Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

[redacted] 2 May 2024
....
SIGNATURE DATE

Case number: **32708/22**

In the matter between:

BURNESS ACCOUNTING (PTY) LTD **Applicant**

And

PEST FUNDI (PTY) LTD **Respondent**

JUDGMENT

Chabedi AJ

Introduction

[1] This is an application for the provisional liquidation of the respondent, Pest Fundi (Pty) Ltd, in terms of section 346 of the Companies Act 61 of 1973 on the basis that the respondent has neglected and failed or refused to pay the applicant the amount of R13 062.46 owed by it to the applicant, Burness Accounting (Pty) Ltd as at 1 May 2022. The applicant seeks the provisional order to issue as a rule

nisi returnable on a date to be determined on which a final order for the winding up of the applicant would be sought.

Background

[2] The amount owed to the applicant was for services rendered by the applicant to the respondent in terms of an agreement in a form of a letter of engagement dated 20 January 2021. The debt is a total of amounts contained in three invoices issued by the applicant to the respondent dated 7 December 2021, 31 January 2022 and 28 February 2022, respectively, plus interest thereon calculated from December 2021 to the date of demand, 1 May 2022. The respondent did not pay the invoices.

[3] On 1 May 2022 the applicant addressed a letter to the respondent titled "*Letter of demand for indebtedness owed to Burness Accounting (Pty) Limited, trading as the Tax Shop Bedfordview in terms of (A) section 129 as read with section 130 of the National Credit Act, 34 of 2005 and (B) section 345 of the Companies Act 61 of 1973, read with schedule 5 (Item 9) of the Companies Act of 2008*." The title of the letter as being in terms of both the National Credit Act and the Companies Act is a subject of some controversy dealt with in more detail below.

[4] Section 345 of the Companies Act dealing with "*when a company is deemed to be unable to pay its debts*" provides that:

> *"(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.

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company."

[5] The letter was issued on behalf of the applicant by its attorney of record purportedly in terms of section 345(1)(*a*) of the Companies Act to demand payment of the debt and was delivered at the registered address of the respondent at 18 Van Tonder Road, Edenglen, Edenvale, Gauteng on 4 May 2022. According to the service affidavit attached to the founding affidavit by the candidate of the attorney of record, Ms Temoso Morale, the letter was affixed to the "fence" of the registered address. The letter was also sent to the director of the respondent, Mr Andrew Sally - also the deponent to the opposing affidavit - to an email address bearing his name. The respondent did not respond to the letter of demand.

[6] The applicant contends that as a result of the failure by the respondent to pay the debt within three weeks from the date of the delivery of the letter of demand, the respondent is commercially insolvent and deemed to be unable to pay its debts in terms of section 345(1)(*c*) of the Companies Act. The applicant also avers that save for one VW vehicle, it was unable to verify whether the respondent owned any other movable assets. A property search by the applicant did not reveal any immovable property being registered in the applicant's name.

[7] The respondent is opposing the application and has filed an opposing affidavit in which it raises five (5) points *in limine* on the basis of which it argued, the application ought to be summarily dismissed. As to the merits, the respondent admits that the mentioned address is its registered address, but denies that it has any knowledge of the letter of demand.

[8] The respondent also admits that it has signed the letter of engagement attached to the applicant's founding affidavit. However, in paragraph 27 of its opposing affidavit Mr Sally stated that the respondent's refusal to pay the invoices of the applicant was not due to its inability to pay, but rather "*as a result of a dispute the respondent has with the applicant regarding the services rendered which services were not at all standard as agreed between the parties, and further the services rendered by the applicant caused the respondent to suffer financial losses being the reason for non-payment of the invoices*."

[9] The respondent also claims that it has a counterclaim against the applicant, which is in excess of the applicant's claim against it. As proof of this counterclaim the respondent attached an invoice from an entity named CCC Bookkeeping Services (Pty) Ltd dated 21 March 2022 in the amount of R19 032.50. According to the respondent, the invoice was for the services that the applicant allegedly rendered to it which were rectified by CCC Bookkeeping Services. There is no averment that the alleged counterclaim was ever communicated to the respondent. The items charged on the invoice are also not dated, therefore it is not apparent from the invoice as to when such work was undertaken.

[10] The respondent also claimed that the applicant is well aware that the respondent has a positive nett asset value in excess of its liabilities and as proof of this attached a so called certificate of solvency issued by an entity named Accountability, apparently a debt collector. The value of the nett assets is not stated in the opposing affidavit. The respondent also claims to have a bond registered over a property in Ramsgate in 2002 and a Ford Ranger Bakkie on hire purchase with Wesbank since 2022. The values of both the property in Ramsgate and the Ford Ranger Bakkie are not stated. The respondent also did not attach any documents showing that these assets are registered in its name.

[11] In the replying affidavit the applicant challenged the facts stated above as to the respondent's liquidity and solvency on the grounds, among others, that the invoice by CCC Bookkeeping Services attached as proof of the counterclaim shows that the alleged work that had to be rectified included the resubmission of returns to SARS, which means SARS could also be a creditor of the respondent. The respondent also did not state that the invoice was paid. The respondent also did not state that the invoice was paid. Therefore, far from showing that it owns assets, the respondent has disclosed that it in fact has liabilities. The applicant also stated that the so-called solvency certificate from Accountability, is not proof of solvency at all, but an opinion expressed on a basis of information which was not verified.

[12] I note that the certificate from Accountability on the face of it appears to be allocation of scores in respect of items such as number of years in business, number of properties purchased, age of recent judgment and number and age of enquiries made in respect of the business. The underlying source of the allocated scores is however not attached or explained. Beyond mentioning the Ramsgate property and the Ford Ranger Bakkie, the respondent has not stated the value of these assets and what other assets of value it owns which could prove that it is not commercially insolvent and thus able to pay its debts.

Deemed inability to pay debts

[13] In the case of *Afgri Operations Ltd v Hambs Fleet (Pty*) Ltd 2022 (1) SA 91 (SCA) at paragraph [12], the court restated the old principle in winding up applications that generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt.

[14] It is also a well-established principle of our law that winding-up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is *bona fide* disputed on reasonable grounds. The procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt. (*See also PM Meskin et al Henochsberg on the*

Companies Act 71 of 2008 5 ed vol 1 at 693 – 4. See also Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347 – 348 and Kalil vDecotex (Pty) Ltd and Another 1988 (1) SA 943 (A) ([1987] ZASCA 156) at 980D).

[15] Where, however, the respondent's indebtedness has, *prima facie*, been established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds. The existence of a counterclaim which, if established, would result in a discharge by set-off of an applicant's claim for a liquidation order is not, in itself, a reason for refusing to grant an order for the winding-up of the respondent but it may, however, a factor to be taken into account in exercising the court's discretion as to whether to grant the order or not. (*As per Willis JA in Afrgri Operations Ltd v Hambs Fleet (Pty) Ltd 2022 (1) SA 91 (SCA) at para [6]-[7], pp.94-95).*

[16] On the facts, the applicant has established that there is a debt that the respondent owes to it, which remained unpaid at least at the date of the letter of demand and the respondent does not deny that it is indebted to the applicant in this regard. Therefore, the applicant has established that the respondent is unable to pay its debts, thus, is entitled to bring these winding up proceedings and *prima facie*, to the order for the provisional liquidation of the respondent.

[17] That being the case, it is necessary to first consider each of the points *in limine* raised by the respondent, before finally addressing the merits of this case. In the opposing affidavit the respondent raised 5 points *in limine*: first, the authority of the deponent to the applicant’s affidavit; second, the authority of the attorney to act on behalf of the applicant; third, non-compliance with section 129 of the National Credit Act; fourth, non-compliance with section 345 of the Companies Act; and fifth, factual dispute and *bona fide* defence. In the heads of argument filed on behalf of the respondent, the issues of the authority of the deponent and that of the attorney were abandoned; and additional issues were raised, namely, the attack on the application for condonation for the late filing of the replying affidavit and non-compliance by the applicant with section 346(4A)(*a*) and (*b*) and section 34(3) of the Companies Act.

Condonation

[18] The applicant filed its replying affidavit on 16 January 2023 outside the ten (10) day period required to file a replying affidavit. On 27 January 2023 the respondent filed a notice in terms of rule 30(2)(*b*) in which it complained that the filing of the replying affidavit constitutes an irregular step and provided the applicant with an opportunity to remove the cause of complaint within 10 days thereof. The applicant did not remove the cause of complaint and on 14 February 2023 the respondent filed a notice of application in terms of rule 30(1). On 15 February 2023 the applicant filed an application for condonation of the late filing of its replying affidavit. The respondent did not oppose the condonation application. In June 2023 the respondent proceeded to set down the rule 30 application on 29 June 2023. It transpired that the application was not properly enrolled and as a result was not heard. Nothing further was done regarding this rule 30 process.

[19] The question whether or not to grant condonation is a matter of the court's discretion based on the facts. According to the affidavit filed in support of the condonation application, the replying affidavits was commissioned on 14 December 2022. The applicant's attorney's offices experienced loadshedding at that time and were therefore unable to scan and file the replying affidavit. The attorneys then decided to close their offices at that time for the December holidays.

[20] The replying affidavit was subsequently filed on 16 January 2023. In total there was a delay of nine (9) days. When the matter came before me on 30 January 2024, the application for condonation was not opposed and the rule 30 process appeared to have been abandoned. Counsel for the respondent, Ms Smit in her heads of argument set out factual statements and thereafter argument purportedly in opposition of the application for condonation; thereafter in oral argument attempted to oppose the condonation application from the Bar, making factual submissions which were not contained any affidavit. I rejected this approach as inappropriate.

[21] In the case of *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A)[1] (at 720 E-G) the court identified the jurisdictional factors that should be taken into account in the exercise of its discretion in applications for condonation, among others, namely, the degree of non-compliance, the adequacy of the explanation for such failure, the prospects of success and the importance of the case. I am satisfied that the applicant has provided a complete account of the delay and that a delay of nine days, which occurred over the December holiday period, is not excessive such as to vitiate the entire process or cause prejudice to the respondent. I therefore find that it is in the interest of justice to grant condonation for the late filing of the replying affidavit.

[22] Having considered the respondent's heads of argument, the points *in limine* raised can be grouped under two headings, namely, non-compliance with the National Credit Act, and non-compliance with the jurisdictional and notice requirements for winding up as set out in the Companies Act. It is important to point out that although the respondent and subsequently, its counsel in the heads of argument has characterised these issues as points *in limine*, presumably capable of being decided independent from the facts, these points are admittedly interwoven with the facts, albeit only from the applicant's version. Therefore, the sustainability of these points of law is heavily dependent on the respondent's own version in the opposing affidavit.

[23] The respondent's counsel, Ms Smit in her heads of argument has made certain postulations in order to argue these points, often on facts not contained in the opposing affidavit. A blatant example is the attempt to oppose the condonation application as discussed above and the argument, as appears in more detail below, that the letter of engagement is a credit agreement in circumstances where the respondent itself has not even engaged much with the letter beyond agreeing to signing it. I deal with the points of law with in separate headings below.

Compliance with section 129 of the National Credit Act

[24] According to the heading of the letter of demand, the notice was issued in terms of section 129, read with section 130 of the National Credit Act, as well as in terms of section 345 of the Companies Act. It was argued on behalf of the respondent that the agreement relied on by the applicant is an incidental credit agreement subject to the National Credit Act. Therefore it should have been delivered in accordance with section 129(5) thereof, which requires a notice to be delivered to the defaulting consumer by (a) registered mail, or (b) to an adult person at the location designated by the consumer. In terms of subsection (6) the consumer must in writing indicate the preferred manner of delivery contemplated in sub-section (5) and in terms of subsection (7) proof of delivery is satisfied by (a) a written confirmation by postal service or its authorised agent, of delivery to the relevant post office or postal address; or (b) the signature or identifying mark of the recipient.

[25] Ms Smit referred to the case of *Sebola v Standard Bank of South Africa* Ltd 2012 5 SA 142 and argued that on the principles set out in that case, the applicant failed to deliver the notice in terms of section 129, and therefore was not entitled to institute legal proceedings against the defaulting party.

[26] This argument is ill-fated. First, although the applicant has titled the notice as being both in terms of section 129 of the National Credit Act and the Companies Act, it is not the applicant's case that the letter of engagement is a credit agreement or that the relief sought is on the basis of the letter being one. The deponent to the respondent's opposing affidavit only admits that he has signed the letter of engagement (the agreement), but for the rest, he does not at all engage with the agreement and what it seeks to provide. Therefore, there is no factual basis to assess that it is an incidental credit agreement or that it being one for that matter is relevant to these proceedings. Counsel's postulation and views on what could be the facts is irrelevant.

[27] Second, this is an application for the winding up of the respondent in terms of the Companies Act and not proceedings for the enforcement of a debt. Therefore,

the National Credit Act and the principles in the Sebola case do not find application. The point in *limine* that there was non-compliance with the National Credit Act as a prerequisite for the institution of these proceedings therefore fails.

Compliance with section 345(1)(*a*)(i) of the Companies Act (Old Act)

[28] In its opposing affidavit, the respondent denies any knowledge of the notice in terms of section 345(1) ever being issued by the applicant to it and argues, as a point *in limine*, that such notice should have been served by the sheriff with jurisdiction over the area and therefore did not comply with the delivery requirements of section 345(1) of the Companies Act. This position was abandoned and in her heads of argument, Ms Smit for the respondent, then raised a new issue that the term "service" should be interpreted with reference to section 220 of the Companies Act 71 of 2008 (new Companies Act) which provides that "*serving of documents*" shall mean "*unless otherwise provided in this Act, must be served on a person, will have been properly served when it has been either (a) delivered to that person; or (b) sent by registered mail to that person's last known address*."

[29] Counsel argued that the demand or notice was never served at the registered address of the respondent as required by the old Companies Act because the respondent never acknowledged receipt of the demand. Counsel further argued that the picture attached to the service affidavit as proof of service depicted a wall and the number 18 while the service affidavit stated that it was affixed to a fence, thereby attempting to cast doubt that the letter of demand was served at the correct address. All of these are not contained in the opposing affidavit.

[30] The relevant provisions of the old Companies Act and the new Companies Act only stipulate the manner and proof of service. There is nothing in section 345 of the Companies Act that provides that in order for service to be regarded as having been effected there must be acknowledgement of receipt by the person served. As to the latter arguments about the picture depicting a wall and not a fence, any submission in this regard must be based on facts. Counsel's argument was not based on any evidence submitted by the respondent in its affidavit. Just

as the agreement, the deponent on behalf of the respondent stated that he bears no knowledge of the demand, and presumably its service. No other version was proffered and none can be advanced by counsel unless confirmed by the party concerned. Counsel conceded as much.

[31] Section 345(1)(*a*)(i) patently states that the demand must be served on the company, by leaving the same at its registered office. The evidence submitted by the applicant, which the respondent did not contradict, shows that the notice was affixed to the outer perimeter wall of the premises of the registered address. I am therefore satisfied that there has been compliance with the service requirements in terms of section 345(1) of the Companies Act. The point *in limine* that there was no compliance thereto, lacks merit and is therefore dismissed.

Notice formalities in terms of section 346(4A)(a) of the Companies Act

[32] Section 346(4A) of the Companies Act provides that:

> *"(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.

(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."

[33] It was argued on behalf of the respondent in the heads of argument and oral argument that the applicant served the application on the South African Revenue Service (SARS) via email, which is not evident from the papers, nor is there proof of service, and the applicant has failed to attach the affidavit of the person who served the application on SARS. The respondent argued in this regard that the provisions of section 346(4A)(*b*) are peremptory, and therefore non-compliance thereto, is fatal to the application.

[34] In *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd 2015 (2) SA 526 (SCA)* (at para [13] E-F), the court stated the following regarding the peremptory nature of the requirements in section 346(4A)(a) (citations not included):

"[13] Like the earlier subsections, there can be little doubt that the section imposes an obligation on the applicant to furnish the application papers to the persons named in the section. That accords with the section's purpose. For example the inclusion of SARS in the list is dictated by its role in protecting South Africa's tax base and ensuring that in the public interest all taxes properly levied are collected. There are obvious reasons why it should know about applications for winding-up or sequestration."

[14] It cannot, however, be the case that courts are hamstrung and precluded from dealing with applications for winding-up or sequestration because they are uncertain whether the application has in fact come to the attention of all employees. That is not a sensible construction of this requirement. Were that the case the statutory methods of placing the application papers on a notice board to which the employees have access, or fastening them to the gates of premises where the employees work, could never be accepted as sufficient. The usual way of achieving certainty in regard to the receipt of documents is by requiring service in accordance with the rules of court, but that is not what the section demands. In my view the proper interpretation of the requirement that the application papers be 'furnished' to the identified persons is that they must be made available in a manner reasonably likely to make them accessible to the employees. It is not a requirement that the court must be satisfied that the application papers have as a matter of fact come to the attention of those persons. "

[35] In the founding affidavit, the deponent on behalf of the applicant states that "*I shall likewise serve a notice of this application on SARS and at the hearing of the application report to the honourable Court in this regard*." Although, counsel for the applicant, Mr Van Zyl referred the court to an email from one Yolandi de Bruin, of the applicant's correspondent attorneys, addressed to an email address simply stated as "Liquidations" filed together with the returns of service by the applicant, there was no accompanying affidavit confirming the same. On enquiry by the court as to how, in those circumstances, the court could satisfy itself from the email that there was compliance with the provisions of section 346(4A)(*a*), Mr Van Zyl submitted that the "Liquidations" email address is currently being used by SARS to accept service of liquidation applications since the Lockdown. As regard the failure to file the service affidavit in terms of section 346(4A)(*b*), Mr Van Zyl submitted that it was an omission that he did not pick up before the hearing of the matter, however this could be rectified when the final order is sought.

[36] While on the principles as set out in the EB Steam Company *supra*, I can accept that this mode of service may be a legitimate one as explained by Mr Van Zyl, there was no affidavit filed by the applicant of the person who furnished the copy of the application to SARS and setting out the manner in which the application was so served as contemplated in terms of section 346(4A)(*b*). In the EB Steam Company case (supra) the court stated further 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 para (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*."

[37] It is trite that compliance with sections 346(4A)(*a*) and (*b*) are peremptory. As stated in EB Steam Company *supra*, the purpose of the section is however achieved if the applicant is able to show in one of several ways how compliance

with subsection (a) was done. This the applicant must set out in an affidavit contemplated in terms of subsection (*b*). In the absence of an affidavit in terms of section 346(4A)*(b)*, I am unable to satisfy myself that the method adopted has reasonably brought the application to the attention of SARS, and thus there has been compliance with the section.

[38] The question is whether it is impermissible for the court to grant a provisional winding-up order without compliance with section 346(4A)*(b)* having occurred. In EB Steam Company *supra*, paragraph 25 thereof, the court held that it is not. I am inclined to agree with this position. This in light of the merits of this application which are overwhelmingly favourable to the applicant and the fact that the respondent has failed to seriously dispute the case on its merits, and thus failed to discharge the onus that it is not unable to pay its debt and not commercially insolvent.

[39] It is not reasonable in my view to refuse the granting of a provisional order only on the grounds of non-compliance with the provisions of section 346(4A)(*b*) of the Companies Act in the circumstances where when the applicant seeks a final winding up order, possibly with the participation of other interested parties, including SARS should it choose to intervene, it could still show compliance thereof in a manner contemplated in terms of the Act.

Compliance with section 346(3) of the Companies Act

[40] Section 346(3) of the Companies Act provides that every application to the Court referred to in subsection (1) shall be accompanied by a certificate by the Master, issued not more than ten days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding-up.

[41] On the documents before me, the application was issued on 17 June 2022 and served on the Master on 1 August 2022 and on the respondent on 18 August 2023. The certificate of the Master was issued on 23 August 2022. The nominated date for the hearing of the matter was stated as 8 September 2022 and a notice of set down in this regard was filed on 25 August 2022. On 8 September 2022, the application then unopposed, came before Mbongwe J and was postponed *sine die*.

[42] The respondent does not dispute that the Master's certificate accompanied the application at the hearing of the application or at all. The complaint, as counsel's argument goes, was that the Master's certificate was issued on 23 August 2022 after, and not before, the application was launched in June 2022, contrary to the provisions of section 346(3) of the Companies Act. In reference to the authority in EB Steam Company (paragraph [9]), counsel for the respondent argued that the date when the certificate ought to accompany the application, which could be at the hearing of the application, must be distinguished from the date by when the certificate must have been issued, which is the date of the launch of the application.

[43] It is correct that compliance with section 346(3) is peremptory and as the cited *dictum* in the EB Steam Company (*supra*) clearly states, it is envisaged that security must be issued before the application is launched. However, the court in that case also held that the peremptory nature of the provisions should be applied in a manner that achieves its legislative purpose.

[44] In my view the purpose of the provisions of section 346(3) is achieved when the application was served on the Master on 1 August 2022 and actual security was subsequently filed on 23 August 2022 before the application was first set down on 8 September 2022, before a notice to oppose was filed on 28 October 2022. In my view there has been sufficient compliance with the provisions of section 346(3).

Conclusion

[45] It has been held in a number of cases that an applicant for a provisional order of liquidation need only make out a *prima facie* case (see *Kallil v Decotex*, *supra* at [976D]). The general approach of the Court in deciding whether to grant the application should be whether on the evidence presented in the affidavits filed by the parties, the balance of probabilities favoured the applicant, if so the court should grant the provisional order and if not, dismiss the application. (*See Provincial Building Society of South Africa v Du Bois1966 (3) SA 76 (W) at 81A-B)*

[46] In the case of Kallil v Decotex *(supra)* at [976I-I] the court went on to state that "*Where the application for a provisional order of winding-up is not opposed or where, though it is opposed, no factual disputes are raised in the opposing affidavits, the concept of the applicant, upon whom the onus lies, having to establish a prima facie case for the liquidation of the company seems wholly appropriate; but not so where the application is opposed and real and fundamental factual issues arise on the affidavits, for it can hardly be suggested that in such a case the Court should decide whether or not to grant an order without reference to respondent's rebutting evidence*."

[47] In this case there is no rebutting evidence. The respondent admits that it is indebted to the applicant, but claim that there is a counterclaim. Save for stating that the amount in the counterclaim is higher than the debt, the respondent failed to submit any further detail of the counterclaim and how it is related to the applicant given that the alleged date of the counterclaim is after the applicant's invoices which remain unpaid. The other grounds of opposition by the respondent were by way of points *in limine*, all of which were unsustainable as discussed above.

[48] I am therefore satisfied that the applicant has made out a proper case for the provisional order for the winding up of the respondent.

[49] In the premises, I make the following order:

1. The respondent is placed under provisional liquidation in the hands of the Master of the High Court.

2. A rule *nisi* is issued calling upon the respondent and other interested parties to show cause on or before on 5 August 2024, why the respondent should not be placed under final winding-up.

3. The applicant is directed to serve this order on the Master of the High Court and the South African Revenue Service and an affidavit confirming such service must be filed before the return date.

3. The costs of this application shall be costs in the liquidation.

MPD Chabedi
Acting Judge of the High Court
Gauteng Division, Pretoria

APPEARANCES

For the applicant:	Adv H Van Zyl
	Karlin Coetzee Attorneys
For the applicant:	Adv N Smit
	Albasini Attorneys
Date of hearing:	30 January 2024
Date of Judgment:	2 May 2024

This judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by email to the attorneys of record of the parties. The date of the delivery of the judgment is deemed to be 2 May 2024.