

IN THE REPUBLIC OF SOUTH AFRICA



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

Case Number: 2024-022468

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
2026/09/09	
DATE	SIGNATURE

THIRTY SEVEN60 INVESTMENTS (PTY) LTD

Applicant

and

VALORIS GROUP (PTY) LTD

Respondent

JUDGMENT

SHANGISA, AJ

Introduction

- [1] This is an application for the winding up of the respondent in terms of the provisions of s 344(f), read with ss 345(1)(a)(i) and 345(1)(c) of the Companies Act¹ (1973 Companies Act), on the basis that the respondent is unable to pay its debts.
- [2] In terms of s 224(3), read with item 9 of schedule 5 of the Companies Act² (2008 Companies Act), the 1973 Companies Act continues to apply in respect of the winding up of insolvent companies.
- [3] The respondent opposes the application. At this stage, it is convenient to set out the brief background to this matter.

Factual Background

- [4] It is common cause that, in February 2021, the applicant and the respondent entered into a written lease agreement under which the applicant acted as the respondent's landlord.
- [5] On 11 February 2022, the applicant and the respondent entered into a 2-year extension of the existing lease agreement.
- [6] On 8 November 2023, the respondent advised its employees that it would close its business operations.
- [7] On 14 November 2023, the respondent advised the applicant that it would stop its recycling operation at the leased premises. As a result, the respondent stated that it had to terminate the lease early.
- [8] The following day, on 15 November 2023, the respondent again wrote to the applicant regarding the early termination of the lease and stated that it was facing financial difficulties. As such, it would be unable to meet its payment obligations in terms of the lease agreement.

¹ 61 of 1973.

² 71 of 2008.

- [9] On 4 December 2023, the applicant served on the respondent a statutory letter of demand in terms of s 345 of the 1973 Companies Act. On the same day, to protect its landlord hypothec, the applicant issued summons and an automatic rent interdict against the respondent. There was no response to the applicant's s 345 letter.
- [10] The respondent denies being indebted to the applicant. It contends that when the rental interdict summons was served on it on 4 December 2023, and the premises were locked, that constituted an act of spoliation of its undisturbed possession of the leased premises. As a result, so the respondent argues, the applicant repudiated the lease agreement, and this was accepted on 14 December 2023.
- [11] The respondent's case is that having been denied undisturbed use and possession of the leased premises since 14 December 2023, it was not obliged to pay the rental.

Applicable Legal Principles

- [12] In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*³ (*Datacolor*) the court cited the following description of repudiation given by the court in *Nash v Golden Dumps (Pty) Ltd*⁴ (*Nash*):

“Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to “repudiate” the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated.”⁵

³ 2001 (2) SA 284 (SCA).

⁴ 1985 (3) SA 1 (A).

⁵ *Datacolor* above n 3 at paras 16-9.

- [13] I have already pointed out above that it is common cause that on 14 November 2023, the respondent advised the applicant that it would cease its recycling operations at the leased premises, and that, as a result, it had to terminate the lease early. In my view, the respondent's letter of 14 November 2023 constituted its repudiation of the lease agreement.
- [14] The other issue which arises for consideration concerns whether the respondent committed any act of insolvency that entitles the applicant to a provisional winding-up order.
- [15] The court in *Afgri Operations Limited v Hamba Fleet (Pty) Limited*⁶ (*Afgri*), at paragraph 9, set out the test which the applicant must meet to be entitled to a provisional winding-up order by holding the following view:
- “[9] Indeed, it is precisely by reason of the fact that a court may first make a provisional order of liquidation that in *Kalil v Decotex (Pty) Ltd & Another*⁷ (*Kalil*) a different test was applied from that in *Plascon-Evans* when setting out the circumstances that would be sufficient to justify the making of such an order of liquidation. It is that the affidavits must demonstrate a prima facie case in favour of the applicant. It may bear repeating that *Plascon-Evans* is the locus classicus as to the test in the factual enquiry before a final order can be made in motion proceedings.”
- [16] The court in *Kalil* held that all the respondent must do is show, on the balance of probabilities, that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds. As a result, where the respondent is indebted to the applicant and fails to show that such indebtedness is disputed on *bona fide* and reasonable grounds, the applicant has a right to a winding-up order.
- [17] It is not seriously disputed that at the time of the repudiation of the lease agreement, and as of 30 November 2023, the respondent was indebted to the applicant for R 117 463.19. What is more, on the papers it appears that because

⁶ 2022 (1) SA 91 (SCA).

⁷ 1988 (1) SA 943 (A).

of the respondent's repudiation, the applicant has a claim for damages for the repudiation of the lease agreement, which is at least the value of the remainder of the lease agreement of R 2 253 484.80.

- [18] On 24 January 2024 the respondent wrote a letter to the applicant in which it offered to settle its indebtedness to the applicant. It seems to me that on the conspectus of the evidence contained in the papers, the respondent is indebted to the applicant in an amount exceeding R 100.
- [19] The respondent has proffered nothing to seriously suggest that there is a *bona fide* and reasonable dispute of its indebtedness to the applicant. Instead, it was content to assert that it had not repudiated the lease agreement and that the applicant had in fact committed spoliation against it. This assertion is at odds with the weight of undisputed evidence, including the letters already referred to, in which it admitted its indebtedness.
- [20] I have already found that the respondent failed to deal with the s 345(1) letter sent by the applicant. In terms of s 345 of the 1973 Companies Act, a company is deemed to be unable to pay its debts if it is indebted to a creditor for not less than R 100. Failure to satisfy the debt or respond constructively within three weeks of demand for payment may give rise to an application for an order placing the debtor in provisional liquidation. It seems to me that the respondent falls foul of the provisions of s 345 of the 1973 Companies Act. In any event, the respondent readily admitted in the letter it sent to the applicant that it was unable to meet its payment obligations in terms of the lease agreement. The respondent's defence is not genuine or reasonable. There is no doubt that the respondent committed an act of insolvency.

Conclusion

- [21] On the conspectus of the undisputed facts, I am satisfied that the applicant has discharged its onus that it is a creditor of the respondent who is indebted to it in the amount of no less than R 100. Further, the applicant has demonstrated on the balance of probabilities that the respondent has failed to satisfy the debt and

that it is unable to pay its debts. Accordingly, the respondent is deemed to be insolvent.

[22] I consequently find that the respondent committed an act of insolvency, and that it is therefore liable to be provisionally wound up.

[23] In the circumstances, the application for a provisional order of liquidation must succeed.

[24] Wherefore, I make the following order:

1. The Respondent is placed under provisional liquidation in the hands of the Master of the above Honourable Court.

2. A rule *nisi* is hereby issued, calling upon the Respondent and all interested parties, if any, to show cause to the above Honourable Court on a date to be determined by the registrar of this court, why an order in the following terms should not be granted:

- 2.1 that Respondent be placed under final liquidation; and

- 2.2 that the costs of the application should be costs in the liquidation, which costs are to include costs of counsel on scale C.

3. A copy of this order shall be served:

- 3.1 that Respondent be placed under final liquidation; and

- 3.2 that the costs of the application should be costs in the liquidation, which costs are to include costs of counsel on scale C.

- 3.3 on the Respondent by the Sheriff of the above Honourable Court at its *Domicilium address* (in terms of the lease agreement) and at its registered address;
- 3.4 on the local offices of the Receiver of Revenue by the Sheriff of the above Honourable Court;
- 3.5 on Respondent's creditors by one publication thereof in an issue of two national newspapers; and
- 3.6 on Respondent's employees (if any), and any trade unions of which such employees may be members (if any), by the Sheriff of the above Honourable Court.

[REDACTED]

S.L SHANGISA

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 the electronic file. The date and time for hand-down is deemed to be 10h00 on 09 September 2026.

HEARD ON:

05 May 2025

DATE OF JUDGMENT:

9 September 2026

APPEARANCES:

For the Applicant:

Adv. M Louw

Instructed by:

Lacante Attorneys Incorporated

For the Respondent:

Adv. T Lipshitz

Instructed by:

B Makukunzva Attorneys