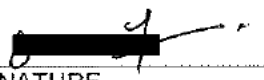




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024- 126051

(1)	REPORTABLE: NO YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	NO REVISED: NO
03/07/2025 DATE	
 SIGNATURE	

In the matter between:

TELESA COMMS (PTY) LTD

APPLICANT

and

MIA TELECOMMS (PTY) LTD

RESPONDENT

Summary:

In an application for liquidation founded on a written agreement for the provision of services, the respondent raised a dispute regarding the quality of services rendered but notwithstanding this made repeated undertakings to pay specific amounts which were not honoured. The court held that such admissions and undertakings, even if the principle debt is disputed, were sufficient to establish a liquidated claim and confer *locus standi*

upon the applicant in terms of section 344 (f) read with section 345 of the Companies Act 61 of 1973.

The undertakings to pay specific amounts and the subsequent failure without explanation to pay those amounts did not disclose a *bona fide* dispute on reasonable grounds as contemplated by the Badenhorst rule, nor do they undermine the applicant's *locus standi* for the purpose of section 345 of the Companies Act 61 of 1973.

Where a party alleges that new matter has been introduced in the replying affidavit and seeks to deal with it, it must do so timeously and not wait until the matter is argued as failure to act promptly may weigh against it in the exercise of the court's discretion.

JUDGMENT

FINE AJ:

INTRODUCTION

[1] This is an application for the final winding up of the respondent company on the grounds that it is unable to pay its debts as contemplated in terms of section 344(f) read with section 345(1)(a) and/or (c) of the Companies Act¹ ("the Companies Act").²

[2] The applicant contends that it is a creditor of the respondent by virtue of a services agreement concluded between the parties on or about 4 November 2020

¹ 61 of 1973, as amended

² The provisions of chapter 14 of the Act continue to apply with respect to the winding up of insolvent companies by virtue of the provisions of Item 9 of Schedule 5 of the Companies Act 2008.

("the agreement"). The applicant rendered services in terms of the agreement, but payment has not been made by the respondent.

[3] On 22 May 2024, the applicant made written demand for payment of the amount of R544 984,87 which it contended was due, but remained unpaid. On 2 August 2024 the applicant addressed a letter of demand to the respondent in terms of section 345(1)(a)(ii) of the Companies Act demanding payment of R557 545,66, being the outstanding amount owed by respondent to applicant as at 31 July 2024 ("the 345 demand").

[4] The respondent opposes the application. It disputes the indebtedness on the basis that there has been material non-performance by the applicant of its contractual obligations in terms of the agreement, and contends that the debt is disputed on *bona fide* and reasonable grounds and that accordingly, liquidation proceedings are inappropriate. It further contends that it is not factually insolvent and in support, annexes its most recent audited financial statements dated February 2024 ("the audited financial statements").³

³ The respondent in its answering affidavit engages in a detailed analysis of the audited financials which according to it demonstrates an excess of assets over liabilities in the sum of R14 379 667 (assets R63 178 491 and liabilities of R48 798 824) and that it is therefore not factually insolvent.

BACKGROUND

- [5] The competing contentions of the applicant and respondent must be viewed in the light of the terms and conditions of the agreement,⁴ and the ongoing discussions and exchanges of correspondence which took place between the parties.

The agreement

- [6] In terms of the agreement, the applicant was obliged to deliver and install a fully functional resource management system to cater for the management of the respondent's client billing.
- [7] The agreement contains detailed provisions relating to the calculation of the amount/s payable by the respondent, and the date/s upon which such payment/s is/are to be made. There is no dispute in respect of the manner in which the amount payable has been calculated or the date upon which it is to be paid.
- [8] The agreement also makes provision for invoices, in respect of work carried out by the applicant, to be rendered by it, following which the invoiced amounts are to be paid within thirty days of the date of the invoice.

⁴ Which was amended on 23 May 2022, details of which are not relevant to the issue at stake

- [9] Clause 12 of the agreement provides for the remedies of each of the parties in the event of a breach by the other and provides, *inter alia*, that in the event of the applicant breaching its obligations in terms of the agreement and failing to comply with written notice served on it by the respondent within seven business days, the respondent would be entitled (but not obliged) forthwith, without further notice and without prejudice to any of its rights or remedy which it may have in terms of the agreement or in law to cancel the agreement.

The dispute

- [10] The dispute concerning the respondent's liability to pay the agreed service fees must be considered against the backdrop of protracted discussions and exchanges of correspondence between the parties. These communications, to which I will refer briefly below, reflect a pattern of engagement in which the applicant consistently asserted its entitlement to payment under the agreement, whilst the respondent raised various objections, some general and others more particularised, regarding the alleged inadequacy or incompleteness of the performance. What is clear is that, despite the respondent's contention that there had been malperformance by the applicant, it did not exercise the right to cancel the agreement as provided for in terms of clause 12 thereof. The invoice rendered by applicant to respondent reflects a continuous supply of services and claims for the amounts payable in respect of the services rendered.

[11] It is correct that there were disputes in relation to the quality of the services rendered. However, what clearly emerges – from the correspondence, the conduct of the respondent, and the facts which I am about to recount – is that on various occasions the respondent expressly undertook to make payment of certain amounts, which are not in dispute, but failed to honour these undertakings. These admissions, repeated assurances and reference to cashflow problems, coupled with the non-payment strongly suggest an inability to meet financial obligations as they fall due and are in my view, consistent with commercial insolvency.⁵

The discussions and exchange of correspondence between the parties

[12] On 28 August 2023, the respondent addressed an email to the applicant stating that it would not be able to pay certain historical amounts for the next four months.

[13] On 20 March 2024, written demand was made by the applicant for payment within seven days of the amount of R527 632,44. On the same day, Mr Driessel replied on behalf of the respondent, stating, *inter alia*, that he had agreed to a monthly payment of R7 000. The terms of the email are clear and unequivocal and despite what appear to be ongoing disputes in relation to the quality of the services rendered, the respondent expressly acknowledged liability to pay an amount of

⁵ They also call into question and cast doubt on the *bona fides* of the dispute.

R7 000 per month in clear and unequivocal terms. Despite the undertaking, it did not pay.

[14] This communication was followed by an email dated 27 March, again authored by Mr Driessel, indicating that the respondent was servicing the interest portion of the debt at R10 000 per month, but stating that if the applicant could accommodate respondent with web services to all of its platforms, it would consider increasing the rate from R10 000 to R37 000 per month.

[15] On 24 May 2024 a letter of demand was issued by the applicant to the respondent, claiming payment of a balance outstanding of R544 984,87 within seven days. On the same day, Mr Driessel replied, suggesting that the issue be resolved more amicably outside of the framework of the letter of demand, and again raising issues in relation to the quality of the services rendered by the applicant.

[16] The 24 May 2024 letter of demand was the forerunner to the important meeting between the parties which took place on 30 May 2024. That meeting was attended by Mr Munn on behalf of the applicant and Mr Driessel on behalf of the respondent. Its purpose was to resolve the issues surrounding the outstanding balance due under the agreement and issues in relation to what the respondent

contended were defective services.⁶ The meeting is significant, and the terms discussed were fully recorded. A full transcript of the recording was introduced as an annexure to the replying affidavit and forms an important part of the applicant's response to the defences raised.⁷

[17] What is clear from the contents of the affidavit and the transcript is that the respondent committed to pay a minimum amount of R8 000 per month commencing on 30 May 2024 until the total amount had been paid in full. That appears not only from the contents of the transcript but also the respondent's response to the applicant's email dated 30 May 2024, in which Mr Munn records that the respondent had committed to pay a minimum of R8 000 per month commencing on 30 May 2024. In an email dated 30 May 2024, Mr Driessel confirmed that that was the agreement arrived at on 30 May 2024.

[18] There appears to have been no payment of the amount agreed upon during the course of the meeting, and in response to a demand dated 10 June 2024, Mr Driessel stated that he would make payment during the course of that day. However, no payment was made.

⁶ Significantly, the last payment received from the respondent was sometime in January 2024 and this obviously caused some concern to the applicant.

⁷ I will deal with the admissibility of the transcript later in this judgment but emphasise that the replying affidavit with the transcript was received by the respondent in mid-February 2025 and there was no attempt on its part to deal with the contents of the transcript.

[19] On 2 August 2024, the 345 demand was made. A copy of the 345 demand was served on and left at the respondents registered head office. Despite the lapse of a three week period from the date of service of the 345 demand on it, the respondent has failed to make payment of the outstanding balance to the applicant, or otherwise secure or compound the sum to the applicant's reasonable satisfaction.

The transcript

[20] Evidently, the transcript was introduced in reply to undermine any suggestion that the respondent's failure to pay the amounts claimed by the applicant, or at least the failure to pay the R8 000 per month, was *bona fide* and also to expose the evasive nature in which the respondent had dealt with material allegations relating to its inability to pay the debt owed to the applicant in its answering affidavit.

[21] Importantly, the transcript of that meeting demonstrates unequivocally the following:

- a. The clear terms of the acknowledgement and undertaking to pay an amount of R8 000 per month;
- b. The respondent's inability to pay its debts since it was cash-strapped and not in a cash positive flow position;
- c. The respondent could not afford the service and while it acknowledged its

liability to pay, it was not in a position to do so. Accordingly, it was attempting to find another way in which it could meet its payment obligation each month;

- d. The amount of R8 000 which the respondent agreed to pay was arrived at as a result of proposals and counter-proposals: the applicant insisting on a of payment of approximately R33 000 and the respondent for the lesser amount of R8 000 per month, which was eventually agreed upon.

[22] Faced with the damaging contents of the transcript, the respondent resorted to prevarication and opportunism. The replying affidavit, including the transcript, had been filed in and during February 2025, and the present matter enrolled for hearing for the first week in June 2025. On receipt of the replying affidavit, the respondent simply applied to strike out the contents of the transcript, without in any manner dealing with its contents. That position was maintained in its heads of argument, but during the course of oral argument and without any prior notice, without any explanation for the delay or indication of what would be stated in relation to the transcript, the respondent sought an opportunity to deal with its contents, which I declined.⁸

⁸ *Manufacturers Development Co (Pty) Ltd v Repcar Holdings (Pty) Ltd and Others* 1975 (2) SA 776 (WLD) at pg. 777, para E-F where the court held that a respondent in proceedings is not entitled to a postponement as a matter of right since that is something within the discretion of the court and an important circumstance is that the respondent if granted the postponement will be able to place the facts before the court which will constitute a ground of opposition to the relief claimed.

[23] I am of the view that the transcript should be allowed as it constitutes valuable evidence negating evasive, and improbably denials by the respondent in its answer.

[24] The transcript does not introduce new matter. It deals issuably with matters which have been raised in the founding affidavit and more particularly what transpired during the meeting held on 30 March 2024, and explains its outcome. It effectively puts paid to the respondent's evasive prevarication. Even if it did constitute new matter (which it does not), there are a number of reasons why it should be admitted. Firstly, the respondent had ample opportunity to deal with its contents and chose not to do so. Secondly, it is not an irrefrangible rule of our law that a party may not introduce new matter in its replying affidavit. It always remains in the discretion of the court to have regard to new matter.⁹ Thirdly, and having previously declined (at least impliedly) to deal with the transcript, the inexplicable and opportunistic attempt to deal with the issue at the eleventh hour was unacceptable.

[25] I was reminded on a number of occasions during the course of oral argument by the respondent, in relation to the admissions of liability, that context is important.

⁹ *Shephard v Tucker's Land and Development Corporation (Pty) Ltd* 1978 (1) SA 177 at 178 where the court stated that the rule is not absolute, it is not a law of the of Medes and Persians, that a court has a discretion to allow new matter to remain in the replying affidavit and give the respondent an opportunity to deal with it in further affidavits but that indulgence will only be allowed in special or exceptional circumstances.

Of course this is true, but context is neither an abstract nor remote concept and is embedded in the contemporaneous documents, the full text of the transcript, and the content of the affidavits. A fair assessment of all of these relevant facts read in their context, leads ineluctably to the conclusion that: despite clear undertakings to pay the aforementioned amounts to the applicant, the respondent did not do so. Accordingly, the respondent's selective assertions, divorced from the facts, are self-serving and unavailing.

[26] In the circumstances, I am satisfied that, even though there is a dispute in relation to the quality of the work undertaken by the applicant, the repeated undertakings to pay specific amounts which were not honoured are sufficient to establish a liquidated claim and confer *locus standi* on the applicant in terms of section 344(f) read with section 345 of the Act.

THE BADENHORST RULE

[27] The "Badenhorst rule"¹⁰, the essence of which is that winding up proceedings are not designed for the enforcement of a debt which is disputed on *bona fide* and reasonable grounds, is well known and has been applied in our courts on many occasions. More recently, in *Afgri Operations Limited v Hamba Fleet (Pty) Ltd*,¹¹ the SCA stated the following:

¹⁰ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-8

¹¹ 2022 (1) SA 91 (SCA)

[17] The question of onus is indeed critically relevant in cases such as this. It bears repeating that once the respondent's indebtedness to the applicant for a winding up order has *prima facie*, been established, the onus is on it, the respondent, to show that this indebtedness is indeed disputed on *bona fide* and reasonable grounds. If one accepts the test set out in English cases upon which the respondent has relied, the respondent would have to show that its counterclaim was genuine."

[28] And in *Kalil v Decotex*¹² the onus was described by the then appellate division in the following terms:

"Consequently, where the respondent shows on a balance of probability that it's indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the court will refuse a winding up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds".

[29] The application of the Badenhorst rule to the present case occasions no difficulty. Viewed in its totality, the evidence establishes that, even though there were disputes in relation to the quality of the services rendered by the applicant to the respondent, the respondent acknowledged liability for and undertook to pay at

¹² 1988 (1) SA 943 (C) at 980 C-D

least part of the debt, but which it is unable to pay, clearly as it is undergoing cashflow and liquidity difficulties. In my view, the respondent has not established that the dispute in relation to the debt is either *bona fide* (subjectively) or reasonable (objectively). Accordingly, the applicant, as a creditor of the respondent, is entitled to seek the winding up of the respondent *ex debito justitiae*.¹³

[30] The fact that audited financial statements of the respondent show an excess of assets over liabilities of approximately R14 million, is not an answer to the issue of the respondent's commercial insolvency and inability to pay its debts. This is particularly so since the respondent has offered no explanation as to why it has not paid at least the admitted indebtedness of R8 000 per month that was agreed to at the meeting of 30 May 2024.¹⁴ In *Absa Bank Limited v Rhebokskloof (Pty) Ltd and Others*,¹⁵ the following was stated:

"... The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercial sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially

¹³ *Afgri Operations* supra at para 12

¹⁴ Whilst factual solvency might be a factor to be taken into account in exercising the narrow discretion, it does not arise in the present case, since the issue was not addressed and does not impact upon the narrow discretion vested in the court to refuse winding up. *Rosenbach and Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd* 1962 (4) SA 593 (D) at 597 E-F and *Sammel and Others v President Brand Gold Mining Co Limited* 1969 (3) SA 629 A at 662

¹⁵ 1993 (4) SA 436 at 440 F-H

insolvent is whether or not it has liquid assets or readily realisable assets to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets fairly valued far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to and should hold that the company is unable to pay its debts within the meaning of s345(1)(c) as read with section 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.”

- [31] In addition to these trite principles, the finding of Innes CJ in *De Waard v Andrew and Thienhaus Ltd* is instructive in this case:¹⁶

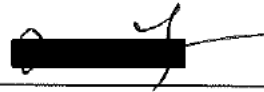
“[T]he Court has a large discretion in regard to making the rule absolute: and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities'. To my mind the best proof of solvency is that a man should pay his debts; and therefore I

¹⁶ (1907) TS 727 at 733

always examine in a critical spirit the case of a man who does not pay what he owes.”

[32] In my view, those comments apply with equal force to the present case and, in the circumstances, I make the following order:

- a. The respondent is placed under provisional winding up in the hands of the Master of the High Court, Johannesburg;
- b. All persons who have a legitimate interest are called upon to put forward on or before 28 July 2025 at 10:00 or so soon thereafter as the matter may be heard reasons why this court should not order the final winding up of the respondent and that the costs of this application including the costs of the grant of the provisional order be costs in the winding up of the respondent;
- c. A copy of this order is to be served on the various persons as provided for in terms of section 346(A) of the Companies Act, 1973 and is to be published once in the Government Gazette and once in a newspaper circulated in Gauteng;
- d. A copy of this order is to be furnished to each known creditor and shareholder either per email or per telefax or per registered post.



DM FINE
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 03 June 2025
DATE OF JUDGMENT	: 03 July 2025
APPLICANT'S COUNSEL	: Adv M De Oliveira
APPLICANT'S ATTORNEYS	: Cox Yeates
RESPONDENT'S COUNSEL	: Adv L Hollander
RESPONDENT'S ATTORNEYS	: HBG Schindlers Attorneys