentence against the defendant. Notwithstanding the defendant's opposition to the action provisional sentence was granted in favour of the plaintiff on 13 March 1980. The defendant subsequently entered into the principal case after paying the plaintiff R10 000,00, against provision of security de restituendo by the latter. This comprised the first action between the parties.

On 2 April 1980 the plaintiff instituted a second action against the defendant. In that action the plaintiff claimed the balance of the purchase price, amounting to R50 000,00, on account of the defendant's

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failure to make regular payments in respect of such balance in terms of the agreement. The action was defended. While both actions were pending the defendant's estate was sequestrated, the final order of sequestration being granted on 31 March 1981.

On 30 July 1981, presumably after the first meeting of creditors, the defendant submitted a written offer of composition to his trustee in terms of section 119(1) of the Act. In it the defendant expressed the wish to submit an offer to "my creditors". In terms of the offer the defendant bound himself, upon acceptance thereof, to make payment to concurrent creditors of an amount equal to 10 cents in the rand in respect of their claims. The trustee duly convened a meeting of creditors on 9 September 1981 to consider the defen= dant's offer. The plaintiff received due notice of both the offer and the meeting. Despite the fact that he had a proved claim for costs against the defendant, the plaintiff was not present or represented at the meeting in question, and accordingly did not vote on the offer. Nor did the plaintiff take any steps at or before such meeting to have his disputed claim for R50 000,00 admitted to proof, or to ensure that the offer was not voted on until he was given the opportunity to prove such claim. The defendant's offer of composi= tion was duly accepted at the meeting by the requisite majority of creditors who proved claims against the defendant's insolvent estate, both in number and in value, as required by section 119(7) of the Act.

The facts which have been set out above are either common cause or not in dispute. It is also not disputed that had the plaintiff qualified to vote on the offer of composition in respect of his claim for R50 000,00, he would have voted against the offer, and by so doing would successfully have prevented its accep= tance.

The pending actions between the parties duly proceeded, and they were in due course consolidated and heard together. Judgment was ultimately given in favour of the plaintiff, thus confirming that at all relevant times prior to judgment the plaintiff had been a con= current creditor of the defendant in respect of the R50 000,00 claimed in the second action. The defendant no longer disputes his indebtedness to the plaintiff in that amount. The sole dispute relates to whether he is obliged to pay the full amount of R50 000,00 to the plaintiff, or only R5 000,00 in terms of the offer of composition. The defendant's counsel rightly conceded at the hearing of the appeal that the plaintiff is entitled to the full R10 000,00 in respect of the provisional sentence action, as he was not a creditor of the defendant's insolvent estate in respect of that amount, payment thereof having been made to the plaintiff prior to the defendant's sequestration. The offer of composition could accordingly not have applied to it.

It was contended on the defendant's behalf that the offer of composition, having regard to the terms thereof, and the provisions of section 119 and 120 of the Act, was binding on all the defendant's concurrent creditors, including the plaintiff.

Counsel for the plaintiff, relying heavily on the decision in Kleena Industries (Pty) Ltd v Senator Insurance Co Ltd 1982(2) SA 458 (W), which deals with an offer of compromise under section 311 of the Companies Act 61 of 1973, submitted that the essential enquiry in the present matter was to ascertain to whom the defendant's offer of composition was directed. The need to do so, it was argued, arose from the fact that on its acceptance as provided for in the Act an offer of composition becomes a binding contract, and it is essential to have regard to its terms to determine those bound by it. It was further contended that as the words "my creditors" in the offer of composition were ambiguous it was permissible to have regard to extrinsic evidence to establish the identity of the creditors concerned. Such evidence, according to the plaintiff's counsel, established that the plaintiff was not regarded by the defendant as one of his creditors, and he was accordingly excluded from the provisions of the offer of composition. The subsequent statutory acceptance of the offer was therefore not binding on him.

The provisions of the Act relevant to the present appeal are for the sake of convenience set out below:-

"119 (1) At any time after the first meeting of the creditors of an insolvent estate, the insolvent may submit to the trustee of his estate a written offer of composition.

(2) If the trustee is of the opinion that the creditors will probably accept the offer of composition, he shall as soon as possible after receipt of the offer post in a registered letter or deliver to every creditor who has proved his claim, a copy of the offer with his report thereon.

(3) ......

(4) ......

(5) Whenever the trustee posts or delivers to the creditors a copy of an offer of composition in terms of the preceding provisions of this section, he shall simultaneously convene and give notice to the creditors of a meeting for the purpose of considering the said offer and any other matter mentioned in the notice.

(6) ......

(7) If / ....

(7) If the offer of composition has been accepted by creditors whose votes amount to not less than three-fourths in value and three-fourths in number (calculated in accordance with the provisions of section fifty-two) of the votes of all the creditors who proved claims against the estate, and payment under the composition has been made or security for such payment has been given as specified in the compo= sition, the insolvent shall be entitled to a certificate under the hand of the Master of the acceptance of the offer: Provided that no offer may be so accepted if it contains any condition whereby any creditor would obtain as against another creditor any benefit to which he would not have been entitled upon the distribution of the estate in the ordinary way; ......

(8) In sub-section (7) the word 'creditor' includes a creditor who has not proved a claim against the insolvent estate in question.

120 (1) An offer of composition which has been accepted as aforesaid shall be binding upon the insolvent and upon all the creditors of the insolvent estate in so far as their claims are not secured or otherwise preferent but the right of any preferent cre= ditor shall not be prejudiced thereby, except, in so far as he has expressly and in writing waived his preference.".

(The original text of the Act was signed in Afrikaans, but there are no material differences in wording or meaning between the sections quoted and their Afrikaans counterparts.)

It is doubtful whether the provisions of section 311 of the Companies Act, and the authorities relating thereto relied upon by the plaintiff, offer any real assistance in interpreting the provisions of sections

119 and 120 of the Act. Notwithstanding a similarity in substance between these sections (cf. Smith v Mann 1984(1) SA 719 (W)), there are fundamental differences between an offer of compromise under section 311 of the Companies Act and an offer of composition under section 119 of the Act. Section 311 of the Companies Act applies to both solvent companies and those in liquidation. An offer of compromise under that section can be directed to a wide spectrum of creditors or members, or any class of either. There is scope for the inclusion of certain members and shareholders, and the exclusion of others. Hence the need to ascertain to whom the offer is addressed. By contrast it would seem that on a proper interpretation of the provisions of section 119 and 120 of the Act,

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which apply only on insolvency, an offer of composition includes all concurrent creditors, without exception, and binds all such creditors, proved or unproved, if duly accepted. (Cf. Haffajee v Ramdhani 1947(1) SA 823 (A) at 829.)

The relevant portion of the defendant's offer of composition reads as follows:

> "I desire to submit to my creditors an Offer of Compromise in terms of section 119 of the Insolvency Act, as amended, on the following terms :
>
> 1. I Offer to pay:
>
>   1.1 All costs of sequestration and administration in full, including any fees payable to the Master of the Supreme Court.
>
>   1.2 All claims of Preferent Creditors in full, but only to the extent of the preference to which such credi= tors are entitled in terms of the

Insolvency Act limited to the sum of R3 000,00 (THREE THOUSAND RAND) and in the event of the claims of Preferent Creditors exceeding the sum of R3 000,00, their claims shall be abated pro-rata.

1.3 All claims of Secured Creditors in full to the extent of their security.

1.4 Concurrent creditors the sum of 10 cents (TEN CENTS) in the Rand."

The Act envisages three kinds of creditors, preferent, secured and concurrent. The offer embraces all three, and on the face of it includes all the defen= dant's creditors. This would include the plaintiff, whom it is admitted on the pleadings was at all material times a concurrent creditor of the defendant. The Act provides for the offer to reach the creditors through the trustee. The creditors primarily envisaged are the concurrent creditors, for it is they who will ulti= mately all be bound by the offer. This stems from the provisions

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of section 120(1) of the Act which, while making an offer of composition once it has been accepted in terms of section 119 (7) binding "upon all the creditors", excludes from its operation preferent and secured creditors. That the legislature intended that an offer of composition should apply fully and equally to all concurrent creditors, and that no concurrent creditors would be excluded from its provisions, appears from the first proviso to section 119 (7) read with section 119 (8), which precludes any condition in such offer benefitting one creditor (proved or unproved) against another. It would seem that the aim of the legislature was to achieve parity amongst concurrent creditors. This can only be achieved if an offer of composition encompasses and binds all concurrent creditors once accepted in terms of the Act. An insolvent may in certain circumstances compromise privately with some of his creditors outside the provisions of the Act (Mahomed v Lockat Brothers and Co Ltd 1944 AD 230 at 241), and it may thus more readily be inferred that the legis= lature intended a different situation to apply to a compo= sition in terms of the Act. The situation which has arisen in the present matter is probably the very situation which the legislature sought to avoid. By providing that all concurrent creditors of an insolvent are bound by a properly accepted offer of composition the legislature has ensured that creditors can not claim that they fall beyond the ambit of the composition, thereby securing for them= selves greater benefits than they would have enjoyed if bound by the composition.

Although section 119 (2) of the Act enjoins a trustee to send a copy of the offer of composition and his report thereon to proved creditors only, a meeting of creditors convened under section 119 (5) to consider an offer of composition is a general meeting in terms of section 41 of the Act. It must accordingly be convened in the manner prescribed by section 40, by publication of a notice in the Gazette which must include specific reference to the offer of composition as a matter to be dealt with at the meeting. Written notice under section 119 (2) to proved creditors only is not sufficient. (Mia v The Master and Others 1940 TPD 86.) This fits in with an intention to bind all concurrent creditors, proved or unproved, because it ensures that they will all have notice of the meeting at which the offer of composition is considered, and an opportunity to prove their claims, and participate in and vote at the meeting. It is not disputed in the present matter that the plaintiff had notice of the offer of composition and of the meeting to consider it.

Because section 119 (7) of the Act only permits creditors who have proved claims to vote on an offer of composition, the plaintiff had no right to vote until he had proved his claim. Various avenues were open to him to obtain such right. Although his claim was un=liquidated he could have tendered proof thereof at a meeting of creditors. It would then have been up to the presiding officer to decide whether or not to admit his claim (cf. Wynne and Godlonton, NNO v Mitchell and Another, NNO 1973(1) SA 283 (E) at 290). Section 78(3) of the Act provides that a trustee, if authorised by the creditors, may admit any claim, whether liquidated or unliquidated, if proof thereof is tendered at a meeting of creditors. It is conceivable that the plaintiff's claim could have been dealt with in this manner. The plaintiff was entitled to an opportunity to prove his claim before the offer of composition was considered (Mia v The Master and Others, (supra) at 94). If all else failed he could have instituted legal proceedings to prevent a vote being taken at the meeting until such time as his claim was adjudicated upon. The plaintiff

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was therefore in a position to take steps to enable him to vote on the offer of composition.

Once the offer of composition was accepted by the requisite majority in value and number of the proved creditors as provided for in section 119(7) of the Act the plaintiff, by statutory enactment, became a party to the offer and bound by its terms, having regard to the provisions of section 120 (1). The legal nexus between an insolvent and his concurrent creditors arising from the acceptance of an offer of composition is not contrac= tual in the strict juristic sense, because the necessary consensus required to conclude a contract would normally be lacking. The offer becomes binding on concurrent creditors despite their not having agreed thereto (in the case of those not represented at the meeting or unable to vote because they had not proved their claims), or despite their opposition thereto (in the case of a minority who were outvoted). In the end result, though, an offer of composition, properly accepted in terms of the Act, is in the nature of a statutory novation. It has the effect of res judicata, and the rights and obligations of the parties thereto must be looked for within the four corners of the composition (Blou v Lampert and Chipkin, NNO and Others 1970(2) SA 185 (T)).

To sum up. On a proper construction of the provisions of section 119 and 120 of the Act an offer of composition necessarily extends to and embraces all con= current creditors, without exception, and becomes binding

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on all such creditors, proved or unproved, on an acceptance of the offer in the manner provided for in section 119(7). Consequently the trial Judge erred in holding that the plaintiff was not bound by the offer of composition.

As the plaintiff is bound by the offer of composition, the defendant is entitled to succeed on appeal. It follows that the application for condonation must be granted. Being bound by the offer of composi= tion the plaintiff is entitled to recover R5 000,00 in respect of his claim for R50 000,00. In the provisional sentence action he is entitled to judgment for the full amount of R10 000,00. The total award of the Court a quo therefore falls to be reduced from R60 000,00 to R15 000,00.

There remains the question of costs. The defendant has been substantially successful on appeal. He has succeeded on the only issue in dispute, thereby bringing about a considerable reduction in the amount to which the plaintiff is entitled. He is accordingly entitled to the costs of appeal. Although the defendant's heads of argument were signed by two counsel, only one counsel appeared to argue the appeal. No justification exists for awarding the costs of more than one counsel. It was conceded by the defendant's counsel that as the appeal was confined to only one issue it was unnecessary to prepare the full record of the proceedings. For the purposes of the present appeal the record could have been limited to about $^1/_6$ th of its present length. The defendant is accordingly not entitled to recover more that $^{1}/_{6}$ th of the costs of the record. The defen=dant's success on appeal does not detract from the fact that the plaintiff, in the end result, was still success=ful at the trial, wholly in relation to the provisional sentence action, and substantially in relation to the second action when measured in terms of the issues in=volved and the amount to which he is ultimately entitled. In the circumstances the plaintiff remains entitled to the trial costs on the basis awarded in the Court a quo. As there were no valid grounds for opposing the application for condonation an appropriate order would be to direct the defendant to pay the costs of the application on an unopposed basis.

In the result:

(a) The application for condonation is granted;

(b) The appellant is ordered to pay the costs of the application for condona= tion on an unopposed basis;

(c) The appeal is allowed, with costs, save that the appellant is only en= titled to $^{1}/_{6}$th of the costs of the appeal record.

(d) The judgment of the Court _a quo_ is altered by reducing the amount awarded in respect of the second action from R50 000,00 to R5 000,00. For the rest the order of the Court _a quo_ is confirmed.

J W SMALBERGER
ACTING JUDGE OF APPEAL

WESSELS, AJA)
JANSEN, JA)
CILLIè, JA) CONCUR
VIVIER, AJA