REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

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

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

(3) REVISED.

18.7.2013 ....
DATE SIGNATURE

17/7/2013

Case number: **55336/2012**

In the matter between : -

LSP PETROLEUM (PTY) LTD Applicant

and

KUKHANYA MARKETING CC Respondent

And

JAMES NTIMANE First Applicant

AGNES THEKISO Second Applicant

MALOBOHANG MOFOLO Third Applicant

MANDLA PETER TIMANA Fourth Applicant

And

LSP PETROLEUM (PTY) LTD Respondent

In re:

LSP PETROLEUM (PTY) LTD Applicant

and

KUKHANYA MARKETING CC Respondent

JUDGEMENT

JANSE VAN NIEUWENHUIZEN AJ

[1] The applicant applies for an order placing the respondent under provisional liquidation.

INTERVENTION APPLICATION

[2] On 29 May 2013, I postponed the application in order to afford the applicant an opportunity to comply with the provisions of section 346(4A) of [Appendix I: Chapter XIV of the 1973 Act to the Companies Act, 71 of 2008] ("1973 Act") the 1973 Act.

[3] Subsequent to the service of the application on the employees of the respondent, four of the respondent's employees launched an application for leave to intervene in the application.

[4] In support of their allegation that they have a direct and substantial interest in the winding-up application, the employees state the following:

"10.1 we are employees of Kukhanya Marketing CC;

10.2 we depend on the said entity for our job security and livelihood;

10.3 we are breadwinners at our respective households;

10.4 the winding-up of Kukhanya Marketing CC will inevitably result in us losing our employment;

10.5 there is a high rate of unemployment in the Republic of South Africa; and

10.6 we have dependants who would equally suffer severe prejudice should our employment with Kukhanya Marketing CC, on which we depend for livelihood, terminate.

[5] The devastating effect the winding-up of any company will have on its employees is indeed unfortunate and harsh.

[6] For this reason the legislator, undoubtedly, retained the provisions of section 346(4A) of the 1973 Act, in the Companies Act 71 of 2008.

[7] A direct and substantial interest in the subject matter of a an application is, however, not the only requirement in order to intervene in such an application.

[8] A party who seeks leave to join an application as a respondent must also make allegations which will show:

1) that he or she has a *prima facie* defence to the relief sought by the applicant;

2) that his or her application is seriously made; and

3) is not frivolous.

[See: *Erasmus, Superior Court Practice*, Main Volume, B1-103 and the authorities cited therein.]

[9] At the outset, I must emphasise that I have no doubt that the application brought by the employees for leave to intervene is seriously made and not frivolous. That much appear from their plight set out *supra*.

[10] The only question which remains is whether the employees have a *bona fide* defence to the winding-up application.

[11] In support of their defence, the following facts are stated:

> *"11. In general, we hold the view that there is no basis for the winding-up of Kukhanya Marketing CC."*
>
> *"12. This viewpoint is based on our intimate knowledge of the financial position of Kukhanya Marketing CC."*
>
> *"14. We respectfully submit that Kukhanya Marketing CC is vibrantly solvent, both factually and commercially and that its assets way exceeds its liabilities."*

[12] The statement that the respondent is commercially solvent is, however, as will appear *infra*, not correct.

[13] On Mr Timana's (Timana), the deponent to the respondent's answering affidavit, own version, the respondent is indebted to the applicant and this debt although due and payable, remains unpaid.

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[14] Mr Snyman, appearing on behalf of the employees, argued that a solvent company may not, in terms of the Companies Act, 71 of 2008, be wound-up. In support of this contention, he referred to the following judgments: *HBT Construction and Plant Hire CC v Uniplant Hire CC* 2012 (2) SA 197 FB; *Herman and Another v Set-Mark Civils CC* 2013 (1) SA 386 FB and the unreported judgment delivered on 16 November 2012 by Goosen J in the matter of *Dereck Cecil Platt v Umgamanzi Fishing (Pty) Ltd, Eastern Cape High Court, Port Elizabeth* (case number 3936/2011).

[15] The judgments *supra*, examined the provisions of the Companies Act, 71 of 2008 and concluded that a solvent company may only be wound-up, at the instance of a creditor, in terms of the provisions of section 81(1)(c). Section 81(1)(c) specifies two scenarios that would justify the winding-up of a company within the contemplation of section 81(1).

[16] Should the winding-up application not fall within the two categories envisaged by section 81(1)(c), a creditor needs to proof factually insolvency.

[17] Mr Joubert, counsel for the applicant, referred me to various dissenting judgments.In *Firstrand Bank Ltd v Lodhi 5 Properties Investment CC* 2013 (3) SA 212 GNP, Van der Byl AJ held, that the Legislator did not do away with the well established and commercially sensible approach of commercial insolvency. In other words, it is not necessary for a creditor who relies on a company's inability to pay its debts, to also proof that the company is factually insolvent. The deeming provision in section 345 of the 1973 Act, still applies to applications for the winding-up of a company.

[18] The *Lodhi 5* judgment was followed in the unreported judgment of Van Oosten J in *Firstrand Bank Ltd v Bunker Hills Investments 499 CC* (32130/11) [2012] ZAGPJHC 84 (4 May 2012).

[19] Without referring to any of the authorities *supra*, Dolamo AJ reached the same conclusion in *Edge Geo LCC v Geothermal Energy Systems (Pty) Ltd* (6883/12) [2012] ZAWCHC 391(14 December 2012).

[20] Neither counsel referred me to a Supreme Court of Appeal judgment on the issue, nor could I find one. Until the Supreme Court of Appeal has decided on the correct interpretation of the provisions of the Companies Act, 71 of 2008, under discussion, I find myself in respect full

agreement with the reasoning followed by Van der Byl AJ in the *Lodhi 5* matter.

[21] In the premises, I find that the allegations relied upon by the intervening applicants do not constitute a *bona fide* defence to the relief claimed by the applicant in the liquidation application.

[22] Consequently, the application for leave to intervene cannot succeed.

APPLICATION FOR PROVISIONAL WINDING-UP

[23] The applicant relies on an Acknowledgement of Debt signed on 1 August 2012 by Timana, in his capacity as the sole member of the respondent, in support of the relief claimed against the respondent.

[24] In terms of the Acknowledgement, the respondent admits that it is indebted to the applicant in an amount of R 691 115, 00, which amount was due and payable by no later than 17:00 on 8 August 2012.

[25] The Acknowledgement and its terms is common cause between the parties.

[26] It is furthermore common cause that the respondent has to date not paid the said amount or any portion thereof.

RESPONDENT'S DEFENCES:

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[27] In opposition to the relief claimed by the applicant, Timana on behalf of the respondent, relies on the following defences:

1) The respondent is not indebted to the applicant and the Acknowledgement was signed by him under duress;

2) The respondent is commercially and factually solvent.

BONA FIDE DISPUTE:

[28] In denying that the respondent is indebted to the applicant and alleging that the Acknowledgement was signed under duress, the respondent creates a factual dispute which, if *bona fide*, could proof to be fatal to the relief claimed by the applicant.

[29] The veracity of the allegations in support of the respondent's defences, therefore needs to be scrutinised.

FACTS:

[30] Both parties are involved in the petroleum industry and it is common cause that the respondent has an account at Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd ("PetroSA"), a supplier of petroleum products.

[31] The applicant does not have an account with PetroSA and in order to obtain petroleum products from PetroSA, the account of the respondent is, by agreement between the parties, utilised by the applicant.

[32] The applicant would deposit funds into the respondent's PetroSA account, whereupon PetroSA issues a "listing slip" to the respondent. It is noteworthy that the applicant did not have control over the account and that the account was at all relevant times under the control of Timana.

[33] On 25 April 2012, the applicant paid an amount of R 1 232 724, 00 into the respondent's account at PetroSA, in respect of three loads of diesel ordered by a customer of the respondent, each load amounting to R 410 908, 00.

[34] The fact that the aforesaid payment was made is, *inter alia*, confirmed by Timana in an email dated 13 June 2012.

[35] The transactions with the respondent's customer did not eventuate and as a result the applicant held R 1 232 724, 00 worth of credit in the respondent's PertoSA account.

[36] Against this credit, the applicant ordered two shipments of Liquid Petroleum Gas to the value of R 528 542, 76.

[37] In the premises, the applicant's credit in the respondent's PetroSA account amounted to R 704 181, 24 on or about 9 May 2012.

[38] In order to redeem the credit, the respondent had to cancel the listing slip. Timana was requested to proceed with the cancelation of the remaining orders in order for the R 704 181, 24 to be repaid to the applicant.

[39] Timana complied with the request on 9 May 2012 via an email sent to an employee of PetroSA.

[40] On or about 13 June 2012, an amount of R 85 071, 20 was paid on behalf of the respondent in reduction of the debt owed to the applicant, leaving a balance of R 619 110, 04.

[41] Notwithstanding various promises to pay the amount outstanding, no payment was forthcoming from the respondent.

[42] It is against this background that the Acknowledgement of Debt was signed on 1 August 2012, at the offices of the applicant in Stellenbosch.

[43] Timana's allegation of duress is described by him in the answering affidavit, as follows:

"The Applicant, however, refused to take up said offer and, instead, I was ordered to sign the acknowledgement of debt."

and

"I signed aforesaid document under protest and my co-directors were aware of the fact that I denied that the respondent is indebted in the amount claimed by the Applicant. As stated above, I was informed that I would not be permitted to leave the premises of the Applicant until such time as I had signed the acknowledgement of debt. After I signed the required document I was allowed to leave."

[44] This version of events is denied by the applicant.

[45] Timana's version flies in the face of his subsequent conduct. On 13 August 2012, after the alleged duress exerted on him by his co-directors, Timana sends the following e-mail to Maritz of the applicant:

"Dear Maritz,

Trust this email finds you well.

The outstanding amount sterms from the Credit from PetroSA and Lagerskraal.

I have taken full responsibility on both amounts due to the following reasons,

- *PetreoSA, is my account, this amount is in no way to my company's benefit but LSP Group, I'm identifying a forensic auditor to get to the bottom of this. You saw my email which have been ignored thus far*
- *Lagerskraal. is my client and you paid the money to PetroSA based on my commitment. I have copied you in all my correspondence with them. This is my baby and I'm working hard to get the money back to you. It will definitely not be later than End August, the full amount will be settled."*

LEGAL PRINCIPLES

[46] In terms of section 344 (f) of the 1973 Act, a company may be wound up by the Court if the company is unable to pay its debts as defined in section 345.

[47] Section 345 (1)(c) of the 1973 Act, provides that a company is deemed to be unable to pay its debts if it is proved to the satisfaction of the Court that the company is unable to pay its debts. One of the manners in which a creditor may proof that a company is unable to pay its debts, is:

"Evidence that a company has failed on demand to pay a debt payment of which is due is cogent prima facie *proof of inability to pay its debts: "for a concern which is not in financial difficulties ought to be able to pay its way from current revenue of readily available resources" (Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1964 (4) SA 593 (D)at 597* per *Caney J).* [*Henochsberg on the Companies Act 71 Of 2008, Vol 2* at APPI-55]

[48] In view of the dispute on the papers, it is necessary to determine whether the applicant has succeeded in proving that the respondent is unable to pay its debts.

[49] The test to be applied in an opposed application for the provisional winding-up of a company, was set out in *Kalil v Decorex (Pty) Ltd and Another* 1988 (1) SA 943 AD at 979B, as follows:

"Where on the affidavits there is prima facie *case (ie a balance of probabilities) in favour of the applicant, then, in my view, a provisional order of winding-up should normally be granted ....."*

[50] The factual dispute, the respondent attempted to create in its answering affidavit, do not impress me. Timana's conduct subsequent to the signing of the Acknowledgement of Debt is in total contradiction to the facts underlying his duress defence.

[51] Furthermore, the facts underlying the respondent's indebtedness to the applicant, which indebtedness culminated in the signing of the Acknowledgement of Debt, is for all intends and purposes, common cause between the parties.

[52] On all the evidence before me, I am satisfied that the applicant has made out a *prima facie* case that the respondent is unable to pay its debts.

ORDER:

1. The application to intervene is dismissed with costs.

2. The respondent company is hereby placed under provisional winding – up.
3. A rule nisi is issued calling upon persons who have a legitimate interest to appear on the 21st October 2013 and show cause why this Court should not order that:
   3.1. The respondent company be finally wound up,
   3.2. The costs in the application are to be costs in the winding – up.
4. That a copy of this order be:
   4.1. Served by the sheriff on the respondent company at its registered office,
   4.2. Published in one edition each of the "Die Beeld" and "The Citizen" newspapers,
   4.3. Served by way of prepaid registered mail to all the known creditors of the respondent above R25 000,00,
   4.4. Served by the Sheriff on the South African Revenue Service,
   4.5. Served on the respondent's employees by affixing a copy thereof on the notice board in which the respondent's employees have access or inside the respondents principle place of business, and
   4.6. Served on all known Trade Unions to which the respondent's employees belong

N Janse van Nieuwenhuizen

Acting Judge of the North Gauteng High Court, South Africa

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