



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Reportable

Case no: 2024-142384

In the matter between:

**EXEO KHOKELA CIVIL ENGINEERING
CONSTRUCTION (PTY) LTD
(Registration No: 2004/012859/07)**

APPLICANT

and

**SCHOONSPRUIT DEVELOPMENT (PTY) LTD
(Registration No: 2015/242162/07)**

RESPONDENT

Coram: HIGGINS, AJ

Heard: 1 August 2025

Delivered: 17 September 2025

JUDGMENT

Introduction

[1] This matter concerns an application for the provisional winding-up of the respondent company. The applicant contends that the respondent is commercially insolvent and seeks relief under the provisions of the Companies Act 71 of 2008 (“the Companies Act”) and its transitional arrangements. The respondent opposes the application on the grounds of jurisdiction, liability, and insolvency.

[2] In its determination of whether or not to grant such an order, this Court must consider whether the applicant has established a prima facie case of indebtedness and insolvency, and whether the respondent’s opposition is founded on a bona fide defence or amounts to an attempt to delay liquidation.

Facts

[3] On 30 January 2024, the applicant and the respondent concluded a written agreement for the provision of construction services. The applicant duly performed in terms of the agreement and thereafter issued an invoice for payment.

[4] Despite numerous demands, the respondent failed to make payment. In email correspondence, the respondent acknowledged the debt and indicated that payment was dependent on obtaining external funding. During the proceedings, the respondent denied indebtedness for the work performed.

[5] The applicant launched this application in December 2024. It was heard on 6 August 2025, with supplementary submissions filed thereafter.

[6] On the 5th of August 2025, the day before the hearing, a business rescue application was lodged electronically in the KwaZulu-Natal Division of the High Court, Pietermaritzburg. Notably at the hearing, counsel for the respondent also appeared for the business rescue applicant.

[7] The respondent submits that an unissued copy of the business rescue application was served on all stakeholders on the same day it was lodged. A physical copy was submitted in chambers the following morning. The issued copy of the notice of motion was attached to the supplementary submissions filed after the hearing.

[8] The applicant states that the respondent's principal place of business is in Cape Town, where its directors reside and conduct business. The respondent, however, raises a jurisdictional objection on the basis that its registered office is in Pietermaritzburg.

Issues

[9] The issues for determination are as follows:

- a. Whether this Court has jurisdiction to hear the winding up application.
- b. Whether the business rescue application lodged in the KwaZulu-Natal Division of the High Court was properly

“made” in terms of section 131(6) of the Companies Act¹ so as to suspend these proceedings.

- c. Whether the applicant has established a prima facie case of the respondent’s commercial insolvency warranting the grant of a provisional winding-up order

Law Applicable

[10] Section 224(3) of the Companies Act provides that the repeal of the old Companies Act 61 of 1973 (“the old Companies Act”) does not affect the transitional arrangements in Schedule 5.² Item 9 of that Schedule preserves the continued application of Chapter 14 of the old Companies Act to the winding-up of insolvent companies.

[11] In terms of section 344 of the old Companies Act³), read with section 12, a company may be wound up by the court within whose jurisdiction either its registered office or its principal place of business is situated.⁴ This dual jurisdiction in respect of the winding-up of insolvent companies was confirmed by this Court in *Van der Merwe v Duraline (Pty) Ltd*.⁵

[12] Section 344(f) of the old Companies Act provides that a company may be wound up by the court if it is unable to pay its debts as described in section 345. In terms of section 345(1), a company is deemed unable to pay its debts if, inter alia, it fails to satisfy a creditor’s demand within 21

¹ Companies Act 71 of 2008

² *ibid* section 224(3)

³ Act 61 of 1973

⁴ *Ibid* section 344 and section 12.

⁵ [2013] ZAWCHC 213 see paras 19-31.

days or if it is otherwise proved to the satisfaction of the court that the company cannot meet its obligations.⁶

[13] It is trite that winding-up proceedings should not be employed as a mechanism to enforce payment of a debt that is disputed on bona fide and reasonable grounds.⁷ In principle, an unpaid creditor is, *ex debito justitiae*, entitled to a winding-up order, and the discretion of the court to refuse such relief is a narrow one.⁸ Once a creditor has established a prima facie case of indebtedness, the onus rests on the company to show that such indebtedness is bone fide.⁹

[14] Section 131(6) of the Companies Act suspends liquidation proceedings only upon a properly “made” business rescue application.¹⁰ The Supreme Court of Appeal (“the SCA”) has affirmed that the ‘liquidation proceeding’ refers only to those actions performed by a liquidator in dealing with the affairs of a company in liquidation in order to bring about its dissolution.¹¹

[15] A business rescue application tainted by abuse does not attract the protection afforded by section 131(6) of the Companies Act and therefore cannot suspend or delay liquidation proceedings.¹² A business rescue application launched for tactical delay or without prospects may constitute an abuse of process and should not be permitted.¹³

⁶ Act 61 of 1973 section 345(1).

⁷ *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd* [2023] ZAWCHC 202 para 23.

⁸ *Ibid* para 24; *Afgri Operations Limited v Hamba Fleet (Pty) Limited* [2017] ZASCA 24 para 12;

⁹ *Afgri Operations Limited v Hamba Fleet (Pty) Limited* [2017] ZASCA 24 para 13.

¹⁰ Act 71 of 2008 section 131(6).

¹¹ *GCC Engineering (Pty) Ltd v Maroos* [2018] ZASCA 178 para 19.

¹² *PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services and Others* [2023] ZASCA 111 para 38.

¹³ *ibid* para 27.

Application of Law to Facts

Jurisdiction

[16] The respondent contended that, following this court's judgment in *Sibakhulu*,¹⁴ jurisdiction in winding-up proceedings is confined to the court closest or nearest to a company's registered office.

[17] That approach has not been followed in subsequent judgments of this Court insofar as it purported to apply to insolvent liquidations. In *Duraline*,¹⁵ this Court held that the liquidation of insolvent companies is still governed by Chapter 14 of the old Companies Act, read with section 12. These provisions confer jurisdiction on the court where the company either has its registered office or its principal place of business. Similarly, in *Mfwethu Investments*,¹⁶ it was observed that Binns-Ward J's statements in *Sibakhulu* concerning liquidation were, at most, obiter.

[18] I agree with the reasoning in these authorities. In the case of the winding-up of an insolvent company, the dual jurisdiction under the old Companies Act remains applicable. On the evidence, the respondent's principal place of business is in Cape Town, where its directors reside and operate. This Court therefore has jurisdiction, and the respondent's objection in this regard must fail.

¹⁴ *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Estate (Pty) Ltd* 2013 (1) SA 191 (WCC) para 23.

¹⁵ *Van der Merwe v Duraline (Pty) Ltd* [2013] ZAWCHC 213 paras 19-31; see also *Wild & Marr (Pty) Ltd v Intratek* [2019] ZAGPPHC 613 para 13.

¹⁶ *Mfwethu Investments CC v Citiq Meter Solutions (Pty) Ltd* 2020 JDR 0851 (WCC) para 21-22.

Business Rescue Application

[19] As the SCA held in *Lutchman*, a business rescue application cannot be considered “made” under section 131(6) of the Companies Act unless it has been formally issued.¹⁷

[20] It is common cause that a business rescue application was lodged in the KwaZulu-Natal Division of the High Court on the eve of this hearing and formally issued minutes before it commenced. Counsel for the respondent contends that this step had the effect of suspending the present proceedings in terms of section 131(6) of the Companies Act. The application was opposed by the applicants, who alleged both abuse of process and procedural defects in its service. However, upon reviewing the supplementary submissions and relevant case law, I find that it is unnecessary to consider the effect of the business rescue application on these proceedings.

[21] In *Kalil*, the then Appellate Division (now “the SCA”) held that the phrase “winding-up of a company” refers to the liquidation process itself, and not the preliminary steps taken to obtain a winding-up order.¹⁸ Subsequently, in *Absa Bank Ltd v Summer Lodge (Pty) Ltd*,¹⁹ the Gauteng Division of the High Court confirmed that liquidation proceedings commence only once a provisional or final order has been granted and that the proceedings suspended under section 131(6) do not include the legal proceedings taken by a creditor for purposes of obtaining an order that a company be wound-up.

¹⁷ *Lutchman No and Others v African Global Holdings and Others* 2022 (4) SA 529 (SCA) para 31.

¹⁸ *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 932 (A) at pp 5.

¹⁹ [2013] ZAGPPHC 544 para 16.

[22] Moreover, the SCA in *Richter v Absa Bank Ltd*²⁰ referred to the authority of *Kalil* and *Summer Lodge*, noting that courts have held that the deeming provision under section 131(6) of the Companies Act comes into effect only after a liquidation order has been granted. This position was further developed in *GCC Engineering (Pty) Ltd v Maroos*,²¹ where it was held that it is the actions performed by a liquidator in administering the company's affairs that is suspended, not the legal consequences of a winding-up order.

[23] The Pretoria High Court's interpretation of *Maroos* in *STS Tyres (Pty) Ltd v Bamboo Rock Plant (Pty) Ltd*²² concerned circumstances that are closely aligned with the present matter. In *STS*, while recognising that *Maroos* concerned a business rescue application launched after a provisional winding-up order had already been granted, that Court held that this did not detract from the underlying principle.²³ It reasoned that, since the SCA confirmed that section 131(6) suspends only the process undertaken by a liquidator and does not nullify the legal consequences of a winding-up order, such an application does not prevent the granting of the order itself.²⁴

[24] This Court may consider the reasoning in *STS* for its persuasive value. That said, I find that the approach adopted is both sound and fortified by the other authorities mentioned.

[25] I am therefore satisfied that the business rescue application, even if properly instituted, does not preclude this Court from granting a provisional winding-up order.

²⁰ [2015] ZASCA 100 para 10 fn 2 of judgement.

²¹ [2018] ZASCA 178 paras 17-19.

²² [2024] ZAGPPHC 490.

²³ *Ibid* para 26.

²⁴ *Ibid* para 27.

Provisional Winding-Up

[26] For the purposes of section 344(f) of the old Companies Act, it is not necessary to prove actual insolvency, commercial insolvency is established where the evidence shows that a company cannot meet its debts as they fall due.²⁵

[27] At the provisional stage, the applicant is required to demonstrate its entitlement to an order on a prima facie basis.²⁶ That is to say, the court must be satisfied on the affidavits that the balance of probabilities favours the applicant.²⁷ Once a creditor has proved indebtedness, it is ordinarily entitled to a winding-up order, and the court's discretion to refuse such relief is limited.²⁸

[28] In the present matter, the debt is substantiated by invoices as well as the respondent's written acknowledgements that payment was contingent upon securing external funding. The respondent's own admissions of financial distress, both in correspondence and in its business rescue application, further reinforce the probability of commercial insolvency. I am therefore satisfied that the applicant has established a prima facie case. The onus thus shifts to the respondent to demonstrate that the debt is genuinely disputed on bona fide and reasonable grounds.²⁹

[29] The respondent has failed to discharge this onus. None of its directors, who had previously admitted liability, deposed to an affidavit. Instead, the answering affidavit was filed by the respondent's attorney, who denied indebtedness without providing supporting evidence. No

²⁵ *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd* [2023] ZAWCHC 202 para 25.

²⁶ *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 932 (A) at pp 59-71.

²⁷ *Ibid.*

²⁸ *Afgri Operations Limited v Hamba Fleet (Pty) Limited* [2017] ZASCA 24 para 12.

²⁹ *ibid* para 13.

credible financial records were furnished to demonstrate solvency, and nothing was placed before the Court to rebut the respondent's prior written acknowledgements of liability. As confirmed by the SCA in *Wightman t/a JW Construction v Headfour (Pty) Ltd*,³⁰ bare denials do not create a genuine dispute of fact.

[30] The evidence before me establishes a prima facie case in favour of granting a provisional winding-up order. The respondent has failed to show that the debt is genuinely disputed on bona fide and reasonable grounds, or that it is in a position to discharge its obligations. I am further satisfied that the requirements of justice and equity, as envisaged in section 344(h) of the old Companies Act, have been met.

Relief Sought

[31] The applicant seeks a provisional winding-up order with costs on Scale B. Given the strength of its case and the respondent's conduct, such relief is warranted. There is no basis in law or equity to withhold the order sought.

Order

[32] The following order is made:

- a. The Respondent is placed under provisional winding-up in the hands of the Master of the High Court.
- b. A rule nisi is issued, calling upon the respondent and all interested parties to show cause, if any, on a date to be determined by the Registrar, why a final winding-up order should not be granted.

³⁰ [2008] ZASCA 6 para 13

- c. Service of this order shall be affected in accordance with the rules.
- d. The Respondent shall pay the costs of this application including the costs of counsel on scale B.

HIGGINS, AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant:	Mr S Van der Meer
Instructed by:	Van der Meer and Partners Inc.
For Respondent:	Adv. J De Vries

Instructed by:

Padayachee and Partners Attorneys