

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Date: **6th March 2023** Signature: _____

CASE NO: 5974/2022

DATE: 6TH MARCH 2023

In the matter between:

INTELLO CAPITAL CC

Applicant

and

SIGGE MANAGED SOLUTIONS (PTY) LIMITED

Respondent

Coram: Adams J

Heard: 27 February 2023

Delivered: 06 March 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 6 March 2023.

Summary: Liquidation – company – application for provisional winding-up order on the grounds that the respondent company is unable to pay its debts within the meaning of s 345(1)(c) of the Companies Act 61 of 1973 – whether applicant's claim is *bona fide* disputed on reasonable grounds (the *Badenhorst* rule) – defences raised by respondent bad in law –

Furnishing of copy of winding-up order to employees – alternative modes of doing so – failure to furnish papers to employees of respondent before hearing – not barring court from granting provisional winding-up order – Companies Act 61 of 1973, ss 346(4A)(a)(ii) – respondent could nevertheless be placed under provisional liquidation –

Provisional winding-up order granted with a return date.

ORDER

- (1) The respondent, Sigge Managed Solutions (Pty) Limited, with registration number 2017/388673/07, be and is hereby placed under provisional liquidation in the hands of the Master of the High Court, Johannesburg.
- (2) A *rule nisi* be and is hereby issued calling upon the respondent and all other interested persons to appear and to show good cause on **Monday**, the **1st** of **May 2023** at **10:00** or so soon thereafter as the matter may be heard, as to why:
 - 2.1. The Respondent should not be placed in final liquidation;
 - 2.2. The costs of this application should not be costs in the liquidation on an attorney and client scale;
- (3) Service of this Order is to be effected as follows:
 - 3.1. Service by the Sheriff upon the respondent at its business address;
 - 3.2. Service by the Sheriff upon the employees of the respondent and on any registered trade unions (if any), at the business address of the respondent, in terms of s 346A of the Companies Act, Act 61 of 1973;
 - 3.3. Service on the South African Revenue Service by the applicant's attorneys;
 - 3.4. Service on the Master of the High Court by the applicant's attorneys;
 - 3.5. On all known creditors with claims in excess of R25 000 by means of registered mail and/or email;

- 3.6. Publication of this Order shall be in both an English and Afrikaans newspaper circulating in the local provincial area of the respondent's registered address, as well as in the Government Gazette.

JUDGMENT

Adams J:

[1]. In this opposed application, the applicant ('Intello Capital') seeks a provisional winding-up order against the respondent ('Sigge'), which, according to Intello Capital, is unable to pay its debts. Intello Capital therefore applies for the winding up of Sigge on the grounds that it is unable to pay its debts within the meaning of s 345(1)(c) of the Companies Act, Act 61 of 1973 ('the 1973 Companies Act'). The case of Intello Capital in the main is that Sigge is commercially insolvent in that it is factually unable to pay its debts.

[2]. Intello Capital claims that Sigge is indebted to it (Intello Capital) in an amount of R3 343 163.45, being in respect of monies lent and advanced by Intello Capital to Sigge during or about November 2020 pursuant to and in terms of a written 'Facility Letter' duly signed by Sigge on 18 November 2020, as well as a written acknowledgment of debt of the same date by Sigge in favour of Intello Capital. Sigge reneged on the first set of agreements and failed to repay the outstanding amount of the loan by April 2021 and the parties concluded a further acknowledgement of debt on the 25th of October 2021, which agreement Sigge also breached. It failed to effect payment of the whole amount of the loan by 18 March 2022, as per the latter agreement between the parties.

[3]. It is the case of Intello Capital that Sigge does not have a valid and a *bona fide* defence to the claim, which, so Intello Capital contends, is aptly demonstrated by the fact that during January 2022 it attempted to extricate itself from its admitted indebtedness to Intello Capital by disingenuously relying on spurious legal defences, such as claims that the agreements are void and unenforceable because it ostensibly contravene provisions of the Pension Fund

Act¹ and the National Credit Act². There is merit in this contention by the Intello Capital. These grounds of defences to the claim by Intello Capital, although repeated in the answering affidavit of Sigge, were not persisted with by Sigge by the time this application was heard before me on 27 February 2023. That was confirmed by Mr Aucamp, who appeared on behalf of Sigge. As for the other defences raised to the monetary claim by Intello Capital, as well as to the defences raised to this liquidation application, I shall revert to those later on in this judgment.

[4]. On 3 February 2022 Intello Capital caused to be delivered to Sigge's attorneys a letter, which in effect was a demand in terms of Section 345 of the Companies Act, Act 71 of 2008, advising Sigge that Intello Capital would be applying for its winding-up on the basis that it was unable to pay its debts as and when they fall due and, so the letter indicated, it was therefore commercially insolvent.

[5]. Whilst Sigge accepts that it was advanced an amount of R3 100 000 by Intello Capital during November 2020 and that *ex facie* it is liable to Intello Capital for repayment of that sum, together with interest thereon, it alleges that it is entitled to withhold payment of the said sum on the basis of a material misrepresentation, which presumably induced it to enter into the loan agreement, which it would not have done but for the said misrepresentation. The case of Sigge is that a Mr Cloete Greeff, a representative of a related company by the name of Optimum Financial Services CC ('Optimum'), introduced Sigge to Intello Capital under the pretence that Intello Capital was a division of Optimum.

[6]. Sigge makes much of the fact that, according to it, the agreements were concluded with Intello Capital 'on the strength of the impression created that Intello Capital CC was a division of Optimum Financial Services CC'. There are two difficulties with Sigge's case in that regard and, in my view, they are clutching at the proverbial straws.

¹ Pension Fund Act, Act 24 of 1956;

² National Credit Act, Act 34 of 2005;

[7]. Firstly, nowhere in the answering affidavit does Sigge allege that they were induced by this supposed misrepresentation to enter into the contractual relationship with Intello Capital. Moreover, I can think of no reason why, in the circumstances of this matter, it would have made any difference to Sigge as to who was advancing to them the so-called 'bridging finance', which they apparently were in desperate need of at the time. The point is simply that, howsoever one views this matter, it appears that this defence by Sigge is an afterthought and an attempt to get out of their clear obligation to refund to Intello Capital the amount in excess of R3 million. Sigge's conduct seems to me to be unconscionable.

[8]. Secondly, the allegation of a misrepresentation flies in the face of the agreements concluded between the parties, notably the two written acknowledgements of debt, which made it abundantly clear that Sigge was contracting with Intello Capital and with no one else. That, in my view, spells the end of Sigge's case on that aspect. Its defence based on a supposed misrepresentation is bad in law and is rejected.

[9]. It is trite that liquidation may not be used to enforce payment of disputed debts. It is not suitable to resolve complex factual disputes. See *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd*³ and *Badenhorst v Northern Construction Enterprises (Pty) Ltd*⁴. Probabilities may not be the basis for factual findings unless the court is satisfied that there is no real and genuine factual dispute. Where the court finds that there is a real and genuine factual dispute incapable of resolution on papers, it can only dismiss the application if it finds that the applicant should have realized when launching the application that there was a factual dispute. See *Adbro Investment Company Ltd v Minister of Interior*⁵.

[10]. As already indicated, *in casu* there is no real factual dispute relating to Sigge's liability to Intello Capital arising from not one, but two written

³ *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) at para 154;

⁴ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346(T) at 347-348;

⁵ *Adbro Investment Company Ltd v Minister of Interior* 1956 (3) SA 345 (A) at 350A.

acknowledgments of debts. Moreover, the defence is bad in law. Therefore, the defence raised by Sigge is not *bona fide* and it is not disputing its liability to Intello Capital on reasonable grounds. Far from it.

[11]. Intello Capital seeks a provisional winding-up order, and the issues in summary are whether Intello Capital is owed the money they claim and whether their claim is disputed on reasonable grounds. In *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another*⁶, Rogers J said the following:

‘[7] In an opposed application for provisional liquidation the applicant must establish its entitlement to an order on a *prima facie* basis, meaning that the applicant must show that the balance of probabilities on the affidavits is in its favour (*Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 975J – 979F). This would include the existence of the applicant's claim where such is disputed. (I need not concern myself with the circumstances in which oral evidence will be permitted where the applicant cannot establish a *prima facie* case.)

[8] Even if the applicant establishes its claim on a *prima facie* basis, a court will ordinarily refuse the application if the claim is *bona fide* disputed on reasonable grounds. The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is *bona fide* disputed on reasonable grounds, is part of the broader principle that the court's processes should not be abused. In the context of liquidation proceedings, the rule is generally known as the *Badenhorst* rule, from the leading eponymous case on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348C, and is generally now treated as an independent rule, not dependent on proof of actual abuse of process (*Blackman et al Commentary on the Companies Act*, Vol 3 at 14 – 82 to 14 – 83). A distinction must thus be drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the applicant's claim, however, the court must consider not only where the balance of probabilities lies on the papers but also whether the claim is *bona fide* disputed on reasonable grounds. A court may reach this conclusion even though on a balance of probabilities (based on the papers) the applicant's claim

⁶ *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC);

has been made out (*Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783G – I). However, where the applicant at the provisional stage shows that the debt *prima facie* exists, the onus is on the company to show that it is *bona fide* disputed on reasonable grounds (*Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 218D – 219C).’

[12]. For all of these reasons, I agree with Mr Els, Counsel for Intello Capital, that this defence of misrepresentation is not a valid and a *bona fide* defence, which can assist Sigge in resisting the winding-up application. It is an afterthought aimed at camouflaging Sigge’s commercial insolvency. I therefore of the view that Intello Capital has made out a case for the provisional winding-up of Sigge.

[13]. There is one more issue which I need to address and that relates the alleged non-compliance by Intello Capital with the provisions of s 346(4A) of the Companies Act⁷, which provides as follows: -

- ‘(4A) (a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application –
- (i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and
 - (ii) to the employees themselves –
 - (aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or
 - (bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;
 - (iii) to the South African Revenue Service; and
 - (iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.
- (b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with.’

[14]. Sigge takes issue with the fact that the winding-up application, although addressed to the ‘Employees of the respondent’ and to the ‘Trade Unions of the

⁷ Companies Act, Act 61 of 1973;

Employees', was apparently not served on them as required by subsection (4A)(ii). This means, so Sigge contends, that the application should either be dismissed or be removed from the roll and for that contention reliance is placed on a couple of High Court cases, notably *Cassim v Ramagale Holdings (Pty) Ltd*⁸ and *Bees Winkel (Pty) Ltd v Mkhulu Tshukudu Holdings (Pty)*⁹.

[15]. As regards the furnishing of the winding-up application to the employees of Sigge and/or any of their Trade Unions, the sheriff served same or attempted to serve same on them. The sheriff's return relating to the employees of Sigge reads as follows: -

'On this 06 day of April 2022 at 12:28, I served the Notice of Motion in this mater upon Enver, Employee, apparently a responsible employee and apparently not less than 16 years of age, of and in control of and at the principal place of business within the court's jurisdiction of Sigge Managed Solutions (Pty) Ltd at The Employees of the Respondent at 1 Houer Road, Bidvest SADC Depot, City Deep, Johannesburg, by handing to the PARTY SERVED a copy thereof after explaining the nature and exigency of the said process. Rule 4(1) (a) (v)

REMARK: Spoke to Lelanie, Director's wife, she said the registered address is 21 The Broads, Mulbarton; Residential address is 10 Poinsettia Road, Meyersdal – Enver informed that there is no Trade Unions.'

[16]. The sheriff's return in respect of the Trade Unions of the Employees read along similar lines as follows: -

'On this 06 day of April 2022 at 12:28, I served the Notice of Motion in this mater upon Enver, Employee, apparently a responsible employee and apparently not less than 16 years of age, of and in control of and at the principal place of business within the court's jurisdiction of Sigge Managed Solutions (Pty) Ltd at The Trade Unions of the Employees at 1 Houer Road, Bidvest SADC Depot, City Deep, Johannesburg, by handing to the PARTY SERVED a copy thereof after explaining the nature and exigency of the said process. Rule 4(1) (a) (v)

REMARK: Spoke to Lelanie, Director's wife, she said the registered address is 21 The Broads, Mulbarton; Residential address is 10 Poinsettia Road, Meyersdal – Enver informed that there is no Trade Unions.' (Emphasis added).

[17]. From the foregoing, it is apparent that a copy of the winding-up application was furnished to at least to one employee of Sigge and that there is apparently no Trade Union or Trade Unions which represent the employees of

⁸ *Cassim v Ramagale Holdings (Pty) Ltd* 2020 JDR 1325 (GJ);

⁹ *Bees Winkel (Pty) Ltd v Mkhulu Tshukudu Holdings (Pty) Ltd* 2021 JDR 1760 (NWM);

Sigge. It also appears that there may very well be other persons employed by Sigge, although that is not certain. There has however not been compliance with the letter of s (4A)(a)(ii) in that the said application was not displayed on the notice board to which the employees have access or on the front gate or on the front door. The question therefore remains whether this means that the winding-up application should fail or be removed from the roll as was held in *Cassim and Bees Winkel*. I think not. And I say so for the reasons mentioned in a more recent judgment by this Court (per Viljoen AJ), namely *Aqua Transport and Plant Hire (Pty) Ltd v TST Broker (Pty) Ltd*¹⁰, which contains a useful discussion on the relevant authorities, including *Cassim and Bees Winkel*.

[18]. I can do no better than to quote from *Aqua Transport and Plant Hire*, in which Viljoen AJ held as follows: -

[38] I find myself in respectful disagreement with the conclusions in the judgments of *Pilot Freight, Cassim and Bees Winkel* insofar as those judgments elevate a service affidavit to an indispensable requirement for the granting of a provisional order. I say this for four reasons:

- 38.1 Firstly, in the *E B Steam* matter, the Supreme Court of Appeal considered whether a final order of liquidation had been granted correctly. The court considered the need for and the required content of a service affidavit in the context of a final order.
- 38.2 Secondly, according to the exposition of the facts found in the *E B Steam* judgment, the application papers contained no information against which the efficacy of the service on the employees could be judged but for the sheriff's return. There is no mention of a service affidavit. Despite the apparent absence of a service affidavit, the court considered the content of the return of service and found it insufficient to prove that the application had been furnished to employees. Although there was no service affidavit and no compliance with s 346(4A)(a)(i) and (ii), the court granted a provisional order of winding up. If this judgment is interpreted to require a service affidavit, and a comprehensive one at that, as a prerequisite for a provisional order, a disconnect between the court's findings and the eventual order follows. In my view, a judgment must be interpreted in such a way as to preserve the integrity thereof.
- 38.3 Thirdly, the *E B Steam* matter distinguishes between "service" in terms of the rules of court and the "furnishing" of a copy of the application to employees. The court found the methods of "furnishing" set out in that section not to be peremptory. I do not read the judgment as suggesting that "service", an endeavour aimed at achieving certainty of receipt beyond that required by s 346(4A)(a), is unacceptable as means of complying

¹⁰ *Aqua Transport and Plant Hire (Pty) Ltd v TST Broker (Pty) Ltd* 2023 JDR 0191 (GJ);

with that section. "Service" is proven by a sheriff's return. Thus, the court was quite prepared, as I mentioned above, to determine the matter of the furnishing of copies to employees on the evidence provided by the sheriff's return in the absence of a service affidavit by the sheriff or anybody else. It stands to reason that if the sheriff's return is accepted as *prima facie* evidence of service for purposes of the institution of proceedings, a return of service should in principle be acceptable proof of service on interested parties.

- 38.4 Fourthly, an overly strict approach to proof of service of the application on employees undermines the caution expressed in the *E B Steam* judgment that s 346(4A) is not intended to provide a respondent with technical defences. Its intention is to provide employees and their representatives adequate opportunity to protect their interests in the event of the insolvency of their employer. This aim is effectively achieved by an order in the terms of that granted by the Supreme Court of Appeal.

[39] I thus conclude that the filing of a service affidavit is not an absolute *sine qua non* for a provisional order of liquidation.' (Emphasis added).

[19]. I respectfully adopt the reasoning and conclusion in *Aqua Transport and Plant Hire*. The requirement that an affidavit of service be filed in terms of s 346(4A)(b) before any order may be granted is not absolute. An affidavit is not required in the event of the sheriff having furnished a copy of the application papers to the Trade Union representing the employees of the company or to the employees. It will suffice that the sheriff's return or returns confirm that the purpose of subsection 346(4A)(a)(i) and (ii) have been achieved, that being that the employees' attention has been drawn to the fact that an application has been brought for the liquidation of their employer. The emphasis throughout must be on achieving the statutory purpose of, so far as reasonably possible, bringing the application to the attention of the employees.

[20]. Importantly, and on the basis of *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd*¹¹, the requirement that the application papers be furnished to the employees is peremptory. However, even if the applicant is, for whatever reason, not able to furnish the application papers to the employees before the hearing, a court could still grant relief in the form of a provisional winding-up order. Put another way, there will be circumstances (and not necessarily exceptional ones,

¹¹ *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA);

as was held by *Bees Winkel*) in which a court will be justified in granting a provisional winding-up order. An important consideration in that regard would, in my view, relate to whether or not the respondent is *bona fide* in its opposition to the winding-up application. As was held in *EB Steam*: -

'The position may well be that an overwhelming case is made on the papers for the grant of a winding-up order and that any delay will allow assets to be concealed or disposed of to the detriment of the general body of creditors and particularly the employees and SARS, who may have preferential claims. It would be absurd to hold that the court was disabled from granting a provisional order merely because it had not been feasible, possibly as a result of the conduct of the employer, to furnish a copy of the application papers to the employees or a representative trade union or even SARS, although the latter is unlikely to be a practical problem.'

[21]. *In casu*, I have already found that Sigge's indebtedness to Intello Capital is not disputed on *bona fide* and reasonable grounds. In fact, in my view, Sigge disputes its liability to Intello Capital to pay the amount in excess of R3 million on rather spurious grounds aimed at camouflaging its commercial insolvency. This in itself is good reason why consideration should be given to granting the provisional winding-up order. Moreover, although the sheriff did not comply with the letter of s 346(4A), it may very well be that the service of the application on 'an employee' of Sigge served the purpose of bringing the said application to the attention of the employees.

[22]. For these reasons, I am of the view that an order for the provisional winding-up of Sigge should be granted.

Order

[23]. Accordingly, I make the following order: -

- (1) The respondent, Sigge Managed Solutions (Pty) Limited, with registration number 2017/388673/07, be and is hereby placed under provisional liquidation in the hands of the Master of the High Court, Johannesburg.
- (2) A *rule nisi* be and is hereby issued calling upon the respondent and all other interested persons to appear and to show good cause on **Monday, the 1st of May 2023, at 10:00** or so soon thereafter as the matter may be heard, as to why:

- 2.1. The Respondent should not be placed in final liquidation;
- 2.2. the costs of this application should not be costs in the liquidation on an attorney and client scale;
- (3) Service of this Order is to be effected as follows:
 - 3.1. Service by the Sheriff upon the respondent at its business address;
 - 3.2. Service by the Sheriff upon the employees of the respondent and on any registered trade unions (if any), at the business address of the respondent, in terms of s 346A of the Companies Act, Act 61 of 1973;
 - 3.3. Service on the South African Revenue Service by the applicant's attorneys;
 - 3.4. Service on the Master of the High Court by the applicant's attorneys;
 - 3.5. On all known creditors with claims in excess of R25 000 by means of registered mail and/or email;
 - 3.6. Publication of this Order shall be in both an English and Afrikaans newspaper circulating in the local provincial area of the respondent's registered address, as well as in the Government Gazette.



L R ADAMS
*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON:	27 th February 2023
JUDGMENT DATE:	6 th March 2023 – judgment handed down electronically
FOR THE APPLICANT:	Advocate A P J Els
INSTRUCTED BY:	Barnard & Patel Incorporated, Clydesdale, Pretoria
FOR THE RESPONDENT:	Advocate S Aucamp
INSTRUCTED BY:	Brian Wilkin Attorneys Inc, Mulbarton, Johannesburg