

REPUBLIC OF SOUTH AFRICA



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

Case No: 43996/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE: 26 January 2022

In the matter of:

Nadia Fourie
Leon Bosman

First Applicant
Second Applicant

and

Housezero Construction Pty (Ltd)
Housezero Commercial Pty (Ltd)
Neriel Hurwitz
Yehoram Gur-Arie
Suntank Pty (Ltd)
Compliance Management Services Pty (Ltd)

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent

Summary: Provisional liquidation - Badenhorst's Rule - just and equitable winding up.

JUDGMENT

Maumela J

1. This matter came before court in the urgent roll. The Applicant seeks an order:
 - 1.1. Declaring that the First, Second, and Sixth Respondents be placed under final liquidation in the hands of the Master of the High Court and a return date be issued, calling upon any interested party to show cause why a final liquidation order should not be made.
 - 1.2. That in the alternative, the First, Second, and Sixth Respondents be placed under provisional liquidation in the hands of the Master of the High Court and a return date be issued, calling upon any interested party to show cause why a final liquidation order should not be made.
 - 1.3. That costs be costs in the winding up of the First, Second, and Sixth Respondents
2. The Michelle Bosman deposed on behalf of the Second Applicant, albeit on the strength of a Special Power of Attorney granting her authority to act on behalf of the Second Applicant who currently finds himself abroad.

BACKGROUND.

3. The Applicants, together with others aver that they fell victim to the unscrupulous business practices of the First, Second, and Sixth Respondents with the Third and the Fourth Respondents at the helm of the companies. Due to the acts of the Respondents, the First Applicant, who was later joined by the Second Applicant sought an interim interdict pending the institution of liquidation proceedings.
4. On the 16th of September 2021, they launched an application for the liquidation and/or in the alternative, provisional liquidation of the First, Second, and Sixth Respondents based on the facts set out in the initial Founding Affidavit. The Applicants contended that it will be just and equitable to grant the relief sought.

5. The liquidation of the Respondent companies was previously sought under this case number on the ordinary roll. The Respondents did not file any opposing papers in the matter. The matter was set down on the unopposed roll for 30 November 2021. On the 27th of November 2021, the Respondent sought to oppose the matter and it was removed by agreement before Acting Justice Jordaan on the 30th of November 2021. However, the Respondents still did not file any answering affidavit.
6. The Applicants contended that the Respondent companies and specifically the 2nd Respondent through the conduct of its director Yehoram Gur Arie, (the 4th Respondent), have falsely represented to the Applicants and various unsuspecting members of the public that they are capable of delivering modular type homes within a very short space of time; twelve weeks to be specific. The prospective purchasers were led to believe that the houses are ready for delivery and is completed and therefore that payment of the purchase price is due and thus demanded. After payment, the houses were not delivered.
7. This was confirmed during a Carte Blanche Expose aired on the 21st of November 2021. The 4th Respondent once again made similar promises in an undercover operation, and on the same day, the legal representative of House Zero made an offer to the 2nd Applicant. The Applicants argue that this conduct amounts to an act of insolvency in terms of section 8 of the Insolvency Act and that it justifies the liquidation application under section 344 of the Companies Act.
8. It was submitted that the grounds upon which the liquidation is sought are set out in the papers. On the 29th of November 2021, an enquiry was publicly made to the “House Zero” Instagram page and House Zero still replied, quoting a price for the House. An inference was drawn to the effect that House Zero continued unabated to trade and it portrayed a false narrative in spite of the pending litigation and the serious averments.
9. The Applicants argue that this rendered the matter urgent as it is in the public interest, (being just and equitable), to provisionally liquidate the Respondent companies and to remove their assets from them and to place them in the hands of a liquidator, and thus preventing them from trading any further.

RE: URGENCY.

10. The Applicants submitted that given the time line of events as has become crystallised since the airing of a Carte blanche episode of the 21st of November 2021, it has become justified to launch this application on an urgent basis. They made the point that it is trite law that once it has been shown (on a *prima facie* basis that it would be just and equitable to provisionally liquidate the Respondent companies, the matter is inherently urgent. It could not have been expected of the Applicants to act sooner on urgency since the notion of urgency only eventuated as from the 21st of November 2021.
11. Initially, the Applicants sought a wide range of reliefs on an urgent basis. In that regard, they sat in order amongst others providing for the following:
 - 11.1. Dispensing with the forms, service and time periods prescribed in terms of the Uniform Rules of the High Court of South Africa and directing that the matter be heard as one of extreme urgency in terms of Rule 6(12) of the Rules.
 - 11.2. The incorporation of the affidavit deposed to by Michele Bosman under the above stated case number on 26 August 2021.
 - 11.3. The final liquidation of the first, second, fifth and sixth Respondents, alternatively its provisional liquidation (coupled with a *rule nisi*) and the assets of those Respondents be placed in the hands of the Master of this Court.
 - 11.4. The piercing of the corporate veil in terms of section 20(9) of the Companies Act, *vis a vis* the third and fourth Respondents in as far their conduct as directors of the above stated company Respondents renders it just to do so.
 - 11.5. That costs be costs in the winding up of the First, Second, Fifth and Sixth Respondents.
12. The newly uploaded draft order on behalf of the Applicants, which is in accordance with the submissions reflects that the only reliefs persisted with on an urgent basis are-
 - 12.1. The positive consideration of the matter as one of urgency and
 - 12.2. The provisional liquidation of the first, second, fifth and sixth Respondents.

13. The issues in this matter can be narrowed down to:
 - (a). The urgency of the matter.
 - (b). Whether the Applicants have shown *prima facie* that the Respondent companies are insolvent.
 - (c). whether it is just and equitable to provisionally liquidate those Respondents.
14. The following were presented to be the basis for seeking the provisional liquidation of the First, Second, Fifth and Sixth Respondents:
 - (a). The Applicants and aggrieved persons are creditors of the Respondents jointly or individually which debts have not been disputed by the Respondents but rather acknowledged.
 - (b). That it is just and equitable to do so.
 - (c). That the Respondent is unable to pay its debts, as and when they fall due and
 - (d). That the Respondent is commercially insolvent.
15. The Applicants submit that the above can be amplified as follows:
 - 15.1. The Respondents have solicited payments from the Applicants and aggrieved persons under false pretences to the tune of R8 638 279.63.
 - 15.2. The First to Fourth Respondents contracted with the Applicants and aggrieved persons and the funds were paid into the accounts of the Second, Fifth and Sixth Respondents.
 - 15.3. The Respondents have failed dismally to maintain the agreements which were reached and against the backdrop of the versions provided by each Applicant and aggrieved person were evidently aware that they could not and would not deliver as falsely agreed.
 - 15.4. It is apparent that not only are the Respondents committing fraud against members of the public but also that the Respondents substratum have fallen away and that they cannot deliver on these existing or new projects.
 - 15.5. The Respondents have committed an act and various other acts of insolvency.
 - 15.6. Despite the above the Respondents via the Fourth Respondents has still represented to a consumer that they can deliver within 12 weeks and
 - 15.7. Despite the above, the Respondents continue to trade and induce members of the public in a fashion similar to that of

the Applicants and aggrieved parties.

16. Under paragraph 10 of the Implementation of the Judge President's Practice Directive dated 11 June 2021 for the Urgent court of 17th December 2021 (16h00 to 24th December 2021, where the following directive stands noted: "*..urgent court is not intended to hear complex factual and/or legal issues scattered over hundreds of pages and which may take a long time to consider and finalize...Such complex cases may be removed from the roll and the parties may be referred to the Deputy Judge president to be allocated to a special court at some time in future...*".
17. The Applicant conceded that according to the indexed bundles, the papers filed and uploaded by the parties exceed 500 pages. However, they submitted that the issues to be considered by this Court narrow the ambit of the papers to be considered drastically and that Counsel confines his submissions in line with the above. The court may exercise its discretion and remove the matter together with a referral thereof to the Deputy Judge President with a view to be allocated a special court at some time in future. The Applicant further submits that in the event where the matter is removed, the issue of costs should be reserved or that costs be ordered to be costs in the cause.
18. Nonetheless, the Applicants argue that the court should consider this application on an urgent basis. To that end, heads here in are set out under the following subheadings:
 - 18.1. *Locus Standi* of the Applicants;
 - 18.2. Urgency and
 - 18.3. The Basis for the Liquidation.

LOCUS STANDI.

19. The Applicants submit that they have sufficient interest in the right to institute legal proceedings. They make the point that their interest emanates from the fact that they are creditors of the Respondents, in that they were defrauded by the Respondents, as a consequence of which they suffered loss approximately in amounts of R5 427 000.00 and R1 623 000.00. For that reason, this application is brought in terms of section 81 (1) (c)(ii) of the Companies Act, No. 71 of 2008.

20. Furthermore, it is submitted that this application is also brought based on the interest of the public in that the latter stands to suffer fraud and significant financial harm, if an order for the provisional liquidation of the Respondents is not granted.
21. It is contended that the *locus standi* of the Applicant's to bring this application in respect of the parties mentioned in paragraphs 4.1. and 4.2. herein above, is derived from section 157(1),(c) and section 157(1)(d) of the Companies Act, No. 71 of 2008, which reads as follows: -
- "(1). When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person*
- (a). directly contemplated in the particular provision of this Act;*
 - (b). acting on behalf of a person contemplated in paragraph (a), who cannot act in their own name; class of affected persons, or an association acting in the interest of its members; or*
 - (d). acting in the public interest, with leave of the court."*
- (own emphasis and underlining.)*

URGENCY.

22. It is trite law that an applicant in an urgent application must demonstrate on its papers that there are special circumstances that render the matter urgent. See:
- 22.1. *Gallagher Estates v Norman's Transport Lines (Pty) Ltd*,¹
- 22.2. *IL&B Marcow Caterers v Greterman's SA*.²
- 22.3. A judgment by Justice Wepner: In re several matters on the urgent court roll of the 18th of September 2012 (South Gauteng High Court) and
- 22.4. *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers*.³)
23. It is also trite that applicants for an urgent application have to show the following:
- (i). That real loss or damage will be suffered if the reliance were to be placed solely on the normal procedure provided for in the Rules of Court, and

¹. 1992 (3) SA 500 (WLD) at 502.

². 1981(4) SA 108 (CPD).

³. 1977 (4) SA 135 (W) at 136A-137E).

- (ii). That deviation from the prescribed time limits will not prejudice the Respondent. (See, *Nelson Mandela Metropolitan Municipality v Greyvenouw*⁴).
24. It has also been held that an Applicant in an urgent application must make out a case in the founding affidavit to justify the particular extent of the departure from the norm which is involved in the time and day for which the matter be set down. See: *Minister of Water Affairs & Forestry v Stilfontein Gold Mining Co Ltd and Others*⁵, on page 339 and further. In the case of *Minister of Water Affairs & Forestry, supra*, it was held that one must consider an urgent application within the context of all the surrounding facts and circumstances; See also *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk*⁶.
25. In the case of *Jin Sweet Supermarket CC v Minister of SAPS N.O and Another*⁷, Deputy Judge President Hendricks held as follows: “[4] There are different degrees of urgency. Rule 6 (12) of the Uniform Rules of Court (the Rules) provide for a court to deviate from the specified time limits provided for in the Rules, on good cause shown.
26. In the case of *South African Airways SOC v BDFM Publishers (Pty) Ltd & 2 Others*⁸, at paragraphs [24] and [26] the following is stated:
‘[24]. ... When a litigant contemplates any application in which it is thought necessary to truncate the times for service in the Rules of Court, care must be taken to use all reasonable steps to mitigate such truncation. In a matter in which less than a day’s notice is thought to be justifiable, the would-be applicant’s attorney must take all reasonable steps to ameliorate the effect thereof on the would-be respondents. The taking of all reasonable steps is not a collegial courtesy, it is a mandatory professional responsibility that is central to the condonation necessary to truncate the times for service. When there is the prospect of a hearing before a judge after business hours, and even more so, when there is the prospect of the hearing taking place elsewhere than in a courthouse, the duty to take reasonable steps is ever more important and imperative.’ “

⁴. 2004(2) SA 81(SE).

⁵. 2006 (5) SA 33 (W).

⁶. 1972 (1) SA 773 (A) at 782A-G.

⁷. (UM228/2019) [2020] ZANWHC 16 (9 January 2020)/

⁸. 2016 (2) SA 561 (GJ).

27. In the case of *Nelia's Liquor Store CC v Vresthena (Pty) Ltd & Another*⁹; the following was stated in paragraphs [32] and [33]:
 “[32]. The question of whether sufficient grounds exist for a matter qualifying to be considered as urgent and that condonation, as envisaged in terms of rule 6(12) (a), should be extended to an applicant must be considered with due and judicial regard to the following:
 32.1 the relief requested by an applicant;
 32.2 the facts of the matter, with specific reference to the chronology of events leading up to and culminating in the launching of the application on an urgent basis;
 32.3 any other extraordinary factor(s) which may be present in the particular circumstances of the case which may render it necessary and in the interest of justice to extend the relief contemplated in Rule 6(12) to an applicant, notwithstanding the fact that considerations emanating from the above referred to two subparagraphs may militate against the granting of the relief set out in rule 6(12).
 [33]. An applicant must not only set forth sufficient grounds as referred to in the preceding paragraph but must also explain any dilatory behavior on its part. The onus to do so rests squarely on an applicant.”
28. In our law, commercial urgency has also been accepted as justifying the launching of an application in the urgent Court. See in this regard *Ziegler South Africa (Pty)Ltd v South African Express SOC*¹⁰, on page 631, paragraph 17, and the reference to *IL&B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another*; *Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another*¹¹; *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd*¹², at page 586F – G.
29. It is furthermore trite law that an application for the liquidation of a company carries inherent urgency. That much was expressed in various cases, in various jurisdictions. In the matter of *Myburgh v The Master of the High Court Bloemfontein Free State Division, Bloemfontein NO*,¹³ the full Court on page 6, paragraph 173, held as follows:
 “[13] Considering the inherent urgency of insolvency proceedings, I cannot find that the Second Respondent committed an irregularity in proceeding with the

⁹. (UM 39/2019) 2019 ZANWHC 21 (2 May 2019) the following was stated in paragraphs [32] and [33]:

¹⁰. 2020(4) SA 626 (GJ)

¹¹. 1981 (4) SA 108 (C)

¹². 1982 (3) SA 582 (W).

¹³. 2019 JDR 1698 (FB).

enquiry in spite of the noting of the appeal.”

30. In the case of *Van Greunen v Sigma Switchboard Manufacturing CC*, Acting Justice Plasket, (as he then was), wrote:
“[8] *Meskin*, in commenting on s346 of the Companies Act 61 of 1973, states that winding-up proceedings are ‘motion proceedings and the general rules pertaining to such proceedings are applicable, subject to the provisions of the Act and the practice in winding-up matters as developed through judicial decisions’. In this field of law, differences in local practices are marked. In this division, as stated above it is practice for such applications to be brought on shorter than usual notice and on a short form notice of motion. From what I can gather this has been the practice for at least 40 years.
[9] The practice referred to above developed, no doubt, because of the fact that it is well recognised that ‘ordinarily any application for liquidation merely as such contains an element of urgency: if a case for winding-up can be made, *ex hypothesi*, a removal of its property from the control of the company’s directors and a suspension of enforcement of creditors’ rights of action and execution in the ordinary course should occur as soon as possible’
[10] In recognition of the in-built urgency of liquidation applications, the practice has developed in this division that it is unnecessary for applicants to formalistically recite a standard set of allegations to satisfy the terms of rule 6(12) and to seek and obtain a specific order condoning the non-compliance with provisions of rule 6. The practice sensibly works from the reasonable and recognised assumption that all liquidation applications are urgent and so should be treated differently to other applications. Patterns of practice, expectations and perhaps even rights have developed over the years on the basis of the practice and it would, in my view, be an unwarranted interference with these legitimate interests to interfere with the established practice.”
31. In the case of *Ex parte: Nell N.O. and Others*¹⁴, Justice Tuchten held: “Another factor supporting the view I have taken is the inherent urgency of insolvency proceedings. In *Absa Bank Ltd v De Klerk and Related Cases*¹⁵, the court said: There is frequently a large body of creditors whose rights are affected by sequestration, who may wish to be heard on the return day, and who may be prejudiced by delay. This inherent urgency leads *Meskin* to make the following recommendation in *Insolvency Law* at 2.1.7 at 2-34, a recommendation which I endorse and which the Courts in this Division have in fact applied: ‘It is respectfully submitted that any application for sequestration merely as such contains an element of urgency: if a case for sequestration can be made, *ex hypothesi*, a removal of his property from the control of the debtor and a suspension of enforcement of creditors’ rights of action and execution in the

¹⁴. (45279/14) [2014] ZAGPPHC 620; 2014 (6) SA 545 (GP) (29 July 2014),

¹⁵. 1999 4 SA 835 E 838J-839A.

ordinary course as soon as possible.”

32. To substantiate the assertion that there is urgency attendant to this matter, the Applicants pointed out the following on the 6th December 2021:

- 32.1. That this present application was preceded by various litigations by the first Applicants (either individually or jointly) against some or all the Respondents.
- 32.2. Ultimately on 16 September 2021 the First and Second Applicants launched an application for the liquidation/provisional liquidation of the Respondent companies and certain further and/or ancillary relief.
- 32.3. The basis for the above stated application was premised on the ground that it was just and equitable to liquidate the Respondent companies.
- 32.4. After the application had been launched (under the present case number), two further parties who fell victim to the unscrupulous conduct of the Respondent companies as largely driven by the fourth Respondent, came to the fore.
- 32.5. The Respondents did not file any opposing papers in that application.
- 32.6. After the dies for the filing of opposing papers had expired, the Applicants set the matter down on the unopposed roll for 22 November 2021, before her ladyship Acting Justice Jordaan.
- 32.7. On Friday 19 November 2021, (that is the court day prior to the date for the hearing of the matter), the Respondents through their legal representative indicated that they now wanted to oppose the application.
- 32.8. This caused the matter to be removed from the unopposed roll and the Respondents were ordered to pay for the wasted costs occasioned thereby.
- 32.9. This was made an order of Court by agreement.
- 32.10. On 21 November 2021 the Respondents’ attorney of record transmitted an “off the record” email, (LBU 2-117C-7), wherein he stated as follows: *“This email is informal and on acceptance a formal document will be finalized setting out all the necessary details to the satisfaction of both parties. With the property of Mr. Bosman our client will complete the project at their own cost and thereafter market and sell the property with the proceeds going towards your client to settle his claim the claim amount to be set and finalised.”*

33. The Applicant submits that this communication given the import thereof *vis some vis* the “insolvency” of the Respondent companies, are not protected by privilege or any other prohibition against disclosure. This much is evident from the dicta in *Absa Bank v Hammerle Group (Pty)Ltd*¹⁶, as contained in paragraph [13] thereof where it was held as follows: “[A]s a matter of public policy, an act of insolvency should not always be afforded the same protection which the common law privilege accords to settlement negotiations. A creditor who undertakes the sequestration of a debtor’s estate is not merely engaging in private litigation; he initiates a juridical process which can have extensive and indeed profound consequences for many other creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent. I would therefore be inclined to draw an analogy between the individual who seeks to protect from disclosure a criminal threat upon the basis of privilege and the debtor who objects to the disclosure of an act of insolvency on the same basis.”
34. On the evening of the 21st of November 2021, a television program named ‘Carte Blanche’ aired an expose’ in respect of the business of the Respondents. In this, the following was revealed:
- 34.1. That the Respondents were disposing of an asset belonging to them¹⁷.
 - 34.2. That the Fourth Respondent during an undercover meeting with the Carte Blanche journalist (as a prospective buyer) indicated that the Respondents attended to completion of modular homes within 12 weeks¹⁸.
35. The Applicants view that this had to be seen against the backdrop of the plight of the Applicants and the aggrieved persons where the Respondents despite payment of vast amounts of money in some instances after 24 months still did not make good on their undertaking of completion with 12 weeks. The Respondents even in the case of *Botha and Govender* employed the same *modus operandi* and illustrated an inability to complete the projects, in that they sourced large amounts of money from the clients yet, they simply did not deliver the modular homes within the twelve-week period. The homes remain derelict construction sites, years thereafter.

¹⁶. 2016(5) SCA.

¹⁷. (Annexure LBU2B – p343 indexed bundle 4, which is not disputed by the Respondents).

¹⁸. (Annexure LBU2C – p346 of Indexed Bundle 4, which is not disputed by the Respondents).

36. The Applicants contended that the email stated above by the Respondent's attorney of record is nothing other than an offer to make an arrangement with a creditor for releasing him of wholly or partially from his debts. It is contended that it is a concession of a debt owed and an attempt to be partially released from the obligation to pay such debt. The Respondents did not tender to pay the debt to Bosman in full. Instead, it tendered to complete the project where after it would sell the home. The proceeds will then go towards Bosman "to settle the claim"
37. The Applicants contend that the above; (read with their averments on urgency from 117B-16- 117B-22), justified the launching of these proceedings on an urgent basis. They contended that the Respondents have again demonstrated their willingness to utilize every legal stratagem to delay the ventilation of the matter. This was amply demonstrated by their belated opposition to the initial liquidation application.
38. The Applicants argue that they did not delay acting after the events of the 21st of November 2021. On the 24th of November 2021, it became transparent that in spite of the above, the Respondents still conducted business unabatedly and engaged with members of the public. They point out that this is demonstrated by annexure "LBU8A" – p346 of indexed bundle 4. On 29 November 2021 the Respondents advertised on their social media page and gave pricing to a member of the public.
39. The Applicants contend that the above circumstances justified the bringing of an application on an urgent basis. They pointed out that should there not be swift redress, the Respondents will continue to prey on unsuspecting or ignorant members of the public in that they will "sell the idea "of modular homes being delivered within twelve weeks; demanding huge amounts to be paid before delivery; only to renege on their undertakings.
40. It was submitted that the conduct of the Respondents in thereafter frustrating the due process of law, with impunity, which conduct they continue with, renders it urgent, just and equitable for the Court to act swiftly to protect the public at large.
41. The Applicants charge that the true to their obstructive manner of litigation, the Respondents have once again filed an answering affidavit wherein they liberally make use of derogatory innuendos

and statements attacking both the Applicants and their legal representatives. They pointed out that it is significant that the Respondents revert once again to nothing other than an attempt to delay the adjudication and ventilation of the matter.

42. Two illustrate this among others, they point out the following among the acts of the Respondents:
 - 42.1. That they deny that the matter is urgent,
 - 42.2. That they allege that the urgency is self-created,
 - 42.3. That they aver that there is a multitude of factual disputes which could only be resolved by way of oral evidence and
 - 42.4. That they allege that the airing of the programme can be no basis for urgency as the programme was pre-recorded.
43. The Applicants made the point that the Respondents failed to demonstrate a *bona fide* basis upon which the Court is to conclude that it would not be just and equitable to provisionally liquidate the respondent companies. It is contended that the Respondents repeatedly used the same *modus operandi* to create the impression to clients that they are capable of delivering modular homes within twelve weeks and that in the process they may seek huge payments on the basis that the homes are ready for delivery, only thereafter failing to do so.
44. The Applicants also pointed out that the Respondents do not proffer any explanation for why they informed the First Respondent as far back as November 2019 that her house is ready for delivery and that a further substantial sum of money stands to be paid, where after they still failed to deliver the house. It is also alleged that many other instances of this nature happened as illustrated repeatedly in the Founding Affidavit.

BASIS FOR LIQUIDATION.

45. It is trite that in provisional liquidation applications, the Applicant must show on a *prima facie* basis that it would be just and equitable to remove the Respondent companies' assets from the company and place it in the hands of the Master and ultimately a liquidator. The question of whether the requirements are met on a *prima facie* basis is determined by assessing whether the balance of probabilities on the affidavits favour the Applicants' case.
46. The test for determining whether the said requirements are met or not can be tracked back to the well-known judgment by Corbett JA,

(as he then was), in the case of *Kalil v Decotex (Pty) Limited and Another*¹⁹. In that matter, the Hon. Judge held that a Court can hardly decide an application for the provisional winding up of a company without reference to rebutting evidence. He then explained that the term *prima facie* case means that the balance of probabilities should favour the granting of the application for the provisional liquidation.

47. An onus rests on the Respondents to prove that the indebtedness is disputed on *bona fide* and reasonable grounds. This is referred to as the Badenhorst's Rule. The Applicants contend that in this case the Respondents failed to satisfy the standard requirements in line with that the Badenhorst's Rule.

THE APPLICANTS' CLAIMS IN RESPECT OF INDEBTEDNESS.

48. It is incumbent on the Applicants to illustrate that the First, Second, Fifth and Sixth Respondents are indeed creditors of the companies listed. To that end, the Applicants submitted the following:
- 48.1. That the First Applicant on 11 May 2021 sent a letter of demand, demanding repayment for the full amount of R5 427 000.00 ("Five Million Four Hundred Thousand Rand")²⁰.
- 48.2. That on the 17th of May 2021, the First and Second Respondents responded however, they did not deny that they are indebted.
- 48.3. That the First Applicant on 11 May 2021 sent a letter of demand, demanding repayment for the full amount of R5 427 000.00 ("Five Million Four Hundred Thousand Rand")²¹.
- 48.4. That the Second Applicant contacted with the Second Respondent and attended to payment to the Sixth Respondent. On the 2nd of July 2021, he sent a letter of demand to the First, Second and Sixth Respondents, demanding repayment of the full amount of R2 210 015.18, ("Two Million Two Hundred and Ten Thousand and Fifteen Rand").²²

¹⁹. 1988 (1) SA 943 A.

²⁰. See paragraph 120 page 63 Indexed Bundle 1.

²¹. See paragraph 120 page 63 Indexed Bundle 1.

²². See Annexure LB79, page 261; Indexed Bundle 3.

- 48.5. That on the 21st of November 2021, the Respondents replied to the Second Applicant's demand and do not deny that an indebtedness exists but rather attempts to make a compromise.²³
- 48.6. That on the 16th of September 2021, Elize Botha sent a letter of demand to the Respondents²⁴ to which no response has been forthcoming.
- 48.7. That Vassanthia Govender paid R868 207.50 ("Eight Hundred and Sixty Eight Thousand Rand and Fifty cents") into the account of the Fifth Respondent and contracted with the First or Second Respondents²⁵.
- 48.8. That the Respondents do not dispute receipt of payment nor that any debt exists²⁶.
49. In our law, failure by a debtor to repudiate allegations of indebtedness can be taken to be an admission that such indebtedness is founded. In the case of *McWilliams v First Consolidated Holdings (Pty) Ltd*²⁷, Miller JA stated the following at page 10 E - H: *"But in general where according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct. Such party's silence and inaction, unless satisfactorily explained may be taken to be constituting an admission by him of the truth of the assertion or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute."*
46. It was submitted that the Respondents' silence or failure to dispute that a debt is owed to the First Applicant, Botha and Botha amounts to a concession. It was similarly submitted that the Respondents' failure to dispute that the Second Applicant is owed an amount of money amounts to an admission that they indeed owe the Second Applicant (a debt).
47. It was therefore submitted that it is confirmed that there is an indebtedness to the Applicants. From the facts tabulated above, the

²³. See paragraphs 35 – 39, pages 325 to 329, Indexed Bundle 4, and Annexure **LB2** at page 341. Indexed Bundle 4.

²⁴. Hereto attached as Annexure LBU4, page 349 of the Indexed Bundle 4)

²⁵. See Annexure LBU7A, page 341 of Indexed Bundle 4.

²⁶. See pages 412 – 414 of Index Bundle 5.

²⁷. 1982 (2) SA 1 (A).

court finds that the Respondents did not successfully challenge the allegation that they are indebted to the Applicants.

JUST AND EQUITABLE BASIS FOR LIQUIDATION:
DISAPPEARANCE OF SUBSTRATUM AND FRAUDULENT
MISREPRESENTATION.

48. In the case of *Rand Air (PTY) Ltd v Ray Bester Investments (PTY) Ltd*²⁸ at p350, it was held that there are five categories which would warrant the winding-up of a company on the ground that it is just and equitable to do so. They are the following: -

48.1. “The **first** is the disappearance of the company’s substratum.

Where the company was formed for a particular purpose for instance, and that purpose can no longer be achieved at all, its *raison d’être*, its substratum has gone and it may be fair and equitable to the incorporators under those circumstances to wind it up. There is a variety of circumstances which can possibly lead to the disappearance of a company’s substratum.

48.2. **Secondly**, illegality of the objects of the company and fraud committed in connection therewith. If a company is promoted in order to perpetrate a serious fraud or deception on the persons who are invited to subscribe for its shares, it is the kind of case in which the persons who are defrauded in that fashion can take the promoters to Court and, provided the circumstances demand that, ask that the company be wound up.

48.3. The **third** is that of deadlock which results in the management of companies’ affairs, because the voting power at board and general meeting level is so divided between dissenting groups that there is no way of resolving the deadlock other than by making a winding up order. The kind of case which falls most frequently to be dealt with under this heading is the one where there are only two directors or only two shareholders, usually in a private company, who hold equal voting shares or rights and have irreconcilably fallen out.

48.4. **Fourthly**, grounds analogous to those for the dissolution of partnerships. Where the company is a private one and its share capital is held wholly or mainly by the directors and it is in substance a partnership in corporate form, the Court will order its winding up in the same kind of situation that it

²⁸. 1985 (2) SA 345 (W).

would order the dissolution of a partnership on the ground that it is just and equitable to do that.

- 48.5. **Fifthly**, there is oppression. Where the persons who control the company have been guilty of oppression towards the minority shareholders” (*own emphasis and underlining*) whether in their capacity as shareholders or in some other capacity, a winding up order in suitable cases may be made. This is in addition to other remedies in the Companies Act, which are available to oppressed minorities to obtain not only dissolution, but also a money judgment.”
49. The Applicants argue that in this case, the **First** category of grounds for winding up a company finds application given that the Respondents are unable to deliver on their promises as is evident from the failure to deliver in some instances for over two years despite an agreed to contract time of 12 weeks, and the second category of illegality finds application herein as a justification for the liquidation of the Respondent on the ground that it is just and equitable to do so. Over and above that, it is also just and equitable to provisionally liquidate the First, Second, Fifth and Sixth Respondents on the basis that they are trading while they are insolvent.
- DISAPPEARANCE OF SUBSTRATUM.
50. The Applicants dispute that the Respondents intended to run a *bona fide* construction company which renders the services promised in terms of the building schedules concluded and the attractive advertising campaigns of the First and Second Respondents, but it is submitted that even to the extent that the Respondents purport to build modular system homes that they are not even able to attend to that mandate and purpose as is illustrated not only in the case of the Applicants but also all the aggrieved persons mentioned.
51. The disappearance of the substratum of the First, Second, Fifth and Sixth Respondents is illustrated in the papers of the Applicants as set out below, and it is submitted that the Respondents do not raise a *bona fide* dispute in relation to why all projects mentioned by the Applicants have not been completed.
52. In respect of the First Applicant on the 19th of November 2020, the Fourth Respondent guaranteed that the modular system home of the First Applicant would be completed by the 23rd of December

2020²⁹. The present status of the First Applicants Modular System home can be seen at Annexure LB41, page 209 Index Bundle 3. In respect of the Second Applicant, it was agreed that the modular system home would be completed in 12 weeks and the contract date was 27th June 2019³⁰. The first and second payments were made on the 3rd of July 2019 and 2nd September 2019, and the initial completion date was 20th March 2020. As at today's date, the modular system home is not completed and it is nearly **21 months** after the initial contract date for completion. The Respondents conceded that the modular system home of the Second Applicant is not complete.

53. In respect of Robin Knox Grant, it was agreed that the project would run on a discounted upfront payment for an expedited completion date starting from February 2020. Since payment, Robin Knox Grant has had six different project managers and as at June 2021, when he terminated the agreements 16 months later, the modular system home is a derelict building site. The Respondents do not dispute that the modular system home is not completed³¹.
54. In respect of Elize Botha, the contract date was the 8th of November 2019 and it was agreed that the project would be completed in 14 ("Fourteen") weeks. As at the time when this application was launched which was 26 ("Twenty Six") months later, the Respondents had only delivered bags of cement and steel railings³². The Respondents do not dispute that the modular system home is not complete much as they do not proffer *bona fide* reasons as to why it has been unable to complete the modular system home.
55. On that basis, the Applicants submit that the substratum of the Respondents have fallen away and they are incapable of completing projects they undertook to complete.

FRAUDULENT MISREPRESENTATIONS – ILLEGALITY OF OBJECTS AND FRAUD COMMITTED THEREWITH IN.

56. The Applicants submitted that in accordance with the test set out in the *Rand Air* judgment, it is evident that it is just and equitable that

²⁹. See Annexure LB26 page 173, Indexed Bundle 2.

³⁰. See Annexure **LB67** page 244 index bundle 3.

³¹. See paragraphs 84 – 89, pages 48 – 49 of Index Bundle 1.

³². See annexure "**LB4**" in particular pages 366 and 367 of Indexed Bundle 4.

the Respondents be placed under provisional liquidation as a consequence of the expansive fraudulent misrepresentations which have been perpetrated via the Fourth Respondent in particular. In expansion hereof:

56.1. It is submitted that against the background of facts set out by the Applicants that any of the contracts concluded were concluded under false pretences given that the Respondents had at the time of concluding each agreement, known of the other projects in respect of which it had dismally failed to perform and accordingly were aware that they could not perform accordingly and therefore the misrepresentation of short time frames in lieu of large payments was patently false³³.

56.2. In respect of the First Applicant:

56.2.1. In or during 15th to 19th of November 2020, an employee of the Respondents indicated to the First Applicant that the modular system home was complete and ready for delivery, subject to payment³⁴.

56.2.2. On the 19th of November 2020, the Fourth Respondent guaranteed that subject to payment, the modular system home would be completed by the 23rd of December 2020³⁵.

56.2.3. The Respondents knew this misrepresentation to be false and did so for the sole purpose of soliciting funds from the First Applicant and in expansion hereof:

56.2.3.1. On 25 September 2020 an employee of the Respondents advised the Second Applicant that it would be impossible to commit to completion dates³⁶.

56.2.3.2. On 30 March 2021 the contractor employed by the Respondents advised the Respondents that he has only reached the concrete milestone in respect of the First Applicant's modular

³³. See Annexures LB16 and LB17 at pages 160 and pages 162 of Index Bundle 2, and pages 23 – 25 of Index bundle 1.

³⁴. See Annexure LB28F page 181 Indexed Bundle 2.

³⁵. See annexures "LB28J, LB28L, LB28P, and LB28Q at pages 185 to 192 of Index Bundle 2.

³⁶. See annexure LB76 page 256 of Index Bundle 3.

system home and that money paid in respect of another project was being used to pay for the First Applicants construction³⁷.

56.2.3.3. The Respondents do not dispute that the modular system home of the First Applicant is incomplete and on their own version, (which is disputed), only materials have been purchased. A far cry from a completed and ready to deliver home.

57. In respect of the Second Applicant, in a fashion similar to the First Applicant but only a few months prior:

57.1. The Respondents created the false impression that they would be able to deliver in a short period of time in an effort to induce a large upfront payment³⁸.

57.2. On 1 June 2020 and 22 June 2020, the Respondents advised the Second Applicant that the modular system home was completed and ready for delivery subject to final payment of the amount of R553 776.75 ("Five Hundred and Fifty-Three Thousand Seven Hundred and Seventy-Six Rand and Seventy-Five cents")³⁹ in an effort to induce payment from the Second Applicant.

57.3. The Respondents knew this misrepresentation to be false given that on the 25th of September 2021, they advised the Second Applicant that there were manufacturing difficulties and that they were not near completion of even the manufacturing stage. On the 22nd of February 2021 and the 26th of February 2021, contractors of the Respondents advised the Second Applicant of the expansive materials still required to complete their modular system home and that only 30% of the milestones had been reached⁴⁰.

57.4. Similarly, in respect of all the aggrieved persons, it is submitted that the Respondents committed to truncated time frames for completion and demanded upfront payment in exchange for assurances that the time frames would be met.

³⁷. See paragraph 100 at page 53 of Index Bundle 1, and annexure LB89 at page 296 of Index Bundle 3 part (b).

³⁸. See paragraphs 73-74 pages 40-41 of Indexed Bundle 1.

³⁹. See Annexures LB73, LB74 and LB75 at pages 253 – 255 of Indexed Bundle 3 and pages 42 to 46. of Index Bundle 1.

⁴⁰. See Annexures "LB77" and "LB78" at pages 257 and 260 of Index Bundle 3.

- 57.5. On 21 November 2021, and against the backdrop of all of the above knowledge of said representation to be patently false, the Fourth Respondent advised the undercover journalist on Carte Blanche that the Respondents are capable of completing the modular system home in a period of 12 weeks⁴¹.
- 57.6. On 29 November 2021 the Respondents provided pricing to a member of the public⁴².
58. The Respondents do not dispute that the modular system homes were not ready for delivery at time of promise or present *bona fide* evidence to that extent. On the Respondents' own versions, they could not perform and the modular system homes are not completed and in the instance of the First Applicant it is conceded that on the version of the Respondents, (which is denied), that only materials were purchased.
59. The Respondents do not tender any *bona fide* evidence that a modular system home has been completed in the time frames promised. On the 21st of November 2021, it was uncovered that even with the home which was previously submitted to be completed, progress only stands at 75% towards completion⁴³. The Applicants submitted that the Respondents cannot seriously contest that by creating an impression, that a modular home is ready for delivery, (and persisting with the creation of same), they created a strong appearance that a modular home is ready for delivery and that once payment of a substantial amount of money, which is not the case, the house will be available for delivery. The applicants contend that this could on the part of the Respondents constitutes commercial fraud.
60. To create the impression that a modular home is capable of delivery within twelve weeks whilst knowing this has been proven over and over to be false, also constitutes a wilful misrepresentation of facts. Although the Respondents were embroiled in litigation and although on the papers here in it would appear to involve in excess of R8 million, the Fourth Respondent as director of the Respondent Companies did not hesitate pursuing with the misrepresentation against unsuspecting third parties.

⁴¹. See annexure "LBU2C" at page 346 of Index Bundle 4.

⁴². See annexure "LBU8A" at page 376 of Index bundle 4.

⁴³. See annexure at page 344.

61. The Applicants reiterated that the Respondents' conduct does not only provide a further ground for their winding up on the basis that it is just and equitable to do so, but it also motivates the urgency of this application and for the Respondents to be placed under provisional liquidation.

FURTHER SUBMISSIONS JUST AND EQUITABLE WINDING UP:

62. The applicants submitted that it is reckless for the Respondents to trade whilst they are in a state of insolvency. To point out that such conduct on the part of the Respondents constitutes a further basis for their winding up. They referred to the case of *Absa Bank v Hammerle, supra*. They contended that this case should find equal application in that creditors at large may be prejudiced if a debtor is allowed to continue to trade whilst he or she is insolvent; (paragraphs 13-17). See also *GWK (Pty) Ltd v Jannie Coffee Boerdery CC and others*⁴⁴; *Pienaar v Thusano Foundation and Another*⁴⁵, at page 580 to 582.
63. In the case of *Cunninghame and Another v First Ready Development 249 (Association Incorporated under s 21)*⁴⁶, it was held that where an entity conducts business that contravenes statutory requirements, (and hence is illegal), this constitutes a ground for winding up on the basis that it is just and equitable. In *KIA Intertrade, Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd*⁴⁷, the Court with reference to section 344(h) of the Companies Act, 1973, concluded that the conduct of the Respondent company warranted a liquidation on the basis that it was just and equitable where it closed a number of branches, retrenched staff, closed its head office and directed funds to an overseas concern on grounds not satisfactorily explained.

THE ADVANTAGE TO CREDITORS.

64. The Applicants submitted that it would be to the advantage of the creditors for the Respondents to be provisionally and ultimately finally wound up. The Respondents have remained silent on their financial position and have in this regard been evasive and far from forthcoming. They charge that Respondents continue with failure to address this position despite having an obligation to do so. See

⁴⁴. Case no 1552/06- Northern cape High Court; par (11) -((18).

⁴⁵. 1992(2) SA 552(BG).

⁴⁶. 2010(5) SA 325 (SCA).

⁴⁷. 1998 JDR 0848 (W).

*Stratford and Others v Investec Bank Limited*⁴⁸.

65. It is submitted that in terms of *Meskin and Company v Friedman*⁴⁹, it was held that the advantage of a full investigation into the affairs of an insolvent would in itself constitute a benefit. It was further submitted that in the case of *Awerberg v Le Grange*⁵⁰, the court held as follows: *“In my opinion, the facts put before the Court must satisfy that there is reasonable prospect, not necessarily a likelihood, but a prospect which is not too remote, that some pecuniary benefit will result to the creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reason for thinking that as a result of an inquiry under the Act, some may be revealed or recovered for the benefit of creditors, that is sufficient.”*
66. The Applicants point out that it has already been established that the Respondents own a property to the value of R4 164 000.00 (“Four Million One Hundred Thousand and Sixty-Four Thousand Rand”)⁵¹. They do not dispute a pecuniary benefit to this extent and consequently a provisional liquidator would be well placed to deliver a report in this respect.

BALANCE OF HEADS AND CONCLUSION.

67. The Applicants submitted that that the issue raised by the Respondents that there was non-compliance with section 345(1) of the 1973 Act, is simply a non-starter because the liquidation is sought for reasons that make compliance therewith irrelevant. They make the point that this matter was brought on urgency and that the approach adopted in as far as filing a founding affidavit and new notice of motion were under circumstances justified. To argue that under these circumstances the Applicants must be frustrated in their prosecution of the matter due to the highly technical argument that a formal application to amend and supplement the founding affidavit, would have been to place formalism over substance.
68. It is similar to the acknowledged practice in urgent Courts to re-enrol a matter together with an affidavit supplementing the initial affidavit and setting out why it justifies the re-enrolment on urgency. It is further emphasized that the Applicants did not file a supplementary affidavit, but a founding affidavit wherein they

⁴⁸. 2015 (3) SA 1 CC.

⁴⁹. 1948 (2) SA 555 W.

⁵⁰. 1939 OPD 28.

⁵¹. See page 343 of Index Bundle 4.

prayed that the founding affidavit of the Second Applicant in the initial application be incorporated therein.

CONCLUSION.

69. Accordingly, the Applicants submitted that they have made out a case regarding:
- 69.1. Why the matter is to be heard as one of urgency.
 - 69.2. The contention that it is just and equitable for a provisional liquidation order to be granted against the First, Second, Fifth and Sixth Respondents and
 - 69.3. That an appropriate costs order be made against the opposing Respondents.

EVALUATION.

70. In this matter, the Respondents do not dispute indebtedness. Neither do they proffer a reasonable explanation for their delay is not failure to deliver in line with the agreement by way of presenting houses that are both complete and compliant with the features agrees to. Instead, they seek to raise aspects like lack of access to materials or to show that building materials have been sourced. They also made concerted efforts to enter into agreements with other parties in order to be in a position to deliver in line with the agreement. Some of the activities to admit of an appearance that the Respondents are financially not in a position to afford the wherewithal with which to perform in line with this agreement.
71. The Respondents dispute some of the assertions made against them by the Applicants. However, they cannot explain away the fact that they remain glaringly out of time where timelines have been agreed to and therefore failure to deliver on their part remains unrefuted.
72. It is trite that in their nature, insolvency matters are inherently urgent⁵². Despite the above, the Respondents continue to trade and to induce members of the public in a fashion. That poses a risk against those of the members of the public who may be unaware of the true situation of the Respondents. Such members of the public may prove to have been gullible in dealings with the Respondents. It is that which necessitates intervention by the

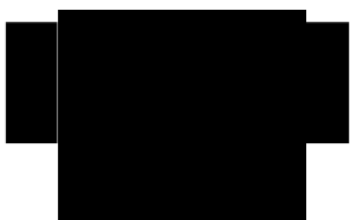
⁵². See Ex parte: Nell N.O. and Others above.

court.

73. It also has to be considered that the order the Applicants seek is one which is interim with a *rule nisi*. Were it to be that the Applicants misstated some of the facts, there will be latitude at hand for the Respondents to set the record straight over the return date. Over and above that, the Applicants do not seek a cost-order. Prejudice against the Respondents if any, comes inherently minimized within this application and in particular, in the event of the granting of the order sought.
74. Having read the papers filed at court and having heard counsel for the parties, the court finds that the Applicants have made their case for the granting of the interim order and the following order is made:

ORDER.

1. This application is heard as one of urgency in accordance with Rule 6 (12), the requirements of the Rule of the High Court in respect of notice, forms, service and time periods are dispensed with and the Applicant's departure therefore is condoned.
2. The Court has read the founding affidavit and annexures thereto deposed to by Michelle Bosman under the above mentioned case number on 26 August 2021 into the founding affidavit of the 6th of December 2021 as if specifically incorporated herein.
3. The First, Second, Fifth and Sixth Respondents are placed under provisional liquidation, in the hands of the Master of the High Court and a return date is ordered to be issued, calling upon any interested party to show cause why a final liquidation order should not be made.
4. It is ordered that the provisional liquidation shall serve as a rule *nisi* until the return date set by the Registrar.
5. The costs shall be costs in the winding up of the First, Second, Fifth and Sixth Respondents.



T. A. Maumela.
Judge of the High Court of South Africa.

REFERENCES

For the Applicant:
Instructed by:

Adv. N Jagga
Goshen Attorneys Inc.

For the Respondent:

H Bouwer – Attorney with right of
appearance

Judgment heard:

21 December 2021

Judgment delivered:

26 January 2022