REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2025-125474

(1) REPORTABLE: NO/~~YES~~
(2) OF INTEREST TO OTHER JUDGES: NO/~~YES~~
(3) REVISED: ~~NO~~/YES

[redacted]

....
SIGNATURE   DATE 26 February 2026

In the matter between:

PALADAR RESOURCES (PTY) LTD — Applicant
(Registration number: 2016/325606/07)

and

CONNAUGHT MINING (PTY) LTD — Respondent
(Registration number: 2020/910735/07)

JUDGMENT

STAIS AJ:

This judgment is handed down electronically by circulating it to the parties' representatives by email and by uploading on CaseLines.

[1] This is an application for the provisional winding up of the respondent in terms of the Companies Act, 2008 ("Act"), alternatively the Companies Act, 1973 ("1973 Act").

[2] During argument, Ms Acker (who appeared for the applicant) circumscribed the causes for the relief sought under the 1973 Act to the respondent's inability to pay its debts [s 344(f)], alternatively that it is just and equitable that it be wound up [s 344(h)]. She submitted in the further alternative, in the event the respondent was not insolvent, that it falls to be wound up in terms of the Act for the reason that it was just and equitable [s 81(1)(c)(ii) and (d)(iii)], and in this regard the court was requested to specifically consider factors that would otherwise lend independent support under the Act for a winding up by reason of fraud [s 81(1)(e)(i)] and misapplication or wasting of assets [s 81(1)(e)(ii)]. A further cause, that of deadlock [s 81(1)(d)(i) and (ii)], was appropriately abandoned.

[3] I am specifically asked to determine (a) whether the applicant is a creditor of the respondent; (b) whether the respondent is unable to pay its debts; and (c) whether it is just and equitable to wind up the respondent? I shall consider each in turn.

[4] But before doing so, I must deal with the concern expressed by Mr Van den Bogert (who appeared with Mr Steyn, for the respondent) that the applicant cannot have it both ways by relying on the solvency alternatively insolvency of the respondent, and seek relief under both the Act and the 1973 Act. The main relief was sought under the Act and therefore, so he argued, the respondent was entitled to accept that it was common cause that the respondent is solvent. To my mind the argument loses sight of the fact that the applicant relies alternatively on the solvency or insolvency of the respondent. I need therefore say no more on the subject than refer to the approval given to this approach in *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA).

[5] It is common cause that the applicant is a shareholder of the respondent. It has the necessary standing to bring the application for a winding up on the grounds

of both an inability to pay in terms of s 344(f) of the 1973 Act, and also on just and equitable grounds in terms of s 81(d)(ii) of the Act and s 344(h) of the 1973 Act.

Is the applicant a creditor of the respondent?

[6] The applicant alleges that the respondent is indebted to it in the sum of R5,500,000.00 arising from a written loan agreement ("Loan Agreement") concluded on 22 September 2022. The respondent admits the Loan Agreement; admits that the applicant advanced it the sum of R2,750,000.00; and admits that it was agreed that the respondent would repay R5,500,000.00 to the applicant. However, it disputes its indebtedness arising from the Loan Agreement on several grounds, two of which satisfy me that the debt is disputed on *bona fide* and reasonable grounds, and either of which would constitute a good defence to the claim.

[7] The first is the undisputed fact, on the papers before me, that the applicant has not complied with the provisions of a *lex commissoria* contained in the Loan Agreement. Although this dispute may not affect the applicant's status as a contingent creditor, the absence of lawful demand goes directly to the question whether the debt is due and payable. It also raises the question whether the loan was valid and extant (the respondent alleges that it was fictitious and that no demand has been made for payment since inception of the Loan Agreement). I shall revert to this issue when I deal with the applicant's alleged inability to pay its debts.

[8] The second is the respondent's contention that the claim will likely have prescribed before the hearing. Irrespective of whether I consider this to be a question of law or by applying the Badenhorst principle, it appears from the affidavits before me that there may be merit to this defence [see the first and third judgments in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC)]. There is no suggestion that summons for payment of the loan has been served on the respondent.

[9] The Loan Agreement provides that the loan was to be repaid "*as may be agreed from time to time ... but on or before the termination date.*" The termination date was defined as the discharge date or 6 months from the affective date, *i.e.*, in either event when the advance was made in or about October 2022. Absent agreement to extend the payment date and absent a lawful demand, Mr Van den Bogert may be correct in his submission that the debt has become prescribed. But the submission is not without certain concerns that prevent me from making a definitive finding in this regard.

[10] In the affidavits before me, the applicant's bald allegation that the respondent failed to make payment pursuant to a proper demand was met with the answer that the applicant had "*not demanded any payments*" under the Loan Agreement. This response stands factually uncontradicted by the absence of any supporting facts or of any particularity adduced in the replying affidavit. Mr Van den Bogert pointed out that the applicant failed to establish that it had complied with the terms of the *lex commissoria*. It being trite law that a *lex commissori* requires strict compliance with its terms [*Rautenbach v Venner* 1928 TPD 26 at 30]. But none of this is decisive of this issue.

[11] The affidavits before me referred to a recent judgment by Makume J (as did counsel in their arguments) that was delivered in an earlier application brought by the applicant and its former director (Mr Sharp, who was at the time also a director of the respondent) to address certain governance issues and to have the respondent placed in business rescue. I refer to *Sharp & Anor v Buthelezi & Others* c/no 2024-088147, in which the applicant herein was the second applicant and the respondent herein was cited as the fifth respondent – "Sharp application". To allow me to consider the context in which the referenced *dicta* in Makume J's judgment were made, I requested, and was granted, access to the Sharp application on CaseLines. I found an unexplained anomaly. The affidavits filed of record in the Sharp application disclosed the undisputed fact that the applicant had on 25 July 2024 made a demand on the respondent in terms of the *lex commissoria* contained in the Loan Agreement [founding affidavit 02-48 para 119, FA23 02-151, answering affidavit 02-261 para 348]. I hasten to add that counsel who appeared before me were not the same counsel

who argued the Sharp application before Makume J. But the ineluctable conclusion is that I am not in a position to divine the reasons for the respondent's emphatic denial, in its affidavits before me, that the applicant had made "*any demand*". The answering affidavit in the Sharp application was deposed to by NI Buthelezi ("Ms Buthelezi"), who deposed to a confirmatory affidavit in the present matter. She may have an explanation for the variance in the respondent's version.

[12] The aforementioned raise material disputes of fact incapable of being resolved without hearing *viva voce* evidence. In the circumstances, it is not necessary to consider the other defences to the claim, which I found unconvincing. Suffice it to say that the dispute as to the existence of the debt cannot be resolved on the affidavits and, all things otherwise being equal, I may have referred it to evidence [*Kalil v Decotex (Pty) Ltd & Anor* 1988 (1) SA 943 (AD) at 981D-J]. However, for reasons that follow, it is not necessary to do so.

<u>Inability to pay debts</u>

[13] I accept Ms Acker's argument that a company's failure to pay on demand a debt that is due and payable, may be *prima facie* proof of an inability to pay its debts on demand. The question, though, is whether this is an allegation that can fairly be made against the respondent on the facts before me.

[14] An applicant must make out its case in the founding affidavit [*My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) at paragraph 177]. The highwater mark as to the respondent's inability to pay is the allegation that the applicant does "*not know whether the respondent is insolvent*", but that there is "*doubt that it is solvent*". No cogent evidence was produced to support this allegation.

[15] On the evidence before me, I must perforce accept that the applicant did not make a lawful demand on the respondent for payment of the loan or, at best for the applicant, that there is a material dispute of fact on this issue which cannot be resolved on the papers before me. In either event, I cannot take it as proven

that the respondent is unable to pay the loan amount, which is the only source of the respondent's alleged insolvency relied on by the applicant.

[16] There are various allegations to the effect that the respondent has lost, wasted or misspent money. None of these allegations provide sufficient reason to find that the respondent is insolvent. The allegations are disputed by counter allegations, often with reference to documentary and other supporting evidence. Despite the applicant's allegations of mismanagement and financial concerns, there is ample evidence that the respondent continues to trade. And that it does so successfully and profitably. The founding affidavit speaks of anticipated revenue from a specific project of R16 million which the applicant says contradicts an earlier estimate of R50 million, and it criticises a misappropriation of coal stock sales of R10½ million. Even the allegation that "*theres a hole of R30m in the project and they need to optimise it to prevent a loss* (sic)", drew no more than a mild reaction from the applicant's director at the time: "*Sounds interesting. Can you share some facts?*". There is nothing to gainsay the respondent's version that R30 million was not lost. I also cannot ignore the finding by Makume J that the applicant's financial position was healthier than before the governance disputes and that the respondent was not financially distressed. The applicant has not produced evidence to establish that the respondent's financial status has materially deteriorated since Makume J's judgment.

[17] The applicant has failed to establish, even *prima facie*, that the respondent is factually or commercially insolvent.

<u>Just and equitable</u>

[18] What remains, is to consider whether it is just and equitable for the respondent to be wound up. It matters not whether in terms of the Act or the 1973 Act.

[19] The applicant's complaints are based on friction between shareholders, an alleged lack of financial transparency and a fraud perpetrated on the applicant. These issues require context.

[20] In 2020, Mr Sharp was the sole shareholder of the applicant, and the latter was the sole shareholder of the respondent. Mr Sharp was at the time the only director of both the applicant and the respondent. The respondent acquired a mining right in 2022. By March 2023 Muziwen Holdings (Pty) Ltd ("Muziwen") had acquired 40% of the applicant's shareholding in the respondent and was represented on the latter's board by its sole shareholder and director, Ms Buthelezi. By March 2023 Muziwen had acquired a further 20% shareholding from the applicant and became the majority shareholder (60%) of the respondent. The balance (40%) remained with the applicant. Mr Sharp was still the applicant's sole director and remained on the respondent's board, together with Ms Buthelezi. Muziwen subsequently appointed further directors to the respondent's board and purported to remove Mr Sharp as a director, all of which resulted in a strained business relationship between Mr Sharp and Muziwen's directors on the respondent's board.

[21] These were the prevailing circumstances when a company owned by Mr Dovey (the deponent to the applicant's affidavits herein) acquired the applicant in mid-2025. Two months later Mr Sharp (supported by Mr Dovey) launched the Sharp application. The purpose of the Sharp application was threefold – removing Muziwen's newly-appointed directors, setting aside Mr Sharp's removal and placing the respondent in rescue in terms of Chapter 6 of the Act. Makube J endorsed the new appointments, reversed the removal of Mr Sharp and refused to place the respondent in rescue.

[22] Mr Sharp has resigned from the respondent's board. He was not substituted by Mr Dovey, who has never served on the board. There are no disputes as between the respondent's directors that are relevant to the relief sought herein. The disputes do not relate to the functioning of the respondent's board.

[23] The applicant's principle complaint is that the respondent's board (more specifically Ms Buthelezi, a director and chief executive officer) refuses to provide the applicant with financial information. But it must be borne in mind that the applicant is a minority shareholder that is not represented on the board. Mr Dovey, representing the applicant, is entitled to the limited financial (and other)

information identified in s 26(1) of the Act or as provided for in the respondent's memorandum of incorporation ("MOI"). But he sought, and claimed an entitlement, to be granted immediate and full access to the respondent's bank statements and management accounts, quantities of coal stock, and details of any sales and potential sales. At no time was any reference made to the MOI or to s 26 of the Act or to any other right that would entitle the applicant to be granted access to such detailed information as he sought about the respondent's "*financial affairs*".

[24] The respondent does not have recent audited financial statements. But this fact was not raised specifically in support of the just and equitable relief. It is a matter to be resolved as between shareholders in terms of the MOI. I am not prepared to wind up the respondent at the instance of the applicant merely because the board failed to attend to the preparation of audited financial statements. The applicant was until shortly before this application represented on the board by Mr Sharp and is not innocent of this failure.

[25] The applicant also raises an instance of potential fraud arising from an alleged fraudulent representation made to the applicant involving a document from the Department of Mineral Resources and Energy ("DMRE"). The document required of the applicant to transfer 20% of its shares in the respondent to Muziwen. It is not clear to me who allegedly made the representation. There is no evidence supporting the allegation that Ms Buthelezi was the author of the DMRE document. Further, an expert report by a questioned document examiner cautions that the original wet ink signed document is required to determine the authenticity of the document. In any event, and even if I am able to resolve the dispute around this document, the applicant accepts that it has a claim against Muziwen arising from the alleged fraud. It is not suggested that the fraud relates to the running or management of the respondent. I am not prepared, in these circumstances, to wind up the respondent on the basis of an unproven fraud that that can be determined in litigation between the two shareholders.

[26] No further detail was presented of the alleged "*sinister threats*" Ms Buthelezi allegedly made to Mr Dovey. Save for the respondent's refusal to furnish the information that the applicant requested, there is no specific evidence of friction between shareholders. Certainly, none that would justify a winding up of the respondent.

[27] A further aspect that causes me concern, is the fact that the applicant fears that a final order would put at risk the mining right that only expires in four years' time. As a consequence, the respondent (or, ironically, the applicant) would continuously be required to justify every few weeks on each consecutive return day, for several years, why the provisional order should not be made final. I cannot permit the drastic consequences that will be brought about over the long term by the respondent's changed status, *i.e.*, loss of control by directors, impact on contracts and the effect on the respondent's business and trading ability.

[28] Mr Van den Bogert submitted that winding up is a drastic measure not justified by the facts, and, in any event, that the applicant has alternative remedies available to it *inter alia* as provided for in ss 161, 162 and 163 of the Act. I agree.

[29] Attempting to justify the winding up the respondent on the grounds of it being just and equitable, was ill-advised.

[30] The applicant failed to establish that the loan debt was due and payable, that the respondent is insolvent or unable to pay the loan debt, or that it is just and equitable that the respondent be provisionally wound up.

[31] I do not agree with Mr Van den Bogert that my order calls for a punitive costs award, but I do believe that the respondent was justified in appointing two counsel.

[32] I grant the following order:

1. The application is dismissed.

2. The applicant shall pay the respondent's costs on scale C, such costs to include the costs of two counsel (one being a senior counsel).

[redacted]

P STAIS
Acting Judge of the High Court
Johannesburg

APPEARANCES:

Applicant:	L Acker
Instructed by:	Thomson Wilks Attorneys
Respondents:	D van den Bogert SC, with JA Steyn
Instructed by:	Malherbe Roos Attorneys
Date of hearing:	10 February 2026
Date of judgment:	26 February 2026