

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 7185/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 03/12/2025

SIGNATURE:

In the matter between:

VOLTEX (PTY) LTD
(Reg No: 1964/006740/07)

Applicant

And

TUMISHI ELECTRICAL AND BUILDING CONSTRUCTION CC **Respondent**
(Reg No: 1997/013334/23)

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **03 December 2025**.

JUDGMENT

Makoti AJ

Introduction

[1] Voltex (Pty) Ltd (Voltex) is the applicant which is seeking the winding-up of the respondent, which is Tumishi Electrical and Building Construction CC (Tuminshi).

Naturally, Tumishi opposes the application. In due time I will traverse the issues upon which the application and its opposition are predicated.

[2] The application was first heard as an urgent application on 05 September 2023. It was struck from that roll for want of urgency. What presents before me is only the substantive part of the application in which I must decide whether to grant an order winding-up Tumishi.

Identification of the relief sought by Voltex

[3] In its original application Voltex asked for provisional winding up of Tumishi and that the latter's affairs be placed in the hands of the Master of the High Court. The recent stance that it has lately adopted is that an order of this court be granted for final winding-up of Tumishi. The contention is that it would not be helpful to merely place Tumishi under provisional liquidation. It is Voltex's case that Tumishi is commercially insolvent in that it is unable to pay its debts when they become due.

[4] Tumishi on the other hand contends that the application is not sustainable and should be dismissed with costs. It disputes that it is insolvent and therefore that it should be wound-up.

Summary of facts

[5] On 27 February 2015 Tumishi concluded a credit application at or from Voltex. It was represented Mr Matome Peter Aurelius Maraka when making the application. The completion and existence of the credit agreement is not disputed by Tumishi. In terms of the credit agreement Tumishi was to, from time to time, buy goods from Voltex on credit.

[6] A limit of **R250 000-00** (Two Hundred and Fifty Thousand Rand Only) was initially put in place. The credit limit may have subsequently changed, but there are no facts as to how that happened.

[7] Between July 2018 to June 2019, Voltex alleged, Tumishi's indebtedness had grown to **R1 834 084-54** (One Million, Eight Hundred and Thirty-Four Thousand and Eighty-Four Rand and Fifty Four Cents). I can accept this to be correct as it is untrammelled. Tumishi offered no dispute to the allegations to that effect. Also, it is not disputed that Tumishi failed to pay the said amount within thirty (30) days after being presented with a statement of indebtedness.

[8] Tumishi has been unable to pay its debts. This is admitted, but it disputes that it should be wound-up. Its contention is that its inability to pay its debts is not a ground for it to be placed in liquidation. Also, it argued that for liquidation to be granted Voltex ought to have alleged and proven that it is insolvent. Further that Voltex had to show that liquidation would be to the advantage of the creditors.

[9] Voltex issued summons against Tumishi on 06 December 2019 for payment of the debt amounting to **R1 022 011-74** (One Million, Twenty-Two Thousand, Eleven Rand and Seventy-Four Cents).¹ The case was still pending when the winding-up application was instituted. A second set of summons was issued also on 06 December 2019 for an amount of **R812 072-80** (Eight Hundred and Twelve Thousand, Seventy-Two Rand and Eighty Cents). This case, too, was pending when this application was lodged.

Statutory provisions regulating the winding-up of close corporations

[10] A statutory letter of demand was issued by Voltex to Tumishi and served 31 March 2023. In terms of sections 68 and 69(1)(a) of the Close Corporation Act² (the Act), Voltex contends that Tumishi is unable to pay its debts. Section 68(c) and (d) of the statute read thus:

“A corporation may be wound up by a Court, if-

(a) ...

(c) the corporation is unable to pay its debts; or

¹ Case No. 8550/2019.

² No. 69 of 1984.

(d) it appears on application to the Court that it is just and equitable that the corporation be wound up.”

[11] The new Companies Act has repealed section 68 of the Close Corporation Act. This has left the provisions applicable to close corporations being, *inter alia*, section 66 and 69 of the Act. Since the coming into being of the Act, and in terms of its amended section 66, the laws referred to in Item 5 of Schedule 9 of the Companies Act³ apply to the winding up of close corporations too.⁴ It seems to me that the effect of the amendment to section 66 and the repeal of section 68 of the Act is to incorporate the changes effected by section 22⁴ and harmonise the grounds for winding-up insolvent close corporations with those applicable to insolvent companies under the old Act.

[12] By virtue of the amended section 66 of the Act, the pathway for winding insolvent close corporations up is to be found in sections 344 to 348 of the old Companies Act.⁵ Thus, reliance for winding-up a close corporation can no longer be in terms of the repealed section 68 of the Act. Its section 69 remains extant.

[13] Section 69 of the Act is a deeming provision in terms of which a close corporation may be deemed to be unable to pay its debts if it has failed to, within 21 days of receipt of a written demand, pay the amount of indebtedness. Tumishi does not deny having been served with the written notice contemplated in section 69(1)(a) of the Act. It only denies that it is unable to pay its debts when they become due. As to the applicability of section 69(1)(a) Siwendu J held in Absa⁶ that:

“[23] From a plain reading, section 69(1)(a) exists “for the purpose of 68(c)”. It is not a standalone provision. It is complementary to, and must be read with, the repealed section 68(c). As 93 Quartz Street contends, section 69(1)(a) is not “the enabling provision”. By that it is meant that it does not confer the power on the court to grant the liquidation. It is a

³ Act 61 of 1973.

⁴ Section 66 of the Close Corporation Act 69 of 1984.

⁵ ABSA Bank Limited v 93 Quartz Street Hillbrow CC 2025 (2) SA 450 (GJ) (6 December 2023) para 16.

⁶ *Ibid.*

deeming provision to facilitate the proof of an act of insolvency for the purpose of the exercise by the Court of the jurisdiction to wind up.”

[Emphasis added]

[14] Tumishi which does not dispute being indebted to Voltex contends that it has sufficient assets above the value of the debt. It argues on that basis that it is not just and equitable that it be placed in liquidation. On 24 January 2025 it filed a supplementary affidavit in which it admitted to being indebted to Voltex, but denied that it was unable to pay its debts within the contemplation of section 69(1)(c) of the Act. It expressed that it intended to cede to Voltex an amount of **R1 262 339-50** (One Million, Two Hundred and Sixty-Two Thousand, Three Hundred and Thirty-Nine Hundred and Fifty Cents) that was owed to it by the Polokwane Local Municipality. If done, that would defray only part of the debt.

[15] All the denials of insolvency, commercially, are happening at a point where it is clearly discernible from evidence that Tumishi is not able to pay its debts when they become due. An attempt to cede the debt mentioned above is one indication of the fact that Tumishi has no means of paying the debt owed to Voltex, which is due. Where such is shown, it can only be an indicator that the debtor is commercially insolvent.⁷

[16] That the debtor, Tumishi, is commercially insolvent can be read from the following statements which form part of its answer:

“32. I ..., a solvent close corporation may no longer be wound-up simply because it is indebted to a creditor, and it is unable to pay its debts.”

[17] The above statement as an admission of two things. First, that Tumishi is indebted to Voltex. There can be no question about that. The attempt in the heads of argument to paint a different picture is not sustainable. Second, that it is unable to pay its debt. As I have pointed out, the debt has become due and payable. If that left some doubt, the following expressions make the point unequivocal:

⁷ Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd 2014 (2) SA 518 (SCA) paras 20 - 22.

“52. Save to admit that the Respondent has been unable to pay, I dispute that it should be wound up. The Respondent will be able to pay in the near future as it has secured a project for more than what it is owing to the Applicant on which it is currently working.”

[18] The supplementary answering affidavit that was filed against normal convention on 24 January 2025, which I have nonetheless considered, also admits to Tumishi's indebtedness to Voltex. It states the following:

“Save to admit that the Respondent is still indebted to the Applicant, the Respondent submit that the Respondent is not unable to pay its debt within the meaning of Section 68(c), Section 69(1)(c) of the close corporation Act, no 69 of 1984, read with Section 344(f) and 345(1)(c) of the companies Act, no 69 of 1973. In amplification of the denial, the Respondent submit that the Respondent is having projects and properties which are more than the debt owing to the Applicant. The Respondent is further having an amount owed by the Polokwane Local Municipality to the amount of R1 262 339.50 which the Respondent is intending to cede the amount to extinguish the Applicant's debt. ...”

[19] The above sounds like a plea for clemency. Not so much a defence in proceedings of this nature. The question of debt, which is the first issue for consideration is out of the way.

[20] I have also taken note of the time lapse since the application was first lodged, that Tumishi's initial answering affidavit was signed on 30 August 2023. In the supplementary affidavit it still conceded indebtedness and promised payment in the future. More than sixteen months later it still returned a similar report of having projects which will enable it to pay its debt to Voltex.

[21] There is no explanation of what impeded it from making payment, just promise of a future that has failed to materialize since August 2023. I have no doubt

that Tumishi is a corporation that is unable to pay the debts which have become due. What remains is whether it is just and equitable to grant a winding-up order.

Whether a winding-up order should be granted

[22] It is not automatic that a winding-up order will be granted against a company that is in debt and which is not able to pay its debts. That is an argument by Tumishi. To advance this contention it relied on a passage in *Thusanyo Investment (Pty) Ltd v Maduo Supply & Projects CC*⁸ (Thusanyo) in which the following was said:

“53. ... In light of the recent change in legislation a solvent Close Corporation may therefore no longer be wound-up purely because of the fact that it is indebted to a creditor and it is unable to pay its debts.”

[23] I have mentioned earlier that Tumishi has not explained what impeded it from making payment since August 2023. In its supplementary it merely says that it is intending to cede a debt to Voltex with no tangible steps to show for the intent. The email attached to the supplementary answer also speaks the language of intent, and nothing more. I may accept, for its benefit that it has funds which will be used to part pay the debt, but there is still a problem in that there will still be a debt of more than half a million rand owing. No tangible plans are in place to pay the outstanding amount.

[24] Relying again on *Thusanyo* the respondent contended that factual insolvency had to be proven for winding-up of a close corporation. Actual or factual insolvency occurs when the liabilities of a natural or juristic person as fairly assessed, exceeds the value of its assets causing it to be unable to pay all its debts. In that context debts would also include the debts that might not have fallen due and/or subordinated debts of the relevant creditors.⁹

⁸ *Thusanyo Investments (Pty) Ltd v Maduo Supply & Projects CC* (39913/20) [2022] ZAGPPHC 95 (24 February 2022).

⁹ *Luiz and Van der Linde* 1993 SA Merc LJ 231; *Ex parte De Villiers NNO in Re Carbon Developments* supra par 112B; 114B; 502C–H.

[25] In *ABSA Bank Limited v Hammerle Group (Pty) Ltd*¹⁰ the court dealt with an application for liquidation in which a debtor admitted to its debt. The court noted *inter alia* the following prior to granting winding-up order:

“[12] In my view the contents of this letter again serve, not only as an unequivocal acknowledgement of indebtedness by the respondent in the amount claimed under the loan agreement, to the appellant. It also shows that the respondent is unable to pay its debts and, in consequence, commercially insolvent. The respondent contended that the letter was written with a view of settling a dispute and was as such inadmissible. It accordingly applied that the letter be struck out, which application was granted. Although the offending paragraphs, which reflected the settlement proposals, were blocked out, the respondent's argument that the entire document was rendered inadmissible was upheld.”

[26] On this judgment it seems that even where commercial insolvency is palpable, winding-up order should not be granted. That seems to be behind the contention that Voltex must prove that Tumishi is factually insolvent to be granted a winding-up order given the number of times that the latter has admitted indebtedness. Section 344 of the Old Companies Act provides that a company may be wound-up if, *inter alia*, it is unable to pay its debts as contemplated in section 345 of the same statute¹¹ and if it appears to the court that it is just and equitable to grant such order.

[27] In *HBT Construction and Plant Hire CC v Uniplant Hire CC*¹² the court held that an application for the liquidation of a close corporation could not be based on s 69 of the Act alone. It reasoned that section 68(c) had been the empowering provision pursuant to which a close corporation could be liquidated, and that section 69 had merely qualified the meaning of ‘*unable to pay its debt*’ under section 68.

¹⁰ Absa Bank Limited v Hammerle Group (Pty) Ltd 2015 (5) SA 215 (SCA) (26 March 2015).

¹¹ Section 344(f).

¹² 2012 (5) SA 197 (FB).

[28] The court concluded, according to it, section 69 of the Act did not amount to an independent ground upon which to wind up a close corporation. In the absence of section 68, the court held, section 69 could not be relied upon to liquidate a close corporation. The court held that an applicant seeking to liquidate a close corporation must instead prove that the close corporation is actually insolvent or persuade the court that liquidation is just and equitable in the circumstances. This is one of the authorities that Tumishi relies on.

[29] My comprehension of sections 344(f) and 345, the latter being a deeming provision, is that a close corporation may be wound-up if it is deemed to be unable to pay its debts. More so in that section 66 of the Act calls for consideration insolvency laws which are applicable in terms of the old Companies Act.

[30] This was the view expressed in *Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC and Another*¹³ (Scania) in which the court held that the amendment of section 66(1) of the CC Act has the effect of extending the provisions of the old Act. The court held that in order to give effect to the legislative intent, section 344 of the old Companies Act must fill in the gap and operate in conjunction with s 69 of the Act to form the basis upon which to liquidate a close corporation which is deemed to be commercially insolvent. The essence of that judgment is that “*the grounds for winding-up ‘insolvent’ close corporations by order of court are now the same as the grounds for winding-up of ‘insolvent’ companies*”.

[31] In *ABSA Bank Ltd v Tamsui Empire Park 1 CC*¹⁴ the court followed Scania and held that section 69 of the Act should now be considered with section 344 of the old Companies Act. Cloete J held the view that in choosing to retain section 69 of the Act “*the legislature must have intended for it to have some purpose. The only manner in which this can be achieved is by following the approach of the court in Scania Finance, namely that, s 69 of the CC Act must, despite its reference to s 68, be construed as referring to s 344(f) of the old Act.*”

¹³ 2013 (2) SA 439 (FB).

¹⁴ 2013 ZAWCHC 187.

[32] Further, according to Cloete J, “*the reference in s 69 to s 68(c) can thus be construed as a reference to a repealed provision which has nonetheless been substantially re-enacted, in relation to close corporations, by way of the transitional provisions in the new Act read with s 344(f) of the old Act.*” Thus, the court held the view that an applicant can show that demand had been duly made on a debt which was due and that the close corporation had failed to settle the debt within the specified time frame, would be entitled to an order to liquidate the close corporation. I am aligned to this viewpoint.

[33] In any case, on the question of factual insolvency, which forms the substratum of Tumishi’s defence, the court was not provided with any evidence of the assets that it allegedly owns. I have nothing to compare the established indebtedness with, just mere *ipse dixit* from Tumishi. It gets even worse in that even the alleged payments, which I have mentioned were made only in heads of argument, lack supporting proof.

[34] The concept of just and equitable is a standard that is used in various legal contexts. It enjoins the court to balance the competing interest of the parties, third parties even, and to grant an order that would not leave any of the parties with undue hardship. In this case, and given the extent of time lapse since the case was instituted, with Tumishi still demonstrating inability to pay its debts to Voltex, I deem it just and equitable to grant an order for winding up as prayed for in the notice of motion.

Order

[35] The following order is made:

[a] The Respondent, **Tumishi Electrical and Building Construction CC**, is placed under provisional winding-up in the hands of the Master of the High Court, Limpopo Division, Polokwane.

[b] Parties with legitimate interest are called upon to show cause on 29 January 2026 why provisional liquidation.

[c] A copy of this order should be served:

[i] on the employees of Tumishi at its registered address and on any registered Trade Union representing the employees;

[ii] by publication in the Government Gazette in the Beeld and the Citizen newspapers;

[iii] physically at the offices of the Master of the High Court and the South African Revenue Services; and

[iv] to all known creditors by registered mail or via electronic mail or though telefax.

[d] Costs of this application are in the liquidation.

MZ MAKOTI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR APPLICANT : MR MOOLMAN (Heads by K Lavine)
ORELOWITZ INCORPORATE ATT.
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POLOKWANE

FOR FIRST RESPONDENTS : S DLAMINI
S RANGOANASHA INCORPORATED
POLOKWANE

HEARD ON : 16 MAY 2025
DELIVERED ON : 03 DECEMBER 2025