



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2023-127693

- [1] REPORTABLE: NO
- [2] OF INTEREST TO OTHER JUDGES: NO
- [3] REVISED: YES

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SIGNATURE

DATE: 19 November 2025

In the matter between:

SAVVY HOLDINGS GROUP (PTY) LTD

Applicant

and

**BAKWENA ENTERTAINMENT AND PRODUCTION SERVICES
(PTY) LTD T/A BAKWENA TELECOMMUNICATIONS**

Respondent

JUDGMENT

PULLINGER AJ

- [1] In application launched at the beginning of December 2023, the applicant seeks an order winding up the respondent in terms of section 344(f) read with section 345, alternatively section 344(h) of the Companies Act, 1973 (*"the Companies Act"*).
- [2] The respondent has enrolled this matter for hearing in circumstances where the applicant failed to file a replying affidavit, heads of argument or in any other manner, prosecute it.
- [3] The applicant alleges that it is the respondent's creditor in the amount of R48,300.00 arising from a written agreement (*"the Agreement"*) for the provision of certain trailer and print advertisement services (*"the Services"*).
- [4] The applicant contends that it rendered the Services to the respondent during the period December 2022 to July 2023. As at 31 October 2023, so the applicant asserts, the respondent had not paid the aforesaid sum which sum is due to the applicant.
- [5] On 13 September 2023 the applicant's attorneys transmitted by email what is contended as being the statutory demand contemplated in section 345(1)(a)(i) of the Companies Act to the respondent and asserts this demand came to the respondent's attention.

- [5.1] There is a factual dispute as to whether the so-called statutory demand was received by the respondent. The respondent asserts that it was sent to an incorrect email address.
- [5.2] This is, however, immaterial. The so-called statutory demand is not one as contemplated in section 345(1)(a)(i) of the Companies Act as it was not left at the respondent's registered address (*Body Corporate of Fish Eagle v Group 12 Investments (Pty) Ltd* 2003 (5) SA 414 (W) at [4]).
- [5.3] As a result, the applicant is not able to rely on the deeming provision in section 345(1)(a)(i).
- [6] The consequence of the foregoing is that first, the applicant must establish that it is the respondent's creditor and, second it must prove to the court's satisfaction that the respondent is unable to pay its debts as contemplated in section 344(1)(c).
- [7] There is a further factual dispute as to whether the applicant rendered the Services. The respondent contends that it cancelled the agreement after having received an invoice in January 2023 for the Services. The respondent contends that that the Services were not rendered (in January 2023 or at all). It appears to be common cause that the trailer which was the subject of the agreement, was never made available and no artwork was done.

- [8] In argument before me, Ms Kotze on behalf of the applicant, relied on a number of invoices ostensibly rendered by the applicant in terms of the Agreement which, so she submits, demonstrate the respondent's indebtedness to the applicant. In the same breath however, Ms Kotze accepted that the rental of the trailer could only commence once the initial payment was made. The initial payment was not made for the reason aforesaid and this occasioned the cancellation of the Agreement. On this construction it would appear that the Services were not rendered. This is irresolvable on the papers as framed.
- [9] Ms Kotze then sought to place reliance on various terms of the Agreement which, so it was argued, were a complete answer to the dispute surrounding the respondent's obligation to pay for the Services.
- [10] There is no need to analyse the terms of the Agreement nor whether these provide a complete answer to the respondent's opposition because the applicant did not rely, in its the founding affidavit, on the Agreement.
- [11] It warrants restating that a founding affidavit must make out a case for the relief sought. In this way a founding affidavit must contain both the *facta probanda* and *facta probantia* necessary for a case to be established (*Quartermark Investments (Pty) Ltd v Mkwanaazi and Another* 2014 (3) SA 96 (SCA) [13] and the authorities therein cited).
- [12] So then, and as a general proposition, when an applicant seeks to prove the existence of a debt arising *ex contractu*, it must prove the agreement, the terms

of the agreement, the applicant's performance and the respondent's non-performance. The principle is that the debt is the amount to which the applicant would be entitled to had the respondent performed (*Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22). This gives rise to a debt that is due to the applicant and which, when unpaid after demand, leads to the inference that the respondent is unable to pay its debts (*Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597 D to G). The applicant did not make out such a case.

[13] This matter is more nuanced because the applicant was also required to have established that its right to payment accrued before cancellation and is unaffected by any cancellation (*Crest Enterprises (Pty) Ltd v Rykloff Beleggings (Edms) BPK* 1972 (2) SA 863 (A) at 870 G – H).

[14] Thus, it cannot be said that the founding affidavit makes out a case for the respondent's winding up in terms of section 344(f) read with section 345 of the Companies Act in respect of a debt said to arise *ex contractu*. As such, this application should be refused on this basis (*Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 369 C/D to E).

[15] In this case, one can understand why the facts necessary to establish a debt based on a breach of the agreement were not pleaded in the founding affidavit; it is because the applicant's case is predicated upon the deeming provision in section 345(1)(a)(i) of the Companies Act in terms of which, the necessary facts are limited to a demand for payment of not less than R100.00 due to the

creditor, which demand has been left at the company's registered address and that the amount demanded has not been paid, secured or compounded to the creditor's reasonable satisfaction within a period of three weeks after delivery of the demand as aforesaid.

[16] In the present instance, the applicant has not proved, in any satisfactory manner, that the respondent is unable to pay its debts as contemplated in section 345(1)(c).

[17] In respect of the applicant's case for just and equitable relief, the principles in *Quartermark* and *Hart* hold true. The highwater mark of the case made out for this relief is that a liquidator might be able to conduct an inquiry into the respondent's affairs. This falls well short of what just and equitable relief contemplates and the circumstances under which this form of relief may be sought (*Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd* 2014 (5) SA 1 (SCA) at [15]). The bald conclusions that comprise the applicant's case for just and equitable relief simply do not pass muster (*Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) at [28]).

[18] On consideration of the applicant's conduct, it is entirely inappropriate for a winding up application to be launched, which creates a *concursum creditorum*, and then fail to prosecute it. This sort of conduct is prejudicial to the respondent and to the *concursum* if a winding up order were to be granted, regard being had to the provisions of section 348 of the Companies Act which operates to

make the commencement of the winding up retrospective to the date on which the application was launched (*Development Bank of South Africa Ltd v van Rensburg and Others* NNO 2002 (5) SA 425 (SCA) at [8]) and the serious consequences of a winding up order, regard being had to, *inter alia*, section 341 of the Companies Act which operates to void certain transactions.

[19] Ms Magagula, who appeared for the respondent, advanced an argument in support of a punitive costs order that this application is an abuse of process. This is correct given applicant's dilatory conduct and my conclusions concerning the applicant's failure to have made out any sustainable case for the respondent's winding up. It is appropriate in the circumstances that the costs of this application be paid on the scale as between attorney and client.

[20] In the circumstances the following order is made:

This application is dismissed with costs on the scale is between attorney and client, with counsel's cost to be taxed on Scale B.



**A W PULLINGER
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 14h00 on 13 October 2025.

DATE OF HEARING: 13 OCTOBER 2025

DATE OF JUDGMENT: 13 OCTOBER 2025

APPEARANCES:

COUNSEL FOR THE APPLICANT: Adv Kotze instructed by Coetzee Attorneys

COUNSEL FOR THE RESPONDENT: Adv Magaula instructed by ML Mateme Inc