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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 020590/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED. YES

DATE: 30/01/2025

SIGNATURE

In the matter between:

TOPFIX (PTY) LTD

Applicant

(Registration Number: 2001/016597/07)

and

GO BUSINESS (PTY) LTD

Respondent

(Registration Number: 2018/257899/07)

JODY GABRIELSEN

Intervening Party

(For the provisional winding-up of the Respondent)

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date for the handing down of the judgment shall be deemed to be 30 January 2025.

JUDGMENT

LG KILMARTIN, AJ:

A. INTRODUCTION:

[1] This is an application brought by Topfix (Pty) Ltd (“the Applicant”) for the provisional winding-up of Go Business (Pty) Ltd (“the Respondent”).

[2] The Applicant seeks the winding-up of the Respondent on the basis that the Respondent is unable to pay its debts as and when they become due and payable, as envisaged in section 344(f), read with section 345(1)(a) of the Companies Act, 61 of 1973 (“the Act”), as well as on the basis that it would be just and equitable for the Respondent to be wound up in terms of section 344(h) of the Act.

[3] The matter was heard in the opposed motion Court on 26 November 2024.

[4] On 25 November 2024, a day before the hearing, Jody Gabrielsen (referred to below as “Mr Gabrielsen” or “the Intervening Party”), applied for leave to intervene in these proceedings and also sought a postponement of the winding-up application, pending the adjudication of a business rescue application to be instituted within 30 days of the date of the order, failing which, the main application could be set down for hearing. The Intervening Party was represented by Mr Vorster.

[5] Mr Gabrielsen’s application was dealt with at the commencement of the hearing and an *ex tempore* judgment was delivered in respect thereof. Orders were also made on 26 November 2025: (i) dismissing the postponement application; and (ii) granting Mr Gabrielsen leave to intervene. No order as to costs was made in the postponement application for reasons explained in the *ex tempore* judgment.

[6] After Mr Gabrielsen’s application was dealt with, argument was presented on behalf of the Applicant (represented by Mr de Leeuw), and the

Respondent (represented by Mr Scheepers), regarding the merits of the main application.

[7] As we are dealing with an application for a provisional winding-up order, it is only necessary for the Applicant to make out a *prima facie* case for such an order.¹

[8] Before canvassing the arguments raised by the Applicant and the Respondent and explaining the Court's reasons for the orders made below, it is necessary to deal with the relevant background facts (most of which are common cause or cannot genuinely be disputed by the Respondent) and the relevant provisions and authorities pertaining to applications of this nature.

B. RELEVANT BACKGROUND FACTS:

[9] The Respondent is a company which forms part of the XBS Group of Companies ("the XBS Group").

[10] On 12 May 2023, the XBS Group, represented by Arnold Steynberg ("Mr Steynberg"), concluded a written loan agreement with the Applicant ("the agreement").

[11] The relevant portions of the agreement read as follows:

"LOAN AGREEMENT

ACKNOWLEDGEMENT OF DEBT

Entered between:

Top Fix (Pty) Ltd Reg Nr: 2001/016597/07

("the Lender")

And Arnold Steynberg ID: 6[...] REPRESENTING THE FOLLOWING ENTITIES ("XPS GROUP COMPANIES"):

CRW TRADING (PROPRIETARY) LIMITED

(Registration Number 2013/188471/07) (the "Borrower")

BORDER BULK SERVICES (PROPRIETARY) LIMITED

¹ *Kalil v Decotex (Pty) Ltd and Another* 1988(1) SA 943 (A) at 945 B-C and 978 D-E.

(Registration Number 2017/199732/07) (the "Borrower")
ECO-ENVIROLITE CONCRETE (PROPRIETARY) LIMITED
(Registration Number 2017/031712/07) (the "Borrower")
GO BUSINESS (PROPRIETARY) LIMITED
(Registration Number 2018/257899/07) (the "Borrower")
TALA LIGHT WEIGHT CONSTRUCTION (PROPRIETARY) LIMITED
(Registration Number 2016/472029/07) (the "Borrower")
XBS ADMINISTRATION (PROPRIETARY) LIMITED
(Registration Number 2013/041309/07) (the "Borrower")
XBS GROUP (PROPRIETARY) LIMITED
(Registration Number 2012/089305/07) (the "Borrower")
SAHARA FREIGHT SOUTH (PROPRIETARY) LIMITED
(Registration Number 2014/277473/07) (the "Borrower")
LOUBSER BULK SERVICES (PROPRIETARY) LIMITED
(Registration Number 2007/005283/07) (the "Borrower")

1 Amount of loan

The Lender hereby agrees to lend the sum of R4,500,000 to the Borrower on the terms set out here in under.

2 Payment of loan to Borrower

It is agreed that the purpose of the loan is to settle an outstanding account which the XBS group company has with Thusanyo Investments (Pty) Ltd. The lender agrees that the loan will be paid out directly to Thusanyo Investments (Pty) Ltd in settlement of the account of the XBS Group companies.

The borrower further agrees and gives instructions to Thusanyo Investments (Pty) Ltd to remit payment of any amount directly to Top Fix (Pty) Ltd as repayment of the loan, on any and all payments made on behalf of XBS Group (Pty) Ltd.

3 Period of loan

This loan shall endure from 12 May 2023 to 16 May 2023. It is further agreed that the loan does not fall within the limitation of the National Credit Act and the national credit act will not be applicable to this agreement.

4 Interest

It is agreed that the loan is interest free.

5 *Place and time of repayment*

Repayment will be made by EFT into the elected bank account of the lender. XBS Group of companies agrees that Top Fix (Pty) Ltd should pay Thusanyo Investments on behalf of XBS Group of companies.

7 *Acceleration clause*

If the Borrower fails to pay any instalment on due date the Lender shall be entitled but not obliged to claim the full balance of the loan together with the interest up to the date of payment.

...

10 *Breach of terms*

If the Borrower fails to make payment of any instalment or payment on the due date and the Lender decides to enforce the acceleration clause, he shall give written notice to the Borrower calling upon him or her to make payment within 24 hours, failing which the Lender shall be entitled to claim payment of whatever is due in terms of this agreement.

...

12 *The whole contract*

The parties confirm that this contract contains the full terms of their agreement and that no addition to or variation of the contract shall be of any force unless done in writing and signed by both parties.”
(sic).

[12] It is *inter alia* clear from the express terms of the agreement that: (i) the Applicant agreed to loan an amount of R4, 500, 000.00 to the XBS Group (which includes the Respondent); (ii) the purpose of the loan was to enable the XBS Group to extinguish its indebtedness to Thusanyo Investments (Pty) Ltd (“Thusanyo”); (iii) the loan would “*endure from 12 May 2023 to 16 May 2023*”; and (iv) that the provisions of the National Credit Act, 35 of 2005 would not apply to the agreement.

[13] In the founding affidavit deposed to by the Managing Director of the Applicant, Micheal Stopforth (“Mr Stopforth”), he confirmed that the R4, 500, 000.00 had been duly advanced as provided for in the agreement (i.e. to Thusanyo). The Respondent criticised the Applicant for failing to attach proof of payment of the loan amount to the founding affidavit. However, Mr Stopworth did confirm under oath that, as Managing Director of the Applicant, he did have control over the books and records relating to the matter which would have shown payment of the money. In any event, as part of the replying papers, the Applicant provided proof of two payments made by it to Thusanyo, namely: (i) R3, 377, 097.56 on 12 May 2023; and (i) R2, 248, 489.79 on 15 May 2023. Both payments were made during the loan period and, although much was made of the fact that the total of the two payments exceeded the loan amount, in my view, nothing turns on this as it is clear that more than the loan amount was advanced by the Applicant to Thusanyo during the loan period. Hence, I am satisfied that the Applicant complied with its obligation to make payment of the loan amount in accordance with the agreement.

[14] According to the Respondent, *“the loan agreement did not include any repayment terms or the date upon which the loan was due and payable, save for payments made by the XBS Group (Pty) Ltd to Thusanyo....”*. The Respondent even went as far as to argue that no there was no evidence that the *“elected bank account of the lender”* into which payments would be made were provided. The Applicant, in turn, argued that the only reasonable interpretation of the agreement would be that the entire loan amount would have become due and payable after the duration period expired, i.e. after 16 May 2023. I agree with the Applicant as the Respondent’s suggestion that it was open to it to repay the loan at its own leisure and as and when it pleases does not sit cheek by jowl with the express wording of the agreement and, in particular, the fact that it was expressly stated that it would only be in place until 16 May 2023. I also agree with the Applicant that the Respondent’s interpretation of the agreement, as far as repayment terms is concerned, is insensible and unbusinesslike.² The Court is of the view that the remaining balance of the loan amount (which for reasons

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para [18].

explained below was less than the total amount) became due and payable after the agreement terminated on 16 May 2023.

[15] As the XBS Group (including the Respondent) failed to repay the loan amount by 16 May 2023, the Applicant's attorneys sent a notice to the XBS Group in terms of section 345(1)(a) of the Act ("the section 345 demand") via email to Mr Steynberg's email address, [a\[...\]](#) on 11 September 2023 at 09h35, demanding payment of R4,500,000.00, within three weeks of the date of service of the notice and it was expressly stated that:

"For purposes of the above payment we confirm that our trust banking details are as follows:

HN ATTORNEYS

FIRST NATIONAL BANK

ACC NO: 6[...]

Branch Code: 2[...]

REFERENCE NUMBER: TF56 XBS GROUP".

[16] There could accordingly have been no doubt after the section 345 demand was sent, which bank account the outstanding balance of the loan should be paid into.

[17] It appears that the section 345 demand was also served at the registered address of the Respondent.

[18] Significantly, at 11h25 on 11 September 2023, less than two hours after the section 345 demand was emailed to Mr Steynberg, he responded to the Applicant's attorney via email (with an email signature describing him as the Managing Director of XBSGLOBAL), stating the following:

"SUBJECT: RE: TF56 LETTER OF DEMAND – TOP FIX (PTY) LTD //
XBS GROUP

Good morning Kim,

We are willing to pay R500 000.00 per month from 30 September 2023 until this debt is redeemed.

Kindly revert back,

Regards, Arrie”

[19] The above email unequivocally demonstrates that Mr Steynberg and the Respondent were well aware that the loan amount was due and payable and Mr Steynberg’s proposal flies in the face of the arguments which were advanced on the Respondent’s behalf in this regard in the answering affidavit and at the hearing and demonstrates that they are contrived.

[20] The repayment proposal in Mr Steynberg’s email was accepted by the Applicant and, on 13 September 2023, the Applicant’s attorneys sent a draft acknowledgement of debt (“AOD”) to Mr Steynberg. Clause 4.1 of the AOD refers to payment of monthly instalments of no less than R500,000.00 per month commencing on or before 30 September 2023.

[21] In the answering affidavit, the Respondent pointed out that the amount of indebtedness in the AOD was recorded as R1,636,644.25 (“the remaining balance”). It was accepted by the Applicant in the replying affidavit that the reference in the founding papers to the total loan amount of R4, 500, 00.00 being outstanding was a *bona fide* an error and that the remaining balance referred to in the AOD was correct.

[22] Mr Steynberg failed to respond to the email attaching the draft AOD or to sign the AOD on behalf of the XBS Group (including the Respondent).

[23] On 27 September 2023 the Applicant’s attorneys sent an email requesting an urgent response and reminding Mr Steynberg that the first instalment was due and payable on 30 September 2023.

[24] As no response or payment was received by 30 September 2023, on 3 October 2023, the Applicant’s attorneys sent a further letter requesting that the

signed AOD together with proof of payment of the first instalment be sent by close of business that day.

[25] Mr Steynberg also confirmed in the answering affidavit that he obtained a copy of the AOD from James Hills (“Mr Hills”), the Head of Finance & Business Development at Thusanyo, via email, on 11 October 2023, and was requested to sign it. A copy of the email correspondence between Mr Hills and Mr Steynberg (which was attached to the answering affidavit deposed to by Mr Steynberg) confirms that Mr Steynberg actually requested the assistance of Mr Hills to structure the payments to be made to the Applicant.

[26] No response was ever forthcoming to the demands and no instalments were received despite Mr Steynberg’s written proposal to pay off the debt. It accordingly became clear to the Applicant that the Respondent was unable to honour its obligations and unable to pay its debts. This led to this application being brought.

C. RELEVANT LEGAL PROVISIONS AND AUTHORITIES:

[27] Sections 344(f) and 344(h) of the Act provide that:

“A company may be wound up by the Court if-

...

(f) the company is unable to pay its debts as described in section 345...

...

(h) it appears to the Court that it is just and equitable that the company should be wound up.”

[28] Section 345 of the Act provides as follows:

“345 When company deemed unable to pay its debts

(1) A company or body corporate shall be deemed to be unable to pay its debts if-

- (a) *a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-*
 - (i) *has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or*
 - (ii) *in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or*
 - (b) *any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or*
 - (c) *it is proved to the satisfaction of the Court that the company is unable to pay its debts.*
- (2) *In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company."*

[29] In *Absa Bank Limited v Rhebokskloof (Pty) Limited & Others*,³ the following was stated:

*"Turning to the merits of the matter, Mr Gauntlett contended that ABSA was entitled to a final winding-up order on the basis that Rhebokskloof was 'commercially insolvent'. **The concept of***

³ 1993 (4) SA 436 (C) at 440 E/F - 441 A.

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 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)." (Emphasis added).

[30] In *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others*⁴ the Supreme Court of Appeal dealt with the test for commercial insolvency and stated *inter alia* the following:

“The argument about timing misconceived the nature of commercial insolvency. It is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company “is able to meet its current liabilities, including contingent and prospective liabilities as they come due”... Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading.

[31] It is clear from the provisions of the Act that for a creditor to have *locus standi*, it must have a liquid claim of at least R100.00 that is due and payable to it by the Respondent it wishes to have wound up.

[32] Where an Applicant has established *prima facie* that it has a claim against the Respondent of at least R100.00, which is due and owing, the onus shifts to the Respondent to show that its indebtedness to the Applicant is *bona fide* disputed on reasonable grounds.⁵

[33] The principle that a Respondent is required to dispute the entire debt *bona fide* and upon reasonable grounds has become known as the “*Badenhorst rule*” (being a reference to the case from which it emanates, namely *Badenhorst v Northern Construction Enterprises (Pty) Ltd*⁶) The Badenhorst rule was also recognised by the Appellate Division (as it was then known) in *Kalil v Decotex (Pty) Ltd & Another*.⁷

⁴ 2020 (2) SA 93 (SCA), para [31].

⁵ *Kalil v Decotex (Pty) Ltd* 1988 (1) SA (T) at 980 B – D.

⁶ 1956 (2) SA 346 (2) at 347 H – 348 B.

⁷ 1988 (1) SA 943 (AD) at 980C – G.

[34] In *Wightman t/a JW Construction v Headfour*⁸ the following was stated about real, *bona fide* and genuine disputes of fact:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the facts said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disallow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.” (Emphasis added).

⁸ 2008 (3) SA 371 (SCA), para [13] at 375 F/G – 376 C.

D. DISCUSSION OF THE MERITS

(a) Locus standi and liquidated debt

[35] In my view, the Applicant has illustrated *prima facie* that it has a liquidated claim of at least R100.00 against the Respondent, and that the remaining balance was due and payable after the loan term expired and, despite demand, payment has to date not been made. The Applicant therefore has *locus standi* to bring this application.

[36] As far as the onus then shifts to the Respondent to demonstrate that the entire debt is disputed on *bona fide* and reasonable grounds, it has failed to seriously and unambiguously address the facts and has not made any real attempt to grapple with the relevant factual allegations. In fact, the Respondent's responses are mostly evasive and constitute bare denials.

[37] In order to successfully oppose a winding-up, the Respondent must dispute the existence of the debt.⁹

[38] In this regard: (i) there is no dispute that the agreement was concluded and that the Respondent was a party to it; (ii) there is evidence that more than R4, 500 000.00 was advanced by the Applicant to Thusanyo; (iii) Mr Steynberg's proposal to repay the outstanding amount in instalments of R500, 000.00 from the end of September 2023 in response to the section 345 demand constitutes a clear concession that a debt of at least R100.00 was due and payable to the XBS Group (which includes the Respondent); and (iv) Mr Steynberg asked Mr Hills on 12 September 2023 to assist in structuring the payments to the Applicant.

[39] The version in the answering affidavit is: (i) completely at odds with Mr Steynberg's proposal on 11 September 2023 and request for Mr Hills' assistance with structuring payments; and is (ii) highly improbable.

[40] In the answering affidavit, without disputing its indebtedness in any meaningful sense, the Respondent makes the bald assertion that the

⁹⁹ *Imobrite (Pty) Ltd v DTL Boerdery CC* [2002] ZASCA 67 (13 May 2022), para [14].

Respondent disputes the amount claimed as the amount in the AOD is less than what is referred to in the section 345 demand.

[41] However, the Respondent fails to take the Court into its confidence to show what portion of the remaining balance is disputed; what amount it avers is outstanding; and instead seeks to hide behind bare and unsubstantiated denials and technical arguments based on an interpretation of the agreement which cannot pass muster, particularly in light of the common cause facts and conduct of Mr Steynberg.

[42] It is also significant that, up until the receipt of the answering affidavit, the Respondent never averred that the debt was not due and payable, and instead (correctly) accepted that it is indebted to the Applicant. Why else would one offer to pay the debt off in instalments and seek to “*structure*” the repayments? The sudden *volte face* in the answering papers in this regard demonstrates that the Respondent is not *bona fide* in disputing the indebtedness to the Applicant on reasonable grounds.

(b) Commercial insolvency

[43] As far as commercial insolvency is concerned:

[43.1] the section 345 demand was served by the Sheriff on the Respondent’s registered address on 13 September 2023 and was sent by email to Mr Steynberg on 11 September 2023;

[43.2] the section 345 demand came to Respondent’s knowledge as Mr Steynberg responded to the demand the same day he received it and made a proposal to repay the debt in instalments of R500 000.00 per month from the end of September 2023;

[43.3] notwithstanding the express proposal to pay the debt off in instalments of R500 000.00 from 30 September 2023, the Respondent has failed to make any payment to date;

[43.4] despite the lapse of 21 days from the date of sending the section 345 notice, the Respondent neglected and / or failed to pay, secure or compound the indebted amount.

[44] In *Body Corporate of Fish Eagle v Group Twelve Investments*¹⁰ the following was stated regarding the deeming provision of section 345(1)(a) of the Act:

“The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the Respondent is unable to pay its debts (Ter Beek’s case supra at 331F).”

[45] In the light of the above, the Respondent had an evidentiary burden to satisfy the Court that it is able to pay its debts and is not commercially insolvent.

[46] In its attempt to discharge the evidentiary burden on it, the Respondent provided its audited financial statements for the period ending February 2023. On the basis of these statements, the Respondent argued that, as its assets by far exceed its liabilities, the Court should find it to be commercially solvent, particularly as it claims to have had a profit in excess of R2, 000, 000.00 for the financial year of 2023.

[47] A thorough analysis of the financial statements demonstrates that they are not only unreliable but that the Respondent does not have cash at hand to pay the Applicant. In this regard, it was pointed out by the Applicant’s counsel that:

- [47.1] the financial statements were reviewed by the auditors based on information provided by the directors of the Respondent;
- [47.2] the auditors who reviewed the financial statements did not prepare them;
- [47.3] the review was not done with full disclosure of all books; and
- [47.4] the financial statements show that the actual cash at hand is a total amount of R201, 014.00, which is substantially less than the amount due to the Applicant and is even less than the monthly payment proposed by the Respondent.

[48] The Court also notes that in the Report of the Independent Reviewer it is *inter alia* stated that:

¹⁰ 2003 (5) SA 414 (W) at 423 B-C.

“The procedures performed in a review are substantially less than those performed in an audit conducted in accordance with International Standards on Auditing. Accordingly, we do not express an audit opinion on these financial statements.”

[49] As far as the Respondent attempted to argue that it is factually solvent since its assets exceed its liabilities, the Applicant contended that this was also incorrect. The mere fact that the value of a company's assets may exceed the amount of its liabilities does not preclude a finding that the company is unable to pay its debts.¹¹

[50] Put differently, the fact that a company is factually insolvent (in the sense that the value of its assets is exceeded by its liabilities) is not *per se* a ground upon which it can be wound up.¹²

[51] In *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited*¹³ the Supreme Court of Appeal (“the SCA”) stated the following in this regard:

“For decades our law has recognised two forms of insolvency: factual insolvency (where a company’s liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities). See, for example, Johnson v Hirotec (Pty) Ltd;[4] Ex parte De Villiers & another NNO: In re Carbon Developments (Pty) Ltd (in Liquidation);[5] Rosenbach & Co (Pty) Ltd v Singh’s Bazaars (Pty) Ltd.

That a company’s commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a

¹¹ *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 440 A-441A.

¹² *Sunny South Cannery (Pty) Ltd v Mbangxa* [2001] 1 All SA 474 (SCA) at 481.

¹³ 2014 (2) SA 518 (SCA), paras [16] and [17].

court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money - and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets. Were the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the new Act, set out in s 7(1) thereof."

[52] It was also pointed out by the Applicant's counsel that, if the Respondent is in such a strong financial position as it claims to be, this does not explain why the Respondent was unable to pay its debts towards Thusanyo, which it previously relied on a loan from the Applicant to satisfy, and which necessitated it to conclude an AOD in terms of which it acknowledges indebtedness to Thusanyo in an amount of R3, 518, 547.87. The Respondent also reneged on that acknowledgment of debt and it was confirmed in the replying affidavit that Thusanyo is instituting legal action for the recovery of this debt.

[53] Having considered all of the evidence, I am of the view that it appears that the Respondent is commercially insolvent and cannot pay its debts as and when they become due and payable.

(c) Just and equitable ground and discretion

[54] In addition to the above, the Applicant contends that the Respondent should be wound-up on the basis that it is just and equitable to do so as envisaged in section 344(h) of the Companies Act.

[55] Section 344(h) "*postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up.*" It confers upon the Court a wide discretionary power which must, of course, be exercised judicially, taking into

account all relevant circumstances. The justice and equity are those between the competing interests of all concerned.¹⁴

[56] In *Afgri Operations Limited v Hamba Fleet (Pty) Limited*¹⁵ the following was stated about the ambit of the Court's discretion in matters of this nature where unpaid creditors are concerned:

“Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court a quo did not keep in view the specific principle that, generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the Respondent company that has not discharged that debt.

[57] In light of the above, this Court's discretion is limited as we are dealing with an unpaid creditor.

[58] On a conspectus of all the evidence, I am of the view that the Applicant has succeeded in demonstrating a *prima facie* case that the Respondent should be provisionally wound up on the grounds relied upon.

[59] As far as costs are concerned, the matter is of importance to the parties concerned and is somewhat complex, hence, costs are awarded on scale B.

E. ORDER

[60] I accordingly grant the following order (which includes the orders granted pursuant to the *ex tempore* judgment handed down on 26 November 2024):

1. Jody Gabrielsen (“the Intervening Party”) was granted leave to intervene in the winding-up proceedings instituted by Topfix (Pty) Ltd, the creditor, against Go Business (Pty) Ltd, the debtor, in the above Honourable Court under case number 2024-020590 on 26 November 2024;

¹⁴ *Moosa NO v Mavjee Bhawan (Pty) Ltd* 1967 (3) SA 131 (T) at 136 G/H.

¹⁵ 2022 (1) SA 91 (SCA) at para [12].

2. The application for postponement by the Intervening Party was refused on 26 November 2024;
3. No order as to costs was made in relation to the application for postponement;
4. The Respondent is hereby placed under provisional winding-up;
5. The Respondent, the Intervening Party and any other party with a legitimate interest is called upon to show cause why this Court should not order the final winding-up of the Respondent on the return day of 5 May 2025 at 10h00 or so soon thereafter as the matter may be heard;
6. A copy of this order shall be forthwith served on the Respondent at its registered address and upon the employees and their registered trade unions, if any, by service at the registered address and on the attorneys representing the Respondent and the Intervening Party;
7. A copy of this order shall be published in the Government Gazette and in a local circulating Newspaper;
8. A copy of this order shall be served on the South African Revenue Services and the Master of the High Court;
9. Costs of this application are costs in the winding-up of the Respondent, including the costs of counsel on scale B.

LG KILMARTIN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Dates of hearing:	26 November 2024
Date of judgment:	30 January 2025

For the Applicant:

Instructed by:

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