

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case no: 2022-035872

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 12 June 2025

In the matter between:

**THE ACTION ENTERPRISE AND
SUPPLIER DEVELOPMENT TRUST**

Applicant

and

MONTLE AND NEO TRANSPORT SERVICES CC

First Respondent

MONTLE GERALD SELEPE

Second Respondent

DATE OF JUDGMENT: This judgment was authored and issued by the Judge whose name is reflected herein and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines.

The date for hand-down is deemed to be 12 June 2025.

JUDGMENT

STYLIANOU, AJ

1. The applicant is the Action Enterprise and Supplier Development Trust, a trust duly registered in accordance with the laws of the Republic of South Africa under Master's reference number IT1515/2011. The Trust was previously known as the Ed Action Fund Trust.
2. The first respondent is Montle and Neo Transport Services CC, a close corporation duly registered in accordance with the laws of the Republic of South Africa under registration number 2008/224709/23.
3. The second respondent is Montle Gerald Selepe. The Notice of Motion seeks no relief against the second respondent.
4. The parties concluded a loan agreement in terms of which the applicant agreed to lend and advance R9,4m to the first respondent.
5. The loan agreement was concluded between the applicant, the first respondent (defined in the agreement as "the Borrower") and the second respondent (defined in the agreement as "the Entrepreneur").
6. A special notarial covering bond was registered in favour of the applicant and passed as security for the first respondent's indebtedness to the applicant. The Special Notarial Covering Bond specially hypothecated and bound to and in favour of the applicant, in terms of section 1 of the Security by Means of Movable Property Act, No 57 of 1993, the following assets:

"1. TANK CLINIC

VIN number: A[...]

Vehicle registration number: Z[...]

. MERCEDES-BENZ

VIN number: W[...]

Engine number: 5[...]

Vehicle registration number: X[...]

3. AFRIT

VIN number: A[...]

Vehicle registration number: G[...]

4. AFRIT

VIN number: A[...]

Vehicle registration number: G[...]

5. GRW ENGINEERING

VIN number: A[...]

Vehicle registration number: D[...]

6. GRW ENGINEERING

VIN number: A[...]

Vehicle registration number: D[...]

7. SCANIA

VIN number: 9[...]

7. In addition, in terms of the special notarial covering bond the first respondent hypothecated in favour of the applicant:

“3.3.1.2 generally all its moveable property and effects (of whatever description and where so ever situate, such as the MORTGAGOR [First Respondent] may now possess or in the future become possessed of, without exception and without in any way limiting the generality of these provisions, including:

3.3.1.2.1 all debts of whatever kind or nature owing to the MORGAGOR;

3.3.1.2.2 its rights to all quotas, permits, licenses and the like;

3.3.1.2.3 all its contractual rights of whatsoever nature including but without limiting the generality of this clause, rights in respect of insurance policies taken out by or in favour of the MORTGAGOR;

3.3.1.2.4 all its plant, equipment, machinery, furniture, fittings, stock in trade and vehicles, nothing excepted;”

8. The special notarial covering bond provides that in the event that the first respondent fails to pay any amounts due and payable to the applicant from whatever cause and/or commits a material breach of any agreement between the first respondent and the applicant thereby entitling the applicant to cancel such agreement or accelerate performance, then the applicant shall be entitled to declare the first respondent's full indebtedness to the applicant from whatever cause to be due and payable and perfect its security in terms of the bond by, *inter alia*, entering any premises of the first respondent and taking possession of any assets listed in the bond and thereafter to dispose of all the assets or take other steps to ensure that it is able to utilise the assets in order to recover the first respondent's indebtedness to the applicant.

9. In the answering affidavit, the first and second respondents admit the citation of the parties, the conclusion of the loan agreement and the registration of the special notarial covering bond as well as the terms thereof.

10. The applicant alleges that the first respondent breached the loan agreement by *inter alia* failing to make repayments to the applicant in terms thereof. Other breaches of the terms of the loan agreement are alleged by the applicant such as a failure by the first respondent to account to the applicant by furnishing it with management, financial and other operational documents and information relating to the first respondent's business as well as a failure to allow the applicant to inspect the assets that had been pledged to the applicant in terms of the special notarial covering bond.

11. Due to the first respondent's default, the applicant cancelled the loan agreement and accelerated the balance payable. It now seeks to perfect its security.

12. The applicant seeks payment of the sum of R10 758 636.00 and an order authorizing the Sheriff of the Court to attach and take possession of the assets specifically referred to in the special notarial bond as well as generally, all of the first respondent's movable assets.

13. The first respondent admits that it breached the loan agreement in that it had made only seven payments to the applicant totalling R1 612 480 between the months of February 2021 and August 2021.

14. In its answering affidavit, the first respondent admits that it is indebted to the applicant in the amount of R10 758 636.00, which amount represents the total outstanding amount in terms of the loan agreement. The first respondent goes so far as to say:

"The respondents (sic) are willing to pay the amount of R10 758 636.00 to the applicant and they have never disputed their liability towards the applicant. The respondents will still honour their agreements with the respondent."

15. The respondents do not seriously dispute the applicant's right to take possession of the assets specially hypothecated as well as the general assets. Only a bald denial to the assertion that the applicant can do so is proffered.

16. No basis is set out for the denial and, given the fact that the indebtedness is admitted, the first respondent would have been required to comprehensively explain why, since the failure to pay is admitted, the applicant would not be entitled to the relief it seeks.

17. The bald denial can therefore be rejected as no real dispute of fact is created thereby and it is clearly untenable.

18. Other than admitting the breaches, the respondents make vague allegations regarding the applicant playing a role in hampering its business activities. This line is not developed by the respondents and in any event, even if the allegations were true, the first respondent does not explain why this would affect its indebtedness to the applicant and why it still admits owing the applicant R10 758 636.00.

19. It was against this background that the matter came to the opposed motion court for the week of 10 March 2025.

20. The matter was allocated for hearing on Wednesday 12 March 2025 at 10h00.

21. Mr Mfusi, who appeared for the respondents handed up an affidavit dated 11 March 2025 which was deposed to by the second respondent on behalf of the first respondent and himself wherein the Court was informed that the respondents sought a stay of the application and the removal of the matter from the Court roll.

22. The affidavit of 11 March 2025 explains that the first respondent had been placed under voluntary winding up in terms of s80 of the Companies Act 71 of 2008 ("the New Companies Act") and that the second respondent had initiated a process to surrender his estate for the benefit of all his creditors.

23. Section 80 of the New Companies Act deals with the voluntary winding-up of a solvent company. Quite to the contrary, the answering affidavit filed by the respondents paints a picture of a company that is unable to pay its debts as and when they fall due.

24. In the affidavit requesting the postponement, the deponent attaches certain annexures which he describes as follows:

“6.1 the filing via email to the CIPC as Annexure “AP1”;

6.2 the member’s resolution as Annexure “AP2”;

6.3 the prescribed notice as Annexure “AP3”; and

6.4 confirm that the prescribed fee was deposited on the CIPC system for payment as per the CIPC required electronic payment.”

25. The prescribed fee is R250.00.

26. Adv. Setaba who appeared for the applicant submitted that the affidavit did not establish that the first respondent had been placed into voluntary winding-up in terms of section 80 of the Act as there was no proof of payment of the prescribed fee of R250.00 to the Companies and Intellectual Property Commission (“CIPC”).

27. Section 80 of the Act provides as follows:

“80 Voluntary winding-up of solvent company

(1) A solvent company may be wound up voluntarily if the company has adopted a special resolution to do so, which may provide for the winding-up to be by the company, or by its creditors.

(2) A resolution providing for the voluntary winding up of a company must be filed, together with the prescribed notice and filing fee.

(6) *A voluntary winding-up of a company begins when the resolution of the company has been filed in terms of subsection (2)."*

28. Hence, in terms of s80(6), the voluntary winding up only commences once the resolution is filed in terms of s80(2) which in turn requires it to be filed with the *"prescribed notice and filing fee"*.

29. As there was no evidence of the payment of the filing fee, Mr Setaba submitted that there was no evidence that the winding-up of the first respondent had commenced and hence, an order as sought in the notice of motion could be granted as there was no intervening winding-up.

30. In response to this, Mr Mfusi handed up from the Bar a printout from the CIPC which he submitted was proof of payment of the R250.00 fee to the CIPC. On the face of it, it was clearly not a receipt evidencing payment of the prescribed fee. The document appeared to be a CIPC Entity Search which recorded that "SIMPHIWE MFUSI ACC# (ACFXSE)" had a balance in his favour with the CIPC of R250.00. Mr Mfusi explained that the account with the CIPC was his firm's account.

31. The document that Mr Mfusi sought to rely upon was clearly not proof of payment of the prescribed fee and I allowed the matter to stand down to Friday 14 March 2025 to afford the respondents an opportunity to obtain proof of payment and to allow the parties to get clarity on what the status of the first respondent was.

32. At the resumption of the hearing on Friday 14 March 2025, the respondents were unable to furnish any evidence that the prescribed fee had been paid.

33. Mr Mfusi handed up another affidavit by second respondent (dated 13 March 2025) which attached to it as annexure "AP9" an "Account Statement" which reflected that an amount of R230 had been deposited into the Account of SIMPHIWE MFUSI (ACFXSE) held with the CIPC bringing the balance on that account to R250.00. This was no more proof of payment of the prescribed fee than the first document tendered as proof of payment. In fact, both documents merely stated the

same thing, that the account of SIMPHIWE MFUSI (ACFXSE) was in credit for the sum of R250.00.

34. There was no proof that payment of the sum of R250,00 had been made to the CIPC as the prescribed fee for the voluntary winding-up of the first respondent.

35. Accordingly, there was no proof of compliance with section 80(2) and (6) of the Companies Act.

36. To the contrary, counsel for the applicant handed up a printout from CIPC dated Thursday, March 13, 2025 at 22:25 (the evening before the reconvened hearing) which indicates that the “*Enterprise Status*” of the first respondent is “*In Business*”.

37. Mr Mfusi objected to this document being handed up to the Court on the basis that it was not sworn to and attached to an affidavit.

38. Mr Setaba referred the Court to the judgment of Levenberg AJ in the matter of ***The Furniture Bargaining Council v AXZS Industries (Pty) Ltd Trading As Don Elly Enterprises*** 2020 (2) SA 215 (GJ) where the Court was presented with a CIPC report which Levenberg AJ characterised in par [27] as having “*official legitimacy*”. However in that case, the CIPC document formed an attachment to a supplementary affidavit and was not merely handed up from the Bar.

39. In the absence of an affidavit confirming what the CIPC Printout was and how it was obtained, I cannot have regard to it.

40. Even so, there is still no evidence that the prescribed fee had been paid and therefore no evidence that the necessary formalities in section 80 had been complied with.

41. Another difficulty for the respondents are the terms of the Member’s Special Resolution which is alleged to have placed the first respondent into voluntary winding-up.

42. The resolution attached to the affidavit of 11 March 2025 is a resolution which the deponent refers to as *“the member’s resolution”*. I quote it in full:

“MEMBER’S SPECIAL RESOLUTION

*PASSED BY THE SOLE MEMBER AND SHAREHOLDER OF MONTLE AND
NEO TRANSPORT SERVICES CLOSE CORPORATION (Reg No:
2008/224709/23)(“Close Corporation”)
HELD AT 3[...] F[...] STREET, M[...] C[...], C[...], GAUTENG, ON THE 2TH
DAY OF FEBRUARY 2025*

1. *By a written resolution signed by GERALD MONTLE SELEPE (Identity Number: 6[...]), the sole Member of the Close Corporation, pursuant to Section 80 of the Companies Act, 71 of 2008 (“Companies Act”), the following Special Resolution was duly passed:*

1.1 *The Close Corporation be voluntarily wound up;*

1.2 *The Creditor, Themba Mazwai, intends to wound up the Close Corporation and the Close Corporation has no other option outside of such a push (sic) but to voluntarily wound up the Close Corporation. In that regard, the Creditor will in terms of Section 80 of the Companies act assume all powers to carry on the business of the Close Corporation, manage and appoint a registered liquidator to grant such powers to realize all Close Corporation assets, settle all outstanding liabilities and distribute the remaining proceeds to the sole Member, after providing proper notice to all other creditors and following all legal requirements;*

1.3 *The sole Member of the Close Corporation is authorized to file this Special Resolution with the Companies And Intellectual Property Commission (CIPC) together with the prescribed notice and filing fee.*

GERALD MONTLE SELEPE: SOLE MEMBER AND SHAREHOLDER

MONTLE AND NEO TRANSPORT SERVICES

Date: 27 FEBRUARY 2025”

43. On the face of it, the resolution appears to be one passed by the members of the first respondent that a creditor will bring an application for the voluntary surrender of the first respondent.

44. This is not a resolution to place the first respondent into voluntary winding-up. It is also not clear to me on what basis a creditor can “*assume all powers to carry on the business of the [first respondent], manage and appoint a registered liquidator...*”

45. It seems clear therefore that there is no evidence of the first respondent being placed under voluntary winding-up and therefore, given the admission of liability on the part of the first respondent, there is no reason why the relief sought by the applicant should not be granted.

46. As regards the second respondent. The affidavit filed of 11 March 2025 states that Mr Selepe (the member of the first respondent and the second respondent) had decided to surrender his estate “*...as a debtor, for the benefit of all my creditors.*”

47. As previously mentioned, no relief is sought against the second respondent in the Notice of Motion. As such, the possibility that he may have surrendered his estate is no bar to the application proceeding against the first respondent.

48. In any event, there is also a difficulty with the surrender of the second respondent’s estate.

49. Section 4(1) of the Insolvency Act, 24 of 1936 requires the publication of an advert in the Gazette and in a local newspaper to take place no more than 30 days and no less than 14 days before the date of the application for the surrender of an estate.

50. The second respondent says that notice of his surrender was published in the Star newspaper on 5 March 2025. Due to some difficulties with the Government

Printers, the advert in the Gazette did not appear on the date that the first respondent intended i.e. 7 March 2025 and arrangements were made for it to appear on 14 March 2025. The forms submitted to the Government Printers which (for both dates) are annexed to the affidavit of 11 March 2025 both record the date on which the application for the surrender of the second respondent's estate is to take place as being 22 April 2025.

51. This means that the advert in the Star appeared 47 days before the intended application. The intended advert in the Gazette for 14 March 2025 would appear 38 days before the intended application.

52. Hence, there was therefore no compliance with section 4(1) of the Insolvency Act and the voluntary surrender would therefore be a nullity.¹

53. In the circumstances, I order as follows:

1. Judgment is granted against the first respondent in favour of the applicant, in the amount of R10 758 636.00.

2. An order is granted authorizing the applicant and/or the Sheriff of the Court with jurisdiction, to enter the first respondent's business premises situated at 3[...] F[...] Street, M[...] C[...], C[...], Gauteng, or any other premises occupied by the first respondent, and to attach and take possession of the following assets, whether kept in such premises or elsewhere:

2.1. the following assets listed in Annexure A of Special Notarial Covering Bond B[...] ("the listed assets"):

2.1.1. Tank Clinic, Vin number A[...], vehicle registration number Z[...];

2.1.2. Mercedes-Benz, Vin number W[...],
engine number 5[...], vehicle registration

¹ ***Ex Parte Oosthuysen*** 1995 (2) SA 694 (T)

number X[...];

2.1.3. Afrit, Vin number A[...], vehicle registration number G[...];

2.1.4. Afrit Vin number A[...], vehicle registration number G[...];

2.1.5. GRW Engineering, Vin number A[...], vehicle registration number D[...];

2.1.6. GWR Engineering, Vin number A[...], vehicle registration number D[...];

2.1.7. Scania, Vin number 9[...].

2.2. generally, all the first respondent's moveable property and effects (of whatever description), including the following ("the general assets"):

2.2.1. All debts of whatever kind or nature owing to the first respondent;

2.2.2. The first respondent's rights to all quotas, permits, licences and the like;

2.2.3. The first respondent's contractual rights of whatsoever nature;

2.2.4. All of the first respondent's plants, equipment, machinery, furniture, fittings, stock in trade and vehicles.

3. The applicant is entitled to hold the listed assets and the general assets as security for the payment of the amount of R10 758 636.00;

4. The applicant is entitled to dispose of the listed assets and the general assets or any of them by public auction or by private treaty or otherwise in the applicant's sole discretion;

5. The applicant is entitled to execute upon all or any of the listed assets and the general assets;

6. The first respondent is directed to pay the costs of this application on an attorney and client scale.

X STYLIANOU, AJ

Acting Judge of the Hight Court

Heard: 12 and 14 March 2025

Judgment delivered: 12 June 2025

Appearances:

For Applicant: Adv. Setaba

Instructed by: Webber Wentzel Attorneys

For Respondents: Mr. Mfusi

Instructed by: Mfusi & Co Attorneys