

What is a Section 345 Letter of Demand?

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INTRODUCTION

In South African corporate law, section 345 of the Companies Act No. 61 of 1973¹ is a significant provision, especially when it comes to the liquidation of a company. The conditions provided for in this section, which (when utilised) can lead to liquidation proceedings, are scrutinized in this article. These conditions most famously include a company's inability to pay its debts. Additionally, we will examine the consequences of nonpayment of a section 345 letter of demand and how does the Courts grant an order for liquidation of a company.

WHAT IS A LETTER OF DEMAND?

We all know the basics of what a letter of demand is: it's a formal letter sent to an individual or a company to make payment of the money that is owed. In layman terms **PAY BACK THE MONEY ASAP!**

A letter of demand must contain the following information:

1. The precise amount owed;
2. State clearly that the letter is a demand for debt to be paid;
3. A specified period for when payment is due, typically 21 days, by which the payment is due;
4. The consequence of non-payment of the debt

But what exactly is a letter of demand in terms of section 345 of the Companies Act?

345 OF THE COMPANIES ACT 61 OF 1973² ("THE ACT")

Section 345 of the Act states:

"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) in the case of any Body 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 [Para. (b) substituted by s. 26 of Act 59 of 1978.]

(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."³

In terms of section 345 of the Act, a creditor can serve a letter of demand on a company for debts amounting to R100.00 (One Hundred Rand) or more. Pretty scary isn't it, to think that for a mere R100.00 you can be served with a letter of demand.

The section 345 letter of demand acts as a formal notice, which is basically a "heads up" to settle the debt, and it starts a clock ticking which creates a very scary, and unmovable, deadline for the debtor company. If the company fails to comply with the letter of demand within three weeks of having received it or fails to put up a bona fide defense within that time, the creditor has the right to apply for the company's winding up, and this could potentially lead to its liquidation.

According to section 345, a company is considered insolvent if it receives a letter of demand for payment of its debts and it does not pay the debt within three weeks, or if the sheriff indicates in his/her return of service that the debtor has not discovered enough disposable property to satisfy a judgment. If a company is unable to pay its debts as specified in section 345 of the Old Companies Act, the Court may wind it up in accordance with section 344 of the Old Companies Act.

CAN YOU ALSO BE SUED IF YOU DON'T PAY ON A S345?

A company can most definitely can be sued if it does not pay within the stipulated period after receiving the letter of demand, this constitutes grounds for a creditor to initiate liquidation proceedings against the company.

EXCEPTION TO THE RULE THAT A COMPANY CAN BE WOUND UP IN TERMS OF SECTION 345 - THE BADENHORST RULE

The Badenhorst Rule was created in the ruling in the Badenhorst v Northern Construction Enterprise (Pty) Ltd⁴ case. In terms of this ruling, a debt that is contested on legitimate and reasonable reasons cannot be enforced through winding up procedures.

The purpose of winding up is not to serve as a debt collection mechanism for one creditor - it is to wind up the entire company for the best interests of all of the creditors. If this process is misused, to obtain payment for just one creditor (through the section 345 letter process), a court can refuse to wind up the company on the basis of the abuse of the liquidation process for just one creditor.

In most cases a Court will not ordinarily grant an order for the winding up of a company if the company has not acknowledged liability for the debt. In such an instance, the onus falls on the company to provide valid reasons for disputing the debt.

It is also important to note that if a court is of the opinion that an application for the winding-up of a company is an abuse of the court's process or has been brought on malicious or vexatious grounds⁵, it may allow the company to prove any damages it may have suffered as a result of the application and grant the company any compensation the court deems appropriate under section 347(1A) of the Old Companies Act.

This will ultimately result in the applicant being subjected to a punitive cost order during the winding-up procedures if the court finds that the application constitutes an abuse of the legal system.

Although section 345 gives creditors the "upper hand" to collect outstanding debt, it must be applied carefully to prevent legal issues/disputes. When you receive a section 345 Letter of Demand, it is best to act fast, pay the debt owed or if there is a dispute, contact your attorney who can advise you accordingly.

¹Companies Act No. 61 of 1973

²Section 345 of the Companies Act No. 61 of 1973

³Definition cited as per Section 345 of the Companies Act No. 61 of 1973

⁴Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T)

⁵Section 347 (1A) of the Companies Act No. 61 of 1973



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