



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

(1) Reportable: No
 (2) Of interest to other judges: No
 (3) Revised: Yes
 SIGNATURE: [Redacted Signature]

CASE NUMBER: 62454/2021

In the matter between:

BUSINESS PARTNERS LIMITED

APPLICANT

and

MONTACHE VILLAS (PTY) LTD

RESPONDENT

Coram: A Vorster AJ

Heard: 17 April 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, by uploading the judgment onto <https://sajustice.caselines.com>, and release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 6 September 2023.

ORDER

1. The respondent company be and is hereby placed under final winding-up.
2. Cost of the application will be cost in the liquidation, and may be recovered on a scale as between attorney and client.
3. Cost of opposition of the application is disallowed and will not be cost in the liquidation.

JUDGMENT

A Vorster AJ

Introduction

- (1) This application concerns winding-up proceedings in terms of the provisions of Chapter 14 of the **Companies Act**, No. 61 of 1973 ('the old **Companies Act**'), and Part G of Chapter 2 of the **Companies Act**, No. 71 of 2008 ('the new **Companies Act**').¹

- (2) The applicant is a business loan provider that provides loan finance to businesses for expansion, working capital, equipment, takeovers, property, franchises, or management buyouts.

- (3) The respondent obtained approval to develop (rezone) an immovable property, the Remaining Extent of Holding 52, Raslouw Agricultural Holdings, Pretoria, into high density residential units. The development property, together with certain units situated in a Sectional Title Scheme called Montache Villas in Randfontein, forms the whole or greater part of the respondent's assets or undertaking (business).

¹ **FirstRand Bank Ltd v Lodhi 5 Properties Investments CC** 2013 (3) SA 212 (GNP) at [35]; **FirstRand Bank Ltd v Bunker Hill Investments** 499 CC [2012] JOL 29144 (GSJ); **Standard Bank of South Africa Ltd v R-Bay Logistics CC** [2013] 1 All SA 364 (KZD) at [40], 2013 (2) SA 295 (KZD) at [37] & **Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd** [2014] 1 All SA 507 (SCA) at [22], 2014 (2) SA 815 (SCA) at [22].

(4) On 14 June 2018 the applicant and the respondent concluded a written loan agreement in terms of which the applicant advanced in excess of six million rand to the respondent. The express purpose of the loan was to finance the development of the property in Pretoria. The agreement provided that:

(4.1) the bulk of the loan was to be utilized for land and buildings (i.e. construction costs in terms of approved building plans);

(4.2) the loan in the sum of R6'534'700.00 (capital + interest) had to be repaid in one installment on 1 February 2019;

(4.3) 'standard terms and conditions' were incorporated into the principal agreement and the parties were to conclude a 'royalty agreement';

(4.4) it was a condition precedent that the respondent provides the following security:

(4.4.1) deeds of surety given by three of the directors of the respondent²;

² Two of the three directors resigned on 8 April 2019.

- (4.4.2) a first covering mortgage bond over the property situated in Pretoria;
 - (4.4.3) a first covering mortgage bond over the sectional title units in the Montache Villas Sectional Title Scheme;
 - (4.4.4) cessions to the applicant of the three directors' loan accounts in the respondent.
- (5) On 14 June 2018 the applicant and the respondent concluded the written royalty agreement foreshadowed in the loan agreement. The royalty agreement provided that the respondent will pay the applicant royalty fees in the amount of R465'000.00 (plus VAT), upon the successful transfer of 6 units out of the development property in Pretoria, with R77'500.00 being the unit price per successful transfer. The balance of the sum of R465'000.00 was payable on or before 1 July 2019, irrespective of whether units were transferred or not.

- (6) On 19 November 2019, before the dates for repayment of the loan amount and royalties became due, the applicant and respondent concluded an addendum to the respective agreements. The addendum amended the repayment date of the loan amount, and the amounts and payment dates of the royalties. In terms of the addendum the loan still had to be repaid in one installment, but the repayment date was postponed to 1 June 2019. The addendum provided for the respondent to pay the applicant royalty fees in the amount of R540'000.00 (plus VAT), upon the successful transfer of 3 units out of the development property in Pretoria, with R180'000.00 being the unit price per successful transfer. The balance of the sum of R540'000.00 was payable on or before 1 July 2020, irrespective of whether units were transferred or not.
- (7) The agreements contained ancillary provisions, and conditions precedent, that are not relevant. What is relevant is that all conditions precedent were met, and the applicant complied with its obligations by advancing the loan amount to the respondent. Because both the loan and royalty agreements expressly fixed a time for performance, a culpable failure by the respondent to repay the loan, or pay royalties, on or before the due dates automatically placed it in mora ex re, without the need for any intervention on the part of the applicant.

- (8) The respondent failed to pay the loan amount as and when it fell due. It also failed to pay the royalties as and when it fell due. The deponent to the respondent's answering affidavit, who is the only remaining director of the respondent, alleges that the respondent's inability to repay the loan amount and royalties was because of the deleterious effect the Covid-19 pandemic in South Africa had on the building and property development industry, and delays caused by development approvals. It is notable, when considering this statement, that the first confirmed case in South Africa was on 5 March 2020, and the national state of disaster, with its concomitant restrictions, was only declared on 15 March 2020, close to a year after the due date for repayment of the loan amount. The Covid-19 pandemic could accordingly not have had any effect on the respondent's ability to repay the loan, when it became due. Similarly, the royalties had to be repaid by 1 July 2020, two and a half months after the national state of disaster was declared, and almost two years after the royalty agreement was concluded.
- (9) The reason proffered by the deponent to justify the respondent's failure to comply with its contractual obligations should be approached with a healthy dose of skepticism. However, nothing turns on this, the only legally relevant fact is that the debts became due and payable, and the respondent failed to discharge the debts.

- (10) On 3 June 2021 the applicant caused a statutory demand in terms of Schedule 5, Item 9 of the new **Companies Act**, read with sections 344(f) & 345(1)(a) of the old **Companies Act**, to be served on the respondent's registered address by sheriff. Copies of the demand was also subsequently sent to two of the respondent's directors via email. It is common cause, alternatively not disputed on any credible grounds, that the statutory demand was dispatched to, and received by the respondent in the prescribed manner.
- (11) After service of the demand, the respondent neglected to pay the sum claimed or secure or compound for it to the reasonable satisfaction of the applicant. In addition, after the demand was served, from May 2021 – October 2021, the respondent's only remaining director engaged the applicant's attorneys in correspondence with a view of compromising the applicant's claims because the respondent was unable to satisfy the debts. These attempts to compromise the claims were acts of insolvency as defined in section 8(e) of the **Insolvency Act**, No. 24 of 1936.
- (12) On 8 December 2021 the applicant issued out an application for the winding-up of the respondent in terms of section 345(1)(a) & (c), read with section 344(f) of the old **Companies Act**. The application is based on the respondent's actual and deemed inability to pay its debts.

The winding up application

- (13) The applicant has locus standi to apply for the winding-up of the respondent because it is a creditor of the respondent. In fact, on the respondent's version the applicant is its only major or significant creditor. The affidavits do not deal with prospective liabilities, but one can accept that the respondent is, and will in future become liable for municipal debts due to the local authorities in whose area of jurisdiction its properties are situated.
- (14) The court has jurisdiction over the registered address of the respondent and accordingly has the requisite jurisdiction to consider an application for the winding-up of the respondent.³
- (15) The applicant has claims against the respondent in excess of R100.00. As things stand, the applicant's claims against the respondent are in excess of R7'000'000.00. The bases of the claims are set out in the introductory paragraphs. The applicant holds securities for the due fulfillment of the claims enunciated in paragraph 4.4 supra.

³ **Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd intervening)** 2012 (1) SA 191 (WCC) & **CIPC Practice Note 2** of 2012.

(16) I am satisfied that the applicant strictly satisfied all the conditions imposed by section 344(f), read with section 345(1)(a), of the old **Companies Act**,⁴ for the winding-up of the respondent, by demonstrating that the respondent is deemed to be unable to pay its debts, based on the following undisputed or common cause facts:

(16.1) a demand for payment has not been met;

(16.2) the applicant is a creditor for a sum of not less than R100.00 then due and payable;⁵

(16.3) service on the company's registered office of a demand requiring payment of the sum had been effected;⁶ and

⁴ I considered the incidence of onus, and the test whether the onus was discharged, with reference to the dicta in **Phase Electrical Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd** 1973 (3) SA 914 (W) at 917G–918B.

⁵ **Barclays Bank (DC&O) v Riverside Dried Fruit Co (Pty) Ltd** 1949 (1) SA 937 (C) at 948.

⁶ **BP and JP Investments (Pty) Ltd v Hardroad (Pty) Ltd** 1977 (3) SA 753 (W) at 760A.

(16.4) the respondent has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the applicant.

(17) I am further satisfied that it is proved that the respondent is unable to pay its debts as provided for in section 344(f), read with s 345(1)(c) & (2) of the old **Companies Act**.⁷ On the respondent's own version it has no cash or expendable capital available from current revenue or readily available resources to satisfy the applicant's claims. In **Administrator, Transvaal and others v Theletsane and others** 1991 (2) SA 192 (A) the then Appellate Division dealt with the circumstances in which an applicant may rely on allegations in an answering affidavit to make out its case. I am satisfied that the Court can fairly adjudicate whether the respondent is able to pay its debts having regard to the evidence adduced on behalf of the respondent.

(18) In **Standard Bank of South Africa v R-Bay Logistics**⁸ the court held as follows on whether for the purposes of section 344(f) of the old **Companies**

⁷ **Rand Produce Supply Co v Orchards Dairy Ltd** 1912 WLD 124 at 127; **Ex parte East London Café (Pty) Ltd** 1931 EDL 111 at 112 & **Chandlers Ltd v Dealesville Hotel (Pty) Ltd** 1954 (4) SA 748 (O) at 749.

⁸ *Supra* at par [27].

Act it is possible for a court to conclude, upon evidence of actual insolvency, that a company is also unable to pay its debts:

“There has been judicial debate about whether, for the purposes of Section 344(f) of the old Companies Act, it is possible for the Court to conclude, upon evidence of actual insolvency, that a company is “unable to pay its debts”. Certainly, proof of the actual insolvency of a respondent company might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts but that conclusion does not necessarily follow. On the other hand, if there is evidence that the respondent company is commercially insolvent (ie cannot pay its debts when they fall due) that is enough for a Court to find that the required case under Section 344(f) has been proved. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court’s residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under Section 344(f).”

- (19) The respondent does not contend that it is solvent and adduced no evidence of such solvency⁹. It is common cause, alternatively not disputed on any credible grounds, that on 25 October 2021 the respondent owed the applicant

⁹ **Standard Bank of South Africa Ltd v R-Bay Logistics CC** supra at [40].

an amount of R7'470'053.89 with interest at the then rate of 9% per annum which, notwithstanding being due and payable, remains unpaid.

(20) I therefore conclude that the respondent is unable to pay its debts and insolvent. Absent a defence situated within one or more recognized legal constructs, the applicant is entitled to an order that the respondent be placed under final winding-up. The application is opposed by the respondent on the bases that:

(20.1) the respondent intends to commence with business rescue proceedings that may result in the respondent returning to commercial solvency, or at least secure a greater advantage to its creditors;

(20.2) the respondent is not factually insolvent because its assets exceed its liabilities.

(21) I will demonstrate that none of the bases upon which the application is opposed are legally tenable, and the respondent cannot rely on it to defeat the applicant's claim for a winding-up order.

Business rescue proceedings

- (22) Section 129 of the new **Companies Act** provides for business rescue proceedings to commence through a resolution by the board of directors, and section 131 through an order of court.
- (23) A resolution by the board of directors to commence with business rescue proceedings must be preceded by a majority decision of the board, unless the memorandum of incorporation provides otherwise. The resolution must also comply with the requirements of section 73 of the Act. The resolution will only be effective once it is filed with the Companies and Intellectual Property Commission accompanied by a section 129(7) notice. A resolution may not be adopted if liquidation proceedings already commenced.
- (24) Section 131 of the Act provides for affected persons such as shareholders, creditors, unions, or employees to initiate business rescue proceedings in the event of the directors of the company not having adopted a resolution contemplated in section 129. Affected persons may apply to court at any time for an order placing the company under supervision and commencing business rescue proceedings.

- (25) In terms of section 133 of the Act once business rescue commences, there is an automatic general moratorium or stay on legal proceedings against the company and its property. Claims against the company may only be enforced with the consent of the business rescue practitioner or leave of the court. The temporary moratorium is effective on commencement of business rescue proceedings and temporarily prohibits all legal proceedings against the company under business rescue.¹⁰
- (26) Legal proceedings are interpreted widely by the courts¹¹ and in terms of section 131(6) of the Act a creditor may not proceed with a winding-up application until a business rescue application was adjudicated upon.
- (27) In **Richter v Absa Bank Limited** 2015 (5) SA 57 (SCA), the Supreme Court of Appeal considered whether an application for business rescue could be

¹⁰ **Merchant West Working Capital Solutions (Pty) Ltd. v Advanced Technologies and Engineering Company (Pty) Ltd and Another** (13/12406) [2013] ZAGPJHC 109 (10 May 2013) 8.

¹¹ **LA Sport 4 x 4 Outdoor CC v Broadsword Trading 20 (Pty) Ltd** (A513/2013) (2015) ZAGPPC 78 (26 February 2015).

made in terms of section 131 of the Act, after a final liquidation order had been granted. Section 131(1) allows affected persons to apply to court 'at any time' for an order placing the company under business rescue. Section 131(7) permits a court, when considering an application for business rescue, to grant an order provided for in subsections 131(4) & (5) of the Act 'at any time' during 'any liquidation proceedings'. The court held that a company continues to exist notwithstanding a final liquidation order having been granted. The company is merely divested of control of its affairs in favor of the liquidator. The company will be dissolved once the liquidator finally winds up the company's affairs and the Master issues a certificate to that effect. The court accordingly held that it is competent to apply for business rescue in terms of section 131 of the Act, even after a final liquidation order has been granted.

- (28) From what is stated above it is clear that at any time before the final winding-up of the company business rescue proceedings may be commenced with and such proceedings will suspend any liquidation proceedings until (i) the court has adjudicated upon the application; (ii) the business rescue proceedings end, if the court makes the order applied for.

- (29) Having regard to the effect of business rescue proceedings on insolvency proceedings it will not be appropriate for a court to dismiss a winding-up application on the basis that business rescue proceedings commenced, but merely to adjourn the hearing, conditionally or unconditionally, until such time as the suspension is lifted in the manner prescribed above.
- (30) However, it is a prerequisite for successful reliance on the moratorium placed on insolvency proceedings that business rescue proceedings should have commenced. The mere intention to commence with business rescue proceedings is not sufficient. Besides the fact that the Act requires the proceedings to have commenced, the recent judgment of the SCA in the matter of **PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services and Others** (Case no 543/21) & **Brita De Robillard NO and Another v PFC properties (Pty) Ltd and Others** (Case No 409/22) [2023] ZASCA 111 (21 July 2023) is support for the proposition that a court may grant a final winding-up order, notwithstanding the fact that business rescue proceedings commenced, to prevent the proceedings from being abused as a stratagem to frustrate a creditor's bona fide claim for the winding-up of an insolvent company, where the company has no prospects of being rescued.

- (31) Business rescue proceedings are a mechanism to facilitate the rehabilitation of a company that is financially distressed, aimed at restoring a company to solvency. The court considering whether the commencement of business rescue proceedings is an impediment to the granting of a winding-up order should satisfy itself that a cogent evidential foundation exist to support the existence of a reasonable prospect of business rescue,¹² and that the business rescue application does not constitute an abuse of process.
- (32) In the present case business rescue proceedings hadn't commenced and all the court has is vague and unsubstantiated allegations that the respondent may benefit from such proceedings. Although it is stated in the answering affidavit that business rescue proceedings will "literally be in the best interest of all the parties concerned", the benefit to affected persons or entities are not dealt with at all. Later in the judgment I will deal with the proposition that no company exists for its own sake, and the existence of a company should also serve the interests of other affected persons or entities, whose interests should be balanced.
- (33) Advantage to creditors and calculation of a dividend are in any event not facts that may have a bearing on the exercise of the Court's discretion.

¹² **Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and others** 2012 (2) SA 378 (WCC).

- (34) Affected persons remain at liberty to commence with business rescue proceedings at any time prior to the final winding-up of the respondent. The granting of a winding-up order does not disentitle any affected person from pursuing this course if they are genuinely invested in such a process.
- (35) The paucity of allegations about the benefits of business rescue proceedings and the fact that proceedings hadn't commenced militates against the court exercising its discretion against granting a winding-up order on this basis. Accordingly, this defence must fail.

The respondent is not factually insolvent

- (36) Based on cashflow projections attached to the answering affidavit Counsel for the respondent contended that the respondent's assets far outstripped its liabilities and that the company was not factually insolvent but merely commercially insolvent. It was argued that this fact should move the court to exercise its discretion against granting a winding-up order.

- (37) If a company's assets exceed its liabilities, but it is still unable to pay its debts, the company is commercially insolvent.¹³
- (38) In considering the manner in which commercial insolvency, as opposed to actual insolvency, should influence the court's discretion, regard should be had to the following remarks made in **Absa Bank Ltd v Rhebokskloof (Pty) Ltd** 4 1993 (4) SA 436 at 440F:

"The concept of commercial insolvency as a ground for winding-up a company is eminently practical and commercially sensible. 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

¹³ **Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd** 1962 (4) SA 593 (N) at 597 & **FirstRand Bank v Lodhi** 5 supra at para 30.

liable to be wound-up. As Caney J said in Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd 1962 (4) SA 593 (D) at 597E-F:

'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.'

Notwithstanding this the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, ex debito justitiae, to a winding-up order (see Henochsberg on the Companies Act 4th ed vol 2 at 586; Sammel and Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662F)."

- (39) The applicant is as entitled to a final winding-up order in the case of commercial insolvency as it would be in the case of actual insolvency. Accordingly, this defence must also fail.

Request for a provisional order to be granted

- (40) From the Bar, Counsel for the respondent argued that, in the event of the court finding that the applicant is entitled to a winding-up order, a provisional order be granted to allow the respondent to advance reasons on a return date why the respondent should not be finally wound-up.
- (41) The court retains a discretion to refuse to grant an order sought by an unpaid creditor. This discretion is a 'very narrow one' and is rarely exercised and then in special or unusual circumstances only'.¹⁴
- (42) Two types of judicial discretion emerged in our case law, namely a discretion in the true sense or a discretion in the loose sense¹⁵. A discretion in the true sense is where the court has a wide range of equally permissible options

¹⁴ **Afgri Operations Ltd v Hambs Fleet (Pty) Ltd** 2022 (1) SA 91 (SCA) at para 12.

¹⁵ **Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and another** [2016] JOL 33413 (CC) at par 82 – 97. A discretion in the true sense is sometimes referred to as a discretion in the strict or narrow sense and a discretion in the loose sense is sometimes referred to as a discretion in the broad or wide sense. I will adopt the same nomenclature as the Constitutional Court and refer to these two types of discretion as a discretion in the true sense and a discretion in the loose sense.

available to it¹⁶. A discretion in the loose sense means no more than that the court is entitled to have regard to several disparate and incommensurable features in coming to a decision¹⁷. To determine whether a final winding-up order should be granted the discretion to be exercised by the court is a discretion in the true sense.

- (43) The court will exercise a judicial discretion where it properly directs itself to all the relevant facts and (legal) principles,¹⁸ which are neither disparate nor incommensurable, and where it discharged the duty to provide reasons to rationalize the way it exercised its discretion.¹⁹ In consideration of the aforesaid, the facts relevant to the exercise of the court's discretion are:

¹⁶ **Media Workers Association of South Africa and others v Press Corporation of South Africa Limited** 1992 (4) SA 791 (A) at 800E.

¹⁷ **Knox D'Arcy Ltd and others v Jamieson and others** [1996] ZASCA 58, 1996 (4) SA 348 (SCA) at 361I.

¹⁸ **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others** 2000 (2) SA 1 (CC) at para [11].

¹⁹ **Helen Suzman Foundation v Judicial Service Commission** 2015 (2) SA 498 (WCC) at par 14 – 16.

- (43.1) whether a recognized ground for liquidation of the respondent company, as provided for in sections 344 & 345 of the old **Companies Act**, had been established on the affidavits;
- (43.2) whether the applicant has the requisite locus standi to apply for the winding-up of the respondent company;
- (43.3) whether the court has jurisdiction for purposes of winding-up the respondent company;
- (43.4) whether the application was brought in the prescribed format (either Form 2 or Form 2(a)), with a founding affidavit);
- (43.5) whether the affidavit in support of the application contains all necessary averments such as locus standi of applicant, jurisdiction, insolvency of the respondent, grounds for winding-up, any such facts as may have a bearing on the exercise of the court's discretion, such as security held by the applicant for its claim and assets of the company, security for costs of the application, that service has been effected as provided in section 346(4) & 346(4A) of the old **Companies Act**, etc.;

- (43.6) whether the application was served in the prescribed manner and notice of the application was given in the prescribed manner to the Master, the South African Revenue Services; the respondent's registered address employees of respondent, and trade union of employees;
 - (43.7) whether an affidavit was filed on behalf of the applicant setting out how section 346(4A)(a) had been complied with.
- (44) The principles relevant to the exercise of the court's discretion are:
 - (44.1) There are different paradigms of legitimacy for the existence of a company, however, no company exists for its own sake. The existence of a company should either serve the interests of its shareholders, creditors, employees (or their representatives), the State, or the community, and these interests should be balanced. Where a company's continued existence no longer serves the interests of these affected persons or entities, or the interests are materially unbalanced, its existence is no longer legitimate. What this means is that a company in financial distress should not be

saved for its own sake, but for the sake of affected persons or entities.

(44.2) Where a company's financial position is so dire that it is no longer able to continue trading because, (i) its liabilities exceed its assets, or (ii) it cannot pay its debts as and when they fall due, at least prima facie the existence of the company no longer serves the interests of affected persons or entities and the company should be wound-up to ensure a fair and orderly distribution of its assets among creditors.

(44.3) Neither the old, nor the new **Companies Act** require a final order to be preceded by a provisional order. The default position is therefore that a final order should be granted²⁰ unless the court is satisfied, on facts properly established on affidavit, that the interests of all affected or interested parties will not be adequately safeguarded if a final winding-up order is granted, in which case a provisional order should be granted.

²⁰ The position is aligned with the Practice Manuals of the GSJ and the GNP which require an applicant to seek a final winding-up order in the notice of motion.

(44.4) In practical terms this would mean that when it is established on the affidavits that:

(44.4.1) there are affected or interested persons or entities, without knowledge of the application;

(44.4.2) with a direct and substantial interest in the liquidation of the company;

(44.4.3) whose legal interests in the company will be prejudicially affected by a final winding-up order, because the liquidation of the company cannot be sustained or carried into effect without prejudicing them;

a provisional order should be granted, calling on such affected or interested persons or entities to put forward reasons why the court should not order the final winding-up of the company.

(44.5) I'm emboldened in my view by Items 9(1) & (2) of Schedule 5 of the new **Companies Act**⁸ which retained the application of section 346A of the old **Companies Act** to the winding-up of companies under the new **Companies Act**, and which requires, in addition of

the provisional order being served on the company, service of the provisional order on (i) trade unions;²¹ (ii) employees of the company;²² (iii) the South African Revenue Services;²³ (iv) publication in the Government Gazette and a local newspaper; (v) notice to all known creditors by registered post.

(44.6) The court may also grant a provisional order where an applicant in unopposed insolvency proceedings only manages to establish a prima facie case,²⁴ i.e., does not strictly satisfy each of the conditions for the winding-up of the respondent company a priori.

(45) In exercising its discretion not to grant a final order the merit of legal certainty and the like treatment of similarly situated litigants should be emphasized by the court.²⁵ It is inimical to the rule of law, which is a foundational value of the

²¹ Section 346A(1)(a) of the old **Companies Act**.

²² Section 346A(1)(b) of the old **Companies Act**.

²³ Section 346A(1)(c) of the old **Companies Act**.

²⁴ **Kalil v Decotex (Pty) Ltd** [1988] 2 All SA 159 (A), 1988 (1) SA 943 (A) at 976A–B.

²⁵ **Van der Walt v Metcash Trading Limited** [2002] ZACC 4; 2002 (5) BCLR 454 (CC); 2002 (4) SA 317 (CC) at para 39.

democratic State,²⁶ that cases with singularity of facts should have divergent judicial outcomes. Specific rules and criteria, precisely formulated, should guide the court in exercising its discretion. This will provide legal certainty to the parties, curtail litigation, facilitate the proceedings, and reduce cost. One of the overall objectives of insolvency law is after all predictability.

- (46) There is of course another reason why a final, as opposed to a provisional, winding-up order should be the default position in liquidation proceedings. In liquidation proceedings, once successful, the commencement date is retrospective to the date the application is issued,²⁷ as opposed to sequestration proceedings which commence upon the granting of a provisional sequestration order.²⁸ In terms of section 11 of the **Insolvency Act** a provisional sequestration order is published. The issuing of a liquidation application is not published. Accordingly, publication of the commencement date of sequestration proceedings takes place but publication of the commencement date of liquidation proceedings don't. There are dire consequences for creditors and the public at large who deal with a company

²⁶ **Masetlha v President of the Republic of South Africa and Another** (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007) at para [173].

²⁷ Section 348 of the old **Companies Act**.

²⁸ Section 10 of the **Insolvency Act**.

after the commencement date of liquidation, and who may be oblivious to the fact that liquidation proceedings commenced. Section 341 of the old **Companies Act** provides as follows:

“(1) *Every transfer of shares of a company being wound-up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void.*

(2) *Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.”*

It is therefore imperative that a court curtail proceedings and grant a final winding-up order, as opposed to a provisional order, unless there are good reasons to grant a provisional order.

(47) In summary, unless there are legally relevant facts that militates against it, the granting of a final liquidation order should be the default position. In this case there are no legally relevant facts that militates against the granting of a final liquidation order. The applicant complied strictly with all the substantial and

procedural requirements of the relevant laws for the respondent to be placed under final winding-up. Should I exercise my discretion against granting such an order I would not exercise my discretion judicially. The applicant is entitled to a final winding-up order.

Costs

(48) In **Gerber v Chris Vlok Property Services Tshwane CC** (49324/2020) [2021] ZAGPPHC 339 (20 May 2021), a case in which I gave judgment in this court, at paras 38 & 39 I said the following:

“(38) *To determine whether the respondent should pay costs on an attorney and client scale it needs to be established whether the respondent’s opposition was frivolous and vexatious and amounted to an abuse of the court process.*

(39) *The respondent never had a realistic chance of defeating the applicant’s claim based on an alleged ius retentionis. The ‘improvements’ precipitated an illegality, and the respondent could not in good conscience have believed that the ‘improvements’ were useful. It should have been apparent to the respondent that the only conceivable outcome for the*

applicant would be to remove the improvements and restore the property to a residence. To persist with a completely untenable defense is prima facie frivolous and vexatious."

I remain of this view.

- (49) The respondent persisted with completely untenable defenses to defeat the applicant's bona fide application for liquidation. These defenses were raised in vague and vacuous terms, and in certain instances not even properly on the papers. The respondent never had a realistic chance of successfully opposing the application. I therefore hold that the respondent's opposition of the application was prima facie frivolous and vexatious.
- (50) Under these circumstances the applicant should not be out of pocket, and its cost in the liquidation should be recovered on a scale as between attorney and client.
- (51) Because the opposition of the application was frivolous and vexatious, the cost of opposing the application should not erode the equity in the insolvent estate and accordingly not be cost in the liquidation.

Conclusion

(52) There is no legally sustainable defense to the applicant's claim for a winding-up order. There are also no legally relevant facts which can persuade me not to grant a final order.

(53) On a conspectus of all the issues raised I propose to:

(53.1) order the respondent to be placed under final winding-up;

(53.2) order that cost of the application be cost in the liquidation, to be recovered by the applicant on a scale as between attorney and client;

(53.3) order that cost of opposition of the application be disallowed and not be cost in the liquidation.



A. VORSTER AJ

Acting Judge of the High Court

Date of hearing: 17 April 2023

Date of judgment: 6 September 2023

Heads of argument for applicant: Adv. C.L. Markram-Jooste

Appearance for applicant: Adv. J.H. Jooste

Instructed by: Strydom Britz Mohulatsi Incorporated

Heads of argument for respondent: Adv. L.K. van der Merwe

Appearance for respondent: Adv. L.K. van der Merwe

Instructed by: Cawood Attorneys