IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 42609/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
DATE	SIGNATURE
08/10/2024	**N V KHUMALO J**

In the matter between:

LINTEG FIBRE (PTY) LTD **APPLICANT**

and

BOLENG FIBRE (PTY) LTD **1ST RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 08 October 2024.

JUDGMENT

Khumalo N V J

Introduction

[1] The s 345[1] letter of demand plays a pivotal role in the court's initiated winding up process of Companies, in that service thereof prior to the institution of legal proceedings to wind up is mandatory. This is to grant the debtor Company an opportunity to rectify its default, failing which it will be deemed to be unable to pay its debts as they fall due, therefore insolvent, unless it timeously puts up a reasonable and *bona fide* defence to the alleged indebtedness. In a situation where the Co disputes its indebtedness, and the factual allegation relating thereto or validity of the claim, what is key is whether the defence or dispute is reasonable and bona fide, further if or is the deeming effect to be applicable and if so justifiable.

[2] The Applicant in this matter, Linteg Fibre, is applying for the final, alternatively provisional liquidation of the Respondent company, Boleng Fibre Pty Ltd. The application is predicated on an alleged outstanding debt for which the Applicant has issued the statutory letter of demand and the Respondent has failed to comply with. Applicant therefore insists the Respondent must be deemed unable to pay its debts as stipulated in section 345.

Parties

[3] The Applicant, Linteng Fibre (Pty) Ltd, is a private company registered and incorporated in terms of the laws of the Republic of South Africa, it describes itself as a turnkey solutions company that specialises in the installations of fibre optic network for service providers and also for internet usage, with its place of business situated at Suttle Road, Midrand, Gauteng. It is in this Application represented by its Chief Financial Officer, Charl Johannes Potgieter, who has declared under oath to have been duly authorised to launch and pursue this Application.

[4] The Respondent is Boleng Fibre (Pty) Ltd, also a private company registered and incorporated in terms of the laws of the Republic of South Africa, with its place of

[1] of Act 61 of 1973 read with Schedule 5, Item 9 of Act 71 of 2008.

business situated at 570 Fehrsen Street, Brooklyn Bridge, Pretoria, Gauteng. It is a sole propriety company represented by Mr Albert Arthur Fitchet ("Fitchet") its sole director and Chief Executive Officer. The Respondents builds optic fibre networks (OFN) which it then sells and or transfers the right to it to companies like the Applicant.

Background Facts

[5] On or about November 2020, the Applicant, represented by Mr Etienne Knipe, and the Respondent, represented by Mr Fitchet, reached a verbal agreement in respect of the sale of optic fibre networks ("Optic Fibre Network agreement" or "the first agreement"). The parties disagree as to some of the material terms of the contract. The following material terms were agreed between the parties: that

[5.1] The Respondent had a Grant of Rights ("GOR") agreement in its name thereby affording the Respondent the exclusive rights to install an optic fibre network in various complexes namely, Bergbries Villas -76 Units, Waverly Ridge -30 Units, Bergtuin -100 Units and Bergview Villas-50 Units.

[5.2] The Applicant would acquire all the optic fibre network and optic fibre network points that are owned by the Respondent in these complexes which had already been installed per unit.

[5.3] The Applicant would pay a certain amount (vat included) per point. The parties initially disagreed as to the price that was agreed upon. The Respondent stated that the Applicant was to pay R4 000 per unit whereas the Applicant, firstly, stated that it was supposed to pay R3 600 and later agreed with the Respondent.

[5.4] The Respondent would transfer the Grant of Rights (GOR) in its name which rights would be ceded and transferred to Linteg Funding, a company nominated by the Applicant and the relevant Body Corporate, or Developer in the Complex would sign the relevant documents to transfer such rights to the Applicant.

[5.5] All the Developments already had optic fibre network installed the Applicant would have sole ownership of the network points.

[5.6] The Applicant would acquire all the rights and the optic fibre network in respect of the sites by January 2021.

[5.7] The Applicant shall pay the Respondent an overall amount of R920 000 for the optic fibre network at the sites.

[5.7] The pertinent Body Corporates, Developers or Homeowners' Association and the Respondent would transfer and cede the Respondent's GOR rights that it had to Linteng Funding (RF) (Pty) Ltd (A company in the group of companies of the Applicant) by executing necessary GOR agreements relating to communication infrastructure.

[6] On 31 December 2020, the Respondent sent an invoice of R600 000 to the Applicant for part payment for the sites as per the agreement. By January 2021, the Applicant had not obtained the sites' rights and the optical fibre network. The reason, being that the Respondent owed money to Reflex Solutions (Pty) Ltd (Reflex), a company in the same sector that also installs hardware on the site. The Applicant and Respondent came to an agreement on or around January 2021, that the Applicant would pay Reflex directly the sum of R341 146.93 (which the Respondent owed Reflex) and the amount was to be set off against the Respondent's account.

[7] Pursuant to settling the debt owed to Reflex, the Applicant received the GOR in respect of Waverly, Bergbries and Bergtuin from the Respondent but not for Bergview Villa. Applicant alleges to have subsequently received Bergview Villa GOR document that was initialled by Fitchet. Upon investigation he was informed by one Mr Lobser from Bergview Villa that the Respondent never owned any optic fibre network inside Bergview Villa. It is instead owned by Eskom, and outside the Development, a fact that has not been disputed by the Respondent.

[8] The Applicant owned micro trenching machines. On February 2021, the parties reached another verbal agreement for the Applicant to provide micro trenching services ("the Micro Trench Agreement" or "second agreement") at the designated GBtel sites. The terms of the agreement were as follows:

[8.1] The Respondent will send the Applicant a purchase order in relation to the rendering of the micro trenching services identified by GBtel and/or the Respondent at the Pretoria sites.

[8.2] Upon its completion of the rendering of the micro trenching work, the Applicant will measure the distance and issue an invoice, which invoice the Respondent would settle upon receipt. They had agreed on a form of billing.

[9] According to the Applicant when all this was happening, it became evident that the Respondent defrauded it. As a result, on 8 April 2021 its attorneys wrote a letter to the Respondent recording the fact that the Respondent made a misrepresentation on the ownership of the optic fibre network at Bergview Villa. As a result, the Applicant paid the R600 000 plus an additional R343 968 it paid to Reflex amounting to R943 968, suffering damages in the amount of R331 564.19. It indicated that future damages are still to be calculated. The Applicant issued an invoice to the Respondent for R331 564.19 and demanded payment of the amount within 7 days.

[10] On 28 April 2021 the Applicant issued an invoice to the Respondent also on the micro trenching agreement in the amount of R326 094, of which the Respondent paid an amount of R269 727.73 on May 5, 2021. On 17 May 2021, the Applicant rendered a further invoice to the Respondent in respect of the micro trenching work that was done. In response the Respondent's attorneys at the time sent a letter to the Applicant's attorneys on 25 May 2021, asking the Applicant to include adequate details and to explain the reasons why they are requesting a payment. The Respondent claimed that it was the Applicant rather who was indebted to the Respondent by virtue of the Applicant's failure to complete the work that the Respondent has paid for. The Respondent denied owing the Applicant the money that was stated on the invoice. Instead pointed out that in so far as it was concerned due to the Applicant's failure to

complete the work already paid for, ‘it had a counterclaim against the Plaintiff which at that point appeared to exceed any claim which the Plaintiff had which it was in the process of quantifying. The Applicant then included measurements taken by Rousseau on 12 May 2021.The Respondent disputed that any money was owing to the Applicant.

[11] The Applicants attorneys wrote a without prejudice letter to the Respondents on 31 May 2021, referring to the settlement of the sale by the Respondent of the GRO’s it did not own. The fact that the Applicant took up work on behalf of the Respondent in a Development in Waverley Pretoria which resulted in the additional amount of R591 213.57 invoiced to the Respondent, which it has failed to pay in full. As a result of the Respondent’s failure to pay it had to withdraw from the site, having informed the Respondent some time ago. It denied that any work was not completed as all work invoiced for had been attended to so no items outstanding.

[12] The Applicant had also on 7 May 2021 wrote a letter to Respondent outlining their interaction. It pointed out that the Respondent was always under financial constraints and desperate to sell the GOR’s it had in the Complexes. Knipe of the opinion that the Applicant was helping the Respondent who had alleged to Knipe that Respondent had all the GOR’s for all these Complexes. It turned out that the Respondent actually fraudulently sold the asset it never had with Fletcher initialling the Bergview Villa agreement pretending it had Loubser, the Developer’s signature.

[13] In addition, the Respondent was given notice that the Applicant will be removing their teams from Waverley until all the outstanding monies from Bergtuin had been paid. The link between the Wonderboom Complexes had to be completed and a deposit of R250 000 paid for further work in Waverley. Plaintiff warned that failure to do so a liquidation order would be sought and criminal proceedings instituted against the Respondent. According to the Applicant no response was received from Respondent. There are letters though that were exchanged between the parties after the demand letter.

[14] On 20 May 2021/2020 the Applicant wrote the s 345 letter It recorded that the Respondent is indebted to it in the amount of R922 777.36 and demanded that the Respondent within a period of three weeks from the date of receipt of the letter, pay

or secure or compound for payment to the satisfaction of the Applicant, failing which the Respondent would be deemed to be unable to pay its debts and be liable to be placed under compulsory liquidation by the order of the High Court. The letter was served by the Sheriff. According to the Applicant no response was received and Respondent deemed to be unable to pay its debts.

[15] The Applicant further alleges that the Respondent is indebted to it in the amount of R888 782, 94 notwithstanding the amount in the s 345 letter. That is R263 600 for Bergbries (Bergview Villa), R591 213.97 for Waverley and R23 968.97 overpayment for Reflex. The Applicant alleges that the Respondent is bound to be wound up on one or more of the following grounds:

[15.1] unable to pay its debts as envisaged by s 345;

[15.2] It is just and equitable as envisaged in s 344 (h) of the old Act incorporated as aforesaid, that the Respondent be wound up;

[15.3] The Respondent is unable to pay its debts when its due therefore at least commercially insolvent;

[15.4] The Respondent does not have the ability or financial means to settle its indebtedness to the Applicant.

[16] The Applicant also acknowledged that it is required to serve this Application not only on the Respondent but also the trade union and or the employees of the Respondent by affixing a copy of the Application to any Notice Board to which the Applicant and employees have access inside the premises of the Respondent if there is no access to the premises 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 Respondent conduct any business at the time of the Application.

[17] The Respondent in its response raised two points *in limine* challenging the authority of the CFO to bring these legal proceedings without the resolution of the Company authorising him to do so. Further, the Applicant's failure to join Fibre

Funding, the company to whom the rights to the GOR was transferred or ceded by Respondent.

[18] Furthermore the court had to determine if:

[18.1] the Applicant followed the proper procedure when instituting the liquidation Application?

[18.2] there was a ground for winding up the Respondent. With the Applicant having made a case or proven any one or more of the grounds raised in its Founding Affidavit.

[18.3] Whether a provisional or final liquidation order should be granted

Whether the applicant has locus standi to launch this application?

Respondent's submission

[19] In answering to the Applicant's Application the Respondent submits that no resolution is attached to the founding affidavit papers confirming that the deponent to an affidavit is authorised to act on behalf of the applicant and to appoint attorneys. The Respondents state that in terms of Annexure OA2 and OA3,[2] Linteg Funding and the Applicant have more than one director. This means that a resolution by the board of directors should be filed depicting that the deponent has authority to act. The Respondents submit that this is because the directorial powers are not conferred on directors individually and individual directors may not as agents bind the company, unless specifically so empowered by the board of directors' resolution.

Applicant's submissions

[2] Case lines 004-48 -004-57.

[20] The applicant submits that the Respondent's submission that because the Applicant has more than one director, it means that without the resolution of the board the deponent to the affidavit does not have the required locus standi, is incorrect.

Applicable law

[21] In *Interboard SA (Pty) Ltd v Van Den Berg*,[3] the Applicant applied for an order placing the Respondent under provisional sequestration. The Respondent contested the Application and raised *locus standi* as a point *in limine*. The Respondent argued that the Financial Officer lacked authority to depose to the affidavit for the reason that there was no resolution attached empowering him to act on behalf of the applicant. The court upheld the point *in limine* and dismissed the application. This was because there was no resolution empowering the Financial Officer to act on behalf of the Applicant. The resolution was filed late after the Respondent had raised the objection on *locus standi*. The court held that late filing of the resolution would be prejudicial to the Respondent.

[22] Recent cases specifically in *Ganes and Another v Telecom Namibia Ltd,*[4] the court held that in determining the question of whether a person has been authorised to institute and prosecute motion proceedings, it is irrelevant whether such person was authorised to depose to the founding affidavit.[5] The deponent to an affidavit in motion proceeding need not be authorised by the party concerned to depose to the affidavit.[6] The Supreme Court of Appeal in *Masako v Masako and Another*,[7] recently held that an attorney requires the client's authorisation to bring the application on behalf of the client. It should be noted that this principle does not apply in this case. This is because the challenge is not about the attorney's *locus standi* but the applicant's employee to launch the application. However, of paramount importance is the court's analysis relying on the *Ganes* decision that;

[3] [1989] 4 All SA 762 (O).
[4] 2004 (3) SA 615 (SCA).
[5] *Ibid para 19.*
[6] *Ibid.*
[7] 2022 (3) SA 403 (SCA).

"[i]t stands to reason that a deponent to an affidavit is a witness who states under oath facts that lie within her personal knowledge. She swears or affirms to the truthfulness of such statements. She is no different from a witness who testifies orally, on oath or affirmation, regarding events within her knowledge. Thus, when Ms Moduka deposed to the founding affidavit, she needed no authorisation from her client."[8]

[23] Further, in *African Bank Ltd v Theron and another*,[9] the Respondents challenged the authority of the general manager (Fourie) to depose to the affidavit on behalf of the African Bank. The court rejected the respondent's argument and found that respondents had not put up any factor which could lead to an inference that Fourie did not have proper authority. The court in this case held that:

"*where the challenge to an applicant's authority to depose to the founding affidavit was weak, a minimum of evidence was sufficient to justify the inference that the applicant was properly before the court*. *One of the general powers of management was the power to litigate and to authorise litigation, a fortiori in the case of a juristic person. There was no need for the legislature to enumerate every power of management when it divested one person of all his managerial powers and conferred those powers on another. There could be no meaningful power to manage without the power to exercise the legal rights of the bank, if necessary, by recourse to the courts*."[10]

[24] In the present matter, the authority of the Applicant's attorneys to take legal action has not been challenged and is accordingly not in issue. What is contested is the authority of the deponent Charles Johannes Potgieter to launch the Application against the Respondent. Charles Johannes Potgieter stated that he is the Chief Financial Officer employed by the Applicant. He also indicated that he is duly authorised to depose to the affidavit and the facts are within his personal knowledge. Indeed, without a resolution by the board of directors of the Applicant that he is duly authorised to embark on these proceedings, he lacks authority locus standi to do that

[25] Relying on *Ganes* and *African*, Bank decisions, the cases whose facts case before this court, it is irrelevant whether Charles Johannes Potgieter is or not

[8] *Ibid* para 11.
[9] 1996 (4) All SA 156 (SE).
[10] *Ibid at* 159.

authorised to depose to the founding affidavit. This is because a deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. In addition, Chief Financial officer holds management powers and, one of the general powers of management is the power to litigate and to authorise litigation.

Whether there is non-joinder of a party.

Respondent's submissions

[26] The Respondent state that the Application should be dismissed because the Applicant failed to join Linteg Funding in this Application. The Respondent submit that, the Applicant referred to a specific term of the oral agreement which is that the Respondent will transfer GOR's to Linteg Funding in respect of individual complexes mentioned above. It is alleged that the Respondent did not transfer a specific GOR concerning Bergview Villa to Linteg Funding. Thus, the Respondent says that because of this allegation Linteg Funding should be joined in this application. In addition, the Respondent state that Linteg Funding and Linteg Fibre (Applicant) are two separate companies as depicted in annexures "OA2 and OA3". This supports the argument that there is a non-joinder of Linteg Funding in the application.

Applicants Submission

[27] The Applicant submit that the Respondent concluded an agreement with Linteg Fibre and not Linteg Funding (RF) (Pty) Ltd. Linteg Funding was solely the holder of GOR's and not a party to the Sale of Fibre Optic Network deal. Hence the Applicant submits that Linteg has no interest in the matter and is not seeking any relief as it did not pay any amount to the Respondent.

Applicable Law

[28] Joinder is a procedure by which multiple parties or multiple causes of action are joined together in a single action. There are two forms of joinder of parties: joinder of convenience and joinder of necessity. The joinder of necessity requires proving that a

party has a direct and substantial interest in the subject matter of the pending litigation.[11] A party is joined of convenience because there is a legal tie between the party to be joined and the applicant, which on the ground of equity, the saving of costs, or the avoidance of multiplicity of actions, the Court will deem it in the interest of justice that the matters should be heard together.[12]

[29] In *Judicial Service Commission and Another v Cape Bar Council and another,*[13] the Court held that:

> *"It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see e.g. Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one."*[14]

[30] In *DE van Loggerenberg and E Bertelsmann Erasmus: Superior Court Practice Erasmus*,[15] in the commentary on Uniform Rule 10, the issue of non-joinder is discussed. The following is stated:

> *". . . the question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the court's order may affect the interests of third parties. The test is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. A mere financial interest is an indirect interest and may not require joinder of a person having such interest . . . The rule is that any person is a*

[11] *Ronnie Dennison Agencies (Pty) Ltd t/a Water Africa SA v SABS Commercial Soc Ltd* [2014] ZAGPPHC 998.
[12] *Rabinovich and Others NNO v Med: Equity Insurance Co. Ltd* 1980(3) SA 415 (W) at 419 E.
[13] 2013 (1) SA 170 (SCA).
[14] *Ibid* at para 12.
[15] *(RS 19, 2022) at D1-124–D1-126.*

necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined."[16]

[31] The word "interest" has been interpreted to mean a direct and substantial interest which a person is required to have in the subject matter before he or she can be said to have *locus standi* in such a matter or before such a person may be joined or be allowed to be joined in proceedings.[17] The Court in *Gordon v Department of Health: KwaZulu –Natal,*[18] held that:

"*If an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined."*[19]

[32] In the *Minister of Finance v Afri Business NCP,*[20] the court stated that:

"*A person is regarded as having a direct and substantial interest in an order if that order would directly affect that person's rights or interests. The interest must generally be a legal interest in the subject matter of the litigation and not merely a financial interest.*"[21]

[33] Applying the above test, in the present matter, Linteg Funding was not a party to either the Micro Trenching agreement or the Sale of Fibre Optic Network agreement. It is only involved in this case since the Respondent was supposed to transfer the GOR's including the Bergview Villa to Linteg Funding on the instructions of the Applicant. It is not in dispute that the said GORs were not transferred. The Respondent's alleged subsequent failure to reimburse the Applicant or pay the debt allegedly owed to the Applicant's is the genesis for this Application. Linteg Funding and the Applicant are indeed two separate companies. The Respondent owes Linteg

[16] *Ibid.*
[17] *Lebea v Menye and Another* 2023 (3) BCLR 257 (CC) para 30.
[18] 2008 (6) SA 522 (SCA).
[19] *Ibid* at para 9B.
[20] 2022 (4) SA 362 (CC).
[21] *Ibid* para 23.

Funding no money and the granting or refusal of final or provisional winding up will not have an effect on Linteg Funding's business. Therefore, in my view there is no reason for Linteg Funding to be joined in this Application. Consequently, this point *in limine* should also be dismissed.

Whether there is a ground for winding up the Respondent

Applicable law

[34] Section 344 of the Companies Act 61 of 1973, titled circumstances in which company may be wound up by the Court reads at 344 (f) as follows:

> **"***A company may be wound up by the Court if—*
>
> *(a) the company has by special resolution resolved that it be wound up by the Court;*
>
> *(b) the company commenced business before the Registrar certified that it was entitled to commence business;*
>
> *(c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;*
>
> *(d) in the case of a public company, the number of members has been reduced below seven;*
>
> *(e) seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company;*
>
> ***(f) the company is unable to pay its debts as described in section 345;***
>
> *(g) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;*
>
> ***(h) it appears to the Court that it is just and equitable that the company should be wound up."***

[35] The main argument put forward by the Applicant in its Application for final alternatively provisional liquidation of the Respondent is that the Respondent is not able to meet its obligations or pay its debts. An explanation for the possibility of a company being found not to be able to repay its debts is given in section 345 of the Companies Act.[22] The section reads as follows:

[22] Op cit note 1 above.

(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; or

ii. in the case of anybody corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager, or principal officer of such body corporate or in such other manner as the Court may direct,

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

(b) any process issued on a judgment, decree, or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree, or order or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."

[36] According to this section, looking at section 345 (1) (a) and (c) relevant in this case, a company is deemed unable to pay its debts when a creditor who is owed at least R100 leaves a demand for payment at the company's registered office and the company fails to pay, secure, or compromise the claim within three weeks of receiving the demand. As mentioned in *Afric Oil (Pty) Ltd vs Ramadaan CC*,[23] it is crucial to provide a letter of demand at the company's registered office. If the creditor fails to deliver as required, the application for liquidation fails. In *Afric oil (Pty) Ltd* only the letter of demand was delivered to Ramadaan by fax from Afric Oil. The letter was not sent to the registered address of the corporation. It was found that there were no service provided to the corporation in accordance with the provisions of the section despite receiving the request. As a result, although the Afric Oil showed that Ramadaan had not been able to meet its debts, it could not rely on the section for liquidation.

[23] 2004 (1) SA 35 (N).

[37] Sharrock, Van der Linde & Smith state that to prove section 345 (1) (c) the Court must take account of the company's contingencies and potential liabilities when deciding whether or not a company is incapable of paying.[24] The source of payment is immaterial.[25] In *Helderberg Laboratories CC and Others v Sola Technologies (Pty) Ltd*,[26] the court stated that:

> *[16]"…the ability of a company or close corporation to pay its debts may be demonstrated by itself making payment or by its ability to obtain the necessary finance from an exterior source. In the latter instance the creditworthiness of the debtor would normally enable it to raise the necessary funds. As submitted by Mr Brusser, the emphasis in determining the ability of a company or close corporation to pay its debts, should be on the fact of payment and not on the source of the payment*."[27]

[38] In *Body Corporate of Fish Eagle v Group Twelve Investments,*[28] Milan J stated that:

> *"The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts (Ter Beek's case supra at 331F). 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 s 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.*"

[39] In addition, there are different sorts of insolvency that must be taken into account when figuring out the company's ability to pay. The court has highlighted the existence of factual insolvency in *Johnson v Hirotec Pty Ltd*.[29] The court said, as follows:

> *[6] "Factual insolvency may, in an appropriate case, be indicative of the company's inability to pay its debts and, as Goldstone JA pointed out in Ex Parte De Villiers supra*

[24] Op cit note 1 above.
[25] *Ibid.*
[26] [2007] JOL 20684 (C).
[27] *Ibid* para 16.
[28] 2003 (5) SA 414 (W) at 428B-C.
[29] [2000] JOL 7440 (A).

at 502E, it would clearly be a relevant and material factor in deciding whether a court should exercise its discretion to grant a winding-up order. The significance to be attached to a company's factual insolvency obviously depends upon the circumstances of the particular case. There are many variables, and it is not necessary, or even possible, to list them all. What is of importance in this case is the marked deterioration of the respondent's position from the 1996 to the 1997 financial years, coupled with a lack of liquidity at the end of the 1997 financial year. At that stage, the bank balance stood at a mere R728, and current liabilities exceeded the amount due by debtors. The respondent's financial statements, therefore, do not further its case. On the contrary the position that is revealed supports the view that the company, apart from being factually insolvent, is commercially insolvent as well."[30]

[40] In *Standard Bank of South Africa Limited v R-Bay Logistics CC,*[31] the court set out the broad categories of insolvency. These are actual\literal and commercial insolvency. These are different methodologies for determining whether a company is unable to pay its debts. The court held as follows:

[14] "It has long been accepted that, in our law, a state of "insolvency" has two different meanings. Actual or literal insolvency involves a comparative measurement of the value of a company's assets and its liabilities. If the total value of those liabilities exceeds the total value of the assets, the company is actually insolvent. However, "commercial insolvency" recognises that, whether a company is actually insolvent or not, if it does not have sufficient cash resources to make payment of its ongoing obligations, as and when they fall due, the company is commercially insolvent

[15] The two concepts (i.e., actual insolvency vs commercial insolvency) are quite different. The former involves the mere assessment of the value of a company's assets and liabilities. The latter involves an assessment of the company's cash flow, to determine whether it has the immediate wherewithal to pay its current expenses, as they fall due.

[27] 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 company might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts, but that conclusion

[30] *Ibid* para 6.
[31] 2013 (2) SA 295 (KZD).

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 under 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).'[32]

Respondent's submission on the alleged debt.

[41] The Respondent argues that the applicant is abusing the liquidation procedure to force payment. They point out that in the Founding Affidavit[33], the Applicant indicates to have been aware of the disagreement regarding the alleged debt before starting the liquidation procedure. The Respondent further claims that there are legitimate and valid reasons to challenge the debt's existence. The Respondent claims that the Applicant fails to provide the methodology used to determine the debt. They claim that the Applicant made numerous mistakes about the number of units and the names of the particular complexes.

[42] The Respondent further contends that the Applicant is misinforming the court when it claims that there was no response to the letter of demand, making reference to the letter dated 25 May 2020 attached as Annexure CJP22 that the Respondent's attorneys submitted in response to the demand letter. Furthermore, The Respondent contends that despite the Applicant being fully aware of the Respondent's principal place of business address, which the Applicant's personnel used to store their equipment during the project of the second agreement, the s 345 notice was sent to the Respondent's registered address and delivered via fax. A client of the Respondent, GBitel was the recipient of the email. The notice was merely attached and sent through email to the Respondent, sheriff never delivered it. They claim that this demonstrates the Applicant's ulterior intention, which was to harm the Respondent's reputation.

[32] *Ibid* para 14-15 & 27.
[33] in particular pages 004-62 and 004-63

[43] Looking at the facts before this court, I believe that the facts of this case do not show that the Respondent is unable to pay, taking into account the aforementioned criteria in section 345. This is due to the fact that the Respondent promptly filed a letter in response to the Applicant's letter of demand. This response was within three weeks after having received the letter of demand. There is no indication in the Respondent's reply indicating that the Respondent acknowledges the debt and is unable to pay. Instead, in the letter, it was stated that because the Applicant rendered defective services the Respondent will not pay for such service. In my humble view, the Respondent's letter sent to the Applicant in response of the letter of demand and its refusal to pay do not constitute incapacity to pay as defined by section 345. In addition, there are no financial statements or balance sheets depicting the Respondent's financial position. Hence, the court cannot make a finding of factual or commercial insolvency of the respondent.

Whether the Applicant followed a proper procedure when instituting the liquidation Application.

Applicant's submission

[44] The Applicant submit that the sheriff was instructed to serve the Application on the Respondent's employees in accordance with the section 346 (3) and (4) of the Companies Act. According to the Applicant the Application was properly served by placing a copy of the Application on the notice board where the Respondent conducts the business. The Applicant further submits that if the court finds that there was no proper service of the Application, a provisional winding order should be granted coupled with the order that the Application and court order be served on the employees and trade unions with a return date as this does not render the application fatal.

[45] On contrary, the Respondent disputes the proper service of the Application to the employees. It is claimed that the Applicant did not serve the application on the Respondent's workers in accordance with the correct procedure. According to the Respondent, it employs eight people, some of whom are union members. Therefore, the service of the Application is crucial so that the employees can contact the unions to which they belong. The Respondent further claims that it is obvious from the Sheriff's

return that the notice was attached to a notice board where the respondent is no longer in business.

Applicable law

[46] Section 346 (3) and 4A of the Companies Act,[34] titled application for winding up of a company lists requirements to complied with in an application for a winding up order. The relevant parts of the section reads as follows:

[3]

(a) Before an application for the winding-up of a company is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged with the Master, or, if there is no Master at the seat of the Court, with an officer in the public service designated for that purpose by the Master by notice in the Gazette.

(a) The Master or any such officer may report to the Court any facts ascertained by him which appear to him to justify the Court in postponing the hearing or dismissing the application and shall transmit a copy of that report to the applicant or his agent and to the company.

[4] (A) (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.

[34] Op cit note 21.

(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."

[47] According to this section, the Application of the creditor requesting winding up must, be accompanied by a Master's certificate issued 10 days prior to the hearing, served to the Master and furnished to all registered trade unions, employees, the South African Reserve Service, and the company. An affidavit must be filed before court hearing to prove compliance.[35]

[48] In *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd*,[36] the court stated that:

"[15] Section 346(4A)(b) is of considerable significance because it reinforces the proposition that the papers must be furnished to the relevant persons only after the application has been lodged with the Registrar. Additionally, it requires the applicant to provide an affidavit, which may be presented to the court at the hearing itself, setting out the manner in which paragraph (a) was complied with. It necessarily follows that, if for any reason it has not been possible to comply with those requirements, or compliance has taken an unusual form, the affidavit must spell this out. That raises the question of the court's powers in the event of such non-compliance.

[16] The type of problem posed in complying with the section neatly emerges from the facts in one of the cases to which we were referred, namely Hendricks NO and others v Cape Kingdom (Pty) Ltd. There the evidence showed that none of the employees were still at the premises of the company or any other premises where it had carried on business. Three employees had been served personally with copies of the application papers. The point was then taken by the company that there had not been service at the places or in any of the forms specified in section 346(4A)(a)(ii) and that other employees had not been served. The applicant then caused another person to be personally served and in relation to three employees at a farm, who were not present when an attempt was made to serve them, the application papers were left with another employee who was present. The court

[35] Op cit note 1 above at 251.
[36] [2014] 1 All SA 294 (SCA).

held that the requirements of the section had been satisfied. In my view, it was correct to do so. All that could reasonably have been done to make the application papers available to the employees had been done.

[17] The point has already been made that it is obligatory for the applicant for a winding-up order (or a sequestration order) to furnish a copy of the application papers to the persons mentioned in section 346(4A). When dealing with employees the section refers to three possible ways of doing this. The one is by placing the papers on a notice board at the premises where they work and to which they have access. The second and third are by affixing a copy of the application papers to the front gate of the premises where the employees work, if access to the premises cannot be obtained, or to the front door of the premises from which the business was conducted at the time of the application. Manifestly none of these methods may result in the application papers actually coming to the attention of the employees. If the business has closed down none of them may serve to inform the employees of the application for winding-up. However, there may be other means of doing so, as in Hendricks (supra), where personal service on the employees was feasible. What this suggests is that, whilst the obligation to furnish the application papers to the employees is peremptory, the modes of doing so indicated in the section are directory and alternative effective means may be adopted. In other words, the methods for furnishing employees with the application papers as set out in section 346(4A)(a)(ii) are no more than guides. If other more effective means are adopted and reflected in the affidavit filed in terms of section 346(4A)(b) then, provided the court is satisfied that the method adopted was reasonably likely to make the application papers accessible to the employees, there has been compliance with the section.

[18] It follows that when the court is satisfied that the method adopted by the applicant to furnish the application papers to the employees is satisfactory and reasonably likely to make them accessible to the employees, there is no reason to refuse a winding-up order, whether provisional or final, merely because they were not furnished to the employees in one of the ways indicated in section 346(4A)(a)(ii). Nor should the court refuse an order merely because it is not satisfied that the application papers have come to the attention of all employees. That is not what the section requires.

[23] …The requirement that the application papers be furnished to the persons specified in section 346(4A) is peremptory. It is not however peremptory, when furnishing them to the respondent's employees, that this be

done in any of the ways specified in section 346(4A)(a)(ii). If those modes of service are impossible or ineffectual another mode of service that is reasonably likely to make them accessible to the employees will satisfy the requirements of the section. If the applicant is unable to furnish the application papers to employees in one of the methods specified in the section, or those methods are ineffective to achieve that purpose and it has not devised some other effective manner, the court should be approached to give directions as to the manner in which this is to be done. Throughout, the emphasis must be on achieving the statutory purpose of as far as reasonably possible bringing the application to the attention of the employees."[37]

[49] In my view, the facts make it very evident that the Respondent's employees were not properly served. However, the devious conduct of instructing service on the address were it is well known that the employees of the Respondent will not be found should be frowned upon as it prejudices the rights of the employees. The Applicant simply claims that it gave the sheriff instructions to deliver the Application to the Respondent's place of business; nonetheless, the Application was delivered to a location other than the Respondent's principal place of business as shown by the Sherriff's return of service. As stated in *EB Steam Company (Pty) Ltd,* even if the employees were not properly served, the Application should not be dismissed on that basis.

Whether a provisional or final liquidation order should be granted.

[50] The Applicants submit that the Respondent is insolvent and unable to pay the debt it owes the Applicant. On the other hand, the Respondent, asserts that there are factual disagreements covered by rule (6)(5)(g) of the Uniform Rules of Court. The Respondent claims that the Applicant was made aware of the true factual issue by the Respondent long before the section 354 notice was delivered. In essence, the Respondent's challenge to the winding up motion is a factual disagreement; the Respondent contends that this disagreement should not be subject to oral testimony. According to the Respondent, the Application ought to be denied.

[37] *Ibid* para 9-19, 15-18 & 23.

[51] The Respondent further argues that the Applicant is abusing the liquidation procedure to force payment. In the Founding Affidavit[38] the Applicant indicates to have been aware of the disagreement regarding the alleged debt before starting the liquidation procedure. The Respondent further argues that there are legitimate and valid reasons to challenge the debt's existence. The Respondent claims that the Applicant fails to provide the methodology used to determine the debt. The Applicant made numerous mistakes about the number of units and the names of the particular complexes. Notably also the amounts demanded were not the same.

Applicable law

[52] Rule 6 (5) (g) of the Uniform Rules of Court reads as follows:

> *"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise".*

[53] In *Badenhorst v Northern Construction Enterprises (Pty) Ltd,*[39] the court held that:

> *'A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the court. Some years ago, petitions founded on disputed debts were directed to stand over till debt was established by action. If, however there was no reason to believe that the debt it established would not be paid the*

[38] in particular pages 004-62 and 004-63
[39] 1956 (2) SA 346 (T) at 347H-348C.

> *petition was dismissed. The modern practise has been to dismiss such petitions. But of course, if the debt is not disputed on some substantial ground the court may decide it on the petition and make the order."*[40]

[54] As shown above, the present case presents factual disputes. These disputes play a crucial role in determination of whether or not to grant the final alternatively provisional winding up of the Respondent. The court in *Reynolds No v Mecklenberg (Pty) Ltd,*[41] held that:

> *"When the application is opposed, and any of the allegations of fact relied upon by the applicant are disputed, the Court may, in its discretion, grant a provisional winding-up order if it considers that the requirements for a winding-up order have been established on a balance of probabilities. The question whether any bona fide dispute of fact should be referred to evidence is a question that may be left over for decision on the return day before any final winding-up order is issued."*[42]

[55] In situations where the company *bona fide* and on reasonable grounds disputes its indebtedness to the creditor the court will not ordinarily grant the provisional winding up.[43] The court in *Kalil v Decotex*,[44] stated as follows:

> *"Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the court will refuse a winding up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds. Though not always formulated in exactly the same terms this rule appears from decisions such as Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T), at p 347 H – 348 B."*[45]

[40] *Ibid.*
[41] 1996 (1) SA 75 (W).
[42] *Ibid* at 81.
[43] Op cit note 1 at 251.
[44] [1988] 2 All SA 159 (A).
[45] *Ibid* at 181 (1).

[56] In this matter, there are a lot of factual disputes. The parties disagree on essential facts to determine whether to grant a final or alternatively, provisional winding up. The requirements in section 344 (f) to wind up a company have not been met. This is because it is not clearly shown that the Respondent is indebted to the Applicant and unable to pay the debt. There was an existent dispute already about the Respondent's indebtedness prior to the insolvency proceedings being instituted. Evident that the dispute will have to be first resolved by way of a legal action. Bearing also in mind that the fact that a Company might be struggling to pay its debts does not preclude it from disputing or challenging what might be found to be a baseless and an unfounded claim of indebtedness which gives rise to a genuine dispute on the alleged indebtedness.

[58] The Respondent in this matter has also not been proven in line with section 345 that it failed to pay the alleged debt. In my view, it is considerably more probable as the Respondent has alleged that the Respondent is solvent but refusing to pay because of the allegations it has raised, however, there is no evidence provided before this court such as the financial statements to show the Respondent's financial position. Hence, in my view, due to the existence of a factual dispute and the absence of enough evidence to determine the financial standing of the Respondent, the Application cannot succeed.

[59] Under the circumstances the following order is made:

1. The Application is dismissed with costs.

[redacted]

N V Khumalo
Judge of the High Court
Gauteng Division, Pretoria

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