

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 64309/2009

Date: 10 May 2013

In the matter between:

WATERKLOOF MARINA ESTATES (PTY) LTD

Plaintiff

and

CHARTER DEVELOPMENT (PTY) LTD (IN LIQUIDATION)

First Defendant

CITY LAKE MARINA (PTY) LTD

Second Defendant

YUNNAN CONSTRUCTION ENGINEERING CC

Third Defendant

THE MASTER OF THE HIGH COURT PRETORIA

Fourth Defendant

and

H A MARAIS

Third Party

JUDGMENT

PRETORIUS J.

[1] This is a stated case where the court has to decide certain issues separately in terms of Rule 33 (4) of the Uniform Rules of Court.

[2] The issues the court has to adjudicate are separated. In this application the court has to adjudicate:

“paragraph 7 & 8 of the plaintiffs particulars of claim;

Paragraph 6.4 of the first defendant’s amended plea;

Paragraph 1 of the plaintiff’s amended replication;

Paragraph 2.3 & 2.4 of the third party’s consequentially amended plea; and

Paragraph 1.3 of first defendants adjusted rejoinder.”

[3] The parties have agreed that for purposes of the stated case the court must assume that the plaintiff acted *bona fide* as envisaged in section 82(8) of the Insolvency Act, 1936; and that the second meeting of creditors were properly constituted; and that the persons present at this meeting was duly authorised and that they acted in accordance with the terms of their respective mandates.

[4] The court has to determine whether, as matter of law, the plaintiff is entitled to rely on and compel performance of the sale of shares agreement having regard to the provisions of section 82(8) of the Insolvency Act 24 of 1936 and the provisions of section 339, 386(3) and 386(4)(h) and 389(3)(a) of the Companies Act, 61 of 1973. (the “Act”)

[5] The parties to the stated case are the plaintiff, the first defendant and the third party. The background is that the first defendant was placed into final liquidation on 30 July 2002. The third party was appointed as sole liquidator of the first defendant on 28 October 2002.

[6] On 30 January 2003 the second meeting of creditors of the first defendant was held where, *inter alia*, resolution 6 was adopted which authorized the third party:

“...to dispose of the movable assets of the (first defendant) by public auction, private treaty or public tender in his sole discretion and that the mode of sale of any one or more of the assests shall be detenvined by the (third party) and that all costs incurred in relation thereto be costs of administration and paid for by the estate. ”

[7] There were no contributories of the first defendant. It is common cause that no second meeting of members of the first defendant was held at all and the resolutions of 30 January 2003 were not adopted by the members of the first defendant.

[8] On 18 August 2004 the plaintiff entered into a written agreement with the first defendant, represented by the third party, in terms of which the first defendant, acting under authority granted to him at the meeting of creditors held on 30 January 2003, sold and the plaintiff bought 40% of the issued shares in the second defendant for the amount of R6,000,000.00.

[9] On 14 September 2006 Chavonnes Badenhorst St Clair Cooper was appointed as joint liquidator of the first defendant together with the third party to finalize the winding up of the first defendant. The first defendant has refused to comply with the sale agreement and has refused to transfer the shares against a tender of payment of the purchase price alleging that the sale of shares agreement was invalid and unenforceable.

[10] On 20 October 2009 the plaintiff issued summons praying for an order directing the delivery and transfer of first defendant's 40% shareholding in the second defendant, against payment of R6 million.

[11] On 16 January 2012 the third party resigned as liquidator of the first defendant. In February 2012 the first defendant issued a third party notice, claiming that in the event it is found that effect should be given to the sale of the share agreement in terms of section 82(8) of the Insolvency Act 24 of 1936, the third party should be held liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of him contravening section 82 when dealing with the property.

[12] The first defendant contends that the third party was not authorized by the members of the first defendant to sell any movable property of the first defendant by private contract as provided for in section 389(3)(a) read with section 386(4)(h) of the Companies Act. The plaintiff contends that the third party acted pursuant to the resolutions passed by the creditors of the first defendant at the second meeting of creditors on 30 January 2003, which authorized the third party to sell the first defendant's shares in the second defendant to the plaintiff by private contract without the members' authority, and this did not invalidate the administration action.

[13] Alternatively, the plaintiff contends that the sale of shares agreement is valid and enforceable as provided for in section 82(8) of the Insolvency Act read with the provisions of section 339 of the Companies Act.

[14] The court has to determine whether the sale of shares agreement is valid and enforceable. Section 386 (3)(a) and 4(h) of the Act provide:

“(3) The liquidator of a company -

*in a winding up by the Court, with the authority **granted by meetings of creditors and members or contributories** or on the directions of the master given under section 387;*

(4) The powers referred to in subsection (3) are -

...

(h) to sell any movable and immovable property of the company by public auction, public tender or private contract or to give delivery thereof.” (Court's emphasis)

[15] It is clear from section 386(3) that a liquidator may only act with the authority of both creditors and members or contributories or on the direction by the Master of the High Court. A liquidator who seeks to exercise his powers in terms of section 386(4)(h) has to have the authority of both the creditors and the

members. Neither the contributories nor the Master had authorized the sale of the shares in the company and no court application was launched to rectify the situation. Unless section 82 of the Insolvency Act is applicable the court has to find against the plaintiff.

[16] In **Griffin and Others v The Master and Another (Commins and another intervening) 2006 (1) SA 187 (SCA)** at paragraph 6 and 7 Zulman JA held:

*“[6] It is clear that s 386(3) specifies in terms that a liquidator may only exercise the powers given (with certain exceptions which are not here relevant) if granted authority to do so. **Furthermore, s 386(3)(a) specifies from whom this authority must be obtained; namely, in the case of a winding-up by the court, meetings of creditors and members or contributories or on the directions of the Master.** It is not suggested that in this case there was any authority given by contributories or that there were directions from the Master.*

[7] The learned authors Blackman et al in their Commentary on the Companies Act (2002) vol 3 at 14 - 330 correctly state the position in these terms:

*'Section 386(3) provides that with the required authority the liquidator "shall have the powers mentioned in ss (4)". **Thus it would seem that the grant of authority is not merely a condition for the exercise of those powers, but, is rather, a necessary condition for their existence. Where the liquidator requires such authority to exercise a particular power, other than the power to litigate [a situation not of application here], it is open to a third party to raise the question of the liquidator's lack of authority.'** ” (Court’s emphasis)*

[17] The court has to decide whether the conclusion of the agreement qualified as administrative action by the liquidator who is the third party in this application. In **President of the Republic of South Africa and Another v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)** at 66 F - 68 B the Constitutional Court held:

“[141] In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute 'administrative action' Similarly, judicial officers may, from time to time, carry out administrative tasks. “

[18] In **Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and**

Mpumalanga and others 2003 (1) SA373 (SCA) at 382 B-D Olivier JA found:

*“[12] What is an administrative act for the purpose of justiciability? There is no neat, ready-made definition in our case law, but in *Hira and Another v Booyesen and Another* 1992 (4) SA 69 (A) Corbett CJ at 93A - B required, for common-law review, the non-performance or wrong performance of a statutory duty or power; where the **duty/power is essentially a decision-making one and the person or body concerned has taken a decision, a review is available.**” (Court’s emphasis)*

[19] The liquidator had to act in the interest of the creditors and the members, not in the public interest, as this was a private agreement. The liquidator made no decision on which he had acted, he only acted on the authority of the creditors who authorised him to sell 40% of the shares. It cannot be held to have been a decision which can be characterized as administrative action as he had made no decision.

[20] Section 1 of PAJA provides and sets out what a “decision” is:

*““**decision**” means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—*

(a) ...

(b)...

(c)...

(d)imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingl.”

[21] The liquidator had to act in the interest of the creditors and the members, not in the public interest, as this was a private agreement. The liquidator made no decision on which he had acted, he only acted on the authority of the creditors who authorised him to sell 40% of the shares. It cannot be held to have been a decision which can be characterized as administrative action as he had made no decision.

[22] The court finds that the agreement was not an administrative action as the liquidator did not take a

decision, but was granted authority by the creditors to sell the shares and PAJA is thus not applicable.

[23] The court has to decide whether the alternative argument that the sale of shares is valid and enforceable by virtue of the application of the provisions of section 82(8) of the **Insolvency Act, 1936** read with section 339 of the Act.

[24] Section 339 of the **Companies Act** provides:

*“In the winding up of a company unable to pay its debts, the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied **mutatis mutandis in respect of any matter not specifically provided for in this Act.**”* (Court’s emphasis)

[25] Section 82(1) of the **Insolvency Act** provides:

“ Subject to the provisions of sections eighty-three and ninety the trustee of an insolvent estate shall, as soon as he is authorized to do so at the second meeting of the creditors of that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct ”

[26] Section 82(8) of **the Insolvency Act** provides:

*“ If any person other than a person mentioned in subsection (7) has purchased in good faith from an insolvent estate any property which was sold to him in contravention of this section, or if any person in good faith and for value acquired from a person mentioned in subsection (7) any property which the last mentioned person acquired from an insolvent estate in contravention of that subsection, **the purchase or other acquisition shall nevertheless be valid, but the person who sold or otherwise disposed of the property shall be liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of the dealing with the property in contravention of this section.**”* (Court’s emphasis)

[27] There is a difference between a company’s liquidation and a private individual’s insolvency. The property of the company remains vested in the company whereas in an insolvency the property of the individual vests in the trustee. In **van Zyl NO v Commissioner for INL Rey 1997 (1) SA 883 CPD** at 891 C Hodes AJ held:

“It should be remembered that a company in liquidation is administered not only for the benefit of creditors, but that the liquidator is obliged to take the interests of members into account. In terms of s 342(1) of the Companies Act, if there is a surplus after payment to creditors, this goes to members. The interest of members in the proper winding-up of the company is recognised in ss 360(1),

[28] However the position of a trustee and a liquidator are similar, a trustee, like a liquidator, may sell on the direction of creditors, although in the case of a company the direction of members must be sought.

[29] The liquidator, who has been authorized in terms of abovementioned sections of the Act to sell the company property, performs a juristic act on behalf and in the name of the company. The liquidator acts in a representative capacity and the rights and obligations arising from his acts accrue to the company in liquidation.

[30] The court was referred to **Oertel and Others NNO v Director of Local Government and Others 1981 (4) SA 491 (T)**, a Full Bench decision of this division where Nestadt J held at p 508:

*“In terms of s 82 the trustee of an insolvent estate shall, as soon as he is authorised to do so at the second meeting of the creditors of that estate, **sell all the property in such manner and upon such conditions as the creditors may direct. It is not whether the necessary authority of the creditors of the company to sell was obtained. In any event the creditors could not validly so direct. The obligations imposed on a trustee and a liquidator under s 82 obviously presuppose that the sale of estate property is not unlawful or prohibited***(Courts emphasis)

[31] The court confirmed that section 82 of the Insolvency Act is applicable in the winding-up of a company in terms of section 339 of the Companies Act although it dealt with a creditors’ voluntary liquidation. Therefor the provisions of section 82 of the Insolvency Act apply in the winding-up of a company.

[32] In an insolvency, where the estate is in fact insolvent, the trustee of the insolvent estate is obliged by statute to sell the assets of the insolvent without considering the wishes of the insolvent as set out in section 82(1) of the Insolvency Act.

[33] In **Mookrey v Smith NO and Another 1989 (2) SA 707 (C)** at 711C to 711F it was set out:

“To the extent that a trustee is bound to comply with instructions from creditors as to the manner which the estate is to be wound up and the assets to be disposed of, he may be regarded as a kind of statutory agent for creditors.

If an agent acts outside his powers his act, ieaving aside ratification, is a nullity. It therefore seems to me that the Legislature could not have intended that an act performed by a trustee beyond the scope of authority given to him at the second meeting of creditors should be anything but invalid.”

[34] and at 711 E - F:

“But where an act is clearly ultra vires the authority given by the creditors to the trustee it seems to me that invalidity must have been intended to result. This is also the view of A L Stander in an article on Mookrey v Smith in (1988) 51 THRHR at 252.

Once there is a rule as uncompromising as this, it goes almost without saying that some method has to be devised to protect an innocent third party from the consequences of having entered into an unenforceable transaction. Section 82(8) does this by providing that if a purchaser is bona fide the sale shall nevertheless be valid.” (Court’s emphasis)

[35] The first respondent argues that section 82(8) is devised to protect *bona fide* purchasers in a *sui generis* situation where the common law principles of agency cannot apply as in the present action. According to the first respondent in the present action the principles of agency should apply. The first respondent argues that the innocent plaintiff will be able to sue the liquidator for any damages, if it chooses not to approach the court to ratify the sale.

[36] It is clear that there is no provision in the Companies Act of 1973 which deals with this situation where a liquidator sells the property of the company in liquidation without authorization by the members of the company in liquidation.

[37] Therefore the provisions of section 339 of the Act must apply and section 82(8) of the Insolvency Act of 1936 applies. Oertel’s case was overturned on appeal, but the finding that section 82 is applicable to companies in liquidation was unaffected.

[38] In **Sherry v Henning NO** (*supra*) DE Vos J held at para 6:

“There is no similar provision in the Companies Act dealing with sale of property and it follows that section 82 is therefore applicable ” (Court’s emphasis)

[39] I have considered all the arguments, facts and authorities and I can find no reason not to agree with the authorities and find that section 82 of the Insolvency Act is applicable. Therefore I find that the third party and the plaintiff entered into the agreement in terms of which the third party sold to the plaintiff the shares in the second respondent.

[40] The following order is made:

1. The court finds that the sale of shares agreement is valid and enforceable;
2. The first defendant to pay the costs of the plaintiff including the costs occasioned by the use of two counsel.

Judge Pretorius

Case number: 64309/2009

Heard on: 11 April 2013

For the Plaintiff: Adv. Hoffman SC

: Adv. Kuny

Instructed by : David Kahn & Associates

For the First Defendant: Adv. Rossouw SC

Adv. Moller

Instructed by : Brooks & Brand Inc

For the Third Party: Adv. Swart SC

Instructed by: VDT Attorneys

Date of Judgment: 10 May 2013