



REPORTBALE

CASE NO: SA 30/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

REUBEN MILLER N.O.

First Appellant

ENVER MOHAMED MOTALA N.O.

Second Appellant

LINDIWE KAABA N.O.

Third Appellant

and

PROSPERITY AFRICA HOLDINGS (PTY) LTD

Respondent

Coram: SHIVUTE CJ, HOFF JA and FRANK AJA

Heard: 26 June 2019

Delivered: 30 July 2019

Summary: This is an appeal against the decision of the court *a quo* wherein the court dismissed with costs the appellants' contention that an application for the recognition is not necessary where a foreign liquidator institutes action in respect of movable assets or where such claim is based on a liquid document. The court *a quo* found that the recognition was necessary prior to the institution of the proceedings. The court *a quo* further found that without such recognition, the proceedings instituted by the appellants amounted to a nullity which could not be ratified.

Respondent in its plea raised the issue of non-recognition of the liquidators prior to instituting their action claiming R5 million against it. This prompted an application for recognition for the purposes of the action instituted about six years previously, inclusive of seeking authorisation from the court to allow the liquidators to ratify the institution of the action. In argument, appellants relied on the cases of *Bekker NO v Kotze & others*, and *Olivier NO & another v Insolvent Estate D Lidchi* to advance the point that it is not necessary for foreign liquidators to be recognised in their quest to institute action against the respondent for R5 million allegedly owed to the South African medical aid fund (which they represent) known as Renaissance Health Medical Scheme (in liquidation) by the respondent, as its guarantor and co-principal debtor.

The issues this court is tasked to determine are: (1) whether foreign appointed liquidators of a corporation in liquidation in a foreign country can institute legal proceedings prior to being recognised as such in Namibia to recover money allegedly owing to the liquidated corporation by a Namibian corporation; (2) whether the action initially instituted and the steps subsequent thereto in respect of such action up to the time of a recognition can be ratified, for if not, it would serve no purpose to recognise the appellants as the liquidators in this country, and finally (3) whether the court dealing with a recognition application in circumstances such as the present can recognise the liquidators and authorise them to ratify the previously unauthorised actions as sought for in this matter?

It is held that, the appellants (liquidators) did not have the power to institute action in this country without recognition by a court in this country.

It is held that, where a person without authority (*falsus procurator*) purports to act on behalf of another (the principal) the latter can at any stage before judgment ratify litigious acts of such false *procurator*. However Renaissance as an existing entity could not give such authority to the liquidators who act on its behalf with the powers bestowed on them (this authority is a legal requirement). The liquidators did not have the authority to institute the action in Namibia as the authority given to them did not have extra territorial effect. Based on the general principles relating to ratification and their lack of recognition by a Namibian court, the institution of the

action and the steps taken with regard to the action after institution cannot be ratified.

It is held that, the recognition order does not operate retroactively. Neither can a court authorise retrospective ratification of acts that are not capable of ratification in law.

It is thus held that, the appeal is dismissed with costs.

APPEAL JUDGMENT

FRANK AJA (SHIVUTE CJ and HOFF JA concurring):

[1] A foreign judgment has no direct operation of its own force in Namibia. By virtue of the principle of territorial sovereignty it is only of effect in the jurisdiction of the country in which it was issued. It may however, either in terms of the common law of Namibia or by virtue of a Namibian statute, in certain instances be accorded recognition and be given the same effect as if it is a judgment of a Namibian court.

[2] This appeal concerns the question whether foreign appointed liquidators of a corporation in liquidation in a foreign country can institute legal proceedings prior to being recognised as such in Namibia to recover money allegedly owing to the liquidated corporation by a Namibian corporation.

[3] As far back as in 1935 in the *Zinn*¹ case the South African Appellate Division held that 'a foreign representative' required recognition in South Africa so as to give such person *locus standi in judicio* and stated by then (1935) this was

¹ *Zinn NO v Westminster Bank Ltd* 1936 AD 89 at 99.

so 'By long and unvaried practise, illustrated by cases too numerous to cite, such plaintiff requires recognition before he can sue in our courts of law'. Even earlier, namely, in 1905 in the *Re Estate Campbell* case² recognition was granted to an English receiver whose sole duty was to collect outstanding debts in South Africa. Without such recognition, any claim a liquidator may decide to bring will not be entertained by a Namibian court.³

[4] That the above position represents the current law is borne out by reference to the standard works on the topics such as LAWSA⁴ and Mars both of whom refer to a plethora of case law in support of their stance. The latter summarises the position as follows when it comes to movable property:⁵

'If the sequestration order is granted by the court of the debtor's domicile, that order vests the debtor's movables, wherever they are situated, in that trustee. In theory that trustee need not apply for recognition to the High Courts in the Republic. As a matter of practice, however, such an application is invariably made and the need for formal recognition has been elevated into a principle.' The recognition order in these circumstances is a declaratory order regarding the foreign trustee's entitlement, subject to local requirements, to administer the assets as though they were in the relevant foreign jurisdiction from which he derives his authority. Such recognition enables the successful applicant to invoke the 'active assistance of the Court' in performing his duties effectively. It is submitted that the foreign trustee holding the sequestration order granted by the court of the debtor's domicile may reasonably expect that the South African court will exercise its discretion in favour of granting that trustee recognition for the purposes of dealing with the debtor's movable property in the Republic.

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² 1905 TS 28.

³ *Moolman v Builders & Developers (Pty) Ltd* 1990 (1) SA 954 (A) at 960B-C.

⁴ 4(3) *Lawsa* 2nd ed para 236.

⁵ Mars: *The Law of Insolvency in South Africa*: 10 ed at 736-738.

Similarly, the foreign representative of a company who wishes to deal with any of its assets located in South Africa must first apply for recognition to the High Court of South Africa. Recognition of the foreign liquidator exceeds mere acknowledgement of his foreign appointment and local representation of the company. Such recognition constitutes a declaration, in effect, of entitlement to deal with South African assets in the same way as if they were within the jurisdiction of the foreign courts, subject to the South African courts' imposition of conditions for protecting local creditors or in recognition of the requirements of South African laws.

The discretion of the court whether to grant recognition to the foreign representative is exercised on the basis of comity, convenience and equity.'

[5] The reference to South Africa in the extract from Mars cited above obviously needs to be changed to Namibia to reflect the position in Namibia. If this is done Mars also reflects the position in Namibian law correctly. It needs to be pointed out however that whereas the movable assets of an insolvent vests in the trustee, the position is not the same when it comes to the winding-up of corporations where a liquidator or receiver is appointed. Such liquidator or receiver is required to seek recognition from the court in which jurisdiction the property is before dealing therewith.⁶ A foreign liquidator whose appointment has not been recognised simply lacks the power to act in that capacity in Namibia.

[6] In the present matter, appellants are South African liquidators appointed to wind-up the South African medical aid fund known as Renaissance Health Medical Scheme (in liquidation). The appellants (as plaintiffs) instituted action against a Namibian company Prosperity Africa Holdings (Pty) Ltd for R5 million allegedly owing by the latter as its guarantor and co-principal debtor. The respondent

⁶ *Donaldson v British South African Asphalte and Manufacturing Co Ltd* 1905 TS 753 at 756-757, *Deutsche Afrika Bank (in liquidation) v National Bank of SA Ltd and the Registrar of Deeds* 1923 SWA 19, *Liquidator Rhodesian Plastics (Pvt) Ltd v Elvinco Plastic Products (Pty) Ltd* 1959 (1) SA 868 (C) at 869C-E and *Moolman* at 959H-960D.

(defendant *a quo*) in its plea raised the issue that the liquidators did not obtain recognition prior to instituting the action. This prompted an application for recognition for the purposes of the action instituted about six years previously inclusive of seeking authorisation from the court to allow the liquidators to ratify the institution of the action.

[7] In the founding affidavit of the application for recognition, the stance taken by the appellants is that the application for recognition is not necessary where a foreign liquidator institutes action in respect of the movable assets or where such claim is based on a liquid document. According to the deponent of this affidavit there are two Namibian authorities that support their stance. The court *a quo* dismissed the stance of the appellant and held that recognition was necessary prior to the institution of the proceedings. Without such recognition, the instituted proceedings amounted to a nullity which could not be ratified. As a consequence, the court *a quo* dismissed the application with costs. The appeal lies against this order with the leave of the court *a quo*.

[8] The two Namibian cases on which the appellants rely for their submission that their recognition in this country was not necessary are the *Bekker*⁷ and *Olivier*⁸ cases. Both cases involved the competency of trustees not recognised as such to litigate in this country.

[9] In the *Olivier* case, Strydom JP confirmed what is stated by Mars, namely that the foreign trustees laying claim to movables were compelled to bring an

⁷ *Bekker NO v Kotze & others* 1994 NR 373 (HC).

⁸ *Olivier NO & another v Insolvent Estate D Lidchi* 1998 (NR) 31 (HC).

application for recognition as the need for formal recognition has now been elevated into a principle.⁹

[10] In the *Bekker* case, the insolvent's estate was provisionally sequestrated in South Africa at the behest of the South African Receiver of Revenue and a provisional trustee appointed. This provisional trustee sought recognition in this country which the High Court granted. In addition, an order was granted to the provisional trustee to attach various movables and to interdict the use of certain bank accounts. The provisional order in South Africa was however not confirmed but discharged on the basis that the applicant in that country lacked *locus standi*. Thereafter the insolvent's estate was again provisionally sequestrated at the behest of the Government of South Africa and the same provisional trustee again appointed.¹⁰ The provisional trustee then again approached the Namibian High Court for a similar order as the one previously granted. Strydom JP did not recognise the provisional trustee as the 'previous recognition which was based on a provisional sequestration order clearly demonstrated why a court would only recognise final orders by a foreign court'. A temporary interdict was however granted to attach movables and to prevent transacting on bank accounts pending the appointment and recognition of the trustee to administer the estate.

[11] In the course of his judgment Strydom JP stated that: 'Where the sequestration order was given by the court of the debtor's domicile, movables, wherever situated, vest in the trustee, and in my opinion also in the provisional trustee.¹¹ As a result it was not necessary to make an order that the movable

⁹ *Olivier* at 38F.

¹⁰ *Bekker* at 374I-375I.

¹¹ *Bekker* at 377J-376A.

property vested in the provisional trustee and because of that the said trustee had the necessary *locus standi* to seek the interim relief. Further because of the vesting of the property in the trustee it was also not necessary to formally recognise such trustee for the purpose of the interim interdict.¹² The fact that it would still be necessary for formal recognition once a final trustee had been appointed is clear from the following statement by Strydom JP:

'If the provisional sequestration is confirmed and the applicant is appointed as trustee in the estate, he must then ask for recognition to deal with such assets.'¹³

[12] It follows from the above that the foreign appointed trustee in the country of the domicile of the insolvent has the necessary *locus standi* to bring a temporary interdict pending his recognition and obviously the necessary *locus standi* to bring a recognition application. What he or she cannot do is to exercise any power of a trustee prior to being so recognised. This includes the institution of legal proceedings as indicated above with reference to the *Estate Campbell* case.

[13] Thus even if a liquidator is in the same position as a trustee, recognition is necessary prior to the institution of an action as prior to that such liquidator cannot act in that capacity in this country as he or she lacks the power to do so. In any event, the position of a liquidator is not the same as that of the trustee as a company (unlike the insolvent natural person) is not divested of its movable property and the movable property of a company thus does not vest in the liquidator unless the court granting a winding-up order so decides.¹⁴ The directors of such company cease to function except in very limited circumstances not

¹² *Bekker* at 377G.

¹³ *Bekker* at 377G.

¹⁴ Section 361(3) of the South African Companies Act (section 366(3) of the Namibian Companies Act) and *Secretary for Customs & Excise v Millman NO 1975 (3) SA 544 (A)* at 552.

relevant to this matter. The custody and control of the liquidated company's property is placed in the hands of the Master until a liquidator or liquidators are appointed when this passes to the liquidator(s). The liquidator(s) must then wind-up (liquidate) the company for the benefit of the creditors and members of the company. The powers granted to the liquidator is hence also limited by and aligned with his or her task. These powers are essentially threefold. Those which he or she can exercise on his or her own, those for which authority is needed from the creditors or members or the Master and those which can only be exercised with leave of the court. To this should be added a fourth category namely; where any of the abovementioned powers is to be exercised in a foreign country, the prior recognition of the liquidator in that foreign country is necessary.

[14] From the founding affidavit in the application for recognition it appears that the liquidators were initially appointed pursuant to s 386(1)(a)(b)(c)(e) and (4)(f) of the Companies Act 61 of 1973 (South Africa). What this section provides for is not stated but I shall assume it is the same as s 392 of the Namibian Companies Act 28 of 2004 which deals with powers of liquidators. The power to institute action does not fall under the provisions mentioned in the original appointment. This power was granted to the liquidators by a South African High Court subsequent to the liquidation and is referred to as an order 'to extend the powers' of the liquidators. It follows that there was never an order that the property of the company would vest in the liquidators.¹⁵

[15] Once liquidated, the company's capacity to act was curtailed. Its directors for all practical purposes could not act for it and the only persons who could act for

¹⁵ Section 366(3) of the Namibian Companies Act 28 of 2004.

it were the liquidators who have limited powers as pointed out above. As far as litigating on behalf of the company in liquidation is concerned a South African court granted the powers to the liquidators. That court's writ only runs in that country and the liquidators thus could not and cannot litigate in this country unless the power to litigate is recognised in this country.

[16] Whereas there is an argument to be made that foreign trustees should be allowed to litigate in respect of the movable property that vests in them and that they should only need to be recognised once they wish to exercise other powers of trustees such as the calling of creditors meetings or holding of enquiries, etc as this was apparently the position prior to the practice developing to require recognition in all instances, this cannot apply to liquidators where the movable property of a company in liquidation does not vest in them. As pointed out in the extract from Mars quoted above and also referred to in the *Bekker* case, the approach in the common law prior to the practice developing the requirement of recognition of foreign trustees in all cases, was based on the fact that movables of the insolvent vested in the trustee where the debtor's court of domicile sequestrated him or her. This is not, as a general rule, the position in liquidation proceedings as pointed out above.

[17] In the *Terrace Bay Holdings*¹⁶ case, a court of this country with reference to the 3rd edition of *Henochsberg* held that the position of a liquidator is akin to an agent upon whom the Companies Act has cast special duties. As conceded in the current edition of *Henochsberg*¹⁷, this is not an apt comparison. The authority is not derived from the company, but from the Companies Act which in most cases

¹⁶ *Terrace Bay Holdings (Pty) Ltd v Strathmore Diamonds (Pty) Ltd* 1976 (3) SA 664 (SWA) at 667.

¹⁷ *Henochsberg on the Companies Act*; Vol 1, comments on s 367.

provides that authority must be obtained from sources other than the company, eg creditors or a court. I agree with the statement in the current edition of *Henochsberg* that, in relation to the company, a liquidator occupies a position that 'approximates to that of a board of directors or a managing director to whom all the directors' management powers have been delegated' with the proviso that the powers of a liquidator are obviously not as extensive as that of a board or managing director of a solvent company but are limited by the Companies Act. A liquidator is in fact the human face of a company in liquidation and the acts of the liquidator are the acts of the company. A liquidator acts instead of the company and where a liquidator acts in his capacity as such he acts for the company in liquidation.¹⁸

[18] It follows from the foregoing that the appellants (liquidators) did not have the power to institute action in this country without recognition by a court in this country and hence that the application for recognition thus needs to be considered.

[19] The relief sought in the recognition application is threefold. Firstly, to be recognised for the purposes of the proceedings (action) already pending in the High Court. Secondly, to deal with the company in liquidation's assets in Namibia. Thirdly, 'to be authorised in so far as it may be necessary to ratify all proceedings and/or actions taken or instituted' with regard to the said pending action. As for the relief sought to deal with assets in Namibia generally no evidence was produced to indicate any assets other than the claim which forms the subject matter of the pending action and nothing further needs to be said in this regard.

¹⁸ *Gainsford NNO v Tanzer Transport* 2014 (3) SA 468 (SCA) paras 14 and 15 and *Shepstone & Wylie & others v Geyser* NO 1998 (3) SA 1036 (SCA) at 1044B-C.

[20] As the recognition of the liquidators was necessary prior to them being able to institute action, the only question that remains is whether the action initially instituted and the steps subsequent thereto in respect of such action up to the time of a recognition can be ratified, for if not, it would serve no purpose to recognise the appellants as the liquidators in this country. As mentioned, the court *a quo* held that the institution of the action was a nullity which could not be ratified.

[21] The institution of the action by the liquidators was not necessarily a nullity. This is so because they instituted the action in their 'representative' capacity, ie *qua* liquidators of Renaissance. This being so, it was merely unauthorised.¹⁹ It is clear that they purported to act on behalf of the liquidated entity. Where a person without authority (*falsus procurator*) purports to act on behalf of another (the principal) the latter can at any stage before judgment ratify litigious acts of such false *procurator*.²⁰ The basic concept underlying ratification is that the principal would have been able to perform the act sought to be ratified if the principal had been present. Hence where there was no principal in existence at the time of the unauthorised act²¹ or where the principal would not have had the capacity to so act, such act cannot be ratified.²² If prior authority of the representative is required in law, such as prior written authority to enter into an agreement relating to the sale of land on behalf of a principal, a lack of such prior authority prevents ratification afterwards.²³

¹⁹ *Santam Insurance Ltd v Boo* 1995 (3) SA 301 (A) at 310G-H.

²⁰ *Santam* at 311A.

²¹ 1 *Lawsa*, 2 ed, para 110.

²² *Lawsa*, para 127.

²³ *Lawsa*, para 129.

[22] Renaissance as an existing entity could not give such authority as the liquidators act for it with the powers bestowed on them. The liquidators did not have the authority to institute the action as the authority given to them in this regard did not have extra territorial effect. The South African court could not have granted them authority as its writ does not run outside that country. It follows that the 'principal' whom the liquidators ostensibly represented did not have the capacity to institute or authorise the action and hence also not the capacity to ratify the institution of the action. Furthermore, for the liquidators to operate in this country they needed recognition. They could not exercise any powers as liquidators prior to recognition by a Namibian court. This means prior authority by an entity who by no means can be regarded as a 'principal' of the liquidators was a requirement in law. It follows, that based on the general principles relating to ratification, the institution of the action and the steps taken with regard to the action after institution thereof cannot be ratified.

[23] The only question remaining is whether the court dealing with a recognition application in circumstances such as the present can recognise the liquidators and authorise them to ratify the previously unauthorised actions as sought for in this matter. According to the legal practitioner for the appellants, there is no impediment to obtain recognition *ex post facto* as 'recognition in respect of a foregoing liquidator is not about recognising *locus standi* . . . the company in liquidation is not dissolved. It remains a person as envisaged in the Interpretation Proclamation, just like a normal South African foreign company, who may litigate here, without seeking special permission'.

[24] I do not agree with the submission that, where a person (natural or artificial) lacks the capacity to litigate in this country that such person somehow has some residual *locus standi*. Without such capacity in respect of the intended litigation, such person has no standing in *judicio*. The fact that the capacity and *locus standi* of a foreign liquidator is determined in accordance with the law where the appointment was made is of no effect. This means only that, once the appointment in the foreign country is established as a fact, that the Namibian courts will accept that such appointment has been made and that the liquidator has the powers which liquidators in that country obtain through such appointments. From a Namibian perspective such liquidators will have the necessary *locus standi* to seek a recognition order so that their powers - insofar as such powers are also recognised in Namibian Law – be recognised in Namibia. It is only subsequent to such recognition that they will have the necessary capacity to act on their powers in Namibia.

[25] I must say, I am not sure what the reference to a 'normal South African foreign company' referred to by the legal practitioner for the liquidators intend to convey. In Namibia foreign registered and incorporated companies can register as an external company and such companies will be able to litigate on the same basis as local companies. In any event Renaissance is not in the position of a normal South African company. It is in liquidation with the effect that its capacity (*vires* or powers) are truncated and the custody and control of its property has been entrusted to the liquidators who are now the persons who must (within the powers granted to them) wind up Renaissance. Renaissance's powers to litigate are thus those granted to the liquidators. These powers do not extend to Namibia unless and until recognised in this country.

[26] On behalf of the liquidators it was submitted that the *Bekker* case provided authority for the proposition that recognition could be sought *ex post facto*. This is simply not correct. The interim relief granted was pending an application for recognition which meant, failing such recognition, the interim relief would fall by the wayside and furthermore, it was expressly stated that prior to recognition, the applicant in that case could not exercise any powers of a trustee.

[27] It was also submitted on behalf of the liquidators that they have, in fact, been recognised by the court. This was according to the submission inherent in the conduct of the matter where this point was raised as a defence in a summary judgment application (which was not persisted with) and where the court adjudicated on exceptions raised against the particulars of claim (unrelated to the non-recognition point). The point of non-recognition was thereafter raised in the plea to the claim. I do not agree. There was no basis on the pleadings before court for it to consider this issue up to the bringing of the recognition application. The summary judgment application was not persisted with and the exception did not raise the issue. It was only after close of pleadings and when the matter was ready to proceed to trial that it became evident that the matter remained an issue for the court to determine. This prompted the recognition application. It must be borne in mind that such applications are usually brought prior to the institution of action and on application (as they should be). This means that the court hearing an action will not necessarily be aware of such application. Where a foreign liquidator in an action does not allege in the particulars of claim a prior recognition (as in the present matter) and no exception is taken against such particulars of claim (as in the present matter) a court may assume that recognition had been obtained and

the failure to mention this was simply an oversight and this is the reason why no exception is being taken. Thus in an analogous matter (the *SOS-Kinderdorf*²⁴ case) an *incola* who had to attach property to confirm jurisdiction against a *peregrinus* obtained default judgment without averring such attachment in the summons. The defendant sought a rescission of the default judgment on the basis, among others, that the court granting the order lacked jurisdiction. It turned out that an attachment had in fact been made and that the failure to make this allegation was simply an oversight. The point raised was dismissed as the court granting the default judgment in fact had jurisdiction. It follows that the fact that the court *a quo* proceeded with the matter as it did prior to the recognition application cannot be said to have been an implied recognition of the liquidators.

[28] To sum up: The recognition order does not operate retroactively. Neither can a court authorise retrospective ratification of acts that are not capable of ratification in law.

[29] It follows that the appeal falls to be dismissed with costs.

[30] In the result I make the following order:

The appeal is dismissed with costs, such costs to include the costs of one instructing and two instructed legal practitioners.

²⁴ *SOS Kinderdorf International v Effie Lentin Architect* 1990 NR 300 at 303E-304B.

FRANK AJA

SHIVUTE CJ

HOFF JA

APPEARANCES:

APPELLANTS:

R Heathcote (with him C E van der Westhuizen)

Instructed by Erasmus & Associates, Windhoek

RESPONDENT:

R Töttemeyer (with him D Obbes)

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