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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE No: 2025/080158

(1) REPORTABLE: YES/NO

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

(3) REVISED.

SIGNATURE: VAN WYK ASL (AJ)

DATE: 24 JUNE 2025

In the matter between:

**THE HANS MERENSKY LANDOWNERS
ASSOCIATION (PTY) LTD**

APPLICANT

and

**SOUTHERN SKY RESIDENTIAL
PROPERTIES (PTY) LTD
(Registration Number: 2006/017584/07)**

RESPONDENT

JUDGMENT

VAN WYK ASL (AJ):

INTRODUCTION

1. The applicant, The Hans Merensky Landowners Association, applied to this Court, on an urgent basis seeking the compulsory liquidation of the respondent. The basis for seeking the relief sought is premised thereon that the applicant alleges that the respondent is commercially insolvent and unable to pay its debts as envisaged in section 344(f) read with section 345 of the Companies Act, 61 of 1973 (*“the Act”*).
2. The applicant furthermore argued that it would be just and equitable to place the respondent under winding up and for a liquidator to be appointed to ensure that all creditors are treated fairly and equally and for an investigation into the conduct of the respondent and its director as envisaged in section 344(h) of the Act.
3. The respondent is the owner of two (2) immovable properties. The first property is situated at Erf 8[...], Phalaborwa Extension 1. The second property is situated at Portion 75 of Portion 57, Merensky (*“the Merensky property”*). The Merensky property is a property which falls within the Hans Merensky Golf Estate and as a result thereof, the respondent, as the owner of this property, is liable to make payment of monthly levy amounts to the applicant. The obligation to make payments as such is admitted by the Respondent.
4. The applicant argued that the respondent, at the time of launching its application, is indebted to it in an amount of R 293 363-58 and at the time of filing its replying affidavit increased to an amount of R 309 434-10 which will increase monthly.
5. It is trite that where an applicant has established, *prima facie*, that it has a claim against the respondent, which is due and owing, but which remains unpaid, the *onus* shifts to the respondent to show that its indebtedness to the applicant is *bona*

fide disputed and on reasonable grounds.¹ Further, in determining the claim amount an applicant can rely on all information before the Court disclosed in the affidavits.² If a debt has been partially paid or is partially disputed, a creditor still has *locus standi* to bring an application if the unpaid part of the liquid debt that exceeds R100.00. Considering the facts presented by the applicant and those facts admitted by the respondent and insofar as it may be relevant to mention herein, I am of the view that the applicant is a creditor of the respondent, and it established the requisite *locus standi* to institute these proceedings which I will deal with in more detail below.

URGENCY

6. The Respondent argued that this application is not urgent and is an abuse of this Courts process. The applicant in essence argued that the matter is urgent and remains urgent following the discharge of the provisional liquidation order on 23 April 2025 by my brother, Kganyago J.

7. In *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd*³ the Supreme Court of Appeal dealt with a matter where the Court a quo dismissed a liquidation application for a lack of urgency. In adjudicating upon the appeal, the Supreme Court of Appeal held as follows at paragraph 30 of its judgment:

“The high court erred. Winding-up applications are, in general by their nature, urgent.”

8. The Supreme Court of Appeal approved the finding by the Court in the matter of *Van Greunen v Sigma Switchboard Manufacturing CC*⁴ where the Court held as follows at paragraph 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

¹ *Kalil v Decotex (Pty) Ltd* 1988 (1) SA (T) at 980B – D; *Helderberg Laboratories CC v Sola Technologies* 2008 (2) SA 627 (C) at paras 21 and 22.

² *Stephan v Khan* 1917 CPD 24.

³ [2022] ZASCA 143 (24 October 2022).

⁴ [2003] ZAECHC 12.

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.

9. In *Ex parte: Nell N.O. and Others*⁵ the Court, per Tuchten, J, confirmed this position and held in respect of urgency of insolvency proceedings as follows:

“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 1999 4 SA 835 E 838J-839A, 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 recommendations 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.

10. In *Fourie and Another v Housezero Construction (Pty) Ltd*⁶ the following was confirmed and held at para 28:

“In our law, commercial urgency has also been accepted as justifying the launching of an application in the urgent court ... 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.”

11. The applicant argued that since the provisional order was discharged on 23 April 2025 there exists a well-founded fear that the respondent under control of Ms Shamira Rinderknecht, will attempt to transfer the two immovable properties out of

⁵ 2014 (6) SA 545 (GP).

⁶ 2022 JDR 0202 (GP).

the name of the respondent to frustrate creditors, including the applicant. This seems to be the only assets held by the respondent.

12. The applicant substantiated its fears by the fact that the respondent's director, Ms Rinderknecht, has over the years embarked on numerous litigious matters solely to frustrate the rights of creditors.

13. This Court was referred to remarks made by the Supreme Court of Appeal in *Southern Sky Hotel and Leisure (Pty) Ltd and Others v Southern Sky Food Enterprises (Pty) Ltd*⁷:

“One final comment is necessary regarding the manner in which Rinderknecht has over the years frustrated the various efforts to wind- up a company that was clearly financially distressed since at least 2013. I need not restate the facts. It took the Irish Investors close to eight years of litigation to obtain a final liquidation order. The liquidators have the following to say about this latest attempt to frustrate the liquidation process:

‘Simply put, the business rescue applications have been filed as part of a clear and unlawful stratagem to abuse the machinery of business rescue and to further frustrate the eventual winding-up of the insolvent estate of [the company]. [The respondent] acted in concert with the original applicant [Vision] who issued the first business rescue in December 2020. Both applications constitute abuse and are nothing but simulated litigation. The aim and motive are to procure and [sic] ulterior object, namely a suspension of litigation.’

14. It was furthermore argued that this application will only be heard in the opposed motion roll by June or July 2026, if this matter is brought in the normal course. In further support of the applicants' fears the applicant said that the effect will be that by the time the matter is heard in the normal course, there may be no assets left that can be realized and the proceeds be distributed to creditors, resulting in detrimental prejudice to the creditors of the respondent which includes the applicant. In consequence the applicant argued that this application is urgent, and an

⁷ 2023 (4) SA 99 (SCA).

imperative need exists for a *concursum creditorum* to be established and for a liquidator to be appointed.

15. It is a well-established principle in our law that the liquidation of a company's estate establishes a *concursum creditorum* whereafter nothing can be done by any of the creditors to alter the rights of other creditors.⁸ It is trite that the object of an insolvency order is to ensure 'a due distribution of assets among creditors in the order of their preference.'⁹

16. The Court in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) in paras 6 states as follows:

'[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait'

17. In the matter of *Mogalakwena Municipality v Provincial Executive Council and others*¹⁰ the learned Tuchten, J held at paragraph 64 as follows:

"It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.

⁸ *Walker v Syfret* N.O. 1911 AD 141 at 160.

⁹ *Walker v Syfret* N.O. 1911 AD 141 at 166.

¹⁰ 2016 (4) SA 99 (GP)

18. In the affidavits filed in this application, reference was made to prior and never-ending litigation involving the Respondents director, Ms Shamira Rinderknecht and other entities/companies she was involved in. I am of the view that those proceedings and the facts which gave rise thereto play no determining role in this application, except for the provisional order, which was discharged on 23 April 2025, whether by agreement between those parties or not. The culminating effect thereof is that the immovable assets of the Respondent are no longer preserved, protected or under the control of provisional liquidators. Further, the Respondent admitted that it is a debtor of the applicant, subject to its defense of set-off which I will deal with later herein below.

19. Considering the authorities and facts referred to herein *supra*, I am of the view that the application is urgent and that the applicant will not be afforded substantial redress at a hearing in due course.

20. Accordingly, I find that the matter is urgent.

21. The respondent applied for condonation for the later filing of its answering affidavit. This application is not opposed by the applicant. Considering the reasons advanced by the respondent and this court's discretion under these circumstances, specifically in urgent applications, the late filing of the respondent's answering affidavit is condoned.

22. During argument, the respondents counsel highlighted that the applicant attempted to make out a case or amplify its cause of action in its replying affidavit which, according to trite legal principles should not and cannot be allowed. In the answering affidavit, the respondent raised issues regarding (a) the alleged resolution taken by the board of the applicant in terms whereof Ms Rinderknecht's subsidiary companies decided to provide financial assistance to the applicant and that any amounts owing by the respondent to the applicant must be set-off against such indebtedness, and (b) the statement provided to the applicant as regards to its alleged indebtedness to Ms Rinderknecht. Upon careful consideration of the affidavits filed by the parties, I am satisfied that the applicant pleaded the requisite primary and legal facts to sustain a cause of action in its founding affidavit,

specifically those facts which are required in applications of this nature. The applicant pleaded that it is a creditor of the Respondent, it is owed more than R 100-00, that the respondent is commercially insolvent and it would be otherwise just and equitable to place the respondent under liquidation. It follows that the allegations pleaded by the respondent, referred to in (a) and (b) *supra* warranted a response from the applicant in its *replying* affidavit. After all, the respondent raised the defence(s) referred to in (a) and (b) *supra* in its answering affidavit.

23. In *eBotswana (Pty) Ltd v Sentech (Pty) Ltd and Others*¹¹ Spilg J in para 28 said the following:

*“ ... The short answer is that in view of the contents of the answering affidavit it was well within the ordinary procedural rules for the applicant to respond by introducing further corroborating facts. Even if certain of the averments could have been made in the founding affidavit, on its own that is no basis for excluding it for consideration. It is evident that Sentech would not have been able to challenge the averment or document produced”*¹².

MERITS OF THE MATTER

24. I will now deal with the merits and defences of this application. In establishing whether the applicant is entitled to relief it seeks by placing the respondent under liquidation it is important for it to establish certain jurisdictional factors such as:

24.1 Whether the applicant is a creditor of the respondent in an amount of more than R100.00.

24.2 Whether there is a *bona fide* dispute of indebtedness on reasonable grounds.

24.3 Whether the respondent is commercially insolvent.

24.4 Whether it would be just and equitable to place the respondent under liquidation; and

¹¹ 2013 (6) SA 327 (GSJ)

¹² *Hidro -Tech Systems (Pty) Ltd v City of Cape Town and Others* 2010(1) SA 483 (C) at para 81 and *Smith v Kwanonqubela Town Council* 1999(4) SA 947 (SCA) at para 15.

24.5 This Court's discretion in refusing a winding-up order in these circumstances.

25. It is undisputed on the affidavits before me that the applicant is a creditor of the respondent. In a letter by the respondent's attorneys of record, dated 25 April 2025 it was conceded that the "*levies of her (Rinderknecht) related properties are due and should be offset and the residue thereon be paid to our client (Rinderknecht)*". Further, the respondent admitted in paragraph 9 of its answering affidavit that it is the owner of Portion 75 of Portion 57, Merensky, which falls within the Hans Merensky Golf Estate and by virtue of such ownership the respondent is liable to the applicant for the payment of monthly levies. As mentioned herein *supra*, I am of the view that the applicant is a creditor of the respondent.

26. It follows that the respondent must dispute the existence of the debt. This was confirmed by the Supreme Court of Appeal in the matter of *Imobrite (Pty) Ltd v DTL Boerdery CC*¹³ where the Supreme Court of Appeal said at paragraph 14:

"It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of a debts. Thus, winding-up proceedings ought not to be resorted to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused."

27. In paragraph 1.13 of the respondents answering affidavit it states that "*a real dispute exists with regard to the indebtedness of the respondent towards the applicant*".¹⁴ I agree, that if the continuous repetitions, denials and irrelevant matter are stripped from the respondent's answering affidavit, it is evident that the respondent relies on an alleged set-off as a basis for not being liable to pay the debt owing to the applicant.

28. Following the respondents' argument, and accepting hypothetically that a valid resolution was adopted by the applicant's board on 1 September 2023, the

¹³ [2022] ZASCA 67 (13 May 2022).

¹⁴ Answering affidavit, at para 1.13, page 007-18.

Respondent's main defence remains that it owes the applicant amounts for arrear levies but that such debt should be set off against the debt incurred by Ms Rinderknecht on behalf of the applicant, i.e. the purported legal fees which was paid on behalf of the applicant.

29. The applicant argued that the respondent relies on an invoice issued by Ms Rinderknecht. The invoice under discussion is a single document which seems to have been prepared by Rinderknecht herself wherein she states that a total amount of R 4 588 329-09 was purportedly paid by her in legal fees on behalf of the applicant. Further, the applicant argued that there is no actual account and invoice from the attorney that attended the legal work nor any vouchers for any disbursements to arrive at the exorbitant amount of R 4 588 329-09. What is furthermore absent is any proof that this amount was even paid for by Rinderknecht. It follows that the applicant disputes the amount owed in legal fees to Rinderknecht.

30. Even if it is accepted that a valid resolution was adopted by the applicant's board on 1 September 2023, the purported claim by Ms Rinderknecht or hypothetically the Respondent for that matter is for legal fees which existence and amount is disputed by the applicant. The applicant, without a doubt and specifically considering its denial(s), would be entitled to a taxed bill of costs which would only after such taxation render the purported legal fees liquidated in nature. On the conspectus of the evidence *in casu*, the disputed legal fees were not taxed at all, which renders the claim by Ms Rinderknecht or hypothetically the respondent not liquidated in nature. On the conspectus of the evidence before me, Ms Rinderknecht purportedly advanced monies to- and on behalf of the applicant. It follows that Ms Rinderknecht might have a claim premised on unjustified enrichment against the applicant if such fees were in fact paid on behalf of the applicant. This purported or potential claim is in any event not liquidated.

31. In order for a party to successfully rely upon set-off as a defence that party must allege and prove:

- 31.1 There is an indebtedness by the one party to the other and *vice versa*¹⁵;
- 31.2 The debt relied upon in support of the set-off is due and payable¹⁶;
- 31.3 Both debts are liquidated¹⁷; and
- 31.4 The parties are indebted to each other in the same capacity.¹⁸

32. On the version of the respondent, the applicant is indebted to Rinderknecht for the repayment of alleged legal fees. The problem for the respondent is twofold, firstly, the applicant and the respondent are not mutually indebted to one another and secondly, the purported claim for legal fees are not liquidated, even if the applicant was hypothetically indebted to the respondent.

33. The respondent further relied on *annexure “AA7”*, an annexure to its answering affidavit, to suggest that the set-off applies between the respondent and the applicant. If consideration is given thereto, the letter suggests that the erstwhile attorneys for the respondent acted on behalf of “*Ms Rinderknecht, NewInvest (Pty) Ltd, Golden Quilt Investments 164 CC and Southern Sky Estate (Pty) Ltd, herein referred to as our clients*”. This letter made no mention of the respondent as their client and is consequently of no assistance to the respondent.

34. In *Capricorn Beach Homeowners Association v H.E.S. Potgieter t/a Nilands and Another*¹⁹ the Supreme Court of Appeal dealt with a defence of set-off in circumstances where the parties were not mutually indebted to one another, similar as to the facts *in casu*.

34.1 In dealing with these facts, the Supreme Court of Appeal held as follows:

“I deal first with the appellant’s defence based on set-off. The appellant’s claim to set off the client’s debt against the erroneous payment made by the first respondent is ill-conceived. The appellant and the first respondent are not mutually indebted to each other. Set-off operates only where two persons

¹⁵ Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd 2000 (4) SA 598 (C).

¹⁶ Mahomed v Nagdee [1952] 2 All SA 121 (A), 1952 (1) SA 410 (A).

¹⁷ Fatti’s Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd [1962] 1 All SA 578 (T), 1962 (1) SA 736 (T).

¹⁸ Road Accident Fund v Myhill NO 2013 (5) SA 426 (SCA).

¹⁹ 2014 (1) SA 46 (SCA).

reciprocally owe each other something in their own right. Wille's Principles of South African Law 9 ed (2007) at 1834. In Schierhout v Union Government (Minister of Justice) 1926 AD 286 at 289, Innes CJ commented as follows with regard to set-off:

'The doctrine of set-off with us is not derived from statute and regulated by rule of court, as in England. It is a recognised principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other pro tanto as effectually as if payment had been made.' (Emphasis added.)

*In the present matter the appellant and the first respondent are not mutually indebted to each other. The appellant knew that the payment was made in error and was therefore not entitled to appropriate the erroneously transferred funds. See Nissan South Africa (Pty) Ltd v Marnitz NO & others 2005 (1) SA 441 (SCA) para 24. Even on the appellant's own version no grounds exist for set-off to operate against the first respondent."*²⁰

35. The principle that a Respondent is required to dispute the entire debt bona fide and upon reasonable grounds has become entrenched and is known as the **Badenhorst rule** (after *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (2) at 347H to 348B). The rule was recognized in the then Appellate Division in *Kalil v Decotex (Pty) Ltd & Another*²¹.

36. In *Kalil v Decotex (Pty) Ltd and Another*²², Corbett JA referred with apparent approval to the earlier decision of Hiemstra AJ (as he then was) in *Badenhorst v Northern Construction Enterprises (Pty) Ltd*²³, approving a passage from Buckley on Companies, which included the following statement:

"But, for course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order".(own emphasis

²⁰ Capricorn Beach Homeowners Association v H.E.S. Potgieter t/a Nilands and Another 2014 (1) SA 46 (SCA) at paragraphs 13 and 14.

²¹ 1988 (1) SA 943 (AD) at 980C- G

²² 1988 (1) SA 943 (A) at 979 B-C

²³ 1956 (2) SA 346 (T) at 348

added). The learned Judge of Appeal went on to add the following at 1165 and said:

“a bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court (as required in Petersen's case (supra) to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious, intended merely to delay the hearing. The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard. ”

37. In *Meyer No V Bree Holdings (Pty) Ltd*²⁴ Margo J, accepted the court's reasoning in the *Room Hire Company* case as applying, equally, to winding up proceedings and the application of the Badenhorst Rule. (a reference to the case of *Badenhorst v Northern Construction Enterprises (Pty) Ltd*²⁵ where it was formulated and adopted)

38. Professor Blackman in "Companies", in Joubert The Law Of South Africa²⁶describes the meaning of "a bona fide dispute on reasonable grounds" as follows:

“A debt is not bona fide disputed simply because the respondent company says that it is disputed. The dispute must not only be bona fide or genuine but must be on good, reasonable or substantial grounds. The expression 'genuine dispute' connotes a plausible contention requiring the same song of consideration as a 'serious question to be tried'. It is not sufficient for the company merely to establish that there is a serious question to be tried as to whether the dispute over the debt is genuine in that the debt is disputed on the basis that an honestly held belief that it is not payable and is not disputed merely for the purposes of delay or obstruction. 'Genuine' in this context does not mean fabricated for the purposes of the proceedings or not just thought up

²⁴ 1972 (3) SA 353 (T) at 354 D-H

²⁵ 1956 (2) SA 346 (T)

²⁶ Vol 4, Part 3, paragraph 113

or brought forward without genuine belief: there can be no genuine dispute if there are not substantial grounds for disputing the debt."

39. Fourie J held in *Helderberg Laboratories CC and Others v Sola Technologies (Pty) Ltd*²⁷ that:

"I am in respectful agreement with the aforesaid dictum of Milne J, which has been approved by the Appellate Division in Kalil v Decotex (Pty) Ltd and Another (supra) at 980E. It therefore appears to me that it would be preferable to refer to this duty, of a respondent to show that the alleged debt is disputed on bona fide and reasonable grounds, as an evidential burden and not an onus"

40. Considering the legal principles and the facts contained in the affidavits, I am of the view that the respondent's reliance on the defence of set-off is misplaced and incorrect in law for the reasons advanced in paragraph 32 *supra*. Consequently, I am of the view that the respondent failed to disclose a *bona fide* dispute for the indebtedness on reasonable grounds as regards to the claimed amount it owes the applicant. The respondents' defence premised on set-off is furthermore legally and factually unsustainable. Accordingly, the respondent's defence premised on set-off must fail.

41. Considering that there is a clear indebtedness owing by the respondent to the applicant, which indebtedness are not disputed on *bona fide* and reasonable grounds by the respondent, I turn to consider, on the affidavits before me, whether the respondent is commercially insolvent. The applicant's attorneys transmitted 2 (two) notices and demands in terms of section 345 of the Act to the respondent at its registered address.²⁸ The aforesaid notices were served by the Sheriff on the respondent's registered address on respectively on 7 and 8 April 2025.²⁹ Notwithstanding the lapse of 21 days from the date of serving the section 345

²⁷ 2008 (2) SA 627 (C) at paragraph [22] and [23]

²⁸ Annexure "FA17" and "FA18" to the applicants founding affidavit, on page 004-64 to 004-75.

²⁹ Annexure "FA19" and "FA20" to the applicants founding affidavit, on page 004-76 to 004-77.

notices, the respondent has neglected, refused and/or failed to pay, secure or compound the indebted amount.

42. Considering the respondents failure to rely successfully on its defence of set-off, the only conclusion is that the respondent is commercially insolvent and ought to be deemed as such. A company's inability to pay its debts may be proved in any manner. Evidence that a company has failed on demand to pay a debt of which payment is due is cogent prima facie proof of its inability to pay debts

"... for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources".³⁰

43. In *Body Corporate of Fish Eagle v Group Twelve Investments* 2003 (5) SA 414 (W) at 428B-C the Court held as follows:

"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)."

44. Accordingly, with the deeming provision taking effect, the respondent had an evidentiary burden to satisfy this Court that it is able to pay its debts and that it is commercially solvent. In my view, a task which the respondent dismally failed to do. The respondent failed to advance any audited financial statements to prove its solvency. Considering the respondents failure to satisfy the requirements to successfully relying on a defence of set-off, there are no primary or secondary facts placed before this court which disputes the fact that the respondent cannot meet its day-to-day liabilities. The respondent has accordingly failed to rebut the presumption that it is commercially insolvent and unable to pay its debts.

45. As stated by Caney J in the case of *Rosenbach*³¹:

³⁰ *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597 per Kany J

³¹ 1962 (4) SA 593 (D) at 597

“the proper approach in deciding the question whether a company should be wound up on this ground appears to me. to be that, if it is established that a company is unable to pay its debts, in a sense of being unable to meet current demands upon it, its day-to-day liabilities in the ordinary course of business, it is in a state of commercial insolvency”.

46. In *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others*³² the Supreme Court of Appeal dealt with the test for commercial insolvency and held as follows at paragraph 31:

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

47. Furthermore, over a century ago Innes, CJ in the well-known matter of *De Waard v Andrew & Thienhaus Ltd*³³ made the following apposite remarks:

“The matter is not sprung upon him. . . of course; the court has a large discretion in regard to making the law absolute; and in exercising that discretion the condition of a man’s assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon and examine very narrowly the position of a debtor who says: “I am sorry that I cannot pay my creditor, but my assets far exceed my liability”. To my mind the best proof of solvency is that a man

³² 2020 (2) SA 93 (SCA).

³³ 1907 TS 722 quoted with approval in *ABSA Bank Limited v Rhebokskloof (Pty) Ltd and Others* 1933 (4) SA 436 (C) at 447C-F.

should pay his debts; and therefore, I always examine in a critical spirit the case of a man who does not pay what he owes.”

48. The aforesaid judgment of Innes CJ, was confirmed by Berman J, in *Rhebokskloof*³⁴, where he held the following:

“The oft repeated and, with respect, eminently commonsensical and practical statement of Innes CJ in De Waard v Andrews & Thienhans Ltd 1907 TS 727 at 733 is singularly apt in the instant context, viz:

'To my mind the best proof of solvency is that a man should pay his debts; and therefore, I always examine in a critical spirit the case of a J man who does not pay what he owes', words which were echoed by Bristowe J in his judgment in the same case, in which he said at 739:

'After all, the prima facie test of whether a man is insolvent or not is whether he pays his debts; and if he cannot pay them, that goes a long way towards proof that he is insolvent.'”

49. The applicant argued further that the respondent stands to 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. Unlike the other paragraphs of section 344 of the Act, this paragraph *“postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up.”*³⁵

50. The expression *“just and equitable”* *“is not to be interpreted so as to only include matters ejusdem generis the other grounds specified in”* the section.³⁶

³⁴ ABSA Bank Limited v Rhebokskloof (Pty) Ltd and Others 1933 (4) SA 436 (C) at 447C-F.

³⁵ Moosa NO v Mavjee Bhawan (Pty) Ltd 1967 (3) SA 131 (T) at 136 per Trollip J (as he then was); Erasmus v Pentamed Investments (Pty) Ltd 1982 (1) SA 178 (W) at 181; Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd 1989 (4) SA 31 (T) at 42–43; Cuninghame v First Ready Development 249 (Association incorporated in terms of section 21) [2010] 1 All SA 473 (SCA) at para 3.

³⁶ Erasmus case *supra* at 181 per Nestadt J (as he then was); and see Emphy v Pacer Properties (Pty) Ltd 1979 (3) SA 363 (D) at 365 and cases there cited, especially Loch v John Blackwood Ltd [1924] AC 783 (PC).

51. It confers upon the Court a wide discretionary power which must be exercised judicially, considering all relevant circumstances. Justice and equity are those facts between the competing interests of all concerned.³⁷

52. A creditor may apply on this ground³⁸. In the matter of *Kyle v Maritz & Pieterse Inc*³⁹ the Court found that the company was indebted to the creditor *ex contractu* (at 230) but granted a winding-up order on the ground that it was just and equitable to do so.

53. The court in *Herman and Another v Set-Mak Civils CC*⁴⁰ specifically agreed that it would be just and equitable to place a company in liquidation where there is a total disregard for the rights and claims of its creditors.

54. Berman, J in the decision of *Absa Bank Limited v. Rhebokskloof (Pty) Limited & Others*⁴¹ said the following:

“Notwithstanding this, the Court has a discretion to refuse the winding up under these circumstances, but it is one which is limited where a creditor has a debt which a company cannot pay, in such a case the Creditor is entitled, ex-debito justitiae to a winding up order.

55. In *E Sacks Futeran and Co (Pty) Ltd v Linorama (Pty) Ltd; Ex parte Linorama (Pty) Ltd* 1985 (4) SA 686 (C) at 687 it was held:

It is now well established that while the Court has a discretion whether or not to wind up a company unable to pay its debts, where an unpaid creditor - and that is what the applicant is - seeks a winding up, the Court's discretion is very narrow for an unpaid creditor who cannot obtain payment and who brings his

³⁷ Moosa case supra at 136.

³⁸ *Sweet v Finbain* 1984 (3) SA 441 (W) at 444–445; and see eg *Bechuanaland Malt & Milling Co Ltd v International Seed & Produce Co (Pty) Ltd* 1952 (3) SA 863 (W); *Simmons NO v Snobberie Cape (Pty) Ltd* 1977 (3) SA 451 (W) where the application failed for lack of [Page 702] prima facie proof that the applicant was a creditor.

³⁹ 2002 3 All SA 223 (T).

⁴⁰ 2013 (1) SA 386 (FB).

⁴¹ 1993 (4) SA 436 (C) on page 440

claim within the Companies Act, as against the company, is entitled ex debito justitiae to a winding up order

56. In *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) it was held at 662:

“Consequently, the loan creditors would probably have insisted upon taking a compulsory winding-up order against the company, to which they were entitled ex debito justitiae”

57. This principle was further confirmed by the Supreme Court of Appeal in the matter of *Afgri Operations Limited v Hamba Fleet (Pty) Limited*⁴² where it was held:

“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.

58. It is this Court’ view that the applicant complied with all the requirements to obtain a liquidation order against the respondent because:

58.1 The applicant is a creditor of respondent;

58.2 The respondent failed to dispute the indebtedness based on *bona fide* and reasonable grounds;

58.3 The respondent is unable to pay its debts; and

58.4 It would be just and equitable to place the respondent under winding-up.

59. After carefully considering the attempted defence(s) raised by the respondent and a holistic consideration of all the facts and defence(s) raised in this application, I find that it will be just and equitable that the respondent company be wound up.

⁴² 2022 (1) SA 91 (SCA) at para 12.

Upon my conclusion as aforesaid, the making of the order for the winding-up does not involve the exercise of a discretion.⁴³

60. As highlighted in the matter of *Business Partners Limited v Montache Villas (Pty) Ltd*⁴⁴ Vorster AJ in my view correctly stated as follows:

60.1 The court retains a discretion to refuse to grant an order sought by an unpaid creditor. This discretion is a 'very narrow one' and is rarely exercised and then in special or unusual circumstances only'⁴⁵

60.2 Two types of judicial discretion emerged in our case law, namely a discretion in the true sense or a discretion in the loose sense⁴⁶. A discretion in the true sense is where the court has a wide range of equally permissible options available to it⁴⁷. A discretion in the loose sense means no more than that the court is entitled to have regard to several disparate and incommensurable features in coming to a decision⁴⁸. To determine whether a final winding-up order should be granted the discretion to be exercised by the court is a discretion in the true sense.

60.3 The court will exercise a judicial discretion where it properly directs itself to all the relevant facts and (legal) principles⁴⁹, which are neither disparate nor incommensurable, and where it discharged the to rationalize the way it exercised its discretion⁵⁰ In consideration of the aforesaid, the facts relevant to the exercise of the court's discretion are:

⁴³ Kyle v Maritz & Pieterse Inc [2002] 3 All SA 223 (T) at 232; and Paarwater v South Sahara Investments (Pty) Ltd [2005] 4 All SA 185 (SCA) .

⁴⁴ (62454/2021) [2023] ZAGPPHC 1147.

⁴⁵ Afgri Operations Ltd v Hambs Fleet (Pty) Ltd 2022 (1) SA 91 (SCA) at para 12.

⁴⁶ Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and another [2016] JOL 33413 (CC) at par 82 – 97. A discretion in the true sense is sometimes referred to as a discretion in the strict or narrow sense and a discretion in the loose sense is sometimes referred to as a discretion in the broad or wide sense. I will adopt the same nomenclature as the Constitutional Court and refer to these two types of discretion as a discretion in the true sense and a discretion in the loose sense.

⁴⁷ Media Workers Association of South Africa and others v Press Corporation of South Africa Limited 1992 (4) SA 791 (A) at 800E.

⁴⁸ Knox D'Arcy Ltd and others v Jamieson and others [1996] ZASCA 58, 1996 (4) SA 348 (SCA) at 361I.

⁴⁹ National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at para [11].

⁵⁰ Helen Suzman Foundation v Judicial Service Commission 2015 (2) SA 498 (WCC) at par 14 – 16.

60.3.1 whether a recognized ground for liquidation of the respondent company, as provided for in sections 344 & 345 of the old Companies Act, had been established on the affidavits;

60.3.2 whether the applicant has the requisite locus standi to apply for the winding-up of the respondent company;

60.3.3 whether the court has jurisdiction for purposes of winding-up the respondent company;

60.3.4 whether the application was brought in the prescribed format (either Form 2 or Form 2(a)), with a founding affidavit);

60.3.5 whether the affidavit in support of the application contains all necessary averments such as locus standi of applicant, jurisdiction, insolvency of the respondent, grounds for winding-up, any such facts as may have a bearing on the exercise of the court's discretion, such as security held by the applicant for its claim and assets of the company, security for costs of the application, that service has been effected as provided in section 346(4) & 346(4A) of the old Companies Act, etc.;

60.3.6 whether the application was served in the prescribed manner and notice of the application was given in the prescribed manner to the Master, the South African Revenue Services; the respondent's registered address employees of respondent, and trade union of employees;

60.3.7 whether an affidavit was filed on behalf of the applicant setting out how section 346(4A)(a) had been complied with.

60.4 The principles relevant to the exercise of the court's discretion are:

There are different paradigms of legitimacy for the existence of a company, however, no company exists for its own sake. The existence of a company should either serve the interests of its shareholders, creditors, employees (or their representatives), the State, or the community, and these interests should be balanced. Where a company's continued existence no longer serves the interests of these affected people or entities, or the interests are materially unbalanced, its existence is no longer legitimate. What this means is that a company in financial distress should not be saved for its own sake, but for the sake of affected people or entities.

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

60.6 Neither the old nor the new Companies Act require a final order to be preceded by a provisional order. The default position is therefore that a final order should be granted⁵¹ unless the court is satisfied, on facts properly established on affidavit, that the interests of all affected or interested parties will not be adequately safeguarded if a final winding-up order is granted, in which case a provisional order should be granted.

60.7 In practical terms this would mean that when it is established on the affidavits that:

60.7.1 there are affected or interested persons or entities, without knowledge of the application;

60.7.2 with a direct and substantial interest in the liquidation of the company;

60.7.3 whose legal interests in the company will be prejudicially affected by a final winding-up order, because the liquidation of the company cannot be sustained or carried into effect without prejudicing them; a provisional order should be granted, calling on such affected or interested persons or entities to put forward reasons why the court should not order the final winding-up of the company.

60.8 I'm emboldened in my view by Items 9(1) & (2) of Schedule 5 of the new Companies Act which retained the application of section 346A of the old Companies Act to the winding-up of companies under the new Companies Act, and which requires, in addition of the provisional order being served on the company, service of the provisional order on (i) trade unions;⁵² (ii) employees of the company;⁵³ (iii) the South African Revenue Services⁵⁴ (iv)

⁵¹ The position is aligned with the Practice Manuals of the GSJ and the GNP which require an applicant to seek a final winding-up order in the notice of motion.

⁵² Section 346A(1)(a) of the old Companies Act.

⁵³ Section 346A(1)(b) of the old Companies Act.

⁵⁴ Section 346A(1)(c) of the old Companies Act

publication in the Government Gazette and a local newspaper; (v) notice to all known creditors by registered post.

60.9 The court may also grant a provisional order where an applicant in unopposed insolvency proceedings only manages to establish a prima facie case⁵⁵ i.e., does not strictly satisfy each of the conditions for the winding-up of the respondent company a priority.

60.10 On the conspectus of the evidence before me, the respondent company, is the registered owner of only two immovable properties, has no permanent employees, no trade unions are involved, has no other creditors, at least on the respondent's version. The applicant complied with all the formalistic requirements in support of this application.

61. In exercising its discretion not to grant a final order the merit of legal certainty and the like treatment of similarly situated litigants should be emphasized by the court⁵⁶. It is inimical to the rule of law, which is a foundational value of the democratic State⁵⁷ that cases with singularity of facts should have divergent judicial outcomes. Specific rules and criteria, precisely formulated, should guide the court in exercising its discretion. This will provide legal certainty to the parties, curtail litigation, facilitate the proceedings, and reduce cost. One of the overall objectives of insolvency law is after all predictability.

62. There is of course another reason why a final, as opposed to a provisional, winding-up order should be the default position in liquidation proceedings. In liquidation proceedings, once successful, the commencement date is retrospective to the date the application is issued⁵⁸ as opposed to sequestration proceedings which commence upon the granting of a provisional sequestration order⁵⁹ In terms of section 11 of the Insolvency Act a provisional sequestration order is published. The issuing of a liquidation application is not published. Accordingly, publication of the

⁵⁵ Kalil v Decotex (Pty) Ltd [1987] ZASCA 156; [1988] 2 All SA 159 (A), 1988 (1) SA 943 (A) at 976A–B.

⁵⁶ Van der Walt v Metcash Trading Limited [2002] ZACC 4; 2002 (5) BCLR 454 (CC); 2002 (4) SA 317 (CC) at para 39.

⁵⁷ Masetlha v President of the Republic of South Africa and Another (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007) at para [173].

⁵⁸ Section 348 of the old Companies Act.

⁵⁹ Section 10 of the Insolvency Act.

commencement date of sequestration proceedings takes place but publication of the commencement date of liquidation proceedings don't. There are dire consequences for creditors and the public at large who deal with a company after the commencement date of liquidation, and who may be oblivious to the fact that liquidation proceedings commenced. Section 341 of the old Companies Act provides as follows:

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

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

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

64. In summary, unless there are legally relevant facts that militates against it, the granting of a final liquidation order should be the default position.

65. Considering the facts of the matter at hand, I am of the view that there are no legally relevant facts that militates against the granting of a final liquidation order. The applicant complied strictly with all the substantial and procedural requirements of the relevant laws for the respondent to be placed under final winding-up. Should I exercise my discretion against granting a provisional order I would not exercise my discretion judicially.

66. It follows that the applicant is entitled to a final winding-up order.

67. The applicant employed senior and junior counsel. I am of the view that it was justified under these circumstances. I am of the view that the respondent's

opposition to the applicant's application was mala fide which had no prospect of success in law. As a result, I will allow the costs of both junior and senior counsel.

CONCLUSION

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

69. On a conspectus of all the issues raised I make the following order:

69.1 the respondent is placed under final winding-up.

69.2 the cost of the application is cost in the liquidation, to be recovered by the applicant on a scale as between attorney and client which includes the cost of senior counsel and junior counsel.

69.3 the cost of opposition of the application is disallowed and not cost in the liquidation.

ASL VAN WYK
Acting Judge of the High Court
Limpopo Division, Polokwane

APPEARANCES:

HEARD ON : **10 JUNE 2025**

JUDGMENT DELIVERED ON: **24 JUNE 2025**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be at 10:00

FOR THE APPLICANT : **J HERSHENSOHN SC** with him
R DE LEEUW

INSTRUCTED BY : BARNARD & PATEL INCORPORATED
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