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

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

24/12/19
DATE

[redacted]
SIGNATURE

Case No: 88661/2019

A C JANSEN First Applicant

C JANSEN Second Applicant

and

ROYAL PIE COMPANY (PTY) LTD Respondent

JUDGMENT

D S FOURIE, J:

[1] This is another urgent application which was set down for hearing one week before Christmas. I therefore do not intend to give a lengthy judgment, but to deal only with the main issue, i.e. whether the respondent is commercially insolvent.

[2] The applicants apply for leave to bring a derivative application for the provisional winding-up of the respondent, *alternatively* they pray for an order for

the provisional winding-up of the respondent on the basis that the respondent is commercially insolvent. Both the applicants are shareholders and were, at the time when the application was issued, also executive directors of the respondent. They have, subsequent to the bringing of this application, been suspended as directors of the respondent. The respondent carries on business as a manufacturer of meat pies and has fourteen outlets in the Gauteng Province.

[3] The application is opposed by the respondent. The answering affidavit has been deposed to by another director and shareholder of the respondent, a certain Gert Strydom ("Strydom"). Another shareholder of the respondent is VEA Group Holdings (Pty) Ltd ("VEA"). It is not in dispute that VEA has to date invested over R7 million in the respondent. The business relationship between the applicants on the one hand and the other shareholders on the other hand has deteriorated to such an extent that these parties no longer can cooperate in the same business.

[4] The applicants contend that the respondent is commercially insolvent. In addition thereto they allege that money is being stolen from the respondent on a continuous basis. Money due to the respondent is also being redirected into third party accounts as a result whereof, so it is alleged, the respondent is trading under insolvent circumstances.

[5] These allegations are denied by Strydom. According to him it was agreed that the applicants would hand over the business by the end of October 2019 and that, until such time as the handover was complete, the applicants would continue with their duties for the respondent. He further explains that a

turnaround strategy for the respondent was agreed upon. This includes a six month business plan in terms whereof they intend restructuring the business of the respondent. In terms of this plan the cash held by the various stores would be deposited directly into the respondent's various suppliers' bank accounts. This, according to the explanation, was to ensure that the respondent's suppliers were paid and that the business of the respondent could continue.

[6] It is further explained by Strydom that the respondent is able to pay its debts as and when they fall due. In this regard it is financially supported by VEA who has agreed to assist the respondent financially. It is also conceded by him *"that the respondent has been operating at a loss"*. According to him this does not mean that the respondent is insolvent or that it is unable to pay its debts as and when they fall due. In this regard he points out that *"VEA Group Holdings has, to date, invested over R7 million in the respondent and is eager to see a return on its investment"*.

[7] However, Strydom also points out that this application has resulted *"in the loan to the respondent being called up, and which entitles VEA Group Holdings to purchase the applicants' shares in the respondent"*. According to him the respondent had defaulted on its loan obligations to VEA on a number of occasions in the past. He then explains the claim for repayment as follows:

> *"Mr Nel of VEA Group Holdings confirms that VEA Group Holdings intends providing such notice to all the companies and hereby gives notice to the respondent in terms of this affidavit that VEA Group Holdings immediately claims payment of the outstanding balance of the loan amount (as defined in the share sale agreement)."*

[8] The shares sale agreement makes provision for accelerated payment in clause 10 thereof. It provides, *inter alia*, that if any Court application is brought to place either of the companies in liquidation, the purchaser (VEA) shall be entitled to claim immediate payment of the outstanding balance of the loan amount plus interest. There is no indication in the answering affidavit that the respondent is financially capable of repaying the loan amount of approximately R7 million. As a matter of fact, it appears that on 17 December 2019 the respondent's overdraft account with First National Bank showed a debit balance of R1 202 428.54. That is the position after VEA had advanced another amount of R800 000.00 to the respondent.

DISCUSSION

[9] In terms of section 346(1)(c) of the Companies Act 61 of 1973 the applicants have *locus standi* to bring this application for the winding-up of the respondent, in that an application to the Court for the winding-up of a company may be made by one or more of its members. In terms of section 344(f) of the Act, a company may be wound up if it is unable to pay its debts as and when they fall due, i.e. that it is commercially insolvent.

[10] In *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* (306/2019) [2019] ZASCA 152 Wallis JA, with reference to *LAWSA*, clarified the term *"commercial insolvency"* by stating that:

> *"A company is unable to pay its debts when it is unable to meet current demands on it, or its day-to-day-liabilities in the ordinary course of*

business, in other words, when it is 'commercially insolvent'. The test is therefore not whether the company's liabilities exceed its assets, for a company can be at the same time commercially insolvent and factually solvent, even wealthy. The primary question is whether the company has liquid assets or readily realisable assets available to meet its liabilities as they fall due, and to be met in the ordinary course of business and thereafter whether the company will be in a position to carry on normal trading, in other words whether the company can meet the demands on it and remain buoyant."

[11] In this matter it is common cause that VEA has decided to call up the loan that the respondent has with it and to claim immediate payment from the respondent of over R7 million. It is significant to take into account that there is no explanation, by either Strydom or VEA, that the respondent is financially capable to make immediate repayment of the loan as claimed.

[12] Counsel for the applicants has pointed out that the calling up of the loan differentiates VEA's financial support from that of a bank allowing an overdraft facility. It cannot be a benefactor – ensuring the commercial solvency of the respondent – and at the same time acts as a creditor of the respondent by claiming immediate payment of an amount in excess of R7 million. I agree with this submission. These are clearly contradictory and mutually exclusive suggestions made on behalf of the respondent. The absence of any explanation that the respondent would be able to comply with this demand, justifies the inference that it is unable to pay its debts as they fall due.

[13] This inference is further strengthened by Strydom's explanation that the respondent had defaulted on its loan obligations to VEA on a number of occasions

in the past and with VEA Group Holdings' financial backing, the respondent is able to pay its debts. As pointed out above, VEA cannot act as friend and foe at the same time. No doubt, the financial support by VEA has now been terminated and replaced by a firm demand for immediate payment of approximately R7 million, without any indication that the respondent will be able to perform. Taking into account all these considerations, I have no doubt that the respondent, on its own account, is commercially insolvent.

[14] There appears to be various creditors of the respondent who may have an interest in these proceedings. I have therefore decided to grant a provisional winding-up order.

ORDER

In the result I make the following order:

(1) The abovementioned respondent is hereby placed under provisional winding-up;

(2) All persons who have a legitimate interest are called upon to put forward their reasons why this Court should not order the final winding-up of the respondent on 10 March 2020 at 10:00 or so soon thereafter as the matter may be heard, in the unopposed motion Court;

(3) A copy of this order must be served on the respondent at its registered office;

(4) A copy of this order must be published forthwith once in the Government Gazette;

(5) A copy of this order must be forwarded to each known creditor by prepaid registered post or by electronically receipted telefax transmission;

(6) The costs of this application shall be costs in the liquidation, including the costs of two counsel.

[redacted]

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 24/12/19