



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: YES/NO Of Interest to other Judges: YES/NO Circulate to Magistrates: YES/NO
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Case number: 2724/2022

In the matter between:

JENN TRAINING & CONSULTANCY (PTY)LTD

Applicant

And

AD LADEM (PTY) LTD t/a KIDS CAMPUS

Respondent

JUDGMENT BY: C REINDERS, J

HEARD ON: 17 NOVEMBER 2022

DELIVERED ON: 14 APRIL 2023

- [1] This is an opposed application wherein the applicant seeks an order that the respondent's estate be placed under provisional liquidation in the hands of the Master of the High Court.
- [2] The applicant avers that during 2019 it entered into an agreement with the respondent in terms whereof the respondent borrowed an amount of R 2 000 000-00 from applicant. The respondent, so the applicant avers, breached the agreement by failing to make any payment and/or at least the first payment. This caused the applicant to serve a notice in terms of section 345 of the Companies Act¹.
- [3] The respondent failed to react to the notice and obviously failed to effect any payment. The applicant therefore relies on the provisions of sec 345(1)(a) of the Act in that the respondent is deemed to be unable to pay its debts.
- [4] The respondent filed an opposing affidavit. Therein the director of the respondent states that she does not intend to offer a *seriatim* response to the founding affidavit as she opines that the applicant does not have *locus standi* to prosecute the liquidation and secondly denying the deponent to the applicant's affidavit to have been properly authorised to institute the proceedings. In the affidavit much is said about the "vagueness" of the annexed loan agreement, however it appears to be common cause that the respondent did borrow the R 2 million, received the amount and has failed to make any payments. It is not suggested when the respondent recons the amount is due and payable and/or what the respondents view is how the loan should be repaid. It is stated in the affidavit that the respondent is not insolvent but that the deponent does not intend to elaborate on the allegation.
- [5] At this stage of the proceedings the applicant merely needs to show its entitlement to the order *prima facie*. It must show therefore the balance of probabilities to be in its favour.²

¹ Companies Act 61 of 1973 (commonly referred to as "the old Companies Act").

² *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943(A) at 979.

[6] In as far as there are disputes on the papers a distinction is to be drawn between disputes in respect of respondent's liability to the applicant and other disputes. In respect of disputes regarding respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds and in respect of other disputes whether the balance of probabilities favours the applicant's version.

[7] Recently in ***Atlantic Oil Atlantic Oil Inland (PTY) Ltd v Datnis Trading (PTY) Ltd***³ Snellenburg summarised the consequences of a respondent's failure to rebut the statutory presumption that it unable to pay its debts as follows:

[18] In ***Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*** the Supreme Court of Appeal authoritatively held that the deeming provisions concerning the inability to pay its debts, contained in section 345 of the old Companies Act may be used to establish the insolvency of a company. The Court held that a commercially insolvent company may be wound up in accordance with chapter 14 of the old Companies Act, as is provided for in subitem 9(1) of schedule 5 of the new Companies Act and that factual solvency in itself is not a bar to an application to wind up a company in terms of the old Companies Act on the ground that it is commercially insolvent. "That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time." Factual solvency will however always be a factor in deciding whether a company is unable to pay its debts."

[8] Snellenburg AJ concluded that "(e)ven if the respondent was factually solvent, a fact that the respondent did not establish, the same would not be a bar to the liquidation of the respondent on the basis that it is commercially insolvent."⁴

[9] I am not convinced that any of the grounds raised by the respondent is sufficient to decline a provisional order of liquidation. To aver that the

³ (3460/2021) [2022] ZAFSHC 126.

⁴ At paragraph [19].

deponent has not been properly authorised fails to convince me. It is the attorney who should be properly authorised and where such authority is disputed it should be dealt with in terms of Rule 7 of the Uniform Rules of Court.⁵

[10] Accordingly I am satisfied in all the circumstances that the applicant has made out a case for the provisional winding up of the respondent.

[11] Wherefore I make the following order:

1. The Respondent Company is hereby placed under PROVISIONAL LIQUIDATION in the hands of the Master of the High Court.
2. A Provisional Order is hereby issue calling upon all interested parties to show cause, if any, to the Court on the **1st** day of June **2023** at **09h30** why a FINAL ORDER OF LIQUIDATION should not be granted against Respondent Company.
3. Service of this rule, and a copy of the Notice of Motion and annexures must be effected on the Respondent Company at its registered Office, or its principal place of business within the court's jurisdiction.
4. This order must, without delay, be published in DIE VOLKSBLAD and THE GOVERNMENT GAZETTE.
5. A copy of the winding-up order must be served on -
 - 5.1 Every registered trade union that as far as the Sheriff can reasonably ascertain, represents any of the employees of the Respondent Company.
 - 5.2 The employees of the Respondent Company by affixing a copy of the application and provisional order on any notice board to which the

⁵ Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA).

employees have access inside the Respondent Company's premises or if there is no access to the premises by the employees, by affixing a copy to the front gate or front door of the premises from which the Respondent Company conducted any business.

5.3 The South African Revenue Services.

6. The sheriff must ascertain whether the employees of the respondent are represented by a Trade Union and whether there is a notice board on the premises to which the employees have access.



C REINDERS, J

On behalf of applicant:

Adv HJ van der Merwe

Instructed by:

Marius van Zyl Inc.

BLOEMFONTEIN

On behalf of respondent:

Adv S Grobler SC

Instructed by:

Kramer Weihmann & Joubert

BLOEMFONTEIN