

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NO: PA7/01

In the matter between

WAVERLY BLANKETS LTD

APPELLANT

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

BRAND F. N.O.

SOUTH AFRICAN CLOTHING AND

TEXTILE WORKERS' UNION

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

JUDGMENT

NICHOLSON JA

[1] The appellant is a registered company, which carries on the business of manufacturing blankets. The third respondent is a registered trade union. During 1995 and 1996 64 members of the third respondent were dismissed for various acts of misconduct. Certain procedural aspects of the relationship between the third respondent, its members and the appellant were regulated by an agreement entered into between the third respondent and the appellant - then known as Consolidated Waverly Textile Ltd - on 21 August 1990.

[2] On the 19 April 1997 the appellant was placed under provisional liquidation and joint provisional liquidators were appointed who continued to run the appellant's business pending either the disposition of the appellant's business, the disposition of its assets or the adoption of a scheme of arrangement as contemplated in section 311 of the Companies Act, No 61 of 1973. On 29 April the appellant wrote to the third respondent indicating that it

was putting together a plan “in order to resuscitate the Waverly business and to ensure that jobs are saved for the East London area”. The letter also requested an irrevocable guarantee from it that it would work with appellant in order to ensure industrial stability and peace.

[3] On 20 May 1997 the personnel department of the appellant sent out notices to all employees informing them that their contracts of employment and the recognition agreement, subsisting between the appellant and the third respondent, had been terminated as a result of the provisional liquidation of the appellant.

[4] On 26 May 1997 the appellant and third respondent concluded an agreement on wages, leave pay, provident fund and other related matters.

[5] On or about 17 July 1997 the High Court granted leave for the convening of meeting to consider a proposed scheme of arrangement in terms of section 311 of the Companies Act. On the same date appellant and third respondent wrote a joint letter to the secretary of the Bargaining Council for the Textile Manufacturing Industry of the Republic of South Africa. The letter records the fact of the provisional liquidation and the fact that “the future of the employees has been under intensive negotiation during the past eight or so weeks”

[6] The letter goes on to make mention of the scheme of arrangement being approved by the creditors of the appellant and attaches the agreement relating to wages dated 26 May 1997 mentioned above, the acceptance of which would determine whether the purchaser Dacman Investments (Pty) Ltd (“Dacman”) put forward the offer of compromise. The joint letter goes on to say that “this agreement has been arrived at in order to secure the continued employment of a large number of people and then only after a great sacrifice by these people; should it for any reason now fail the jobs of these people will be placed in jeopardy.

[7] The letter makes it plain that the third respondent was very well aware of the scheme and terms thereof. Although no mention is made of the dismissed employees whose arbitration is at issue, their fate could not have been absent from the minds of the appellant and the third respondent at that time. The very laudable concern of both parties was to preserve as many of the remaining jobs as possible.

[8] On 21 August the scheme of arrangement, in terms of which Dacman bought shares in the appellant, was sanctioned by the court and the provisional liquidation order was discharged. Throughout the relevant period the appellant’s

business continued operating without interruption.

[9] An agreement was concluded between appellant and the third respondent on 29 August. The preamble of that agreement reads: “ the agreement is made and concluded by the parties on the understanding that new management and ownership, taking over from the provisional liquidation, will take over the existing procedural agreement including the Agency Shop Agreement, without amendment to any condition of employment unless exception is granted by the Bargaining Council or negotiation at plant level and reduced to writing in terms of Annexure A (the recognition agreement)”.

[10] The recognition agreement, resuscitated by the subsequent agreement of 29 August contained a provision in clause 15.4.1 to the effect that any dispute of right be arbitrated by an arbitrator appointed by IMMSA. The third respondent’s attorney sent a letter of demand dated 17 November 1997 that appellant submit the prior dismissal disputes of 1995 and 1996 to such arbitration but the appellant declined by letter dated 24 November 1997.

[11] The third respondent then referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relation Act, No66 of 1995 (the Act) and after an unsuccessful attempt at conciliation on 31 March 1998, the matter was referred to the CCMA for arbitration.

[12] The dispute was referred for arbitration in terms of Section 24 of the Act. The third respondent sought the following relief: “1. Determination that the employer is bound by the said collective agreement. 2. Determination that the employer is obliged to refer to arbitration under the said collective agreement, the dispute relating to the dismissal of union members for alleged (sic) various acts of misconduct”.

[13] On 15 March 1999 the second respondent a commissioner of the CCMA, arbitrated the dispute and issued his award on 4 May 1999. He found that the CCMA had jurisdiction to arbitrate the dispute. He also found that the recognition agreement had survived the provisional liquidation and scheme and was not terminated by operation of law or the facts. He found further that neither the agreement of 29 August 1997 nor the provisions of the Companies Act nor the scheme of arrangement terminated the 64 dismissed employees’

right to submit their dismissal dispute to private arbitration. In June the appellant launched a review application in the Labour Court and sought an order reviewing that ruling and setting it aside. The Labour Court handed judgement in October 2000 dismissing the review application with costs. With the leave of the Labour Court the appellant now appeals against that judgement on 9 grounds that are set out in the notice of appeal.

[14] Before the commissioner the present appellant argued three submissions; firstly, that the CCMA lacked jurisdiction as the dispute involved the law of insolvency and the High Court had jurisdiction; secondly, that section 38 of the insolvency Act automatically terminated the contracts of employment, and, finally that the scheme of arrangement extinguished the claims of the dismissed employees.

[15] In this Court Mr Tip SC, who appeared for the appellant with Mr Myburg, the heads of argument having been drawn by Mr Franklin SC, placed no reliance on the first two grounds set out in the previous paragraph and directed his energies at the third submission. This ground involves the preliminary question whether the dismissed employees were creditors under the scheme of arrangement.

[16] Section 311(!) Of the Companies Act provides the machinery in terms of which compromise or arrangement may be made between (a) a company and its creditors, or any class of them, or (b) a company and its members, or any class of them, or (c) a company and any combination of its creditors and or members, or any class of them. The successful implementation of such a scheme requires three procedural steps. Firstly, a person with locus standi brings an application to obtain the authority of the court for the summoning of meeting of the creditors or members concerned. Secondly, if the court grants the order, the meetings are held in order to obtain the agreement of the required majority of the creditors or members. Thirdly, if the proposal ie agreed to by the required majority or majorities, the sanction of the court must be sought.

[17] If sanctioned by the Court, the proposal, on registration by the registrar of a copy of the court's order, becomes binding on all the creditors or members concerned (whether or not they have all agreed to it) and on the company itself. Under a compromise a "receiver" is usually appointed whose function it is to implement the compromise.

[18] While the Companies Act does contain a definition of who a "member" of a company is, it contains no definition of "creditor". In order to ascertain if

the 64 dismissed employees were incorporated as creditors by the scheme of arrangement it is necessary to properly interpret the scheme. It is clear that the term “creditors” is broad enough to accommodate contingent creditors and creditors with illiquid claims. See *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994(2) SA 265 (AD) at 288F-289E.

[19] In *Morris v Airomatic (Pty) Ltd t/a Barlows Airconditioning Co* 1990 4 SA 376 (A) at 398 Milne JA said

“ In *Kleena Industries (Pty) Ltd v Senator Insurance Co Ltd* 1982 2 SA 458 (W) Slomowitz AJ wens so far as to hold at 463 that: “where the Act refers to a sanctioned composition as being binding on all creditors or on all members of a particular class of them, the word “all” must be qualified to mean no more than all those whom the offeror intended, on proper construction of the offer, should be bound”. *If this is correct then, whether or not a particular compromise is binding on creditors in respect only of those claims by virtue of which they are, or claim to be, creditors will depend upon the correct construction to be upon the terms of that compromise*”. (Emphasis added)

[20] I also accept that it was competent for the third respondent challenged the applicability of the scheme of arrangement to the 64 dismissed employees in the proceedings before the second respondent, as opposed to challenging the scheme in the High Court itself. See *Barclays National Bank Ltd v H.J. de Vos Boerdery* 1980(4)SA 475(AD) at 484 A-B.

[21] “Creditors” are not defined as such in the scheme of arrangement and they therefore must be ascertained by a perusal of the other provisions of the

scheme.

[22] Clause 5.5 of the scheme of arrangement deals with the rights after sanction and provides that they “(save for the excluded creditors) be confined to the right to claim payment from the receivers of his/its dividend in terms of clause 4.2.1 supra and no creditor (other than the excluded creditors) shall after the final date have any claim against the company”. The excluded creditors are defined and include a number of banks, financial institutions and others. It is common cause that the third respondent and 64 employees are not excluded creditors.

[23] A “claim” is defined as “any claim of whatever nature and howsoever arising [including claims] for payment or performance. A “contract” is defined to include a “contract of employment”. The plain meaning of “claim” includes a claim for reinstatement, (which is a form of specific performance) or for compensation and the definition of “contract” clearly implies that contracts of employment were always contemplated.

[24] Mr Pillemer, who appeared for the third respondent, argued that the proper forum for a determination of the merits of whether the dismissed employees’ claims survived the scheme of arrangement was the private arbitrator mentioned in the collective agreement. There are two problems with this submission. The first is what could be termed a jurisdictional fact, namely, whether, the scheme disposed of the dispute by novating or compromising it, there was an existing dispute to refer to private arbitration. The second problem relates to the proper forum for resolving such a dispute; in other words, whether the arbitrator should entertain such a claim, given that the scheme provided the High Court of the Eastern Province Local Division as the forum for dispute about claims in terms of clause 5.1.6 read with the definition of “court”.

[25] In order to proceed to private arbitration the third respondent had to show that there was an existing claim by the dismissed workers for reinstatement. If the claim had been compromised by the scheme, then the right to proceed to arbitration was extinguished. As I have already indicated, the claims for reinstatement fell into the wide definition of “claim” and ceased to exist save in the context of enforcement against the receiver.

[26] Where a party takes the view that impending arbitration proceedings will be invalid, a difficult question arises on what such a party should do about such arbitration proceedings. The one option is for such party to approach a court of competent jurisdiction and seek an appropriate order before such arbitration proceedings can commence. Another approach would be to raise the objection

in such arbitration proceedings, and, if the objection is dismissed, participate in the arbitration proceedings under protest and only approach the court of competent jurisdiction for appropriate relief if such party is aggrieved by the outcome of such proceedings. The third is for such party not to participate at all in the arbitration proceedings but to await the outcome thereof and, approach the court of competent jurisdiction if such party gets aggrieved by the outcome. Botha J expressed preference for the first approach in *Inter Continental Finance and Leasing Corporation (Pty)Ltd v Stands 56 and 57 Industria Ltd* 1979(3)SA 740(W) at 754. In *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others* (2000) 21 ILJ 2382 (LAC) at par 20 this Court expressed doubt that a hard and fast rule can be fixed in regard to such situations. In my view which of the routes is preferable is dictated to a very large extent by the facts of each case and the circumstances surrounding it.

[27] Mr Pillemer argued that the third respondent as a union had rights separate from the rights of the members whose reinstatement it was seeking. It will be recalled that in the dispute referred for arbitration the third respondent sought the following relief: “2. Determination that the employer is obliged to refer to arbitration under the said collective agreement the dispute relating to the dismissal of union members for alleged (sic) various acts of misconduct”. The third respondent sought no relief qua union.

[28] It is also clear from the correspondence between the bargaining council and the appellant that the third respondent was involved in a balancing act - which was indeed the laudable approach - of trying to secure as many existing jobs of its members as possible. The third respondent presumably concluded that its best interest lay in supporting the scheme and therefore preserving the jobs of the workers retained by the appellant.

[29] Mr Tip argued that, when the offeror in the scheme of arrangement- *Dacman* - considered buying shares in the appellant, it was only right and just that an accurate and clear picture was obtained as to the creditors that *Dacman* would have to deal with. The excluded creditors were named and *Dacman* was aware that it would deal with those separately.

[30] Insofar as the other creditors were concerned *Dacman* made an offer to them on the basis that there were no claims unaccounted for. It is for that reason that “claim” definition was couched in a wide language to make sure that no creditor could hide in the background and ambush the offeror - *Dacman* - with a claim which was not covered by the scheme of arrangement. If the word “claim” excluded the rights of the dismissed employees to bring their dispute to

a private arbitration and claim reinstatement and backpay, Dacman faced the prospect of very expensive litigation in the first place and in the second place the possibility of having to reinstate 64 employees and pay astronomical amounts of backpay if such were successful. In addition Dacman would have to find jobs for the reinstated workers.

[31] If the word “claim” excluded the dismissed workers’ rights to reinstatement and backpay, the offeror might have thought might have thought twice about putting forward the scheme. Had Dacman backed out of the scheme the appellant might well have been finally liquidated and the members of the third respondent, who were still working there, would probably have also lost their jobs. Such a state of affairs would have been detrimental to all parties concerned. The correspondence reveals close co-operation between the appellant and third respondent in backing the scheme on the basis that it was mutually beneficial, certainly insofar as the members who had jobs were concerned.

[32] Mr Pillemer referred us to a conflict, or potential conflict between s. 311 of the Companies Act and s. 24 of the Labour Relations Act, in which event the latter statute prevails. See s. 210. Section 24 requires every collective agreement to contain certain conciliation and arbitration provisions. Such provisions are indeed to be found in the collective agreement in the present appeal. In terms of subsection (2) disputes or alleged disputes about the interpretation or application of a collective agreement may be referred to the CCMA if: “(b) the procedure provided for is not operative”. A dispute unresolved by conciliation may be referred to arbitration. See subsection (5).

[33] Turning to s.311 of the Companies Act, itself say nothing different. The scheme of arrangement, as sanctioned by the High Court, provided for the dispute claims of creditors (i.e disputed by the receivers) to be determined by a different forum, namely, the Eastern Cape Division of the High Court. This is not an uncommon stipulation in certain kinds of schemes of arrangement. No doubt the learned Judge could have ordered otherwise, but I suspect that he was not asked to do so.

[34] What then is or are the dispute(s) in the present matter? It is not the union’s case that the previously dismissed workers have sought to prove claims in terms of the scheme of arrangement, which claims have been rejected by the receivers. The union’s real case, however, is that the previously dismissed workers are not bound by the scheme of arrangement at all, and that such of the workers who have good claims should be paid not a dividend out of some

special fund, but in full. This is the real question which the union presented for conciliation and arbitration. albeit in jurisdictional terms. Thus the union relied, inter alia, on the revival of the collective agreement. For reasons which appear elsewhere in this judgment, the revival argument must fail in relation to the previously dismissed workers.

[35] I can see no fundamental conflict between s.311 of the Companies Act and the provisions of the Labour Relations Act. Section 311 has been on the statute book for many years and it serves a useful purpose, especially when companies run into trouble. That is demonstrated by the facts of the present case. It seems unlikely that Parliament, when enacting the Labour Relations Act, intended to undermine s.311 whenever a company, being rescued from insolvency, has employee creditors and a collective agreement, which is often the case. In the standard type of s.311 arrangement with the creditors, the employees will have a vote as creditors, which they can exercise for or against the proposed scheme according to their best interests. I do not think that the legislature intended to take that opportunity away from them or to preclude the opportunity for compromise afforded by s.311. In this case it was open to the dismissed employees, as creditors to seek to persuade, first the majority in the creditors meeting, and, secondly, the High Court, that disputes such as the dismissal disputes be referred to arbitration. They did not do so.

[36] It is so that the provisions of a particular scheme of arrangement may offend against the Labour Relations Act in a respect which escapes the attention of the Judge who sanctioned the scheme. That situation does not arise here in a material way.

[37] I am therefore of the opinion that the rights of the dismissed employees to bring reinstatement proceedings for their dismissal fell within the definition of a “claim” in the scheme and that their rights to arbitrate such claims were extinguished by the sanctioning of the scheme.

[38] If the 64 dismissed employees had a claim then such had to be dealt with in terms of the scheme of arrangement. In *Serein Investments(Pty) Ltd v Myb (Pty) Ltd* 1967 4 (SA) (C) 438, Diemont J said:

“Whereas previously a creditor had the right to sequestrate the company and look to the liquidator to pay him a dividend in due course, he is obliged now to sit back and wait for the provisional

liquidator or receiver to implement the terms of compromise. The compromise is binding upon and unimpeachable - even if he did not vote for it - until such time as it has been set aside. If he disapproves of the method of distribution as being in conflict with the terms of the compromise, he may have a remedy against the receiver. He may even be entitled to ask the Court to set aside the compromise - this is an issue that was not argued and I express no final view on it”.

[39] Any claim they had lay against the receiver under the scheme and if there was a dispute such had to be referred to the High Court as I have mentioned. For this additional reason the third respondent had no right to seek private arbitration. The agreement concluded between appellant and the third respondent on 29 August providing for the taking over of the existing procedural agreement, does not take the matter any further. That the recognition agreement was resurrected did not mean that the claims by the dismissed workers were given new life. At best for the third respondent it provided for the same mechanisms to be available for workers dismissed after that date.

[40] It seems to me that the award of the commissioner is clearly reviewed on a number of grounds. The commissioner found that a dismissed employee “should not be disbarred from establishing a claim for the purposes of enforcing it against the insolvent estate of his employer by following the arbitration route”. Secondly he found that there was no indication in the Companies Act or the scheme “that existing procedural rights contemplated in the [recognition] agreement to resolve dispute of right through arbitration have been terminated”.

[41] The commissioner focussed on the continued existence of the recognition agreement and failed to properly appreciate the implications of the adoption of the scheme of arrangement. He failed to appreciate that the rights of the dismissed employees fell within the definition of a claim in the scheme. For the reasons set above it is clear that those conclusions were materially defective. The award was not justifiable as to the reasons given and there were material legal and factual errors in the reasoning process that one must conclude that

there was no fair trial of the issues and that a gross irregularity of the latent type has taken place. See *Toyota South Africa Motors (Pty) v Radebe and Others* [2000] 3 BCLR 243 (LAC) at 250A-C and 257H-I. It can also be said that the award was not rationally related to the purpose for which the power was given from an objective point of view. See *Shoprite Checkers (Pty) Ltd v Ramdau NO and Others* 2001 (4) SA 1037 (LAC) para [26].

[42] This appeal raised issues of some complexity and justified the employment of two counsel. Success for the appellant must, therefore, include such costs.

[43] In the result:

- a. the appeal is upheld with costs, including those consequent upon the employment of two counsel;
- b. the judgment of the court a quo is set aside and replaced with the following order:
 - (i) “the Award of the second respondent is hereby set aside.

(ii) The third respondent is ordered to pay the costs of this application”.

NICHOLSON JA

I agree.

ZONDO JP

I agree.

COMRIE AJA

Appearances:

For Appellant: Adv. S.K. Tip SC with Adv. A.T. Myburg.

Instructed by: Pierre Naude and Associates

For Respondent: Adv. M. Pillemer SC

Instructed by: Channels Albertyn and Tanner

Date of Hearing: 11 June 2002

Date of Judgment: 11 December 2002