

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 26865/2019

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

19/8/2025
DATE


SIGNATURE

In the matter between:

TUHF PROPERTIES (PTY) LTD
(Registration number: 2003/021683/07)

Applicant

and

THE ARGYLE COURT HOUSING ASSOCIATION
(NPC Registration number: 2001/025492/08)

First Respondent

BONELAKHE MTHANDENI NDLOVU

Second Respondent

FRANS MASIMATLA NONG

Third Respondent

TINNY XHAKAZA

Fourth Respondent

HILTON NDLOVU

Fifth Respondent

SIBUSISO TWALA

Sixth Respondent

PASTER DINGULWAZI NKOSI

Seventh Respondent

VALENTIA MATSHOBA

Eighth Respondent

Summary: Application for the liquidation of the First Respondent – whether the Applicant established that it was as creditor of the First Respondent – whether the First Respondent was commercially or factually insolvent – whether it is just and equitable to wind-up the First Respondent - whether the Court should exercise its discretion not to place the First Respondent in winding-up – whether the winding-up of the First Respondent will lead to homelessness.

Held: The evidence established that the Applicant was a creditor of the First Respondent and that the Applicant therefore had locus standi to apply for the winding up of the First Respondent. The evidence established that the First Respondent was both factually and commercially insolvent.

Held: It was just and equitable to grant an order winding up the First Respondent in order to put an end to the ever-increasing indebtedness of the First Respondent to the Applicant and the City of Johannesburg in circumstances where there was no evidence of the First Respondent being able to make payment of such indebtedness.

Held: The Respondents contention that the winding up of the First Respondent would lead to the homelessness of the occupier of Argyle Court did not have merit since their rights of occupation would be protected by the provisions and protections in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 and was not a reason to exercise a discretion not to grant an order winding up the First Respondent, particularly in circumstances where the Applicant was entitled to seek the winding up of the First Respondent, ex debito justitiae.

Held: The application for the winding up of the Respondent in the hands of the Master of the High Court is granted and the costs of the application are costs in the winding up proceedings.

The joinder application is dismissed and the parties are each to pay their own legal costs occasioned by the joinder application.

JUDGMENT

KAIRINOS AJ:

1. This is an application for:

1.1. an order winding up the first respondent on the basis that:

1.1.1. it is unable to pay its debts; and

- 1.1.2. that it would be just and equitable for the first respondent to be wound up;

as contemplated in sections 344(f) and (h), 345(c), 346 and 347 of the Companies Act 61 of 1973 of the Republic of South Africa ("the 1973 Companies Act").

2. The matter has a long and unfortunate history which evidences that the First Respondent does not generate sufficient income to pay its ever-increasing debts and has been plagued by infighting and factionalism. This infighting and factionalism together with tenants not paying their rental obligations has placed the First Respondent in this position of insolvency.
3. What is indeed sad as will appear below, is that at a certain point, the First Respondent owed a negligible amount of some R54 to the Applicant and could have applied for the transfer of the immovable property (being the subject matter of the written agreement of sale between the Applicant and the First Respondent). That was however thwarted by the infighting between the members and/or directors of the First Respondent to the point where over a period of some 13 years since 2012, the First Respondent has not been paying its debts and has been plunged into what the Applicant calls "hopeless insolvency".

4. The facts of this matter sadly reflect how a laudable project to allow the disadvantaged in society an opportunity to access home ownership was brought to its knees by in-fighting and factionalism.
5. The Second to Eighth Respondents are directors of the First Respondent (being a Housing Association) and beneficiaries of the project by the Gauteng Department of Human Settlements called the Seven Buildings Projects ("the Project"). The aim of the Project was to enable people of low income to access home ownership and to secure their tenure, through the provision of a housing subsidy that was utilised to purchase equity into the Project. The Project involved approximately 2500 people living in seven blocks of flats in the city centre of Johannesburg, Joubert Park, Hillbrow and Berea and was run through an incorporated entity as Sevens Building Company (Pty) Ltd ("SBC").
6. The Project was meant to transform the low-income residents of the 400 apartments of Argyle Court, Banksome Towers, Coniston Court, Manhattan Court, Margate Court and Stonehope Mansions, into joint owners of the buildings in a collective housing scheme.
7. The Inner City Housing Upgrade Trust ("ICHUT"), loaned the SBP approximately four million rands for the renovation of the buildings under the project. After failing to repay this loan, the SBP was liquidated in January 2002 by this Court.

8. Owing to their inability to access conventional sources of funding, and not wanting to lose their government offered housing subsidy equity in the building, the Housing Association of Argyle Court, being the First Respondent, accepted financial assistance from the Applicant for the purchase of Argyle Court from the liquidator of SBP.
9. The financial assistance from the Applicant was effected through the conclusion of three related agreements:
 - 9.1. the first agreement, titled the Tripartite Agreement, was entered into between SBC (in liquidation), the First Respondent and the Applicant. The purpose of this agreement was to cancel the offer to purchase agreement between the SBC in liquidation and the First Respondent, termed the First Purchase agreement, owing to the inability of the First Respondent to procure funding from the conventional financiers and to record the Second Purchase Agreement between the SBC (in liquidation) and the Applicant;
 - 9.2. the second agreement was the Deed of Sale between the SBC (in liquidation) and the Applicant, in terms of which the Argyle Court was sold to the Applicant on 13 October 2014, for a consideration of R 415 000.00;
 - 9.3. the third agreement was the Deferred Sale Agreement between the Applicant and the First Respondent. This agreement was entered

into in accordance with the provisions of the Alienation of Land Act, 66 of 1981 and entitled the First Respondent to the transfer of Argyle Court into its name upon the payment of the loan for the purchase of Argyle Court by the First Respondent. The First Respondent was also, in terms of section 27(1) of the Act, entitled to the transfer of the property to its name as soon as it had paid 50% of the purchase price.

10. The Deferred Sale Agreement was performed with relatively little difficulty until 2012, when some members of the First Respondent sought to have the property transferred into its name in accordance with the Deferred Sale Agreement. What followed was infighting between the members of the First Respondent – which had split into two factions. This infighting between the members of the First Respondent effectively paralysed the First Respondent and from then on its debts grew.
11. Had the debt been paid and the property transferred to the First Respondent in 2012, the Argyle Court block of flats would have been transferred to the First Respondent and would have constituted an asset of the First Respondent. Alas this was not to be as a result of the factional infighting between the members of the First Respondent and the concomitant paralysis in the decision making of the First Respondent.
12. To make matters worse, when the members became factionalised, each faction appointed its own property management agent to whom they

allegedly paid their rental. However, no evidence of the payment of rentals to the property management agents was produced by the Respondents.

13. An administrator, Mr Cyprian Mondli Pehlukwayo, was appointed by this Court on 31 July 2017, in accordance with an earlier court order granted on 31 May 2017. There are opposing contentions between the Applicant and the Second to Eighth Respondents as to whether the administrator carried out his functions properly and adequately. The Applicant and the administrator contend that his functions were thwarted by the infighting between the two factions and the failure of the tenants to meet their rental obligations and numerous other insurmountable problems with the administration of the First Respondent.
14. The Respondents contend that despite the First Respondent being unable to pay its debts as and when they fall due or at all and therefore being both commercially and factually insolvent, I should nevertheless exercise my discretion not to wind up the First Respondent.
15. The Second to Eighth Respondents, being both members and directors of the First Respondent, oppose the application on the following grounds:
 - 15.1. a large portion of the R 2 052 512.00 amount allegedly owed by the First Respondent to the Applicant is unsubstantiated and or prescribed;

- 15.2. The debt relating to the City of Johannesburg Metropolitan Municipality is for the City to collect and not the Applicant;
 - 15.3. the First Respondent is not insolvent and the true financial position of the First Respondent is unknown and there cannot therefore be a conclusion that it is unable to pay its debts;
 - 15.4. that the Recovery Plan proposed by the administrator has not been implemented;
 - 15.5. that liquidation will lead to homelessness;
 - 15.6. that it is not just and equitable to wind-up the First Respondent.
16. The following issues therefore call for determination
- 16.1. The authority of the deponent to the founding affidavit – this issue was wisely not proceeded with;
 - 16.2. The Applicant's *locus standi* as creditor of the First Respondent;
 - 16.3. Whether the First Respondent is commercially insolvent, i.e. unable to pay its debts as and when they fall due;

- 16.4. Whether it is just an equitable for the First Respondent to be wound up based largely on the Respondents' contention that liquidation of the First Respondent will lead to homelessness;
- 16.5. Whether the Applicant has complied with the procedural requirements of the Companies Act, 61 of 1973;
- 16.6. The Respondents' contention that there should be a stay of proceedings and a joinder of various Government Departments.
17. In regard to the Applicant's *locus standi* as a creditor and the First Respondent's commercial insolvency, the evidence establishes that on the Second to Eighth Respondents' own version, the First Respondent has for years been unable to pay its debts and that appears from annexure "T4.5" to the founding affidavit.
18. On 30 July 2018, the Third, Fifth, Sixth, Seventh and Eighth Respondents personally signed a resolution in their capacities as directors of the First Respondent, expressly recording that the First Respondent "owes the City of Johannesburg R3,506,066,72 as at end May 2018 and the City had switched off electricity supply since May 2018 due to the long standing electricity account of R1,714,837.80 as at end of May 2018" and that the First Respondent would apply to the Applicant to borrow R60,000.00 as a draw-down on its current facility, in order to make a down payment of R100,000.00

to re-establish the electricity supply, since the First Respondent only had R53,000.00 in its bank account.

19. Furthermore, the Applicant relies on two loans for venue hire and the above-mentioned loan for settlement of utilities in the sum of R60,000.00, which were all advanced during the course of 2018 with the concurrence of the directors, including of several of the opposing Respondents and the Court appointed administrator. There appears to be no cogent answer as to why the amounts owed to the Applicant have not been paid, which leads to the irresistible inference that the First Respondent does not have funds to do so.
20. Whilst the Respondents also contend that many of the debts relied upon by the Applicant have prescribed, they have no cogent explanation why a taxed costs order under case number 45485/2013 in the sum of R63,795.56 - which is subject to a 30-year prescription period and has therefore clearly not prescribed – has not been paid.
21. Furthermore, the Applicant points out that the Court appointed administrator acknowledged the First Respondent's indebtedness when he deposed to his confirmatory affidavit on 16 July 2019 and the First Respondent is liable to the Applicant for insurance costs which are being incurred on a monthly basis to date and which is not disputed by the Respondents.
22. The Applicant correctly contends that the facts demonstrating the hopeless financial position of the First Respondent and its complete inability to pay its

debts, are incontrovertible. This is clearly proved not only by the First Respondent's failure to make payment to the Applicant, but also by its failure to make payment of the debt owed to the City of Johannesburg, which remains unpaid.

23. As at the following dates, the First Respondent owed the City the following amounts:

23.1. At the end of July 2017, R2,5 million;

23.2. As at June 2019, R4,046,007.27; and

23.3. As at the end of January 2023, R8,436,042.56.

24. Whilst it is correct, as contended by the Respondents, that the Applicant cannot rely on the First Respondent's indebtedness to the City to establish the Applicant's *locus standi* as a creditor, it can nevertheless rely on the indebtedness to the City to establish that the First Respondent cannot pay its debts as and when they fall due and that it is therefore both commercially and factually insolvent. In relation to its own *locus standi*, the Applicant has at least an unpaid and taxed costs order as aforesaid which is more than R100 and therefore affords it *locus standi* as a creditor.

25. The matter was previously on the roll and argument was presented before the Honourable Ms Justice Dippenaar. The learned judge did not determine

the merits of the application, but postponed the matter *sine die* and required the administrator to deliver a comprehensive report pertaining to the affairs of the First Respondent from the date of his appointment to date, as well as particulars of when and how the administrator complied with his duties and obligations. The learned judge also provided the parties with an opportunity to deliver further affidavits.

26. The administrator delivered his affidavit and report, which further demonstrated that the First Respondent is clearly unable to pay its debts at present, it has been unable to do so for years and there is no reasonable prospect of the First Respondent ever paying off its debts from the only income that it could potentially generate, being rental income.
27. The parties thereafter delivered further affidavits. Nothing therein controverted the Applicant's evidence that the Applicant is a creditor of the First Respondent, the First Respondent is heavily indebted both to the Applicant and the City and the First Respondent has for many years been unable to pay its debts and is still unable to pay its debts.
28. Section 346(1)(b) of the 1973 Companies Act provides as follows:

"346 Application for winding-up of company

(1) An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made-

(a) ...;

(b) by one or more of its creditors (including contingent or prospective creditors);"

29. A contingent or prospective creditor has been defined in *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd 1971 (1) SA 524 (T)* at 528C, as one who by reason of some existing *vinculum juris* has a claim against a company which may ripen into an enforceable debt on the happening of some future event or on some future date.

30. The Applicant is a creditor of the First Respondent, in that the latter is indebted to the applicant in the amount of R2,052,512.00 as at 31 March 2019, which amount is *inter alia* made up of the following:
 - 30.1. service costs incurred in terms of clause 7 of the deferred sale agreement concluded between the Applicant and the First Respondent in relation to Argyle Court (“the deferred sale agreement”);

 - 30.2. insurance charges incurred in terms of clause 8 of the deferred sale agreement. All the debts set out in paragraphs 16.1 to 16.7 of the founding affidavit appear *inter alia* from annexure “T4.7” thereto. The service costs and insurance charges are debts specifically provided for in clauses 7 and 8 of the deferred sale agreement. The First Respondent failed to insure the building, hence the Applicant had to do so in terms of the deferred sale agreement, with the First Respondent being contractually obliged to repay the costs thereof to

the Applicant, which were debited to "T4.7" from time to time. These charges continue to be incurred on a monthly basis, to this date;

- 30.3. loans extended by the Applicant to the First Respondent in respect of legal fees incurred by the First Respondent from time to time, as appears from resolutions passed by the Board of Directors of the First Respondent *inter alia* on 31 May 2016 and 12 July 2016;
- 30.4. a loan extended by the Applicant to the First Respondent (represented by the administrator) during March 2018 in the amount of R23,300.00 in respect of venue and related costs for the holding of a members' meeting on 7 April 2018;
- 30.5. a loan extended by the Applicant to the First Respondent (represented by the administrator) during June 2018 in the amount of R22,250.00 in respect of venue and related costs for the holding of the First Respondent's annual general meeting on 2 June 2018;
- 30.6. a loan extended by the Applicant to the First Respondent during July 2018 in the amount of R60,000.00 in order to re-connect essential services by virtue of the First Respondent's failure to make payment of its accounts with the City. Each of the Third, Fifth, Sixth, Seventh and Eighth Respondents, in their capacities as directors of the First Respondent, personally signed the resolution referring to this loan, and it was signed by the administrator as well;

- 30.7. monthly interest accruing on the outstanding balance of the account of the First Respondent with the Applicant;
- 30.8. a taxed bill of costs in the sum of R63,795.56.
31. It is important to note that the legal fees required in terms of the resolution dated 31 May 2016, were in order to defend criminal charges that had been brought against *inter alia* the Second Respondent (who is the deponent to the opposing Respondents' answering affidavit, in which this very debt is now sought to be denied). This resolution was signed by *inter alia* the Third Respondent, the Seventh Respondent and the Eighth Respondent. The legal fees required in terms of the resolution dated 12 July 2016, were in order to defend civil proceedings instituted against *inter alia* the Third Respondent and the Fourth respondent. This resolution was signed by *inter alia* the Second Respondent, the Seventh Respondent and the Eighth Respondent.
32. The Respondents' defence to the Applicants' claims constitutes in essence bare denials, a bald allegation that the Applicant has not provided any amounts for the service costs and insurance charges, that the Applicant has not specified the principal sum on which interest is calculated, as well as an unsubstantiated contention that the debts in paragraphs 16.3 to 19 of the founding affidavit "have since prescribed."

33. In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at par [55], the Supreme Court of Appeal per Cameron JA (as he then was), summarized the relevant principles as follows with reference to the well-known cases of *R Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1168 and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5, as follows:

“[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise ‘fictitious’ disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be ‘a bona fide dispute of fact on a material matter’. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.”

34. *In casu*, the Respondents have simply not advanced any evidence whatsoever of any facts that would support their bare denial of the First Respondent’s indebtedness and commercial insolvency.
35. Section 344(f) of the 1973 Companies Act, 61 of 1973 provides that:

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

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

36. Section 345 of the aforesaid Companies Act provides as follows (with added emphasis):

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

(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) ... ; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.”

37. South African law recognises two forms of insolvency:

37.1. factual insolvency (where a company's liabilities exceed its assets);

37.2. commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities) - *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597 D - G; *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) at par 6.

38. In *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D), Caney J held as follows at 597 D – G:

*"The proper approach in deciding the question whether a company should be wound up on this ground appears to me, in the light of what I have said, to be that, if it is established that a 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; that it is unable to pay its debts may be established by the means provided in para. (a) or para. (b) of sec. 112, or in any other way, by proper evidence. If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts. Cf. *Chandlers Ltd v Dealesville Hotel (Pty.) Ltd.*, 1954 (4) SA 748 (O) at p. 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 his case within the Act. He is not bound to give time'.

Buckley, p. 450.

This view is supported also by Palmer at p. 27:

'The fact that there is due to the petitioner a liquidated sum, that the debt is not disputed, and that the petitioner has demanded payment without success, affords cogent prima facie evidence of the company's inability to pay its debts, and is the evidence most commonly relied on.'

Evidence that a company has failed on demand to pay a debt, payment of which is due, is cogent prima facie proof of inability to pay its 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."

39. In *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C), Berman J held as follows at 440F – H:

"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 available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up."

40. In *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA), it was held as follows at par [17]:

"[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 liabilities than with abstruse economic exercises as to the valuation of a company's assets. Were the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the new Act, set out in s 7(l) thereof.”

41. The objective facts, including the First Respondent's own conduct and words, clearly demonstrate that it is unable to pay its debts. The First Respondent does not have enough funds to settle the massive outstanding account of the City, which has spiralled out of control and which remains unpaid. How the First Respondent will pay its debts to the City, the Applicant and other creditors is not explained. The First Respondent could not make payment of the reconnection charge of R100,000.00 or the amounts owing to the Applicant.

42. It must be borne in mind that the First Respondent presently occupies Argyle Court (and has been occupying Argyle Court for many years) in terms of the deferred sale agreement. The First Respondent is liable for all electricity and water consumed, as well as for other municipal charges in respect of Argyle Court and the Applicant as owner remains liable to the City should the First Respondent not make such payments. In addition, by virtue of its occupation

and consumption, the First Respondent is also in terms of *inter alia* section 49 of the Gauteng Local Government Ordinance 17 of 1939 liable to the City for the consumption charges for water and electricity supplied to Argyle Court.

43. As appears from paragraph 18 of the founding affidavit, it was recorded that the First Respondent was at that point in time indebted to the City in the amount of R4 056 007.27 in respect of municipal charges for water, electricity and the like. The Respondents have not alleged that this debt, or any of the First Respondent's other debts, have or can be paid. They have also not furnished any evidence of any liquid assets or readily realisable assets available to meet the First Respondent's liabilities as they fall due in the ordinary course of business, and thereafter to be in a position to carry on normal trading.
44. Having regard to all the evidence of insolvency (both commercial and factual), I find that not only is the First Respondent commercially insolvent but also that the Applicant has the necessary *locus standi* to apply for its winding-up and is entitled to such order *ex debito justitiae*.
45. In regard to whether it is just and equitable to wind-up the First Respondent, section 344(h) of the Companies Act, 61 Of 1973, unlike the preceding subparagraphs of section 344, this section postulates not facts but only a broad conclusion of law, justice and equity as a ground for winding-up. It is well settled that the subsection giving power to the court to wind up a

company on the just and equitable ground is not confined to cases in which there are grounds analogous to those mentioned in other parts of the section. Nor, on the other hand, can any general rule be laid down as to the nature of the circumstances that have to be borne in mind in considering whether a case comes within the phrase. It must also be recognised that there is no necessary limit to the generality of the words “just and equitable”. Section 344(h) affords a court a wide judicial discretion in the exercise whereof.

46. In *Sweet v Finbain 1984 (3) SA 441 (W)* it was held as follows:

“The ground is to be widely construed; it confers a wide judicial discretion, and it is not to be interpreted so as to exclude matters which are not ejusdem generis with the other grounds specified in s 344. The fact that the Courts have evolved certain principles as guides in particular cases, or examples of situations where the discretion to grant a winding-up order will be exercised, does not require or entitle the Court to cut down the generality of the words “just and equitable”.”

47. The Respondents dispute that it is just and equitable for the First Respondent to be wound up, and they contend that there is no longer factionalism in the Argyle Court community and that all factions are now dissolved and people are working together.
48. There is however, no explanation of how the tenants are allegedly working together and how they intend to address the First Respondent’s massive debt and its evident inability to make payment thereof.

49. The court appointed administrator, was not able to put the affairs of the First Respondent in order. Rental increases were met expectedly met with hostility and so were the steps taken by the administrator to put proper security and cleaning services in place. The administrator apparently had numerous meetings with the various parties and the Applicant was even requested to advance further funds in order to facilitate the venues and logistical arrangements for some of the meetings, and to make payment to the City of Johannesburg to re-connect the electricity supply.
50. Letcor, one of the property managing agents, has not submitted past financial records and it has not transferred monies that belong to the First Respondent. Some tenants continue to make payment to Letcor. The continued presence of two property managers for one building is making it impossible to account for past income and expenditure, as well as going forward. This a liquidator will put an end to and sort out with the various mechanisms afforded to liquidators in the Companies Acts and the Insolvency Act, 24 of 1936.
51. The bottom line is that the First Respondent does not have funds. The proposed recovery plan relied upon by the Respondents requires funding to implement and it is impossible to implement the recovery plan without funding.
52. The First Respondent is in continuous breach of the deferred sale agreement, it has borrowed monies it has not repaid, it has run up a

considerable debt and it is evidently no longer anywhere near becoming the owner of the Argyle Court building. It is financially objectively unable to take transfer.

53. The First Respondent's debt has spiralled out of control and it continues to mount further, to the prejudice of all concerned. It can no longer achieve its objective, as laudable as such was.
54. The First Respondent simply cannot be allowed to continue incurring further debt and to trade further in hopelessly insolvent circumstances. The only solution is for it be wound up and it would be just and equitable for that to occur.
55. If the just and equitable basis for the winding-up needs be considered at all, since the Applicant has established that the First Respondent is both factually and commercially insolvent therefore entitling it to a winding-up order, it must be taken into account when having regard to justice and equity that the Applicant, being the owner of the property currently occupied by the First Respondent, remains liable to the City for the services rendered by the City to the property. At a certain point this state of affairs must come to an end. This point has now been reached. The bleeding must stop and the First Respondent must be put out of its misery, unless the Respondents are able to show why this Court's discretion to place the First Respondent must nevertheless be exercised against such order.

56. It seems to me that the only issue which therefore requires further determination is the Respondents' contention that the winding-up of the First Respondent will lead to homelessness in respect of the tenants and therefore I should exercise my discretion against granting a winding-up order in respect of the First Respondent. In essence the Respondents contend that now that the infighting has abated and the directors and members are all working together, the First Respondent should be given a further chance to continue to operate in order to prevent the homelessness of the tenants.
57. The Respondents contend that the implications of a winding-up of the First Respondent is that such an order will lead to homelessness of the Second to Eighth Respondents and/or other tenants living in Argyle Court, in the context where the state housing subsidy is implicated and where the City will be required in law to furnish emergency alternative accommodation. The Respondents contend further that the Court ought to therefore join the national, provincial, and municipal authorities in charge of human settlements to these proceedings. The Respondents contend that a report from these authorities detailing how, in the context of the potential loss of state investment to this project they may intervene in order to secure the Associations hold over the property and the residents' tenure in it, is a necessary step in these proceedings.
58. The Respondents' contentions are based on the authority of the Constitutional Court in *Jafftha v Schoeman and Others; Van Rooyen v Stolz and Others* 2005 (1) BCLR 78 (CC) at para 31, where the Constitutional

Court held that there is a 'negative content to socio-economic rights.' In this regard, the Constitutional Court was in agreement with the appellants' argument that the 'negative obligation under section 26 of the Constitution of the Republic of South Africa, 1996, is not to prevent or impair existing access to adequate housing and while the positive obligations fall only on the State, the negative obligation applies to everyone, including private persons'.

59. The Respondents contend that it is for this reason that the Constitutional Court in *Gundwana v Steko Development and Others 2011 (3) SA 608 (CC)* held that the *Jaftha* decision applies to mortgage bonds as well as to so-called extraneous debts and that it applied to High Court execution procedures and that the result was the Rule 46 and 46A.
60. Similarly here, so the Respondents contend, the impact of winding-up the First Respondent would have a direct effect on the Second to Eighth Respondents' rights under section 26 of the Constitution and it is only just and equitable that section 26 considerations be taken into account in the exercise of the Court's discretion whether or not to grant the Applicant the relief it seeks.
61. The Applicant contends that the present application is not an eviction application, and the liquidation relief will not have any legal or practical impact on the right to housing of the occupiers of the Argyle Court building.

62. The Applicant also state that the liquidation of the First Respondent does not amount to an order evicting the occupiers. The Respondents in turn contend that the aforesaid argument is not sustainable and is purportedly rejected by the authorities in *Jaftha* and *Gundwana* pointing to exactly the opposite line of reasoning.
63. I have considered the respective contentions of the parties in relation to the exercise of my discretion, particularly in relation to the issue of whether a winding-up order will lead to homelessness. I find myself favouring the contentions of the Applicant that the winding-up order will itself not necessarily lead to homelessness. A liquidator has a number of various avenues to follow in the liquidation of the First Respondent. The liquidator may elect to cancel the agreement with the Applicant or may elect to enforce it – no party has suggested that the said agreement has been cancelled and I was informed that it has not been cancelled by either party. The Applicant may thereafter seek to either conclude its own agreements of lease with the existing tenants or to evict them. It is only at that stage that there is a risk of homelessness. That being so, the occupiers – whether lawful or unlawful – have the protection of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998*.
64. This approach has support in in relation to Rule 46A, where the Constitutional Court in *Bestbier and Others v Nedbank Ltd 2024 (4) SA 331 (CC)* held that tenants in a property need not be joined in proceedings since they are protected either by ESTA or the rule of *huur gaat voor koop*.

Similarly, in the context of winding-up proceedings – where the property housing the potential homeless is not even owned by the First Respondent, there can be no potential homelessness arising merely from the winding-up of the First Respondent. It is for the Applicant to then take steps to evict the occupiers and at that stage the requirements of *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* will become applicable which affords a measure of procedural and substantive protections to the occupiers of the property. It is at that stage that their section 26 constitutional rights will be taken into account and if necessary protected by the courts.

65. Having made such finding, it follows that the joinder of various government departments is not necessary and the joinder application must be dismissed. The Applicant seeks the costs of the joinder application from the Second to Eighth Respondents. However, it is clear that the Respondents sought the joinder purely to attempt to protect their section 26 constitutional rights, however misguided that may have been. I therefore decline to award a costs order in favour of the Applicant in respect of the joinder application.
66. In the circumstances, there is no reason to exercise my discretion not to grant a winding up order of the First Respondent.
67. Despite a bald denial in this regard by the Respondents, the affidavits and annexures evidence that the Applicant has complied with all the statutory and procedural requirements for a winding-up order.

68. In the circumstances, the following order is made:

68.1. The First Respondent is placed under final winding up in the hands of the Master of the High Court.

68.2. The costs of the application are to be costs in the winding up of the First Respondent.

68.3. The joinder application is dismissed and the Applicant and the Second to Eighth Respondents are to bear their own costs in respect of the joinder application.

KAIRINOS AJ

Acting Judge of the High Court: Gauteng Division, Johannesburg

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Dates of Hearing: 23 July 2025

This judgment is delivered by upload to the digital data base of the court and by transmission email to the parties on 19 August 2025. The judgment is deemed to be delivered on 19 August 2025.