REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 5548/2015

DATE: 9 APRIL 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

PHILLIP JACOBS Applicant

and

PC UDINGO JOINT VENTURE (PTY) LTD Respondent

(ID .[...])

JUDGMENT

RAULINGA J

[1] The applicant launched an urgent application asking for the following relief:

(a) That the respondent be placed under provisional liquidation;

(b) That a *rule nisi* be issued calling upon all persons interested to show cause, if any, on a date fixed by this Court, why the respondent should not be placed under final liquidation and why the costs of this application should not be costs in the cause.

(c) That the service of the order be effected as indicated in paragraph 4 of the notice of motion.

[2] The synoptic facts leading to this urgent application are that the applicant, his daughter, Ms Fodia Marco and Kutloano Leballo are shareholders in the respondent. The applicant and Mr Leballo hold 45%'shares each in the respondent, whereas Mrs Marco holds only 10%. On the 20 December 2014 the applicant's name was removed from the respondent's account -and as a result he is unable to view any transactions on the respondent's account. On the 8 January 2015, Mr Leballo and Mrs Mono, at a meeting of directors, removed the applicant as a director of the respondent in his absence. The applicant also claims that Mrs Leballo is depleting the funds of the respondent's company's bank account. He also claims that the respondent is dysfunctional as a result.

[3] On the contrary, the respondent avers that the respondent is functional in that it is in the process of completing a number of building projects. Further that- there is no deadlock between the members or the directors of the respondent, as applicant is a minority shareholder who is merely disgruntled and wants to "hijack" a substantial part of the business of the respondent.

[4] I accept the applicant's submission that given the circumstances of the case and the fact that he could only consult with his attorneys on the 15 January 2015, the matter must be treated as urgent. In essence, the urgency arose on the 20 December 2014 when his name was removed from the bank account of the respondent and finally on the 8 January 2015 when he was removed from the directorship of the company. He had no opportunity before that to launch an urgent application than do so at the earliest opportunity in January 2015.

[5] Applicant contends that he has a right to apply for provisional liquidation of the respondent in terms of section 81(l)(d) of Act 71 of 2008 (New Companies Act)("the Act") which provides for a company, one or more of its directors, or one or more of its shareholders to apply to a court for an order to wind up a solvent company. He further argues that in *Muller v Hilly Valley (PTY) Ltd (2012) All SA 187 (GSJ)* as confirmed in *Budge and Others v Midnight Storm Investments and Another 2012(2) SA 28 (GSJ)*. the court rejected a proposed interpretation of section 89(l)(d) of the Act based on .the Uesdem Gemeris Rule (which put forward a meaning of the just and equitable ground for winding-up) which was limited to the circumstances referred to in sections 81 (l)(c), 81(l)(d)(i) and 81(l)(d)(ii), and held that the legal basis for the winding up under section 81(l)(d)(iii) of the New Act is the same as that under section 344(H) of the Old Act.

[6] In companies having a few members the court looks at the persona relationship between the members in deciding whether or not to liquidate the company and, as long as there is proof of a dispute which upsets this personal relationship, there need not even be a deadlock which makes it impossible to carry on the business of the company. *Moosa v Maujee Bhawan (PTY) Ltd 1967(3} 5A 131 (T) at 138.* However, these arguments

cannot be considered in isolation, one must take a step back and consider other factors.

[7] The respondent correctly submits that the substratum of the respondent has not fallen away, as the respondent continues to trade and is in the process of completing a number of building contracts. Further that the applicant has an alternative in that he can use the rights afforded to him in terms of sections 163 and 164 of the Act, which provide ample protection for minority shareholders such as the applicant.

[8] As already intimated in paragraph 6 above, a court hearing an application for the winding-up of a company on the grounds that it is just and equitable is required to exercise a judgment in arriving at the required conclusion of law to be derived from the facts placed before it - as submitted by the respondent. To arrive at that conclusion, the Court is obliged to examine all facts placed before it and to determine which of them is relevant to the formation of an opinion on the question of justice and equity; and, as difficult as "justice and equity are to define, they have to be seen as setting an objective standard that will be the same in every Court in the land" - *Tjospomie Boerdery (PTY) Ltd v Drakensberg Bottler's (PTY) Ltd 1989 (4) SA31Ta 41 -42.*

[9] Much as I am convinced that the relationship between the shareholders or directors has deadlocked, based on the reasons given above, I am of the view that it is fair and reasonable not to wind-up the company.

[10] It is evident *ex-facie* the record that the applicant has failed to comply with the peremptory provisions of sections 346(4A)(a) and (b) of the old Companies Act 61 of 1963, which applies by virtue of section 9 of Schedule 5 of the new Companies Act, as its provisions are necessary to give "full effect" to Part G of the new Companies Act. A winding-up order is defined to section 1 of the old Companies Act to mean "any order of court whereby a company is wound-up and includes any order of court whereby a company is placed under provisional winding-up for so long as the order is in force.

[11] It has been held by our courts that the words used in the preamble of section 346 (4A)(a) are to the effect that "when a petition is presented to Court" entail service of the application when the papers are lodged at Court, i.e filed with the *Registrar - P. W Roberts v The Taylor of Bunkingham CC Case No. 2008 / 21864 (WLD) at paras [6] - [7] Corporate Money Managers (PTY) Ltd and Others v Panamo Properties 49 (PTY) Ltd 2013(1) SA 522 (GNP).* The words "before or during the hearing" in section 346 (4A)(b) mean that such affidavit "must" be filed before or during the hearing. The respondent is correct in submitting that since the hearing in *casu* is over the opportunity to file such an affidavit has passed.

[12] In Corporate *Money Managers (PTY) Ltd and Others (Supra)* it was held that, on a proper interpretation of section 346(4A)(a)(iii) and 4A(b) of the Companies Act 61 of 1973, the furnishing of a copy of an application for a winding-up of a company to the South African Revenue Service at the time when the

application is lodged with the registrar of the court is peremptory. Proof of such furnishing by means of an affidavit in this manner prescribed by section 346 (4A)(b) is also peremptory - (paragraph [10] at 524 D). In *Ivor Charles Stratford and Others v Investec Bank Limited* *[2014J ZACC38,* the Court intimated that in terms of Section 38(1) of the Insolvency Act No.24 of 1936 a sequestration order granted against a debtor has the effect of suspending contracts of service of the debtor's employee with immediate effect. In *EB Steam Company (PTY) Ltd v Eskom Holdings Soc Ltd* *[2013] ZASCA 167; 2014 (1) All SA 294 (SCA)* the Supreme Court of Appeal dealt with section 346 (4A) of the old Companies Act - a section identical to section 9(4A) of the Insolvency Act. There it held that compliance with section 346 (4A) is peremptory whilst the method in which a creditor furnishes the application to the employee is directory. One must be mindful of the fact that there was no attempt of service at all on the employees of the respondent.

[13] This therefore takes me to question whether I may postpone the matter in order to allow the applicant to rectify the non-compliance. As in *Corporate Money Managers (PTY) Ltd and Others (supra)* the difficulty in this case is that the arguments have been closed on both sides. All the aspects concerning the case were fully canvassed. Moreover, the employees have been deprived of their right to adequate notice and such prejudice could not be cared at this stage.

[14] I am also minded to mention that the confirmatory affidavit to the replying affidavit is not commissioned. This renders the replying affidavit a nullity.

[15] I accordingly would dismiss the application with costs.

T J RAULINGA

JUDGE: GAUTENG DIVISION, PRETORIA