IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 2025-230396

In the matter between: -

INDGRO OUTSOURCING (PTY) LTD **Applicant**

and

BASFOUR 3281 CC **Respondent**

AND:

CASE NO: 2025-230421

In the matter between: -

INDGRO OUTSOURCING (PTY) LTD **Applicant**

and

SAVE WHOLESALERS CASH AND CARRY CC **Respondent**

ORDER

1. Application 2025-230396, (The "**Basfour** application"), is dismissed and the applicant is directed to pay the costs on scale B
2. Application 2025-230421 (The "**Save** application"), is dismissed and the applicant is directed to pay the costs on scale B.

JUDGMENT

PITMAN J

Introduction

[1] On 9 June 2026 I heard argument in these two opposed applications for the provisional liquidation of each respective respondent. They were argued simultaneously as, although the respondent differs in each, the applicant is the same and the basic material facts and law in relation to the issues in both applications is the same. It was, in fact, agreed by the parties' representatives, advocate Pietersen for the applicants and advocate Hartzenberg SC for both respondents, that the matters should be dealt with by me on that basis. As a result, this judgement is a judgement in respect of both applications. The orders will differentiate them. I will refer to the respondent in matter 2025- 230396 as **"Basfour"** and the respondent in matter 2025-230421 as **"Save"**.

The material facts

[2] In my judgement the material facts and issues determinative of these applications are fairly straightforward despite the volume of the paper comprising each application and the voluminous heads of argument submitted on behalf oin each.

[3] As its name suggests the applicant is the provider of temporary employment services in the nature of what was previously known as "labour broking services". Notwithstanding the nomenclature, these type of services remain legislated for and are of application and definition in, for example, s198 (1) of the Labour Relations Act 66 of 1995 ("LRA").

[4] **Basfour** conducts the business of supermarkets at various locations. **Save** is described as a discount and wholesale distributor of groceries.

[5] On about 1 April 2014 the applicant and **Save** concluded written agreements establishing a contractual relationship between them in terms of which the applicant would provide temporary employment and related services to **Save.** On 30 January 2019 the parties concluded a written addendum to those agreements.

[6] On 23 July 2024 the applicant and **Basfour** concluded similar written agreements, by now referred to as Service Level and Commercial Agreements in relation to various **Basfour** businesses. These agreements also established a contractual relationship between the applicant and the **Basfour** in terms of which the applicant would provide temporary employment services to **Basfour.**

[7] Although not strictly relevant to the outcome of this matter, in July 2025 a dispute arose regarding the alleged cancellation by **Save** of the agreements at its "Save Hyper Frontline" and "Save Hyper Online" departments. Notwithstanding the dispute the applicant continued providing services to **Save** until September 2025.

[8] The applicant alleges that during August 2025 it became aware that certain of its employees had become employed by other service providers and notified both **Basfour** and **Save**, in different letters, that what the applicant called "placement fees" were accordingly due to it by both **Basfour** and **Save** in respect of those employees, as a consequence of the relevant agreements. **Basfour** and **Save's** attorneys' responses, dated 1 September 2025, set out that both were terminating the

agreements on the required notice periods, and would require no further services during those notice periods. The letters stated that both would pay the applicant the agreed "service fees" for the notice periods, notwithstanding. Although not identifying specifically a response to the claim for "placement fees", the letters point out that **Basfour** and **Save** took the view that all the employees in question had become the respondent's employees by operation of law in terms of s 198 A (3) of the LRA.

[8] The applicant's then attorneys responded in writing, in a letter dated 5 September 2025, to the effect that the termination was accepted. It also accepted that the relevant employees it had provided who had exceeded 3 months employment at **Basfour** and **Save** had, by operation of law, become **Basfour** and **Save's** employees. They submitted that because of the "triangular" nature of the relationships between them, the employees and the corporations together with the "contractual" agreements, that the "placement fees" had become due.

[9] Statutory s 345 letters of demand, dated 13 October 2025, were then served (on 15 October 2025) on both **Basfour** and **Save** by the applicant. It demanded "placement fees" of R300 987.23 and RR521 230,40 respectively, as the underlying alleged debts.

[10] **Basfour** and **Save's** attorneys responded in writing on 10 November 2025. They informed the applicant, *inter alia,* that it was common cause that all employees in question earned below the threshold set by the Minister of Labour as contemplated in s198A(2) of the LRA, and that the employees in question had become direct employees of **Basfour** and **Save** after 3 months and had not been "solicited" by **Basfour** or **Save** as required by the relevant "placement" penalty clauses. It was submitted that they were accordingly not liable to the applicant for "placement fees". The letters emphasised the solvency of the corporations, cautioned against the institution of liquidation proceedings, referred specifically to the "Badenhorst Principle" regarding a disputed debt, and threatened "punitive costs" if such liquidation applications were pursued.

[11] A further letter was sent to the applicant's attorneys, dated 15 November, denying again any liability by either **Basfour** or **Save** for any "placement fees".

[12] Both liquidation applications were, notwithstanding, instituted on 26 November 2025.

[13] It is common cause that the applicant relies entirely, in respect of each respondent, on a debt alleged to be "placement fees". In establishing these debts, it relies on two particular identical clauses in both sets of the relevant agreements. Those clauses read as follows-

'The Respondent shall not solicit, in any manner whatsoever, any temporary employee to leave their engagement with the Applicant, or offer employment directly or indirectly to any such temporary employee during the period of such temporary employee's employment with the client or within a period of 12 (twelve) months after the termination thereof'

and secondly;

'In the event that the Respondent offers employment to any temporary employee directly or indirectly as aforesaid, then the Respondent shall be obliged to pay the Applicant an amount equal to 12% (twelve percent) based on the annual gross (cost to company) salary package, and this shall include the employment of any temporary employee through any alternative service provider.'

The argument

[14] The applicant submitted the following:

a) The respondents had both agreed, in terms of the written agreements, to pay all *"service fees including, but not limited to, value added tax and all other fees of whatsoever nature ancillary to the rendering of services"* by the applicant in pursuance of the agreements.

b) The *"placement fees"* charged fall within the definition of service fees.

c) The respondents, in their attorneys' letters of 1 September had agreed to pay all *"service fees"*.

d) Therefore, for the above two reasons, the *"placement fee"* liability was

proved on the papers to be due by the respondents to the applicant.

e) Even if that was not so, the placement fees were service fees and, on that basis, due.

f) As a result, the respondents were substantial creditors of the applicant, had failed to comply with the s345 Notices, and were therefore deemed to be unable to pay their debts.

g) The financial statements put up by the respondents to prove liquidity constituted hearsay and should not be given any weight.

h) The applicant was accordingly entitled to the provisional liquidation of the respondents.

[15] The respondents submitted the following:

a) "Placement fee" is not defined in the agreements. Only "service fee" is.

b) The "placement fee", as it allegedly arises pursuant to the possible application of the two clauses set out above, is clearly not a "service fee" given the definition of "service fee" as it appears in the agreement.

c) The placement fee in any event is, and has, the effect of, an unenforceable, illegal, and *contra bonis mores* penalty provision.

d) In any event further, the possible application of the two clauses above, requires triggering events which the applicant has neither averred nor proved on these papers. Those tiggering events comprise a "solicitation" of employment by the respondents and/or "an offer" of employment by the respondent.

e) The common cause facts are that the relevant employees became permanent employees of the respondents by operation of law and thus the "triggering" events are not the cause of such employment on any level.

f) That being so, the fundamental basis of the application, requiring proof of the respondents being creditors of the applicant, does not actually exist, let alone *prima facie* exist.

g) The Badenhorst principle is accordingly of application. The respondent has shown a *bona fide* defence to the alleged debts based on reasonable grounds.

h) In any event further, the respondent has put up substantial evidence by

way of financial statements and other documents proving the respondents' liquidity and clear ability to pay its debts, and certainly these debts, even if they were to be valid.

i) As a result, these liquidation applications constitute "egregious abuses of process" deserving of punitive costs orders upon their dismissal, which dismissals, it is argued, are inevitable.

Legal Principles

[16] The core idea underpinning liquidation in South African law is to ensure, and provide, an orderly and fair, way to end a company's life when it cannot pay its debts or continue operating properly. Philosophically and legislatively, the process is creditor-focused. The process exists primarily for the benefit of creditors. Whilst business rescue tries to save a company, liquidation accepts that the company is terminal ill and focuses on, as some have expressed an orderly funeral for it.

[17] Section 345 of the Companies Act 61 of 1973 provides a statutory mechanism for establishing that a company is deemed unable to pay its debts, thereby grounding an application for winding-up under section 344(f). The section reads, in relevant part:

'(1) A company or body corporate shall be deemed to be unable to pay its debts if — (a) a creditor, by cession 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; ... 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 ... (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.'

[18] The requirements for a valid section 345 (1) (a) demand are therefore straightforward and strict:

1. The applicant must establish that it is a creditor to whom the company is indebted in a sum of not less than R100 that is then due.

2. The demand must be served by leaving it at the company's registered office (or in the prescribed manner for external companies).

3. The company must neglect to pay the sum, or secure or compound for it to the creditor's reasonable satisfaction, for a period of three weeks after service.

Compliance with these formalities creates a *prima facie* case of commercial insolvency via the deeming provision.

[19] In the present matters, the applicant relies on unanswered s 345 demands served on 15 October 2025, both of which remained unsatisfied for the statutory period. This, so it is argued, establishes the necessary *prima facie* foundation for the provisional orders sought.

[20] However, the deeming effect of s 345 is not absolute. It operates as a rebuttable presumption and does not preclude a respondent from raising a defence that the alleged indebtedness does not exist or is not good in law. Where the respondent shows, on reasonable grounds, that the debt is *bona fide* disputed — including on the basis that the applicant is not a creditor at all — the court will ordinarily decline to grant even a provisional winding-up order and relegate the parties to ordinary action proceedings.

[21] This engages the well-established Badenhorst principle. As stated in *Badenhorst v Northern Construction Enterprises (Pty) Ltd*,[1] winding-up proceedings ought not to be resorted to in order to enforce payment of a debt the existence of which is *bona fide* disputed on reasonable grounds. The procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt. The procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt.

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[1] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956(2) SA 346 (T) at 347H-348C

[22] This principle is rooted in the fundamental nature of liquidation as a collective remedy for the benefit of all creditors and shareholders, rather than a private debt-collection mechanism for a single claimant. Granting a provisional winding-up order on a disputed debt risks inflicting irreparable commercial harm before the underlying liability has been properly established. Liquidation affects the interests of all stakeholders, disrupts ongoing business, and carries severe reputational and economic consequences. It should therefore not be invoked lightly or as a form of procedural pressure or, as has often been said, as a *"weapon in terrorem"* to pay an alleged debt.

[23] Winding-up provisions in the Companies Act (and its predecessors) were intended to address genuine commercial insolvency, not to shortcut ordinary civil litigation. Courts have long recognised that ordinary action proceedings provide the proper forum for ventilating contested issues, with pleadings, discovery, oral evidence, and cross-examination. Whereas liquidation applications proceed on affidavit and are ill-suited to resolving complex factual or legal disputes over the very existence of indebtedness.

[24] This principle upholds the rule of law and procedural fairness. It guards against abuse of process by preventing a putative creditor from using the drastic remedy of liquidation as leverage to force payment or settlement of a claim that may ultimately prove unfounded. In my judgment, even where a section 345 demand has been ignored, a *bona fide* and reasonable dispute raised in opposition of a liquidation application can account for a *prima facie* case, particularly at provisional stage. The respondent bears the onus of showing the dispute meets the required threshold, but once reached, the court will ordinarily refuse the order.

Analysis

[25] In the present matter, these principles find direct application. Whilst the applicant relies on the deeming effect of an unpaid, and unanswered timeously s 345 demand, the respondents' defences that the alleged liabilities are not good in law (and

that the applicant is accordingly not a creditor) engages, in my judgment, with the type of dispute the Badenhorst rule seeks to protect.

[26] It is a matter of undeniable logic that the timing of the defence cannot automatically undermine its *bona fides,* particularly if the grounds advanced are reasonable. The timing of the dispute, even if raised only after expiry of the s345 three-week period, may be relevant to the credibility of the defence but does not, without more, render it disingenuous, *mala fides*, or of no relevance. The court must still evaluate whether the grounds advanced are reasonable and whether the dispute's resolution ought to be established in the ordinary course of a trial.

[27] On the issue of whether the respondents have discharged the onus of showing *bona fide* defences, the argument is that they have done so by showing, *bona fide*, that the alleged debts arising out of the alleged "placement fee" claims have no foundation or basis on the facts set out.

[28] In my judgment that argument is good. I am satisfied that far from falling "clearly under the "service fee" definition, as argued by counsel for the applicant, there is a *bona fide* and reasonable argument that it does not. The precise definition of what "services" were understood by the parties to be actual services, and whether "placement fees" were agreed to have fitted into that definition when the written agreements were concluded is, in my judgment, a *bona fide* triable issue. According to the current legal position regarding the interpretation of written agreements by our Courts, there are a number of factors which may need to be considered beyond the mere *ipsissma verba* of the document/s. That will necessitate oral evidence.

[29] On the facts before me, I am of the view that if pressed upon for decision at this stage, and only on the papers, I would hold that "placement fees" cannot be interpreted as "service fees" given only the agreements themselves and the submissions made herein by the respondent's counsel in relation to them. In my judgment, the applicant's

letter agreeing to pay the one or two months "service fees", could not have been meant an admission to include various "placement fees" which would have been one off amounts and not monthly amounts. There seems to me to be a clear distinction in the agreements between the two types of fees.

[30] During argument I asked counsel for the applicant whether, if the applicant had proceeded by way of action instead, and if this defence (that the respondents were not creditors for these reasons) had been raised in, as is now the summary judgment procedure, a summary judgment answering affidavit in opposition to an application for summary judgement, what submissions he would make to support an argument that the defence does not constitute a *bona fide* defence avoiding summary judgment. In my judgment he was unable to provide one. I am aware that the tests may be a little different in context, but in my view any acceptance that the defence is *bona fide* triable as a summary judgment defence also, which I am of the view it does, ends all debate about its basis for the liquidation of the respondents in these matters.

[31] The defence is, however, also *bona fide*, in my judgment, in respect of the requirement of the triggering events before any "placement fees" (as referred to be the applicant) or "penalty provisions" (as referred to by the respondents) would in any event become due. These triggering events are not alleged or proved by the applicant on these papers because all relevant employees became so by operation of law. They were not solicited or "offered" employment on the facts before me. Thus, on the applicant's own papers the "debts" are, in my judgment, not proved.

[32] Even if I were to be wrong on both of the above issues, in my judgment the respondents have none-the-less discharged all obligations they have in establishing that they are not insolvent, despite the deeming effect of s345. The respondents attached current audited annual financial statements ("AFS'"). These are signed off by the respondents' deponent himself as member. They are not therefore ordinary hearsay documents, but are corporation records vouched for by the member himself. They are routinely accepted by our courts as the corporations' own records. That they

are audited adds further weight to them. *In casu* none are challenged by any alternative evidence. The applicant has no knowledge of the respondents' financial status. The applicant identifies no other creditors of the respondents save for a vague assertion that there are bound to be some.

[33] In each matter the AFS' show anything but insolvent entities. They are, on those documents, both presently commercially and actually solvent, and able to pay their debts, in my view.

Conclusion

[34] In my judgment, therefore, both applications must fail. For the reasons set out above-

a) The applicant has not shown that it is a creditor of the respondents, the alleged debts being disputed on *bona fide* and reasonable grounds.
b) In any event, no triggering events needed to create the alleged debts are proved by the applicant.
c) The respondents have demonstrated that they are solvent and able to pay their debts despite the "deeming" provisions of s345.
d) The liquidation process is not to be used as a debt collecting procedure.

Costs

[35] Costs are a matter of my discretion, which discretion I must exercise judiciously and judicially. There is no reason why the costs should not follow the result. However, I have decided not to grant punitive costs as requested by counsel for the respondents. I do so based on an equitable consideration and balance of the following facts:

a) The applicants requested the "placement fees" from the respondents in their August 2025 letters.

b) The respondents' responses did not tackle the "placement fees" issue directly. Instead, it only pointed out LRA consequences of short-term employment.

c) The statutory s 345 letters of demand were served on 15 October 2025 on both **Basfour** and **Save** by the applicant.

d) The respondents ignored them.

e) The respondents then corresponded with the applicant after 26 days only, wherein they denied liability for "placement fees".

f) However, by then the respondents had, because of their failure to respond timeously both become "deemed" in law to be unable to pay their debts, entitling the applicants to proceed.

g) I am aware that in a letter dated 15 November 2025 the respondents again caution the applicant against the "liquidation" route.

h) The applicant issued the papers in both applications on 26 November 2025.

i) The "Financials" upon which the respondents rely, were only put up with the papers after issue of these applications.

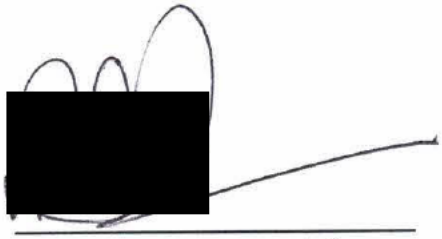
j) The respondents' heads of argument, practice notes, list of authorities, and chronology were over 100 pages for each application. Despite both applications having been agreed to be argued on the same day, both of those voluminous sets of heads documents are to a significant extent identical. The respondents' voluminous bundles of argument were entirely unnecessary both in extent and repetition.

k) The applicant's equivalent bundles are only approximately 23 pages for each.

[36] In my discretion, therefore, whilst the costs should follow the result, they should be ordinary party and party costs on scale B.

Order

1. Application 2025- 230396, (The **Basfour** application), is dismissed with costs on scale B
2. Application 2025-230421 (The **Save** application) is dismissed with costs on scale B.



JUDGE PITMAN 18/6/26

APPEARANCE

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CASE INFORMATION

Date Judgment Reserved:	09 June 2026
Date Judgment Handed Down:	This judgment is delivered electronically by circulation to the parties' legal representatives via email and by uploading it to Court Online. It is deemed to have been handed down on 18 June 2026 being the date it is uploaded to Court Online.