REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

[redacted]

DATE SIGNATURE

CASE NO.: 2025-173454

In the matter between:

YANYAN LI	First Applicant
GENCHENG ZHOU	Second Applicant
and	
HELDERZICHT DEVELOPMENT (PTY) LIMITED	First Respondent
HYDER PROPERTIES (PTY) LIMITED	Second Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The applicants, describing them as shareholders of the first and second respondents for a period in excess of six months, seek the winding-up of each of the respondent companies. The applicants expressly state in their founding affidavit that they seek the winding-up of each respondent company in terms of section 344 read together with section 345 of the Companies Act, 1973 on the basis that the respondents are factually and commercially insolvent, alternatively that it is just and equitable to wind-up the respondents.

2. The respondent companies did not deliver an answering affidavit and instead delivered a notice in terms of Uniform Rule 6(5)(d)(iii) raising three questions of law. The respondents seek that should any of the three questions of law be upheld, the application should be dismissed with costs.

3. The three questions of law, as described by the respondents in their notice, are that:

    3.1. the application is incompetent as it is a single application seeking the winding-up of two respondent companies;

    3.2. the applicants have not proven standing as "*members*" under section 346 of the Companies Act, 1973;

3.3. the applicants are precluded from seeking a winding-up order on the basis that the respondents are unable to pay their debts.

4. The respondents seek leave to deliver an answering affidavit in the event that their questions of law are dismissed. This was opposed by the applicants, who submitted that the respondents must stand or fall by their decision to only deliver a Rule 6(5)(d)(iii) notice raising the questions of law and not to deliver answering affidavits dealing with the remaining merits of the application.

5. The applicants expressly state in their founding affidavit that one of the grounds of winding-up relied upon is that the respondents are factually and commercially insolvent and so are to be wound up in terms of section 344 as read with section 345 of the Companies Act, 1973. Section 346(2) of the Companies Act, 1973 precludes a member of a company seeking the winding-up of a company unless the application is on the grounds referred to in section 344(b), (c), (d), (e) or (h). The winding-up of a company because of an inability to pay its debts is in terms of section 344(f) and so this is not one of the specified grounds upon which a member can seek the winding-up of a company. The question of law raised by the respondents on this aspect is good.

6. The applicants in their heads of argument, in the joint practice note and during argument conceded that this is so. The applicants' counsel submitted there is an alternate basis for the winding-up of the respondents, and that is on the grounds that it is just and equitable. The

applicants in paragraphs 34 to 36 of the founding affidavit describe the "*oppressive conduct*" towards them in their capacities as minority shareholders of the respondent companies.

7. I agree that this alternate basis for winding-up is asserted.

8. The question of law on this issue, although conceded by the applicants in favour of the respondents, is not dispositive of the application.

9. The respondents also sought to strike out various averments in the founding affidavit insofar as they related to the alleged inability of the respondent companies to pay their debts in that once it was conceded that the applicants have no *locus standi* to seek a winding-up on the basis of the respondent companies' inability to pay their debts, these averments are irrelevant. The applicant's counsel countered that the averments nonetheless remained relevant as a factor in determining whether it was just and equitable to wind-up the respondent companies. I agree that the averments remain relevant and so I do not grant the striking out relief.

10. As to whether it is incompetent for the applicants to seek in a single application the winding-up of two respondent companies, the respondents submit in their heads of argument that *"[t]he legal position is that unless (i) the respondents have consented to a joint application or (ii) there is a complete or near identity of interests between them, a joint application is impermissible."* The applicants cite as authority paragraph 17 of the Full Court decision of this Division of *Bidvest Bank Ltd v Waste Partner Investments (Pty) Ltd* [2024] ZAGPJHC 1137 (11 November 2024).

11. Wilson J writing for the Full Court in that paragraph held *"the applicable law is that such joinder is competent either where there is consent, or where there is an identity, or near identity, of interest between the respondents"* (my emphasis).

12. As appears from their heads of argument, the applicants, also referring to the Full Court decision, agree that this is the applicable test.

13. In any event, the Full Court decision is binding upon me.[1] Any doubt that may have previously existed that a 'complete' identity of interests is required,[2] and that a 'near identity' of interests would not suffice, has now been resolved. A 'near identity' of interests will suffice.

14. The parties agreed that there was no consent to the joinder. Nor did the applicants argue for a 'complete identity' of interest. Rather, both parties argued, effectively, that there was a 'near' identity of interests.

15. Wilson J for the Full Court observed in paragraph 9 that:

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[1] The finding of the Full Court as to the applicable test is a *ratio decidendi* as it was necessary to have enabled the Full Court to find that the court *a quo* per Vally J (2023] ZAGPJHC 1126 (5 October 2023), had not impermissibly exercised his discretion in relation to costs in refusing costs to the applicant for the winding up of a respondent debtor. Vally J reasoned the applicant in the matter could, and should, have proceeded for the winding up of the respondent debtor in the same application that the applicant had brought for the sequestration of a respondent debtor, where both respondent debtors were liable for the same debt.

[2] See, for example, *Breetveldt & Others v Van Zyl & Others* 1972 (1) SA 304 (T) at 314F/G that: *"Such a proceeding cannot be allowed, except possibly by the consent of all interested persons, or in a case where there is a complete identity of interests"* (my emphasis).

> *"The cases on joinder in liquidation and sequestration proceedings do not seem to explore what counts as an identity of interests in much detail. There is also equivocation in the cases about the extent to which a set of debtors' interests must align before it is appropriate to join more than one of them in the same proceedings."*

16. Each case needs to be considered on its own facts as to whether there is a 'near' identity of interests.

17. As the law is now settled as to the applicable test, a close analysis of the cases, particularly over the last five decades and in this Division[3], to determine the test is unnecessary.[4] Nonetheless there are useful findings or observations made in various of those cases that assist, in the present instance, is deciding whether there is a 'near' identity of interests.

18. The reasoning of Margo J in *Breedveldt* above at 314G-H remains instructive, acknowledging that the context is one of insolvency:

> *"In the present case, each company has its own separate share capital, separate shareholders and separate creditors, and the fusing of the interests of all four companies in one proceeding is confusing and prejudicial to persons interested in only one such*

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[3] Starting with *Breetveldt & Others v Van Zyl & Others* 1972 (1) SA 304 (T)

[4] As was done, for example, in *Strutfast (Pty) Ltd v Uys & Another* 2017 (6) SA 491 (GJ).

company. In the compulsory winding-up of a company, the petition is an important document. Its purpose, inter alia, is to place before the Court, for the information of the company, the creditors and shareholders, a statement of the material facts upon which a winding-up order is claimed, and it also serves to provide information to the Master, the Sheriff, the liquidator and other interested parties. If, for example, creditors in one or other of the companies in this case should wish to intervene on the return day, or to suggest a compromise under sec. 103 of the Companies Act, there is no valid reason why they should have to become involved in the affairs of three other companies."

19. Coetzee J in *Ferela (Pty) Ltd v Craigie & Others* 1980 (3) SA 167 (W) referred to *Breetveldt* with approval and reasoned at 172F/G that apart possibly from issues of convenience and the like that would feature in joinder applications in terms of the court rules,:

"Of course there is the further very important feature which exercised my mind. This is not simply a case where either money or property is claimed from a respondent and where the provisions of Rule 10 would very easily be applicable mutatis mutandis. This is a procedure which really achieves a concursus creditorum. That is the purpose of sequestration proceedings. It is to my mind inadvisable that two separate estates can be dealt with in this way, each leading to its own and utterly separate concursus creditorum."

20. It appears to me that when considering whether there is a ‘near identity’ of interests is different to, and requires more than, what may ordinarily suffice for purposes of a joinder in terms of Uniform Rule 10, such as that the right to relief in relation to the persons proposed to be joined depends upon the determination of substantially the same question of law or fact.[5] The nature of the proceedings, which is that they are insolvency proceedings, and which if granted result in a *concursus creditorum* in respect of each respondent, is to be taken into account.

21. Notably those cases that have found, or motivate for, a sufficient identity of interests to justify joinder in insolvency proceedings are those involving unpaid applicant creditors where the respondents were liable for the same debt, usually jointly and severally, and where the applications were based on the respondents’ inability to pay their debts, or their estates were insolvent, as the case may be.[6]

22. This factor in favour of a sufficiently ‘near’ identity of interests is absent in the present instance. The applicants do not (at least any longer) seek the

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[5] In support, see *Brack v Front Runner Racks 2000 (Pty) Limited and other*s [2011] ZAGPJHC 34 (4 May 2011, where Boruchowitz J in para 10 referred with approval to *inter alia Ferela* above, which emphasised that the provisions of Uniform Rule 10(3) are not readily applicable to liquidation or sequestration proceedings.

[6] See, for example, *Kirkwood Garage (Pty) Limited v Lategan and Another 1*961 (2) SA 75 (E) (sequestration of respondent’s estates where jointly and severally liable), and which featured prominently in the judgment of Vally J in *Bidvest a quo* above; *Business Partners Ltd v Vecto Trade 87 (Pty) Ltd and Others* 2004 (5) SA 296 (SE) (involving the liquidation of a respondent company liable as principal debtor and the sequestration of the estates of spouses married to each other out of community of property who were liable as sureties and co-principal debtors); *Maree and another v Bobroff and another* [2018] ZAGPJHC 79 (3 April 2018) (involving the sequestration of the estates of two respondents who were jointly and severally liable for debts arising from settlement agreements).

winding-up of the respondents on the distinct grounds that they are unable to pay their debts Also, there is no joint and several liability of the two respondent companies to the applicants.

23. The only case to which I was referred where the issue of joinder of respondents in the context of liquidation proceedings based on the grounds of it being just and equitable is that of Boruchowitz J in *Brack v Front Runner Racks 2000 (Pty) Limited* above. Although Boruchowitz J was applying the test of 'complete' identity of interests, the following in paragraphs 11 and 12 of the judgment remains instructive:

> *"[11] The application is based on the just and equitable ground contemplated in section 344(h) of the Companies Act. This section confers upon the Court a wide discretionary power which has to be exercised judicially with due regard to the justice and equity of the competing interests of all concerned….*
>
> *[12] The competing interests involved are of the widest character and would include the legal, financial, pecuniary and non-pecuniary interests of those concerned, whether directly or indirectly, in the affairs of the company sought to be winding-up. Where, as in the present case, two companies are involved, the Court has to separately determine in respect of each company whether it is just and equitable that it be wound up. The field of fact to be covered is extensive as the competing interests involved are not the same, and the same questions of law and fact do not arise."*

24. Boruchowitz J went on to find that the differences were such in the matter before him that the joinder of the two respondent companies was not justified. The differences included the different nature of the two companies (the one being a trading operation with employees that

manufactures and distributes accessories for off-road vehicles, and the other a property-owning company), that presumably each have their own separate creditors and debtors and that presumably both have their own separate relationship with SARS and their bankers.

25. Turning to the present matter, the respondents submit, as appears from their heads of argument and supplementary heads of argument, there is no near identity of interests where:

25.1. they have different roles and businesses and perform different functions. The first respondent is a land developer. The second respondent is the construction arm;

25.2. their capital and funding structures differ. The first respondent has the large shareholder loan from Hebei of R105 million. The second respondent reflects inter-company indebtedness (it is the first respondent that is indebted to the second respondent for some R151K by way of a loan account, as appears from the balance sheet annexed as "FA15");

25.3. their creditor profiles differ. The second respondent as a construction company has subcontractor retention and supplier controls. The first respondent as a property developer has customer deposits, deferred income, and different liabilities;

25.4. their assets and risks differ. The first respondent holds development inventory and investment property. The second respondent holds construction-related assets and obligations;

25.5. their banking facilities and operational cash positions differ;

25.6. each have their own annual financial statements and the like.

26. Why, as described in their heads of argument, the applicants submit that there is a near identity of interests is:

26.1. there is an interrelation between the two respondents in regard to their business activities and especially their common shareholding and the ultimate controlling shareholder, Keji Zheng;

26.2. the conduct underpinning the just and equitable basis for the winding-up of the respondents is conduct in regard to the applicants, directors of both respondents, as shareholders:

26.2.1. involving both respondents;

26.2.2. the other two shareholders of the respondents, Zheng and Hebei, including *inter alia* (i) the second applicant being removed as chairman of the respondents; (ii) taking away the responsibilities of the first applicant, the managing director of both respondents; and (iii) the attempt to remove the applicants as directors of the respondents.

27. The respondents respond that at best for the applicants there is no more than a potential governance overlap, which relates to the averred oppressive conduct.

28. I agree with the respondents' submissions that there is not a sufficiently near identity of interests. The financial information provided by the applicants in their founding affidavit, and particularly the balance sheets, income statements and the like, show that the financial interests of each respondent are substantially different, including their assets, liabilities, income and expenses.

29. By way of example the first respondent as a land developer is reflected as at 31 July 2025 with assets of R157 million (consisting predominantly of land and buildings (which appears to be developed property) and of 'work in progress' (which appears to be property that is still being developed), with liabilities of R123 million (most of which is the loan from its majority shareholder Hebei of R105 million that has been recalled), leaving an equity of some R33 million. In contrast, the second respondent is reflected as at 31 July 2025 with assets of some R7 million (which includes a loan to the first respondent of some R156K), liabilities of some R5,2 million, leaving equity of some R1.7 million. The scale of the assets and liabilities of each respondent is markedly different.

30. The main creditors for the first respondent and who would have a particular interest in a concursus of the first respondent, are, other than the loan from its shareholder Hebei of R105 million, various unspecified

suppliers for R5.5million, Goldmark Investments for R862K and the second respondent for R156K. SARS features only for R32K.

31. The main creditors of the second respondent, who would have a particular interest in a concursus of the second respondent, are various unspecified subcontractors, as would be expected of a construction company. Another major creditor is SARS for PAYE, VAT and other taxes.

32. Rome AJ in *Strutfast* above in paragraph 34 noted that the applicant's founding affidavit contained no averments from which, for example it could be discerned that there is an identical group of joint creditors for each of the respondents, and, also, that there was a failure to distinguish or attempt to delineate between the creditors and assets of each of the respondents. Although in the present instance the applicants have described the financial position of each respondent company in their founding affidavit, and as supported by the annexes, this was not done for purposes of showing a near identity of interests but rather to show the averred inability of the respondent companies to the pay its debts. As appears above, the difference in the financial positions of each respondent militates against, rather than supports, a near identity of interests.

33. The interests of the general body of creditors in each concursus if liquidation orders were to be granted is sufficiently different that this weights significantly against a near identity of interests, particularly given that these are insolvency proceedings.

34. The averred oppressive conduct asserted by the respondents is the majority shareholders Zheng and Hebei exclusion (or at least sidelining), and further attempted exclusion (or sidelining) of the applicants, and this in the context of the averments that having done so Zheng is hollowing out the respondents for his own advantage, including the funnelling of income received by the respondents to pay back the loan to Hebei. Whilst I appreciate that there is some overlap in relation to this averred conduct, the founding affidavit is sparse in detail of this conduct, and distinctly in respect of each respondent. Much of what is averred is globular, pertaining to both respondents. It does not appear that much, if anything, is averred why the applicants as minority shareholders have an expectation not to be excluded from each respondent company.[7] This makes it difficult to ascertain whether there is a sufficiently substantial overlap in the oppressive conduct complained of towards supporting a near identity of interests.

35. Whilst it may be that a court seized with separate applications may have to investigate the same or similar conduct resulting in the exclusion (or sidelining) of the applicants as minority shareholders, it does not follow that the balance of the enquiry as to whether the conduct complained of is sufficient to sustain a just and equitable winding up would be the same..

36. It may also be that if the oppressive conduct is established, the relief to be granted in relation to each respondent may be different. Section 346(2)

[7] Compare *Thunder Cats Investments 92 (Pty) Ltd and another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others* 2014 (5) SA 1 (SCA), para 18.

of the Companies Act, 1973 provides that where the application is presented by members of the company and it appears to the court that the applicants are entitled to relief, the court shall make a winding-up order, unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. The financial profile of each respondent company is sufficiently different that this consideration also increases the divergence of interests for purpose of joinder of both respondents in a single application.

37. I find that the question in law raised by the respondents on this issue is good, and so application stands to be dismissed. The applicants did not seek any other outcome should the question in law be upheld.[8]

38. It is therefore unnecessary for me to decide the remaining question of law, which is whether the applicants have proven their standing as 'members' to seek a just and equitable winding-up of the respondent companies in terms of section 346(1)(c) and (2) of the Companies Act, 1973.

39. Although the respondents sought costs on an attorney and client scale on the basis that they had forewarned the applicants not to persist with their application by way of a letter on 13 October 2025 before the delivery of their notice in terms of Rule 6(5)(d)(iii) in November 2025, in my view this

[8] In light of the applicants no longer relying on a winding up of the respondents because of an inability to pay debts, I did raise with the applicants' counsel what the applicants' position would be if I found that the questions in law were not dispositive of the application, but I refused the respondents leave to file an answering affidavit. That though is something else, which is irrelevant in light of the decision I have arrived at.

does not warrant a costs order other than on the usual party and party scale. I cannot find that the applicants' persistence with the application in the usual cut-and-thrust of litigation warrants any form of punitive costs order.

40. I make the following order:

    40.1. the application is dismissed;

    40.2. the applicants, jointly and severally, are to pay the costs of the first and second respondents, including the costs of senior counsel on scale C and of second counsel on scale B.

[redacted]

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Gilbert AJ

Date of hearing:	17 February 2026
Date of judgment:	24 February 2026
Counsel for the Applicants:	L Hollander
Instructed by:	Bouwer Cardona Inc Johannesburg
Counsel for the Respondents:	A Subel SC with J Brewer
Instructed by:	Edward Nathan Sonnenbergs Inc. Sandton