

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

DATE

SIGNATURE

Case No.: 2026-028294

In the matter between:

ASHLEY ERASMUS First Applicant

EX SOLUTIO ENGINEERING (PTY) LIMITED

(in provisional liquidation) Second Applicant

and

NEDBANK LIMITED First Respondent

GERT LOUWRENS STEYN DE WET N.O.

AVIWE NTANDAZO NDYAMARA N.O.

(joint provisional liquidators of the Second Applicant) Second Respondents

THE SHERIFF OF THE HIGH COURT Third Respondent

RAMOS ELECTRONIC SERVICES CC Fourth Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG Fifth Respondent

JUDGMENT

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

Gilbert AJ:

1. The first applicant is the chief executive officer and a shareholder of the second applicant (“the company”). The company was placed under provisional winding-up on 10 November 2025 because of an inability to pay its debts, with a return date of 4 May 2026. Provisional liquidators were appointed on 19 December 2025 and who are cited as the second respondents.
2. On or about 3 February 2026 the provisional liquidators in the execution of their duties took steps which resulted in a freeze of the company’s bank account with the first respondent bank. The first applicant became aware of this on 4 February 2026 and so approaches court on an urgent basis seeking that the hold on the company’s bank account be uplifted and that any monies that may have been transferred from that bank account and which were being held in suspense by the first respondent bank be returned to that bank account. That relief is described in the amended notice of motion to operate *pendente lite* until the finalisation of the liquidation proceedings on the return date in May 2026.
3. It is clear from the founding affidavit and the submissions made on the first applicant’s behalf during argument that the purpose of the relief is to restore control of the bank account to the company’s directors and in

particular the first applicant so as to enable the company to continue to trade until the liquidation application is finalised on the return date. The first applicant asserts that he needs to make use of the funds on behalf of the company to transact, such as to pay the South African Revenue Services, employees, suppliers and others. The first applicant asserts that without such monies the company cannot continue to trade as the company does not have access to its funds as they had been frozen. The first applicant argues that this is necessary to allow the business of the company to trade and so as to preserve the company pending the return date.

4. It was at the instance of the fourth respondent as creditor for some R2.8 million that the company was placed under provisional winding-up. It is the fourth respondent who has opposed these urgent proceedings. The provisional liquidators as the second respondents delivered reports setting out their position and that they abide the decision of the court.
5. Amongst those that the first applicant intends paying on behalf of the company if the urgent relief is granted and monies are unfrozen is the fourth respondent in an amount of some R1.4 million. The first applicant disputes on behalf of the company that the company is indebted to the fourth respondent other than for that amount and that by paying the fourth respondent this amount, this would affect the company's prospects of resisting the confirmation of the provisional order of winding-up on the return date.

6. What the first applicant effectively seeks is that the court permit him to continue to operate the company's bank accounts and to make various dispositions of the company's property in the form of the funds to a range of persons.
7. It is, or at least should be, immediately evident that such relief would be contrary to, if not subversive of, the basic principle underlying insolvency law that upon the grant of a sequestration or winding-up order that a *concursum creditorum* is established, which has the effect that nothing may be done that would result in the diminishing of the assets in the insolvent estate or which would prejudice the rights of creditors. As held in the *locus classicus* of *Walker v Syfret* N.O. 1911 AD 141 per De Villiers CJ at 160, "*the effect of a winding-up order is to establish a concursus creditorum, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors*" and, at page 166, "[t]he sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as existed at the issue of the order".
8. Unsurprisingly, the primary basis of opposition by the fourth respondent was that the relief sought by the first applicant is legally incompetent. Also, not surprisingly, the provisional liquidators in their report raised the same concerns.

9. The various authorities have been usefully collected by the fourth respondent's attorney, who appeared on behalf of the fourth respondent, in his heads of argument. I do not refer to all these authorities as the principles are trite.

10. The Supreme Court of Appeal is *Pride Milling Co (Pty) Ltd v Bekker N.O. and another* 2022 (2) SA 410 (SCA) at paragraph 18 referred to the authors' M.S. Blackman *et al* in their *Commentary on the Companies Act* that "*the court has no power to permit a company being wound up to make dispositions of its assets. After a winding-up order has been granted the court may validate dispositions made before the provisional winding up order was granted, but it cannot validate dispositions made after that order*" (my emphasis). Such discretion as a court may have to validate payments, as provided for in section 341(2) of the Companies Act, 1973 relates to those dispositions that were made after the retrospective deemed date of commencement of the winding-up (which in terms of section 348 of the Companies Act, 1973 is when the application for winding-up was presented to court) and the grant of the winding-up order (which is the provisional order where such an order precedes a final order). The court has no discretion or power to validate payments made after the advent of the *concurso creditorum* that arises upon the grant of the liquidation order. Axiomatically the court has no discretion or power to grant relief authorising such payments in anticipation of those payments being made after the advent of the *concurso creditorum*

11. But this is precisely what the first applicant in this matter seeks, namely that the court permit him to continue to operate the company's bank account and make a host of post-*conkursus* dispositions.
12. The first applicant does not seek to preserve the funds in the company's bank accounts pending the return date but to make use of those funds in transacting on behalf of the company.¹ Although styled as interim relief, the relief, if granted, is not interim in effect.
13. Nevertheless, assuming in favour of the first applicant that a *prima facie* right would suffice, I enquired of the first applicant's counsel as to the jurisprudential basis upon which a court can grant an order permitting the first applicant to continue to operate the company's bank account and make post-*conkursus* dispositions. This is especially so as the first applicant's counsel had regard to the trite authorities and principles set out in the fourth respondent's heads of argument and so was aware of the fundamental difficulties that the first applicant faced in establishing a *prima facie* right to the *pendente lite* interdictory-based relief that he sought.
14. The asserted 'right' as described in the applicants' founding affidavit and/or heads of argument is "*the right of the second applicant to in the interim trade as a business and an entity*", the right "*to operate a bank account so that it may properly conduct the business,*" the right of "access

¹ This appears from the relief sought paragraph 3 of the first applicant's amended notice of motion, which is the hold on the company's bank account being uplifted.

to its bank account so that it may trade accordingly,” and similarly described rights.

15. Of course, the company, being in provisional liquidation, has no such rights at the instance of its directorship to effectively continue ‘business as usual’. The intended effect of the advent of the *conkursus* is that the company no longer has these rights.

16. As pointed out by the fourth respondent’s attorney, in *Secretary for Customs and Excise v Millman* N.O. 1975 (3) SA 544 (A) at 552H Botha JA said “[u]pon the compulsory winding-up of a company its directors cease to function as such ... and they are, therefore, deprived of their control on behalf of the company of the property of the company which is then deemed to be in the custody or control of the Master or liquidator”. The second respondent’s attorney also referred to the more recent decision in *GCC Engineering (Pty) Ltd and others v Maroos and others* 2019 (2) SA 379 (A) at para 21 where the Supreme Court of Appeal held that “the order placing the company under winding up is still in place and has not been set aside. On the granting of the winding-up order, the directors of the company cease to function as directors and the property of the company falls under the control of the Master or the appointed liquidators. The directors of the company in liquidation have been stripped of their control and management of the company placed in winding-up by the court. There is no legal provision either statutory or at common law that sanctions the re-vesting of control and management of the company in liquidation to the director of the said company” (my emphasis).

17. In the present instance the relief that the first applicant seeks is to effectively restore control and management of the company under winding-up to its directors, and more specifically to operate the bank account and to make payments from that bank account. The right asserted by the first applicant simply does not exist.
18. When the first applicant's counsel was pressed on this, the right changed somewhat to the 'right' to protect the business of the company in the interim pending the return date so as not to render nugatory the relief that may be granted on the return date, particularly the discharge of the provisional order. In a subsequent explanatory affidavit filed by the first applicant's attorneys of record referred to below, this 'right' was echoed.
19. The first applicant's argument is that should it transpire that the provisional order was not confirmed on the return date and so the company was discharged from winding-up, there would be nothing left of the company's business and so the company had the right to approach court in the interim to obtain relief to ensure that should the company succeed in discharging the provisional order on the return date, there still was a business left.
20. The difficulty with this argument is that conversely if the provisional order is confirmed and a final order of winding-up is granted, then a whole range of dispositions would have taken place in the interim. All those persons who received payment would have received payment when they should

not have received payment.² Short shrift was given to this argument, as highlighted by the fourth respondent's attorney, by the Supreme Court of Appeal in *Pride Milling* above in paragraph 21:

“Counsel for Pride Milling sought to persuade us that Excellent Petroleum is wrong and urged us to overrule it. The foundation for this contention was that, when a court grants a provisional winding-up order, it still retains the power on the return date of such order to discharge the provisional order. In that event, so counsel argued, the provisional order would be rendered ineffectual, i.e. as if it had never been granted in the first place. The status quo ante would thus be restored. This argument is plainly unsustainable for it contains the seeds of its own destruction. Fundamentally, its flaw is that it seeks to compare the position when there is a winding-up with the position when there is not. These are no more alike than the proverbial apples and pears.”

21. During argument, first applicant's counsel, for the first time, sought to find some refuge in section 354(1) of the Companies Act, 1973, argued that as section permitted a court to stay winding-up proceedings, this provided some or other support for the court to do so in the present circumstances. This was repeated in the subsequent explanatory affidavit and further submissions filed by the first applicant's attorneys of record referred to below.

² Leaving aside whether even if the provisional order is discharged, that could retrospectively validate payments that were invalid at the time they were made.

22. Section 354(1) provides '*[t]he Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up order ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit*'. But, as pointed out by the fourth respondent's attorneys in his further submissions, no mention was made of section 354(1) in the first applicant's founding affidavit or even in his counsel's heads of argument.
23. Similarly the first applicant, for the first time, in argument and then his subsequent explanatory affidavit and submissions sought to find support in Uniform Rule 45A, which provides that "*[t]he court may, on application, suspend the operation and execution of any order for such period as it may deem fit...*".
24. That in particular circumstances the court may stay winding up proceedings in terms of section 354 or suspend the operation and execution of the order in terms of Uniform Rule 45A does not provide a basis for the relief sought by the first applicant styled as interim interdictory relief, where the relief advanced in the affidavits is not based on those provisions.

25. On the basis asserted by the first applicant in his affidavits in these proceedings, there is no right to support the relief that the first applicant seeks, even *prima facie*.
26. The first applicant also has difficulties on the other requirements for interim relief.
27. As to the requirement of the absence of any other satisfactory relief, I engaged with the first applicant's counsel why the return date had not been anticipated. No persuasive answer was forthcoming other than such anticipation of the return date may shortly be forthcoming. I raised with the first applicant's counsel that if the first applicant was concerned with preserving the business of the Company in the meanwhile, steps could have been taken long since to anticipate the return date, presuming a case could be made out to do so. The company has been under provisional winding up since 10 November 2025. The response was that there was no need to do so as the bank accounts were only frozen in early February 2026, and that until then the first applicant was able to continue to conduct the company's bank account. I raised my concern that in doing so the first applicant was acting contrary to the law in that once the provisional winding-up order was granted, he no longer had any authority or capacity to transact on behalf of the company, as set out above. It appeared to me that the first applicant simply went about with business as usual, including transacting on the company's bank account, as if no provisional order had been granted and even though he has throughout been represented by attorneys. It seemed to me that it was only when

the bank account was frozen, which the provisional liquidators were entitled to do in discharging their duties to take control of the assets of the company, that the first applicant was stirred into any action.

28. I also raised with the first applicant's counsel that if there was a business worth saving, the first applicant could have been far more forthcoming in cooperating with the provisional liquidators to seek of them a solution, such as an exercise and/or extension of their powers to carry on the business of the Company. Instead the first applicant appeared to adopt the position that he was entitled to conduct the business himself and operate its bank accounts. As it would transpire, as will appear below, the first applicant was able to reach some or other arrangement once he and his attorney met with one of the provisional liquidators.
29. That the first applicant did nothing until the bank accounts were frozen in early February 2026 would have justified a refusal to find that the matter was urgent and so to strike the matter from the roll but I rather prefer, in this instance, to deal with the application on its substantive merits, or lack thereof.
30. As to the requirement of a well-grounded apprehension of irreparable harm of the interim relief is not granted and the provisional order is discharged on the return date, I refer to the rejection of this argument in *Pride Milling* above.
31. As to the requirement of where the balance of convenience lies for purposes of an interim interdict, I refer to what has already been set out

above as to the effect of post-*conkursus* payments being made which are not only contrary to insolvency law but which affect the interests of all those recipients of payments who would not be entitled to those payments and would be required to restore those payments if the provisional order is confirmed.

32. I find that the first applicant's case for interdictory relief has no merit.
33. As stated, even if I could grant the relief restoring control of the bank accounts to the first applicant, it would be final in effect. Once the payments are made from the bank account, those payments have been made and the property of the Company under winding-up is dissipated. But as the first applicant has not established the requirements for interim relief, I need not consider whether the more stringent requirements for final interdictory relief have been satisfied.
34. The fourth respondent seeks that the first applicant pays the costs on an attorney and client scale because *inter alia*:
 - 34.1. the application being premised upon a fundamentally flawed understanding of the consequences that flowed from the granting of a provisional winding-up order;
 - 34.2. the first applicant not referring to a single authority that supported the relief sought;

- 34.3. the failure of the first applicant and his attorney to constructively engage with the provisional liquidators from 10 November 2025 when the provisional order was granted and instead adopting the position that the first applicant's attorney was only available for a meeting on 17 February 2026;
- 34.4. the present proceedings constituting an abuse of the court process, both because of its lack of merit and because of the delaying in the launching of the application.
35. These submissions have merit.
36. I raised with the first applicant's counsel whether this was not perhaps a 'hopeless case' as described by the then High Court judge Owen Rogers, and now Constitutional Court Justice, in his article "*The Ethics of the Hopeless Case*"³ and whether this was an appropriate case where the attorney should be precluded from recovering any fees. The first applicant's counsel appeared to be aware of this article. I also drew attention to cases such as *Mashishi v Mdladla* [2018] 17 BLLR 693 (LC), *Motloun v Malubane* [2024] 11 BLLR 1166 (LC), *Mavundlu Community v Minister of Agriculture, Rural Development and Land Reform and Others* [2020] ZALCC 25 (25 May 2020) and on appeal *Chithi v Minister of Rural Development and Land Reform and others* 2025 (3) SA 183 (SCA). I enquired of the first applicant's counsel whether the first applicant's attorney sought an opportunity to file an explanatory affidavit in this regard

³ *The Advocate* December 2017, pp 36-51.

and for further submissions to be made on this aspect. The invitation was accepted and I directed that the first applicant's attorney delivers an explanatory affidavit together with submissions by a particular date, to be followed by the fourth respondent making submissions should it so choose.

37. Justice Rogers offers the view in his article,⁴ in the context of an advocate's ethical duties, that it is improper in this country to act in support of a hopeless case. Justice Rogers poses, and answers, the question: *"Should misconduct of this kind be assessed objectively or subjectively? Not without hesitation, I suggest that test is the latter. That emphasis falls on whether counsel genuinely believes that the case is not hopeless and is thus properly arguable. If the case is objectively hopeless, one could usually infer the advocate's subjective appreciation of this. To ward off this inference, the advocate might have to plead a failure properly to research the case, which would be misconduct of a different kind"*.
38. Justice Rogers⁵ continues that *"where the litigant himself is at fault, it might be more appropriate to make a special costs order against the litigant and a further order that counsel may not recover any fee"*.
39. That the test is subjective found favour in *Motloung* above in paragraph 37, where, after referring to the article of Justice Rogers, Meyerowitz AJ held that *"[s]pecifically: was the practitioner subjectively satisfied that the*

⁴ Above, p 49.

⁵ At p51.

argument would fail (as opposed to merely recognising the likelihood of favour – which would be permissible”.

40. The first applicant’s attorney in his explanatory affidavit proffered the explanation that subjectively he was, and remains, of the view that there was, and is, an arguable right worthy of protection by approaching the urgent court. The first applicant explains that this was after consultation with counsel, who too was of that view.
41. The first applicant explains that regard was had to section 354 of the Companies Act, 1973 and Uniform Rule 45A in arriving at that mindset. I have some difficulty in accepting this as no mention was made of these until argument, as described above.
42. On the other hand, Nicola Whitear and Helen Kruuse in their case commentary on *Mashishi v Mdlala* above in discussing the topic and the article of Justice Rogers⁶, refer⁷ to the famous comment of Megarry J in *John v Rees* 1970 1 Ch 345 at 402:

“As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable

⁶ ‘The Ethics of Legal Practitioners in Resource-Scarce Institutions’ *Obiter* (2019) pp 383 to 398.

⁷ At p391.

conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.”

43. Although the ‘right’ relied upon by the first applicant in these proceedings is unarguable to sustain the interdictory relief he sought, it may be that perhaps, and I put it no higher than that – perhaps, some or other case could be made out in terms of section 354(1) for a stay of the liquidation proceedings or for a suspension of the operation of the order in terms of Uniform Rule 45A and which might have had the effect of the relief sought in these proceedings. But that is not the basis that the first applicant approached the court. It appears to me that the belated references to section 354(1) and Uniform Rule 45A, and also to the Constitution, were more attempts to find some basis to justify the relief once the ‘right’ actually asserted in the affidavits dissipated.
44. Upon reflection, and only narrowly, do I find in the exercise of my discretion that a punitive costs order is not to be visited on the first applicant’s attorney precluding him from recovering a fee.
45. It still remains what the appropriate costs order is to be awarded against the first applicant in favour of the fourth respondent.
46. Of concern is that after the first applicant’s attorney delivered his explanatory affidavit and further submissions but before the fourth respondent could deliver its responding submissions, the first applicant, without any leave having been granted, delivered a further, supplementary affidavit. The first applicant explains in this affidavit that

after I reserved judgment, he together with his attorney met with one of the liquidators and reached an arrangement in relation to the interim conduct of the business.

47. The first applicant describes this arrangement in his supplementary affidavit. There is no supporting affidavit from the liquidators nor was fourth respondent afforded an opportunity to respond on oath. The fourth respondent nevertheless did offer submissions in response when delivering his submissions on costs.
48. The position adopted by the first applicant is that this arrangement effectively vindicates the right that he was asserting, and so that there is no need any more for the relief that he seeks as he has achieved his outcome. The first applicant states that the only issue that remains alive relates to costs. The first applicant submits that costs of the urgent proceedings should be reserved for the court to determine on the return date in the liquidation proceedings, failing which costs be awarded against him on a party and party scale.
49. The first applicant is not entitled to unilaterally preclude the court from determining the application on its merits. The fourth respondent has neither consented to the effective withdrawal of the application nor has the court granted the first applicant leave to do so.⁸

⁸ Uniform Rule 41(1)(a).

50. I offer no view on the legal legitimacy of the arrangement that the first applicant contends that he reached with the provisional liquidators, particularly bearing in mind the limited powers of provisional liquidators. No more can provisional liquidators agree to post-concursus dispositions without the requisite powers in terms of section 386 of the Companies Act 1973 to do so than the court can order them. But it is clear that the arrangement as described does not equate, even approximately, to the relief that is sought in the urgent proceedings. The bank accounts remain in the control of the provisional liquidators, which is what the first applicant came to the urgent court to upset. The fourth respondent's attorney also makes the point in his further submissions that the provisional liquidators have been calling for a meeting with the first applicant and his attorneys since 14 January 2026. The first applicant could have approached the provisional liquidators to make an arrangement since 10 November 2025 when the provisional order was granted. The first applicant cannot belatedly claim some form of victory because he has after judgment was reserved entered into some or other arrangement after meeting with a provisional liquidator. That the first applicant asserts some form of vindication in the circumstances of this case does him no credit.
51. Something must be said about the first applicant, through his attorneys, delivering a supplementary affidavit without seeking leave other than by a cursory one-liner that the facts sought to be introduced are relevant and may a bearing on the further proceedings in the present matter. The Uniform Rules of Professional Conduct for the General Council of the Bar

of South Africa provide in paragraph 4.13 under the heading '*Judgment reserved – Further material to be placed before court*':

"It is improper for counsel to attempt to place any further material, of whatever nature, before the court after judgment has been reserved without the consent of his opponent. Such consent should not be unreasonably withheld, particularly when the request made is to refer the court to authorities which will assist it in giving a correct judgment. Nonetheless, if consent is refused, the proper course is to request the court, through the Registrar, to receive the further material or, where appropriate, to make an application to re-open the case."

52. I do not know to what extent the first applicant's counsel was party to or complicit in the delivery of the supplementary affidavit and so I do not say anything about counsel's conduct. But should such an obligation be placed upon counsel, including in relation to further cases authorities, *a fortiori* in relation to the attorney and a further affidavit. There is no indication that the fourth respondent was approached for consent and, as stated, only the most cursory reference to the leave of the court was made in the affidavit itself.

53. Having regard to the various factors – such as the distinct lack of merit of the first applicant's case, the lack of urgency and the disregard for the court rules and process – I find that the present proceedings do constitute an abuse of court process and justify that the fourth respondent be awarded a greater indemnity in respect of the costs it has incurred in these unnecessary and meritless urgent proceedings.

54. The fourth respondent also sought that the first applicant and his attorneys be precluded from recovering any fees or disbursements in relation to the application from the company as the second applicant. This was on the basis that the attorneys could not have represented the company as an applicant as the company was under provisional winding up. Upon my engagement with the fourth respondent's attorney, he accepted that the first applicant's attorneys in any event would not be able to recover any fees from the company as the company was under winding-up. There is therefore no need for me to consider what residual power the first applicant may have had to continue to represent the second applicant, assuming that the first applicant's case had any merit.
55. This is the second occasion the court has been critical of the first applicant in his conduct in the litigation. As pointed out by the fourth respondent's attorney, Gautschi AJ in granting a provisional order was critical of the manner in which the first applicant had gone about opposing the liquidation application, mentioning in his judgment the opportunism of the first applicant as well as deliberate failure in his answering affidavit in those proceedings to deal in a forthright manner with the indebtedness asserted by the fourth respondent against the company. This notwithstanding a change in counsel, although the attorneys remain the same.
56. The first applicant is cautioned to be more circumspect in the manner in which he goes about litigating in relation to the liquidation proceedings.

57. The following order is made:

57.1. the application is dismissed on its merits;

57.2. the first applicant is to pay the costs of the fourth respondent on a scale as between attorney and client.



Gilbert AJ

Date of hearing: 19 February 2026

Further submissions received on: 2 and 5 March 2026

Date of judgment: 9 March 2026