17/12/2010

NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

15.11.2010 DATE

SIGNATURE

CASE NO.: 69849/2010

DATE:

In the matter between:

JOHANNES DU PLESSIS VAN ZYL **APPLICANT**

And

SUBLIME INVESTMENTS (PTY) LTD **1ST RESPONDENT**

MANDRE BELEGGINGS (PTY) LTD **2ND RESPONDENT**

RONBEL 108 (PTY) LTD **3RD RESPONDENT**

REGISTRAR OF COMPANIES **4TH RESPONDENT**

CARRIM, S **5TH RESPONDENT**

JUDGMENT

WEBSTER J

1. The applicant, a creditor and shareholder in the first respondent seeks an order in the following terms:

   "2. That the First Respondent is interdicted and restrained from confirming or accepting the offer made on the immovable property situated at Portion 96 of the farm Lyttelton 381 J.R., Deed of Transfer T47965/94 on the 9th day of November 2010 pending the determination of the application issued under case number 68859/10 by the Applicant against the Respondents;

   3. That the First Respondent is interdicted and restrained pending the determination of the application issued under case number 68859/10 from selling the property."

2. Briefly summarised, the background facts are as follows:

2.1 the applicant was placed under liquidation, at its own instance, on 10 April, 2003;

2.2 the major, if not the sole asset it then owned was the immovable property described in prayer 2 *supra*.

2.3.1 It is common cause that there is a garage or filling station on the said property which was, and is still leased to Engen Petroleum (Engen).

2.3.2 In terms of the said lease, Engen has a pre-emptive right to match any offer received for the property, if the property is sold during the currency of the said lease. Engen is obliged to exercise such right within 45 days of being notified of such offer. If it exercises such right a binding contract comes into existence on the same terms and conditions as are set out in the offer to purchase.

2.4.1 The third respondent is the cessionary of debts allegedly owed by the first respondent to ABSA BANK LTD which were duly ceded to the third respondent. There is litigation in progress regarding the "ABSA CLAIMS" which amount to over R9 million.

2.4.2 There is a dispute whether those debts have prescribed or not.

2.5 The liquidator who was initially appointed on 1 July, 2004, did nothing in execution of his statutory obligations to liquidate the company despite a written instruction given by the Master of the High Court dated 1 April, 2009. In consequence of his alleged failure to perform his duties he was removed from office. A new liquidator was appointed on 18 May, 2010.

2.6 The new liquidator gave notice of his intention to sell the property by public auction on 9 November, 2010. He proceeded to do so. The highest offer he received for it was

R11.2 million. This figure exceeds by far the value of R3 million placed on the property by the applicant.

2.7 The current liquidator was not joined in his official capacity. He opposes the granting of the order sought.

3. It was submitted on behalf of the applicant that the applicant having found sufficient means to pay off all the first respondent's creditors (the money having been paid into the applicant's Attorney's trust account, expressly for that purpose) and there being no other creditors against the first respondent save perhaps for a claim by the third respondent that was acquired by way of cession from ABSA it was desirable that the liquidation order should be set aside.

4. It was contended further that the ABSA claims having been rejected at the meeting of creditors was no longer enforceable and, alternatively, that such claims had prescribed.

5. It was submitted on behalf of the first respondent that (i) the offer of R11.2 million had already been communicated to Engen. That, in terms of the contract with Engen constituted an irrevocable offer. The application instituted as it was before the expiry of the period of 45 days was accordingly premature; (ii) there was no merit in the application in terms of section 354 of the Act to discharge the company from liquidation as the seven years had elapsed since the company was liquidated. Further, the offer obtained in respect of the property was such that the value previously placed on it by the applicant and the former liquidator, was incomparable with the offer of R11.2 million. In the words of Joël Dick Pienaar, the auctioneer who conducted the auction on 9 November, 2010, the auction price is "...an exceptionally good price for a service station property at the given location". (iii) It was submitted that any

further delay would be to the prejudice of creditors and shareholders and further that in the applicant's own contention the liquidator would be held liable for any damage suffered as a consequence thereof – such remedy was suitable and available to the applicant were the application to be refused.

6. It was submitted on behalf of the second and third respondents that (i) the second respondent had proved a claim against the first respondent in the amount of R304 968.07; (ii) the third respondent had instituted action in this court based on the ABSA claims for R691 334.26. There was a further "ABSA claim" for R7 943 094.03 that was to be instituted. It was argued that from enquiries made the latter claim was apparently secured by a mortgage bond which would quash any argument of its prescription; (iii) the application for the setting aside of the liquidation order would not pass muster the test of proving "exceptional circumstances" and further because by no stretch of imagination could the applicant satisfy the Court, that there was 'no dispute of fact'. In addition, it was submitted that the application envisaged by the applicant had to be considered against the background of not only the interest of the applicant but those of the creditors and the public at large.

7. In an application for a temporary interdict the applicant has to establish the following, *viz.*, (a) a *prima facie* right; (b) a well-grounded apprehension of irreparable harm; (c) that the balance of convenience favours the granting of the order; and (d) the absence of any other satisfactory remedy. I shall deal with these briefly.

8. The applicant bases his "right" on the hope that the application for liquidation will be set aside because the amounts owing to the proved creditors have been secured by the payment of the amount owing to them into his Attorney's trust account and further that

there are no other creditors. This argument is most unconvincing. The applicant wishes to have his cake and eat it. In my view the payment into his Attorney's trust account displays a lack of good faith. If the intention is that the creditors of the first respondent should be paid I see no logic not to do so right away. The applicant does not wish to do so lest he is unsuccessful with his section 354 application. Once the creditors have been paid he will not be able to reclaim the money he has paid. His intention if unsuccessful appears to be able to instruct his Attorneys to refund the money paid into the trust account to himself.

9. Secondly, the submission that the ABSA claims have prescribed call for various assumptions to be made, the primary one being that none of these claims were secured by mortgage bond. It boggles the mind that a bank would have lent a company that is trading and owns immovable property without taking the sensible precaution of passing a mortgage bond over the company's sole asset, the garage property or any other immovable property. In my view it would be a travesty of justice to assume in the applicant's favour that the ABSA claims have prescribed. Apart from these observations it would, in my view, be totally reckless for the Court to make any assumptions especially that the section 354 application is likely to succeed when all the facts are not before the Court and more so because there is a doubt in my mind that the facts as disclosed in this application do not appear to make out "exceptional circumstances" (See Ward v Smit and Others: In re Gurr v Zambia Airways Corp Ltd 1998(3) SA 175 at 181 C-E where Scott JA said:

> *"It follows that an applicant under the section must not only show that there are special or exceptional circumstances which justify the setting aside of the winding-up order; he or she is ordinarily required to furnish, in addition, a satisfactory explanation for not having opposed the granting of a final order*

or appealed against the order. Other relevant considerations would include the delay in bringing the application and the extent to which the winding-up had progressed. (Compare Aubrey M Cramer Ltd v Wells NO (supra at 305H).)"

10. The applicant's apprehension of "irreparable harm" and the absence of any other satisfactory remedy go in tandem in this matter. The property has fetched a bid that is just under four times the applicant's valuation of the property. If the bid is accepted the applicant will land in a financial windfall beyond his dreams. Further and in any event, if the order sought is not granted and the applicant is successful in his section 354 application after the bid has been acted upon the applicant will still have the right to sue the liquidator for damages.

11. With regard to the balance of convenience the applicant finds himself in the unenviable position where this application is still-borne. This is so because of Engen's right to exercise its right to first option. As indicated above this application was launched within the 45 day "option period" available to Engen. The failure to cite and join Engen in these proceedings is an insurmountable obstacle that "non-suits" the applicant.

12. The application is accordingly dismissed with costs.

G. Webster.

G WEBSTER

JUDGE IN THE HIGH COURT