



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG**

Reportable

CASE NO: M620/2022

In the matter between:

KOBUS VAN DER WESTHUIZEN N.O.

FIRST APPLICANT

SONIA SAFFY N.O.

SECOND APPLICANT

and

**THE MASTER OF THE HIGH COURT
MAHIKENG**

FIRST RESPONDENT

**THE CHIEF MASTER OF
THE HIGH COURT**

SECOND RESPONDENT

**SOUTH AFRICAN RESTRUCTURING
AND INSOLVENCY PRACTITIONERS
ASSOCIATION NPC (“SARIPA”)**

THIRD RESPONDENT

CORAM: Masike AJ

Date Heard: 01 August 2025

Judgment is handed down electronically by distribution to the parties’ legal representatives by e-mail, and released to SAFLII. The date that the judgment is deemed to be handed down is **27 MARCH 2026 at 11h00.**

Summary: *Voluntary winding-up — close corporation — liability of members as contributories — whether members are liable to contribute to winding-up costs by virtue of membership alone — sections 337, 395, 397 and 403 of the Companies Act 61 of 1973 read with section 66 of the Close Corporations Act 69 of 1984 — held, members are not contributories and incur no contribution liability merely by virtue of membership — liability arises only where the founding statement of the close corporation contractually binds the members to contribute, or where a member has signed as surety, indemnitor or guarantor for the corporation’s debts — sections 395, 397 and 403 of the Companies Act are procedural provisions that presuppose the existence of liability and do not independently create it — Master’s fees — section 153 of the Insolvency Act 24 of 1936 read with the Third Schedule as amended by Government Gazette No. 41224 dated 3 November 2017 — no fee payable where total gross value of assets according to liquidation and distribution account is less than R5 000.00 — Third Schedule creates a tariff operative only from the R5 000.00 threshold — no provision imposing a fee below that threshold.*

JUDGMENT

MASIKE AJ

INTRODUCTION

[1] Mr Kobus Van Der Westhuizen N.O (“the first applicant”) and Ms Sonia Saffy N.O (“the second applicant”) contend that in the case of a winding-up of a close corporation (or company) for its creditors by way of resolution adopted by the members (or shareholders in the case of a company), as contemplated in section 349 read with section 351(1) of the Companies Act 61 of 1973 (“the Companies Act”), the members (shareholders/directors in the case of a company) are not liable to pay any contribution by virtue of their membership and member interest or shareholding.

[2] They further contend that in terms of section 153 of the Insolvency Act 24 of 1936 (“the Insolvency Act”), read with the Third Schedule of the Insolvency Act as amended by Government Gazette No. 41224 dated 3 November 2017, no fee is payable to the Master in respect of an insolvent estate under final sequestration or liquidation where the total gross value of the assets according to the liquidation and distribution account is less than R5 000.00.

[3] The Master of the High Court, Mahikeng (“the first respondent”) disagrees with those contentions. As a result of the difference between the parties on the

interpretation of section 349 read with section 351(1) of the Companies Act and section 153 of the Insolvency Act read with the Third Schedule as amended, this Court is approached to issue a declaratory order declaring that the interpretation preferred by the first and second applicants is correct. The first respondent opposes the application.

BACKGROUND FACTS

[4] There is no controversy between the parties regarding the background facts of the application. Harties Wine Club CC (“Harties”) was placed into voluntary liquidation by a special resolution on 28 October 2019. From the wording of the winding-up resolution, the winding-up is stipulated as being for creditors.

[5] The winding-up was accordingly effected in terms of sections 349 and 351 of the Companies Act. By virtue of section 67(2) of the Close Corporations Act 69 of 1984 (“the Close Corporations Act”), the liquidation of corporations is regulated by Item 9 of Schedule 5 of the Companies Act 71 of 2008 (“the Companies Act 2008”), which continues to make Chapter XIV of the Companies Act applicable to the liquidation of close corporations.

[6] The first and second applicants were appointed as joint liquidators of Harties with the powers set out in section 386(1) of the Companies Act, read together with Item 9 of Schedule 5 of the Companies Act 2008. The first and general meeting of creditors was held on 29 September 2020. At that meeting, no creditors submitted claims.

[7] On 19 February 2020, the first and second applicants submitted the first and final liquidation and distribution account to the first respondent. From the reading of the *pro forma* liquidation and distribution account, the estate of Harties possessed no assets that could be found by the applicants or reflected in the account.

[8] The first and second applicants contended that the value of the assets for the purpose of calculating Master’s fees is nil. The first respondent took the view that Master’s fees of R250.00 are payable, and that there should be a contribution from the members of Harties towards the winding-up costs.

[9] The first respondent relies on sections 337, 395, 397, and 403 of the Companies Act, read with section 66 of the Close Corporations Act, in support of its contention that the members of Harties are liable to contribute towards the winding-up costs and that the Master’s fees in the amount of R250.00 are payable.

ANALYSIS

[10] The subject matter of the application before this Court is clearly novel and has not previously engaged the attention of the courts. The voluntary winding-up of Harties is referred to as a “creditors’ voluntary winding-up”, even though it did

not arise from a decision by the creditors. It is a members' decision. This type of winding-up is applicable when the close corporation is insolvent.¹ It is not in dispute that a resolution contemplated in section 349 of the Companies Act was passed and was registered in terms of section 200 of the Companies Act.

[11] Chapter XIV, section 339 of the Companies Act reads as follows:

'339 Law of insolvency to be applied *mutatis mutandis*

In the winding-up of a company unable to pay its debts, the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act.'

[12] In the event of an application for the winding-up of a company which is unable to pay its debts and there is no free residue, or the free residue is insufficient to cover the costs associated with the winding-up, the provisions of sections 14(3), 89(2) and 106 of the Insolvency Act set out which creditor becomes liable to contribute towards the costs of the winding-up.²

[13] In resolving the controversy between the parties, this Court must determine who is liable to contribute to the costs of a voluntary liquidation by special resolution of the members of a close corporation, where the winding-up is stipulated as being for creditors but there is no free residue, or the free residue is insufficient to cover the costs associated with the winding-up.

[14] An exercise in interpreting the Companies Act, the Close Corporations Act, and the Insolvency Act is required. In *CSARS v United Manganese of Kalahari (Pty) Ltd*³ ("United Manganese"), Wallis JA, writing for the court, said the following:

'It is unnecessary to rehearse the established approach to the interpretation of statutes set out in *Endumeni* and approved by the Constitutional Court in *Big Five Duty Free*. It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. The approach is as applicable to taxing statutes as to any other statute. The inevitable point of departure is the language used in the provision under consideration.'⁴

[15] The estate of Harties possessed no assets. Where there is no free residue, or the free residue is insufficient to cover the costs associated with the winding-up, section 106 of the Insolvency Act provides a mechanism for determining which creditors must contribute towards the costs of the winding-up.

¹*Furniture Bargaining Council v AXZS Industries (Pty) Ltd Trading as Don Elly Enterprises* (2018/40163) [2019] ZAGPJHC 457; [2020] 1 All SA 391 (GJ); 2020 (2) SA 215 (GJ) (11 October 2019) para [34].

²*FirstRand Bank Limited v Master of the High Court (Pretoria) and Others* (1120/19) [2021] ZASCA 33; 2021 (4) SA 115 (SCA) (7 April 2021) paras [22]–[23].

³(264/2019) [2020] ZASCA 16 (25 March 2020).

⁴*CSARS v United Manganese of Kalahari (Pty) Ltd* (264/2019) [2020] ZASCA 16 (25 March 2020) para [8].

[16] Section 106 of the Insolvency Act reads as follows:

‘106. Contributions by creditors towards the cost of sequestration when the free residue is insufficient

Where there is no free residue in an insolvent estate or when the free residue is insufficient to meet all the expenses, costs and charges mentioned in section ninety-seven, all creditors who have proved claims against the estate shall be liable to make good any deficiency, the non-preferent creditors each in proportion to the amount of his claim and the secured creditors each in proportion to the amount for which he would have ranked upon the surplus of the free residue, if there had been any: Provided that—

(a) If all the creditors who have proved claims against the estate are secured creditors who would not have ranked upon the surplus of the free residue, if there had been any, such creditors shall be liable to make good the whole of the deficiency, each in proportion to the amount of his claim;

(b) if a creditor has withdrawn his claim, he shall be liable to contribute in respect of any deficiency only so far as is provided in section 51, and if a creditor has withdrawn his claim within five days after the date of any resolution of creditors, he shall be deemed to have withdrawn the claim before anything was done in pursuance of that resolution.

(c) if all the creditors who would have ranked upon the surplus of the free residue, if there had been any, have withdrawn their claims and, after payment of their contribution in terms of paragraph (b) there is still a deficiency, the remaining creditors whose claims have been proved against the estate shall, even though they would not have ranked upon the surplus of the free residue, if there had been any, be liable to make good such deficiency, each in proportion to the amount of his claim.’

[17] Section 106 of the Insolvency Act does not find application in this matter because no creditors submitted claims in the insolvent estate of Harties, and there was no petitioning creditor in this matter.

[18] It is contended on behalf of the first respondent that the first and second applicants have not indicated which statutory provision they rely upon to justify the declaratory relief they seek.

[19] The first respondent relies on sections 337, 395, 397, and 403 of the Companies Act, read with section 66 of the Close Corporations Act. The first respondent contends that from the reading of section 337 of the Companies Act, the definition of “contributory” applies to two situations. First, the section refers to companies limited by guarantee. Second, the second and last part of the section refers to any company that is unable to pay its debts.

[20] The first respondent contends that this application concerns a close corporation that is unable to pay its debts and has launched a creditors’ voluntary winding-up, bringing it squarely within the second part of the definition.

[21] I have considered section 337 of the Companies Act, which reads as follows:

‘337 Definitions

In this Chapter, unless the context otherwise indicates—

‘company’ includes a company, an external company, and any other body corporate;

‘contributory’, in relation to a company limited by guarantee, means any person who has undertaken to contribute to the assets of the company in terms of section 52(3)(b) in the event of its being wound up and, in relation to any company which is unable to pay its debts and is being wound up by the Court or by a creditors’ voluntary winding-up, includes any person who is liable to contribute to the costs, charges and expenses of the winding-up of the company.” (own emphasis)

[22] The first respondent contends that in the situation when there is no free residue, or the residue is insufficient to cover winding-up costs, and where there are no creditors who have proved their claims or no petitioning creditor, then the members of the close corporation become liable to contribute towards the costs, charges, and expenses of winding-up. The first respondent relies on the reading of section 337 of the Companies Act, read with section 66 of the Close Corporations Act.

[23] Section 66 of the Close Corporations Act reads as follows:

‘66 Application of Companies Act, 1973

(1) The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.

(1A) The provisions of Chapter 6 of the Companies Act, read with the changes required by the context, apply to a corporation, but any reference in that Chapter to—

- (a) a company must be regarded as a reference to a corporation; or
- (b) a shareholder of a company, or the holder of securities issued by a company, must be read as a reference to a member of a corporation.

(2) For the purposes of subsection (1)—

- (a) any reference in a relevant provision of the Companies Act, and in any provision of the Insolvency Act, 1936, made applicable by any such provision—
 - (i) to a company, shall be construed as a reference to a corporation;
 - (ii) to a share in a company, shall be construed as a reference to a member’s interest in a corporation;
 - (iii) to a member, director, shareholder, or contributory of a company, shall be construed as a reference to a member of a corporation; [...].’

[24] It is contended on behalf of the first respondent that from the reading of section 337 of the Companies Act, read with section 66 of the Close Corporations Act, a contributory is a person who is liable to contribute to the costs of the winding-up. It is further contended that section 66(2)(a)(iii) of the Close Corporations Act, when read with the Companies Act, means that any reference to a “contributory” shall be construed as a reference to a member of a close corporation.

[25] The first and second applicants contend that for members of a close corporation to become, or be regarded as, a contributory as contemplated in section 337 of the Companies Act, the members would have to contractually agree in the founding statement of the close corporation to become so liable. They further contend that the founding statement of Harties does not provide for any personal liability on the part of its members in the event of Harties being wound up by reason of its inability to pay its debts or by a creditors’ voluntary winding-up.

[26] The first respondent has not addressed this argument in the heads of argument filed on its behalf, nor did it address it in oral argument before this Court. The first and second applicants attached the amended founding statement of Harties to their replying affidavit. The amended founding statement is dated 7 December 2012. From the reading of the amended founding statement, there is no provision therein for the members of Harties to be liable for any contribution in the event of Harties being wound up by reason of its inability to pay its debts or by a creditors’ voluntary winding-up.

[27] In terms of section 2(3) of the Close Corporations Act, a member of a corporation shall not merely by reason of membership be liable for the liabilities or obligations of the corporation.⁵ This is because the close corporation is treated independently from its members. Members are liable only when they have signed as surety, indemnitor, or guarantor for the close corporation’s debts and obligations.

[28] The members of a close corporation may additionally be held personally liable if they contravene the provisions of sections 63, 64, and 65 of the Close Corporations Act. Those sections deal, respectively, with joint liability for debts of the corporation in prescribed circumstances (section 63), liability for the reckless or fraudulent carrying-on of the business of the corporation (section 64), and the power of the Court to disregard the separate juristic personality of the corporation in cases of gross abuse (section 65).

[29] In my view it is apparent, from a reading of the answering affidavit of the first respondent, the heads of argument filed on its behalf, and having considered the submissions of Adv Williams who appeared for the first respondent, that the

⁵*Crous v Wynberg Boys High School and Others* (200/2024) [2025] ZASCA 107 (18 July 2025) para [17].

first respondent, in concluding that the members of a close corporation are contributories, read section 337 of the Companies Act with section 66(2)(a)(iii) of the Close Corporations Act and arrived at that conclusion. The approach adopted by the first respondent violates the Companies Act, the Close Corporations Act, and the Insolvency Act.

[30] The conclusion reached by the first respondent ignores sections 2(3), 63, 64, and 65 of the Close Corporations Act. If that conclusion were correct, those provisions of the Close Corporations Act would be rendered entirely superfluous.

[31] It is a well-established principle of statutory interpretation that the Legislature is assumed to be aware of existing legislation and its interpretation when new legislation is formulated. In *Independent Institute of Education (Pty) Limited v KwaZulu-Natal Law Society and Others*⁶ (“Independent Institute”), Theron J, writing a concurring judgment in which Froneman J concurred, said the following:

‘It is a well-established canon of statutory construction that “every part of a statute should be construed to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature”. Statutes dealing with the same subject matter, or which are in *pari materia*, should be construed together and harmoniously. This imperative harmonises conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, the Legislature knows and has in mind the existing law when it passes new legislation and frames it with reference to that law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.’[footnotes omitted]

[32] In my view, the reference in section 337 of the Companies Act to “and, in relation to any company which is unable to pay its debts and is being wound up by the Court or by a creditors’ voluntary winding-up, includes any person who is liable to contribute to the costs, charges and expenses of the winding-up of the company”, refers to a member or members of a close corporation who have contractually agreed in the founding statement of the close corporation to be liable to contribute to the costs, charges and expenses of the winding-up, or who have signed as surety, indemnitor, or guarantor for the close corporation’s debts and obligations. The provision describes and identifies persons who are *already* liable to contribute; it does not itself create any new or independent liability.

[33] Having found that the members of a close corporation qualify as contributories within the meaning of section 337 of the Companies Act only where they have contractually agreed in the founding statement to be liable to contribute to the costs, charges and expenses of the winding-up, or have signed as surety, indemnitor, or guarantor for the close corporation’s debts and obligations, I turn to consider whether sections 395, 397 and 403 of the

⁶[2019] ZACC 47 para [38].

Companies Act, also relied upon by the first respondent, independently create liability where none otherwise exists.

[34] Section 395(1) of the Companies Act provides that in the case of a winding-up by the Court or of a creditors' voluntary winding-up, the liquidator shall, *if necessary*, settle a list of contributories. The critical words are "if necessary". They make plain that the duty to settle such a list is contingent; it arises only where there are persons who qualify as contributories and whose liability needs to be established and quantified. Section 395 imposes an administrative duty on the liquidator; it presupposes the existence of contributories. It does not create the liability itself.

[35] Section 397(1)(a) of the Companies Act empowers the liquidator to proceed to recover from the contributories a proportion of or the full amount of their liability as may be required from time to time. Section 397(2)(a) provides that the liability of a contributory for the payment of any amount shall be a debt due by him to the company from the date on which the liquidator demanded the amount. Like section 395, section 397 is a procedural and enforcement mechanism. It enables the recovery of contributions from persons who are *already* liable; it does not, in itself, impose that liability.

[36] Section 403(1)(a) of the Companies Act requires every liquidator to frame and lodge with the Master a liquidation and distribution account and a plan of contribution apportioning liability "if there is a liability among creditors and contributories to contribute towards the costs of the winding-up". The use of the conditional "if" in section 403 is significant. It confirms that the existence of a liability to contribute is a precondition for the operation of the section. Section 403, like sections 395 and 397, operates on the assumption that liability has been established elsewhere. It does not create it.

[37] In the result, the reliance by the first respondent on sections 395, 397, and 403 of the Companies Act is without merit. Those sections constitute a self-contained procedural code for the administration and recovery of contributions from persons identified as contributories under the substantive law. They have no operation in the present matter because, as I have found, the members of Harties are not contributories. Their founding statement confers no such liability upon them, and no other recognised basis for member liability under the Close Corporations Act (sections 63, 64, or 65, or voluntary suretyship) has been established.

[38] I turn now to the issue of Master's fees. Section 153 of the Insolvency Act reads as follows:

'153 Fees of office and certain costs

(1) The Master shall recover in respect of the several matters and in the manner mentioned in the Third Schedule to this Act the fees therein specified.

(1)*bis* The Minister may, from time to time, by notice in the Gazette, amend the said Third Schedule.

(2) Any expenses incurred by the Master or by an officer who is to preside or presides or has presided at a meeting of the creditors of an insolvent estate in the protection of the assets of an insolvent estate or in carrying out any provision of this Act shall, unless the court otherwise orders, be regarded as part of the costs of the sequestration of that estate.”

[39] The Third Schedule to the Insolvency Act, as amended by Government Gazette No. 41224 dated 3 November 2017, provides that on all insolvent estates under final sequestration, where the total gross value of the assets according to the trustee’s liquidation and distribution account and/or contribution account is R5 000.00 or more but less than R50 000.00, the fee payable to the Master is R250.00.⁷

[40] The first and second applicants contend that the plain reading of the schedule makes it clear that the Master’s fees become payable only when the value of the estate equals or exceeds R5 000.00.

[41] The first respondent contends that there is nowhere in the Third Schedule where it is stated that an estate with a value from zero to less than R5 000.00 attracts a fee of R0. The first respondent highlights that the Third Schedule reads as follows:

- ‘(a) is R5 000 or more, but less than R50 000 — R250
- (b) is R50 000 or more, but less than R150 000 — R1 000
- (c) is R150 000 or more, for each complete further R5 000 when the gross value exceeds R150 000, a further R275; subject to a maximum fee of R275 000.’

[42] I agree with the first respondent that the schedule does not expressly provide for an estate with a zero or sub-R5 000 value. However, the reading of the schedule that commends itself to me does not require an express provision for zero-value estates. The Third Schedule creates a tariff that is triggered only once the gross value of the assets meets the lowest prescribed threshold of R5 000.00. In the absence of any provision fixing a fee for estates below that threshold, none is payable. The principle is well established: a taxing provision must expressly impose the obligation to pay; it may not be implied. Below R5 000.00, no fee falls due.

[43] The first and second applicants accordingly correctly contend that no Master’s fee is payable in respect of the estate of Harties, which is devoid of assets.

⁷Government Gazette No. 41224 dated 03 November 2017 at pages 62–63.

CONCLUSION

[44] In the absence of any creditor who proved a claim in the estate of Harties, in the absence of a petitioning creditor, and in the absence of any contractual or statutory obligation on the part of the members of Harties to contribute towards the costs of the winding-up, there is no party from whom the costs of the winding-up may be recovered. The liquidators, who accepted appointment in the knowledge that the estate was without assets, must bear any professional costs and expenses they incurred in the winding-up as an irrecoverable charge of that appointment. That is the consequence of accepting an insolvent estate that is entirely devoid of assets. There is no provision in the Companies Act, the Close Corporations Act, or the Insolvency Act that shifts that loss onto members who have not undertaken any personal liability.

[45] It follows that the members of Harties are not liable to contribute towards the winding-up costs, and no Master's fee is payable in respect of the estate.

COSTS

[46] It is a trite principle in our jurisprudence that costs follow the cause, and I have found no reason to deviate from this principle. The first and second applicants have sought costs on an attorney-and-client scale against the first respondent, and in the alternative, on a party-and-party scale on Scale C.

[47] This application has a protracted history. The first and second applicants were initially granted default judgment on 26 January 2023 by Mfenyana J. The first respondent launched an application to rescind the judgment, and the rescission was granted by Petersen J on 6 January 2025. In the judgment rescinding the default judgment, Petersen J said the following:

‘The interpretation of laws, particularly those related to the law of insolvency, has proven to be an unruly horse.’⁸

[48] I agree with Petersen J's observation: this matter needed to be fully ventilated, and it was. I am not persuaded that costs on an attorney-and-client scale are warranted in this matter. The purpose of an award of costs is to indemnify a successful party who has incurred expenses in instituting or defending an action.⁹ The matter was complex; it engaged the mind of this Court for a considerable period and is of importance to the first and second applicants and to the first respondent. Importantly, while the first respondent's interpretation of the legislation is ultimately wrong, it was not a vexatious or manifestly unreasonable position to adopt in the face of statutory provisions that have not

⁸*Master of the High Court Mahikeng v Van Der Westhuizen N.O and Others* (M620/2022) [2025] ZANWHC 2 (6 January 2025) para [27].

⁹*Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488.

previously been judicially construed in this context. Costs on a party-and-party scale (Scale C) are warranted.

ORDER

[49] In the result, the following order is made:

1. In the case of a winding-up of a close corporation (or company) for its creditors by way of resolution adopted by the members (or shareholders in the case of a company), as contemplated in section 349 read with section 351(1) of the Companies Act 61 of 1973, the members (shareholders/directors in the case of a company) are not liable to pay any contribution by virtue of their membership and member interest or shareholding alone, unless they have contractually agreed to such liability in the founding statement of the close corporation or have signed as surety, indemnitor, or guarantor for the close corporation's debts and obligations.
2. In terms of the provisions of section 153 of the Insolvency Act 24 of 1936, read with the Third Schedule of the Insolvency Act as amended by Government Gazette No. 41224 dated 3 November 2017, no fee is payable to the Master in respect of an insolvent estate under final sequestration or liquidation where the total gross value of the assets according to the liquidation and distribution account is less than R5 000.00.
3. The first respondent is ordered to pay the costs of this application on a party-and-party scale, Scale C.



T MASIKE

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

APPEARANCES

For the applicants:	Adv SN Davis
Instructed by:	Tintingers Inc c/o LFS Inc, Mahikeng
For the first respondent:	Adv Z Williams
Instructed by:	The State Attorney, Mahikeng