



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 2025-205747

In the matter between:

EDUCOR HOLDINGS (PTY) LTD

APPLICANT

and

**BOWWOOD AND MAIN 131 (RF) (PTY) LTD
RESPONDENT**

FIRST

THE MASTER OF THE HIGH COURT, DURBAN

SECOND RESPONDENT

EDUCOR PROPERTY HOLDINGS (PTY) LTD

(IN PROVISIONAL LIQUIDATION)

THIRD RESPONDENT

AFFECTED PARTIES

FOURTH RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for handing down is deemed to be 24 November 2025.

ORDER

1. The applicant's application under Part A of its Notice of Motion is dismissed.

2. The applicant is directed to pay the costs of the first respondent and the affected party, the Government Employees Pension Fund, on Scale C, including the costs of senior counsel and the costs of two counsel where employed.
3. Part B of the application is adjourned *sine die*.

JUDGMENT

SHAPIRO AJ

Introduction

[1] The applicant is Educor Holdings (Pty) Ltd, which is the majority shareholder of Educor Property Holdings (Pty) Ltd (“EPH”). EPH is in provisional liquidation, pursuant to an order granted by Madam Justice Jikela in this Court on 23 October 2025 under case number 2025-179256. The applicant in the liquidation application (which was brought as an urgent application) is Bowwood and Main No 131 (RF) (Pty) Ltd (“Bowwood”), which is the first respondent in this application.

[2] Educor has launched an urgent application in terms of section 354 of the Companies Act 61 of 1973¹ for orders staying the provisional liquidation order and interdicting any persons (including provisional liquidators) from taking any steps to interfere with the management of EPH pending the determination of Part B of the

¹ Section 354(1) states the following: The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.

application – which is an order setting aside the provisional liquidation order, likewise in terms of section 354. Bowwood opposes the application. An affected party, the Government Employees Pension Fund, also opposes the application – although it neither delivered a Notice of Opposition nor any opposing affidavit².

[3] After the application was launched, the Master of the Court (the second respondent) appointed three provisional liquidators to EPH.

[4] Educor argues that exceptional circumstances exist that justify the staying of the provisional liquidation order for the following reasons:

[4.1] EPH was denied its right of access to court in terms of section 34 of the Constitution of the Republic of South Africa, 1996 because the application was not ripe for hearing, was determined on incomplete papers and without EPH's counsel being granted a proper opportunity to be heard;

[4.2] The Court heard the liquidation application as an urgent application when it was not urgent, and refused EPH's application for a postponement of the application to either supplement its papers or apply to strike out portions of Bowwood's replying affidavit to its preliminary answering affidavit;

² The GEPF delivered a confirmatory affidavit, supporting Bowwood.

[4.3] The Court incorrectly accepted that Bowwood was a creditor of EPH and that EPH was commercially insolvent, and it failed properly to consider the defences advanced by EPH.

[5] Given the grounds on which Educor relies, it is necessary to consider what occurred on 23 October 2025.

The events of 23 October 2025

[6] Educor has levelled significant criticism at the way in which the urgent liquidation application was handled in the Motion Court on 23 October 2025.

[7] The transcript of those proceedings was put up by Educor in this application, without objection, and I have considered that transcript.

[8] The application papers were served on EPH on 2 October 2023. It delivered a preliminary answering affidavit in opposition to the application on 13 October 2025. Shortly after the matter was called on 23 October 2025, Mr Harpur SC (who appeared for EPH together with Mr Gevers) submitted that the application was neither ripe for hearing nor urgent and handed Jikela J an answering affidavit as well as concise and long Heads of Argument and a Practice Note.

[9] EPH's Heads of Argument³ set out its grounds of opposition: firstly, arguing that the application was not urgent and was an abuse of process and then advancing legal defences including the application of the *Badenhorst* principle, *lis pendens*, "the section 45 defence", "the indemnity defence – no payment, no liability" before addressing identified paragraphs in Bowwood's Heads of Argument.

[10] Jikela J stood the application down to consider the papers and Heads given to her. After the short adjournment, Jikela J ruled that the application was urgent and she enrolled the application.

[11] Mr Smit SC (who appeared for Bowwood) then made submissions on why a provisional liquidation order was merited. At the start of Mr Harpur SC's address in response, it became clear that he and Mr Gevers' instructing attorney had not given them Bowwood's replying affidavit, which had been delivered on 17 October 2025. Jikela J stood the application down to enable EPH's counsel to consider the reply. The matter was recalled after the long adjournment, and Mr Harpur SC indicated that a substantive application for a postponement was being prepared. After some argument, the matter stood down further and was eventually recalled at about 15h00. While the affidavits in support of the application for the postponement were being commissioned, Mr Harpur SC asked if "in the meantime we can use some of the time" and then made submissions on the applicability of the judgment in *Kalil v Decotex* and the *Badenhorst Rule* in liquidation applications. These submissions,

³ The Heads were 14 pages long, consisting of 56 paragraphs.

albeit brief, touched on Bowwood's legal standing to bring the liquidation application and on the judgment of Rogers J in *Orestisolve*.

[12] At about 15h20, the application for a postponement was delivered and, at Jikela J's request, Mr Harpur SC took her through the founding affidavit – explaining the lapse that led to EPH's attorney not providing counsel with Bowwood's replying affidavit to the preliminary answering affidavit⁴. EPH sought a postponement to either seek leave to supplement its affidavits or to apply to strike out portions of the reply. The submissions in the founding affidavit dealt also with the court's discretion in liquidation applications and the effect of any provisional order on EPH and its employees. Mr Harpur SC also referred the Court to EPH's Heads of Argument.

[13] Mr Smit SC then replied, opposing the postponement application and arguing that EPH's reliance on section 45 of the Companies Act 71 of 2008 to dispute Bowwood's legal standing was misconceived.

[14] Jikela J recorded that she "had the benefit of considering the application papers and the application for a postponement and...submissions from both counsel regarding the postponement application" and the postponement application was refused. Jikela J then turned to the main application. Recording that she had

⁴ Bowwood's replying affidavit was 28 pages long, to which 3 annexures were attached: a cession of rentals in favour of Bowwood by EPH and its subsidiaries, excerpts of a Bill of Costs and a resolution passed in terms of section 45 of the Companies Act passed by the Board of Central Squash Properties (Pty) Ltd, a subsidiary of EPH and a resolution of EPH authorizing Central Squash to render financial assistance in terms of section 45 (I describe the resolutions without making a finding that section 45 was complied with). The two resolutions, which include a two-page list of Guarantors, ran to six pages. Central Squash's section 45 defence to its liquidation was referred to by EPH in its preliminary answering affidavit.

considered the application papers as well as the Heads of Argument from both parties and had “the benefit of listening to Mr Harpur addressing the question of prejudice that was maybe suffered by the respondent should a provisional winding up order be granted”, the Court granted the provisional liquidation order against EPH.

[15] It is against this background that Mr Harpur SC argued that the granting of the provisional order was procedurally and substantively irregular and resulted in a denial of EPH’s right to be heard and of its access to court.

The Section 354 threshold

[16] Section 354 is expressed in materially the same terms as section 120 of the Companies Act 46 of 1926. In *Aubrey M Cramer Ltd v Wells NO*⁵, it was held that an application under section 120 “is an extraordinary one and one that would be granted if at all in only rare cases”.

[17] The Supreme Court of Appeal considered section 354 in *Ward & Another v Smit & Others*⁶ and held as follows:

“The language of the section is wide enough to afford the Court a discretion to set aside a winding-up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events. In the

⁵ 1965 (4) SA 304 (W) at 305

⁶ 1998 (3) SA 175 (SCA) at 180H-181C

case of the former, the *onus* on an applicant is such that generally speaking the order will be set aside only in exceptional circumstances...

There is nothing in the section to suggest that the Court's discretionary power to set aside a winding-up order is confined to the common-law grounds for rescission.

However, in the *Herbst* case *supra*, Eloff J expressed the view (at 109F--G) that no less would be expected of an applicant under the section than of an applicant who seeks to have a judgment set aside at common law. I think this must be correct. The object of the section is not to provide for a rehearing of the winding-up proceedings or for the Court to sit in appeal upon the merits of the judgment in respect of those proceedings. To construe the section otherwise would be to render virtually redundant the facilities available to interested parties to oppose winding-up proceedings and to appeal against the granting of a final order. It would also 'make a mockery of the principle of *ut sit finis litium*'.⁷"

[18] The Court referred with approval to the judgments of *Herbst v Hessels NO en Andere*⁸ and *Abdurahman v Estate Abdurahman*⁹. In *Herbst*, Eloff J cited the following paragraphs of *Abdurahman* with approval:

"An order whereby a Court sets aside its earlier judgment is an extraordinary form of relief granted to a litigant. The grounds upon which such relief could be obtained at common law are well known and very limited...

The Courts of various Provincial and Local Divisions have in the past not considered the discretionary power conferred by this section to be limited to rescission on the common law grounds. They have however stressed that unusual or special or

⁷ Translation: It is in the interest of the state that there be an end to litigation.

⁸ 1978 (2) SA 105 (T)

⁹ 1959 (1) SA 872 (C) at 108H-109E

exceptional circumstances must exist in order to justify relief under s 149 (2). With respect, it appears to me that this approach is based upon sound principles."

"Examples of special and exceptional circumstances which have been found to exist in particular cases are mostly of a kind where the debtor was in fact not insolvent, or had made provision for the payment of his creditors in full, and where in addition he had laboured under some disability or difficulty as regards contesting the sequestration proceedings. See, for example. *Ex parte Belcher* 1939 WLD 39 or, alternatively where in addition unnecessary hardship would be involved for himself and/or for others in the event of his being confined to the ordinary rehabilitation machinery. I have not come across a single case and none has been cited from the Bar in which relief has been granted under s 149 (2) merely upon considerations which affect the merits of the sequestration proceedings."

"In the present case, upon a reading of the allegations in the declaration in a manner most favourable to the plaintiff, it is clear that the declaration does no more than to raise considerations which would have constituted a good defence on the merits to the sequestration proceedings if they had been properly raised and decided in the plaintiff's favour as to their factual aspects... In short, therefore, the declaration broadly invites this Court to rehear or to sit in appeal upon the judgment in the sequestration proceedings as regards the merits thereof. In my opinion this is an invitation to which the Court should not reasonably accede..."

[19] I have quoted at some length from these cases because, cumulatively, they describe both the nature of the threshold that Educor must breach, as well as the nature of an application in terms of section 354: these applications are "extraordinary

and rare” and they are granted only in “unusual”, “special” or “exceptional circumstances”¹⁰.

[20] The cases also make clear that the grounds relied upon by Educor must be scrutinised to determine their real nature and effect - recalling that this application is neither a rehearing of the liquidation application nor an appeal in respect of the merits of Jikela J’s decision

[21] Educor has argued that section 354 confers a wide, equitable discretion on a Court to set aside a liquidation order that should not have been granted in the first place.¹¹ This is so, but any discretion must be exercised on the basis that Educor has met the required threshold.

Did the hearing result in a denial Educor’s rights of access court and to be heard?

[22] Mr Harpur SC argued that the way Jikela J dealt with the liquidation application resulted in a failure of justice and an effective denial of EPH's constitutionally enshrined rights of access to court and to be heard.

[23] Principally this was because the application was not urgent, the papers were not complete, EPH's postponement application should have been granted, and it was not permitted to make sufficient sufficiently detailed submissions before the

¹⁰ A brief survey of cases that consider the phrase “exceptional circumstances” in civil, criminal and labour contexts reveals the same themes: the circumstances must be unusual, extraordinary, remarkable or involve gross injustice. The threshold is indeed a demanding one.

¹¹ *Klass v Contract Interiors CC (In Liquidation) and Others* 2010 (5) SA 40 (W) at para [57]

provisional order was granted – meaning that certain of its defences were not considered.

[24] It was argued that the EPH and its counsel were prejudiced by their belated discovery that a replying affidavit to the preliminary answering affidavit had been delivered some days earlier which they had not had an opportunity to consider and that the reply sought to introduce new evidence in the form of the annexures attached to the reply.

[25] Urgent applications in this Division are not heard separately in a dedicated urgent court. They are set down in the ordinary Motion Court and, if the judge is persuaded that the matter is urgent, the matter will be heard during the court day¹². Necessarily, this means that urgent applications are often dealt with in a non-linear fashion, as opposed to in one uninterrupted hearing as may occur when a matter is argued on the opposed motion roll.

[26] The question whether to enrol an application as urgent is a discretion exercised by the presiding judge. Once that discretion is exercised, the matter must proceed and if a party is dissatisfied with the exercise of that discretion and can satisfy the court that the discretion was not exercised judicially, it has remedies available to it.

[27] The same would apply to the refusal of a postponement – to the extent that this would be appealable. Jikela J exercised her discretion to refuse the application,

¹² As happened in this application, which was argued after the unopposed and opposed roll had been disposed of.

as she was entitled to do. A single judge in a subsequent matter cannot revisit the exercise of that discretion.

[28] However, Jikela J did not grant a provisional liquidation order because she found that the matter was urgent or because she refused to postpone the application. The liquidation order was granted because the Court was satisfied that it was appropriate to do so and that a *prima facie* case for that order had been made out.

[29] This was not the sort of application where EPH did not have the time or capacity to deliver opposing papers and would have been limited to oral submissions made on its behalf. Had it then been denied an opportunity to make submissions, perhaps that would have been grounds to complain that it had been denied its right to be heard. However, EPH delivered two affidavits in opposition to the liquidation application, and it delivered concise and long Heads of Argument. The opposition was not based on different facts advanced or on a version requiring a credibility assessment but instead on several legal propositions.

[30] Jikela J stood the application down to consider the EPH's answering affidavit and its Heads of Argument. Jikela J considered that affidavit, even in the face of Bowwood's argument that the affidavit was improper and should not have been received.

[31] The replying affidavit did not introduce a new case or new material. It dealt with the defences raised in the preliminary answering affidavit and, to the extent that

it referred to the section 45 resolutions passed by EPH's subsidiaries, it did so, firstly to argue that the subsidiaries' section 45 defence was not sustainable but more specifically, to seek to distinguish between the subsidiaries' reliance on section 45 and the ability of EPH to do so where there was both a direct contractual lender/borrower relationship between it and Standard Bank and a direct contractual relationship between itself and Bowwood.

[32] The section 45 resolution that was attached to the reply was not a new document that had never been seen before by EPH or its deponent. Even if it was a new document however, it did not affect the case made out by Bowwood that section 45 did not arise in the direct contractual relationship between itself, EPH and Standard Bank and did not affect its standing as a creditor of EPH or its capacity to seek the liquidation of EPH.

[33] There was not a material difference between the themes addressed in Bowwood's reply and the themes advanced in its Heads of Argument that EPH had considered, and in respect of which it made comments in its own Heads of Argument.

[34] It is so that Jikela J dealt with the matter expeditiously and did not receive lengthy or expanded oral submissions from the parties' counsel.

[35] Mr Harpur SC argued that EPH had been denied the right to be "heard" because it was not given the opportunity to make sufficient or detailed oral submissions.

[36] I cannot agree: whilst (as Mr Harpur SC correctly points out), the *audi alteram partem* principle requires that a party be heard, this cannot mean invariably that such a party must be heard orally for an application to be deemed to be procedurally and substantively regular and fair. Every case must be considered on its own facts.

[37] The principle grants a party right to present their case and for their argument to be placed before a judge. That is what occurred in the urgent application and the inability of EPH to develop its submissions orally to its satisfaction does not alter the fact that the gravamen of those submissions and the law and cases to which it referred were before the presiding judge and had been considered by her.

[38] In my view, it is dangerous to import elastic considerations of "sufficiency" of submissions in the opinion of counsel or their clients when determining whether a party has been denied their right of access to court or to be heard. The test is more objective than that. Our courts often impose time limits on oral argument, not only because of the state of the court rolls but also because parties have already had an opportunity to deliver their arguments to the court. Oral submissions are for the benefit of the presiding judge, to clarify or elaborate upon that which has already been advanced in the written product.

[39] Having considered the transcript as a whole as well as the application papers and the Heads of Argument that served before Jikela J, I cannot identify any procedural irregularity that either vitiated the proceedings or denied EPH its constitutional rights. It was given sufficient opportunity to consider its position,

consider the reply, launch a postponement application and to place its case and argument before the court. EPH was able to deliver two affidavits and Heads of Argument, and the presiding judge took time to consider those papers and was taken through the affidavit in support of the postponement application by Mr Harpur SC.

[40] It follows that Educor's challenge to the procedural regularity of the hearing and the granting of the provisional liquidation order must fail.

Educor's substantive challenge to the provisional order

[41] Educor argues that Jikela J overlooked a number of substantive defences that EPH had advanced against the granting of a provisional liquidation order.

[42] The following substantive defences were canvassed in EPH's preliminary answering affidavit and in its heads of argument in the liquidation application: section 45 and its legality; the Indemnity Defence and whether it was *contra bonos mores*; *bona fide* dispute/Badenhorst principle; *lis pendens* and abuse of process.

[43] Educor cannot argue that these defences were not considered by Jikela J simply because she did not refer to them when granting the provisional order. Those defences were before her in writing and in detail.

[44] As regards the alleged commercial insolvency of EPH, Jikela J was satisfied *prima facie* that EPH was commercially insolvent.

[45] One can accept that the presiding judge agreed (or was not persuaded to the

contrary) that section 45 did not apply in the circumstances of the direct lender/borrower relationship between Standard Bank and EPH or in respect of the contractual relationship between EPH and Bowwood.

[46] Without making a finding in this regard, I can see why Jikela J reached that conclusion, and I too struggle with the notion that section 45 would apply in these circumstances. However, that decision is for another court to make on a different day.

[47] Mr Smit SC and Mr Wasserman SC (who appeared for the GEPF together with Ms Vorster) argued that Educor's substantive challenges are grounds of appeal, properly so called, because they are based on misdirections by Jikela J about whether Bowwood was a creditor of EPH, whether there was a genuine and *bona fide* dispute about the debt and whether EPH was commercially insolvent.

[48] Both counsel argued that I was precluded from considering these substantive challenges in a section 354 application because either they amounted to a rehearing of the application or I was being asked to sit effectively as a Court of Appeal.

[49] In response, Mr Harpur SC argued that if grounds that also would constitute grounds of appeal or a rehearing also separately constituted exceptional circumstances, I was entitled to consider them in determining whether Educor had passed the required threshold permitting a section 354 order staying the provisional liquidation order to be granted.

[50] It seems to me that the proposition that "exceptional circumstances" may be permitted to include findings which affect the merits of the liquidation proceedings and which would constitute grounds of appeal ignores the bright dividing line that our courts have drawn in these cases between that which is considered to be exceptional, on the one hand, and that which would constitute a rehearing of the liquidation or an appeal against it on the other.

[51] In my view, cases in terms of section 354 and its predecessor are rare precisely because the grounds upon which such an application can succeed are extremely limited and cannot include grounds that constitute a rehearing or an effective appeal.

[52] The courts have held that the discretion under section 354 is wider when considering events that occurred after the granting of a provisional liquidation order, and this makes sense. The corollary of course is that the discretion is more limited when the complaint is that the order should not have been granted at all. It cannot be ignored that the same Act that endows parties with the ability to appeal the granting of liquidation orders¹³ (which appeal constitutes, in essence, a rehearing of the application) grants the limited rights available under section 354. The two procedures are separate, with separate jurisdictional grounds.

[53] Apart from the allegations of procedural irregularity, Educor's complaints are not in the same category as those that our courts have found to be both permissible and exceptional. Educor's real complaints are substantive and go directly to whether

¹³ Section 339 of the Companies Act 61 of 1973 read with section 150 of the Insolvency Act 24 of 1936

there were grounds in law that permitted the granting of the provisional order.

[54] Despite disavowing this intention, it seems to me that Educor asks that I conclude that *prima facie* Bowwood was not a creditor of EPH, that the debt upon which Bowwood relied was disputed genuinely and in good faith and that EPH is not commercially insolvent.

[55] Were I to do this, I would in substance either be rehearing the liquidation application or I would be finding that Jikela J misdirected herself in granting the provisional liquidation order on those bases.

[56] I agree with Mr Smit SC and Mr Wasserman SC that I do not have jurisdiction to do so under section 354 because I would then be collapsing the distinction between a section 354 application and a rehearing or appeal against the granting of a winding up order in circumstances where our courts repeatedly have stated that the distinction must be maintained.

[57] I therefore conclude that I have no jurisdiction to consider substantive attacks on Jikela J's findings, as doing so would constitute a rehearing of the liquidation application or an implicit appeal against her order.

[58] I accept that the granting of the provisional order visits some hardship on EPH and its employees. However, that is a natural consequence of a provisional liquidation order, fortified by the statutory suspension of employment contracts when such an order is granted. A consequence that applies by operation of law, even if it

visits some hardship, cannot then be exceptional or unusual justifying the staying of the provisional order under section 354.

[59] Educor's complaints in this regard therefore cannot succeed.

The interim interdict sought

[60] Educor sought an interim interdict restraining anyone, including provisional liquidators, from interfering with EPH's management's ability to operate and control its business pending the final determination of Part B of this application.

[61] Educor asserted that *prima facie* its right to a fair hearing was infringed when the provisional order was granted without full argument or consideration of the replying affidavit. I have already found that its rights were not infringed and Educor therefore has not established a *prima facie* right to the interdict it sought.

[62] The right to such an interim interdict must flow from an order being granted in terms of section 354. If no order is made staying the liquidation proceedings, I cannot conceive of any other circumstances where a court would then be permitted to interdict lawfully appointed liquidators from discharging their statutory duties.

[63] The application for the granting of an interim interdict must likewise fail.

The affected party

[64] Educor cited the GEPP as an affected party and the GEPP was therefore entitled to appear and make submissions in defence of its interests.

[65] The submissions made on behalf of the GEPF were of assistance to the Court. The costs incurred in doing so were legitimately incurred and will form part of the order that I make.

Costs

[66] All the parties were represented by senior counsel and both Educor and the GEPF were represented by two counsel.

[67] The matter was sufficiently complex to justify the employment of two counsel. For the same reasons, costs should be taxed on Scale C as well.

[68] There was no dispute between the parties that costs should follow the result or that costs of two counsel were justified.

Order

[69] I make the following orders:

1. The applicant's application under Part A of its Notice of Motion is dismissed.
2. The applicant is directed to pay the costs of the first respondent and the affected party, the Government Employees Pension Fund, on Scale C, including the costs of senior counsel and the costs of two counsel where employed.

3. Part B of the application is adjourned sine die.

SHAPIRO AJ

Appearances

For the applicant:

G D Harpur SC

A Gevers

Instructed by

Alvia Nair Attorneys

4 Hilclimb Road, Westmead

alvianair@gmail.com

C/O KS LAW

44 Walls Ave, Greyville

admin@kslaw.co.za

For the first respondent:

J Smit SC

Instructed by

Werksmans Attorneys

The Central, Sandton

avandermerwe@werksmans.com

C/O Garlicke and Bousfield Inc

7T Orsvale Crescent, La Lucia Ridge

Victoria.macdonald@gb.co.za

For the Government Employees

Pension Fund (affected party):

G Wasserman SC

Ms Vorster

Date of hearing:

13 November 2025

Date of judgment:

24 November 2025

