

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

DAVID JOHN RENNIE N.O...... appellant

and

MANFRED HOLZMAN first respondent

IAN SINCLAIR FYNN second respondent

IAN LOCKHART WHITEFORD..... third respondent

CORAM: CORBETT CJ, JOUBERT et E M GROSSKOPF JJA.

DATE OF HEARING: 13 March 1989

DATE OF JUDGMENT: 9 May 1989

J U D G M E N T

CORBETT CJ:

This appeal comes before us in the form of
 a special case stated in terms of AD Rule 5(4), proviso
 (i), and the question of law posed is -

Whether sec 423 of the Companies Act 61 of
 1973, as amended, ("the Act") applies to and
 permits relief against a judicial manager
 and/or a provisional judicial manager.

The appeal arises from an application made The appeal in the Cape of Good Hope Provincial Division ("the CPD") for an order that, inter alia, an inquiry be held in terms of sec 423(1) of the Act into the conduct of the three respondents in relation to a company known as Alberton Refractory Materials (Pty) Ltd ("the company"). On 20 November 1981 the company was placed under provisional judicial management by an order of the CPD; and on 10 March 1982 this provisional order was made final. The three respondents were initially appointed provisional judicial managers and then, after the order had been made final, judicial managers. In June 1983 the third respondent resigned as judicial manager.

The judicial management continued until 22 September 1983, when the company was placed under provisional liquidation at the instance of a creditor; and this order was made final on 22 October 1983. It

was granted on the basis, inter alia, that the company was unable to pay its debts. On 1 March 1984 the appellant was appointed liquidator of the company, having previously been the provisional liquidator.

Alleging that during the course of the judicial management of the company the respondents, as judicial managers, and one Hattingh, the chairman and managing director of the company (who figured as a fourth respondent in the Court below), had misapplied, retained or become liable or accountable to the company for money, and were guilty of breaches of faith or trust in relation to the company, appellant applied (in the alternative) for the aforementioned order in terms of sec 423(1) of the Act. The relief applied for included an inquiry into this alleged misconduct and an order that the respondents repay or restore to the company such money or property as they had misapplied, etc.

One of the issues which arose, as far as the three respondents before this Court were concerned, was whether the provisions of sec 423(1) applied to a judicial manager or a provisional judicial manager. Friedman J concluded that they did not. It is the correctness of this decision that is raised by the special case now before us. The judgment of Friedman J has been reported (see Rennie NO v Holzman and Others 1987 (4) SA 938 (C)). I shall call this "the reported judgment".

Sec 423(1) reads as follows:

"Where in the course of the winding-up or judicial management of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company the Court may, on the application of the Master or of the liquidator or of any creditor or member or con-

tributory of the company, enquire into the conduct of the promotor, director or officer concerned and may order him to repay or restore the money or property or any part thereof, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the Court thinks just."

With this subsection must also be read two definitions appearing in sec 1(1) of the Act, viz -

"'officer', in relation to a company, includes any managing director, manager or secretary thereof but excludes a secretary which is a body corporate";

and -

"'manager', in relation to a company, means any person who is a principal executive officer of the company for the time being, by whatever name he may be designated and whether or not he is a director."

In the reported judgment Friedman J pointed out that the only basis upon which a judicial manager (for the sake of brevity I shall omit reference to a

provisional judicial manager) could be brought within the ambit of sec 423(1) was that he fell into the category of an "officer of the company" (see p 941 G); that the definition of "officer" was an inclusive, not an exhaustive one; that the only category mentioned in the definition which could be applicable was "manager"; that "manager", as defined, meant the principal executive officer of the company; and that consequently the question was whether a judicial manager could be described as an officer of the company or, more specifically, as the principal executive officer of the company. In either case, in order to fall within the terms of the subsection a judicial manager had to be an "officer of the company" (see p 941 H - 942 B). This general approach was criticized in appellant's heads of argument, but I can find no fault with it.

In the Court below some reliance was placed

by appellant's counsel on the fact that the ~~corresponding~~ ~~counsel~~
ing section in the previous Companies Act (sec 184 of
Act 46 of 1926 - "the 1926 Act") the persons against
whom relief could be granted, as set forth in sec
184(1), were -

"... any person who has taken part in
the formation or promotion of the com-
pany, or any past or present director,
manager or liquidator, or any officer
of the company...." (My emphasis.)

As appears above, the words "manager or liquidator"
were omitted from sec 423(1). It was argued below
that "manager" in sec 184(1) included a judicial
manager and, since the word "officer" in sec 423(1)
included, by definition, a manager, judicial manager
fell within the ambit of sec 423(1) - see reported
judgment p 942 D. A similar argument was raised
before this Court.

In my view, this argument fails because its
fundamental premise is unsound. As indicated by Coet-

zee J in Timmers and Another v Spansteel (Pty) Ltd 1979 and

(3) SA 242 (T), at p 249 H, the remedy provided by sec

423(1) - and previously by sec 184(1) of the 1926 Act

- can be traced back to sec 165 of the English Compa-

nies Act of 1862. Pre-Union company law statutes in

this country contained provisions, derived no doubt

from the English companies legislation, which are iden-

tical in their wording to sec 184(1) of the 1926 Act

(see sec 209 of Act 25 of 1892 (Cape); sec 186(1) of

Act 31 of 1909 (Tvl); sec 47 of Law 2 of 1892

(OFS)). Manifestly the word "manager" in these

sections could not have referred to a judicial manager,

since the concept of judicial management was introduced

for the first time into our law by the 1926 Act.

"Manager" in these earlier sections clearly referred

to an employee of the company performing managerial

functions. The object of the 1926 Act was to conso-

lidate and amend the pre-Union companies legislation.

It incorporated in sec 184, and without any amendments, the corresponding pre-Union sections referred to above.

In view of this previous history and the meaning of "manager" in these earlier sections, it seems to me that had the Legislature intended the "manager" in sec 184 to mean, or include, judicial manager it would have said so expressly. The absence of any such express reference to a judicial manager, either in sec 184(1), or in the definition of "officer", is, in my opinion, a cogent indication that the word "manager" was not intended to mean or include judicial manager.

Moreover, this line of reasoning can be taken a step further. Bearing in mind this historical background, I consider that had the Legislature intended the present sec 423(1) to include a judicial manager it would have made specific provision to that effect, either in the subsection itself or in either definition of "officer" ~~and~~ or that of "manager".

The principal argument advanced by appellant, both before this Court and in the Court a quo, was that by reason of the managerial functions performed by a judicial manager he falls within the definition of "manager" in the Act, viz "a principal executive officer of the company". This argument is dealt with in the reported judgment at pp 942 E - 944 F. I agree entirely with the reasoning of Friedman J in rejecting this argument. Thus to traverse all the same ground as did the learned Judge would, in my estimation, be pointless. Suffice it to say that in my respectful view Friedman J rightly emphasized - as did Holmes JA in Lipschitz and Another NNO v Wolpert and Abrahams 1977 (2) SA 732 (A), at p 742 A - C, 747 A - F - the importance of the words "of the company" (see reported judgment at p 942 J - 943 E); and correctly held that since a judicial manager is appointed by the Master (by whom his remuneration is fixed) and conducts the

management of the company subject to the supervision of the court, since his duties include investigative functions in regard to the conduct of directors and officers, past and present, and since his "office" is ultimately terminated by an order of court discharging the company from judicial management, he cannot properly be described as an "officer of the company" (see reported judgment p 944 C - E). The learned Judge added (at p 944 E - F) -

"He occupies a position which has been created by statute, his powers are derived from the statute and, although he may be said to hold an office in relation to the company, he is not an 'officer of the company' in the sense in which that term was interpreted in Lip-schitz case supra."

I agree; and would just add the following:

".....judicial management is a measure which is in the discretion of the Court; it is carried out under the direction of the Court by a manager who is an officer of the Court;...."

(per Roper J in In Re: Idstein (Pty) Ltd)

1957 (1) SA 640 (W) at p 643 H).

And certainly in ordinary parlance I do not think that one would ever regard the position of a "principal executive officer" of a company, which would normally be filled by someone having a service contract with the company, as comprehending a judicial manager appointed by the Master in pursuance of a court order placing the company under judicial management.

At p 944 G - I of the reported judgment reference is made to the peculiar nature of the remedy provided by sec 423(1) and to the following remarks of Holmes JA in the Lipschitz case, supra, at p 744 A - C (made with reference to sec 184(1) of the 1926 Act):

"...the subsection makes drastic inroads upon the normal procedure of enforcement of claims. It cuts across and dispenses with pleadings, discovery, and the right of a defendant not to testify. The Court may summarily require the alleged delinquent to give viva voce evidence and to be cross-examined.
..... The procedure may be robust

and wholesome, but it is rough and ready; and the provision should not be construed widely'."

These remarks appear to echo what was said by Lord

Denning MR in Registrar of Restrictive Trading

Agreements v W H Smith & Son Ltd and Others, [1969] 3

All E R 1065, with reference to provisions in the

English Restrictive Trade Practices Act 1956 empowering

the court under certain circumstances to make an order

for the attendance and examination on oath of "any di-

rector, manager, secretary or other officer" of a body

corporate. With reference to an argument that the

word "manager" should be given an extended meaning,

Lord Denning said (at p 1069 D - E):

"It is not right in this section to give the word 'manager' or 'officer' an extended meaning. It is contrary to the spirit of our law. The law of England abhors inquisitorial powers. It does not like to compel a man to testify against himself. It never wants him to incriminate himself or to be faced with interrogation against his

will. It prefers the case to be proved against him rather than that he should be condemned out of his own mouth. When Parliament thinks it right to give the power to administer questions, it should do so in clear terms specifying who is the person to be interrogated;... .."

These factors, which militate against giving the provisions of sec 423 an extensive interpretation, constitute a further reason for not construing the section as being applicable to a judicial manager, or for that matter a provisional judicial manager.

For these reasons the question of law posed must be answered in the negative.

In the result the appeal is dismissed with costs.

M M CORBETT

JOUBERT (JA)
E M GROSSKOPF (JA) CONCUR