

SOUTH AFRICA / JUDGMENT

Morris NO v Airomatic (Pty) Ltd. t/a Barlows Airconditioning Company (327/88) [1989] ZASCA 163 (29 November 1989) [1989] ZASCA 163

COURT

Supreme Court of Appeal

BEFORE

Hoexter, Smalberger, Milne, Steyn, Eksteen

CASE / FILE NUMBER

327/88

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Case No 327/88/wlb

SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the appeal between: DAVID ALEXANDER MORRIS N.O. Appellant and AIROMATIC (PROPRIETARY) LIMITED t/a BARLOWS AIRCONDITIONING COMPANY Respondent
CORAM: / HOEXTER, SMALBERGER, MILNE, STEYN et EKSTEEN JJA Date of
Hearing: 19 September 1989 Date of Judgment: 29 November 1989

JUDGMENT

MILNE JA/

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MILNE JA: A company called REMFA (PROPRIETARY) LIMITED [the company] was put into provisional liquidation with effect from 18 April 1985. While the company was still under provisional liquidation, a Scheme of Arrangement and Offer of Compromise [the scheme] was submitted to the provisional liquidator. Pursuant to an order of court, separate meetings of creditors were held. The requisite majority was obtained and the scheme was sanctioned by the court in terms of s 311 of the Companies Act No 61 of 1973 on 20 August 1985, and the company was discharged from provisional liquidation.

(The order was duly registered in terms of s 311(6) on 28

August 1985.) The scheme made provision for the appointment of the appellant as Receiver to administer it. The appellant, having been duly appointed, issued summons against the respondent in the court a quo claiming an order that "the return" of certain goods by the company to the

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respondent be "set aside" on the ground that the transactions, in terms of which the goods were returned by the company to the respondent, were voidable in terms of the provisions of s 29 of the Insolvency Act, No 24 of 1936. The appellant claimed delivery of the goods, alternatively their value, which was alleged to be the sum of R27 384.

The respondent excepted to the appellant's claim on the ground that the particulars of claim failed to disclose a cause of action. On the morning on which the

exception was heard, counsel for the appellant (not being counsel who had drawn the particulars of claim) applied for an amendment. It was agreed that if the court a quo came to

the conclusion that the amended claim disclosed a good cause of action, the amendment should be allowed and the exception dismissed. If the court came to the conclusion that the

amended pleadings did not disclose a cause of action, it

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should allow the exception and make an appropriate order for the continuation of the proceedings. The exception was upheld and the appellant, with leave of the court a quo, appeals against the upholding of the exception.

It was common cause that, for the purpose of deciding the exception, the correctness of the following allegations had to be assumed:

1. The respondent sold and delivered certain goods to the company.
2. During the period 15 March 1985 to 1 April 1985 the company returned certain of the goods to the value of R27 384 to the respondent.
3. Immediately after the return of these goods, the liabilities of the company exceeded the value of its assets.
4. The return of the goods by the company to the

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respondent constituted a disposition by the company of its property which would have had the effect of preferring the respondent above one or more of the other creditors of the company, had the company not been discharged from provisional liquidation.

5. At the date of provisional winding-up of the company, the respondent was a creditor of the company in the sum of R10 220,70 (being the balance of the purchase price of the goods after deducting the cost of the returned goods).
6. After the scheme was sanctioned, the respondent proved a concurrent claim for the sum of R10 220,70 in accordance with the provisions of the scheme.
7. The ground upon which the company was provisionally wound up was that it was unable to pay all its debts within the meaning of s340 of the Companies Act.

The court a quo considered that the exception

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raised two points:

"The first is the competence of the parties to a compromise to invest the receiver with the power to apply to the court to set aside a transaction under s 29 of the Insolvency Act, and the court's competence to make this order at his instance. The second involves an examination of the terms of this compromise to see whether it in fact authorises the receiver to take proceedings in terms of s 29."

These points are indeed raised by the exception but, as will become apparent, they are not, with respect, the only matters which arise for decision in this case.

JONES J (with whom JANSEN AJ concurred) came to the conclusion that the terms of the scheme did not, in fact, authorise the receiver to take proceedings under s 29, holding that the terms of the scheme were not distinguishable from those under consideration in *South African Fabrics Ltd v Millman N.O. & Another* 1972(4) SA 592 (A) and *Lansdown N.O. v Baldwins Ltd* 1973(3) SA 908 (W).

I am inclined to doubt whether the court a quo was-

right in coming to this conclusion. It was, with respect,

wrong in holding that the effect of the SA Fabrics case was:

"... to limit the powers given to the receiver in a compromise to those powers which are necessary for him to carry out his function to receive, consider and investigate the creditors' claims."

It is quite correct that in that case the court held that the terms of the offer of compromise which were there being considered did so limit the power of the receiver, but it decided that as a matter of construction of the particular offer of compromise under consideration and not as a matter of law. The relevant provisions of the offer of compromise

in that case, after dealing with proof of claims by creditors and the right of the receiver to reject any claims, provided in a separate sub-paragraph that

"the receiver shall, subject to the foregoing, have the same powers *mutatis mutandis* as he would have had as judicial manager (read liquidator) of the company on the winding-up ...".

It was crucial to the decision that, under the offer of

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compromise there under consideration, the company became re-vested with its assets and the management of its own affairs and that the receiver's function related solely to a determined fund of R390 000 and

"... the essence of the receiver's function is to admit or reject proffered claims and ultimately to distribute the R390 000 pursuant to clause 2 of the compromise

(per OGILVIE THOMPSON CJ at p 600E). The learned Chief

Justice then continued at 600E-G

"Quite apart from the question of whether it is competent contractually to invest an individual with certain of the powers conferred by statute upon a liquidator (see *South African Board of Executors & Trust Co (in Liquidation) v Gluckman* 1967(1) SA 534 (AD) at p541), it would for instance, in my view, be contrary to the whole concept of the compromise to construe the opening words of clause 3(b) thereof as investing the receiver with the right, under secs. 29 and 30 of the Insolvency Act, 24 of 1936

- rendered applicable by secs. 181 et seq of the Companies Act -to set aside one of Gurlee's already completed transactions as a voidable or undue preference."

Similarly in the *Lansdown* case, the offer of compromise

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provided that the company became re-vested with its assets and the management of its own affairs. There also, the plaintiff was to distribute the amount of R22 500 which was to be paid in by the offeror, and the clause in the offer of compromise which gave the receiver "all the same powers *mutatis mutandis* as he would have had as liquidator of the company on a winding-up" was preceded by the words "subject to the foregoing". It is clear that the basis upon which TRENGOVE J 'arrived at the conclusion which he did, was his finding that the authority conferred upon the receiver

investing him with the powers of a liquidator on a winding-

up was, qualified by the words "subject to the foregoing"

and "*mutatis mutandis*". See p 912F-G. The effect of this qualification was that although the receiver was given the powers of a liquidator on a winding-up

"... he was given those powers simply to the extent that they were necessary to enable him to carry out his functions in relation to the receipt, consideration and

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investigation of creditors' claims unpaid as at the date of provisional liquidation."

I turn now to examine the terms of the scheme. It

is divided into four parts: the first part is described as the offer and there are three schedules. The first schedule defines the terms used in the other parts of the scheme. The second schedule deals with proof of claims and the third schedule deals with powers of the receiver. Clause 1 of the offer provides that

"In this Offer, unless inconsistent with the context, the words and expressions set forth in the First Schedule shall have the meanings assigned therein."

Both the second and third schedules commence with the words

"This Schedule shall be deemed to form part of the OFFER to which it is annexed".

Clause 2.1 of the offer provides that upon acceptance and

sanction thereof the offeror is to pay to the receiver the capital sum. The capital sum is defined in the first

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schedule as the sum of R122 500 plus the face value of loan

levies and pre-paid taxation at the "fixed date" which is defined as 5 June 1985. Clause 2.2 of the offer provides that the capital sum, together with the amount realised with regard to the "excluded assets" is to be applied by the receiver in the order of preference there set out.

"Excluded assets" are defined in the first schedule as

"Certain assets being cash on hand collected by the LIQUIDATOR prior to the close of business on the 4th day of June 1985, any claims which might arise against any party in terms of Sections 26 , 29 , 30 , 31 and 32 of the Insolvency Act and as is dealt with in Clause 15 in the Third Schedule hereto, certain bad book debts as per list already agreed to between the OFFEROR and the LIQUIDATOR".

(It is common cause that this definition of "excluded assets" must be read as if the word "and" appeared between the word "hereto" and the word "certain"). The first schedule defines "assets" as

"All and every asset of the COMPANY except for excluded assets hereinafter provided, possessed by the COMPANY

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at the FIXED DATE consisting in the main of fixtures, fittings, plant and machinery, and book debts (accounts receivable) plus cash on hand collected by the LIQUIDATOR after the FIXED DATE, stock-in-trade and raw materials."

The first schedule also defines the word "claims" as

"Any and all legally valid claims against the COMPANY of whatsoever nature ..."

(and then follows a wordy recital of what is to be included

in such claims). Clause 4.5 of the offer provided that

"..simultaneously with Sanction of the OFFER and on the date of Sanction, the Provisional Liquidation or Winding-Up Order (as the case may be) be withdrawn and the COMPANY discharged from such Order and is revested with all its assets."

In view of the definition of "assets" the "excluded assets" were not included in the assets which revested in the company.

Clause 16 of the offer provided that subject to-12-

the other terms of the offer, the provisions contained in the second schedule were to govern the procedure relating to

proof of claims. Clause 17 of the offer provided that

"Subject to the other terms of this Agreement, the provisions contained in the Third Schedule shall govern the duties and powers of the RECEIVER."

The third schedule, after the provisions already

mentioned deeming it to be part of the offer, recites the powers of the receiver commencing with the following words

"In addition to any powers conferred upon the RECEIVER in terms of this OFFER or otherwise, and without in any way restricting the generality of these or any of the hereinafter mentioned powers, the RECEIVER shall have such powers as are permitted or allowed by Law including, inter alia:-"

They follow sixteen clauses setting out the powers of the receiver. In clause 6 the receiver is given power

"To adjudicate upon the claims of creditors including the right to demand delivery or (of?) any securities held by any creditor and the right to agree upon or dispute any claim and/or the preference or security of

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any claim."

This seems unnecessary in view of the fact that the second schedule provided, also in clause 6, that the receiver had the power to reject claims "... either wholly or in part or as to any security or preference or as to the valuation of any security ...". The appellant contends that clauses 15 and/or 16 of the third schedule, particularly when read with the definition of "excluded assets", conferred the power upon the receiver to take the action which he did take insuing the respondent. These clauses read as follows:

"15. Notwithstanding anything to the contrary herein contained, the RECEIVER shall have the same powers mutatis mutandis as he would have had as final LIQUIDATOR of the COMPANY upon its compulsory winding-up on the grounds of inability to pay debts, not merely to adjudicate upon and admit or reject in whole or in part any preference or security claimed but also specifically to investigate and take any action in respect of any of the claims of all classes of creditors proved and if necessary, prior to make (sic) any distribution but in terms of the OFFER, to investigate and take any action for the purpose of

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pronouncing upon the legal validity of any claims which he might deem to be necessary in terms of the provisions of Sections 26, 29, 30, 31 and 32 respectively of the INSOLVENCY ACT including and without affecting or in any way limiting the generality of the foregoing, to set aside and take steps to set aside preferences and securities and claims of creditors to the COMPANY in whole or in part as at the date of Provisional Liquidation of the COMPANY and to conduct examinations and enquiries in terms of the relevant provisions of the ACT, as if the COMPANY was at any such stage in Final Compulsory Liquidation.

16. Anything to the contrary herein contained notwithstanding, the RECEIVER shall be obliged to realise all the EXCLUDED ASSETS insofar as the

same are capable of realisation and for this purpose shall have the same powers mutatis mutandis as he would have had as Final Liquidator of the COMPANY upon its compulsory winding-up and without in any way limiting the generality of the foregoing, to remit any monies or other rights to the Republic of South Africa from anywhere in the world; to call upon persons indebted to the COMPANY to pay their debts within a period and at a place mentioned and if any person fails to do so, to recover payment from that person (if need be, by legal proceedings in any country in the world) if in the opinion of the RECEIVER there is a reasonable prospect of recovery of such debts."-15-

It is clear that there are vital differences between the scheme and the offers of compromise under consideration in the SA Fabrics case and the Lansdown case, *supra cit*. In the first place, the company is not re-vested with all its assets because the "excluded assets" are excluded. (The right of a liquidator to set aside impeachable transactions is not an asset of the company, but that is by the way.) Secondly, what has to be distributed in this case is not only the capital sum, namely R122 500, but also "— the amount realised with regard to the excluded assets ...". Furthermore, in sharp contrast to the words "subject to the foregoing" which appeared in both the SA Fabrics case and the Lansdown case, clauses 15 and 16 in the instant case commence with words which

enlarge rather than qualify what follows: in the case of clause 15 with the words "Notwithstanding anything to the contrary herein contained," and in the case of clause 16 "Anything to the

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contrary herein contained notwithstanding,". I cannot therefore, with respect, agree with the reasons of the court a quo for finding that the terms of the scheme did not clothe the receiver with the powers necessary to enable him to bring the action which he did.

That is unfortunately, however, not an end of the

matter because there are, to say the least of it, serious difficulties in ascertaining the correct construction to be

put upon clauses 15 and 16. Had clause 16 stood alone, the interpretation of

the scheme would have been simpler. The obligation contained in that clause to realise all the excluded assets

"insofar as they are capable of realisation" necessarily

implies a duty to do so and the definition of "excluded assets" where it refers to "... any claims which might arise

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against any party in terms of sections 26, 29, 30, 31 and 32 of the Insolvency Act..." seems to envisage the very kind of action that the appellant instituted. The difficulty is, however, that the words which follow immediately after the reference to these sections in the definition of "excluded assets" refer specifically to clause 15 of the third schedule and not clause 16, and there is no claim for rectification. (It is common cause that the words "and as is dealt with in Clause 15 in the Third Schedule hereto" relate to "any claims which might arise against any party in terms of Sections 26 etc." and not to the words "certain bad

book debt's as per list already agreed etc") The words once

used by SELKE J to describe a pleading namely, "an unparagraphed riot of allegation" come to mind when one scrutinises this clause. The respondent contends that, in effect, the whole of this clause is concerned with powers of

the receiver in dealing with claims against the company. This contention is supported by the definition of "claims"

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in the first schedule which, as already mentioned, defines them as "claims against the COMPANY of whatsoever nature". Furthermore, the words "... the same powers mutatis mutandis as he would have had as Final Liquidator of the COMPANY upon its compulsory winding-up on the grounds of inability to pay its debts ..." clearly relate to the specific powers which then follow. The first of these powers is to adjudicate upon and admit or reject, in whole or in part, any

preference or any security claimed. This clearly refers to

a claim against the company. The second power is to

investigate and take any action in respect of any of the

claims of all classes of creditors proved (which in terms

refers to claims of creditors against the company). The third power which follows, as it were in the same breath, is to "... investigate and take any action for the purpose of pronouncing upon the legal validity of any claims which he might deem to be necessary in terms of the provisions of

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Sections 26, 29, 30, 31 and 32 respectively of the Insolvency Act ...". I thought, at first, that one would have to read the words "... for the purpose of pronouncing upon ..." as if they read "for the purpose of obtaining a pronouncement upon ..." but I am no longer certain that this is correct. It would be quite possible for the receiver, without going to court, to pronounce upon the validity of a disposition of property not made for value which was uncompleted 'by the insolvent in terms of s 26(2) of the Insolvency Act. In fact, in the SA Fabrics case supra it

was held by this court at p 600 in fin to 601D that such a

power had indeed been conferred upon the receiver by the

terms of the offer of compromise there under consideration. Sections 29, 30 and 31, however, deal with the powers of the court to set aside impeachable transactions of the kind

there specified and s 32 deals with proceedings

instituted for that purpose. In the Lansdown

case supra the offer of compromise gave the

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receiver the specific power "... to investigate and take any action which you may deem to be necessary in terms of the provisions of sections 29, 30, 31 and 32 of the Insolvency Act ...".

Nevertheless, the court held that the receiver was entitled to avail himself of these powers only insofar as was necessary to enable him to fulfil his function as receiver in respect of creditors' claims submitted to him. The fourth power which is included in clause 15 of the instant case is a power "... to set aside and take steps to set aside preferences and securities and claims of creditors

to the COMPANY in whole or in part as at the date of

Provisional Liquidation of the COMPANY " Here again I

was inclined, at first, to think that the phrase "and claims of creditors to the COMPANY" must be read as "claims of creditors of (or against) the company" but I am no longer certain. The words "claims of creditors to the COMPANY" may, in the context, mean "claims of creditors presented to

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the company".. The difficulty about this construction is that it involves a tautology since the first power referred to above, includes a power to reject any preference in respect of a claim against the company. This is not a particularly potent argument, however, when one realises that there are already two other clauses which also give the receiver power to reject the preference claimed by a creditor in claims against the company. The first is in clause 6 of the second schedule and the second is in clause 6 of the third schedule. Furthermore, if one gives to

clause 15 the meaning which the appellant seeks to give it,

what was the purpose of the first part of clause 16 of the third schedule? I am inclined to think, however, that the definition of "excluded assets" and in particular the words "as is dealt with in Clause 15 in the Third Schedule hereto" indicate that it was intended to clothe the receiver with power to bring proceedings of the nature which he has

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brought.

It is, however, unnecessary to decide this point as I have come to the conclusion that there are other grounds upon which the appeal must fail. The first relates to the particular terms of the scheme, and the second relates to the question of whether the terms of an offer of compromise, sanctioned in terms of s 311 of the Companies Act, can validly apply the provisions of s 29 of the Insolvency Act, read with s 340 of the Companies Act, (or terms having the same effect as those provisions), to persons who would have been subject to such provisions had the company been in the process of being wound up, despite the fact that it is not being wound up.

The latter question is crisply raised in certain obiter dicta of the court a quo. The learned judge, who

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gave the judgment of the court a quo, while fully appreciating that it was not necessary for him to do so, expressed his views as follows:

"The excipient's argument on this point is based upon two propositions which are, I think, unquestionably correct. The first is that where the Insolvency Act - rendered applicable by sections 339 and 340 of the Companies Act - gives a liquidator a special right of action under section 32, to be exercised by him in nomine officii, he cannot transfer that right to another by

way of cession (*South African Board of Executors and Trust Company Limited v Gluckman* 1967(1) SA 534 (AD) 541F-542A). The second is that it is not possible in law for the parties to a compromise to invest the receiver with exactly the same powers which a liquidator is given when a company is being wound up, without any limitations or qualifications whatever. This really arises out of the first proposition. It is a logical extension of the principle in *Gluckman's* case, and *Gluckman's* case is frequently cited as authority for it. See, for example, the *South African Fabrics* case supra at p 600F and the *Lansdown N.O.* case supra at p 913F. Mr Solomon submits that the principle in *Gluckman's* case precludes the transfer of a liquidator's right of action under section 29, not only by way of cession but by way of any other type of contract as well. It follows that that right cannot be conferred by contract upon a person who is not a

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liquidator. This also arises from the wording of sections 29 and 340 which sets the preconditions which must be established before the Court has the power to impeach already completed transactions. These preconditions restrict the Court's power to set aside such transactions to cases where the company which made them is in fact being wound up. The conclusion is that the parties to a compromise cannot invest the receiver with the right to apply to the Court to set aside a transaction under section 29 because it is futile to empower him to ask the Court to do something which it cannot do (*Gunn and Another N.N.O. v Victory Upholsterers (Proprietary) Limited* 1976(1) SA 127 (D) at p 135D). This argument is logical and convincing. I am quite satisfied that it disposes of the matter entirely on the unamended pleadings. But does the same conclusion necessarily follow where an allegation is made that the defendant who benefited by the transaction to be impeached is also a party to the compromise and a creditor whose claim is directly related to the transaction to be impeached? It is one thing to say that because a liquidator may not transfer rights of action specially conferred upon him by the Insolvency Act for the benefit of creditors, creditors may not achieve the same result in terms of a compromise and the Courts will not enforce their attempts to do so. It is quite another thing to say that under no circumstances may creditors agree amongst themselves to pay in the value of assets they have already received in a pre-compromise transaction where the disposition of those assets to them would have been voidable under section 29 if liquidation and not a compromise had followed.. In these circumstances the

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Court is not being asked to enforce a right of action at the instance of a receiver which is specially conferred by statute on a liquidator and which may only be exercised by him. The source of the receiver's

authority and the creditors' rights and obligations is contractual, and the Court is merely being asked to exercise its ordinary power to enforce a contract in the event of a breach. Is there any reason why it should not do so? This would depend upon the terms of the compromise itself. If it provides for an arrangement between the creditors with identical consequences, as between themselves, as those produced by section 29 on winding up I am unable to find anything in the

wording of the Insolvency Act or the Companies Act, or in the reasoning underlying the Gluckman decision, which prevents them from doing so. I do not accept that a receiver who seeks to impeach an already completed transaction in these circumstances is really administering the affairs of the company. The company is no longer involved. The receiver is doing no more than using the machinery of the compromise to enforce rights and obligations created by the compromise. It may be that in invoking the provisions of section 29 *mutatis mutandis*, he increases the amount of the fund to be received and administered, but this - is permissible if the compromise provided for it. It is not as if the receiver and the general body of creditors are seeking to do something under the guise of a compromise which they cannot do, as for example giving the receiver the power to set aside a transaction between the company and somebody who is not a party to the compromise, which is the factual situation to which the remarks in the Gunn case *supra*

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at p 135D refer. They are also not seeking to do something which is illegal, or immoral, or impossible, or contrary to the express provisions of a statute. On the contrary, I think the parties should be encouraged to organise their compromise in such a way as to prevent as far as this is possible any one creditor from enjoying a preference over the others by reason of pre-compromise transactions. This kind of arrangement has already been recognised in the analogous case of a pre-compromise disposition without value. The effect of the South African Fabrics case *supra* at p 601A-603B is that creditors may validly invest their receiver with substantially the same power as a liquidator would have under section 26(2) of the Insolvency Act, which prevents claims arising out of a disposition not made for value from competing with the claims of creditors in the insolvent estate. Subject to the terms of the compromise I can see no reason why the receiver should not also have the power to apply to Court to enforce his decision in respect of dispositions without value; or, to set aside a mortgage bond, pledge or cession of book debts as an undue or voidable preference; or to recover assets or their value for the same reason. This is because all of the creditors, including the creditor against whom the relief is sought, have agreed to submit to the claim. The difficulty raised in Gluckman's case *supra* at p 541H relating to stultifying the rights of other creditors or multiplicity of suits does not arise."

The learned judge was clearly correct in saying that the effect of s 29 of the Insolvency Act and s 340 of the Companies Act is to restrict the Court's power to set aside

such transaction to cases where the company is, in fact,

being wound up.

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Section 340 of the Companies Act provides as

follows:

"(1) Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall mutatis mutandis be applied to any such disposition. (2) For the purpose of this section the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be -

- (a) In the case of a winding-up by the Court, the presentation of the application, unless that winding-up has superseded a voluntary winding-up, when it shall be the registration in terms of section 200 of the special resolution to wind up the company;
- (b) . . .;
- (c) ..."

The dispositions referred to in this section are those which are dealt with in sections 26, 29, 30 and 31 of the Insolvency Act. S 26 deals with a disposition not made for value, s 29 with a disposition which has had the effect of

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preferring one of the insolvent's creditors above another,

s 30 deals with a disposition made by the insolvent with the

intention of preferring one of his creditors above another, and s 31 with collusive dealings between the insolvent and any other party which have had the effect of prejudicing the creditors of the insolvent or preferring one of his creditors above another. S 32 of the Insolvency Act provides that:

"(1) Proceedings to set aside any disposition of property under section twenty-six, twenty-nine, thirty or thirty-one, or for the recovery of compensation or a penalty under section thirty-one, may be taken by the trustee. If the trustee fails to take any such proceedings they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof."

Sub-section (3) of s 32 provides that

"When the Court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the

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disposition or at the date on which the disposition is set aside, whichever is the higher."

I interpose here to draw attention to the provisions of s

31(2) which make it clear that any person who was a party to a collusive disposition in terms of s 31(1) is liable to make good any loss caused thereby to the insolvent estate and also to pay a penalty. It is clear that such a person need not necessarily have been a creditor of the insolvent at any material time. This becomes significant when one

considers whether such provisions can validly be applied by means of a compromise in terms of s 311 of the Companies Act.

It is clear that sequestration of the insolvent is a prerequisite to the exercise by the court of its powers under sections 26, 29, 30 and 31. S 2 of the Insolvency Act defines "sequestration order" as "any order of court whereby an estate is sequestrated and includes a provisional order,

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when it has not been set aside." Similarly s 340 of the Companies Act refers to dispositions by companies "in the event of the company being wound up ..." and s 1 defines a "winding-up order" as "... any order of court whereby a company is wound up and includes any order of court whereby a company is placed under provisional winding-up for so long as such order is in force."

The court a quo, however, suggests that this problem may be overcome if "... creditors agree amongst

themselves to pay in the value they have already received in

a pre-compromise transaction where the disposition of those

assets to them would have been voidable under s 29 if liquidation and not a compromise had followed". In these circumstances, so it is suggested, "the source of the receiver's authority and the creditors' rights and obligations is contractual, and the Court is merely being

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asked to exercise its ordinary power to enforce a contract in the event of a breach." (For ease of reference, I shall call this the reasoning on the second part of the case). There are, with respect, a number of difficulties in the way of this reasoning. The first is that the scheme does not contain provisions to this effect. (That is what the court a quo held, but for reasons which I have already held, are not valid). Assuming (as I am inclined to think is the case) that the scheme does purport to confer the same powers on the receiver as the final liquidator would have had if the company had been wound up, that would not include the

power to set aside a disposition of the kind referred to in

s 29. The Court, and only the Court, has that power. Nor does the scheme purport to confer on the receiver the power which the Court would have had to set aside such a disposition had the company been wound up. Nor does the

scheme purport to confer upon the Court the power to set

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aside a disposition which would have constituted a preference in terms of s 29 had the company been in the process of being wound up despite the fact that it was not being wound up.

Nevertheless, the appellant, in his particulars of claim, alleged that the return of the goods by the company to the respondent had the effect of preferring the respondent above one or more of the other creditors of the company and "in the premises, and in terms of the provisions of s 29 of the said Insolvency Act, the transactions in terms of which the returned goods were returned to the defendant were voidable." An order was

accordingly claimed directing that the return of the goods

(presumably this should be a reference to the transactions

under which they were returned) be set aside.

The appellant's counsel sought to overcome this difficulty by submitting that the court should imply a term

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in the scheme to the effect that the court would have power to set aside such transactions in terms of sections 29 and 32 read with s 340 despite the fact that the company was not being wound up. No such term was pleaded. Quite apart from any other difficulties, however, this assumes that (a) one is dealing with a contract and nothing else and (b) it is a contract to which the respondent was a party. These assumptions are also implicit in the reasoning of the Court

a quo on the second part of the case. For reasons which

will become apparent neither of such assumptions is correct.

There is a substantial body of authority to the

effect that a duly sanctioned offer of compromise is to be

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regarded as having the status of a contract at least for certain purposes. See *Cohen N.O. v Nel & Another* 1975(3) SA

963 (W) at 968F, *Ex Parte Ensor N.O.: In Re Cape Natal Litho*

(Pty) Ltd 1978(3) SA 908 (D) at 911A-D and *Ex Parte Kaplan & Others N N.O.: In Re Robin Consolidated Industries Limited* 1987(3) SA 413 (W) at 419C. Nevertheless it may, and not

infrequently does, lack what is normally regarded as an essential characteristic of a contract, namely, the consensus of all the parties said to be bound by it. As FRANKLIN J said in *Cohen's case* supra at p 968-9:

"... the South African authorities to which I have referred establish that it [a sanctioned compromise] is a contract which is binding on ail the creditors, the members, the company, the receiver and the offeror,. which derives its binding effect not from the actual consent of all the creditors , but by operation of law once the provisions of sec. 103 have been complied with." (my underlining)

Furthermore the court does not, ordinarily speaking, have power in the absence of consent of all the parties to modify

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the terms of a valid contract. It has been held, however, that the court has power, albeit a limited one, to modify the terms of the compromise for the purpose of rendering it effective or more effective. See Investments (Pty) Ltd v Crown Furniture Manufacturers (Pty) Ltd 1963(2) SA 271 (W) at 273C-G, Ex Parte Bobat: In Re Kathorian Trading Co (Pty) Ltd 1965(2) SA 291 (D) at 295C, Penkin & Another v RoelandShoes (Pty) Ltd & Others 1972(1) SA 513 (C) at 517E and ExParte Trakman N.O.: In Re Dumbe Motel (Pty) Ltd 1978(1) SA 1082 (N) at 1087A. Furthermore, since such compromises are

invariably conditional upon their being duly sanctioned by the court, it could not be said that there was a binding

contract between the offeror and the majority (even if therequisite majorities voted in favour of the offer ofcompromise) if the court refused to sanction it. In anyevent, it seems to me artificial to speak of creditors whohave voted against the acceptance of an offer of compromise

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as having contracted in terms thereof and equally artificialto speak thus of persons who have not attended the meetingsof creditors for one reason or another. As a matter offact, although the record is silent on this point, we were

informed (by ágreement of counsel) that the respondent wasnot represented at any of the meetings of creditors to whichthe scheme was submitted for approval. I accordinglydisagree with the remarks of the learned judge a quo that

"It is not as if the receiver and the general body of creditors are seeking to do something under the guise of the compromise which they cannot do, as for example giving the receiver the power to set aside a transaction between the company and somebody who is not a party to the compromise ...",

nor can it validly be said that there is no objection to the receiver applying to court

"... to enforce his decision in respect of dispositions without value ... because all of the creditors including the creditor against whom the relief is sought, have agreed to submit to the claim."

S 311(2) provides that, if the requisite majority of all the

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creditors agrees to the compromise or arrangement, it shall, if sanctioned by the court, be binding on all the creditors. It does not say that they shall be deemed to have agreed thereto. As COETZEE DJP put it in *Ex Parte Kaplan N N.O.* supra cit at 419C:

"Because the purpose of the section is to create machinery to bind a dissenting recalcitrant minority to the agreement between the company and the majority, 'agreement' would have been inapposite to describe the result."

There is, therefore, no basis upon which the term sought to be

implied can be implied. For all the foregoing reasons it follows that the allegations in the appellant's particulars of

claim are inadequate to sustain the cause of action.

There is, however, a further objection to this

notional incorporation of provisions equivalent to the provisions of sections 26, 29, 30 and 32, and that is, that creditors are bound by the scheme in respect only of those claims which constitute them creditors; not in respect of

claims which have been satisfied before liquidation.

This objection was not raised in argument and

-37- counsel were accordingly requested to submit supplementary heads of argument upon the following questions:

A. Would it be correct to say that a compromise or an arrangement duly sanctioned by the Court in terms of s 311 of the Companies Act 61 of 1973, is binding on creditors in respect only of those claims by virtue of which they are or claim to be creditors at the time of acceptance of the offer of compromise (or, in this particular case, possibly at "the fixed date" or the date of provisional liquidation), but not in respect of claims which had been satisfied prior to the provisional liquidation? B. If the answer to A is in the affirmative, whether it would be correct in this case that the offer of compromise is accordingly binding upon the respondent in respect only of its claim for R10 000? (This should have been, in fact, R10 220,70).

Counsel have now submitted supplementary heads of -38-

argument and we are indebted to them for their assistance. Perhaps not surprisingly, it is submitted on behalf of the appellant, that the answer to both questions is in the negative and on behalf of the respondent that the answer to both questions is in the affirmative.

On behalf of the appellant it is submitted that since, in terms of s 311(2) the compromise after sanction is binding "on all creditors", the compromise means just that i.e. that it is binding on all persons who are creditors at

the time of liquidation. The words used in the section are

certainly of wide import but it is necessary to examine what they really mean in the context in which they are used. Obviously, a scheme when sanctioned, is binding on creditors only if the requisite majority has been obtained in each class of creditor sought to be bound by it. As WESSELS JA said in *Barclays National Bank Ltd v H J de Vos Boerdery*

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Ondernemings (Edms) Bpk 1980(4) 475 (A) at 481F:

"... where (as in this case) two classes of creditors are concerned, namely concurrent and secured creditors, and the requisite majority is obtained in respect of one class of creditors only, the compromise, if sanctioned by the Court, becomes binding on that class only."

In *Kleena Industries (Pty) Ltd v Senator Insurance Co. Ltd* 1982(2) 458 (W) SLOMOWITZ AJ went so far as to hold at p463G 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 a 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 put upon the terms of that compromise. This much

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appears to be conceded (at least as a notional possibility) in the appellant's supplementary heads. If this is a correct approach then, in my judgment, the terms of the scheme clearly indicate that the scheme was not intended to refer to claims which had been discharged prior to the date of liquidation. The scheme in this case defines a creditor as "any person, firm, company or other legal entity to whom the company is indebted in respect of any claim." The definition of "claim" appears to include all and any legally valid claims against the company "the cause of which arose on or prior to the fixed date". The "fixed date" was 5 June

1985, and it may be that this had the effect of including

claims which arose between 18 April 1985 and that date. It

is clear, in any event, that the scheme was not intended to

refer to any date earlier than the provisional liquidation

since it defines itself as "The compromise and arrangement proposed by the OFFEROR between the COMPANY and its -41-creditors as at the FIXED DATE".

Quite apart from the way in which this particular scheme is construed, however, it is clear, in my view, that the reference in s 311(2) to creditors can only be a reference to the claims of creditors and only to those claims by virtue of which they are, or claim to be creditors, at the date of provisional liquidation (at the earliest).

The question as to who are "creditors" for the

purposes of s 311 of the Companies Act was raised but not decided in *Ex Parte Kaplan N N.O.* supra cit at p 427-8. COETZEE DJP thought that "The word in the section is probably limited to persons having pecuniary claims, whatever the nature of their source might be." See also his remarks at p 431F as to the definition of "creditors". In

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this regard the respondent's counsel makes a telling point in his supplementary heads. He submits that

1) prima facie the word "creditors" means the same in s 311(2)(a) as it does in s 311(1);

2) with regard to s 311(1)

(i) it does not make sense to talk of a compromise between a company and a person or persons whose claims have previously been satisfied;

(ii) it would not make any sense to give a former creditor, whose claim had already been

satisfied, locus standi to make an application to Court for the convening of a meeting of creditors to consider a compromise between a

company and its creditors; and

(iii) it would not make any sense to include in the meeting of creditors those former creditors

whose claims have previously been satisfied;

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3) with regard to ss 311(2)(a) it would make no sense to

take into account the votes of former creditors whose claims have previously been satisfied, in deciding whether or not to sanction a compromise between a company and its creditors.

It can make no difference that the respondent had a claim which existed at the date of provisional liquidation (or some later date) and that it also had, previously, a claim which was satisfied before the date of liquidation.

There is no reason why it should be in a worse position in respect of its previously satisfied claim than another

creditor who had a previously satisfied claim but is not bound by the compromise because he had no claim at the date of liquidation. (I shall deal later with the suggestion

that the respondent, by lodging a claim, was "approbating" the scheme and therefore could not "reprobate" it).

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It was submitted on behalf of the appellant that if the scheme were to be construed so as to apply to creditors only in respect of claims existing at the date of liquidation "the receiver's powers to act in terms of s 26, 29, 30, 31 and 32 of the Insolvency Act would be illusory as he would not be able to recover any disposition received by a creditor prior to the relevant date." That would indeed appear to be the case, but in the absence of an express undertaking by the person sought to be bound to pay to the receiver what he would have to pay in terms of s 29 of the Insolvency Act had the company been finally wound up, I can see nothing anomalous or unfair in that result.

What is quite clear in this case is that there is no basis upon which it can be said that the respondent is, or was at the time when the provisional liquidation order was granted, or at any material time thereafter, a creditor

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of the company in respect of the goods which were returned by the company to the respondent. The particulars of claim as originally lodged did not even allege that the respondent was a creditor. The amendment makes that allegation but alleges that it is a creditor in respect of R10 220,70. That claim for R10 220,70 is the only claim of the respondent which is subject to the terms of the compromise. It was binding upon the respondent in the sense that, once the scheme was sanctioned, its rights in respect of the R10 220,70 were confined to the rights which were conferred

upon it in the scheme. At no time relevant to these

proceedings was there any dispute between the company and

the respondent with regard to the goods returned or their value. There was no question of there being either a compromise between the company and the respondent in that regard nor any arrangement between the company and the respondent in that regard. I agree with CANEY J where he

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said in *Gangapersad v Pompeni Stores (Pty) Ltd* 1956(4) SA 56

(D) at pp 60-61:

"For none of the former liabilities (those of the liquidator), it seems to me, is an offer of compromise under the provisions of sec. 103 appropriate; at any rate it is not appropriate unless the compromise be made expressly to apply to them. Creditors for this purpose (when the compromise is offered in respect of a company in liquidation) are those who were such, and for so much as was owing to them, at the date of the liquidation order. Cf the remarks of GREENBERG J in *Estate Behr v Klotz* 1926 TPD 353 at p 358 ..." (my underlining)

cf also *Simon and Another v The Assistant Master & Others*

1964(3) SA 715 (T) at 719D-F.

It may be possible to include the claims of

creditors who were such at the time of acceptance of the offer of compromise or the sanction thereof, but it certainly cannot refer to persons who had ceased to be creditors by the time the provisional order of liquidation was made.

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It was also submitted in the appellant's supplementary heads that even if the first question raised by the Court were to be answered in the affirmative, this would not have the result that the scheme is binding on the respondent in respect only of its claim for R10 220,70 because, so it was submitted,

"(i) Respondent was a creditor for R37 604,70;

(ii) In respect of this precise transaction, it received goods to the value of R27 384, leaving the said balance of R10 220,70;

(iii) The compromise is . binding on the respondent in respect of the entire contract for goods sold and delivered. Regard cannot be had only to the said sum of R10 220,70 as this would ignore the cause of action on which the said claim is based;

(iv) As the respondent is a creditor for the balance of the contract price, the offer of compromise is binding on it in respect of the contract on which the claim is based and not merely in respect of the balance of the contract price;

(v) Further, the appellant's claim is based on the identical contract;

(vi) To limit the binding force of the compromise to the balance of the

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respondent's claim would entitle the respondent to rely on the contract but would preclude the appellant from having regard thereto."

The simple answer to this is that if the scheme is not binding in respect of claims which have been satisfied prior to the provisional liquidation, then, as a matter of

logic, it is not binding in respect of so much of a claim as was satisfied prior to liquidation. It is not a creditor in respect of that portion of the claim which it previously had but only for that which is due at the date of liquidation. Furthermore, as submitted on behalf of the respondent, bearing

in mind that the binding effect of the scheme is a result of

the provisions of the statute and not the result of a contract, there is no reason why the respondent should be in a worse position with regard to its former claim of R27 384 than another person would be whose claim had also been satisfied

prior to the provisional winding-up of the company, but who

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did not happen to have an existing claim at the time of the provisional winding-up or at the time of acceptance of the offer of compromise.

It was submitted that "... having elected to prove a claim ..." in terms of the scheme (as alleged in the notice of amendment), the respondent was bound by the terms thereof. There is no substance in this point. There is no question of the respondent approving or reproaching the scheme. The scheme did not make the respondent a creditor:

it did not create the respondent's claim for R10 220,70;

the right to claim the R10 220,70 arose out of the original

contract of sale of the goods by the respondent to the company. The validity of that right was never in issue. The respondent was not a party to the scheme in the sense

that it agreed to the terms thereof. The respondent is, by operation of law, bound by such terms because the court

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sanctioned it. It was, therefore, not permitted to sue the company for the R10 220,70, nor was it entitled to exercise the rights it would have had if the company had been in liquidation. The scheme, far from creating the respondent's claim for R10 220,70, actually restricts it to whatever is payable in terms thereof. There is, furthermore, no element of inconsistency in the respondent's actions. The scheme simply has no application to the transactions involving the return of the goods by the company to the respondent.

In the words of DIDCOTT J in *Ex Parte Trakman N.O.* (supra cit) at 1084D there has in this scheme, been an indiscriminate "borrowing mutatis mutandis of a liquidator's general armoury" which has, indeed, led to "...unforeseen problems and disputes ...".

For the above reasons I arrive at the same-51-

result as the court a quo, and the appeal is accordingly dismissed with costs.

A J MILNE

Judge of Appeal

HOEXTER JA]STEYN JA] CONCUREKSTEEN JA]

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