IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISON, PRETORIA)

Case No: A259-2024

1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
N V KHUMALO J
SIGNATURE DATE
N V Khumalo 29 April 2026

In the matter between:

SHAZIM SULIMAN **APPELLANT**

And

HARTNICK SIGNATURE DEVELOPMENTS **RESPONDENT**

(Registration number: 2013/113548-00117

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 29 April 2026.

JUDGMENT

Khumalo N V, J (with Nyathi and Millar JJ concurring)

Introduction

[1] This is an appeal noted by the Appellant, Mr Shazim Salim against the whole order and judgment that was handed down by Manamela AJ on 21 August 2023 dismissing the Appellant's application for the winding up of the Respondent, Hartnick Signature Developments. The reasons were handed down on 19 September 2024.

[2] The Appellant brought the application in terms of s 344 (f) read with s 344 (h) of the Companies Act 61 of 1973 ("the Old Act") alternatively in terms of s 81 (1) (c) (ii) of the Companies Act 71 of 2008,[1] ("the New Act") alleging that the Respondent is unable to pay its debts as envisaged in s 345 of the Old Act, have on its own admitted that it is unable to do so, is factually and commercially insolvent and it is just and equitable that it be wound up.

[3] The court a quo dismissed the application finding that the Appellant has no *locus standi* to apply for the winding up order since it failed to prove any of the alleged grounds especially s 345 (1) of the Old Act that is deemed to be applicable under a s 344 (f) winding up, or that the Respondent is factually and commercially insolvent, or alternatively that it was just and equitable to wind up the Respondent. The appeal is with leave of the court a quo.

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[1] Caseline 002-22 Applicant's Heads of Argument

[4] The Appellant's brief grounds of appeal are that the court a quo erred in refusing the Application as it misconstrued the subsection applicable on s 345 (1), which is s 345 (1) (c) with which it alleges, to have complied. He argues in the alternative to have shown that it is just and equitable that the Respondent be wound up which on its own admission is factually and commercially insolvent.

[5] The Appellant, is a businessman and the Respondent is a private limited liability company duly incorporated and registered in terms of the Companies Laws of South Africa. The Respondent's sole director and shareholder Mr Hartnick, who had filed the Respondent's opposing papers and the heads of argument on appeal, intended to appear in person on behalf of the Respondent. The court raised a concern about his appearance, since there was no indication that a special permission was sought and granted for him to appear representing the Respondent. It was ordered that Mr Hartnick ('Hartnick') cannot appear, however the documents filed to date will be considered, seeing that winding up proceedings are not regarded to be legal proceedings per se. [2] A director has authority to represent the company to oppose an application for provisional winding up,[3] however cannot appear formally in a legal representative capacity as he has no right of appearance in court.[4]

Factual Background

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[2] In Kings Pie Holdings Pty Ltd v King Pie (Pinetown) (Pty) Ltd; King Pie Holdings (Pty) Ltd v King Pie (Durban) Pty Ltd 1998 (4) SA 1240 (D) at 187 held that: "Applications for provisional or final winding up of a company are not "civil proceedings "as envisaged by sub-s (1) (a) since such an application does not result in an order in the nature of a declaration of rights or of giving or doing something"

[3] Venbor (Pty) Ltd v Vendaland Development Co (Pty) Ltd t/a Camp Store 1989 2 SA 619 (V) and Attorney -General v Blumenthal 1961 4 SA 3133 (T); SA 167 SCA

[4] *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* 2010 (2)

[6] The court a quo judgement succinctly and briefly sets out the factual background. In this judgment the relevant background is broadly outlined to give context to the issues raised on appeal.

[7] On 12 March 2019, the Appellant and the Respondent entered into a written agreement in terms of which the Appellant commissioned the Respondent to construct a residential property on his site in a secured residential estate. In terms of the stipulated contract period, the construction was to be brought to practical completion by 31 January 2020. The Appellant later accused the Respondent of failure to rectify defects and to complete the construction work within the stipulated contract period. He thereafter denied the Respondent access to the property. On 17 June 2020 he cancelled the contract on an allegation of breach of contract. He proceeded to engage the services of an independent third party to complete the construction. The Appellant alleges to have suffered damages in the amount of R1 836 638.85 because of the Respondent's breach and contract cancellation which he is claiming from the Respondent.

[8] On 26 June 2020 the Respondent raised a dispute against the Appellant for non-payment of long outstanding payment certificates on building costs and services rendered. The disputes were referred to arbitration in accordance with the terms of their contract before an AASA affiliated arbitrator that was appointed on 3 February 2021. A pre-arbitration conference was held between the parties with the Respondent represented by Hartnick, its sole director. A record of the minutes indicates that the Respondent had filed a statement of defence and a counterclaim to the Appellant's claim.

[9] On 16 May 2022, in the pre-arbitration hearing of the parties and the arbitrator, it was agreed that the parties are equally liable for the arbitrator's fees and costs of the arbitration. The arbitrator's fees were payable prior to the commencement of the arbitration that was set down on 22 July 2022.

[10] On 18 July 2022, Hartnick addressed a letter under oath to the arbitrator, which he alleges to have sent in confidence, apprising the arbitrator of the Respondent's distressed financial situation since 2019 and its running at a loss for the past 2 years, whilst carrying a very large bad debt as a result of a group of its clients' failure to pay for the work done. The Arbitrator was requested to consider whether it was still viable or necessary to proceed with the arbitration, in the light of the ongoing settlement negotiations initiated by the Respondent and of the advice by the Respondent's accountant that due to the company not having any current projects to sustain the company operations or assets to liquify to current cash flow, and deemed to be an empty shell, that it be deregistered. Also seeing that the Respondent could not afford an attorney and that the arbitration might run at a risk of nonpayment for the services rendered.

[11] On 25 July 2022 there was no appearance from the Respondent even though the arbitrator had advised Hartnick to attend the arbitration. The proceedings were postponed sine die and the Respondent ordered to pay the wasted costs that included the arbitrator and the Appellant's costs. The Respondent was later served with an invoice issued by the arbitrator for his fees dated 25 July 2022 that is pro rata to its contribution in the amount of R75000. The Respondent in the interim sent a compromised settlement proposal to the Appellant.

[12] The arbitration proceedings remain pending. The Respondent failed to pay his contribution towards the arbitration costs and the arbitration awarded wasted costs. The Appellant as a result proceeded with the application for the provisional liquidation based on that, the Respondent:

[12.1] on its own admission, was factually and commercially insolvent, unable to pay its debts as they become due and payable, evidenced by the letter to the arbitrator, highlighting its distressed financial situation.

[12.2] committed various acts of insolvency in terms of the provisions of s 8 of the Insolvency Act, including failing to pay the wasted costs and its portion of the arbitration costs and the compromised settlement proposal on the Appellant's claim,

[12.3] was indebted to the Appellant in the amount of R1 836 638.85, being a contingent claim, a subject of the current arbitration process, besides also owing the Arbitrator and the Appellant's wasted costs in terms of the arbitration award,

[12.4] that it is just and equitable that the Respondent be placed under provisional liquidation in the hands of the master.

[13] The applicable provisions in s 344 read:

344. Circumstances in which company may be wound up by the court. *- A Company may be wound up by the court if:*

(f) the company is unable to pay its debts as described in section 345;

(h) it appears to the court that it is just and equitable that the company should be wound up.

[14] Whilst s 345 reads:

345. *When company deemed unable to pay its debts*.- *(1) A company or body corporate shall be deemed to be unable to pay its debts if –*

(a) A creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-

(i) has served on the company by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) ...or

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) ... or

(c) <u>it is proved to the satisfaction of the Court that the company is unable to pay its debts,</u>

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Courts shall also take into account the contingent and prospective liabilities of the company.

[15] Section 81 of the Old Act reads:

81. Winding-up of solvent companies by court order

(1) A court may order a solvent company to be wound up if—

(c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that—

(ii) it is otherwise just and equitable for the company to be wound up;

[16] The court a quo was not satisfied with the extent to which the Appellant demonstrated its compliance with s 344 (f) and 344 (h) of the Old Act or alternatively s 81 (1) (c) (ii) of the New Act to justify the winding up of the Respondent. It dismissed the Application on the basis that as the Respondent was solvent, the Appellant failed to prove that the Respondent could not pay its debts as they arise.

[17] The court noted that for a party to rely on s 344 (f), it must also comply with at least one of the requirements in s 345 (1) (a) to (c), the latter section acting as a mechanism upon which a company, despite its solvent state, may be deemed unable to pay its debts, which can potentially lead to liquidation proceedings. Notwithstanding having confirmed that the requirements in s 345 (a) to (c) apply in

the alternative, it, in what seems to have been an oversight, incorrectly proceeded to base its findings only s 345 (1) (a).

[18] It was only the Appellant's *locus standi* to apply for liquidation based on its prospective claim for wasted costs and contingent claim for damages yet to be quantified that was taken into consideration, and led the court to find that the Appellant, as a contingent creditor, failed to prove where and when did he set out a demand for the awarded wasted costs, as per requirement in terms of s 345 (1)(a). Moreover, that the Appellant had not presented its bill of costs to the Respondent.

[19] The court was therefore not satisfied that the Appellant has complied with the requirements for s 345 (1) (a). It questioned the consideration of the claims as a debt due, given the fact that the alleged damages debt was a contingent debt the quantum of which was still to be determined and that of the wasted costs, a prospective debt yet to be quantified, hence it insisted on the presentation of a bill or demand being made to determine the inability to pay.

[20] The Appellant correctly points out the court a quo's error in dismissing his Application having had no regard to s 345 (1)(c), the correct section applicable, as a separate and alternate subsection from s 345 (1) (a) for granting an order for the winding up of the Respondent. It has also misconstrued the implication of contingent and or prospective debts in establishing commercial insolvency.

[21] Contingent liability is described as one which, by reason of an existing legal obligation between the creditor and the company (*vinculum iuris*), may become an enforceable liability on the happening of some event, whilst the prospective liability is which by reason of an existing (*vinculum iuris)* legal obligation between the

creditor and the company will become an enforceable liability on a future date or on a date determinable by reference to future events. Section 345 (2) is instructive that the court should take the contingent and prospective liabilities into account for the purpose of determining all three scenarios including whether a company is able to pay its debts.[5] This was overlooked by the court a quo that proceeded to consider these liabilities incorrectly to determine compliance only under s 345 (1) (a) and finding in that instance that the debts were not due, as a result Appellant failed to prove an inability to pay.

[22] In *Murray & Others v African Global Holdings*[6] referred to by the court a quo, the SCA held that:

> *"The test is rather whether a company is able to meet its current liabilities, including contingent and prospective liabilities as they come due. In other words, the question is whether the company has enough liquid assets or readily realisable assets available in order to meet its liabilities as and when they fall due (in the ordinary course of business), and thereafter to be in a position to carry on normal trading. According to the SCA, a company's current financial position, as well as its financial position in the immediate future, should be considered in order to determine the commercial solvency of a company.*

[23] It is therefore instructive that a contingent or prospective liability is not to be treated as if it were due and payable as the court a quo had done, but as it is, an immediate future debt and as one of the factors affecting a court's decision on whether or not the Respondent is unable to pay its debts as they arose.[7] Subsection

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[5] *Aylorand Stein NNO v Koekemoer* 1982 (1) SA 374 (T) at 380)
[6] 2020 (2) SA 93 SCA at par 31
[7] *Barclays Bank v Riverside Dried Fruit CO (Pty) Ltd* 1949 (1) SA937 (C) at 949

2 is considered to extend the meaning of "unable to pay its debts" to the immediate future. In such a case, one of the question that a court has to consider is whether it is possible that the contingent or prospective liabilities will become actual liabilities, and if so whether the company will probably be able to pay them when they do. If the answer to the second question is that it will not be able to pay them when they become actual liabilities as it is in the Respondent's case were even deregistration is indicated to be imminent, when the company is de facto not functional, the court is to hold that the company's inability to pay debts is proved.[8]

[24] The court a quo as a result misdirected itself in not having regard that the Appellant's being a contingent and or prospective creditor is one of the factors to be taken into consideration as instructed in s 345 (2) for the purpose of s 345 (1) (c), to decide whether there is inability to pay debts. The test remains the same whether the company 'is able to meet its current liabilities, including contingent and prospective liabilities as they come due.[9] Put slightly differently, it is whether the company 'has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met, in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant?'[10]

[25] The court in this instance is satisfied that the Appellant has complied with s 345 (c) having proven and it being common cause that the Respondent on its own admission was both factually and commercially insolvent, since it admitted in its letter to the Arbitrator that it is unable to pay its debts existing and prospective, due

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[8] *Taylor and Steynn NNO V Koekemoer* 1982 (1) SA 374 (T) at 380
[9] *Rosenbach and Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597B-C
[10] *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 440F-H.

to its distressed financial situation and to have no cash or liquid assets realizable to meet such debts as they arise. A fact it confirmed to have been corroborated and documented by the Respondent's accountant who indicated that it was actually an empty shell with no current projects to sustain the company operations or assets to liquify to current cash flow.

[26] The Respondent's counter allegation that the situation was divulged in confidence to the arbitrator and therefore could not be used against it, does not apply in insolvency proceedings as it was clearly explained in *Absa Bank Limited v Hammerle Group (Pty) Ltd*[11] that:

> *"Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings is a matter which by its very nature involves the public interest. A concursus creditorum is created and the trading public is protected from the risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged."*

[27] Furthermore the Respondent's conduct sending a compromised settlement proposal to the Appellant in the pretrial meeting and failure to pay its outstanding contribution towards the arbitrators costs having indicated in its letter that it will not be able to do so, confirms the dire situation of the Respondents inability to satisfy its debts as and when they become due.

[11] (205/14) [2015] ZASCA 43; 2015 (5) SA 215 (SCA) (26 March 2015)

[28] As the Respondent on its own admission has not been able to trade, being out of business and in insolvency circumstances for some time, unable to do so without current projects to sustain the company operations or assets to liquify to current cash flow, and having not placed any evidence before the honourable court to prove that it is or will be able to pay its debts as and when they become due, and without establishing the existence of a bona fide dispute, it would be in accordance with public interest policy to place the Respondent under liquidation.

[29] The Appellant has satisfactorily proven the Respondent's inability to pay its debts as substantiated by the Respondent's admission of its actual state of insolvency that the appeal should be upheld.

[30] On the allegations of the Respondent having committed various acts of insolvency in terms of the provisions of s 8 of the Insolvency Act, it has been stated that the provisions of s 8 of the Insolvency Act (prescribing what are "acts of insolvency") have no application to a company in so far as ability or inability to pay its debts are concerned.[12]

[31] On the question of whether it would be just and equitable to grant a provisional liquidation order, the principle applicable was enunciated in *Std Bank of SA v R Bay Logistic Systems CC*[13]referred to in the court a quo that:

> "*... if there is evidence that the company is commercially insolvent (cannot pay its debt when they fall due, that is enough for the court to find that the required case under s 344 (h) has been proved. At that level the possible actual solvency of the*

[12] De Villiers NO v Maursen Properties (Pty) Ltd 1983 (4) SA 670 (T) at 675

[13] (205/14) [2015] ZASCA 43; 2015 (5) SA 215 (SCA) (26 March 2015)

Respondent company is usually only relevant to the exercise of the court's residual discretion as to whether it should grant a winding up order or not even though the Applicant for such relief has established its case under s 344 (f).

[32] The Respondent on its own admitted that it was not able to meet its liabilities as they become due, due to its financial constraints as stated in the letter, and was as a result made to contemplate its deregistration. The Respondent's inability to pay was also apparent as it failed to pay its share of the contribution towards the arbitrator's costs that was quantified and had fallen due, which it had conceded that if the arbitration continues it will not be able to pay for the costs. Its argument against its winding up for the arbitration process to proceed is as a result senseless, as it is in no position to continue with its normal business and have no readily realizable assets to meet any imminent debts.

[33] When, for whatever reason, a company is unable to access any liquid assets it is illiquid and unable to pay its debts as they fall due.[14] It is obvious that the winding up of the Respondent is the only solution and the court a quo erred when it decided otherwise without considering whether it would be just and equitable to do so.

[33] In the circumstances I make the following order:

1. The appeal is upheld with costs,

[14] Murray and Others NNO v African Global Holdings (Pty) Ltd and Others (306/2019) [2019] ZASCA 152 (22 November 2019).

2. The order of the Manamela AJ of 21 August 2023, is set aside and substituted with the following order:

   '(a) The Respondent is liquidated in the hands of the Master of the High Court.

   (b) Costs of the application, will be costs in the winding-up of the Respondent.'

[redacted]

N V Khumalo

Judge of the High Court
Gauteng Division, Pretoria

I agree

[redacted]

J S Nyathi

Judge of the High Court

Gauteng Division, Pretoria

I agree

[redacted]

A Millar

Judge of the High Court

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