

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2025/076256

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: No
<u>11 November 2025</u> DATE SIGNATURE	

In the matter between:

DAVID BERNARD SCOTT

Applicant

and

UNIQUE AWNING CC t/A UNIQUE CONSTRUCTION
(Registration 2009/194660/23)

Respondent

JUDGMENT

C BESTER AJ:

Introduction

- [1] This is an application for the winding-up of the respondent in terms of section 344(f) of the Companies Act 61 of 1973 read with section 69(1)(a) of the Close Corporations Act 69 of 1984.

- [2] The nub of the applicant's case is that he is a creditor of the respondent in the sum of R371 668.61. The amount is made up of two parts: i) a deposit of R291 860.00 paid to the respondent for construction services allegedly not rendered; ii) damages in the amount of R79 808.61 suffered as a result of the respondent's breach of its contractual obligations and which the applicant says represents the amount he had to pay an alternative contractor to complete the works.

The Facts

- [3] The dispute began with an agreement concluded in April 2024, where the respondent was hired to provide specific construction services at the applicant's property in Dainfern, Johannesburg. The applicant paid a deposit of R291 860.00 to the respondent representing half the contract sum, but the contractual relationship between the parties soon deteriorated.
- [4] The applicant accused the respondent of breach of contract and says that he had to contract an alternative contractor to complete the works the respondent is alleged not to have completed.
- [5] The applicant issued summons in October 2024 out of the Randburg Regional Court in the name of Hab & Fire Security (Pty) Limited for payment in the sum of R371 668.61 for a return of the deposit of R291 860.00 with the balance made up of a claim for damages. The action was withdrawn in February 2025.
- [6] A fresh summons was issued in April 2025 for the same amount but this time the claim was proffered in the name of the applicant. The action remains pending and as appears from the respondent's plea annexed to its supplementary answering affidavit,¹ the following allegations are made:
- a. the applicant chased the respondent's employees from his property on 27 May 2024 following a misunderstanding regarding the delivery of river sand

¹ At the commencement of the hearing the respondent applied for leave to introduce a supplementary affidavit together with its plea filed in the Regional Court on the basis that its plea was erroneously omitted from the answering affidavit. While the applicant initially delivered a Rule 30 notice, he consented to the introduction of the supplementary affidavit.

- to the property and informed the respondent that he would advise the Homeowners Association to deny the respondent access to the property;
- b. the applicant unilaterally terminated the agreement on 28 May 2024 and demanded a return of his deposit;
 - c. the applicant denied the respondent access to the property and prevented it from performing its obligations under the agreement;
 - d. until the applicant unilaterally terminated the agreement and denied the respondent access to the property, the respondent had performed work in the amount of R228 250.00 particularised more fully in paragraph 19.1 to paragraph 19.18 of the plea;
 - e. the respondent suffered damages in the amount of R128,700.00 as a result of the applicant not returning prop supports that were kept on the property for use during construction.

Discussion

- [7] The applicant relies on section 69(1)(a) of the Close Corporations Act read with section 344(4) of the 1973 Companies Act to support his case that the respondent is unable to pay its debts.
- [8] Section 69(1)(a) provides that a corporation is deemed unable to pay its debts if it owes a creditor an amount of at least R200 and fails to pay or compound the debt within twenty-one days of written demand being served at its registered office. The provision is similar in structure and effect to section 345 of the 1973 Companies Act which deals with the inability of companies to pay their debts.
- [9] The jurisdictional basis for section 69(1)(a) was previously found in section 68(c) of the Close Corporations Act which provided for the winding-up of close corporations by order of court where the entity is unable to pay its debts. Section 224(2) of the Companies Act 71 of 2008 repealed section 68 in its entirety.
- [10] Courts were initially at odds on the impact of section 68's repeal on the deeming provision created by section 69(1)(a) as appears from the conflicting authorities

Sardiwalla AJ (as he then was) considered in **Body Corporate Sante Fe Sectional Title Scheme NO 61/1994 v Bassonia Four Zero Seven CC** 2018 (3) SA 451 (GJ).² Sardiwalla AJ concluded that section 69 remains in force with its retention a deliberate choice based on a purposive reading of the section which he found is to be maintained by construing section 69 as a reference to section 344(f) of the 1973 Companies Act.³

- [11] The judgment refers to a series of cases where the courts interpreted the section as providing a valid basis for the liquidation of close corporations when read with section 344(f) of the 1973 Companies Act.⁴ Sardiwalla AJ thus concluded that the repeal of section 68 did not leave section 69 meaningless to deny a creditor the right to rely on a deemed inability to pay when proffered as the only ground for a winding-up order.
- [12] More recently in **Absa Bank Ltd v Quartz Street Hillbrow CC** 2025 (2) SA 450 (GJ), Siwendu J resolved the interpretive difficulties that previous courts encountered in addressing the continued application of section 69(1)(a) in the face of the repeal of section 68.
- [13] The judgment found that section 69(1)(a) is of continued application but unlike the court in **Body Corporate Sante Fe**, Siwendu J did not treat the sub-section as the equivalent of section 344(f) of the 1937 Companies Act. The court instead found that the amendments to section 66 and section 68's repeal had brought about the incorporation of the changes made by section 224 of the 2008 Companies Act and had the consequence of consolidating the provisions applicable to the winding-up of insolvent companies and close corporations under the banner of the insolvency provisions of the 1973 Act (i.e., section 344 to 348).⁵

² At 457H to 459G.

³ At 460G. See also the judgment of Snellenberg AJ in **Scania Finance Southern Africa (Pty) Limited v Thomi-Gee Road Carriers CC and Another** 2013 (2) SA 439 (FB) at 445I to 446A where it was held that the winding-up ground for companies and close corporations were now the same with it competent to rely on section 344(f) read with section 69 of the Close Corporations Act.

⁴ See the authorities discussed at 458H to 459G.

⁵ At para 15.

[14] The winding-up of a close corporation in terms of section 69(1)(a) is for this reason only competent where the jurisdiction of the court is invoked in terms of section 344(f). The upshot is that sections 344 to 348 of the 1973 Companies Act apply to the winding-up of an insolvent close corporation at the instance of a court and in the absence of Absa having made out a pleaded case that invoked 344(f) and 345 of the 1973 Companies Act, Siwendu J concluded that Absa was not entitled to a winding-up order.⁶

[15] The correct legal position can thus be summarised as follows:

- a. section 69(1)(a) and section 344(f) are not statutory equivalents with section 69(1)(a) only a deeming provision designed to facilitate ease of proof in establishing the insolvency of a close corporation;
- b. section 69(1)(a) does not vest the court with the power to grant a liquidation order which is found in section 344(f) of the 1973 Companies Act;
- c. a pleaded case based on section 69(1)(a) on its own will not vest the court with the necessary jurisdictional basis to grant a winding-up order in relation to a close corporation found on its inability to pay and must be pleaded with reference to section 344(f) which clothes the court with the statutory authority to grant a winding-up order.

[16] Turning to the facts, the applicant caused a letter of demand to be served on the respondent on 7 April 2025 at its registered address which called upon the respondent to make payment in the sum of R371 668.61 within twenty-one days. The letter references section 345 of the 1973 Companies Act and the founding affidavit specially relies on section 344(f) to bring the applicant within the purview of the 1973 Companies Act.

[17] He alleges that the respondent did not dispute its indebtedness to him, but this is not the case. Not only did the respondent deliver a plea and counterclaim that placed the applicant's claim in issue, but the launch of the application was met with correspondence from the respondent's attorneys on 19 June 2025 that recorded the respondent's denial of liability and pointed to material defences

⁶ At para 25.

raised in opposition to the alleged indebtedness that formed the subject of a pending action before the Regional Court.

- [18] Since the applicant seeks an order that the respondent be placed under final winding-up, the applicant must meet the **Plascon-Evans** threshold⁷ where the respondent's version is preferred over the version of the applicant unless the former's version is to be rejected as being farfetched and fanciful.⁸ The rejection of a respondent's version ordinarily has the consequence that only the applicant's version is before the court with the court not required to consider conflicting factual versions in the face of a version that stands to be rejected out of hand on the papers.
- [19] Whether the applicant was justified in his termination of the agreement is an issue that is dependent on the evaluation of the respondent's contractual performance. This exercise cannot be undertaken in this court and the papers do not show that the respondent's contractual performance was found wanting.
- [20] The version of the respondent that emerges from its plea delivered in the Regional Court action raises matters that if established at trial, will provide it with a defence to the claim. It cannot be rejected out of hand as either farfetched or fanciful. It pleads in considerable detail the grounds upon which it alleges that the work performed until it was denied access to the property amounts to R228 500.00.
- [21] While the applicant argued that the difference is not in dispute and entitles the applicant to a winding-up order on this basis alone, the argument loses sight of the fact that the respondent's case is not left unanswered on this score. It challenges the applicant's right to have terminated the agreement and pleads that it was denied access to the property which prevented it from performing the balance of its obligations under the agreement. In other words, if afforded the opportunity, the respondent would have completed the project in a satisfactory manner in compliance with its contractual obligations.

⁷ **Paarwater v South Sahara Investments (Pty) Limited** [2005] 4 All SA 185 (SCA) para [3] and [4].

⁸ See **Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited** 1984 (3) SA 623 (A) at 634 E-G, **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at 290 D-G.

- [22] The applicant has no answer to these allegations, and the issue can only be decided at a trial with the benefit of oral evidence and the rigours that come with cross-examination.
- [23] The remainder of the alleged indebtedness is similarly disputed. It does not assist the applicant to submit an invoice from a third-party contractor to quantify the applicant's alleged damages. Not only is the document insufficient in that there are no supporting reasons for how the amount is computed, but to make matters worse, the invoice is not accompanied by a supporting affidavit from the author of the invoice whose identity is unknown. When these difficulties were put to the applicant, counsel was unable to present an argument to justify the approach adopted.
- [24] I am in the circumstances unable to attribute a lack of *bona fides* to the respondent.
- [25] Whereas section 69(1)(a) like section 345(1)(a) of the 1973 Companies Act creates a rebuttable presumption to the effect that a respondent is unable to pay its debts,⁹ the respondent has successfully rebutted the presumption by showing that the indebtedness is genuinely disputed on reasonable grounds.
- [26] It is settled law that winding-up proceedings are not intended to resolve disputes concerning the existence or non-existence of a debt and should not be relied upon to enforce a debt that is genuinely disputed on reasonable grounds.¹⁰
- [27] Where a creditor knows that his claim is *bona fide* disputed on reasonable grounds and still pursues an application for winding-up, or persists with the application after it becomes evident that the debt is so disputed, this is usually indicative of an improper purpose and accordingly justifies a finding that the proceedings constitute an abuse of process.¹¹

⁹ **Body Corporate of Fish Eagle v Group Twelve Investments** 2003 (5) SA 414 (W) at 428B-C.

¹⁰ **Electrolux South Africa (Pty) Limited v Rentek Consulting (Pty) Ltd** 2023 (6) SA 452 (WCC) at para 23.

¹¹ Blackman I: Commentary on the Companies Act 1973, Revision Service 9, 2012, Chapter 14 at page 79 and see the authorities listed in footnote 518.

- [28] As Corbett JA (as he then was) remarked in **Kalil v Decotex (Pty) Limited** 1988 (1) SA 943 (A) at 980, conduct of this nature constitutes an abuse of process because it amounts to the misuse of the winding-up process as a means to apply pressure on the respondent to pay a debt that is *bona fide* disputed.
- [29] This is a classic case where the applicant ought not to have resorted to enforce a debt that is *bona fide* disputed on what are clearly reasonable grounds.
- [30] Liquidation proceedings were inappropriate and the applicant's persistence with the application constituted an abuse of process. This is particularly so as he was forewarned that the indebtedness is disputed on substantive grounds which reveals that the respondent intends to vindicate what it considers to be matters of high principle at trial. The respondent not only cautioned the applicant soon after its launch that the indebtedness was disputed, but the conduct of the applicant in persisting with the application in the face of the delivery of the respondent's plea in the Regional Court action shows that the application was doomed to fail and therefore justifies a special costs order.¹²

Conclusion

I accordingly make an order in the following terms:

- [1] The application is dismissed.
- [2] The applicant is ordered to pay the costs of the application on the attorney and client scale.



C BESTER
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

¹² **Walter McNaughtan (Pty) Ltd v Impala Caravans (Pty) Ltd** 1976 (1) SA 189 (W) 192; **Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd** 1998 (2) SA 208 (C) 222-223.

Heard: 3 November 2025

Delivered: 11 November 2025

For the Applicant:

PJ Badenhorst
Nourse Incorporated

For the Respondent:

MM Moodley
HAQ Incorporated