

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA,  
FREE STATE DIVISION, BLOEMFONTEIN**

**Case number: 3063/2021**

**Reportable: YES/NO**

**Of Interest to other Judges: YES/NO**

**Circulate to Magistrates: YES/NO**

In the matter between:

**RM BETON CC**

Applicant

(REG: 2006[...])

And

**RCS FORMCON (PTY) LTD**

Respondent

(REG: 2014[...])

**HEARD ON:** 14 OCTOBER 2021

**JUDGMENT BY:** DANISO, J

**DELIVERED ON:** This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 09H00 on 04 February 2022.

[1] This is an opposed application for the provisional winding up of the respondent in terms of section 344 (f) of the Companies Act 61 of 1973 ("The Old Act") and section 9 of schedule 5 of the Companies Act 71 of 2008 ("The New Act"). The application is premised on the grounds that the respondent is unable to pay its debts when they fall due and it arises from the respondent's failure to pay the

applicant's account for goods (ready-mix concrete) sold and delivered to the respondent on 18 February in the amount of R45 084.60.

[2] It is the applicant's case that the debt is not dispute. Attached to the replying affidavit is a letter the applicant received from the respondent.<sup>1</sup> The letter is dated 8 March 2021 and reads as follows:

*"We are sincerely sorry for the delay in payment in the amount of (R7 935.00) SEVEN THOUSAND NINE HUNDRED AND THIRTY FIVE RAND, due on (28<sup>th</sup> FEBRUARY 2021) for account number (R[...]). Please note that payment will be made at the soonest, and want to assure you that this is only temporary and we will settle the account as soon as possible ...while we take full responsibility on our part, we would appreciate it, if considering the delay are caused by numerous unforeseen circumstances. We also acknowledge that there are no discrepancies on your Monthly Statement and agree with the amount payable ..."*

[3] According to the applicant a letter of demand as contemplated in section 345(1) (a) (i) of the Old Act ("the section 345 letter") was delivered at the respondent's addresses on 6 May 2021. The debt remains unpaid.<sup>2</sup>

[4] The applicant contends that the respondent is unable to pay its debts when they become due and payable it will accordingly be just and equitable that the respondent is provisionally wound up.

[5] It is trite that a company can be wound up if it fails to pay a debt of a creditor to whom the company is indebted to in a sum of not less than one hundred rand within three weeks from the date of delivery of a section 345 letter at its registered office.<sup>3</sup> The onus is on the applicant to satisfy the court on a *prima facie* basis that it

---

<sup>1</sup> Annexure "RA3".

<sup>2</sup> Annexure "IM3" of the founding affidavit is a copy of the letter of demand and Annexures "IM4" to "IM7" are copies of proof of service of the letter of demand by email, WhatsApp (an instant messaging App) and registered post respectively.

<sup>3</sup> s344 (f) and 345 (1) (a) and (c) of the Old Act.

is the creditor of the respondent.<sup>4</sup>

[6] It is not in dispute that the applicant has delivered the ready-mix concrete and that the invoice rendered by the applicant in that regard was not paid. The application is opposed on various grounds namely that: the debt is disputed, the respondent is not insolvent and the section 345 letter of demand is defective.

[7] The respondent also complains about irregularities in the applicant's replying affidavit. It is the respondent's case that the allegations pertaining to its admission of the debt and the inability to pay should have been set out in the applicant's founding affidavit. The allegations must be struck out as the applicant is not entitled to make out its case in a replying affidavit.

[8] With regard to the debt, the respondent states that the reason for non-payment is not due to inability to pay or insolvency. The payment has been withheld for the reason that the applicant failed to deliver the ready-mix concrete within the agreed time. The late delivery delayed the respondent's building project with the result that the respondent suffered damages in the amount of R46 366.56. Accordingly, the respondent is not indebted to the applicant but has a counterclaim against the applicant for the damages it has sustained.

[9] According to the respondent, the business is not insolvent the respondent is able to pay the amount claimed by the applicant but merely refuses to. Annexure "OA3" of the respondent's answering affidavit is a copy of the respondent's financial statements for the year ending 28 February 2021 demonstrating that the respondent is operating a profitable business and Annexure "OA4" is a proof of payment of an amount equivalent to the amount claimed by the applicant into the trust account of the respondent's attorneys.

[10] The respondent also takes issue with the delivery of the section 345 letter and submits that the demand is defective in that the said letter was transmitted by email, WhatsApp and registered post section instead of being delivered at the respondent's

---

<sup>4</sup> Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd & Another 2015 (4) SA 449 (WCC) paragraph 7-8.

registered office number 159 Clarkson Avenue, Estorie, in Bloemfontein as required by section 345 (1) (a) (i).

[11] It is also disputed that there was no reply to the section 345 letter. The respondent points out that a reply was forwarded to the applicant on 3 June 2021 and in the said reply the applicant was informed about the damages sustained by the respondent consequent to the defective delivery.

[12] The respondent states that this application is merely intended to enforce a debt which the applicant is fully aware that it is disputed on bona fide grounds and having failed to comply with the peremptory provisions of section 345 (1) (a) (i) the applicant is not entitled to the order it seeks. The application must be dismissed with costs on a punitive scale.

[13] Before turning to the issue to be considered in this application I deem it necessary to first address the respondent's application to strike out.

[14] I'm not in agreement with the respondent's contention that the applicant has attempted to make out its case in the replying affidavit. The allegations that the debt is not in dispute are alluded to in the applicant's founding affidavit. See paragraph 20. In the replying affidavit the applicant merely attached the letter in which the respondent acknowledges the debt and that it is due and this was in response to the respondent's denial of the fact that the debt is not in dispute. It cannot be said that there has been a variation in the case that the respondent had answered to. I see no prejudice and it has also not been argued that the respondent is prejudiced thereby. I accordingly hold that the evidence is admissible the application to strike out this evidence is dismissed.

[15] The respondent's refusal to pay the applicant's account is not based on legitimate or *bona fide* grounds. The allegation that the respondent is entitled to refuse to pay based on a prospective counterclaim against the applicant is militated by the respondent's own confirmation of the liability to pay the debt together with an admission that it is unable to pay the debt at the time it was due. See Annexure "RA3".

[16] It is also important to note that as at the time of the hearing no counterclaim or action had been instituted against the applicant. I conclude that these allegations do not constitute a real, genuine and *bona fide* dispute of the applicant's claim but a bogus defence aimed at delaying the applicant's claim. I'm persuaded that the respondent is indebted to the applicant as alleged.

[17] The applicant is not required to plead and even prove that the respondent is insolvent. The actual solvency of the respondent is only relevant when the court considers whether to apply its discretion in favour of or against the granting of the winding up order.<sup>5</sup>

[18] I now turn to consider whether the applicant's section 345 letter has been properly "delivered" to trigger the deeming provisions of section 345 (1).

[19] On the facts germane to this matter it is not in dispute that on 6 May 2021 the applicant transmitted the section 345 letter to the respondent through three different modes of transmission, namely, via email, registered post and WhatsApp.

[20] The respondent does not accept that the delivery of the section 345 letter by email, registered post or WhatsApp is in accordance with the provisions of section 345 (1)(a)(i). According to the respondent the letter should have been delivered at its registered address namely: 159 Clarkson Avenue, Estorie, Bloemfontein.

[21] On the available evidence<sup>6</sup> the Sheriff's attempt to serve the section 345 letter at the respondent's aforesaid registered address was unsuccessful. The Sheriff was informed by the occupants of the premises that the respondent is unknown at the said address.

[22] On the respondent's version it has received the section 345 letter of demand

---

<sup>5</sup> Standard Bank of South Africa LTD v R-BAY Logistics CC 2013 (2) SA 295 (KZD) at para 27, Scania Finance Southern Africa (PTY) LTD v Thomi-Gee Road Carriers CC and Another 2013 (2) SA 439 (FB) at para 12.

<sup>6</sup> Page 32 of the founding affidavit is a copy of the Sheriff's return of non-service.

and has also replied. In that regard, I'm inclined to agree with the conclusions in *Green v Amalgamated Brokers CC* (7806/2011) [2012] ZAKZPHC 44 at paragraph 12 that what is important is that the respondent has received the notice. The result is that I determine this issue in favour of the applicant. The statutory letter of demand was properly delivered on the respondent.

[23] The respondent's reliance on the financial statements and payment of the amount owed to the applicant into the trust account of its attorneys as proof of its solvency is impeached by its own admission of the inability to pay the extant debt. It is also quite peculiar that the financial statements which purports to prove the respondent's ability to pay the debt relate to the same period (February 2021) in which the applicant admitted its inability to pay the debt.

[24] It is for these reasons above that I'm not inclined to exercise my discretion in favour of the respondent. I'm satisfied that the applicant has succeeded in making out the case for the order it seeks in the notice of motion.

[25] I accordingly make the following order:

- (1) A provisional winding up order returnable at 9h30 on 03 March 2022 is granted as prayed for in the notice of motion dated 06 July 2021 (Prayer 1-7).

**NS DANISO, J**

#### APPEARANCES:

Counsel for the Applicant:	Adv. FF Jacobs
Instructed by:	Noordmans Inc. <b>BLOEMFONTEIN</b>
Counsel on behalf of Respondents:	Adv. J Els
Instructed by:	Kramer Weihmann Inc. <b>BLOEMFONTEIN</b>