**IN THE HIGH COURT OF SOUTH AFRICA**

**FREE STATE DIVISION, BLOEMFONTEIN**

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| **Reportable:** | **NO/YES** |
| **Of interest to other Judges:** | **NO/YES** |
| **Circulate to Magistrates:** | **NO/YES** |

Case number: **5917/2022**
Case Number: **5772/2021**

In the matter between:

**FIRSTRAND BANK LIMITED** Applicant[1]

and

**YENZA TRADING 519 CC t/a MASENKENG MARKETING** Respondent[2]

**Coram:** Opperman, J

**Heard:** 17 August 2023

**Delivered:** 23 October 2023. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and released to SAFLII on 23 October 2023. The date and time of hand-down is deemed to be 15h00 on 23 October 2023

**Judgment:** Opperman, J

**Summary:** Insolvency

[1] "FirstRand".
[2] "Yenza".

**JUDGMENT**

[1] This is an opposed application for the confirmation of a provisional order of the respondent's winding up granted on 23 March 2023. The applicant submits that the respondent is factually and commercially insolvent and that it will be just and equitable for it to be liquidated.

[2] The remarks of the representative of the applicant in her replying affidavit, dated and commissioned on 26 May 2023[3] and based on the information supplied by Mr Irvin Lyndon Ewertse that is apparently the sole member of the respondent; make it patently clear that the proverbial writing is on the wall for the respondent.[4]

1. In a summary judgment against Yenza the court ruled on 5 May 2022 that <u>no *bona fide* defence</u> in respect of the applicants claim(s) against the respondent <u>was raised.</u> It was ordered that:

   Having considered the documents filed of record and having heard the legal practitioners,

   IT IS ORDERED THAT:

   Against the first and second Defendants[5] jointly and severally the one paying the other to be absolved:

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[3] Pages 487 to 531 of the court bundle indexed on 18 July 2023. Also see page 317.

[4] The matter was brought to court by the litigants on motion proceedings and will thus be adjudicated on this process and on the Plascon Evans – dictum that finds application. It entails as ruled by the Supreme Court of Appeal *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) that:

1. In all instances where there are material disputes of fact on the papers;
2. and where there is no request for the hearing of oral evidence by the parties;
3. the general rule is that final relief may only be granted if those facts as stated by the respondent;
4. together with those facts stated by the applicant that are admitted by the respondent;
5. justify the granting of an order.
6. Simply stated, the court will consider what facts have been alleged by the respondent in its answering affidavit; against the facts and/or version of the applicant which have been admitted by the respondent.
7. This approach makes it possible to effectively establish which facts are common cause between both applicant and respondent; and thereafter consider which facts that are denied by the respondent are, genuine and bona fide, a dispute of fact.
8. If there is indeed a real, genuine, and bona fide dispute of fact, a respondent may, as it is entitled to do in terms of the Uniform Rules of Court, refer such dispute to the hearing of oral evidence.
9. The Plascon-Evan Rule is not rigid in this sense that the matter must be referred to oral evidence.
10. If, however, the respondent fails to do so, the respondent's case will stand and fall on the facts averred in its answering affidavit.

[5] YENZA TRADING 519 CC: Registration Number: 2004/025239/23, First Defendant & IRVIN LYNDON EWERTSE, Second Defendant.

1.

1.1 Payment in the amount of R960 492.51;

1.2 Interest on the amount of R960 492.51 at a prime interest rate plus 2.05% per annum, compounded monthly in arrears from 26 November 2021 until date of final payment, both days inclusive.

2.

2.1 Payment of the amount R1 087 670.13;

2.2 Interest on the amount of R1 087 670.13 at the prime interest rate plus 6.75% per annum, calculated daily and compounded monthly in arrears from 1 November 2021 until date of final payment, both days inclusive.

3. Costs of suit on an attorney and client scale. (Accentuation added)

2. The operation of the law in terms of this order must be abided. The court has found that the full indebtedness of Yenza to FirstRand is due, owing, and payable. This is incontrovertible.

3. Notwithstanding the fact that this court ordered the respondent to make payment of its indebtedness, Yenza, at the time of this application, was not able to do so.

4. This fact alone is proof of the respondents' insolvency and does it cause some reservation to hang over the resistance by the respondent of the present application. Further on the respondent's own version is it no longer conducting business:[6]

49.3.1. The respondent's principal business was the delivery of bread through contracts primarily concluded with Sasko;

49.3.2. The respondent has sold its principal contracts with Sasko to Irko;

49.3.3. Irko is purportedly also in the process of taking over all of the respondent's vehicles without which the respondent cannot effect deliveries;

49.3.4. The respondent no longer has any employees; and

49.3.5. The respondent is further in the process of selling the sole immoveable property which it owns and its sole remaining source of income.

49.4. Consequently, on the respondent's own version its ability to generate income to satisfy its indebtedness through the ordinary course of its business dealings and affairs, as well as its substratum, has disappeared. Accordingly, on the respondent's own version it would be just and equitable to grant a winding up order.

[6] At pages 526 to 527 of the record.

[3] In his affidavit Mr Ewertse explained that they have endeavored to rescue the business.[7] They proposed to Irko, a loyal business acquaintance, to assist them. The feedback was received around April 2023. It was the opinion of Irko that they would only be replacing an existing bond with new finance and not put the business necessarily in a better position to succeed should they lend them money: replacing debt with new debt is not helping them but rather reconciling arrears. In addition:

The business as is, is quite marginal already and taking out rental received, it cannot stand on its own. Also, there is no room for drawings for yourself at this stage which further contribute (sic) to the viability question.

They went on to indicate that:

The quorum felt Basie is ultimately still the main entrepreneur (as you are full-time employed) and we don't have enough history regarding judgements, outstanding creditors, his personal balance sheet etc. and exactly what led to losses historically in the business (pre-covid). The conditions & timeline set by the bank regarding the recalling of the overdraft was (sic) also quite vague. The outstanding municipal account (by the looks of it several years) was a big concern too. They want us to have clarity on exactly what is outstanding at SARS for Yenza and Irko as Irko will likely have to settle these accounts too if Yenza stopped all trading. Even if we address all questions, I think our main obstacles were the business case and viability. Unfortunately, we decided to withdraw the deal. If we cannot pass it by the first committee, we won't be able to get it approved at the second committee. I'm so sorry about this - I was willing to take a chance on it, but the quorum highlighted a few serious risks which they do not feel comfortable with. (Accentuation added)

[4] The applicant is Firstrand Bank Limited, a financial institution duly registered in terms of the applicable legislation of this country. It is also registered as a credit provider in terms of the National Credit Act 34 of 2005. The respondent is Yenza Trading 519 CC t/a Masenkeng Marketing, a close corporation registered and incorporated in terms of the prevailing law. Its main place of business is registered in Heidedal, Bloemfontein and its domicilium in Hamilton, Bloemfontein. As already indicated, Irvin Lyndon Ewertse is apparently the sole member of the respondent.

[5] Meskin[8] states with reference to case law that:

The law regulating the winding up of a corporation is contained substantially in the Close Corporations Act and the 2008 Companies Act. Section 66(1) of the Close Corporations Act as amended in terms of item 7 of

[7] Pages 316 to 318 of the record at paragraphs 132 to 135 of the answering affidavit of Mr Ewertse.

[8] Insolvency, *Meskin's Insolvency Law*, Chapter 1 Law applicable, 1.5 Winding up of close corporation, Last Updated: June 2023 - SI 60, https://www.mylexisnexis.co.za/Index.aspx 21 October 2023.

Schedule 3 of the 2008 Companies Act, provides for the "laws mentioned or contemplated in Item 9 of Schedule 5" of the 2008 Companies Act (i.e., Chapter XIV of the 1973 Companies Act) to apply *mutatis mutandis* to the liquidation of a corporation in respect of any matter not specifically provided for in the Close Corporations Act. In terms of item 7 of Schedule 3 of the 2008 Companies Act, section 67 of the Close Corporations Act was amended so as to apply Part G of Chapter 2 of the 2008 Companies Act to the winding up of a solvent corporation, and section 68 of the Close Corporations Act is repealed. The procedures applicable in the winding up of Close Corporations are therefore essentially the same as those which apply in relation to companies. (Accentuation added)

[6] In order to obtain a provisional winding up order FirstRand had to establish its case on a prima facie basis. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the Plascon-Evans rule. Whereas a prima facie case sufficed for the grant of a provisional order, the grant of a final order requires proof on a balance of probabilities. The degree of proof required when an application is made for a final order is higher than that for the grant of a provisional order.[9]

[7] Mars[10] concluded with reference to case law that:

In the event of opposition being intended, affidavits setting forth the grounds thereof should be lodged with the registrar of the court and served on the sequestrating creditor in sufficient time to enable him to reply thereto; otherwise, a postponement may be necessitated. An applicant must normally stand or fall by his founding affidavit and the facts alleged therein, subject always to the court's discretion to allow a new matter in reply, subject in turn to the respondent being granted an opportunity to deal with the new matter. Although it is permissible to supplement the allegations, the main foundation of the application is that stated in the founding affidavit. The applicant may, however, rely on any information contained in the papers before the court, including facts set out in the respondent's and in the intervening creditor's affidavits.

[8] Imperative in this instance is the fact that Yenza pays an installment here and there, causing that the amount due, as result, to start to fluctuate. This does not affect the nature of the

[9] *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd & Another* 2015 (4) SA 449 (WCC), *Export Harness Supplies (Pty) Ltd v Pasdec Automotive Technologies (Pty) Ltd* [2005] JOL 14056 (SCA) and *Paarwater v South Sahara Investments (Pty) Ltd* [2005] JOL 13832 (SCA).

[10] Bertelsmann *et al, The Law of Insolvency in South Africa*, (10th Edition), Internet: ISSN 2224-4743, Jutastat, e-publications, Chapter 5, Compulsory sequestration, 5.9 Return day of rule nisi, 5.9.1 Opposition at pages 143 to 144.

application. It is not an ongoing credit agreement that is serviced by the respondent as they deem fit. The proceedings are now centered and focused on the insolvency or solvency of the respondent. In *Naidoo v ABSA Bank Ltd* (391/09) [2010] ZASCA 72; 2010 (4) SA 597 (SCA); [2010] 4 All SA 496 (SCA) (27 May 2010), Cachalia JA stated in accordance with the reigning law of insolvency that:

> [4] Mr Reddy's submission, as I understand it, implicitly contains a concession that sequestration proceedings are not in and of themselves 'legal proceedings to enforce the agreement' within the meaning of s 129(1)(b). That his concession is correct is clear from the recent judgment in Investec Bank Ltd v Mutemeri where Trengove AJ concluded that an order for the sequestration of a debtor's estate is not an order for the enforcement of the sequestrating creditor's claim and sequestration is thus not a legal proceeding to enforce an agreement. He did so after carefully considering the authorities which have held that 'sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent' – they are not proceedings 'for the recovery of a debt'. The learned judge's reasoning accords with this court's description of a sequestration order as a species of execution, affecting not only the rights of the two litigants but also of third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those creditors' ordinary remedies and imposing disabilities on the insolvent – it is not an ordinary judgment entitling a creditor to execute against a debtor. (Accentuation added)

[9] The grounds for liquidation are trite and the following is important:

1. Sections 344 and 345 of the Companies Act 61 of 1973 find application in the evaluation of insolvency.

> 344. Circumstances in which company may be wound up by Court.—A company may be wound up by the Court if: (a) the company has by special resolution resolved that it be wound up by the Court; (b) the company commenced business before the Registrar certified that it was entitled to commence business; (c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year; (d) in the case of a public company, the number of members has been reduced below seven; (e) seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company; (f) the company is unable to pay its debts as described in section 345; (g) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs; (h) it appears to the Court that it is just and equitable that the company should be wound up.
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> 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) 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 favor 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.

2. In this instance the evidence shows beyond doubt that Yenza is unable to pay its debts in terms of section 344(f) of the Companies Act 61 of 1973. A demand for payment has not been met. A court order has not been complied with.

3. The threshold in section 345 was overcome by the applicant.

4. A company's assets may exceed its liabilities, but if it is still unable to pay its debts the company is said to be commercially insolvent.

5. The Court retains a discretion – although the discretion to refuse to grant an order sought by an unpaid creditor is a 'very narrow one' that is rarely exercised and then in special or unusual circumstances only.

6. Innes CJ made the following remark in dealing with the defence of solvency in the well-known case of *De Waard v Andrews and Thienhaus Ltd* 1907 TS 727 at page 733:

> Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says:
>
> "*I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities.*"
>
> To my mind the best proof of solvency is that a man should pay his debts; and therefore, I always examine in a critical spirit the case of a man who does not pay what he owes.

7. In *Marais v Westline Aviation (Pty) Ltd and Others* (1193/2021) [2022] ZAFSHC 144 (30 May 2022) it was stated that factual insolvency may be established indirectly as stated in *Mars.*[11] *Absa Bank Ltd v Rheboksskloof* 1993 (4) SA 436 (C) at pages 446H – 447J brings the point home that weight should be attached to a

[11] Bertelsmann *et al*, Mars: *The Law of Insolvency in South Africa*, (10th Edition), Internet: ISSN 2224-4743, Jutastat e-publications, Chapter 4 Acts of insolvency, 4.3 Failure to satisfy judgment debt at pages 91 to 94.

respondent's unexplained failure to pay his debts. The best proof of solvency is to settle one's debts. It just does not make sense why Yenza does not honour their debts if they have the assets to do so.

The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.

8. Of late Wallis JA considered the test for commercial insolvency in a unanimous judgment of the Supreme Court of Appeal. He held as follows in *Murray NO and others v African Global Holdings (Pty) Ltd* 2020 (2) SA 93 (SCA):

[31] The argument about timing misconceived the nature of commercial insolvency. It is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company 'is able to meet its current liabilities, including contingent and prospective liabilities as they come due'. Put slightly differently, it is whether the company —

'has liquid assets or readily realizable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading — in other words, can the company meet current demands on it and remain buoyant?'

Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading.

[32] In the case of the Group the answer to this was clearly that it would not…

[10] FirstRand persists in seeking an order in terms of which Yenza is finally wound up. The above notwithstanding; this is what Yenza argues, in desperation, in their heads of argument:

1. Yenza opposes the confirmation of the provisional winding up order.

2. Although Yenza accepts that it is indebted to FirstRand, it denies that it is indebted to FirstRand in the amount as alleged. FirstRand launched the application on an alleged indebtedness of R2,864,330.43. It is now common cause that Yenza is indebted for much less, i.e., only an amount of R1,835,570.90. It is submitted that this approximately 35% reduction in FirstRand's claim causes this to be an entirely different case than the one FirstRand attempted to make out in its founding papers.

3. Yenza denies that it is either factually or commercially insolvent. Yenza's assets exceed its liabilities with at least just over R1 million, probably more. It is common cause that notwithstanding the provisional order for winding up, Yenza is continuing to pay instalments on its indebtedness to FirstRand. In so far as the liability in respect of the bond over its fixed property is concerned, FirstRand has a bond over that property and the property is worth much more than the amount of the bond.

4. FirstRand alleges that it would be just and equitable for Yenza to be wound up. Yenza denies that it would be just and equitable for it to be wound up. In addition to FirstRand's allegations that Yenza is factually and commercially insolvent, it seems that the sole independent ground based on which FirstRand alleges in the founding affidavit that it would be just and equitable to liquidate Yenza, is to be found in paragraph 82.9 of the founding affidavit. There it is stated that:

> In the light of the precarious financial position of the respondent, [the applicant] submits that there exists a sufficient prospect that an investigation of the affairs of the respondent will result in a pecuniary benefit for creditors which consequently renders the placing of the respondent in winding up just and equitable.

5. It is submitted that this conclusion is entirely unfounded. It is submitted that FirstRand had to allege more and prove it on a balance of probability already in the founding affidavit in order for the application to succeed on this basis.

6. Yenza submits that FirstRand has not satisfied the above jurisdictional requirements. Yenza contends in addition that it is solvent as envisaged in section 4(1) of the Companies Act 71 of 2008 ("the Companies Act 2008"). This Court ought therefore to determine whether FirstRand has satisfied the jurisdictional requirements of section 79(2) and 81(1) of the Companies Act 2008, i.e., whether

it is just and equitable for Yenza to be wound up. It is submitted that FirstRand has also not satisfied this requirement and that its case is lacking in this regard.

9. In any event, as appears from FirstRand's papers, it based its application squarely on the provisions of the Companies Act 1973. In the result, it is submitted that if this court finds that Yenza is solvent, and it is submitted that it is, the provisional order for winding up ought to be discharged for this reason alone.

10. Yenza argues that FirstRand brought the application for Yenza's winding up on the basis that it is "indebted and exposed" to FirstRand in the amount of R2,864,330.43. It was alleged that the last payment received in reduction of Yenza's exposure to FirstRand was made on 8 November 2022 in the amount of R19,000.00 in respect of a written loan agreement entered into between FirstRand and Yenza on or about 26 April 2017. It is common cause that the above no longer holds true. Yenza owes much less, namely only an amount of R1,835,570.90. This is even less than the amount of R1,846,536.36 alleged by Yenza at paragraph 36 of the answering affidavit. In addition, it is not correct that Yenza made its last payment towards its indebtedness to FirstRand on or about 26 April 2017. It is common cause that Yenza made a deposit in terms of the FirstRand platinum overdraft facility on 22 December 2022. It is further common cause that notwithstanding the provisional order of liquidation being granted, Yenza is continuing to service the instalments on its FirstRand indebtedness. It is submitted that this is significant and that the application, which was brought for the winding up of Yenza, now with the changed facts, faces an entirely different landscape and ought, for this reason alone, not to be granted.

[11] FirstRand stands fast; and correctly so, that Yenza is indebted to the applicant t/a First National Bank by way of a term loan agreement and a facility agreement. The First National Bank indebtedness, of Yenza to the applicant, forms the subject of an undisturbed order of this court; Yenza is also indebted to the applicant t/a Wesbank by way of two instalment sale agreements. It is explained that Yenza was, at the time of the issuing of the present application, indebted to the applicant in terms of three instalment sale agreements and has subsequently settled its indebtedness to the applicant in respect of one such instalment sale

agreement; the full particularity of Yenza's indebtedness to FirstRand (i.e. both the First National Bank and Wesbank indebtedness) is evident from the founding affidavit at paragraphs 24 to 48. The facts of this matter illustrate that notwithstanding Yenza being ordered to make payment of a portion of its indebtedness to the applicant, as ordered on 5 May 2022, some 14 months later it has still been unable to do so.

[12] FirstRand explained that Yenza has only managed to make a partial reduction of the quantum of said indebtedness. It stands that Yenza cannot meet its debts.

[13] Slotting in with the above has it been proven that Yenza is factually insolvent because the respondent's liabilities, fairly estimated, exceed its assets fairly valued. If they were not insolvent, they would have been able to meet their debts; that is the inference on their own version.

[14] There exists no expert evidence whatsoever as to the market value of Yenza's assets. The individuals that deposed to affidavits on behalf of Yenza failed to qualify themselves as experts. "Moreover, no process of reasoning which led to the recordals of the purported value of Yenza's assets, as set out in its unsigned financial statements, including the premises from which the reasoning proceeds, is either dealt with or disclosed."[12] In *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 3781 G – H, Wessels JA emphasised the necessity for the facts to be established and the reasons to be disclosed in the following passage:

As I see it, an expert opinion represents his reasonable conclusion based on certain facts or data, which are either common cause or established by his own evidence or that of some other competent witness… Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed…

[15] The issue of section 4 of the Companies Act, 2008 came as an afterthought in the arguments of the respondent and has no application in determining whether Yenza is solvent (or not) for purposes of the present application. Yenza's submissions are misplaced. The unreported

[12] Paragraph 20 of the FIRSTRAND BANK LIMITED'S HEADS OF ARGUMENT (FILED IN SUPPORT OF A FINAL ORDER OF LIQUIDATION OF THE RESPONDENT).

judgment of *Cumming v Nuvest Chemicals (Pty) Ltd* (38402/15) [2017] ZAGPJHC 180 (19 May 2017) has the last say.

APPLICABILITY OF SECTION 4 OF THE NEW ACT

[22] Mr Theron submitted that in assessing the Respondent's solvency, regard may only be had to the audited financial statements of February 2015 and not to the unaudited financial statements of February 2016, which he referred to as a 'document' as section 4, read with sections 28 and 29, of the New Act obliged the court to only have regard to financial statements which complied with the requirements of such sections. That was so, he submitted, because the New Act has repealed the Old Act in its totality. In terms of Section 224(3), read with Schedule 5, and particularly Section 9(1) of Schedule 5 of the New Act, all companies are now wound up in terms of the New Act. Section 9(1) of Schedule 5 of the New Act reads as follows:

'Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).' (emphasis provided)

[23] The liquidation, so the argument continued, occurs in terms of the New Act. Section 4(1) of the new Act reads as follows:

"For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonable foreseeable financial circumstances of the company at that time–

(a) the assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued; and

(b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of –

(i) 12 months after the date on which the test is considered; or

(ii) in the case of a distribution contemplated in paragraph (a) of the definition of "distribution" in section 1, 12 months following that distribution."

[24] Section 4(2) of the New Act imports the requirements of Sections 28 and 29 of the New Act when accounting information regarding the company is considered. Thus, the argument continued, the Court when faced with an application for the liquidation of a company in terms of the New Act, should determine whether the company is solvent by employing section 4 to do so. If the court determines that it is insolvent, the company may only be wound up in terms of Schedule 5, read with the Old Act, and is enjoined by the New Act, in Section 4, to have regard to accounting records as contemplated in Sections 28 and 29. Once it is shown that the company is commercially insolvent (Section 4(1)(b) of the new Act) by having regard to admissible evidence, i.e. accounting records that comply with Sections 28 and 29 of the new Act, the company should be liquidated, so the argument ran.

[25] I do not agree that section 4 of the New Act has any application in determining whether a company is solvent or not for purposes of the current enquiry.

[26] The concept 'solvency and liquidity test' has a particular purpose and application in the New Act. In section 1 of the New Act, the definitions clause, 'solvency and liquidity test' is defined as '..the test set out in section 4(1)' (my emphasis). Section 4 provides that 'For purposes of this Act, a company satisfies the solvency and liquidity test at a particular time if...... ' (my emphasis). Such test must be satisfied when for example loans or other financial assistance is to be provided to directors, distributions are authorised by the board, or the board resolves to offer a cash payment in lieu of awarding a capitalisation share. The test is applied differently depending on the section that puts the test in operation. The provisions of the Old Act that relate to winding up are to be applied as if they had not been repealed.

[27] In *Firstrand Bank Ltd v Wayrail Investments (Pty) Ltd*, Vahed J held at paras [34] and [35] as follows:

> "[34] As best as I can make out, the sections of the 2008 Act that refer to and call for the application of the solvency and liquidity test set out in section 4, are those dealt with in paragraphs 24 to 33 above. To my mind, the solvency and liquidity test, as described in section 4, is a device or tool for the purposes of implementing the provisions or satisfying the restrictions imposed in or by those sections.
>
> [35] Significantly, neither section 81 (or for that matter the whole of Part G) nor Item 9 of Schedule 5 of the 2008 Act refers to the solvency and liquidity test. It refers simply to a solvent company."

[16] The evidence pleaded by FirstRand and Yenza as well as the submissions of counsel convinces that the final winding up of Yenza will be just and equitable, in the interest of justice and to the advantage of the creditor(s). Yenza is unable to pay its debts in the ordinary course of its business dealings and affairs, is financially distressed and in a state of commercial insolvency; Yenza is hopelessly factually insolvent in that its liabilities fairly estimated, exceeds it assets, fairly valued.

**[17] ORDER**

1. It is ordered that the respondent close corporation be placed under final liquidation.
2. The costs of this application shall be paid out of the estate of the respondent.

[redacted]

**M OPPERMAN, J**

**APPEARANCES**

Applicant

**S TSANGARAKIS SC**
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Bloemfontein

Respondent

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