**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Case Number: 2024/126810**

(1) REPORTABLE: Yes

(2) OF INTEREST TO OTHER JUDGES: No

(3) REVISED: Yes

DATE 26/02/2026

SIGNATURE

In the matter between:

| | |
|---|---|
| **URBAN MOUNTAIN (PTY) LTD** | Applicant |
| (Registration Number 2021/564981/07) | |
| and | |
| **THAMI NDLALA HOLDINGS (PTY) LTD** | Respondent |
| (Registration Number 2018/26347/07) | |

**JUDGMENT**

***Summary:***

*Is a damages claim for "holding over" and related charges after lease termination considered a debt payable under section 345(1)(a) of the Companies Act 61 of 1973?*

*The standing of a creditor in terms of section 346(1)(b) read with section 344(f) and section 345(1)(a) is not dependent on a finding of contractual privity between the creditor and debtor. An extensive array of circumstances may result in one or more unpaid obligations, depending on the particular facts and applicable legal principles, whether those obligations arise from the application of the recognised obligations at common law (i.e., contract, delict or enrichment), statute, or constitutional provisions.*

*While a contingent or prospective creditor has standing to file an application for winding-up, a claim originating from unliquidated damages is not a debt then due and payable and does not fall within the ambit of section 345(1)(a).*

*A claim for holding over is not for rental under the former lease agreement but one for damages based on the market rental value of the premises which is typically illiquid, save for those instances where the market related rental value is assumed to be the rental stipulated in the lease agreement and no countervailing evidence is presented to the contrary.*

*A claim for payment of holding over damages is generally unlikely to fall within the ambit of section 345(1)(a) given its illiquid character, particularly when the respondent provides evidence that contests the creditor's pleaded case to equate the market rental value with the rent stipulated in the lease agreement. Where the liquidity of the claim is established, there is no reason in law why a creditor is not entitled to rely on section 345(1)(a) in the face of an unpaid debt for holding over damages then due.*

**Introduction**

1. This application raises a relatively novel question: whether a claim for damages resulting from "holding over" and certain ancillary charges following the termination of a lease agreement constitutes a debt due and payable in terms of section 345(1)(a) of the Companies Act 61 of 1973. I have not been referred to case law, nor has my own research revealed judgments where the issue has come up for judicial consideration.

2. The question arises in the context of an application for the winding-up of the respondent on the grounds that the respondent is unable to pay its debts, as contemplated by section 345(1)(a). The respondent disputes its winding-up by raising several arguments, identified as points *in limine*, which are further elaborated upon below.

**The Facts**

3. The applicant is the registered owner of the immovable property situated at no. 1[...], H[...] Avenue, Northcliff, Johannesburg. On 17 August 2021, the applicant concluded a written lease agreement with the respondent for a period of three years from 1 September 2021 to 31 August 2024 and that governed the respondent's occupation of the property.

4. The respondent was required to pay a monthly rent of R28 000.00 in advance, before the first day of each month. Along with the rent which increased by seven percent per annum, the respondent had to cover additional service charges at the same time, which included electricity, basic services, network fees, water, meter charges, alarm and satellite TV costs, as well as gas, sewerage, refuse removal, and any other utility expenses.

5. Overdue amounts incurred monthly interest at two percent. Clause 10.5

barred the respondent from reducing the rental for any reason. The non-payment of any sums owed to the applicant or to service providers for services rendered constituted a material breach of the lease agreement, thereby entitling the applicant to terminate the lease. In terms of clause 23.2 of the lease agreement, the respondent was obliged to restore the applicant's possession upon its termination, failing which the applicant would be entitled to approach court for the recovery of possession and compensation for the respondent's use and occupation of the property after the date of termination.

6. The respondent assumed possession of the property on 1 September 2021, when its sole director, Mr. Thamsanqa Lucas Ndlala, received the keys to the property. The respondent is the owner of the neighbouring property situated at no. 1[...], H[...] Avenue, Northcliff from where it conducts business as a luxury boutique hotel. The respondent first planned to lease the property from the applicant, aiming eventually to merge the two erven to expand the boutique hotel. The transaction was not completed for reasons unrelated to this application and the respondent continues to occupy the property.

7. The relationship between the parties was not a happy one from inception. By December 2021 the respondent was in material breach of the lease agreement in various respects. It failed to pay monthly rent and service charges amounting to R93 826.32 and constructed several unlawful structures that violated the National Building Regulations and Building Standards Act 103 of 1977. These structures were built without the applicant's knowledge and without obtaining approval from the local authority.

8. The applicant terminated the lease agreement on 17 December 2021 and by May 2022, the respondent was indebted to the applicant in the sum of R266 318.54 in respect of outstanding rental, holding-over damages and service charges.

9. The applicant sent a section 345 demand to the respondent on 27 May 2022 and applied for the respondent's winding-up on 25 November 2022. The respondent opposed the application. The application was enrolled for

hearing on 5 February 2024 when the parties entered into a written settlement agreement that was made an order of court and in terms of which the respondent was ordered to pay the full capital sum due and owing from September 2021 to October 2022 in the amount of R488 469.04 and costs on the attorney and client scale. Payment was made on 8 February 2024.

10. There is no dispute that the respondent continued to occupy the property subsequent to the settlement of the indebtedness on 8 February 2024. The relationship between the parties however did not improve. By 1 September 2024, the respondent owed the applicant the sum of R1 311 517. The total amount included R718 587.60 in holding over damages, based on the monthly rent and escalation per the lease agreement from November 2022 to September 2024, plus service charges for the same period totalling R592 929.57.

11. The applicant's attorneys addressed a further section 345 demand to the respondent on 5 September 2024 for payment of the outstanding amount, alleging that the respondent is unable to pay its debts in the ordinary course of business as and when they arise. The letter of demand was served by the Sheriff at the respondent's registered address on 9 September 2024.

12. The attorneys for the respondent replied in writing on 30 September 2024. They recorded that their client disputed the electricity account on 20 September 2023, and that the property had no water or electricity supply following the disconnection of supply in December 2022. The respondent recorded its continued intention to purchase the property and stated that a formal offer would be submitted in the near future. However, except for an unsubstantiated denial, the remaining indebtedness was not disputed.

13. The applicant's attorneys responded on 15 October 2024. They noted that the applicant provided the respondent with the monthly statements from the City of Johannesburg showing the real water and electricity usage charges and explained that if the services had been cut off, these costs would not have applied to the property. The respondent did not reply to this letter.

**Discussion**

14. Section 345(1)*(a)* provides *inter alia* that a company is deemed to be unable to pay its debts if a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than R100 then due, has served on the company, by leaving it at the company's registered office, a demand (usually referred to as the “statutory demand”) requiring the company to pay the sum due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.

15. A failure to pay the debt due as demanded triggers a statutory presumption in terms of which the company is deemed to be unable to pay its debts and constitutes a jurisdictional ground to place the company into winding-up (section 344(4) of the 1973 Companies Act).

16. The objective of the statutory presumption is to facilitate and expedite proof of insolvency where the debt demanded is more than the amount set by the legislature and remains unpaid. It does not require a creditor to produce positive proof of the precise amount due and owing (see **Blackman I Commentary on the Companies Act 1973**, Revision Service 9 at ch14-146 with reference to the judgment of Kirby P in **FAI Insurances Ltd v Goldleaf Interior Decorators Pty Ltd** (1988) 14 ACLR 285 293 SC(NSW); see also **Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd** 2003 (5) SA 414 (W) at 428B – C).

17. To fall within the scope of the sub-section, a creditor must establish three requirements:

    17.1. it is a creditor of the respondent for an amount not less than R100;

    17.2. the amount must be due and payable (the debt must be liquid);

    17.3. there must be proof that despite demand, the debtor has neither paid the amount claimed nor secured or compounded it to the reasonable satisfaction of the creditor (**Lamprecht v Klipeiland (Pty) Limited** 2014 4 All SA 279 (SCA) at paragraph 15).

18. The respondent contests the applicant's compliance with these requirements and although formulated as points *in limine*, it is appropriate to address them as substantive defences presented on behalf of the respondent.

19. The main issues therefore involve the applicant’s *locus standi* as a creditor; whether there is a *bona fide* dispute about the debt based on reasonable grounds; if the application represents an abuse of process; and the solvency of the respondent.

**The Applicant’s *Locus Standi***

20. The applicant’s standing is a discrete question that does not concern whether the indebtedness is *bona fide* disputed on reasonable grounds (**Absa Bank Ltd v Erf 1251 Marine Drive (Pty) Ltd & Another** [2012] ZAWCHC 42 at paragraph 15; **Gap Merchant Recycling CC v Goal Reach Trading 55 CC** 2016 (1) SA 261 at paragraph 28). The latter involves the application of a broader principle that prevents the misuse of the court's process to compel payment of a debt that is *bona fide* disputed on reasonable grounds (“***the Badenhorst rule***”). The underlying principle holds that liquidation proceedings are not intended to serve as a means of enforcing payment of contested debts (**Badenhorst v Northern Construction Enterprises (Pty) Ltd** 1956 (2) SA 346 (T) at 347H – 348C; **Gap Merchant** at paragraph 20).

21. The genesis of the relationship between the parties is the lease agreement, but as I show below, the absence of a continued lease agreement after 17 December 2021 does not deprive the applicant of *locus standi* to bring these proceedings.

22. Subsequent to the termination of the lease agreement on 17 December 2021, the respondent continued to occupy the property except for a short interval in December 2022 but without making any payment for its occupancy or for service charges incurred from November 2022 to September 2024. It

challenged the validity of the lease termination and continued to hold this position in its answering affidavit which described the termination as "irregular."

23. It adopted a similar refrain in its plea in response to a damages action brought on behalf of the applicant in 2024 for payment of holding over damages and service charges. The respondent modified its stance in its heads of argument and Mr Griesel, who represented the respondent during the proceedings, confirmed that the respondent's formal position was that the lease agreement was validly terminated. The concession was properly made. I deal with the true import of this change in position more fully below.

24. Because no valid lease agreement existed after 17 December 2021, the respondent argued that there is no evidence of a creditor-debtor relationship to support the applicant's *locus standi*. In the absence of a contractual substratum, it argues that the applicant cannot establish a debt for holding over and unpaid service charges from November 2022 to September 2024.

25. The argument does not stand up to scrutiny.

26. Section 346(1)(b) of the 1973 Companies Act entitles a creditor to bring proceedings for the winding-up of a company. It may rely on any existing *vinculum juris* (i.e. a legal obligation which creates a right enforceable in a court of law; see **Holzman v Knights Engineering and Precision Works (Pty) Ltd** 1979 (2) SA 784 (W) 787).

27. The breadth of this sub-section is clear as it includes contingent and future creditors, being anyone who, by virtue of an existing *vinculum juris*, possesses a claim against the company that may become an enforceable debt upon the occurrence of a specified future event or at a future date (see **Blackman I Commentary on the Companies Act 1973**, Revision Service 9 at ch14-151 and the authorities at footnote 1042).

28. The standing of a creditor in terms of section 346(1)(b) read with section

344(f) and section 345(1)(a) is not dependent on a finding of contractual privity between the creditor and debtor. There is nothing to suggest that the statute lends itself to such a restrictive interpretation, and it would exclude creditors with claims arising outside a contractual context from invoking the statutory presumption created by section 345(1)(a) when it is clear that a debtor is unable to pay its debts then due and owing.

29. As Moseneke J (as he then was) observed in **Kyle and Others v Maritz & Pieterse Inc** 2002 3 All SA 223 (T) at paragraph 11, within the context of the confirmation of a provisional winding-up order granted because of an inability to pay debts as provided in section 344(f) read with section 345: "*…the obligation may arise ex contractu, ex delicto or ex variis causa inclusive of any constitutional remedy which creates an obligation which may be validly enforced in a court of law.*"

30. It is unnecessary to enumerate every conceivable type of claim that could designate someone as a creditor. An extensive array of circumstances may result in one or more unpaid obligations, depending on the particular facts and applicable legal principles, whether those obligations arise from the application of the recognised obligations at common law (i.e., contract, delict or enrichment), statute, or constitutional provisions.

31. The precise classification of the applicant's claims in the present context is equally of no moment for purposes of assessing its *locus standi* to bring winding-up proceedings. They are not designed to enforce a debt but to set the machinery of the law in motion to have the debtor declared insolvent (**Collet v Priest** 1931 AD 290 at 299; also see **Investec Bank Ltd and Another v Mutemeri and Another** 2010 (1) SA 265 (GSJ) at 276G-J where Trengove AJ in the context of sequestration proceedings found that they are not intended to enforce a debt but to bring about a convergence of claims in an insolvent estate to ensure an orderly winding-up process where all creditors are treated equally).

32. Accordingly, the formulation of a carefully pleaded cause of action that makes

out a case for payment of the debt is of secondary significance with a founding affidavit not to be scrutinised with the same exactitude as a pleading in High Court action proceedings.

33. This does not imply, however, that an applicant is entirely relieved of the obligation to set out a legally cognisable foundation for its claim. It is possible that the Badenhorst rule may apply more narrowly when, although the facts are undisputed, a legitimate legal issue arises as to whether those facts establish grounds for a claim in law (see **Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another** 2015 (4) SA 449 (WCC) at paragraph 12).

34. It suffices to cloth the applicant with *locus standi* if the facts that emerge from the founding affidavit reveal the existence of a debt. This includes an unliquidated claim for damages for breach of contract (see the judgment of Trengove J (as he then was) in **Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd** 1971 (1) SA 524 (T) at 528G where section 113 of the Companies Act 46 of 1926 which was worded in language not dissimilar to section 346(1)(b), was interpreted to mean that an applicant with a valid claim for damages for breach of contract is a contingent or prospective creditor and has *locus standi* to present a petition for the winding-up of a company).

35. The broad standing given to creditors to bring winding-up proceedings in terms of section 346(1)(b) is however qualified by the wording of section 345(1)(a).

36. Although contingent and prospective creditors are permitted to apply for the winding-up of a company *per se*, this right does not automatically extend to applications based on non-compliance with a demand made in terms of section 345(1)(a) (see **GATX-Fuller v Shepherd and Shepherd Inc** 1984 (3) SA 48 (W) at 52G).

37. The sub-section requires a creditor to show that the debt is “then due” in the

sense of being immediately due and payable. This level of precision is a function of the fact that for a creditor to benefit from the presumption of an inability to pay as a basis to justify a winding-up order, the debt must be liquid.

38. In summary, while a contingent or prospective creditor has standing to file an application for winding-up, a claim originating from unliquidated damages is not a debt then due and payable and does not fall within the ambit of section 345(1)(a) (see **Alton Coach Africa CC v Datacentre Motors (Pty) Ltd t/a CMH Commercial** 2007 (6) SA 154 (D) at 164F in the context of section 69(1)(a) of the Close Corporations Act 69 of 1984 which is virtually identical to section 345(1)(a)).

39. Central to the applicant's *locus standi* is the liquidity of the claim for holding over damages.

40. Mr Pullinger, who appeared with Ms Mamoepa, addressed the issue directly by arguing that the holding over claim was, in fact, a claim for liquidated damages. Before I consider these submissions, a word about damages claims for holding over is necessary.

41. The legal position concerning the nature of holding over damages is a settled one. It is therefore useful to summarise the key principles established by the Full Bench in **Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another** 2013 (4) SA 607 (GSJ) to which Mr Pullinger and Ms Mamoepa drew my attention. The decision comprehensively outlines the relevant legal framework following an exhaustive analysis of the applicable authorities and it is not necessary for me to revisit those cases:

41.1. a landlord is entitled to free and undisturbed possession on termination of a lease agreement, unless the occupier can justify his continued occupation on legal grounds;

41.2. a claim for holding over arises from a breach of the contractual obligation to deliver vacant possession upon termination, as stipulated by the applicable clause in the lease agreement or as required under common law principles (the court acknowledged that a claim can also arise in delict and enrichment as appears from paragraphs 43 to 45);

41.3. since the lease has come to an end, the amount claimable is not the rental that would be payable under the erstwhile lease agreement but is more appropriately characterised as damages which is the market rental value of the premises;

41.4. where reliance is placed on the rental payable under the erstwhile lease agreement, this is not a substantive law requirement but an evidential measure to determine the market related rental;

41.5. a damages claim for a market-related rental is typically considered illiquid; however, this principle is subject to the following important qualification:

41.5.1. in the absence of evidence to the contrary, the market related rental value is assumed to be the rental stipulated in the lease agreement;

41.5.2. the assumption that the two are the same is only valid if the pleaded response reveals no challenge to the landlord's allegations that the rental provided for in the lease is the market related value;

41.6. in the face of countervailing evidence that present an effective legal challenge to the landlord's attempt to equate the rental under the lease with the market rental value, the claim is illiquid;

41.7. where the assumption that the rental in the lease agreement is market related remains undisturbed, the claim can be properly characterised as a liquidated claim (**Hyprops** at paragraphs 33, 41, 42 and 59 and paragraphs 64 to 69; see also in this regard the more recent decision in **Sharma v Hirschowitz and Another** 2020 (3) SA 285 (GJ) at paragraphs 19 to 21 and 27).

42. When these principles are reconciled with the requirements of section 345(1)(a), it becomes evident that a claim for payment of holding over damages is generally unlikely to fall within the ambit of section 345(1)(a) given their illiquid character, particularly when the respondent provides evidence that contests the creditor's pleaded case of equivalence between market rental value and the rent stipulated in the lease agreement.

43. The instances where a debt based on holding over damages falls within the scope of the sub-section are likely to be few. They will be fact specific and largely dependent on the extent to which the answering affidavit in each case disturbs the creditor's attempt to equate the market related rental with the rental under the lease agreement. Where no such disturbance takes place, the underlying debt is liquid in character and meets the threshold of a debt "then due" as employed in the sub-section. I can think of no reason why a creditor saddled with an unpaid debt for holding over damages is precluded in these circumstances from invoking section 345(1)(a).

44. The key allegations in support of the applicant's argument in favour of liquidity appear from paragraphs 55 to 58 of the founding affidavit and can be summarised as follows:

44.1. despite the termination of the lease agreement in December 2021, the respondent refused to vacate the property and restore possession thereof to the applicant;

44.2. the respondent is liable to the applicant for holding-over damages for each and every month in which it unlawfully retains possession of the property, such an amount equivalent to the monthly rentals payable under the lease agreement;

44.3. the respondent is thus indebted to the applicant as at 1 September 2024 in the sum of R1 311 517.17 which despite demand, remains due, owing and payable, the computation of which is set out in a schedule annexed to the founding affidavit marked “FA12”.

45. The contractual obligation that underpins the claim is clause 23.2 which obliges the tenant to restore the landlord’s possession upon its termination of the lease agreement, failing which the landlord is entitled to approach court for the recovery of possession and compensation for the tenant’s use and occupation of the property after the date of termination.

46. The applicant correctly identified the measure of its damages to be based on the market related rental as a matter of substantive law. The evidential footing to support the calculation of the market related rental rests on the assumption that it corresponds with the rental specified in the lease agreement. The computation of the damages amount in the schedule proceeds on this basis.

47. The corresponding paragraphs of the answering affidavit (paragraphs 39 to 41) went no further than to challenge the applicant’s right to terminate the lease agreement and to dispute that the debt is readily ascertainable and thus a debt presently due and owing for purposes of section 345(1)(a). Other than to make legal argument, the respondent did not deal with the facts issuably by showing that the rental stipulated in the lease agreement is not market related but instead based on some other figure because of reasons such as market conditions, other economic considerations or features specific to the property itself.

48. It must be remembered that the applicant does not have to prove an entitlement to the full amount of R718 587.60 representing the sum due for the respondent’s unlawful holding over. The reason is that the applicant is not seeking payment in these proceedings which would require proof of a specific amount.

49. These proceedings have a different objective: to bring about a *concursus creditorum* based on the respondent’s deemed inability to pay an amount no

less than R100 which was due and payable. The dispute concerning the precise computation of the applicant's claim will be settled by the liquidators following the lodgement of a claim or by a court if the applicant and the liquidators do not reach consensus on the issue (**Klipeiland** at paragraph 10).

50. Not having disturbed the assumption that the market related rental is the same as the rental stipulated in the lease agreement, I find that the debt for holding over damages is liquid with the result that the applicant has brought itself within the purview of section 345(1)(a) to establish *locus standi*. The same conclusion is true for the service charges.

51. **Hyprop** is also authority for the proposition that ancillary charges are recoverable as damages on motion, provided they are liquidated and have been actually incurred (at paragraph 104). The City of Johannesburg rendered invoices setting out actual meter readings which is indicative of the consumption of these services from November 2022 to September 2024.

52. The respondent tabled no evidence to show that the amounts were incorrectly calculated, nor did it adduce evidence to support the conclusion that the water and electricity to the property was terminated. It was (and remains) in possession of the property over this period and in the absence of concrete evidence to the contrary, it is fair to conclude that the respondent had the benefit of water and electricity over this period.

**Is the Debt *Bona Fide* Disputed on Reasonable Grounds?**

53. As winding-up proceedings are not intended to enforce payment of a disputed debt which is *bona fide* disputed on reasonable grounds, court should decline to place companies into winding-up when the claims are genuinely and reasonably disputed (**Gap Merchant** at paragraph 20 with reference to **Badenhorst** at 347H-384C). *Bona fides* and reasonableness mean different things though (**Standard Bank of SA Ltd v El-Naddaf and Another** 1999 (4) SA 779 (W) at 748G-895B).

54. To determine if the indebtedness is *bona fide* disputed, a dispute does not meet this threshold because of the respondent's mere say-so. Something more is required by showing that the dispute is genuine and based on reasonable and substantial grounds (**Kalil v Decotex (Pty) Ltd** 1988 (1) SA 943 (A) 980; **Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd** 1998 (2) SA 208 (C) 218-219; **Payslip Investment Holdings CC v Y2K Tec Ltd** 2001 (4) SA 781 (CPD).

55. Bald allegations that lack particularity are not likely to persuade a court that the respondent is *bona fide* (**Bravura Capital (Pty) Limited v Drive Path Trade & Invest (Pty) Limited** 2021 JDR 0267 (GJ) at paragraph 27.4). A respondent typically satisfies the threshold by demonstrating that there exists a substantial question regarding whether the dispute is genuinely contested, based on a *bona fide* belief that the debt is not owed (see **Blackman I Commentary on the Companies Act 1973**, Revision Service 9 at ch14-87). It is not necessary to adduce evidence that will be relied on at trial, but only that the dispute is not unreasonable (**Hülse-Reutter** at 219H).

56. The existence of a *bona fide* dispute on reasonable grounds can be disposed of in summary fashion.

57. Although the respondent acknowledges that the lease agreement was properly terminated on 17 December 2021, the answering affidavit fails to plead a justification for the respondent's ongoing occupation of the property without payment of rent thereafter. It has therefore not discharged the onus to show that the indebtedness is disputed on *bona fide* and reasonable grounds (**Kalil** at 980C; **Exploitatie-en Beleggingsmaatschappij Argonauten 11 BV & another v Honig** 2012 (1) SA 247 (SCA) at paragraph 11).

58. The high watermark of its case is to argue that its occupation of the property after 17 December 2021 is lawful (paragraph 52 of the answering affidavit), but this is at best a legal conclusion unsupported by facts and does not address its failure to pay. The right to lawful occupation carries with it the

corresponding obligation to pay rental, unless there are specific facts which excuses the tenant from the obligation to pay rental. The respondent did not meet this case.

59. In the absence of these facts, the respondent has not provided the court with an explanation to justify the failure to make payments for its occupation from November 2022 to September 2024. The lack of a forthright explanation militates against a finding that the indebtedness is *bona fide* disputed.

60. Mr Griesel argued that his client's occupation derived from a prior oral agreement; however, this arrangement ceased to govern the contractual relationship between the parties upon the execution of the lease agreement and does not explain the basis upon which the respondent is entitled to withhold rental. To the extent that the answering affidavit hints at a defence founded on the *exceptio non adimpleti contractus*, the allegations are so thin that they are incapable of raising a cognisable dispute of fact.

61. Mr Griesel's concession from the bar that the respondent accepts that the lease agreement was validly terminated therefore does not assist the respondent. It called for an explanation from his client to justify its failure to make payment for its occupation in the absence of a contractual right that entitled the respondent to remain in occupation. Because of this deficiency, the respondent has failed to adequately demonstrate that the dispute is genuine and based on substantial grounds. On the contrary, it undermines the very concept of a dispute altogether.

62. As another string to its bow, the respondent pins its hopes on a counterclaim it wants to pursue in the pending action based on an alleged oral agreement. It says the following in paragraph 9.4.2 of the answering affidavit:

> "9.4.2 it is apparent that the alleged debt and the quantification thereof, as well as that in the event of the alleged debt existing then it reasonably would be extinguished by the Respondent's Counter-Claim, *in toto*, crisply establishes such alleged debt is generally disputed on *bona fide* grounds."

63. The claim is based on an oral agreement concluded in June or July 2021 that required the applicant to pay all costs occasioned by the construction work the respondent would undertake at the property except for a boundary wall. The respondent alleges that the applicant failed to pay these costs associated with the construction work undertaken at the property as a result of which the respondent suffered damages in the amount of R1 318 562.69.

64. As Blackman notes, the existence of an unliquidated counterclaim does not impact on the creditor's standing to bring wind-up proceedings but may result in a dismissal of the application if it is demonstrated that the claim is based on genuine and substantial grounds (see **Blackman I Commentary on the Companies Act 1973**, Revision Service 9 at ch14-93 and see the authorities at footnote 613).

65. Blackman in the main relies on two Australian State Supreme Court decisions from New South Wales and Western Australia respectively, in support of this proposition (**Re Jeff Reid Pty Ltd** (1980) 5 ACLR 28 31 SC(NSW) and **Mine Exc Pty Ltd v Henderson Drilling Services Pty Ltd** (1989) 1 ACSR 118 123 SC (WA)).

66. The Federal Court of Australia has subsequently endorsed **Reid** in **Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed) v Australian Securities and Investments Commission** [2010] FCAFC 49. North J and Siopis J, writing for the majority, held that a respondent's inability to pay in response to a statutory demand could not be satisfactorily determined when the respondent proffers a counterclaim on substantial grounds that remains unresolved (at paragraph 42).

67. There is an attractive logic to this reasoning, and it may be hard to see how the presumption under section 345(1)(a) will apply when a debt that is due and payable remains unpaid not due to an inability to pay, but because of a substantial counterclaim that matches or exceeds the amount owed.

68. The wholesale adoption of these principles must be guarded against in our

domestic context.

69. The more appropriate approach is to treat the issue within the prism of the court's discretion on whether to grant a winding-up application.

70. The reason is as follows: a defence advanced on the strength of a counterclaim admits the debt which excludes any room to argue that winding-up proceedings are misplaced because the applicant seeks to enforce a disputed debt; in the face of an undisputed indebtedness, the respondent is then required to show why the court should not exercise its discretion in favour of the grant of a winding-up order (see **Ter Beek v United Resources CC and Another** 1997 (3) SA 315 (C) at 333H to 334C and the authorities cited therein).

71. Unlike its Australian counterpart, the Supreme Court of Appeal does not treat a counterclaim which, if established will lead to the discharge of the creditor's claim by set-off, as sufficient on its own to refuse the grant of a winding-up order. It is but one of the factors the court will consider in the exercise of its discretion as to whether to grant the winding-up order (**Afgri Operations Limited v Hamba Fleet (Pty) Limited** 2022 (1) SA 91 (SCA) at paragraph 7 read with paragraph 18 where the court identified various factors including the illiquidity of the claim, the failure to respond to the section 345 demand and the lack of facts to suggest that the respondent is solvent; see also **Grenco Projects and Construction CC v Hermanys Esplanade Dev Co (Pty) Ltd** 2024 (6) SA 500 (WCC) at paragraphs 95 to 98).

72. Since the court's discretion to deny a final winding-up order is narrow when an unpaid creditor seeks such relief (see **Afgri** at paragraph 16), it is incumbent upon the respondent to address the pertinent factors that weigh against the court exercising its discretion in the applicant's favour.

73. As far as the counterclaim is concerned, the facts do not support the exercise of my discretion in favour of the respondent. Not only is the claim illiquid, but I am unable to find that the counterclaim is a genuine one prosecuted with

the intention of vindicating matters of high principle. As I show below, there are no facts to suggest that the respondent is solvent. To the extent that the counterclaim is later found to be viable, it will be open to the appointed liquidators to pursue the claim, and this applies with equal force to the respondent's application for the winding-up of the applicant brought under case number 2023/085604.

74. The reasons for my scepticism about the counterclaim are as follows.

75. By virtue of its illiquid nature, no set-off can be applied that would result in the extinguishment of the debt owed to the applicant (**Capricorn Beach Home Owners Association v Potgieter t/a Nilands and Another** 2014 (1) SA 46 (SCA) at [13] citing **Schierhout v Union Government (Minister of Justice)** 1926 AD 286 at 289).

76. The oral agreement that underpins the counterclaim directly conflicts with clause 1.32 of the lease agreement. It precludes the making of any structural changes with any upgrades not permitted in the absence of the applicant's consent. When read with the non-variation clause found at clause 32.1, it is unlikely that the parties would have concluded an oral agreement that conflicts with clause 1.32. Even if this had been the case, the oral agreement was reached some months prior to the lease agreement and was superseded by the lease agreement which subsequently became the exclusive record of the parties' understanding regarding its subject matter (clause 32.2), thus rendering it impossible for any oral agreement to coexist with the lease agreement.

77. As for the service charges, the respondent has not showed that their computation is incorrect, but even if one is charitable and prepared to accept that there may have been some billing errors, there is no doubt that water and electricity was consumed on the property from November 2022 to September 2024 for which the respondent is liable. This is notwithstanding periods of interruption (or disconnection) which were not particularised with any degree of tolerable satisfaction.

78. There is accordingly a debt that is due and owing to the applicant for holding-over damages and service charges. The applicant is not required to prove the full extent of the debt for purposes of placing reliance on section 345(1)(a). What matters is that the debt exceeds the statutory minimum, which I am satisfied is the case.

79. The respondent has in the circumstances failed to discharge the onus of demonstrating that its indebtedness to the applicant has indeed been disputed on *bona fide* and reasonable grounds. My conclusion eliminates the need to decide if the applicant engaged in abuse of process.

**The Respondent's Insolvency**

80. There are various ways to prove a company's inability to pay its debts. Evidence that a company has failed on demand to pay a debt which is due is cogent *prima facie* proof of inability to pay its debts. The underlying rationale stems from the fact that a concern without financial difficulties should be capable of meeting its obligations using current revenue or readily available resources (**Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd** 1962 (4) SA 593 (D) at 597).

81. Armed with the presumption that the respondent is unable to pay its debts following a statutory demand which did not yield a positive result, the respondent retains the right to assail the conclusion of law that flows from the failure to properly respond to a statutory demand (**Ter Beek** at 332C; **Body Corporate of Fish Eagle v Group Twelve Investment** 2003 (5) SA 414 (W) at 428B-C). The question involves an analysis of the facts that either establish or refute its solvency.

82. The SCA has traditionally accepted that the best barometer to determine an inability to pay is commercial insolvency: the inability of a company to pay its debts as they fall due (**Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd** 2014 (2) SA 518 (SCA) at paragraphs 16 to 18). If a company is commercially insolvent, it is liable to be wound-up in terms of the provisions

of the 1973 Companies Act (**Murray and Others NNO v African Global Holdings (Pty) Ltd and Others** 2020 (2) SA 93 (SCA) at paragraph 23).

83. However, the SCA has more recently set its face against the employment of commercial insolvency as the sole measure of a company's inability to pay its debts as appears from the majority judgment of Norman AJA (Mokgohloa ADP and Mocumie JA concurring) in **Selective Empowerment Investments Ltd v Companies and Intellectual Property Commission** 2025 (6) SA 496 (SCA) The majority held that in determining whether a company can pay its debts, it demands an assessment of its assets and liabilities (i.e. factual solvency) <u>and</u> not merely an interrogation of whether it is commercially insolvent (at paragraphs 136 and 144).

84. The minority judgment delivered by Koen JA, with Unterhalter JA concurring, found that commercial insolvency remains sufficient to justify a winding-up of a company (see paragraph 35). It lies beyond my scope to decide the issue, and it may be necessary for the SCA to revisit the question in time to come. It will suffice for present purposes to consider the facts with both tests in mind.

85. Turning to commercial insolvency first, the primary question is whether the respondent has assets that are readily realisable to meet its liabilities as they fall due in the ordinary course of business (**Murray** at paragraph 28). It includes cash, banking facilities such as an overdraft, book debts or readily tradeable assets such as marketable securities that can be realised in quick time to generate cash for purposes of settling debts. If a company lacks access to these assets or does not own them, it is unable to pay its debts as they fall due.

86. During the hearing Mr Griesel sought the court's leave to file supplementary heads of argument on the question of the respondent's commercial solvency. After granting the request, I allowed the applicant to submit additional heads of argument in response. However, Mr Griesel's heads of argument contained several submissions that amounted to evidence that would have been more appropriately presented in a supplementary affidavit. No

application for leave was made to file a supplementary affidavit, and I am not prepared to have regard to these submissions to the extent that they are intended to place new facts before me not contained in the respondent's answering affidavit.

87. The answering affidavit presents no substantive evidence indicating the respondent's commercial solvency, other than a brief and unsupported assertion to that effect. It was necessary for the respondent to take the court into its confidence by placing evidential material of a financial nature before the court to show that it has cash in hand, or other assets that are readily tradeable to generate cash for purposes of meeting its ongoing liabilities as and when they fall due. While reference is made in paragraph 10.3 of the answering affidavit to the applicant's assets, they are not readily realisable and do not support the respondent's commercial solvency.

88. Audited financial statements are typically helpful in proving commercial solvency (**Storti v Nugent and Others** 2001 (3) SA 783 (W) at 808 H). They will presumably reflect a balance sheet that records the company's available cash reserves and a cash statement that speaks directly to the issue. No financial statements were presented. In the absence of financial statements, management accounts may potentially shed light on the issue, but these were not provided either. No explanation was given for why these records were not made available. The inference is inescapable that their disclosure would not have supported the respondent's commercial solvency.

89. Because of this, and the absence of supporting evidence:

89.1. it is difficult to assign any weight to statements in the respondent's answering affidavit that assert commercial solvency;

89.2. the allegations in the respondent's supplementary heads of arguments denying that it is commercially insolvent and claiming that its business operations are still "active and viable" offer no assistance to the respondent's case.

90. It does not assist the respondent either to argue that its payment of R488 469.04 on 8 February 2024 in settlement of the historic indebtedness is indicative of its commercial solvency. It does not shed light on the respondent's more recent or current financial position, but the amount is in any event significantly less than the indebtedness the applicant alleges to be outstanding. The respondent's offer to purchase the property does not, in itself, demonstrate commercial solvency, as it does not necessarily indicate the availability of sufficient cash resources to complete the transaction.

91. I am in the circumstances unable to find that the respondent is commercially solvent with my conclusion making it unnecessary to consider the import of the *nulla bona* return on these proceedings.

92. When one interrogates the respondent's case on factual solvency, regard must be had to the following allegations in the answering affidavit:

"10.2 Notwithstanding the afore-going, the Respondent has net assets which significantly exceed the value of the Applicant's purported debt and it is able to pay the disputed debt should same be proven to exist.

"10.3 The Respondent holds, *inter alia*, the following assets, namely:

10.3.1 Immovable property better known as No. 1[...] H[...] Avenue, Northcliff with an approximate value of R35,000,000.00 with a bond registered over the property in the approximate amount of R10,000,000.00.

10.3.2 Mercedes G Class 63 with an approximate value of R4,000,000.00, with an [sic] hire purchase agreement in respect of the vehicle in the approximate amount of R2,800,000.00.

10.3.3 It is already established from the value of these assets listed herein that the assets of the Respondent far exceed the value of the Applicants [sic] alleged claim and in the premises the Respondent is able to demonstrate its **factual solvency**." (emphasis added)

93. No evidence has been presented to establish the respondent's ownership of the motor vehicle, nor is it possible to determine its current value given the outstanding financing amount of two million rand. No facts are alleged to show that the instalments are being paid on a monthly basis.

94. It is not in dispute that the respondent is the owner of the property located at No. 1[...], H[...] Avenue. However, there is no evidence provided to support that the actual market value of the property is R35 million.

95. One would have expected more cogent evidence on this score, particularly since the valuation of non-cash assets is difficult to determine and highly subjective. Courts remain vigilant to the possibility that debtors may overstate the value of such assets to create an appearance of solvency (**Boschpoort Ondernemings**, paragraph 7). Given these considerations, I give the figure no weight.

96. The respondent ignores that the property is mortgaged to Standard Bank and Standard Bank Guarantee Company for R16 million. Its answering affidavit made no mention of the fact that Standard Bank Guarantee instituted proceedings against the respondent claiming cancellation of the loan agreement and payment of R8 262 726.64 as a result of the respondent's default of its monthly instalment payment obligations. The applicant brought these facts to the attention of the court in reply to respond to the respondent's allegations that the property is mortgaged.

97. The respondent's supplementary heads of argument sought to meet these allegations in reply by stating that they constitute new matter with the result that the replying affidavit should be struck out.

98. I see no basis to do so. The rule that a party is precluded from raising new matter in reply is not immutable and the law reports are replete with cases where the rule has been relaxed. It is not necessary to do so in this instance since these allegations are not strictly speaking new matter.

99. The respondent could also have requested leave to file a supplementary answering affidavit to address these matters. It chose not to and the inference is justified that it had no grounds to dispute these facts. In sum, I find that the allegations in the answering affidavit do not show the respondent's assets are greater than its liabilities.

**Conclusion**

100. I am satisfied that on an assessment of the facts, there are no genuine factual disputes concerning the existence of the applicant's claim with the result that the debt is not *bona fide* disputed on reasonable grounds.

101. For all the reasons stated, the applicant has made out a proper case for the final winding-up of the respondent and I make an order in the following terms:

101.1. The respondent is placed under final winding-up in the hands of the Master of the High Court.

101.2. The costs of the application are to be costs in the winding-up of the respondent.

**C BESTER**
**ACTING JUDGE OF THE HIGH COURT**
**JOHANNESBURG**

Heard: 6 November 2025

Supplementary Submissions Received: 10 November and 13 November 2025

Delivered: 26 February 2026

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