IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT DURBAN

Case No. DA 14/2000

In the matter between

THE NATIONAL UNION OF LEATHER WORKERS **Appellant**

and

H BARNARD N.O. and G PERRY N.O. **Respondent**

JUDGMENT

DAVIS AJA

INTRODUCTION.

[1] On 9 March 1998 the shareholders of Vittmar Industries (Pty) Ltd ('the company') passed a special resolution which provided that the company be wound up in terms of section 349 read together with section 351 of the Companies Act 61 of 1973 ('the Companies Act'). The resolution was duly registered by the Registrar of Companies on 13 March 1998, on which date the winding up of the company commenced in terms of the provisions of section 352(1) of the Companies Act. In consequence of this winding up, the contracts of employment between the company and its employees terminated on 13 March 1998.

[2] The preliminary and only issue which was required to be decided by the court **a quo** was whether or not the termination of these contracts of employment in the circumstances described constituted dismissal in terms of section 186(a) of the Labour Relations Act 66 of 1995 ('the Act') read together with section 213 thereof.

[3] In the judgment of the court **a quo, Soni AJ** found that the termination of the contracts of employment in question did not constitute a dismissal as contemplated in section 186(a) of the Act. **Soni AJ** held "Neither party could contend that it was the decision of the employer to institute proceedings which terminated the contract of employment for the purposes of Section 186(a) of the LRA, and that the employee was effectively dismissed on 1 February." Appellant now appeals against this finding.

THE NATURE OF THE DISPUTE.

[4] The case as argued before the court **a quo** was based upon an agreed set of facts which read as follows:

"STATEMENT OF AGREED FACTS:

(a) On 9 March 1998 the shareholders of Vittmar Industries (Proprietary) Limited ('the company') resolved, **inter alia**, that:

(i) the company be wound up in terms of Section 349 as read with Section 351 of the Companies Act, Act No. 61 of 1973 (as amended) ('the Act');

(ii) such winding-up of the company be a creditors voluntary winding-up;

('the resolution').

(b) A copy of the resolution is annexed to the respondent's Response to the applicant's Statement of Claim and marked "R2".

(c) The resolution was a special resolution as contemplated in Section 200 of the Act and was duly registered by the Registrar of Companies on 13 March 1998.

(d) In terms of Section 352(1) of the Act the winding-up of the company commenced on 13 March 1998.

(e) The company is and, at all material times, was unable to pay its debts as contemplated in Section 339 of the Act.

(f) In consequence of the winding-up of the company as aforesaid the employment of all the persons employed by it ('the employees') terminated by operation of law on 13 March 1998 in terms of Section 38 of the Insolvency Act, Act No. 24 of 1936 (as amended).

2.

THE PRELIMINARY ISSUE TO BE DECIDED BY THE COURT:

(a) Whether or not the aforesaid termination of the employment of the employees was a dismissal as contemplated in Section 186(a), as read with the definition of the word "dismissal" in Section 213, of the Labour Relations Act, Act No. 66 of 1995 (as amended) ("the LRA");

and, if so,

(b) whether or not such dismissal was a dismissal as contemplated in Section 189 of the LRA."

[5] Mr Winchester, who appeared on behalf of respondent, referred to the passage in the statement of agreed facts which provided that 'the employment of all the persons employed by it….terminated by operation of law on 13 March 1998 in terms of section

38 of the Insolvency Act…." Accordingly, he submitted that it was common cause that the termination of the employment had been by operation of law as opposed to an act of the employer in which latter case the termination would have fallen within the scope of section 186(a) of the Act. For this reason Mr Winchester contended that the statement of agreed facts ran counter to the essence of appellant's case.

[6] Mr Broster, who appeared on behalf of appellant, referred to the statement of claim which provided, **inter alia,** that "The resolution passed by Vittmar Industries (Pty) Limited's shareholders to effect a voluntary creditors winding up of the company was a decision by an employer which resulted in the termination of its employees' contract of employment." In short, Mr Broster contended that it had always been appellant's case that the decision to voluntarily wind up the company constituted an act of termination of the employees' contracts of employment and that the statement of agreed facts had to be read within that context.

[7] I agree. The relevant passage of the statement of agreed facts reads thus: "In consequence of the winding up of the company of aforesaid the employment of all the employees employed by …. terminated by operation of law…." That the provisions of section 38 of the Insolvency Act 24 of 1936 ('the Insolvency Act') constitute the legal source of the termination of the contract of employment in terms of the law is clear. However, the dispute between the parties concerns another legal question, whether a voluntary winding up of the company by shareholders or creditors constitutes an act of a kind which can be considered to be a dismissal as contemplated in terms of section

186(a) of the Act. In other words the dispute between the parties is whether the initial act which caused the voluntary winding up of the company, which in turn gave rise to the termination of the employment contracts by operation of law was an act which fell within the scope of section 186(a) of the Act.

[8] Section 213 of the Act defines dismissal as being a dismissal in terms of section 186 thereof. Section 186(a) of the Act defines dismissal as being where:- "an employer has terminated a contract of employment with or without notice". In order to decide whether the employer terminates a contract of employment when it is wound up by the shareholders in terms of a voluntary winding up, an analysis of the law relating to voluntary winding up of a company is required.

THE LAW RELATING TO THE VOLUNTARY WINDING UP OF THE COMPANY

[9] A company may be wound up voluntarily if the company resolves by special resolution that it is to be so wound up in terms of section 349 of the Companies' Act. This statutory provision to so wind up the company voluntarily cannot be excluded by a company's articles. See **Southrand Exploration Co. Ltd v Transvaal Coal Association Limited** 1923 WLD 91 –97. Significantly a court will not interfere with the right which the Companies' Act gives to the requisite majority even where 'the company has undertaken obligations which have to be fulfilled during or for a period of years…..or

the effect of such liquidation would establish the inability of the company to carry out these obligations". **Southrand Exploration, supra** at 98.

[10] A voluntary winding up of a company is a members' voluntary winding up, where a special resolution for its winding up provides that the winding up is to be a members' voluntary winding up in terms of section 350(1) of the Act. The resolution is of no force and effect unless

(a) it has been registered in terms of section 220 of the Companies' Act and

(b) security has been furnished to the satisfaction of the Master for the payment of the debts of the company within a period not exceeding twelve months from the commencement of the winding up of the company or the Master has dispensed with the furnishing of such security on production to him of (i) a sworn statement by the directors of the company that it has no debts; (ii) by the auditor of the company that to the best of his knowledge and belief and according to the records of the company, it has no debts.

[11] A voluntary winding up of a company is a creditors' voluntary winding up if the special resolution for its winding up states that the winding up is to be a creditors' voluntary winding up in terms of section 251(1) of the Act. Such resolution has no force and effect unless it has been registered. Where it is intended to pass a resolution for a creditors' winding up of a company, the directors of the company must make out or cause to be made out in the prescribed form of statement as to the affairs of the company and lay it before the meeting convened for the purpose of passing the resolution.

[12] A voluntary winding up commences at the time of the registration of the special resolution authorising the winding up in terms of section 200 of the Companies' Act. As soon as the Registrar has registered the special resolution he must transfer a copy of it to the Master. From the commencement of its winding up the company must cease to carry on business otherwise than for its beneficial winding up and all the powers of its directors cease save insofar as its continuance is sanctioned by the liquidator or the creditors in a creditors' winding up or in a members' winding up by the liquidator or the company in general meeting. Although the company retains control of its assets until the appointment of a liquidator, where the company being wound up is unable to pay its debts, every disposition of its property including rights of action after the commencement of winding up is a void unless the court otherwise orders. In the case of the winding up of a company, including a voluntary winding up, section 38 of the Insolvency Act applies where the company is unable to pay its debts.

[13] Section 38 provides that: "The sequestration of the estate of an employer shall terminate the contract of service to him and his employees but any employee whose contract of service has been so terminated shall be entitled to claim compensation from the insolvent estate of his former employer or any loss which he may have suffered by the termination of his contract of service prior to its expiration.

[14] Mr Winchester referred to the case of **Ndima and Others v Waverley Blankets Ltd** (1999) 20 ILJ 1563 (LC) in support of his submission that the contracts of employment

were terminated by virtue of section 38 of the Insolvency Act rather than in terms of any act of the company. In **Ndima's** case, **supra¸ Zondo J** (as he then was) said "It seems to me, from an analysis of s 197 in general and sub-section (2)(b) read with sub-section (1)(b) in particular that the legislature bore in mind that at the time of the winding up, the contracts of employment of the employees would have terminated by reason, maybe, of s 38 of the Insolvency Act and that if it used the time of transfer only as a cut-off point, that would not be effective to ensure that the employees did not lose their jobs in circumstances where the business continued." (at 1577 F).

[15] Mr Winchester also referred to **SA Agricultural Plantation and Allied Workers Union v H L Hall & Sons (Group Services) Ltd and Others** (1999) 20 ILJ 399 (LC) where **Landman J** said at para 21 "The liquidation of the other companies will terminate the contract of employment between them and their employees. The employees have a claim for damages but nothing more. This court cannot interdict the **ipso jure** termination of employment of employees. Moreover 'the threat' is not a threat; in my view it is an accurate statement of the law." In dealing with this **dictum** of **Landman J, Zondo J** in **Ndima's** case **supra** at para 26 said "In the end it would appear that whether or not there was to be a dismissal it turned on the effect of s 38 of the Insolvency Act on contracts of employment. **Landman J** concluded s 38 has the effect of **ipso jure** terminating the contracts of employment of employees such termination would not be brought about by any act of the employer, **Landman J** concluded that the court could not interdict such a termination"

THE DISTINCTION BETWEEN VOLUNTARY WINDING UP AND COMPULSORY LIQUIDATION.

[16] The judgments cited by Mr Winchester dealt with cases of winding up of a company by the court, the so-called compulsory winding up as opposed to the voluntary winding up described above.

[17] In the case of a compulsory winding up, section 344 of the Companies' Act sets out the grounds in terms of which a company may be wound up by a court. The court's powers to grant a winding up order is a discretionary power. Accordingly the court is not obliged to grant a winding up order when one or other of the grounds for winding up in terms of section 344 is established. Having concluded that the grounds for winding up existed, the court must proceed to the second step in the process in which it must exercise its discretionary power of issuing or declining to issue a winding up order. See **M.S. Blackman** The **Law of South Africa** volume 4 part 3 at para 110.

[18] Accordingly there is a clear distinction to be drawn between a procedure leading to a compulsory winding up of a company in which a court has a clear discretion as to whether to grant such an order and a voluntary winding up where the court cannot interfere with the right which the Companies' Act gives to the requisite majority to so effect a winding up once the proper procedures have been followed.

[19] When account is taken of this distinction between the compulsory winding up procedure and that which pertains to the voluntary winding up of a company, it becomes clear that

in the case of a voluntary winding up, the passing of a resolution duly registered is the only act required to produce the desired result. Hence the question arises as to whether a resolution passed by the company's shareholders to effect a voluntary creditors' winding up of a company constitutes a decision of dismissal of employees.

[20] For this reason Mr Broster submitted that the stark distinction between the two processes of liquidation illustrates that in the case of a voluntary winding up, the shareholder is in control of the process and makes a decision which results in the termination of the employees contract whereas in the compulsory winding up, the decision is made by the court and there is opportunity for opposition to the granting of an order.

THE MEANING OF 'TERMINATION'

[21] In analysing section 186(a) **Brassey** submits that section 186(1)(a) means that an employee is dismissed only when the employer brings the contract of employment to an end in the manner recognised by the law. **M.S.M. Brassey Employment and Labour Law.** Vol. 3 at A8:8.

[22] With regard to the phrase 'with or without notice' **Brassey** writes as follows:

"'With notice' has a slightly different connotation from 'on notice': the latter makes the expiry of notice properly given the occasion for the termination, whereas the former signifies only that notice accompanies a termination and so leaves the basis of this dismissal unstated. It is unnecessary to consider which meaning the legislature intended.

Under the sub-section the giving of notice is a matter of no consequence – what counts is whether the contract was legally terminated 'with or without notice'. It was, it seems, included to make it clear that summary determination is embraced by the sub-section." (at A8:9).

[23] The key issue in the interpretation of the phrase 'an employer has terminated the contract of employment with or without notice' is whether the employer has engaged in an act which brings the contract of employment to an end in a manner recognised as valid by the law.

[24] In the present case the only dispute is whether the action in invoking the process of voluntary winding up of the company which inevitably gives rise to the application of s38 of the Insolvency Act in the case of a company being unable to pay its debts constitutes an act of termination of the contract of employment. In terms of s 349 and s350 of the Companies Act , once the resolution passed by the company has been registered, the voluntary winding up commences. No further act is required to bring s38 of the Insolvency act into play.

[25] Analysed thus, the decision to pass the special resolution caused the contracts of employment to be terminated in that they were brought to an end by an action, being the decision to wind up and in a manner recognised as valid by law that is in terms of section 38 of the Insolvency Act.

[26] This position is entirely different from that which applies in the case of a compulsory winding up. In such a case, the court plays a major role in the ultimate decision to wind up a company in that it has a statutory discretion as to whether to grant such an order. In such a case it probably could not be said that the act of the employer brought about the termination of the contract of employment in that there existed a **novus actus interviens,** namely the decision of the court which in terms of the Companies Act is interposed between the initial application to wind up and the termination of the contracts of employment.

[27] Mr Winchester referred to s 197(1)(b) read with s 197(2)(b) of the Act which deals with the transfer of employees' contractual rights against the old employee who is insolvent and being wound up or sequestrated to the new employer. He submitted that the legislature had considered the question of insolvency and hence posed this section. S 197 provides that the contracts between the new employer and the transferred employees commences afresh save that continuity of service is interrupted . **John Grogan Workplace Law** (5 ed) of 197. The claims against the old employer remains to be lodged with the liquidator. The legal position of the termination of the contract of employment remains unaffected by s 197 insofar as the old employer is concerned.

[28] Mr Winchester submitted that a finding in favour of appellant could have far reaching consequences for all parties affected by a voluntary winding up of a company. That indeed may be so. However, when an Act falls to be interpreted in a manner which raises policy concerns, the answer to such policy imperatives is not to find ambiguity in

legislation where none would otherwise exist but rather for the legislature to cure the position by way of legislative amendment when it considers the interpreted result to run contrary to the intended policy. In this connection mention can be made of the Insolvency Amendment Bill 2000 in terms of which it is proposed to introduce a new section 38 of the Insolvency Act, which would cause contracts of employment to be suspended on the insolvency of an employer and for a detailed process of consultation to take place in an attempt to reach consensus on the appropriate measures to save or rescue the whole or part of the business of the insolvent employer (see clause 38(7)) of the Bill. In the event that the Bill becomes legislation, the policy difficulties to which Mr Winchester referred would be accommodated by detailed legal framework. In conclusion I am of the view that the appeal should succeed.

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

1. The appeal is upheld with costs.
2. The order of the court **a quo** is set aside and in its stead the following order is made:

   The termination of employment of employees of respondent on 13 March 1998 constitutes a dismissal as contemplated in section 186(a) read with section 213 of the Labour Relations Act 66 of 1998 as amended.

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DAVIS AJA

I agree _____

ZONDO JP

I agree _____

DU PLESSIS AJA