



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

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

☒ REVISED. ✓

15/4/2016.
DATE

SIGNATURE

15/4/16.

Case Number: 25713/2016

In the matter between:

SHUDONG LIU

Applicant

and

LEIGH ROERING, N.O.

First respondent

TIMOTHY NDEBELE, N.O.

Second respondent

JUDGMENT

POTTERILL J

- [1] The applicant is urgently applying that the respondents be prevented from selling any of the liquidated company's, Xing Xing Farming, assets pending the rendering of a valuation report by a chartered accountant and an order directing the respondents to take the aforesaid report into account when contemplating a sale of any, or all of, Xing Xing Farming's assets. This chartered accountant should be nominated and appointed by the Chairperson of the South African Institute of its Chartered Accountants and must do so by no later than 7 court days after the expiration of the 10 days. The chartered accountant is to be granted access by the respondents to all of Xing Xing Farming's assets on portion 28 of the Groenfontein Farm in the Bronkhorstspuit district for a proper valuation of the assets. The applicant is also further applying that the respondents be interdicted from selling any or all the assets of Xing Xing's pending finalisation of an application to be brought within 30 days of an order being made to set aside the *ex parte* order made on 9 February 2016 by Louw J under case number 8595/2016.

Background

- [2] The Xing Xing Farming operation is a close corporation; it was placed under voluntary liquidation and the respondents are the appointed liquidators.

- [3] The close corporation's business comprises of the production and sale of chicken eggs in batteries.

Applicant's case

- [4] The applicant in his affidavit set out how he became involved in the business with his brother. He averred that he was unaware of the liquidation and was very surprised as the business was from 2003 until 2015 (excluding the year 2002) making a substantial profit each year. He is a creditor due to his share of the profits never being paid out to him.
- [5] Despite his back-breaking work in building the batteries and his contempt for not receiving his share of the profits he is not contesting the liquidation i.e. applying for the rescission of the liquidation and has not instituted action against his brother for his fair share. His aim is to claim his share of the profits as a creditor in the liquidation. To achieve this, this application is to ensure that not only for his benefit, but also for the benefit of the other creditors, the business is sold as a going concern and not as a forced sale. Although it is not put out in the papers that it must be sold as a going concern this was submitted from the bar. The reason why it must be sold as a going concern is that *"simple arithmetic indicates that the business is doing well and is very far from being bankrupt or even in trouble"*. To

this end a chartered accountant's valuation is necessary and the sale must be stopped to facilitate a higher sale value. Louw J's order must also be set aside.

Respondent's case

- [6] In response to this the respondents set out that the operation of this business comprise of chickens consisting of productive lay hens, chickens destined to become lay hens and which are in the process of being reared and lay hens past their production stage. All of this requires immediate and extensive management in order to avoid any loss in numbers. As it was a fully operational farmer operation that was taken over it required immediate attention in the form of insuring that the hens are properly fed, water provided, eggs removed and sold and all the other duties normally to be expected of an operation of this nature. To this extent they approached the court to extend their power to effect the running of the business. It was conceded that this *ex parte* application contains the standard or normal orders for an extension of the powers of liquidators. From this order it is clear that the respondents were now empowered to defend or institute legal proceedings of a civil nature, criminal proceedings, urgent legal proceedings and the recovering of outstanding accounts. To offer compensation made to the company debtor and to accept payment or to grant an extension of any debtor. To compromise or admit any claim and to make arrangements with creditors. Furthermore the order entailed that they could carry on or discontinue any part of the business of the company insofar as it may be necessary for the beneficial winding-up thereof. They were also

empowered to sell any movable and immovable property of the company by public auction, public tender or private contract. Without this order being extended they would not have been entitled to continue trading the business to engage services of the employees and pay their salaries and similar practical requirements which impact on the normal day to day running of the business.

[7] At the end of January 2016 when the liquidators took control of Xing Xing Farming there existed a major threat to the farming operation in that there was virtually no water on the farm as the borehole supplying water *"have but dried up"*. It was common cause that there was a serious drought during this period. Without this order being granted the liquidators would not have been entitled to procure water from the neighbouring farms. A further three boreholes were drilled on the property. Chicken feed had to be procured to the value of approximately R350 000 per week. This feed supply could be maintained only on arrangement for delayed payment of accounts.

[8] There is no further cash available to pay the outstanding amount of R847,218.60 due to Satinsilk Investments (Pty) Ltd the supplier of the feed. A successful battery operation requires stringent disease control which in turn means substantial amounts have to be paid for medicine.

- [9] The total outstanding debts amount to R2,483,661.10. The amount of overdue debtors is growing and becoming a major concern.
- [10] A veterinarian surgeon, Dr. P.W. Smith, attended to the farm and his report as attached to the answering affidavit. It is his opinion that the pullets are to be transferred to laying houses as soon as possible. He is further of the opinion that if the chickens are not placed out soon there will be serious consequences, amongst which will be vices such as egg-eating and cannibalism. A buyer, Ascend Investment Holding (Pty) Ltd, was identified who is willing to purchase the movable assets, vehicles and equipment, the hatcheries and livestock for an amount of R4,1 million. In view of the dire consequences of not feeding the chickens the sale is thus necessary and must be executed eminently.
- [11] The respondents also caused the valuation of the assets of Xing Xing Farming which was also done by a duly appointed registered appraiser which is also attached to the answering affidavit. According to this valuation report a value of R4 779,770.00 is established as a forced sale value.
- [12] It is accordingly the respondents' contention that the application to rescind Louw J's order is misconceived as it will render it impossible for the respondents to continue with the farming operation.

- [13] It was also argued that the legal duties and obligations of the liquidators and specifically section 353 of the Companies Act, 61 of 1973, provides that the effect of a voluntary winding-up on the status of a company is that it shall from the commencement of the winding-up cease to carry-on its business except insofar as it may be required for the beneficial winding-up thereof.

Reasons for decision

- [14] In *Thorne v The Master* 1964 (3) SA 38 (N) at 50 the role of the liquidators is set out as being:

"The essence of a matter in relation to the realisation of the assets of an insolvent estate is that the trustee takes the estate as he finds it and converts it into cash which he distributes to the creditors. It is no function of his to speculate with the assets in the hopes of improving their value, whether by delaying realisation or by expending money upon them."

- [15] According to the liquidators the day to day running of the business is becoming impossible. There are simply no funds available to continue further with the business. A buyer was identified who is willing to purchase the movable assets, the vehicles, equipment, hatcheries and livestock for an amount of R4.1 million (exclusive of VAT) plus an amount for the stock in trade, which is still to be determined but which will according to the answering affidavit amount to

approximately R650 000. This excludes the total outstanding debtors of R2,483,661.10 which is still to be collected. I must accept the respondent's version.

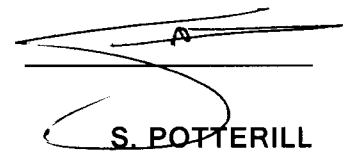
[16] I find it pragmatic to deal with the *ex parte* application and the period of 30 days within to set this aside first. There was nothing untoward in obtaining this order *ex parte*. The applicant is not a member of the close corporation or the owner of the business. He is not a registered creditor and accordingly no service on him was required. The liquidators would not know of him, except as being one of the employees of the business. The order itself was agreed to be within the norm. The only argument that was put before this court was that the applicant has not as required in an *ex parte* application shown good faith because in that *ex parte* application the following averment was made *"thus it is apparent that the farm experiences a shortage of potable water of approximately 15 000 to 30 000 litres per day according to the temperature. This shortfall is further exasperated by the fact that the farm has no watering reserves as the water pumped from the borehole is used the very same day"* (paragraph 24). They also complained of a single borehole that had dried up. However now in the answering affidavit the respondents said that at the time in question *"there was virtually no water on the farms as the boreholes supplying water have all dried up"*. This argument is a fallacy and requires no further address. The moral of the story is that there was a water problem. The essence of the version is that due to the drought the boreholes were

drying up. I find it disturbing that counsel has to rely on such averred inconsistencies as their only ground for setting aside this order. There is accordingly no merit to an application to stay the sale pending the rescission of the *ex parte* application granted by Louw J. Furthermore the fact that any setting aside of the order will hamper any running of the day to day business of the liquidated close corporation speaks for itself.

[17] The applicant's application for the stay of the sale is also ill-conceived. I cannot find that the liquidators are not fulfilling their duties in terms of the law. The whole nature of liquidation applications call for forced sales. This kind of operation that have to be run by liquidators that do not have expert knowledge of chicken battery farming has a huge duty in terms of the law to keep the business running but obtain a willing buyer as soon as possible. No valuation by the applicant is attached to his papers. No reasons are set out why a chartered accountant would be in a position to give a valuation of the assets. It is conceivable that a chartered accountant could give a total of the assets, but not of a forced sale value. In view of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634H there is nothing to gainsay the valuation as attached to the answering affidavit of the respondents and the court must accordingly accept the respondents' version. If this test is applied to the facts in this application it was submitted that the applicant was not entitled to any relief.

[18] This application is fatally flawed, misconceived and does not pass muster of the *Plascon-Evans* principles and therefore I make the following order:

The application is dismissed with costs.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 25713/2016

HEARD ON: 13 April 2016

FOR THE APPLICANT: ADV. V. DE WITH

INSTRUCTED BY: Sun Attorneys

FOR THE RESPONDENTS: ADV. C. ACKER

INSTRUCTED BY: Malan Nortje Attorneys

DATE OF JUDGMENT: 15 April 2016