



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

CASE NO: 2024-090208

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

14/11/2025

DATE

SIGNATURE

In the matter between:-

BELL-FORM (PTY) LTD

Applicant

and

BUCHBUR ENGINEERING (PTY)LTD

Respondent

JUDGMENT

Mfenyana J

- [1] The applicant, Bell-Form (Pty) Ltd, instituted proceedings for the provisional winding up of the respondent, Buchbur Engineering, on the basis that the

respondent is commercially insolvent. The applicant predicates its claim on section 344(f) and 345 of the Companies Act. The applicant alleges that it is owed an amount in excess of R300 000.00 by the respondent.

[2] The applicant is in the business of renting out equipment and related products to construction companies. In September 2020, the applicant and the respondent, represented by one of its directors at the time, Mr Burger, concluded a written agreement for the letting and hiring of equipment.

[3] On 30 May 2023, the amount owed by the respondent to the applicant in terms of the agreement was an amount of R300 000.00. On the same day, the applicant notified the respondent that its account was in arrears. On 13 November 2023, the applicant delivered a letter of demand to the respondent, pursuant to the provisions of s345 of the Companies Act¹.

[4] The applicant, thus avers that the respondent is insolvent in that it has failed to pay its debts as and when they fall due.

[5] In opposing the application, the respondent argued that the deponent to the founding affidavit does not have personal knowledge of the facts deposed to. Without confirmation, those facts amount to hearsay, the respondent argued.

[6] In response, the applicant argued that the respondent only raised the issue of hearsay at the eleventh hour and did not state it in the answering affidavit. To

¹ Act 61 of 1973.

that end, the applicant filed a confirmatory affidavit deposed to by the sole director of the applicant, who confirmed the contents of the founding and

replying affidavits deposed to by Mr van der Meer. The deponent, Mr Bellingan, further avers that Mr Buchner did not raise any issue about hearsay evidence in his answering affidavit and only raised it for the first time in the answering affidavit. This averment overlooks the fact that in his answering affidavit, Mr Buchner denied that Mr van der Meer has personal knowledge of the facts he deposed to in the founding affidavit.

[7] Importantly, Mr Bellingan confirmed issues relating to the agreement between the applicant and the respondent, as well as emails between the parties, in which he was also copied.

[8] It is necessary that I dispose of this issue at the outset. There is a distinction between 'the legal standing of a party, the basis for deposing to an affidavit and the authority to represent a party'. ...The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.² In the answering affidavit, the respondent avers that the deponent to the founding affidavit is not authorised to act on behalf of the applicant, as he has failed to attach a resolution authorising him to do so.

² *Masako v Masako and Another* (724/2020)[2021] ZASCA 168; 2022 (3) SA 403 (SCA)(3 December 2021).

It states further that in the absence of such resolution, the applicant lacks *locus standi* to bring this application.

[9] In this matter, the respondent appears to be conflating the issues of *locus standi*, which is relevant if a party has a direct and substantial interest in the

subject matter, with the attorney's right to act, which may be challenged in terms of Rule 7, and the basis for deposing to an affidavit.

[10] In the absence of a Rule 7 notice, the respondent has no valid basis to challenge the attorney's authority to represent the applicant. Furthermore, the applicant clearly has a direct and substantial interest in this matter. The hearsay evidence issue has been addressed by Mr Bellingan's confirmatory affidavit. Although this affidavit was filed late, it is accepted to the extent that it confirms what was already stated in the founding affidavit.

[11] The applicant has provided a good explanation why it did not initially consider it necessary to file a confirmatory affidavit, being that the facts deposed to are within the knowledge of the deponent, and the respondent did not fervently challenge this issue in its answering affidavit. In this regard, the applicant was wrong as the conclusion of the agreement was not within the knowledge of Mr van der Meer. I do not agree with the respondent that accepting the confirmatory affidavit would result in any prejudice to the respondent. The purpose of a confirmatory affidavit is to corroborate evidence that is already in

the founding affidavit. The respondent has already dealt with the averments in the founding affidavit.

[12] On the merits, the respondent contends that the applicant cannot rely on the allegation that it is unable to pay its debt. In this regard, the respondent avers that it is “solvent, irrespective of whether it is unable to pay its debts”. In this submission lies a contention that the respondent is unable to pay its debts as contemplated in ss 344(f) and 345(1) of the Companies Act.

[13] Despite this concession, the respondent goes further to aver that there are disputes of fact which cannot be resolved in motion proceedings. According to the respondent, it has a *bona fide* defence to the applicant's claim in that it disputes the indebtedness on reasonable grounds. The respondent alleges that it has an ongoing dispute with Mr Burger, who concluded the agreement on behalf of the respondent.

[14] The letter of cancellation of the credit line by the respondent on 1 February 2021 was ineffective as it had a condition that the applicant was required to formally accept the cancellation; failing which, the respondent would deliver a formal notice of cancellation. The applicant never formally accepted or acknowledged cancellation, and the respondent did not deliver a formal notice of cancellation as it had indicated. In fact, the applicant continued transacting with the respondent, as stated by Mr Buchner. Mr Buchner further states that it was only in June of 2023 that he instituted legal proceedings to remove Mr Burger as a director of the respondent.

[15] From the above, it is clear that on 30 May 2023, when the applicant notified the respondent of its indebtedness, Mr Burger was still a director of the respondent.

[16] Despite the respondent's belief that there was no longer a business relationship between the respondent and the applicant, the undertaking by Mr Burger that he would be liable for the respondent's debt could not have extinguished the binding relationship between the applicant and the respondent.

[17] In ***Standard Bank of South Africa v R-Bay Logistics***³ 2013 (2) SA 295 (KZD), the court stated:

“... if there is evidence that the respondent company is commercially insolvent (i.e. cannot pay its debts when they fall due) that is enough for a Court to find that the required case under **Section 344(f)** has been proved. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court's residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under **Section 344(f)**.”⁴

[18] In the circumstances, the applicant has proven the existence of a *prima facie* case that the respondent is unable to pay its debts. The internal machinations of the respondent cannot be used against third parties, in this case, the applicant. The application should succeed.

[19] In the result, I make the following order:

³ 2013 (2) SA 295 (KZD). ⁴
Ibid, para 27.

- a. The respondent, Buchbur Engineering (Pty) Ltd, is placed under provisional liquidation in the hands of the Master.
- b. A rule nisi hereby issues calling upon the respondent and all interested parties to show cause, if any, on **26 January 2026**, why the respondent should not be finally wound up.
- c. Service of the provisional winding-up order shall be effected on:
 - i. the respondent at its registered office.
 - ii. the employees of the respondent, if any, by affixing a copy thereof to any notice board which the employees and the applicant have access to, alternatively by affixing a copy to the front gate of the premises or the front door of
 - iii. the premises where the respondent conducts its business.
 - iv. any registered trade union, as far as it may be ascertained, representing any of the employees of the respondent.
 - v. the offices of the South African Revenue Service (SARS).
 - vi. the provisional winding-up order shall be published in the Government Gazette and in the newspaper circulating in the area where the respondent operates.
- d. The costs of the application shall be costs in the winding-up.


S MFENYANA
Judge of the High Court
Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email and by uploading the judgment onto CaseLines. The date of handing down of the judgment is deemed to be 14 November 2024.

Appearances:

For the applicant:

Counsel: S van der Meer

Instructed by: Van der Meer & Partners Inc

For the respondent:

Counsel: JHF Le Roux

Instructed by: C & A Friedlander Attorneys

Date of hearing : 12 August 2025

Date of judgment : 14 November 2025