REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 5763/2024

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

[redacted]

DATE SIGNATURE

In the matter between: -

INVESTEC BANK LIMITED **PLAINTIFF**

and

D AND M MABUNDA INC **DEFENDANT**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for the hand-down of the judgment is deemed to be 7 August 2026 at 12h30

JUDGMENT

MONENE AJ

Introduction

[1] The applicant, a banking institution, brought this motion proceedings against the respondent, a juristic person duly registered in terms of applicable legal instruments, seeking to have the latter provisionally wound up.

[2] The application, brought in terms of section 344(f) and 344(g) of the Companies Act 61 of 1973("the Act"), is opposed by the respondent.

[3] The basis of the application is the creditor-debtor relationship between the parties as well as the consequent obtaining of a order by the applicant against the respondent which judgement remains unsatisfied. The said order per Mashile J dated 4 October 2022 was for payment of monies totaling R2 174 117,50 and interest thereon arising from four separate claims which had been premised on unpaid loans previously granted to the respondent by the applicant.

[4] It is posited by the applicant that the respondent is since 2022 unable to honour the order and pay in terms thereof and is thus factually and commercially insolvent when assessed through the legal prism of section 344(f) read with section 345(1)(a) of the Act, be deemed insolvent.

[5] Sales in execution in pursuit of satisfying the judgement debt, which curiously included Mr Daniel Temba Mabunda ("Mr Mabunda"), the respondent's apparent surety, in his personal capacity and paltry offers far below a court ordered reserve price had done virtually nothing to defray or reduce the respondent's indebtedness to the applicant, it is posited by the applicant.

[6] In opposition of the application the respondent hoisted being served with the application at a wrong address, failure to serve the respondent's directors, employees and/or trade unions with the application and the founding affidavit deponent's lack of authority to act on behalf of the appellant as preliminary pitfalls fatal to the application. It then while it acknowledged the judgement against it referred to above, denied insolvency, denied the materiality or existence of some other judgements not germane to the application per se although alleged by the applicant as having been obtained by a third party against the respondent, alleged that it has enough assets which outrun liabilities and suggested that it had paid some deposits in the sales in execution pursuant to Mashile J's judgement.

The facts in sum

[7] On 4 October 2022 the applicant obtained a money payment order per Mashile J against the respondent for four separate claims all totaling R2 174 117,50. That order still standing and remaining in force, the facts leading thereto are not relevant in the determination of the issue before me.

[8] That order also declared the respondent's immovable property executable in terms of uniform rule 46, fixing the reserve price thereof at R612 338.69. The sheriff was also authorized to execute a writ.

[9] In the wake of the judgement remaining unsatisfied despite demand by the applicant a sale in execution was held. That sale in execution, according to the applicant, yielded nothing of value in relation to the debt owed. According to the respondent some unspecified deposit amounts pursuant to the sale in execution were paid, ostensibly by its surety, Mr Mabunda.

[10] The applicant then brought this application seeking, as per the notice of motion, a provisional liquidation order against the respondent.

Preliminary matters

[11] Atop the respondent's supra-stated "points in limine", the applicant has added its on to the effect that owing to the unexplained late filing of the respondent's answering affidavit and manifestly late condonation application uploaded only a day before the matter served before this court, I should refuse to factor the answering affidavit into this judgement and essentially treat this application as unopposed.

[12] I have decided to dismiss all the "in limine" points raised by the parties some for lack of substance and all in the interests of justice. Without detaining myself unnecessarily with their unhelpful and dilatory nature, I decline to uphold neither regard being had to the following considerations:

12.1 The lack of authority to depose to the founding affidavit or "act on behalf of the applicant" (whatever that means) is a not only clothed in vagueness but is unnecessarily dilatory and unavailable in law. The law is trite that what can lend itself to challenge is authorization to institute proceedings and not per se act on behalf of as in perhaps deposing to an affidavit. I do not understand the respondent’s point, inelegantly pleaded as is. to be attacking authority to institute proceedings. Beyond that, the balance of all papers before me conclusively persuades me that there is no way the deponent could be engaging on a frolic of her own unbeknown to Investec Bank. This type of clasping of straws raising by raising technical dilatory clearly unmeritorious points in the face of clear evidence that they cannot be factually correct has never washed it with this court.

12.2 The failure to serve the respondent at its “proper” address by sheriff makes no sense to me when raised by a party who has since opposed the matter proving that it has indeed become aware of the application. The main purpose of service is, to me, to make a party or parties having direct and substantial interest aware of proceedings and give such party or parties adequate opportunity to formulate and prosecute an approach to the litigation mooted. It seems to me ludicrous and vexatious for a party to come to the litigation party fully, duly oppose a matter and then argue that the matter be not heard because it became aware irregularly or in a manner it dislikes. Why go back to knock properly when you are already comfortably seated in the room? Why engage in some dilatory gymnastics or re-invention of the same wheel and unnecessarily delay the hearing of a matter at grave prejudice to the parties bottlenecking court rolls when you are already in attendance and ready? Beyond that, the point taken is defeated by the incontrovertible averment by the applicant that service was effected at the respondent’s address as appears on the companies register.

12.3 The point of no service on other possible interested parties cannot stall this court from hearing the matter as the relief sought is provisional and whatever provisional order may be granted would be served on all other possibly peripherally affected parties whose existence must not be assumed. The respondent has averred the existence of employees or trade unions in the most general and unconvincing manner such that justice cannot, where, if they exist, they can ultimately be made aware to make inputs prior finalization, afford to be stalled on speculative suppositions of their existence.

12.4 This court is no adherent to muffling any available voice from being heard in the determination of an issue. While the manifestly late and understandably not responded to condonation application uploaded a day before the hearing of this application is virtually not before me, in circumstances where the answering affidavit was very late, the fact is, beyond the need for compliance with rules which must never be flippantly discounted and perhaps the often itching need to be overly pedantic, no prejudice is visited upon anybody in admitting the answering affidavit filed late. The applicant has been able to reply adequately to the late answering affidavit, the court has perused the full set of affidavits, and the defaulting party can be reprimanded with an appropriate costs order to mitigate non-compliance. In that way our courts, and this court too, shall obviate unnecessarily appearing to be religiously zealous about compliance with the rules even where discretionary condonation is patently in the interests of justice due regard being had to the trite *audi alteram partem* rule. At some point the over-technical kicking of the can down the road resulting from upholding unhelpful points in limine which ultimately strangles court rolls even of appeal courts on peripheral points must, in my view, come to an end.

12.5 This court has in many other instances expressed its lack of appetite for upholding non-dispositive dilatory points in limine which although appearing to make lawyering erudite and interesting do nothing to advance timeous access to justice and effective use of scarce judicial resources as matters are routinely removed by the proverbial kicking of the can down the road against the interests of justice. It stretches incredulity how in most matters' parties exchange blows in each arguing for the dismissal of condonation pleas of the other while at the same time seeking their own condonations to be upheld.

[13] Having thus dismissed all "points in limine" raised, I proceed to identify the issue, evaluate the parties' submissions on the issue through the prism of applicable law and make findings.

The issue and parties' key contentions thereon

[14] The issue is crisp. It is whether the respondent has committed an act of insolvency worthy of attracting, at the very least, a provisional winding up order at this stage.

[15] In the main, the applicant points to the respondent's failure to satisfy the Mashile J order as a basis of its contention for the order it seeks.

[16] As I understand the respondent's defence, it shields itself from the order sought on the following propositions:

16.1 That it is commercially solvent and that therefore our current dual legislative framework to corporate dissolution, ousts the applicability of the old companies Act of 1973.

16.2 That the applicant's reference to section 344(g) of the 1973 Act is misconceived as that section applies to foreign juristic persons registered in South Africa.

16.3 That the application is an abuse of court process in violation of the Badenhorst rule in that the applicant is using it to enforce a debt disputed on substantial grounds.

16.4 That the respondent has tendered an unconditional payment of R1.1 million towards payment of the judgement debt.

16.5 That the debt amount upon which the application is premised is disputed as the applicant holds R170 000.00 from the sale in execution debt and holds covering bonds which may by ordinary execution be used to cover the debt.

Application of relevant legal instruments to the facts

[17] Section 344(f) of the Act, on which the applicant primarily relies in this application, provides that a court may wind up a company if the company is unable to pay its debt.

[18] Inability to pay debts is, in terms of section 345(1)(a), deemed, if post a letter of demand from a creditor for an amount not less than hundred rands, the debtor company fails to pay the monies demanded or to otherwise satisfy the debt.

[19] On the facts *in casu* I find there to be no dispute that the respondent is a judgement debtor in amounts far more than hundred rands, that payment thereof is since October 2022 due and duly demanded in terms of section 345(1)(a) of the Act and that the debt remains unsatisfied. What I find to be the nub of the respondent's protest, more so in the heads of argument than in the regrettably scantily glad answering affidavit, is that the judgement debt has to some extent been reduced(although definitely to nowhere near less than hundred rands), that it is now intending to pay, that there is property that may

be realised by the applicant towards satisfying the debt, that the respondent is commercially solvent and that the application is brought in bad faith as a debt collection mechanism.

[20] In **Standard Bank of South Africa Ltd v Re-Bay Logistics CC 2013(2) SA 295(KZD)("Re-Bay Logistics")** at para 27 it was held as follows:

" *There has been judicial debate about whether, for the purposes of section 344(f) of the Old Companies Act, it is possible for the court to conclude, upon evidence of actual insolvency, that a company is 'unable to pay its debts'. Certainly, proof of the actual insolvency of a respondent might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts, but that conclusion does not necessarily follow. On the other hand, 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 of 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)."*

[21] In my view, the exposition of the law in **Re-bay Logistics** referenced immediately *supra* is as legally unassailable as it is most apt in the issue for

determination in this matter. Proven failure to pay one's debts when due despite lawful demand is, in terms of section 344(f) read with 345(1) of the old Act, incontrovertible proof of insolvency which unmistakably attracts winding up. That case is, prima facie, adequately met on the facts before me.

[22] The question is whether the respondent has mounted any defence available in law to persuade this court to use its residual discretionary powers to refuse to grant a winding up order. Asked differently, the question is whether the respondent has proven commercial solvency as argued, has proven violation of the Badenhorst rule and/or has proven lack of indebtedness to the applicant or reduced liability to any meaningful noteworthy extent. I am not persuaded that any of the respondent's protestations offer it sufficient insulation from a provisional liquidation order regard being had to the following considerations:

22.1 There is on the facts no *bona fide* dispute of indebtedness by the respondent. All there is in the meagre and threadbare answering affidavit is an unsubstantiated glib suggestion that there are some unspecified assets at the applicant's disposal capable of satisfying the debt to some speculative extent. All that is alleged without substantiation from a position of speaking from both sides of the mouth as despite saying there is enough to defray the debt there is a promise or tender to pay the full amount in the future. It is trite dating far back from authorities such as **Meyer NO v Bree Holdings (Pty) Ltd 1972(3) SA**

353(T) that where *prima facie* indebtedness, as in the judgement debt *in casu,* and failure to pay is patent, the respondent bears the onus to show a *bona fide* dispute based on reasonable grounds. In **Gap Merchant Recycling CC v Goal Reach Trading 55 CC 2016(1) SA 261(WCC)** at para 26 the court correctly stated the law, germane to the respondent's attempted defences, *inter alia*, as follows:

" *I see no reason for adopting a different approach when considering, in liquidation proceedings, whether the applicant's claim is bona fide disputed on reasonable grounds. Bona fides relate to the Respondent's subjective state of mind, while reasonableness has to do with whether, objectively speaking, the facts alleged by the respondent constitute a defence in law. Two elements are nevertheless interrelated, because inadequacies in the statement of the facts underlying the alleged defence may indicate that the respondent is not bona fide in asserting those facts…the objective requirements of reasonable grounds for a defence is not met by bold allegations lacking in particularity…bold allegations lacking in particularity are unlikely to be sufficient to persuade the court that the respondent is bona fide.*"

22.2 To the respondent's bold but bald assertion that it remains solvent as it claims without any substantiation that its assets exceed it liabilities, I can do no more than throw a statement of law, with which I fully align myself, from **Absa**

Bank Ltd v Reebokskloof (Pty) Ltd and Others 1993(4) SA 436(C) at para 440 I which went as follows:

"…*It matters not that a company's assets, fairly valued, far exceeds 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 section 345(1)(c) as read with section 344(f) of the Companies Act 61 of 1973, and is accordingly liable to be wound up.*"

22.3 Unpersuaded by the respondent's call for some time out by hoisting the spectre of a tender of payment in the future, I align myself with a view expressed a long time ago in **F Chandlers Limited v Dealesbil Hotel (Pty) Ltd 1954 (4) SA 748(O)** at 749 to the effect that there needs to be adequate proof that there are liquid assets or assets readily available for realisation to pay of a debt for a winding up application to be defeated. That view which is applicable still, in my view, particularly when only a provisional order is, *as in casu*, sought, was expressed in the following words which I deem worthy of restating:

"…*in exercising its powers, the court will have regard to the fact that 'a creditor who cannot obtain payment of his debt is entitled as between himself and the company ex debitio iustitae to an order if he brings his case within the Act. He is not bound to give time.*"

22.4 To the respondent's unsubstantiated and vague protest that part of the debt has been paid or is capable of being set off from realisable assets available to the applicant and further that certificates of balance misstate the extent of its indebtedness, I can only state that, even if it had substantiated partial payment such would have been no defence. In that reasoning I am in the good company of Malan J in **Body Corporate of Fish Eagle v Group Twelve Investments 2003(5) SA 414(W) at 428 B-C** where he held as follows:

"*The deeming provision of s345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts…If the respondent admits a debt over R100 even though the respondent's indebtedness is less than the amount the applicant demanded in terms of section 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts.*"

22.5 While I appreciate and am indebted to counsel for the respondent's lucid exposition of the Badenhorst rule as conceived in **Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956(2) SA 346(T) and** as consistently applied and signatured into our law by subsequent decisions of the SCA, I find there to be no basis for its application *in casu* given the factually emaciated answering affidavit of the respondent. As already lamented elsewhere in this judgement *supra,* the respondent's answering affidavit answered nothing. It does not provide a bona fide defence and falls woefully short of providing any facts, let alone proof that the applicant *in casu* who a judgement creditor since October 2022 is abusing liquidation proceedings to effect debt collection.

23. I agree with the respondent that the applicant's reference to section 344(g) of the Act is misplaced but that, as demonstrated above, in no way subtracts from the solidity of the applicant's case made out in terms of sections 344(f) and 345(1) of the old Companies Act.

[24] In its Notice of Motion, the applicant prayed for a provisional order. In submissions before me counsel for the applicant submitted that the notice of motion's prayers do not curb my discretion to order a final order. Given the earlier finding of this court that non-service of alleged employees and trade unions (no proof that they actually exist was advanced beyond the respondent's bald and bold say so) can be cured in between now and a possible final order, I am disinclined to make a final order. If such parties exist, they deserve to be given an ear before a final order is made.

Costs

[25] While I again note and appreciate the well-argued case for the respondent by counsel for the respondent, I cannot ignore the nothingness of the respondent's answering affidavit which is not only an answer in name only but

was also filed manifestly late as alluded to in condonation of its admission *supra*. The answering affidavit is a displeasing document in the extreme and should ordinarily attract the sternest of frown from this court such that a costs order with a measure of punishment would, in my view, the order to be granted being only provisional notwithstanding, have been called for.

[26] The applicant has however proposed that costs of this application be costs in the application. I shall oblige the successful party.

Order

[27] All the above-stated considered, I make the following order:

27.1 The respondent, D and M Mabunda Inc, is hereby placed under provisional winding up.

27.2 All persons who have a legitimate interest are called upon to put forward their reasons why this court should not order the final winding-up of the respondent on **09 October 2026**, at 10h00

27.3 This provisional order of liquidation must:

27.3.1 be served on the respondent by sheriff, 27.3.2 be served on all relevant trade unions (if any) and all possible employees (if any) by sheriff,

27.3.3 be served on the South African Revenue Services and the Master of the High Court by hand,

27.3.4 be published once in the Government Gazette,

27.3.5 be published in the Lowvelder Newspaper once.

27.4 The costs of this application shall be costs in the liquidation proceedings

[redacted]

Malose Monene

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

APPEARANCES

Heard on	*: 05 May 2026*
Judgment delivered on	*: 07 August 2026*
For the Applicant	*: Adv J Eastes*
	: Instructed by: Delberg Inc Attorneys
	: Tel: 012 361 5001 *: Email: liana@delberg.co.za*
For the Respondent	*: Adv. G P Maluleke*
	Adv. V Chauke
	: Instructed by: D M Mabunda Inc
	: Tel: 013- 880 2011 *: Email: danielmabunda73@gmail.com*