



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case NO: A2023-035929

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
30 AUGUST 2024	
DATE	SIGNATURE

In the matter between:

RIDGEBACK ENGINEERING SUPPLIES (PTY) LTD

Applicant

(Registration Number: 2006/026297/07)

and

EXPERT MACHINING AND ENGINEERING (PTY) LTD

Respondent

(Registration Number: 2018/258747/07)

JUDGMENT

WINDELL, J

Introduction

[1] This is an opposed application for the final, alternatively provisional winding up of the respondent, Expert Machining and Engineering (Pty) Ltd. It is not disputed that the applicant, Ridgeback Engineering Supplies (Pty) Ltd, is a creditor of the respondent. The debt arose from goods sold and delivered to the respondent in terms of an oral and /or tacit agreement that was concluded between the applicant and the respondent ("the oral agreement") during 2017, as well as other subsequent agreements that were entered into between the parties.

[2] The applicant bases its application on section 344(f) read with section 345(1)(a)(i) of the Old Companies Act (the Act),¹ in that the respondent is unable to pay a debt owed to the applicant despite statutory demand made to the respondent. In the further and/or alternative, the applicant seeks a winding up order in terms of section 344(h) of the Act, alleging that it would be just and equitable to wind up the respondent due to the respondent's inability to pay the debt due and the misconduct and mismanagement occurring during the respondent's daily operations.

[3] The respondent opposes the application on three grounds. One, section 345(1)(a)(i) is not applicable as the letter that was sent to the respondent's attorneys is not a demand as contemplated in section 345. Two, the debt is not outstanding due to the respondent's inability to pay the outstanding amount, but rather because it refuses to do so, as there is a dispute regarding the terms of the oral agreement. The winding up application is thus not the appropriate machinery to enforce the claim that is disputed on reasonable and bona fide grounds. Three, the respondent denies that

¹ Act 61 of 1973

it is just and equitable for the respondent to be wound up and be placed under the curatorship of an appointed liquidator as it is able to pay its debts and there is no mismanagement of the respondent.

Factual background

[4] Nicole Bruyns (Nicole) and Gillian Turnbull (Turnbull), Nicole's mother, established the respondent as a Close Corporation, Ridgeback Machine Suppliers CC, in May 2007. The respondent was created for the import and distribution of machine tool accessories and the supply of precision engineering solutions. In 2018 the respondent was converted into a company.

[5] During 2017, Nicole met Ronald Venter (Venter). Venter stated that he possessed the necessary experience and knowledge in managing companies in the same industry and would be able to assist in the growth of the respondent. This encounter led to the division of the respondent into retail (the applicant) and manufacturing (the respondent). Venter and Anthony Bruyns (Nicole's husband) were appointed as directors of the respondent on 11 September 2018 and 29 June 2018 respectively. Nicole and Turnbull remained as directors of the applicant.

[6] As such, the applicant became a sister company of the respondent. Given the natural progression from separating the respondent into two separate companies, no written agreement was entered into between the respondent and the applicant. Between 2017 and February 2022, the two entities operated in terms of the oral agreement, which was as follows: The respondent would place an order for the supply of various goods from the applicant. On acceptance of the order, the applicant would supply the goods to the respondent and generate an invoice to the respondent

for the goods so supplied. Receipt of the invoice would be proof of the goods having been supplied. The respondent would pay the applicant within 60 days of presentation of the invoice.

[7] During 2020, Turnbull sold her shares in the applicant to Venter's company Zalovect (Pty) Ltd ("Zalovect"), and Venter was appointed as a director of the applicant. Venter's new responsibilities at the applicant included the generation of new work for the applicant and the support of the company's management and operations. Venter appointed a financial assistant namely Reynard Combrinck ("Combrinck") who took care of the bookkeeping. Combrinck had access to all the financial information of both the applicant and the respondent, which included the pricing and invoicing details of the applicant.

[8] Since the commencement of the business relationship, the applicant rendered invoices and monthly statements to the respondent, which were duly paid. This included payment of insurance premiums for a Victor V Centre P106 CNC Vertical Machine ("the CNC machine"). The respondent owned the CNC machine, and the applicant was responsible for paying the monthly insurance premiums. The applicant then invoiced the respondent for reimbursement of these premiums.

[9] During the end of 2021, Venter expressed his desire to divest from the applicant and sell the shares held by his company Zalovect to Nicole. Nicole became the sole shareholder of the applicant in February 2022. On 18 February 2022, Venter resigned as director of the applicant.

[10] On or about 2 February 2022 Bruyns resigned as director of the respondent. The applicant alleges that since the resignation of Bruyns, no payments were forthcoming from the respondent in respect of goods supplied, the insurance on the

CNC Machine, and gas bottle rental. The last invoice sent to the respondent in respect of goods delivered was dated 10 February 2022. The last payment received from the respondent was in December 2021.

[11] On or about 1 September 2022, the applicant's attorneys, Gittins Attorneys Incorporated (Gittins), contacted the respondent's attorneys, Philip Venter Attorneys, to resolve the outstanding amounts owed to the applicant as well as other issues not related to this application. On 8 September 2022 Gittins sent a letter to the respondent's attorneys informing them of the discussion's contents. The letter included a copy of an updated statement, which indicated an outstanding balance of R241 090.72. The sum consisted of the following: Goods supplied: R212 521.72; 48.2; insurance on CNC machine: R11 889.96; petrol bottle rental: R2460.79; Jasper (shared email hosting): R2194.41; and interest: R9722.97.

[12] The respondent's attorneys responded to Gittins on 21 September 2022. He was informed that the respondent was aware of the possibility that the applicant may be owed money, but that it disputed the amount that remains unpaid. Additionally, the correspondence specified:

"3.1 Mr Bruyns (AE Bruyns) was appointed as managing director of RMS [respondent].

3.2 Part of Mr Bruyns duties were to ensure that RMS did not overpay for goods to be received from RES [applicant].

3.3 The above is further canvased by the fact that all parties were well aware of a potential conflict of interest by virtue of the fact that Mr Bruyns wife, Nicole Bruyns, was at all relevant times in control of RES.

3.4 *It was therefore agreed between our client and Mr Bruyns that goods would only be purchased on behalf of RMS, from RES, at no more than cost plus 70.0% (ten percent).*

3.5 *During the course of the business relationship, however, it became clear that Mr Bruyns was purchasing goods at a value that far exceed the aforementioned agreed amount and;*

3.6 *accordingly, a significant amount is due to be paid back to RMS and our office is currently in the process of taking further instructions on the precise amount to be tendered as payment."*

[13] The applicant denied that an agreement existed between the applicant and the respondent according to which the applicant would limit its profit margins on good sold to the respondent. However, in an effort to amicably resolve issues between the applicant and the respondent, Gittins sent a letter to the respondent's attorneys requesting that they provide figures regarding the alleged pricing of goods. The respondent's attorneys responded on 21 October 2022 and provided a copy of an Excel breakdown. According to this excel spreadsheet there was an average mark up of 40,4% and in some cases 200% on goods sold to the respondent.

[14] The parties engaged in further correspondence. In a letter dated November 2022 the respondent's attorneys raised an issue with the conduct of Bruyns whilst he was a director of the respondent. They wrote, *"Apart from the aforesaid, your client's conduct (referring to Bruyns) further caused severe cashflow constraints to RMS (referring to the respondent) which necessitated that Mr Venter use his own funding to keep RMS afloat."* On or about 22 November 2022, Gittins sent a subsequent

letter in which he addressed the allegations made by the respondent and informed the respondent that this liquidation application would be filed.

The statutory demand in terms of s 345 (f) of the Act

[15] The applicant avers that the respondent is unable to pay its debts. It relies on section 345 (1) in support thereof. The section provides as follows:

“345. When company deemed unable to pay its debts. –

(1) a company or body corporate shall be deemed unable to pay its debts if –

(a) creditor, by session or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) ...

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) ...

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.”

[16] The applicant relies on the letter that was sent to the respondent's attorneys on 8 September 2022. The letter reads as follows:

“1. The above refers.

2. *The writer spoke with the recipient hereof last week Thursday; being 1 September 2022.*

3. *The purpose of the aforesaid call was to establish whether it would be worthwhile for us to engage with yourselves in settlement talks concerning the disputes that exist by and between our respective clients.*

4. *In the said telephone call, we indicated to you that our clients are primarily concerned with the following:*

4.1. *receiving a full payment in respect of the amounts owing by Ridgeback Machine Supplies (Pty) Ltd to Ridgeback Engineering Supplies (Pty) Ltd in terms of its accounts, an updated statement dated 30 September 2022 in respect of which has been attached hereto for your ease of reference in this regard; and*

4.2. *a full divestment of Anthony Edmond Bruyns from Ridgeback Rentals (Pty) Ltd, which owns a number of unencumbered assets, save for one particular machine which remains financed although it is to be factored in the intended divestment.*

5. *Note that the payment due in terms of the attached is deemed non-negotiable on our part. Once the value of the said assets of Ridgeback Rentals (Pty) Ltd has been established, we can agree payment terms.*

6. *Any and all incidental matters can be agreed to, provided that your client is amenable to the aforesaid endeavours.*

7. *When we spoke, we indicated to you that we will be seeking a winding-up of Ridgeback Rentals (Pty) Ltd if your client is not prepared to embark upon the*

intended settlement negotiations. The basis of such winding-up will be premised upon it being just and equitable under the circumstances.

8. If we are unable to settle, we will also be seeking payment in respect of Ridgeback Engineering Supplies (Pty) Ltd forthwith.

9. We trust that, with a modicum of understanding, it will not be necessary for our clients to resort to litigation herein.

10. All that is stated above is not to be construed as either a novation and/or waiver of any of our clients' rights; all of which remain strictly reserved.

11. Awaiting to hear back from yourselves. If nothing constructive is received back from yourselves by the end of next week, we hold instructions to proceed as aforesaid."

[17] The respondent submits that the letter is not a demand as contemplated in section 345(1)(a)(i) as the demand was not served on the respondent's registered address; does not state the sum so due; and accordingly, the respondent was not afforded the 3 weeks' notice period from date of service of the demand. As a result, the applicant failed to comply with the provisions contained in section 345(1)(a)(i) of the Act for purposes of this application and the respondent cannot be deemed to be insolvent in terms of section 345(1) of the Act.

[18] In *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd*,² the provisions of section 112(a) of the Companies Act 46 of 1926 were examined. A letter of demand had been received by the company but was not delivered at its

² 1973 (3) SA 914 (W).

registered address. Another letter was sent by registered post to the correct registered address but was returned by the post office. Coetzee, J held as follows:

“The way in which this section is framed is significant. Only if the prerequisites enumerated in a conditional clause exist does the court have the power to order a winding-up of the company on this ground. Hence each of the conditions contained in this subsection must be strictly satisfied a priori. ‘Service’ on the company of a demand is required and the method of its service is exclusively described as ‘by leaving the same at its registered office’.³ . . . However, the deeming provision is phrased in such a way that until it is shown that service in this specified manner has taken place, it does not operate at all.”

[19] In *BP & JP Investments (Pty) Ltd v Hardroad (Pty) Ltd*,⁴ it was held that the respondent must have been served with the demand by leaving it at its registered office in order to rely on section 345 (1)(a)(i). The full court in the appeal upheld the decision of the court *a quo* but left open the question as to whether or not substantial compliance with the provisions of s 345(1)(a) would suffice.⁵

[20] In *Nathaniel & Efthymakis Properties v Hartbeestspruit Landgoed CC*,⁶ the court found that substantial compliance with section 69(1)(a) of the Close Corporation Act 69 of 1984 which is the corollary of section 345 of the Act, would suffice, as long as the close corporation had in fact received the demand. It held that to hold otherwise “would elevate form above substance”.

³ At 917B–D.

⁴ 1977 (3) SA 753 (W).

⁵ *BP & JP Investments (Pty) Ltd* 1978 (2) SA 481 (W) at 486–487.

⁶ [1996] 2 ALL SA 317 (T).

[21] P. Delport in *Henochsberg on the Companies Act 71 of 2008*,⁷ maintains that:

“ the question is not whether a demand is ineffective if it is not delivered to the company’s registered office, but that the intention of the Legislature is that, provided that it is shown that the relevant demand was delivered to its registered office, a company will be deemed to be unable to pay its debts as contemplated by s 345(1)(a)(i) without proof that the company has actually received such demand. On this basis a demand not left at the registered office is not a demand for the purposes of s 345(1)(a) even if the company in fact received it; conversely, a demand left at the registered office is a demand for such purposes even if it does not in fact come to the attention of the company (see Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd 1983 (3) SA 815 (O) at 824, referred to with approval in Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd 2003 (5) SA 414 (W) at 418B–C).

[22] I am in agreement with the view expressed in *Henochsberg* and *Phase supra*. In order to capitalise on the presumption provisions in s 345(1)(a)(i), an applicant must at the least comply with the requirements stated by the legislature therein. In *BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd*,⁸ Margo J, also approved of the dictum in *Phase* and held that, “*where an applicant seeks to rely on the inability of a company to pay its debts by showing that a demand was received by the company, and the company failed to respond to that demand within a reasonable time, then, prima facie, the case could be brought under the provisions of para (c) of s 345(1).*”

[23] I am satisfied that the letter send to the respondent does not comply with the requirements of section 345(1)(a)(i) of the Act.

⁷ *Henochsberg on the Companies Act 71 of 2008*. Issue 18. APPI-66.

⁸ 1978 (2) SA 481 (W) at 486.

Just and equitable

[24] The remaining ground for the winding-up of the respondent which the applicant relies on, is that of just and equitable in terms of section 344(h) of the Act. It relies on the following grounds:

- (i) there appears to be a serious misconduct and/or mismanagement of the respondent;
- (ii) the applicant is being prejudiced by the conduct of the respondent or the management of the respondent;
- (iii) the respondent is unable to pay its debts, as and when they fall due; and,
- (iv) the respondent has admitted to serious cash flow constraints and has to be funded by Venter in his personal capacity.

[25] The applicant argues that the respondent, particularly Venter, is now making a disingenuous claim that the applicant has been overcharging them, which is not true. The respondent attempts to rely on the Excel spreadsheet, but upon careful examination, it is inaccurate and does not support the respondent's claim. It is argued that the respondent is using this issue as a tactic to compensate for its inability to pay its debts when they become due. This is further evidence by the respondent's ongoing failure to settle the applicant's invoices and the fact that the respondent has only raised this issue after years of compliance with the agreed terms.

[26] It is submitted that the respondent is also attempting, through its communications, to place blame on its former director. If there is any negligence on

the part of Bruyns, it is the liquidator's responsibility to investigate. The applicant should not be prejudiced by internal disputes within the respondent.

Respondent's defence

[26] The respondent denies that the applicant has been prejudiced because of serious misconduct in the running of its operations or gross mismanagement of its funds. It further denies that the cashflow issues mentioned in the 2022 letter are persistent and are the cause for its refusal to settle the outstanding debt to the applicant. The respondent confirms that the refusal to settle the applicant's claim for outstanding invoices is because of the pending dispute between the parties that arose in December 2021.

[27] A key aspect of the dispute is that Venter was never granted access to or control over the companies' banking and overdraft facilities, despite being duly appointed as a shareholder and director, and being responsible for the daily administration and operation of both entities. The applicant's alleged overcharging and overpricing of goods supplied to the respondent, is a major cause of the remaining dispute. While the respondent acknowledges that Venter was aware of the invoices submitted, he denies any knowledge of the overpricing or overcharging of the goods. This issue ultimately led to Venter selling his shares back to Nicole with regard to the applicant.

[28] The respondent asserts that it appointed Combrinck as its accountant in response to suspicious financial transactions and/or malicious actions by its director, Bruyns. This appointment led to the discovery of the applicant's overpricing or overcharging of products at Bruyns's specific request. Bruyns ultimately resigned following the respondent's thorough investigation.

[29] The respondent argues that Bruyns was compelled to resign as he was aware that he breached his fiduciary duties through his mismanagement and malicious handling of the respondent's daily operations. Additionally, he was aware of the unlawful overcharging or overpricing of the goods purchased from the applicant. The respondent had also discovered, through its internal investigation, that Bruyns had abandoned the respondent for more than three weeks, without the knowledge of Venter or any other management representative and that he unlawfully withdrew funds from the respondent's overdraft facility.

[30] The respondent also denies that the alleged payments owed to the applicant resulted from Bruyns' resignation. Bruyns resigned in February 2022, and the applicant's most recent payment was made in December 2021, which coincided with the parties' dispute.

[31] The respondent denies that it is unable to pay its outstanding debt to the applicant. It states that it is managing its contingent and prospective liabilities and has raised a dispute with the applicant regarding the claimed debt, which remains unresolved. The respondent asserts that it can meet its day-to-day liabilities in the ordinary course of business and is not commercially insolvent. It further claims to have sufficient liquid assets or readily releasable assets to meet its obligations as they become due and to continue its normal trading operations. The respondent is currently trading and managing its obligations and will continue to do so if any obligations arise during the ordinary course of business.

[32] The respondent presented its "Supplier statement" and "Customer statement", in terms of its financials, as an indication of its "buoyancy and ability to trade". The Supplier statement reflects the amounts due to be paid to the respondent's suppliers,

and the Customer statement reflects the total amount to be received by the respondent from its customers for goods sold and delivered. The respondent also attached its customers' list which indicates its monthly income from its customers.

Conclusion

[33] The court's power to grant a winding-up order is discretionary in nature., irrespective of the ground upon which the order is sought.⁹ At the provisional stage the applicant must make out only a *prima facie* case. In *Kalil v Decotex (Pty) Ltd and another*,¹⁰ the Appellate Division held as follows:

"As it was put in the Wackrill case, supra, (at pp 285 H - 286 A) — "Ordinarily the consequences of a final winding-up order are drastic indeed, and it could not have been intended that proof of all the allegations necessary for such an order should be anything less than that required generally in civil cases, that is proof on a clear balance of probabilities, with the admission of viva voce evidence, where that may be necessary, to resolve material disputes on the affidavits. That also appears to be the standard of proof required for a final sequestration order in terms of s 12 of the Insolvency Act 24 of 1936, according to which the Court must be "satisfied" that the petitioning creditor has established the elements of his case."

.....

Where, on the other hand, the affidavits in an opposed application for a provisional order of winding-up do not reveal a balance of probabilities in

⁹ *F&C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 (30 SA 841 (D) at 844.

¹⁰ 1988 (1) SA 943 at 976D-978F. See also *Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) at para 3.

favour of the applicant, then clearly no prima facie case is established and a provisional order cannot at that stage be granted.'

[34] The position is best summed up in *Henochsberg*:¹¹

"Where the application for a provisional winding-up order is unopposed or where, though it is opposed, no factual disputes are raised in the opposing affidavit, the question is whether the applicant has established a prima facie case for the grant of such order. Where the application is opposed and factual disputes are raised, the question is whether on the evidence contained in all the affidavits a prima facie case for the grant of such order has been established on a balance of probabilities."

[35] It is trite that winding up proceedings are not an appropriate method for a creditor, such as the applicant, to pursue when the debt is genuinely disputed.¹² In *Meyer NO v Bree Holdings (Pty) Ltd*,¹³ the court held that where the debt prima facie exists, then the onus is on the respondent to show that it is bona fide disputed on reasonable grounds.¹⁴ Consequently, a court should dismiss the application if, based on the evidence in the affidavits, the respondent proves on a balance of probabilities that the dispute is *bona fide* and reasonable.¹⁵

[36] The payment of the amounts allegedly owed is based on various oral agreements between the parties. While the respondent admits these agreements, it asserts there is a contractual dispute between the parties regarding overcharging and overpricing and contends that it does not owe the amount claimed.

¹¹ *Henochsberg* with reference to inter alia *Kalil v Decotex Pty Ltd supra*. Issue 19. Vol 2. APPI-93..

¹² *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd (23255/2010)* [2012] ZAWCHC 43 (15 May 2012).

¹³ 1972 (3) SA 353 T.

¹⁴ See also *Kalil supra* at 980.

¹⁵ *Henochsberg* Issue 19. APPI -94

[37] The respondent is not required to present the actual evidence on which it would rely at trial, whether through affidavit or otherwise. It is sufficient for the respondent to genuinely allege facts that, if proven, would constitute a good defence to the claim brought against it.¹⁶

[38] The SCA Supreme Court of Appeal in *Imobrite (Pty) Ltd v DTL Boerdery CC*,¹⁷ with reference to *Badenhorst v Northern Construction Enterprises (Pty) Ltd*¹⁸ (the Badenhorst Rule) held that:¹⁹

[39] *"It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of a debts. Thus, winding-up proceedings ought not to be resorted to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused.*

[40] *A winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company's liquidation. It would also constitute an abuse of process if there is an attempt to enforce payment of a debt which is bona fide disputed, or where the motive is to oppress or defraud the company or frustrate its rights."*

[41] The applicant failed to make out a prima facie case for the winding up of the respondent. The grounds advanced by the respondent in disputing the debt are

¹⁶ *Hulse-Reutter and Another v HEG Consulting Enterprises Pty Ltd (Lane and Fey NNO Intervening)* 1998 2 SA 208 (C) at p 219 F-220C. See also *Dineam Trade (Pty) Ltd v Sumali Investments; Commonwealth Shippers Ltd v Mayladn Properties (Pty) Ltd (United Dress Fabrics (Pty) and Another Intervening* 1978 (1) SA 70 (D) at 72D-E.

¹⁷ *Imobrite (Pty) Ltd v DTL Boerdery CC* (1007/2020 [2022] ZASCA 67 (13 May 2022)

¹⁸ 1956 (2) SA 346 (T).

¹⁹ *Supra* at para 14 and 15. See also *Collett v Priest* 1931 AD 290 at 299.

reasonable and bona fide. The dispute raised by the respondent cannot be dealt with in motion proceedings. It follows that a winding-up application is not the appropriate machinery for the applicant to use to enforce its claim.

[42] In any event, I am not convinced that the applicant has met its burden of proving that the respondent is unable to pay its debts or that it would be just and equitable to grant a winding-up order. The respondent has provided reasons for its temporary cash flow issues and has submitted supporting documents demonstrating that it is neither factually nor commercially insolvent. The evidence shows that the respondent remains capable of conducting its business and meeting its current expenses as they fall due to its other creditors.

[43] In the result the following order is made:

1. The application is dismissed with costs.



L WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Delivered: This judgement was prepared and authored by the Judges whose name are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 August 2024.

APPEARANCES

Counsel for the appellant:	Advocate C.A. Read
Instructed by:	Heather van Niekerk Attorneys
Counsel for the first respondent:	Advocate M. Matodzi
Instructed by:	Nyachowe Attorneys.
Date of hearing:	13 May 2024
Date of judgment:	30 August 2024

APPEARANCES

Counsel for the applicant:

Advocate T. Mirtle

Instructed by:

Gittins Attorneys

Counsel for the respondent:

Advocate C. van Niekerk

Instructed by:

Mphahkeke Inc. Attorneys

Date of hearing:

13 May 2024

Date of judgment:

30 August 2024