THE SUPREME COURT OF APPEAL OF SOUTH AFRICA JUDGMENT

Case no**:** 1025/2013
Reportable

In the matter between:

CHATER DEVELOPMENTS (PTY) LTD (IN LIQUIDATION) **Appellant**

and

WATERKLOOF MARINA ESTATES (PTY) LTD **First Respondent**

H A MARAIS **Second Respondent**

Neutral citation: *Chater Developments v Waterkloof Marina Estates & another* (1025/2013) [2014] ZASCA 198 (28 November 2014)

Coram: Navsa ADP, Theron, Wallis, Mbha JJA and Dambuza AJA

Heard: 13 November 2014

Delivered 28 November 2014

Summary: Company – Winding up by Court – Property purchased in good faith in circumstances where the liquidator was not authorised to sell the property – Section 82(8) of the Insolvency Act 24 of 1936 rendered applicable by s 339 of the Companies Act 61 of 1973 – Agreement valid.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Pretorius J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Theron JA (Navsa ADP, Wallis, Mbha JJA and Dambuza AJA concurring):

[1] The issue for determination is whether the provisions of s 82(8) of the Insolvency Act 24 of 1936 (the Insolvency Act) are applicable to a company which is wound up on the basis of an inability to pay its debts, by virtue of the provisions of s 339 of the repealed Companies Act 61 of 1973 (the 1973 Companies Act), which remains applicable in the winding up of companies.

[2] I set out the common cause background to this litigation. Chater Developments (Pty) Ltd (in liquidation) (Chater Developments), first defendant in the court a quo, was placed in final liquidation on 30 July 2002. The second respondent, Mr Hendrie Andries Marais (Marais), third party in the court a quo, was appointed as sole liquidator of Chater Developments on 28 October 2002. On 24 January 2003, the second meeting of creditors of Chater Developments was held for, inter alia, the purposes of proof of claims and the passing of resolutions empowering the liquidator to sell its assets. The second meeting of creditors was adjourned to 30 January 2003, on which date a resolution was adopted which authorised the liquidator,

'to dispose of [Chater's] movable assets by public auction, private treaty or public tender in his sole discretion and that the mode of sale … shall be determined by the [liquidator] and that all costs incurred in relation thereto be costs of administration and paid for by the estate.' There were no contributories to Chater Developments.

[3] On 18 August 2004 the first respondent, Waterkloof Marina Estates (Pty) Ltd (plaintiff in the court a quo) entered into a written agreement with Chater Developments in terms of which it purchased from the latter, forty per cent of the issued shares in City Lake Marina (Pty) Ltd (second defendant in the court a quo) and Chater Developments' claims, if any, against City Lake Marina for the amount of R6 million. In concluding this agreement Chater Developments was represented by Marais who acted under the authority granted to him at the meeting of creditors held on 30 January 2003. On 14 September 2006, Chavonnes Badenhorst St Clair Cooper was appointed as joint liquidator of Chater Developments, together with Marais.

[4] Chater Developments refused to comply with the terms of the agreement asserting that it was invalid and unenforceable because Marais had not obtained a resolution from the members as required by s 386(3)(*a*) of the 1973 Companies Act. In particular it refused to transfer the shares to Waterkloof Marina, against a tender of payment of the purchase price. During October 2009 Waterkloof Marina issued summons out of the North Gauteng High Court (Pretoria) against Chater Developments for an order directing delivery and transfer of Chater Developments' forty per cent shareholding in City Lake Marina, and its claims, if any against City Lake Marina, against payment of R6 million. Two other defendants were cited in the action in the high court, namely, Yunnan Construction Engineering CC (third defendant) and the Master of the High Court, Pretoria (fourth defendant). These defendants, including City Lake Marina, were cited in the proceedings as interested parties and no relief was

sought against them. They did not participate in the trial in the high court, nor in the appeal.

[5] On 16 January 2012 Marais resigned as liquidator of Chater Developments. During February 2012 Chater Developments issued a third party notice claiming that in the event the court finds that the agreement was valid, Marais should be held liable to make good to the estate the amount of the loss which the estate may have sustained as a result of him dealing with the property.

[6] The matter came before the high court (Pretorius J) as a stated case where the court was called upon to decide certain issues separately in terms of Rule 33(4) of the Uniform Rules of Court. The parties were agreed that for the purposes of the stated case the court must assume that (i) Waterkloof Marina acted bona fide as envisaged in s 82(8) of the Insolvency Act; (ii) the second meeting of creditors was properly constituted; and (iii) the persons present at that meeting were duly authorised and had acted in accordance with the terms of their respective mandates. The parties further agreed that 'no second meeting of the members of the first defendant [Chater Developments] was held whether on 30 January 2003 or at all and that the aforesaid resolutions . . . were accordingly not adopted by the members of the first defendant [Chater Developments]'.

[7] The high court was called upon to determine, on the basis of the agreed facts, whether the agreement was valid and enforceable having regard to the provisions of s 82(8) of the Insolvency Act, read with the provisions of s 339 of the 1973 Companies Act. It answered this question in favour of the respondent and found that there was no provision in the 1973 Companies Act, dealing specifically with the situation where the liquidator sells property of the company in liquidation without authorisation by members of the company. Based on this, the judge concluded that s 82(8) of the Insolvency Act was applicable and the

agreement was valid and enforceable. The appeal is against this judgment with the leave of this court.

[8] In this court, Chater Developments contended that the agreement was not valid and enforceable because Marais was not authorised by the members of Chater Developments to sell its movable property by private contract as envisaged in s 389(3)(*a*) read with s 386(4)(*h*) of the 1973 Companies Act.[1] Waterkloof Marina on the other hand contended that the agreement was valid and enforceable by virtue of the provisions of s 82(8) of the Insolvency Act, read with s 339 of the 1973 Companies Act.

[9] Liquidators have certain powers that may be exercised on their own initiative in any winding-up.[2] Then there are defined powers which the liquidator may only exercise on the authority of resolutions of the creditors and members (or contributors) at a general meeting,[3] and if no such authority is given, or could be given, or even where there is a difference between the directions of creditors on the one hand to those of members or contributors on the other hand, then the liquidator may apply to the Master for directions under section 387(2). If the Master refuses to give directions, the liquidator may apply to court for directions.[4] Section 386(3)(*a*) provides that:

'The liquidator of a company in a winding-up by the Court, with the authority granted by a meeting of creditors and members or contributories or on the directions of the Master given under section 387 shall have the powers mentioned in subsection (4)'.

[10] Section 386(4)(*h*) authorises the liquidator 'to sell any movable and immovable property of the company by public auction, public tender or private

[1] *Griffin & others v The Master* (*Commins & another Intervening)* 2006 (1) SA 187 (SCA) paras 6 and 7.
[2] These powers are set out in s 386(1)(*a*)-(*e*) of the 1973 Companies Act and relate largely to core winding-up functions of the liquidator.
[3] These powers are dealt with in s 386(4)(*a*)-(*i*), are extensive and relate mainly to disposal of assets of the company in liquidation.
[4] Section 387(3).

contract and to give delivery thereof.' The authors, Cilliers *et al*, characterise the legal position of the liquidator in the following terms:

'The liquidator does not have the inherent power to realise the assets of the company; he must be authorised to do so by resolutions of creditors and members or contributories – or in the absence of such resolutions, by the Master. The liquidator must, when selling assets of the company, have regard to the directions of meetings of creditors or members or contributories. Subject to such authorisation he may sell movable and immovable property either as a whole or in parcels by public auction, public tender or private contract to any person.' [5]

[11] In this matter the liquidator acted without the necessary authorisation. That would ordinarily invalidate the transaction unless Waterkloof Marina was entitled to the protection of s 82(8) of the Insolvency Act. This court, as did the high court, has to determine whether the laws of insolvency can, in the present circumstances, be applied to render the agreement valid and enforceable. It was common cause that the appellant was wound up on the basis that it was unable to pay its debts. Section 339 of the 1973 Companies Act renders particular provisions of the law relating to insolvency applicable to companies being wound up and unable to pay their debts in respect of any matter not provided for in the 1973 Companies Act. The provisions of Chapter XIV (which includes s 339) of the 1973 Companies Act remain in force.[6] This section reads:

'In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act.'

[12] The predecessor to s 339 of the 1973 Companies Act, was s 182 of the Companies Act 46 of 1926, the relevant portion of which was substantially similar to s 339, and was interpreted by Colman J in *Woodley v Guardian Assurance Company of SA Ltd*[7] to mean that the provisions of the law relating to

[5]H S Cilliers *et al*, *Corporate Law* 3 ed (2000) at 28.73 on 'The Realisation of Assets' (footnotes are omitted). See also J A Kunst, P Delport and Q Voster, *Henochsberg on the Companies Act* 5 ed (2011) at 826.
[6]Appendix I of the Companies Act 71 of 2008.
[7]*Woodley v Guardian Assurance Company of SA Ltd* 1976 (1) SA 758 (W).

insolvent estates shall be applied 'in so far as they are capable of being applied'.[8] The learned judge reasoned that it was just and reasonable that persons in the position of the plaintiff in that matter should be no worse off, because the wrongdoer was a company in liquidation, than they would have been if the wrongdoer had been an individual under sequestration and added that:

'… it is socially desirable that, as far as is practicable, all the consequences of the liquidation of an insolvent company should be similar to those to the insolvency of an individual. Certainly there is no reason for assuming that the Legislature, when enacting a provision which brings about or tends to bring about that result, could not have meant what it said.

The winding-up of a company unable to pay its debts is something closely akin to the winding-up of the estate of an insolvent individual. There are some different requirements which flow from the fundamental difference between a company and an individual: those are specifically provided for in the Companies Act. In respects other than those so provided for I cannot see why the Legislature should not have desired, not merely the procedural rules, but also the substantive rules and consequences, to be the same in both cases. And I can see no justification for an approach which distorts or strains the language of sec. 182 in order to avoid that result'.[9]

A provision of the law relating to insolvency will not apply if the matter is 'specifically provided' for in the Companies Act.[10] The Constitutional Court has approved this approach.[11]

[13] The relevant provision of the Insolvency Act is s 82(8), which 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, [without authority] 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

[8] At 760B-C and 763.
[9] At 763E-F.
[10] *Woodley v Guardian Assurance Company of SA Ltd* 1976 (1) SA 758 (W) at 763. J A Kunst, P Delport and Q Voster, *Henochsberg on the Companies Act* 5 ed (2011) at 668.
[11] *Bernstein & others v Bester & others NNO* 1996 (2) SA 751 (CC) para 96.

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.'[12]

[14] It was contended by the appellant that s 82 was not applicable as the 1973 Companies Act contains provisions, namely ss 386(5) and 387(4), which deal with the situation where a liquidator sells property of the company in liquidation without authorisation by its members. Section 386(5) of the 1973 Companies Act provides that the court may grant leave to a liquidator to conclude an agreement to raise money on the security of the assets of the company or to do any other thing necessary for winding up the affairs of the company.[13] In support of its argument the appellant relied on *Griffin & others v The Master & another*[14] where it was held that s 386(5) can be invoked to resolve a deadlock between creditors and members of a company or close corporation in liquidation. It was suggested that it can thus be inferred that the court is empowered to do whatever is necessary for winding up the affairs of the company and distributing its assets, even if it is against the wishes of the creditors and members. It was further contended that even where the liquidator does not approach court to ratify an unauthorised agreement of sale, the purchaser may, in terms of s 387(4) of the 1973 Companies Act, approach the court for appropriate relief. Section 387(4) provides that any person aggrieved by any act or decision of the liquidator may apply to court for an order that is 'just'.

[15] There is little authority on this point. Section 82 of the Insolvency Act has been said to be applicable to liquidations by virtue of s 339 of the 1973

[12]The persons referred to in s 82(7) of the Insolvency Act include 'the trustee or an auctioneer employed to sell property of the estate in question, or the trustee's or the auctioneer's spouse, partner, employer, employee or agent'.

[13]Section 386(5) of the Companies Act reads: 'In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets.'

[14]2006 (1) SA 187 (SCA) para 10.

Companies Act.[15] Conradie J, in *Mookrey v Smith NO & another*,[16] explained the rationale for s 82(8) of the Insolvency Act:

'To the extent that a trustee is bound to comply with instructions from creditors [and members (or contributors) of the company] 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 [and members (or contributors) of the company].

If an agent acts outside his powers his act, leaving 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 [and members (or contributors) of the company] should be anything but invalid.

…

But where an act is clearly ultra vires the authority given by the creditors [and members (or contributors) of the company] to the trustee it seems to me that invalidity must have been intended to result. …

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.'[17]

And in *Sherry v Henning NO & others*[18] it was found that:

'There is no similar provision in the Companies Act dealing with sale of property and it follows that section 82 is therefore applicable'.

[16] Section 339 renders both procedural and substantive provisions of the Insolvency Act applicable in the winding up of a company.[19] The remedies provided in ss 386(5) and 387(4) of the 1973 Companies Act are discretionary and subject to a particular set of facts being present. This section empowers a liquidator, and only a liquidator to approach court in appropriate circumstances. A purchaser such as the respondent who seeks to preserve a sale concluded in

[15] *Oertel v Director of Local Government* 1981 (4) SA 491 (T) at 508. See generally J A Kunst, P Delport and Q Voster, *Henochsberg on the Companies Act* 5 ed (2011) at 669; 4 Lawsa Part 3 (First reissue) para 104.

[16] 1989 (2) SA 707 (C).

[17] At 711B-F.

[18] [2005] JOL 15358 (T) para 6.

[19] *Woodley v Guardian Assurance Co of SA Ltd* 1976 1 SA (W) 758 at 763F-G.

good faith cannot invoke this section. It was contended by Chater Developments that in the event that the liquidator refuses to act in terms of s 386(5), an aggrieved person such as Waterkloof Marina is entitled to invoke the provisions of s 387(4) of the Act and seek an order from the court compelling the liquidator to abide the sale.

[17] The provisions of s 387(4) do not detract from the applicability of s 82 (8) of the Insolvency Act. The right in s 82(8) is a substantive right that offers protection to an innocent third party such as the respondent, from the consequences of an unenforceable transaction. It validates a purchase in good faith. By contrast, the provisions of s 387(4) provide for a situation where the relief sought is dependent upon the exercise of a discretion by the court. Waterkloof Marina should not be obliged to rely on a discretionary remedy in circumstances where it is able to assert a valid purchase by virtue of the provisions of s 82(8) of the Insolvency Act. It was common cause that Chater Developments was a company unable to pay its debts as envisaged in s 339. There is no provision in the 1973 Companies Act that validates a purchase in good faith from a liquidator who is not authorised to sell. Such a situation is not 'specifically provided for in this Act' and it follows that s 82(8) is applicable.

[18] For these reasons the appeal is dismissed with costs including the costs of two counsel.

L V Theron
Judge of Appeal

APPEARANCES

For Appellant:	AB Rossouw SC with JH Moller Instructed by: Brooks and Brand Inc, Pretoria Van Der Merwe & Sorour Attorneys, Bloemfontein
For First Respondent:	GI Hoffman SC with S Kuny Instructed by: David Kahn & Associates, Johannesburg Symington & De Kok, Bloemfontein