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

CASE NO: 2023-131314

(1) REPORTABLE: ~~YES~~/NO

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

(3) REVISED: YES/~~NO~~.

Signature:

Date: 07/08/2025

In matter between:

ABSA BANK LIMITED

Applicant

and

LOUMARLES LANDGOED (PTY) LTD

Respondent

JUDGMENT

STONE AJ

[1] The applicant applies for the provisional winding-up of the respondent. The applicant contends that the respondent is unable to pay its debts, as contemplated in section 344(f) read with section 345 of the Companies Act, 61 of 1973("the 1973 Act"). As an alternative ground, the applicant asserts

that it will be just and equitable to place the respondent under provisional winding-up, as envisaged in section 344(h) of the 1973 Act.

[2] The respondent initially opposed the application on various grounds.¹ At the inception of his argument, counsel for the respondent, Mr de Leeuw (not a relation to the deponent to the answering affidavit, Mr CAW de Leeuw, with the same surname) indicated, with reference to the well-known “Badenhorst rule”², that he accepted that it was evident from the respondent’s version that its indebtedness to the applicant was not in dispute³, but rather the claim amount. As the existence of the debt was not in dispute, he indicated that he would not persist with such point of opposition, and that he would only focus his argument on the following contentions:

- 2.1 That the respondent is factually solvent, and that it is in a position to pay its debts;
- 2.2 That the applicant has an alternative remedy to enforce its debts, rather than seeking the liquidation of the respondent.

[3] He contended that the court should exercise its discretion to either dismiss the application, or postpone it, for reasons which I deal with *infra*.

The respondent’s indebtedness to the applicant

[4] As the indebtedness is common cause, the applicant is a creditor of the respondent, and it has *locus standi* in this application.

¹ This included that the amount claimed by the applicant was disputed, that the applicant failed to place the respondent on terms, that the application constitute an abuse of process and was made for an ulterior motive, that the respondent was solvent and in a position to repay its debts, and that the applicant has an alternative remedy to enforce its debts rather than seeking the respondent’s liquidation.

² Which stems from *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-34H-348B, that liquidation proceedings are not to be resorted to where the existence of a debt is bona fide disputed by a company on reasonable grounds

³ The Badenhorst rule therefore does not find application. See: *Imobrite (Pty) Ltd v DTL Boerdery CC* [(1007/20) ZASCA 67 (13 May 2022); 2022 JDR 1554 (SCA) at para [16].

[5] According to the applicant's version the respondent is indebted to it in an aggregate amount of more than R36 million, plus further capitalised interests and costs, as follows:

- 5.1 An amount of R 389 945.34 plus further capitalised interest thereon, calculated from 28 November 2023 at a prime linked lending rate, which was 11,75% at the time of the application, being the balance of amounts lent and advanced to the respondent on an overdrawn cheque account;
- 5.2 An amount of R15 217 127.37 plus interest thereon from 28 November 2023, at a prime linked lending rate, which was 15,25% per annum on such date, consisting of unpaid instalments and accumulated interest in respect of an amount which was lent and advanced by the applicant to the respondent in terms of a written term loan agreement.
- 5.3 Amounts of R10 624 794.06 and R9 920 458.01 plus interest on such amounts from 28 November 2023, at a prime linked rate, which was 15,25% per annum at such date. Such amounts are claimed to be due to the applicant by ADL Electrical Contractors (Pty) Ltd (In liquidation)(ADL), respectively in respect of amounts loaned and advanced by the applicant to ADL on a term loan and on an overdrawn cheque account, for which debts the respondent bound itself as guarantor and as surety and co-principal debtor in favour of the applicant.

[6] The present application was lodged by the applicant in December 2023, based on all the debts mentioned in paragraphs 5.1 to 5.3 above.

[7] The applicant also instituted an action in this court under case number 2023-133651, in December 2023, against ADL as first defendant, the respondent as second defendant, and against Web ram 11 (Pty) Ltd and the aforesaid Mr CAW de Leeuw. In such action the applicant claims against the respondent on the basis that respondent bound itself as guarantor for obligations and the indebtedness of ADL to the applicant in terms of a

guarantee agreement, signed on 7 August 2015, and on the basis of a suretyship dated 22 February 2022, for obligations of ADL to the applicant, in amounts of R16 million and R4 million respectively. As appears from the declaration filed in such action dated 23 July 2024, which was attached to the answering affidavit, the applicant claims amounts of R10 630 356.46 and R9 275 842.90 respectively from the respondent in such action. It appears to be based on the same causes as mentioned in paragraph 5.3 above. The Applicant did not include the claims mentioned in paragraphs 5.1 and 5.2 above in its summons. The action is still pending.

[8] As indicated, the respondent's counsel did not persist to dispute the existence of the applicant's indebtedness, and he did not advance arguments in the application disputing the correctness of the claimed amounts, although it was raised on the respondent's affidavit.

[9] The applicant relies on certificates of balance, in accordance with the agreements on which it relies, as *prima facie proof* of the amounts owing. Although same do not accord in all respects with the amounts set out in the founding affidavit, it does show the aggregate of the amounts said to be owing, to be at least the amounts mentioned above, if the interest implications are considered.

Applicant's security

[10] The applicant has security for its claims in the form of four mortgage bonds registered over the respondent's immovable property, a farm, for approximately R20 000.00 plus additional amounts.

[11] The bonds were registered over the immovable property known as Portion 11 of the Farm Rietfontein 513, Registration Division KR Province of Limpopo, 1419,8812 in extent, held by Deed of Transfer: T[...].

[12] The applicant furthermore has security for the aforesaid debts in the form of a general notarial bond for an amount of R10 million.

Attempts to sell the respondent's property

- [13] The history of the attempts to sell the immovable property of the respondent is relevant to the question whether the respondent is solvent, to its ability to pay its debts, the issue of an alternative remedy, whether a liquidation order will be just and equitable, and the exercise of the court's discretion. I therefore proceed to deal therewith in some detail.
- [14] It is not disputed that the respondent and ADL have been clients of the applicant for many years. The respondent and ADL were part of a group of companies, referred to by the applicant as the "ADL Group". They have enjoyed facilities with the applicant for years. The respondent and Mr CAW de Leeuw, inter alia, have provided securities for the debts. Mr CAW de Leeuw is the deponent to the answering affidavit. When he deposed to such affidavit, he was a director of the respondent, and was also involved with ADL.
- [15] During argument the Applicant's counsel, Mr van der Merwe, made me aware of a judgment of Vorster AJ dated 11 October 2024(**VoLTE**)⁴ wherein he ordered the provisional sequestration of the sole shareholder of the respondent, the Andre de Leeuw Famile Trust, and the provisional sequestration of Mr CAW de Leeuw (the deponent to the answering affidavit in the present application) together with his spouse, with whom he is married in community of property. The Applications were made by VoLTE (Pty) Ltd It was common cause in that application that ADL owes such company an amount of about R18 000 000.00, and that the trust and Mr de Leeuw bound themselves as sureties and co-principal debtors to Voltex(Pty) Ltd for the liabilities of ADL. Some contents of the **Voltex** judgment are relevant to the present application. I will refer thereto below.

⁴ Voltex (Pty) Ltd v Trustees for the Time Being of the Andre De Leeuw Famile Trust NO and Others (2023/071111:2023/074271) [2024] ZAGPPHC 1382 (11 October 2024); 2025 JDR 0652 (GP).

- [16] It appears from such judgment that ADL fell in arrears with payments, and Voltex (Pty) Ltd obtained judgment against the sureties on 25 February 2019, after a settlement agreement was not complied with by ADL. Vorster AJ states that ADL was finally wound up on 23 January 2024⁵.
- [17] The applicant's manager who deposed to the founding affidavit in the present application, avers that approximately from 2018 the ADL Group started to have financial difficulties.
- [18] In **Voltex** Vorster AJ mentioned an affidavit which was filed by the said Mr CAW de Leeuw, dated 6 June 2023, wherein he inter alia averred that ADL had always been willing to pay its debts, and that various active and continuous attempts have been made previously to sell the property of the respondent, for such proceeds to be utilised to settle the mortgage bond over the property (in favour of the applicant), as well as the debts of ADL. It is also stated in such judgement that Mr de Leeuw submitted in that matter that the successful sale of the farm was inevitable and in the process of being finalised.⁶
- [19] Mr de Leeuw also confirms in the answering affidavit in the present application that the respondent has engaged in various negotiations in an attempt to sell the property, based on various negotiations between the parties to settle the applicant's claim.
- [20] Early indications that the sale of the respondent's farm was considered as a means to settle debts owing to the applicant by ADL appear from a facility agreement concluded on 21 June 2017, which is an annexure to the applicant's declaration in the abovementioned action (the declaration is attached to the respondent's answering affidavit). In such agreement the following was included as a special condition:

⁵ Id para 3.6.

⁶ Id para 5.

“ Lou Marles Landgoed (Pty)Ltd will be given time until the end of September 2017 to dispose the farm or confirm to us that the farming operation is breaking even, failing which the bank will have no option but to call up the facilities as the bank cannot justify the lending in this name Lou Marles Landgoed (Pty) Ltd. The balance sheet is insolvent.”

[21] Vorster AJ recorded in **Voltex**⁷ that it was evident from the papers in the applications that served before him that the respondent has been attempting to sell the farm since 2018.

[22] It appears from the replying affidavit in the present application, and from correspondence between the parties referred to, that since 2018 the respondent had repeatedly indicated to the applicant that it would sell its property, in order to pay what was owing to the applicant. The following events appear therefrom:

- 22.1 That the respondent's then director, Mr de CAW Leeuw, engaged with the applicant in December 2018, regarding an amount to cancel the bonds over the respondent's immovable property.
- 22.2 An offer to purchase of such property, was provided by email to the applicant by ADL on 27 August 2019.
- 22.3 No transfer realised, however, and communications ensued during 2020 and 2021 between the parties *inter alia* regarding an amount that would be acceptable to settle the indebtedness full and final.
- 22.4 By October 2021 the property had not been sold. On 9 March 2022 the respondent confirmed in an email to the applicant that the property was auctioned on 12 April 2022, but that the bids were not as expected.
- 22.5 On 31 October 2022 Mr de Leeuw sent an email to the applicant's attorney, referring to an offer that was received for the property.

⁷ Id para 6.1.

- [23] In his judgment in **Voltex**⁸ Vorster AJ also mentions that an offer to sell the farm was signed on behalf of the respondent in October 2021 (which, he indicated, was not signed by the purchaser) for a total purchase price of R43 000 000.00. R 33 2150 000.00 of this amount was for the land, R 6 000.00 for movable property and R 1 700 000.00 for game. In the founding affidavit in the present application, the applicant's manager also says that the respondent held out to the applicant that it had sold its property for R43 million. A sale for Such amount evidently did not materialise, as the ADL Group and the Respondent thereafter held out to the applicant that it would be paid from another transaction in terms of which the property was sold for R48 million.
- [24] A copy of an offer to purchase, signed on 23 March 2023, is attached to the answering affidavit. The purchaser is indicated as Babanje Trading (Pty) Ltd. The offer for R48 million included a price of R34 900 000.00 for the farm with improvements, R8 million for movables such as tractors, farming and feedlot equipment, and R5,1 million for 300 heifers. It was subject to a suspensive condition that the purchaser obtains approval of a bond within 45 days.
- [25] Vorster AJ⁹ also refers to a sale in March 2023 for the same amount, which appears to be the same offer. Another offer to purchase, by the same purchaser, is also included in the papers of the respondent, signed on 14 July 2023, for the same price. It was subject to a suspensive condition that the purchaser obtain approval in principle for a loan within 60 days. The respondent confirms in its answering affidavit that the sale for R48 million did not proceed. The applicant confirms that no payments have been forthcoming.
- [26] The last offer referred to in the respondent's answering affidavit was an offer for the sale of the shares in the respondent, for an amount of R44 000 000.00. Such agreement was signed on 31 May 2024. In the answering affidavit the hope is expressed that such sale would succeed, and

⁸ Id para 6.2.

⁹ Id para 7.1.

that it would yield a substantial amount of funds from which the applicant's claims could be settled. This sale has apparently not succeeded either. The purchase consideration mentioned in the memorandum of agreement for the sale of shares shows that it was payable on 31 May 2024.

[27] From proposals made by the respondent's counsel in argument, regarding a further process to sell of the property, with which I deal below, it is evident that such transaction also did not succeed. There is no clear indication on the papers that such offer had succeeded or what transpired with such transaction.

[28] The applicant contends that the sale was not a bona fide attempt to dispose with the property.

[29] In the judgment of Vorster AJ, the following is said in respect of the sale of the shares¹⁰:

"On the version put forward by the Respondents the value of the shares would probably equate to the net asset value of Lou Marles which would in turn equate to the likely proceeds emanating from the sale of the farm minus the amount of the mortgage bond. As ABSA has already instituted proceedings against Lou Marles for a winding-up order, the effective date of the winding-up has already arrived on the assumption that the winding-up order will be granted. Any disposition of the property by way of a sale in execution will accordingly be void in terms of section 341(2) of the Companies Act 61 of 1973."

[30] The Applicant criticised the viability of such agreement, saying that it was unbusinesslike, and that it is questionable whether a prospective buyer with knowledge of the debts would have proceeded to purchase shares in the respondent while the company was more than R36 million in debt. Furthermore, the offer envisaged the release of multiple sureties, and refers

¹⁰ Id par 43.

to a compromise or scheme, which the applicant's manager says she is not aware of. In any event, the shareholder (the aforesaid trust), has been sequestrated. Even if such sale had proceeded, it can be expected that the liquidator of the shareholder may have a claim to the proceeds.

- [31] In summary, there is no indication on the respondent's papers that any historic sale of the land or shares has been successful, despite repeated attempts to sell the land, which attempts have been ongoing since at least 2018. The respondent's papers do not show a clear and successful ongoing transaction for either the sale of the property nor for the shares. There are also no indications on the papers that any further offer to purchase the respondent's immovable property (which the respondent relies on as the means to settle its debts towards the applicant) was made after July 2023.

Section 344(f) read with section 345 (1)(a)(i) and 345(1)(c) of the Companies Act 61 of 1973 ('The 1973 Act')

- [32] The applicant firstly relies on the provisions of subsection 344(f) of the Companies Act, 61 of 1973 (the 1973 Act), which provides that a company may be wound up by the court if it is unable to pay its debts as described in section 345 of such act.
- [33] In terms of section 345(1)(a)(i) of the 1973 Act, a company is deemed to be unable to pay its debts if a creditor with a claim of at least R100 has served upon the company, at its registered office, a demand requiring the company to pay the sum so due, and the company has for a period of three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.
- [34] A letter was sent to the respondent by the applicant's attorneys, dated 21 September 2022. It was served by the Sheriff at the registered address of the respondent on 26 September 2022. In terms thereof the respondent was called upon to make payment to the applicant of amounts which were then due and owing, within three weeks, failing which an application for the

winding-up of the respondent would be made. In my view this constitutes a demand in terms of section 345(1)(a)(i).

[35] In **Lamprecht v Klipeiland (Pty) Ltd**¹¹ the Supreme Court of Appeal held:

*“I have already found that the agreement (that) was made an order of court by Kruger AJ was valid. This leads me to find that the respondent conceded that the applicant has locus standi, that he was a creditor for a sum of no less than R100 and further that it was due and payable. There is no dispute that although the section 345(1)(a) demand was served on the respondent, it has not paid any amount nor secured or compounded any amount to the reasonable satisfaction of the appellant. To my mind, the jurisdiction requirements set out in section 345(1)(a) have been met. As stated by Malan J (as he then was) in **Body Corporate of Fish Eagle v Group Twelve Investments** 2003 (5) SA 414 (W) at 428 B – C:*

*‘The deeming provision of s345(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). If the respondent admits a debt over R100, even though the respondent’s indebtedness is less than the amount the applicant demanded in terms of section 345(1)(a) of the Companies Act, then on the respondent’s own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts.’*

[36] The respondent has not proved that it paid the debt within three weeks, or at all, pursuant to such demand, and as indicated above.ⁱ The respondent is deemed to be unable to pay its debts, in terms of section 344(f) read with section 345(1)(a)(i).¹²

[37] The applicant also relies in the alternative on section 345(1)(c) of the 1973 Act, which provides that a company is deemed to be unable to pay its debts

¹¹ [2014] 4 All SA 279 (SCA); 2014 JDR 1890 (SCA) at para [16].

¹² *Electrolux v Rentek Consulting* 2023 (6) SA 452 (WCC) at par [31].

if it is proved to the satisfaction of the court that the company is unable to pay its debts.

[38] It is confirmed in the applicant's founding affidavits that no payment has been forthcoming, despite demand. In its replying affidavit it stated that the last payments made in respect of the causes of action relied on by the applicant (as mentioned in paragraphs 5.1 to 5.3 above) were respectively on dates in 2018 and 2020.

[39] It has been held that, when considering whether a respondent company is unable to pay its debts as contemplated in section 345(1)(c) read with section 344(f), evidence of a failure by such company to pay on demand a debt which has become due for payment, is regarded as cogent *prima facie* proof that the company is unable to pay its debts.¹³

[40] In this regard, the following was said in **Standard Bank of South Africa Ltd v R-Bay Logistics CC**¹⁴:

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

¹³ Absa Bank Limited v Crossmoor Transport (Pty) Ltd [2020] JOL 4781 (KXP); 2020 JDR 1501 at para 41.

¹⁴ 2013 (2) SA 295 (KZD) at para [27]

*though the applicant for such relief has established its case under section 344(f)."*¹⁵

[41] In **Boschpoort Ondernemings (Pty) Ltd v Absa Bank**¹⁶, the Supreme Court of Appeal held that a solvent company for the purposes of the Companies Act, 71 of 2008 (the 2008 Act) is a company that is commercially solvent, and that commercial insolvency of a company is a ground for its liquidation. In **Murray NO and Others v African Global Holdings (Pty) Ltd and others**¹⁷ the Supreme Court of Appeal held that a commercially insolvent company is liable to be wound up in terms of the 1973 Act and may not be wound up in terms of the Companies Act 71 of 2008 (the 2008 Act).

[42] In **Murray**¹⁸, the Supreme Court of Appeal described the test for commercial insolvency of a company as:

"whether the company 'is able to meet its current liabilities, including contingent and prospective liabilities as they come due'.

[43] The Supreme Court of Appeal also referred with approval to **Absa Bank v Rhebokskloof (Pty) Ltd and others**¹⁹ where the following was said in respect of commercial insolvency:

"Turning to the merits of the matter, Mr Gauntlet contended that Absa was entitled to a final winding-up order on the basis that Rhebokskloof was 'commercial insolvent'.

The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets

¹⁵ See also *Rosenbach & Co v Singh Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at C-G

¹⁶ 2014 (2) SA 518 (SCA) at paragraph [17].

¹⁷ 2020 (2) SA 93 (SCA) at paragraph [31]

¹⁸ *Id*

¹⁹ 1993(4) SA 436 (C) at 440 F-H

available to meet its liabilities as and when 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)."

Is the respondent unable to pay its debts?

[44] The respondent's counsel contended that the applicant is factually solvent. He relied on the sale values of the abovementioned failed offers, submitting that the respondent indeed has readily realisable assets with a value of at least R 48 million at its disposal, from which it would be able to satisfy the applicant's debt and thereafter continue in existence. He contended that the aforesaid offers of sale of the respondent's assets demonstrate that the value of the respondent's properties exceed the total value of the applicant's claims. He submitted that the sale of the respondent's property is inevitable, and that the claims of the applicant will then be settled. He submitted that the respondent is not commercially insolvent and the application against the respondent should fail on this basis alone. He argued that the respondent will be able to sell its property, pay all its debts to the applicant, and be able to continue with the balance of the proceeds from such a sale to the benefit of its members and employees.

[45] Referring to the test for commercial insolvency as set out in **Rhebokskloof**²⁰ and in **Rosenbach**²¹, he contended that the respondent has readily realisable assets.

[46] It may or may not be that the assets of the company exceed the value of its debts, but this has not clearly been proved on the papers. No valuation of

²⁰ Id

²¹ *Supra* n15.

the property of the respondent has been provided.²² and when called upon by the applicant to provide its financial statements, the respondent failed to provide same, stating in its answering affidavit that the applicant was not entitled thereto.

[47] The fact that attempts have been made for many years to obtain a selling price which would cover the claims of the applicant, and the fact that offers have been received for amounts which may have been sufficient to pay the debts owing to the applicant, may well be indicative that the respondent's property has a high value. The failures of various transactions and attempts to sell the property, the inability of a purchaser to obtain finance, and the length of time since the amounts claimed fell due, may on the other hand rather indicate that the value of the property may not be as high as the amounts of the offers suggest, and that it may not exceed the value of the applicant's claims. According to the applicant, such debt was already in excess of R36 million in November 2023, with further interest running, if regard be had to the amounts in paragraphs 5.1 to 5.3 above. Furthermore, when considering the abovementioned breakdown of the purchase considerations included in the failed offers to purchase (for the amounts of R43 million and R 48 million), it appears that the value of the land itself may well be substantially lower than R48 million, and even lower than the amount claimed by the applicant.

[48] It is not necessary to make a final finding as to the probable value of the respondent's property, and I am not in a position to do so in the absence of better evidence regarding the value. But even if I accept that the actual value of the respondent's assets exceeds its liabilities, the question remains whether the respondent is considered to be commercially insolvent, and unable to pay its debts.

[49] From the aforesaid authorities it follows that, even if the respondents assets exceed its liabilities, if it is unable to pay its debts when it fall due, and if it

²² FirstRand Bank Ltd v Mahem Verhurings CC 2017 JDR 0192 (GP) at para [21].

does not have liquid or readily realisable assets to meet its current demands, it will be considered to be commercially insolvent and it will be deemed to be unable to pay its debts.

[50] Applying the test as set out in the authorities mentioned above, I am of the view that the available evidence overwhelmingly show that the respondent is indeed commercially insolvent, and it had been so for some time. Its outstanding debts have been due and unpaid for years, respectively since 2018 and 2020, or at least since the demand in 2022. There is no evidence to show the contrary. Respondent's continuous failure to make payment of its debts, leave no room for a finding that the respondent is able to pay its debts.

[51] The "*primary question*" referred to in **Rhebokskloof**, whether the respondent has "*readily realisable*" assets, available to meet the respondent's liabilities "*as and when they fell due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading*" could evidently not have been answered in the affirmative for years. The repeated failures to sell the assets, also do not suggest that same are readily realisable. The evidence of a sale of shares agreement also cannot assist the respondent, as no clear evidence was presented that the conditions of such sale were met or that it came to fruition. Surely, if it did, one would have expected the respondents to put such evidence before the court.

[52] I therefore find that, even if it may be factually solvent, the respondent is commercially insolvent, and that it is deemed to be unable to pay its debts.

[53] I find that the applicant has made out a case that the respondent is unable to pay its debts, both in terms of subsection 345(1)(a) and subsection 345(1)(c) read with subsection 344(f) of the 1973 Act.

An unpaid creditor's right to proceed with winding-up proceedings, and the court's discretion

[54] In terms of section 347(1) of the 1973 Act, this court has a discretion to grant or dismiss any application for liquidation (under section 346) or to adjourn the hearing of the application conditionally or unconditionally, or to make an interim order or any other order as it may deem just. As indicated below, such discretion is however very limited where a creditor company has a debt which it cannot pay. In such instance, a creditor is entitled to a winding-up order *ex debito justitiae*.

[55] In **Samuel & Others v President Brand Gold Mining Co Ltd**²³, the then Appellate Division confirmed a creditor's entitlement to a winding-up order under circumstances where a company is unable to pay its debts. Trollip JA said the following:

"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."

[56] In **Rhebokskloof**²⁴, Berman J held:

*"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 case the creditor is entitled, ex debito justitiae, to a winding-up order."*²⁵

He also held: ²⁶:

"There is, however to my mind no justification for exercising that narrow discretion open to me in favour of the company, and the suggestion that a mortgage bond be passed by the company over its property does not warrant a finding that this would constitute an asset readily available or even an asset sufficiently available as to justify a refusal to grant a winding-up order. Nor is there any obligation on ABSA to execute against the company's immovable property or to institute provisional sentence

²³ 1969 (3) SA 629 (A) at 662 E-F.

²⁴ *Supra* n19 at 441F-I, and 440F-H.

²⁵ Berman J referred in this regard to Samuel *supra* at 662F.

²⁶ At 441G-I

proceedings on the basis of security held; nor can a court insist on ABSA doing so; nor should the court exercise its limited discretion against Absa because it chooses to seek a final winding-up order.”

- [57] In **Rhebokskloof** the respondent company was the owner of an extremely valuable farm valued by a registered valuer at R 25 million. The company had an overdraft with the applicant in that matter of a substantially lesser amount than the value. Berman J held that the asset was however not to be regarded as liquid. A final liquidation order was granted.
- [58] In **Hammel v Radiocity Contact Centre CC**²⁷, the respondent company contended that the applicant should have proceeded with another remedy, for example to issue a summons to collect debt owed. Dlodlo J however confirmed that it has been established that a creditor has an unfettered right to choose his form of execution, one of which is to wind up the debtor, and that a creditor which has a debt *ex debito justitiae* is entitled to a winding up order. Dlodlo J held that such creditor is not bound to give the creditor time to realise funds.
- [59] In **Rosenbach**²⁸ Caney J held, with reference to a commercially insolvent company:

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

²⁷ (13778/2008) [2008] ZAWCHC 76 (12 December 2008); JDR 1525 (C) at paragraph [15].

²⁸ *Supra* n15 at 597 at C-G.

*into consideration against the making of an order are such as to 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. See **F Chandlers Limited v Dealesville Hotel (Pty) Ltd** 1954 (4) SA 748 (O) at 749.*

Nevertheless, in exercising its powers, the court will have regard to the fact that ‘a creditor who cannot obtain payment of his debt is entitled as between himself and the company ex debito justitiae to an order if he brings this case within the act. He is not bound to give time.’

[60] In **Absa Bank v Newcity Group (Pty) Ltd**²⁹, a business rescue application, it was questioned whether, since the introduction of the 2008 Act, it was still good law to speak of an entitlement (*ex debito justitiae*) to a winding-up order simply because the applicant is an unpaid creditor. The Court held that “*mere illiquidity, capable of being overcome within a reasonable time, should be a trump card to resist liquidation*”.

[61] **Henochsberg**³⁰ indicates, with reference to **Newcity**³¹ that there appears to be a movement away from the *ex debito justitiae* principle in situations where a company is commercially insolvent but factually solvent.

[62] In **Afgri Corporation Limited v Hamba Fleet (Pty) Ltd**³², decided after **Newcity**, the Supreme Court of Appeal reaffirmed that, generally speaking, in liquidation proceedings an unpaid creditor has a right, *ex debito justitiae* to a winding-up order against a company that has not discharged its debt. The principle was reaffirmed that the refusal of a winding-up order under such circumstances entails the exercise of a very narrow discretion “*that is rarely exercised and then in special or unusual circumstances only*”.³³ It is for the respondent to have established such special circumstances.³⁴

²⁹ [2013] 3 All SA 146 (GSJ); 2012 JDR 1413 (GSJ) at para [31].

³⁰ Henochsberg on the Companies Act 71 of 2008, Volume 2, at APPI-42.

³¹ *Supra* n29.

³² 2022 (1) SA 91 (SCA) at paras [12]–[13]. See also *Business Partners Ltd v Sophia Property Investments (Pty) Ltd* [2021] JOL 50156 (GP); 2021 JDR 0594 at para [12]–[13].

³³ *Afgri supra* n32 at para [12].

³⁴ *FirstRand Bank Limited v Evans* 2011 (4) SA 597 (KZN) para [27].

[63] The Supreme Court of Appeal in **Afgri** ³⁵held, with reference to **Newcity**, that different considerations may apply where business rescue proceedings are considered in terms of part A of Ch 6 of the 2008 Act, but that such considerations did not apply in the Afgri application, which was an application for the final winding-up of a company. In the present matter, there is no business rescue application, nor an indication that such application would be made.

[64] In considering the court's discretionary power in the context of winding-up applications, the court in **Imobrite (Pty) Ltd v DTL Boerdery CC**³⁶ referred to established caselaw, summarising the legal position as follows:

"In Afgri Operations Ltd v Hamba Fleet (Pty) Ltd, this court reaffirmed that an unpaid creditor has a right, ex debito justitiae to a winding-up order against a company that has not discharged its debt. Notably, it also reaffirmed the trite principle that the refusal of a winding-up order under circumstances entails the exercise of a narrow discretion. The following observations in Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd, appositely illustrate that the mere fact that there may be more value than the claim is not, without more, sufficient to sway a court towards exercising the discretion in favour of a debtor:

"[17] 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 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

³⁵ Afgri *supra* n32 par [12].

³⁶ Supra n3 at para [20].

liabilities than with the abstruse economic exercises as to the valuation of a company's assets.'

In summing up, it bears emphasizing that the exercise of a discretion in favour of not granting a liquidation order must be based on a solid factual foundation." ³⁷

- [65] The position is that the applicant is entitled to seek execution by way of liquidation *ex debito justitiae*. It is not compelled to seek execution by way of other means. The court only has a very narrow discretion to refuse an order for the winding-up of the respondent, who has failed to pay its debts, and is commercially insolvent. If such discretion is exercised it must be on solid grounds, and it can only be done if it is found that special or unusual circumstances exist to do so.

Other available means to satisfy the debt

- [66] Relying on the legal position as set out in the authorities referred to, that an unpaid creditor is generally entitled *ex debito justitiae* to a winding-up order, and the narrow discretion to refuse a winding-up order, Mr van der Merwe, who appeared for the applicant, contended that this court should not exercise its discretion to refuse or postpone the application.

- [67] Respondent's counsel submitted that, given the discretion that the court retains in terms of section 347 of the 1973 Act, the winding-up sought should be refused, on a consideration of the following facts:

- 67.1 The respondent owns an immovable property with a substantial value and which value exceeds the claim of the applicant by a substantial amount;
- 67.2 The applicant has already commenced with action proceedings against the respondent seeking payment of a debt and the enforcement thereof; and

³⁷ See also Rosenbach *surpra* n15.

67.3 The applicant therefore has an alternative remedy it can pursue which is less invasive and which will allow the payment of the applicant's claim, and which is appropriate in the circumstances.

[68] In the alternative, he submitted that, should this court not be inclined to refuse the winding-up, the matter should be postponed, for the sole purpose of allowing a sufficient opportunity to finalise the sale of the property, which he submitted was in progress.

[69] As indicated above, there is no clear indication on the papers that a viable ongoing sale is in existence, and I am unable to find on the papers that the property of the respondent is actually in the process of being sold.

[70] Counsel for the respondent submitted that the *ex debito justitiae* principle does not detract from the fact that the court still has a discretion, which discretion should be exercised judicially given the facts before it, in line with the court's residual discretion in terms of section 347.

[71] In view of the indication by the respondent's counsel at the hearing that he would not proceed to dispute the indebtedness, and that his contentions would be limited to the arguments referred to above³⁸, I enquired from him, for clarification, whether that would mean that the respondent would submit to judgment in favour of the applicant. The respondent's counsel then requested an opportunity to take instructions, and he intimated that the respondent would indeed consent to judgment. He suggested that this court could exercise its discretion by postponing the application for a period of 6 to 12 months, and that the court can then make such postponement subject thereto that the respondent consents to judgment within a period of time and that the applicant then may take judgment on the basis of such consent. He furthermore suggested that a public sale of the property can then be conducted, as may be agreed between the parties by public auction, by an auctioneer chosen by the applicant. He also argued that the court could

³⁸ Para 2

impose such, or other less severe conditions, rather than ordering a provisional liquidation which would be to the benefit of the company and employees.

[72] It was however pointed out by counsel on behalf of the applicant that the instruction to consent to judgment emanated from the aforesaid Mr CAW De Leeuw, who had already been provisionally sequestrated at the time (as is evident from the Voltex judgment), and that it was therefore doubtful whether such instructions constituted a proper mandate from a director of the respondent. He argued that this court is not in a position to grant judgement, as all relevant facts were not before the court as required in terms of rule 46A which are peremptory when judgment is to be granted for the execution in respect of immovable property. He insisted that the applicant is entitled to a liquidation order.

[73] This court is not in a position, and it does not intend to consider granting a judgment in these proceedings. In the first place, there is no application or action for judgment before me, and the court is indeed not in a position to consider, in the absence of all relevant facts, for example the requirements of rule 46A of the Uniform Rules. The abovementioned existing action also does not cover all the debts. Furthermore, as is evident from the abovementioned authorities the court cannot force the applicant to proceed with another way of execution. The court cannot make an agreement for the parties, nor force them into a process to agree on an execution process to sell the property.

[74] What does require consideration is whether this court should still, in the exercise of its discretion in terms of Section 357(1) of the 1973 Act³⁹, make an order to dismiss or postpone the application, to allow the respondent a further opportunity to sell its land.

³⁹ *Grenco Projects v Hermanus Esplanade* 2024(6) SA 500 (WCC) at paras [90]–[91].

[75] Counsel for the respondent submitted that although section 347(2) of the 1973 Act applies to applications launched by members of a company, the principles therein should find equal application to an application by a creditor, which has alternative remedies available, and which remedies it has indeed commenced with, similar to what the applicant has done in *casu*. Subsection 347(2) reads:

“Where the application is presented by members of the company and it appears to the Court that the applicants are entitled to relief, the Court shall make a winding-up order, unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.”

[76] In my view, the fact that a reference to an alternative remedy is only included in subsection 347(2) in respect of applications by members of a company, the specific proviso in such subsection (that a court should make a winding-up order unless it is satisfied that some alternative remedy exists) should be interpreted to apply only in respect of applications by members, and not as a provision that find application to all winding-up applications. To apply section 347(2) in the way propounded by respondent’s counsel, would in my view not be in accordance with the prevailing case law⁴⁰, wherein it was held that the *ex debito iustitiae* principle finds application, even where applicants who were creditors of a company had alternative remedies. A plain reading of the normal wording used in section 347 as a whole, does not support such an interpretation, and the *inclusio unius exclusio alterius* maxim of interpretation⁴¹ of statutes would in my view also inform a different interpretation of subsection 347(2) as contended for by respondent’s counsel. This, however, does not mean that the court may not, in the exercise of its discretion, take cognisance of the existence of alternative remedies. It however remains a very limited discretion as indicated, and it is not subject to the proviso in subsection 347(2).

⁴⁰ As summarised in Afgri *supra* n32 and Imobrite *supra*, n3.

⁴¹ 2021 (3) SA 1 (CC) at para [50].

[77] Respondent's counsel submitted that, as the applicant has already commenced with proceedings to obtain judgment, the applicant will be able to realise the respondent's immovable property, and all farming equipment situated thereon. This, he contended, would be a less invasive remedy at the applicant's disposal, which will ensure that the applicant receives payment of its claims, yet still allow the respondent to retain the surplus from such sale, and continue in its existence and with other commercial activities.

[78] He relied on three decisions dealing with applications for sequestration, where it was considered whether a sequestration will be more to the advantage of creditors than in a sale in execution. He referred to **Gardee v Dhanmanta Holdings & Other**⁴², which contain the following remarks:

“A feature ... which one notices immediately is that, as far as can be gathered, the applicant is the first respondent's sole creditor. There is certainly no hint of any other. These proceedings thus lack resemblance to the typical sort, in which the debtor has a variety of creditors but insufficient assets to meet all their competing claims, and sequestration seems likely to benefit them as a group by ending the danger that some may be preferred to others and ensuring instead that the proceeds are shared fairly. There is, no reason in principle why a debtor with only one creditor should not have his estate sequestrated. But the potential advantages of sequestration in that situation are inherently fewer, and the case for it is correspondently weaker. Then it is really no more than an elaborate means of execution and, because of its costs, an expensive one too.”

[79] He referred me to **Mamacos v Davis**⁴³ where Burger J stated the following:

⁴² 1978 (1) SA 1066 (N) at 1068 H–1069 A.

⁴³ 1976 (1) SA 19 (C)

“This (the attached ad sale of the property) would be to his own advantage in that he does not have to incur the further costs of sequestration, especially as he already has a judgment of the Court.”

- [80] He also relied on **Waterkloof Boulevard Homeowners Association (Association Incorporated under Section 21) v Yusuf and Another**⁴⁴ where the court held as follows at paragraph [14]:

“The applicant failed to make out a case that sequestration proceedings would benefit itself more than a sale in execution. Counsel submitted that it would probably take another year to obtain an order in terms of rule 46 of the Uniform Rules of Court. This is a consequence of the applicant’s decision to execute its judgment debt through a sequestration application.”

- [81] In my view the last mentioned three decisions are to be distinguished from the present matter, as it pertained to sequestration proceedings, where an advantage to creditors is to be considered. As such it cannot serve as authority in liquidation proceedings. In applications in terms of section 344 of the 1973 Act, it is not part of the case an applicant must make out to show an advantage to itself or to other creditors.⁴⁵

- [82] Counsel for the respondent still argued that an aspect for consideration in exercising the court’s discretion, is that the costs to realise the respondent’s property in a liquidation will be significantly higher than in an execution, as a liquidator is entitled to 3% and an auctioneer will also in liquidation proceedings typically be entitled to 10% commission. He mentioned that only 3% would be payable in an execution by the Sheriff. He therefore contended that a saving can be achieved if the property is not sold in liquidation circumstances, which he submitted would also benefit the applicant.

⁴⁴ 1976 (1) SA 19 (C)

⁴⁵ Securefin Ltd v KNA Insurance and Investment Brokers [2001] 3 ALL SA 15 (W) at 27.

[83] Mr van der Merwe on the other hand contended that at an auction in liquidation, the actual commission payable was speculative. If an auction is held by a liquidator, it may well be less. He submitted that the liquidator has the opportunity to negotiate commission with an auctioneer, and that it may even be that a purchaser at an auction will be required to pay the auctioneer's commission.

[84] Mr van der Merwe also relied thereon that a liquidator is in a far better position to dispose of an asset of the kind which features in this application, as an execution sale by a sheriff has many disadvantages, including:

84.1 The sale is at the sheriff's offices, and not at the premises where bidders, on site, can be stimulated to make attractive bids.

84.2 The sheriff is not able to allow or assist a prospective bidder to inspect the property. Prospective bidders must consequently participate in the bidding process completely blindfolded, without knowing what they would purchase, except for a very broad and basic description of the nature of the property.

84.3 The advertisement process followed by a sheriff is completely inadequate and ineffective. Advertisements appear in small print at the back of newspapers.

84.4 There is a very high frequency in the cancellation of execution sales conducted by a sheriff. Consequently, prospective bidders are loathe to attend a sale by the sheriff, as they sometimes have to put in a lot of effort to attend the sale, only to be informed upon their arrival that the sale has been cancelled.

84.5 The sheriff cannot deal with occupiers occupying the property and such occupation can be a significant factor which may influence the bidding process negatively.

[85] Mr van der Merwe further submitted that a liquidator will be far better equipped to achieve a better price for the realisation of the property falling within the winding-up, for the following reasons:

- 85.1 A liquidator steps in the shoes of the management of the company, to take charge of the assets of the company, and is in position to make arrangements to allow prospective bidders to enter upon the land and the property and to equip prospective bidders far better to make informed offers.
- 85.2 A liquidator can embark upon a far better and more effective advertisement campaign and can also engage the assistance of estate agents to sell the property.
- 85.3 Auctioneers also have an electronic database, where they electronically send information relating to upcoming auctions to their client base. By employing an auctioneer as opposed to the Sheriff, the property could be far better advertised to a far larger group of prospective purchasers who will gain an interest in the property.
- 85.4 The liquidator can also deal with recalcitrant occupiers who may refuse to give prospective bidders access to the premises in order to view it, or a liquidator may embark upon an investigation or an enquiry, and summons, on a compulsion of law, for occupiers to explain their rights relating to the occupancy and in suitable circumstances take proceedings to eject occupiers firstly, in order to give prospective bidders vacant occupation.
- 85.5 A sheriff's auction is conducted in terms of more rigid procedure. As a result, at a sale in execution, the property is sold at the fall of the hammer and even the recording of a reserve price does not entitle a sheriff to keep bids open in order to secure improved offers. However, a liquidator can design his own unique conditions of sale, free from the restrictions imposed by law on a sheriff. A liquidator can for example procure a bid at an auction and then allow, within a 7- or 10-day period after the sale for prospective bidders to make improved offers. It was submitted (in the replying affidavit) that this is also a methodology which results in a far better opportunity to dispose of the properties.

[86] Mr van der Merwe submitted that the applicant's only motive in this matter is to secure a repayment of its debt, in the most cost-effective manner possible

viewed from a cost and time perspective. The respondent's counsel did not persist to rely thereon that the application was an abuse of process.

[87] I deal further with the submissions regarding alternative means to obtain relief, where the exercise of my discretion is discussed below.

Alternative ground for relief: Section 344(h) - Just and Equitable

[88] Should I be wrong in my finding that the applicant is unable to pay its debts, as contemplated in section 344(f), I am still of the view that a case has been made out that a proper case has been made out in terms of section 344(h) of the 1973 Act, which provides that a company may be wound up if it appears to the court that it is just and equitable that it should be wound up.

[89] I pause to point out that it is not strictly necessary to deal with the alternative ground for the application in terms of subsection 344(h)⁴⁶ in view of my finding that the applicant has made out a case in terms of subsection 344(f). If a company is not able to pay its debts when due, but is factually solvent, an applicant does not need to prove that it is nevertheless just and equitable to wind the company up, because section 81(1)(c) of the 2008 (the 2008 Act) only applies to solvent companies.⁴⁷

[90] When a court finds that the aforesaid jurisdictional fact envisaged by section 344(h) exists, that it is just and equitable that a company be liquidated, the court still has a discretion to grant or withhold a winding-up order⁴⁸. A decision as to what is just and equitable involves a balancing of interest of all concerned with the interest of good governance and the smooth administration of justice.⁴⁹ It postulates not facts but a broad conclusion of

⁴⁶ Crossmoor *supra* n13 at par [42].

⁴⁷ Henochsberg *supra* n30 at APPI-55. ABSA Bank Limited v Africa's Best Minerals 146 Limited (Sekhukhune) NO 2014 JDR 2736 (GJ); [2015] 2 All SA 8 (GJ) at paras 20, 21 and 33, wherein the court referred to Boschpoort, *supra*.

⁴⁸ See for example Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers 1989 (4) SA 31 (T) at 42B-F.

⁴⁹ Weare and Another v Ndebele NO and 21 & 31 2009 (1) SA 600 (CC) at para 42.

law, justice and equity. The court must weigh all relevant factors. The fact that a company is not able to pay its debts is not a “*catch-all ground*” under “*just and equitable*” as this is a special ground⁵⁰ based on how the company is being run. The fact that a company is not paying its debts does not necessarily make it just and equitable to have it wound up. Section 244(h) postulates not facts but a broad conclusion of law, justice and equity, as a ground for winding-up.⁵¹ A company can *inter alia* be liquidated on in terms of section 344(h) if its substratum disappears, where it was found for a specific purpose and the purpose can no longer be achieved.⁵²

[91] The applicant specifically relies on the following circumstances, which it says renders it just and equitable that the Court should wind up the respondent:

91.1 It appears that the principal business of the respondent is to earn an income from the property that it owns, by way of its farming operations. The applicant is not aware of any other economic activities conducted by the respondent. The respondent has failed to provide the applicant with any recent financial statements and as a result the applicant came to the inescapable conclusion that the respondent does not pay anything for the privilege of conducting its farming operations on the immovable property bonded to the applicant. The applicant says that only possible alternative is that the respondent siphons away the income derived from the property that it owns. In these circumstances, the applicant contends, it will be just and equitable to wind-up the respondent.

91.2 The applicant avers that the aforementioned state of affairs is exacerbated if it is borne in mind that income earned by the respondent from the property was ceded to the applicant in terms of the common cause four mortgage bonds registered to the applicant.

⁵⁰ HBT Construction and Plant Hire v Uniplant Hire CC 2012 (5) SA 197 (FB) at para [14].

⁵¹ The discussion in Henochsberg, *supra* n30 at APPI-60. Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others 2014 (5) SA 1 (SCA) at para [15]; Erasmus v Pentamed Investments (Pty) Ltd 1982 (1) SA 178 (W) at 181; Moosa NO v Mavjee Bhawan (Pty) Ltd 1967 (3) SA 131 at 136H;

⁵² See for example Thunder Cats *supra* at par [16] and Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W) at 350 C-D.

91.3 In this regard, reference was made to the standard mortgage bond conditions attached to the founding affidavit which contains a cession of rental and other income emanating from the respondent's farm. The relevant part thereof reads as follows:

“7. SESSIE VAN HUURGELD

7.1 Die verbandgewer sedeer hiermee aan die bank al sy regte, titel en belang in en tot alle huurgeld en ander inkomste wat mag voortspruit uit die beswaarde eiendom, as bykomende sekuriteit vir sodanige bedrae wat van tyd tot tyd kragtens die verband verseker mag word, met die uitdruklike reg ten gunste van die bank, onherroeplik en in rem suam:

7.1.1 in stappe teen wanpresterende huurders te doen vir die verhaling van alle huurgeld of vir uitsetting;

7.1.2 om die geheel of 'n gedeelte van enige beswaarde eiendom te verhuur, huurkontrakte te kanselleer of te hernu of aan te gaan op 'n wyse wat die bank goeddink en om enige betreder of ander persoon uit te sit;

7.1.3 om namens die verbandgewer enige geld te verhaal wat ten opsigte van die verkoop van die beswaarde eiendom betaalbaar is; met dien verstande egter dat daar nie volgens die sessie oormaking en oordrag en matigings en magte wat ingevolge hierdie klousule verleen word, gehandel sal word nie sonder die toestemming van die verbandgewer vir solank daar ten volle aan die standaard verbandvoorwaardes voldoen sal word.

7.2 Daar word hiermee ooreengekom dat die bank geregtig is om 'n kommissie te vra van 5% van die bruto bedrae van alle huurgeld wat hy ingevolge hierdie klousule invorder.”

[92] Mr van der Merwe argued that it is just and equitable for the respondent to be wound-up in these circumstances. The respondent cannot continue to retain and/or spirit away the income that has been ceded to the applicant as part of the applicant's security.

- [93] The applicant further relies thereon that the respondent has, in recent times, not made any tangible offers to the applicant, to repay the debt, other than from the proceeds of a sale of its property bonded to the applicant. This, it says, leads to the inescapable conclusion that the respondent itself believes that it will only be able to survive financially, in the event that it manages to sell its property for more than it owes to the applicant. This is indicative of the fact that the respondent is not in a position to repay the debts owed to the applicant other than from the proceeds of the only property that it has.
- [94] Applicant further submits that the respondent has lost its substratum as a trading entity, which itself evidently sees no other option but to sell its only valuable asset, to enable it to repay its debts.
- [95] The respondent answered rather evasively and cryptically in its answering affidavit, denying the applicant's allegations, but not providing sufficient information to show the contrary. It did not deny that the nature of its business was as set out by the applicant, nor did it provide its financial statements. It persisted with its primary contention that if the immovable property is sold, the applicant would have no claim against the respondent. The spiriting away of income is denied by the respondent, however it did not divulge details of how it was or is being used. In respect of the applicant's submissions that the applicant is entitled to receive the ceded income, the respondent answered that the applicant first has to enforce its security, which it says the applicant has elected not to do. It did not provide information to show that it has not lost its substratum, and that it will not lose it if its assets are sold.
- [96] Mr van der Merwe also referred to the judgment in **Voltex**, from which it is evident that ADL has already been finally liquidated. ADL owes an amount of, at least, about R18 million. Sequestration orders have also been issued against the shareholder of ADL and Mr de Leeuw who deposed to the answering affidavit in the present application. They are both held responsible as sureties for debt of ADL. In these circumstances the future viability of the respondent as a self-standing profitable company is indeed unsure, even if

its property is sold for a substantial amount. If its farm is sold, the question remains how it will be able to continue with its farming operations.

[97] Respondent's counsel in argument did submit that the respondent would be able to continue as a concern with any residual amount which may be realised if the respondent's property is sold, but there is no clear indication on the papers what such a business would entail without the land, and that it would be viable. Although I was assured by respondent's counsel that the respondent still has another director, criticism by van der Merwe that there exist uncertainties regarding the continued management of the respondent, may well be justified.

[98] Taking all these considerations into account would in my view justify a finding that the requirements of section 344(h) have been met. In addition, factors such as the history of indebtedness and unsuccessful attempts to sell the property, the uncertainties regarding the management of the company, the insolvency of its director and shareholder, the uncertain value of the assets and its saleability, the long standing failure to pay debt, the fact that a liquidator can take control of the respondent's affairs if it is liquidated and can conduct an investigation into the income and other affairs of the respondent, lead to the conclusion that the requirements of section 344(h) have been met.

Exercise of the court's discretion

[99] Despite my findings that the applicant has made out a case in terms of section 244(f) and 344(h), the court retains a discretion to refuse or postpone the application.

[100] As indicated, the narrow discretion is rarely exercised in circumstances such as exist in the present application, where the company has failed to pay its

debt, and then in special or unusual circumstances only.⁵³ The respondent bears the onus of proving the existence of such circumstances.

[101] Do the circumstances of this application constitute special or unusual circumstances, and is there a “*solid factual foundation*”⁵⁴ for the refusal of an order to wound up the respondent?

[102] In my view the answer must be in the negative. In my view there is nothing really special or unusual about the circumstances of the matter. The inability of a debtor to pay its debts when they fall due, as is the case with the respondent, is not an unusual circumstance. It is also not unusual for a company to fall into debt and being unable to realise assets to pay its debts. It is equally not unusual that a company is commercially insolvent and therefore unable to pay its debts, even if it is factually solvent. A possible difference in the cost of a sale of the property in liquidation proceedings as opposed to execution is also not a special circumstance.

[103] A circumstance that could possibly have qualified as special, would have been a clear indication on the papers that the respondent’s immovable property was or would be sold within a reasonable time, for an amount which would cover the debts owed to the applicant. There exists authority that a “*mere illiquidity capable of being overcome within a reasonable time*” could serve as a trump card to resist liquidation. Even though it maintains that it has readily realisable assets available to pay its debts,⁵⁵ there is no solid factual evidence that, despite various attempts over many years since at least 2018, the respondent’s property will actually be sold within a time of, say, 6 or even 12 months and for an amount which would be sufficient to cover all its debts. The history of the attempts to sell the property suggests that there is no guarantee of a sale within a reasonable time, for an amount which would cover all its debts. The failure to pay debts, for years, suggests

⁵³ Afgri *supra* n32 para [12].

⁵⁴ Boschpoort *supra* n15 para [17].

⁵⁵ Firstrand v Evans *supra* at [27]; Newcity *supra* n28 at para 25.1.

that the respondent suffers from more than a mere illiquidity, and that there is no guarantee that it will be solved as it contends.

[104] The respondent has failed to provide its financial statements, or at least more particulars of its overall financial position. There is also no independent valuation of the property. If regard is had to the values contained in the unsuccessful offers to purchase, it is not obvious that the whole of the debt owed to the applicant would be covered by a sale of the land, even by way of an auction as suggested by respondent's counsel. The apportioned values for the land in such offers, as mentioned above⁵⁶, rather appear to be below the total amount of the applicant's claims.

[105] My view may also have been different if circumstance such as in **Greenco**⁵⁷ existed where the indebtedness was being disputed. The court held⁵⁸ that a genuine counterclaim or defence on the merits to a claim underlying the debt, may sway a court to exercise its discretion in the respondent's favour to refuse a liquidation order⁵⁹. The fact that the respondent's indebtedness was not disputed in argument leaves little room for the exercise of a discretion in the respondent's favour.

[106] I am not convinced that a postponement would result in a better. In my view the grounds for a postponement would not be solid grounds. The prospects of success of a sale of the assets for a value that would be sufficient to save the company are speculative, not proved. In my view there is merit in the applicant's contentions that a better price could well be achieved in liquidation, for the reasons set out above. Even if this is not the case, that would not without more be a ground to postpone or refuse the application.

[107] I also take into account that sequestration orders have been made against the director and shareholder of the respondent. The shareholder and the

⁵⁶ Paragraph [23] to [25].

⁵⁷ *Supra*, n32.

⁵⁸ *Id* para [96].

⁵⁹ Even where a defence or counterclaim is raised, the court will scrutinise it, and its narrow discretion would only be exercised if it is found that such defence or counterclaim is *bona fide*, and has prospects of success. See for example *Afgri*, *supra* n32.

director of the respondent, as well as against ADL. This, and the sale of the respondent's main asset, used for its business operations, are factors which strongly indicate that the respondent may already have lost its substratum or that it will lose it if the property is sold. A liquidator should rather take control of the affairs of the respondent, and to investigate same.

[108] The applicant remains entitled to proceed with liquidation procedure in the absence of proof of special and unusual grounds which would justify a refusal or postponement of the application.

[109] Mindful of these and the other relevant considerations mentioned herein, the legal position and the relevant facts, I find that there do not exist sufficient grounds for the exercise of my discretion to refuse to grant an order for the winding-up of the respondent.

[110] In my discretion I therefore I grant a provisional winding-up order.

An order is made as follows:

- 1. The Respondent is hereby provisional wound up.**
- 2. A rule nisi is issued, calling upon Respondent and al interested parties to show cause, if any, to this Court on 28 October 2025, why a final order should not be granted for the winding-up of the respondent.**
- 3. A copy of this provisional order shall be served as follows:**
 - 3.1. By the Sheriff of the Court on the Respondent at its registered address/office.**
 - 3.2. By the Sheriff of this Court on the employees of the Respondent(if it is ascertained that the Respondent has employees) at the Respondent's registered address and principal place of business, by affixing a copy of the provisional order to any notice board to which the employees have access inside the premises or by affixing a copy of the provisional order to the front door of the premises from which the Respondent conducts business.**

- 3.3. By the sheriff on every trade union that, as far as the Applicant can ascertain, represents any of the Respondent's Employees, if any.
- 3.4. By serving the provisional court order on the Company and Intellectual Property Commission.
- 3.5. By serving the provisional order on the South African Revenue Services and on the Master of the High Court.
4. This order shall be published in "The Citizen" and the "Pretoria News" newspapers.
5. The cost of the application shall be cost in the winding-up of the Respondent and shall include the cost of counsel on scale C.

JS STONE
ACTING JUDGE OF THE HIGH COURT

This judgment is handed down electronically by circulating it to the legal representative by email and being uploaded on Caselines.

Appearances:

Attorneys on behalf of the applicant:	Tim du Toit & Co.
Counsel on behalf of the Applicant:	Adv MP van der Merwe SC
Attorneys on behalf of the Respondent:	Kololo Magro Inc.
Counsel on behalf of the Respondent:	Adv. R de Leeuw
Date of hearing:	6 May 2025
Date delivered:	7 August 2025
