

SOUTH AFRICA / JUDGMENT

Morrison and Sons (Pty) Ltd v Post Desk (Pty) Ltd (2023-123698) [2025] ZAGPPHC 341 (28 March 2025)

[2025] ZAGPPHC 341

COURT

North Gauteng High Court, Pretoria

BEFORE

A Maier-Frawley

CASE / FILE NUMBER

2023-123698

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: 2023-123698

(1)

Reportable: No

(2)

Of interest to other Judges: No

(3)

Revised :

Date:

28/03/2025

A

Maier-Frawley

In the matter between: MORRISON
& SONS (PTY) LTD
Applicant
and
POST
DESK (PTY)
LTD
First Defendant

JUDGMENT

MAIER-FRAWLEY J:

1. This is an opposed liquidation application, being the extended return date of a rule nisi issued on 25 March 2024 in terms of which the respondent was placed in provisional liquidation.[1]
2. The rule nisi called on the respondent and any interested parties to show cause, if any, why the provisional order should not be made final on the return date. Further, the order was to be served: (i) on the respondent at its registered office; (ii) on the South African Revenue Service in Pretoria; (iii) on any employees of the respondent as ascertained by the sheriff at the registered office of the respondent; and (iv) on any registered trade union of the respondent's employees as could be ascertained by

the respondent. The order was also to be published in the Government Gazette, in the Rekord newspaper in English and in the Beeld

newspaper in Afrikaans. The order was served as directed.

3. The applicant seeks a final liquidation order through confirmation of the rule nisi. The respondent seeks the dismissal of the liquidation application through discharge of the rule nisi and, with costs.
4. The liquidation application was brought on the basis that that the respondent is unable to pay its debts as envisaged in s 344 (f) read with s 345(1) of the Companies Act, 1973 (the 'Act'). [2] The applicant's case is that the respondent is both commercially insolvent and well as being deemed insolvent in terms of

s 345(1)(a) of the Act.

5. The applicant brought the application in its capacity as cessionary in terms of a written cession agreement it concluded on 29 October 2023 with Central Solutions Holdings (Pty) Ltd (hereinafter 'Central Solutions' or the 'Cedent'). In terms of the cession, Central Solutions ceded a claim based on a debt incurred by the respondent to Central Solutions, which indebtedness originated from a written Master Rental Agreement (the 'MRA') allegedly concluded on 19 May 2023 between Central Solutions and the respondent.[3]

6. The respondent opposes the application, inter alia, on the basis that it is profitable and not insolvent; that no debt was owed by the respondent to Central Solutions in that all amounts due to Central Solutions were paid by the respondent; and that the respondent did not receive the statutory demand relied upon in these proceedings because the address of its bookkeepers had changed by the time of service of thereof.

Factual matrix

7. It is common cause that the Respondent had employed the services of the Cedent by renting specified printing machines for a period of 60 months, payable

monthly.[4]

Applicant's version

8. According to the Applicant, the machines were rented by the respondent in terms of a written Master Rental Agreement (the MRA) concluded between the Cedent and the respondent, the latter being represented by its director, Johan Nel (deponent to the answering affidavit)[5]. The written agreement commenced on 30 June 2023. The rental of R13,869.00 was payable monthly in advance from the commencement date. Monthly payments due were to be effected by way of debit order from the Respondent's bank account. The equipment was duly delivered and installed by the Cedent and used for over 2 months by the Respondent. The machines were used in the normal course of operations by the Respondent and rental payments constituted a commercial debt in the ordinary course of the respondent's business.
9. Pursuant to debit orders being cancelled and marked unauthorised by the respondent in July 2023 and August 2023, and pursuant to the Cedent having demanded payment, the MRA was cancelled by the Cedent on the basis that the Respondent had failed to remedy its default by making payment of the monthly rental then due and owing.
10. Pursuant to the cancellation, the Cedent collected the machines from the respondent. They were inspected by the Cedent and found to be in perfect working order.

Respondent's version

11. The deponent to the answering affidavit denies signing the MRA. He alleges that the signature appearing thereon is not his signature. The respondent thus denies that it rented the machines from Central Solutions in terms of a written agreement.
12. The respondent admits that the equipment was delivered to it, albeit that one of the printers was delivered late, and avers that Central Solutions received 'the payments due to them at all times'. It is common cause that Central Solutions removed their machines on 07 September 2023.

13. The respondent denies that it became indebted to Central Solutions in the amount of R492,890.00, being the amount of the claim that had been ceded to the applicant, and which amount the respondent avers, represents rental allegedly due for the remaining portion of the rental agreement, which it denies it undertook liability to pay. The respondent relies on a letter of demand received from Schindlers attorneys, representing Central Solutions, dated 8 September 2023 ('the Schindler's letter'),[6] wherein the amount demanded by and allegedly due to Central Solutions in respect of arrear rental was said to be R27 738.00. In support of its version that all amounts due to Central Solutions were paid by it, the respondent attached extracts from its bank statements to the answering affidavit, which evidenced certain payments made by it to Central Solutions before the date of the Schindler's demand. I pause to mention that the respondent did not dispute the contents of the letter, nor the entitlement of Central Solutions to cancel the MRA, as it did in the said letter.
14. Further technical defences were raised in the answering affidavit, which I deal with below.

Discussion

Relevant legal principles

15. The provisions of the Act relevant to this application are:

"344. Circumstances in which company may be wound up by Court. - A company may be wound up by the Court if-

...

- (f) the company is unable to pay its debts as described in section 345;

345. When company deemed unable to pay its debts. -

- (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) ...

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) ...

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

16. It is trite that our law recognizes two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial

insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its

assets may exceed its liabilities).[7]

17. In *Orestisolve*,^[8] Rogers J held that the test for a final order of liquidation is different from the test for a provisional order of liquidation. When seeking a final order of liquidation, the applicant must establish its case on a balance of probabilities. However where there are facts in dispute, the court is not permitted to determine the balance of probabilities on the affidavits, but must rather apply the *Plascon-Evans* rule.

18. Therefore, when an applicant seeks final relief and conflicting versions of fact have emerged in the papers, the court must, in essence, accept the version of the respondent unless the latter's allegations do not raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.^[9] This is subject to the qualification that only when the court is satisfied that a party has seriously and unambiguously addressed the fact said to be disputed in its affidavit, will a real, genuine and bona fide dispute of fact be said to exist.^[10] Put differently, inadequacies in the facts alleged by the respondent and underlying the alleged defence may indicate that the respondent is not bona fide in asserting those facts, for example, where the respondent relies on bald allegations lacking in particularity.

19. Rogers J put it thus: 'If, on the other hand, and with due regard to the application of the *Plascon-Evans* rule, the court is satisfied at the final stage that there is no genuine factual dispute regarding the existence of the applicant's

claim, there seems to be limited scope for finding that the debt is nevertheless bona fide disputed on reasonable grounds.^[11]

20. The established view has been that where a company is unable to pay a creditor's claim the latter is *ex debito justitiae* entitled to a winding-up order and that the court's discretion to refuse same is narrow.^[12]

21. In *BP & JM Investments*,^[13] the court held that "But, to avail himself of the benefit of the deeming provisions contained in para (a) (i) of s 345 (1), an applicant must at the least comply with the requirements stated by the Legislature therein." In *Chiliza v Govender*,^[14] the Supreme Court of Appeal, in referring to *Natal Joint Municipal Pension Fund v Endumeni Municipality*,^[15] held that a court should not disregard the clear language used in a statute and where a provision of a statute is couched in peremptory

language or terms, it must ensure compliance therewith. Section 345(1)(a) requires that the demand be left at the registered address

of the company and that the respondent be permitted three weeks to comply.

22. On 31 October 2023, the applicant served the s 345 demand at the respondent's then extant registered address, being 1[...]

L[...] Street, Murrayfield, Pretoria, as it was statutorily obliged to do.[16] The deponent to the answering affidavit alleges that the respondent was 'not aware' of the demand, as the registered address was the address of its bookkeepers, and the address of its bookkeepers had changed. Significantly, the respondent did not dispute that, at the time of service, its registered address was at 1[...] L[...] Street, Murrayfield, Pretoria (as evidenced in the CIPC company records produced by the applicant), nor did it assert that its registered address had properly been changed by it.[17] The said Murrayfield address was incidentally also the residential address of the deponent to the answering affidavit at the relevant

time, a fact which he failed to mention in the answering affidavit.[18] In my view, the applicant was entitled to serve the demand at the respondent's registered address as reflected in the company records of the CIPC, and, in failing to update its registration information, the respondent took the risk of legal documents not coming to its attention.

23. The respondent relies on a technical point, namely, that the provisional order had been granted under the incorrect case number. The error was explained in the replying affidavit. Being patent, the error may be corrected by the court mero motu in terms of uniform rule 42(1)(b),[19] which I intend to do in the order I make herein. Accordingly, this point lacks merit.
24. The applicant took cession of a claim arising from a debt which, on its version, included arrear rental and rentals for the remaining portion of the lease, following the Cedent's cancellation of the MRA.[20] In the founding affidavit, it is alleged that 'In terms of the MRA, should the agreement be cancelled, the full remaining amount in terms of the MRA will then become due and owing

immediately to the Cedent by the Respondent.' In other words, the applicant relies on a contractual term that obliged the Respondent to pay the monthly rental for the remaining portion of the rental agreement in the event of cancellation (similar to a penalty clause). The existence of such term was denied in the answering affidavit.

25. The applicant failed produce evidence of the written term relied on, which, on its own version, formed part of the MRA. All it produced was the first or covering page of the MRA in 'LA4' to the founding affidavit, which does not contain the term contended for. In consequence, the applicant's averments as to the existence of the term contended for remain unsubstantiated and therefore unproven.

26. But that is not the death knell for the applicant's case. On the respondent's own version, it agreed to rent certain equipment from the Cedent for which it was obliged to pay the Cedent on a monthly basis. It admits that the equipment was delivered to it by the Cedent and avers that the Cedent 'received the payments due to them at all times' prior to the latter's collection of its machines from the respondent. It fails to plead, however, what the amount of the agreed monthly rental was and when it was payable.
27. Significantly, the respondent does not allege that it made payment of that which was not owed to the Cedent. Nor does it plead that performance was rendered by the parties in the absence of an agreement. It avers that it did not conclude a written agreement regulating the parties' performance but fails to state whether the agreement under which the Cedent performed, by renting machines and delivering same to the respondent, and the respondent's payment for such services, occurred in terms of an oral or tacit agreement; where such agreement was concluded; who represented the parties in concluding such agreement; and how the agreement was implemented by the parties, eg, having regard to invoices or statements sent to it by the Cedent. These are material facts that would have been in the knowledge of the deponent to the answering affidavit, which the respondent failed to disclose and which ought to have been disclosed.[21] The inadequacies in the facts alleged by the respondent or lack of particularity, including its bald denial of having concluded the written agreement produced by the plaintiff, point to the conclusion that the respondent was not bona fide in asserting those facts.
28. I am satisfied as to the inherent credibility of the applicant's averments regarding the conclusion of the MRA. The Schindler's letter was relied on by the respondent in the answering affidavit. Therein, demand was made for immediate payment of arrears in terms of the MRA of an amount of R27,738.00. As earlier indicated, the respondent did not dispute the contents of such letter. Rather, it relied on the contents of the letter in support of its version.
29. The respondent relies on extracts of its bank statements in support of its averment that it paid all amounts that were due by it to Central Solutions. These statements reflect that a total amount of R16,021.69 had been paid by the respondent as at the date of the Shindler's letter (8 September 2023), and that two further payments that were made after that date had been reversed by the bank. The statements do not therefore support respondent's pleaded version.
30. The respondent's reliance on its financial statements for the year ended 2023 in support of its version as to its profitability, is problematic. Firstly, the statements are unaudited and outdated. Secondly, they have not been independently reviewed. Thirdly, they do not depict the respondent's financial position as at October 2023, when the statutory demand was served. Fourthly, in consequence, they have little or no evidentiary value. In the result, I conclude that the respondent has not by means of credible admissible evidence refuted the rebuttable presumption in terms of s345 of the Companies Act as to its insolvency.

31. The applicant has succeeded in establishing the respondent's indebtedness and further, that the respondent is unable to pay its debts, as envisaged in s 345 of the Act. It has also complied with the procedural requirements in terms of s 346 and service requirements in s 346A of the Act. It follows that a final liquidation order must be granted.
32. At the conclusion of the hearing on 24 February 2025 I granted an order extending the rule to 28 March 2025 to cater for the intervening period before judgment is delivered.
33. Accordingly, the following order is granted:

ORDER

1. The order of 24 March 2024 reflecting the case no. 2023-080352 is varied to reflect the correct case no. 2023-123698.
2. The rule nisi granted on 24 March 2024, as extended until 28 March 2025, is hereby confirmed and the respondent is placed under final winding-up in the hands of the Master of the High Court, Pretoria.
3. The costs of the application are to be costs in the winding-up of the respondent.

AVRILLE MAIER-FRAWLEY

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, JOHANNESBURG

Date of hearing:

24 February 2025

Judgment

delivered

28 March 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 28 March 2025.

APPEARANCES:

Counsel for Applicant/Plaintiff: Adv JH Lerm Instructed by: Elaine Jordaan Attorneys Inc
Counsel for Defendants: Adv LK Van der Merwe Instructed by: Van Andel Brink Attorneys Inc

- [1] Aside from other extensions granted by various Judges, on 16 September 2024, the rule was extended to 24 February 2024 by order of court.
- [2] The companies Act, 1973 continues to apply to compulsory liquidations in terms of the provisions of item 9 of Schedule 5 of the Companies Act, 2008.

- [3] The cession agreement records that “WHEREAS the Cedent has a claim against the debtor POST DESK (Pty) Ltd...for admitted monies under agreement CS102060 (being the MRA) owed by the debtor to them and the debtor failed on demand to settle the debt as per certificate of an officer of the Cedent on 27 October 2023, and therefor left a balance of R 492 890.00 (four hundred and ninety two thousand and eight hundred and ninety rands and nil cents), this balance being the claim, hereinafter referred to as ("the Claim").
- [4] Par 13 of the founding affidavit read with par 30 of the answering affidavit. The respondent merely alleged in par 30 that Central Solutions received payment for all the services rendered before collecting their machines themselves on 07 September 2023.
- [5] A copy of the MRA appears in annexure ‘LA4’ to the founding affidavit.
- [6] A copy of the Schindler’s letter of demand was annexed marked ‘PDL3’ to the answering affidavit.
- [7] *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* 2014 (2) SA 518 (SCA), par 16. In par 17 of the judgment, the following was said: “That a company’s commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time...”
- [8] *Orestisolve (Pty) Ltd T/A Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC), par 9.
- [9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*
- [1984] ZASCA 51; 1984 (3) SA 623 (A) (‘Plascon-Evans’) at paras 634E-635C; *National Director of Public Prosecutions v Zuma*
- [2009] ZASCA 1 2009 (1) SACR 361 (SCA) para 26.
- [10] A gloss to Plascon-Evans was added in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*
- [2008] ZASCA 6; 2008 (3) SA 371 (SCA). There Heher JA re-iterated that ‘an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers’ (par 12).[10] He then considered how a real dispute of fact arises: In par 13 of the judgment, the court held that ‘A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts

averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.’ (emphasis added)

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[2008] ZASCA 6; 2008 (3) SA 371 (SCA). There Heher JA re-iterated that ‘an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers’ (par 12).[10]

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answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.’ (emphasis added)

[11] Oretisolve supra, par 11.

[12] Oretisolve, par 17, and cases there cited. In par 18 of Oretisolve, Rogers J went on to state as follows “I doubt that the ex debito justitiae maxim has ever been, or justified, an inflexible limitation on the court’s discretion...The ex debito justitiae maxim, I venture to suggest, conveys no more than that, once a creditor has satisfied the requirements for a liquidation order, the court may not on a whim decline to grant the order (and see Blackman op cit Vol 3 at 14-91). To borrow another judge’s memorable phrase, the court ‘does not sit under a palm tree’. There must be some particular reason why, despite the making out of the requirements for liquidation, an order is withheld.” (footnotes omitted)

[12] Oretisolve, par 17, and cases there cited.

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[13] BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd 1978

(2) SA 481 (T) at 487 A-B

[14] Chiliza v Govender 2016

(4) SA 397 (SCA) paras 8-10.

[15] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012

(4) SA 593 (SCA) para 18.

[16] The demand was served at the registered address on an employee, being a person over the age of 16 years.

[17] The respondent was required to ensure that its registration information as registered with the Companies and Intellectual Property

Commission was up to date and accurate. A company may notify the CIPC of any change in its registered office by filing a Notice of Change of Registered office, in terms of Section 23(3)(b)(ii) of the Companies Act, 2008 with the CIPC. In terms of s 23(4) of the 2008 Act, the change of registered address takes effect as from the later of—

- (a) the date, if any, stated in the notice; or (b) five business days after the date on which the notice was filed.

[18] This was evident from the CIPC certificate, annexure ‘RA1’ to the founding affidavit.

[19] Rule 42 (1) read with 42(1)(b) provides, in relevant part, as follows: “The court may, in addition to any other powers it may have, *mero motu* ... vary an order...in which there is ... a patent error or omission, but only to the extent of such ... error ...”

[19] Rule 42 (1) read with 42(1)(b) provides, in relevant part, as follows:

“The court may, in addition to any other powers it may have, mero motu ... vary an order...in which there is ... a patent error or omission, but only to the extent of such ... error ...”

[20] This is evident from the contents of the certificate, annexure ‘LA3’ to the founding affidavit.

[21] In *Mtolo and Another v Lombard and Others* (CCT 269/21) [2021] ZACC 39 (8 November 2021) at para 38 (read with fn 29), the Constitutional court approved of what was said in *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011

- (1) SA 8 (SCA), par 19, as follows: “[I]n *Truth Verification Testing Centre CC v PSE Truth Detection CC* 1998
- (2) SA 689 (W) Eloff AJ stated at 698H-J: ‘I am also mindful of the fact that the so-called “robust, common-sense approach” which was adopted in cases such as

Soffiantini v Mould 1956

- (4) SA 150 (E) in relation to the resolution of disputed issues on paper usually relates to a situation where a respondent contents himself with bald and hollow denials of factual matter confronting him. There is, however, no reason in logic why it should not be applied in assessing a detailed version which is wholly fanciful and

untenable.’”(emphasis added) The Constitutional Court concluded that a court should be prepared to undertake an objective analysis of such disputes when required to do so.

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Prepared on 13 October 2026 · Esheria