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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 15695/22

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

Date: 28 July 2023

In the matter between:

STEPHANUS CORNELIUS VERCUEIL N.O.

Applicant

(In his official capacity as Trustee of the JC Trust
[IT[....]4])

and

HUXLEY TRADING 2 (PTY) LTD

Respondent

(Registration number: 20[....]07)

JUDGMENT

SK HASSIM AJ

Introduction

1. The applicant is the trustee of the JC Trust (“**the Trust**”). He applies in that capacity for the winding-up of the respondent on the ground that it is unable to pay

its debts alternatively and in the event that the respondent is found to be solvent he seeks to wind-up the respondent under the provisions of section 81(1)(d) of the Companies Act, Act No 71 of 2008 (**“the Companies Act, 2008”**).

2. The respondent is a property holding company. It was formed in 2005 for the purpose of acquiring an immovable property, portion [...] F[...] N[...] 1[...] hectares (**“the property”**) for a purchase consideration of R300 000.00, which it did. The acquisition was financed with a loan of R500 000.00 secured by a mortgage bond registered over the property in favour of Nedbank. The applicant, in his personal capacity, and Mr Ignatius Willem Ferreira Senior bound themselves as sureties and co-principal debtors to Nedbank. The applicant does not dispute that Siboniseng Construction and Projects 130 (Pty) Ltd (**“Siboniseng”**) holds the right to services to the property and the right to develop it (**“the development rights”**).

3. The authorised share capital of 100 ordinary shares was issued and allotted in the following proportions:

- (a) 34% by the JC Trust;
- (b) 33% by Mr Ignatius Willem Ferreira Senior (Mr Ferreira); and
- (c) 33% by the latter’s son Mr Ignatius Willem Ferreira Junior (Mr Ferreira Junior).

4. Mr Ferreira and the applicant were appointed as the directors of the respondent. The applicant resigned as a director on 8 August 2005. It is common cause he has not participated in the company’s affairs since then.

5. At around the time of the applicant’s resignation as director, he offered to sell the Trust’s shareholding to Mr Ferreira for R10 000.00 being the value of the monetary contribution to the respondent. The applicant claims that Mr Ferreira accepted the offer but failed to pay the money. Mr Ferreria, on the other hand, contends that he attempted to pay the money and he tenders payment.

Locus standi of applicant

6. The respondent contends that in view of the sale of the Trust's shares, the Trust does not have *locus standi* to apply for the winding-up of the respondent. To counter this, in the replying affidavit the applicant refers to an e-mail in which he was asked by Mr Ferreira's attorney, Mr Shepperson whether he would be willing to dispose of the shares for R10 000.00. The applicant contends that this goes to show that the Trust remains the owner of the shares.

7. I am not satisfied the applicant has made out a case for the winding-up of the respondent. For this reason, and without deciding the issue, I am prepared to accept that the Trust is a member of the respondent and as such has *locus standi* to apply for its winding-up.

Solvency

8. On 21 April 2022, Nedbank obtained default judgment against the respondent for payment of R156 489.68 together with interest. In consequence thereof the property was attached and a sale in execution was scheduled. The amount in arrears at the time was R52 623.38. It, as well as Nedbank's legal costs were paid prior to the sale, and the sale in execution was cancelled. Insofar as the balance of the debt is concerned, the respondent and Nedbank agreed that the debt will be liquidated at R2 700.00 per month. As at 28 October 2022, the amount owing to Nedbank was R117 090.93.

9. In his replying affidavit the applicant disputes that the agreement with Nedbank has been adhered to. This does appear to be the case when regard is had to the statement of 28 October 2022 attached to the respondent's answering affidavit. It appears therefrom that an amount of R1 579.22 was outstanding for more than 90 days, R2 755.61 for more than 60 days, and R2 755.61 for more than 30 days. On 24 November 2022, the applicant established from Nedbank that R9 082.00 was in arrears.

10. The respondent is indebted to the municipality for rates and taxes. The applicant attaches to the replying affidavit a copy of the statement of account from

the municipality which reflects R26 682.59 as being overdue.¹ Based on the monthly rates and taxes due on the property, the applicant estimates that rates and taxes have not been paid for more than five years.

11. According to the respondent Nedbank, and the municipality are the only creditors. The applicant disputes this. According to him the respondent has contingent liabilities to the value of approximately R12 150 000.00. The contingent liabilities will arise if the property is sold on the terms of a proposed draft sale of agreement in that estate agent's commission will have to be paid to Harcourts estate agency,² legal fees³ to Mr Shepperson, and an amount ⁴ to Siboniseng.

12. It is trite that the onus rests on the applicant to demonstrate insolvency. The applicant has produced no evidence as to the value of the property. In the replying affidavit the applicant points out with reference to the municipal statement of account that the market value of the property is R915 000.00.

13. The respondent's liabilities comprise the debt owed to Nedbank and that owed to the municipality. Combined they are below R915 000.00.

14. The applicant's claim that the respondent has contingent liabilities to the value of R12 150 000.00 arises from the failure to appreciate when a contingent or prospective liability arises. The source of the contingent liabilities contended for by the applicant is a proposed draft of an agreement for the sale of the property. No agreement has been entered into. A contingent or prospective liability arises from an existing *vinculum juris* ⁵ between the creditor and debtor. The respondent has no legal obligation to pay the estate agent, the attorney or the holder of the development rights.⁶ And none of them have a legal right to enforce payment.⁷

¹ The total amount outstanding being R27 058.86. R25 628.88 of that was outstanding for more than 90 days, and R1 053.71 for between 30 days and 90 days.

² R650 000.00.

³ R1.5 million.

⁴ R10 million.

⁵ *Holzman NO and Another v Knights Engineering and Precision Works (Pty) Ltd* 1979 (2) SA 784 (W) at 786F.

⁶ Siboneseng.

⁷ *Holzman NO and Another v Knights Engineering and Precision Work* at 787E-F

15. Apart from Nedbank and the municipality, there are no other liabilities; neither actual nor contingent or prospective. The respondent's assets exceed its liabilities.

16. The applicant's case in the founding affidavit for commercial insolvency was the default judgment granted in favour of Nedbank. However, the arrears were paid, and the respondent entered into an agreement with Nedbank for the payment of the outstanding amount. The applicant argues that the failure to adhere to the payment arrangement with Nedbank and the failure to pay rates and taxes for more than five years demonstrates that the respondent is unable to pay its debts.

17. The respondent's only asset is 11,4212 hectares of agricultural land. The applicant knew that the property was to be purchased as an investment and he agreed to the formation of the respondent on this basis and acquired shares therein.

18. Caney J in *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* set out the test for the winding-up of a company on the grounds of commercial insolvency as follows:

"The proper approach in deciding the question whether a company should be wound up on this ground appears to me, in the light of what I have said, to be that, if it is established that a company is unable to pay its debts, in the sense of being unable to meet the current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency; that it is unable to pay its debts may be established by the means provided in para. (a) or para. (b) of sec. 112, or in any other way, by proper evidence. If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts. Cf. *Chandlers Ltd v Dealesville Hotel (Pty.) Ltd.*, 1954 (4) SA 748 (O) at p. 749. Nevertheless, in exercising its powers the Court will have regard to the fact that 'a creditor who cannot obtain payment

of his debt is entitled as between himself and the company *ex debito justitiae* to an order if he brings his case within the Act. He is not bound to give time'. Buckley, p. 450. This view is supported also by Palmer at p. 27:

'The fact that there is due to the petitioner a liquidated sum, that the debt is not disputed, and that the petitioner has demanded payment without success, affords cogent *prima facie* evidence of the company's inability to pay its debts, and is the evidence most commonly relied on.'

This appears to me to accord with sound business principles, for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources.

19. The respondent is not a trading company; it does not carry on business and has no income. It is not a company incurring debts on a daily basis in the ordinary course of business. Both the debt to Nedbank and the municipality stem from the ownership of the land and have not been incurred in the ordinary course of business.

20. Where an applicant for the winding-up of a company is owed a debt that the company cannot pay, the court's discretion to refuse a winding-up order is limited.⁸ The applicant is however not an unpaid creditor. This is therefore not a case of an applicant having the right *ex debito justitiae* to an order winding up a company that has not discharged its debt.

21. I consider now whether in the exercise of my discretion I should find that the respondent should be wound up for failure to pay Nedbank and the municipality timeously.

22. In exercising my discretion whether to wind-up the respondent, I cannot ignore that the intrinsic value of the property exceeds the R915 000.00 which the applicant contends is its value or R1 million which the respondent contends is its value. The respondent's case is that the value of the property rests in its sale together with the

⁸ *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 440F-441A.

adjacent erf 17 which is owned by one Mr Eldie Ferreira and Siboniseng's development rights. I will later return to the proposed disposal of the property.

23. The respondent does not hold the right to services over the property nor the right to develop a township on the property. These are owned by Siboniseng. Siboniseng also holds these rights over the adjacent erf 17.

24. According to the respondent the individual properties and the rights owned by Siboniseng will realise far less if sold separately than if the property is sold as a package with erf 17 and Siboniseng's development rights. In the latter case, it could realise around R20 million. The applicant has not rebutted this.

25. There is no evidence that the two creditors are demanding payment. Nedbank, a secured creditor, is armed with a judgment. Since the cancellation of the sale in execution it has not taken steps to execute upon the judgment. The municipality has remedies available to it to enforce payment of rates and taxes. It has not invoked them.

26. In these circumstances, I am not inclined to exercise my discretion in favour of winding up the respondent notwithstanding that it appears not to be making prompt payments to Nedbank and the municipality.

Winding up the respondent under section 81(1)(d) of the Companies Act, 2008 on the basis that it is just and equitable to do so

27. I turn to consider the applicant's case for winding up the respondent in terms of section 81(1)(d) of the Companies Act, 2008. In broad terms the applicant avers that the respondent should be wound up for the following reasons:

- (a) A deadlock in the management of the respondent.
- (b) An irretrievable breakdown in the trust relationship between the applicant and Mr Ferreira.

- (c) Illegal activities in the management of the respondent and potential fraud in relation to the sale of the respondent's assets to undisclosed third parties.
- (d) Mismanagement of the affairs of the respondent have been resulting in financially adverse consequences.
- (e) Governance irregularities.

Deadlock

28. The respondent has one director, Mr Ferreira. Therefore, there can be no deadlock between directors. No cause of action avails the Trust under section 81(1)(d) (i) of the Companies Act, 2008 to seek the winding-up of the respondent. No case is made out for the winding-up of the respondent under section 81 (1)(d)(ii). The remaining cause of action under section 81(1)(d) is that under section 81(1)(d)(iii), namely whether it is otherwise just and equitable to wind-up a company.

Breakdown of trust

29. The essence of the applicant's case is that he does not trust Mr Ferreira. He believes Mr Ferreira is intent on appropriating the Trust's shares in the respondent and spiriting away the property to the detriment of the Trust, and that he is mismanaging the respondent, acting in breach of fiduciary duties and contrary to the prescripts of sound corporate governance.

30. He alleges irregularities by Mr Ferreira in dealing with the respondent's share capital including increasing the authorised share capital from 100 shares to 1 000 shares thereby diluting the value of the Trust's shareholding, and issuing shares to one Mr Lucky Hatlane Makaringe ("**Mr Makaringe**") who the applicant avers was appointed as a director on 2 November 2021 without a meeting of shareholders having been convened.

31. The applicant attaches to the founding affidavit a CIPC Form COR 39 ostensibly signed by Mr Ferreira and Mr Makaringe reflecting the appointment of the latter as a director on 2 November 2021. A 'board resolution' ostensibly signed by the

two directors, Mr Ferreira and Mr Makaringe on 4 November 2021 which records amongst others a decision to issue 50% of the shares in the respondent to Mr Makaringe is attached to the founding affidavit. A resolution ostensibly signed by Mr Ferreira and one E Malatji described as 'Secretary' recording that a decision that share certificate number 1 reflecting Mr Ferreira Senior's shareholding in the respondent as 100% should be reissued and all previous share certificates should be 'discarded' because Mr Ferreira Senior does 'not know the whereabouts of the company secretarial information' is produced by the applicant.

32. Mr Ferreira denies that he had anything to do with Mr Makaringe's appointment as a director, nor of the authorised share capital being increased. He also denies signing the CIPC Form COR 39 and the two 'board resolutions'. He claims that Mr Makaringe, who he believed was attached to a firm of attorneys assisting him in resolving the proceedings brought by Nedbank against the respondent, was involved in 'nefarious activities' thereby suggesting that the documents bearing his signatures were a forgery. Mr Ferreira's claim that his signatures were a forgery have a ring of truth to it. Mr Makaringe did tell the applicant that he does not know how it came about that he is reflected as a director of the respondent, and offered to resign and renounce any shares that may have been issued to him. He would not have offered to do this if he was legitimately a director and shareholder. Mr Makaringe's involvement is by no means clear from the papers. I must make it clear that I am not suggesting that Mr Makaringe forged the signatures nor that he was involved in nefarious activities. It is possible that fraud was committed by persons unrelated to both Mr Ferreira and Mr Makaringe.

33. In the replying affidavit the applicant refers to an e-mail from Mr Makaringe on 13 May 2022 in which he states that he paid an amount of R21 600.00 for the benefit of the respondent. The e-mail and the proof of payments to Nedbank Home Loans are attached to the replying affidavit. Mr Makaringe appears to have paid an amount to RNK Inc Attorneys apparently in connection with the litigation by Nedbank against the respondent. The dispute of facts relating to Mr Ferreira's actions and his relationship with Mr Makaringe and the latter's involvement in the respondent are not capable of being resolved on the papers.

34. My impression from a reading of the papers is that the applicant is suspicious of Mr Ferreira's actions and the proposed transaction for the sale of the property. He questions Mr Ferreira's motives and suspects that the disposal of the property may constitute fraudulent activity. He does not however disclose the facts which give rise to the suspicion of fraudulent activity save perhaps that the company identified as the purchaser in a draft version of a proposed sale agreement provided to the applicant on 11 May 2022 ("**the first draft sale agreement**") apparently does not exist.

35. The applicant is sceptical of Siboniseng's involvement in the sale of the property. He suggests that Mr Ferreira's attempts to sell the property without disclosing these to him earlier supports his suspicion that Mr Ferreira is dealing with the property as if it belongs to him and intends disposing of it to the detriment of the respondent and the Trust. The applicant seeks support for his suspicions in the first draft sale agreement.

36. The applicant points out that the prospective purchaser is described therein as Hico Properties (Pty) Ltd (registration no 20[....]07). However, the registration number belongs to a company 'Craigieburn Agri Enterprises' and there is no company registered with the name 'Hico Properties'. He says he queried this. There was however no response to the query. Instead, on 3 June 2022, Mr Shepperson sent to him a 'Development Distribution Agreement' signed by Mr Ferreira on 5 February 2020 ("**the signed Development and Distribution Agreement**"), a draft resolution for adoption by the respondent's shareholders authorising the sale of the property and ratifying the actions of Mr Ferreira, a draft deed of sale ("**the second draft sale agreement**") and a draft "development distribution agreement" ("**the proposed distribution agreement**") as attachments to an e-mail which reads as follows:

"In order to achieve maximum value for all the Parties concerned, it is essential that the two properties and the basket of rights be sold together as a package. The individual elements are basically worthless on their own in comparison to

such a package deal. In recognition of this fact, the three parties have been working together over an extended period of time (together with a number of service providers) in order to achieve such joint benefit by selling the complete package. This cooperation has been recognised by the parties in various agreements and I attach hereto a prior Distribution Agreement from 2020. You may also confirm all of the above with Martin Ferreira (a consultant at MacRoberts Attorneys), who represents Eldie Ferreira in this transaction. Eldie is willing and ready to sign. I would humbly submit that any attempt to disrupt these arrangements in creation [sic] of the package would be to the detriment of all the parties, including Huxley and its Shareholders. I have attached the latest draft proposed Agreements for the Sale of the above property and I sincerely urge you to consider these favourably. I still await the exact details of the purchaser and I have accordingly omitted these from the attached drafts. I believe that the authenticity of the Purchaser will be quickly established, since it has 14 days to pay a R2.5m Deposit.

In the light of the above, I look forward to receiving your feedback.”

37. The signed Distribution Agreement reveals who the role players referred to in the e-mail are. Mr Eldie Ferreira is the owner of portion 17 of the farm N [...], the respondent is the owner of portion 18 and Siboniseng is the holder of the development rights in respect of Leeuwfontein Ext [...] which is to be developed on the two erven. These parties entered into a Development Distribution Agreement on 5 February 2020. The agreement records that the three parties will be entering into an agreement with a developer and another company which will result in the transfer of the two erven and the development rights, and realise for the parties R25 million of which R7 million will be payable to the three parties on transfer of the land. The amount will be distributed amongst the three parties. The respondent and Siboniseng to each receive R1 750 000.00, and Eldie Ferreira R3 500 000 being the full purchase consideration for portion 17. The balance of the purchase price, namely R18 000 000.00 will be paid in instalments on sales of erven or houses after the proclamation and transfer of the erven. R8 500 000.00 of the balance of the purchase price will be paid to Siboniseng and R9 500 000.00 to the respondent who will also be responsible to pay Harcourts's reasonable fees.

38. The second draft sale agreement envisages a sale of the respondent's property (i.e., portion 18) and Siboniseng's development rights for a combined purchase consideration of R21.5 million. The identity of the purchaser does not appear from this second draft sale agreement. I do not find anything sinister in this, nor in the fact that the company referred to in the first draft sale agreement was found not to exist. What is clear from the papers is that there have been numerous attempts to realise the best value for a property which has the potential to be developed for township establishment. Mr Shepperson in an e-mail to the applicant informed him that the respondent, Siboniseng and the owner of erf 17 had been working together for an extended period of time with a number of service providers. The applicant has not produced any evidence to controvert this. Mr Shepperson also informed the applicant that the exact details of the purchaser would be inserted when he is told who it will be. In my view it is not implausible that negotiations are afoot with more than one prospective purchaser. The ultimate purchaser will depend on the outcome of the discussions and other variables. Mr Shepperson pointed out to the applicant in the e-mail that the purchaser will be obliged in terms of the agreement with it to pay to the respondent a deposit of R2.5 million within 14 days of the signature of the agreement. This Mr Shepperson opined will prove the genuineness of the purchaser. In my view the obligation to pay a deposit will separate the chaff from the grain. The proposed second draft sale agreement contains a safety net for the respondent. The purchase price has to be secured by guarantees to be provided within 30 days of the payment of the deposit.

39. The distribution between the respondent and Siboniseng of the proceeds of the sale of the property and Siboniseng's development rights is set out in the proposed distribution agreement to be entered into between the respondent and Siboniseng. Siboniseng is to receive R10 million and the respondent R11.5 million.

40. The parties envisage sharing the estate agent's commission. The respondent to pay R400 000.00, and Siboniseng R250 000.00. As far as Mr Shepperson's legal and advisory costs are concerned, the respondent and Siboniseng envisage the respondent paying R600 000.00 and Siboniseng R1 100 000.00. There is also a

provision for R5 000 000.00 to be held as a retention amount for the benefit of the purchaser. The purpose of the retention amount is identified in the second draft sale agreement.

41. I am mindful that the first draft sale agreement envisaged the sale of portion 17 and there was no reference therein to portion 18. Mr Shepperson explained in his e-mail of 20 May 2022 that the potential purchaser sent the agreement⁹ for the purchase of erf 17 but not erf 18. There is again nothing sinister in this. In terms of the signed Development and Distribution Agreement the purchase consideration for erf 17, erf 18 and Siboniseng's development rights was to be R25 000 000.00. Of this amount R3 500 000.00 constituted the purchase consideration for erf 17. The remaining R21 500 000.00 being the purchase consideration for erf 18 and Siboniseng's development rights was to be distributed between the respondent and Siboniseng. The former to receive R11 250 000.00 and the latter R10 250 000.00. In terms of the proposed distribution agreement, Siboniseng will receive R10 million and the respondent R11.5 million.

42. The applicant considers payment of R10 million to Siboniseng as an assumption of a liability by the respondent in favour of Siboniseng without a valid cause. However, the applicant ignores that the respondent would be selling the property and Siboniseng would be selling its right to develop the property. The payment of R10 million to Siboniseng constitutes the purchase consideration for the sale of Siboniseng's rights to develop the property. It is the sale of the property together with Siboniseng's rights that allows the respondent to command a purchase consideration of R11.5 million for the property. If sold on its own the property will realise around R1 million. The payment to Harcourts and Mr Shepperson is for services rendered by them.

43. The applicant has failed to demonstrate that his suspicions are reasonable. The allegation of fraud is not supported by facts. I see no justification for suspecting Mr Ferreira of acting unlawfully or in bad faith. On the facts before me I cannot conclude that he is acting in bad faith or has an ulterior motive in disposing of the property. Nor

⁹ Referred to in the e-mail as 'OTP' (i.e., presumably offer to purchase).

am I able to find any justification for the misgivings regarding Siboniseng's involvement. Far from acting to the detriment of the respondent and shareholders, Mr Ferreira in my view has been astute in exploiting the value of the property and realising the best value for the respondent and its shareholders. There is no merit in the claim that Mr Ferreira is dealing with the property as if it is his own. Mr Ferreira is the director of the company. Nothing precludes him from exploring the sale of a property and it is clear that he is mindful that he requires shareholder consent to dispose of the property.

44. The applicant is frank that he will not support the sale of the property. That is however not a reason to wind up the respondent. The company laws provide remedies in such an instance.

Mismanagement and governance irregularities

45. The applicant raises management and governance concerns. He alleges that shareholder meetings are not convened. To demonstrate mismanagement, he alleges that Mr Ferreira does not know who the auditor of the company is. He alleges that he discovered at a shareholders' meeting on 15 June 2022 that Mr Ferreira did not know when the last annual financial statements were prepared as he had left this to his wife who had passed away.

46. Mr Ferreira's explanation is that his late wife was an accountant and she attended to the preparation of the financial statements. She died on 8 April 2020. And he believed that Mr WJH Pretorius was the respondent's auditor. The applicant has however established that Mr WJH Pretorius is not the auditor.

47. Mr Ferreira's answers are not satisfactory. However, this is not a reason to wind-up the respondent. If the applicant is dissatisfied with Mr Ferreira's management of the respondent (or mismanagement) or Mr Ferreira's failure to adhere to sound corporate governance prescripts, his remedies lie in the Companies Act, 2008. For instance, he has a right to demand the holding of shareholder meetings. Shareholders also have the right to remove directors. The complaints

directed against Mr Ferreira can be addressed without having to resort to winding-up the respondent.

Conclusion

48. I am not persuaded that it is just and equitable to wind-up the respondent be it in terms of section 81(1)(d)(iii) of the Companies Act, 2008 or section 344 (h) of the Companies Act, Act No 61 of 1973 read with section 345 thereof.

Order

49. Consequently, I make the following order:

The application is dismissed with costs.

S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria
(electronic signature appended)

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 July 2023.

Date of Hearing:	8 May 2023
Applicant's Counsel:	Adv J H Lerm
Respondent's Counsel	Adv S L P Mulligan