



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

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

Signature: Date: 09 May 2023

Case no: 2022/0957

In the matter between:

TRENCON COSTRUCTION (PTY) LTD

Applicant

and

RESOLIENT ROCK (PTY) LIMITED

Respondent

NEUTRAL CITATION: *Trencon Construction (Pty) Ltd vs Resilient Rock (Pty) Ltd*
(Case No: 0957/2022) [2023] ZAGP JHC 441 (09 May 2023)

JUDGMENT

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 16h00 on 9 May 2023.*

MOULTRIE AJ

- [1] The applicant in this matter seeks an order in terms of section 344(f) of the Companies Act, 61 of 1973 for the winding up of the respondent company on the on the basis that it is unable to pay its debts as described in section 345(1)(a) of the Act.
- [2] In particular, the applicant relies upon the undisputed facts that:
- (a) the applicant obtained a provisional sentence judgment against the respondent in the amount of R2,015,419.46 on 20 July 2021 under case number 20/17982;
 - (b) the applicant served a demand in terms of section 345(1)(a)(i) of the Act at the respondent's registered office on 27 August 2021;
 - (c) the respondent had failed to satisfy the amount of the judgment and failed to deliver a notice of intention to enter into the principal case within two months, as a result of which the provisional sentence became a final judgment in terms of Rule 8(11);
 - (d) more than 3 weeks had elapsed after the demand had been served on the respondent and the respondent had failed to pay or secure or compound for the amount of the judgment to the reasonable satisfaction of the applicant as envisaged in section 345(1)(a).
- [3] Although the applicant initially sought a final order, I raised concerns at the hearing because the applicant refers in its founding affidavit to "*the sole trade union that represents the employees of the respondent*" and the affidavit handed up in terms of section 346(4A)(b) and the return of service annexed thereto indicated that the applicant had purported to "*furnish a copy of the application ... to [the] trade union*" (as required by section 346(4A)(a)(i)) by having the sheriff affixing a copy thereof "*to the principal gate of the respondent's registered address*". There was no evidence or suggestion that such affixing would have come to the attention of "*the sole*"

trade union” representing the respondent’s employees and there is no reason is given why the application could not be furnished to the relevant trade union at its usual place of business or registered address. The requirement to furnish the application to the union is peremptory,¹ and this court has no inherent jurisdiction to condone non-compliance with the requirement.²

- [4] In view of these concerns, the applicant’s counsel took instructions and indicated that the applicant would instead be moving for a provisional order so as to allow for the application to be furnished to the trade union prior to the grant of any final winding up order.³

- [5] The main ground advanced by the respondent as to why even a provisional order should not be granted was that I should exercise my discretion not to do so because the respondent disputes the underlying debt that forms the basis of the provisional sentence judgment. The defendant’s answering affidavit states that it was “*wrongly advised*” by its previous attorneys not to contest the provisional sentence or to enter into the principal case.

- [6] It is correct that the grant of a winding up order (whether provisional or final) is discretionary, and that an application such as the present may be refused if it is just and equitable to do so.⁴ However, even if I accept that that the underlying debt was indeed not owing, it is not that purported indebtedness that is relied upon by the applicant for the purposes of this winding up application. The indebtedness relied upon in the current application is the provisional sentence judgment, which became final on or about 20 September 2021, and which has not been rescinded or appealed.

¹ *EB Steam Co (Pty) Ltd v Eskom Holdings Soc Ltd* 2015 (2) SA 526 (SCA) para 23.

² *Hendricks NO & others v Cape Kingdom (Pty) Ltd* 2010 (5) SA 274 (WCC) para 31.

³ This was the course of action recommended in *EB Steam* (above) paras 25 & 26.

⁴ *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) 440.

[7] In view of the fact that the obligation to pay the judgment debt can therefore not be disputed (and in fact it is not disputed), there is no basis upon which it may be concluded that there is any doubt whatsoever about the respondent's liability for the debt that formed the basis of its section 345(1)(a)(i) demand,⁵ and there is no room for the application of:

- (a) any general principles regarding inferential reasoning and whether or not it has been proved to my satisfaction that the respondent is unable to pay its debts as contemplated in section 345(1)(c), which section is not relied upon by the applicant and is therefore irrelevant to my consideration of the application; or
- (b) the principle that insolvency proceedings are not the appropriate forum in which to resolve questions as to liability;

when considering the exercise of a discretion not to grant the provisional winding up order.

[8] In the circumstances, I can see no basis why the deeming provision in section 345(1)(a)(i) should not apply and why the provisional order sought by the applicant should not be granted.

[9] I grant 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 all other interested parties to show cause, if any, on **13/06/2023** at 10h00 as to why a final liquidation order should not be granted.
3. A copy of this order must be served on:
 - a. the respondent.

⁵ cf. *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA), especially at para 12.

- b. the South African Revenue Service.
- 4. A copy of this order and the applicant's application must be furnished to:
 - a. the employees of the respondent, if any.
 - b. all trade unions of which any of the employees of the respondent are members, if any.
- 5. The applicant must deliver, by no later than five (5) court days before the return date, an affidavit setting out the manner in which service, as provided for in 3 and 4 above, has been effected.
- 6. The costs of the application are reserved.



RJ Moultrie AJ
Acting Judge of the High Court
Gauteng Division, Johannesburg

DATE OF HEARING: 18 January 2023

DATE OF JUDGMENT: 09 May 2023

APPEARANCES

For the plaintiffs: E Larney instructed by MDA Attorneys

For the defendant: NG Louw instructed by Rina Rheeders Attorneys