IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Not Reportable

Case no: 23826/2024

In the matter between:

BRIAN FRANCIS DALTON APPLICANT

And

POLANOCOL PROPRIETARY LIMITED RESPONDENT

(Registration Number: 2018/533603/07)

Neutral citation:

Coram: Mgengwana; AJ

Heard: 11 March 2026

Delivered: 19 June 2026

Summary: Insolvency – Section 81(d)(iii) of the Companies Act 71 of 2008 – Rule Nisi – Respondent ordered to show cause why a Final Liquidation Order should not be granted on just and equitable grounds.

ORDER

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[1] In the result, I grant the following order:

[1.1] The rule nisi granted on 14 May 2025 as extended is made absolute and the Respondent is placed under final liquidation.

[1.2] The costs of this application are costs in the liquidation, including costs of counsel on Scale B.

JUDGMENT

MGENGWANA; AJ

Judgement handed down: The judgement is handed down electronically by circulating to the parties or legal representatives by email. The date for the handing down of the judgment is deemed to be 19 June 2026.

Introduction

[1] This is an application for this Court to confirm its Provisional Liquidation Order (Provisional Order) granted on the 14th day of May 2025. The application is made primarily based on section 81(1)(c)(ii) of the Companies Act 71 of 2008 (the New Act) and/or section 344(h) of the Companies Act 61 of 1973 (the Old Act) read with Item 9 of Schedule 5 of the New Act, that is, on the basis that it is just and equitable that the Respondent should be placed under final liquidation.

Background

[2] Subsequent to the granting of the Provisional Order, Rodney Kenneth Bartman (Mr. Bartman), a shareholder of the Respondent, deposed to an affidavit on 11 June 2025 in which he averred as follows:

> (a) He is representing the Respondent and various parties who have an interest in the outcome of these proceedings because they are investors and creditors of the Respondent. Mr. Bartman went on to aver that these interested parties hold a real right to occupy the property at 3[...] P[...] V[...], Western Cape (the property).
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> (b) Through the affidavit deposed to by him, he requests that the interested parties be joined in these liquidation proceedings in terms of Rule 10 of the Uniform Rules of this Court (Rule 10).

(c) He also submitted that his affidavit is filed in terms of Rule 6 of the Uniform Rules of this Court (Rule 6) and the reason why the interested parties need to be joined is that they reside on the property, they are investors in the Respondent and will be affected creditors should the Respondent be placed under final liquidation. The interested parties stand to lose their initial investments should the property, which is the primary asset of the Respondent, be sold as part of liquidation as its full value would not be realized and costs will be incurred to liquidate the Respondent.

(d) Because the Applicant has averred in his Founding Affidavit that the Respondent has violated the terms of the Share Block Control Act 59 of 1980 (the Act) which falls under the custody of the Minister of Agriculture, the Minister of Agriculture should have been cited by the Applicant in his application and his failure to do so renders the application defective. The Respondent then went on to submit that this Court should overturn the provisional order and restore the Respondent to its previous status and strike the matter off the roll for failure of the Applicant to join the interested parties and cite the Minister of Agriculture.

(e) The Respondent is solvent because it has approximately 380 members of the public that have invested more than R17 000 000.00 in the Respondent because they have an objective of self-determination. All the members want to eventually form part of an independent community, and they do this by signing lease agreements pending the outcome of the process of self-determination for which the Respondent has already put in an application with the local municipality. This application is to develop an agricultural village as part of the concept of striving for self-determination, a constitutionally recognized substratum.

(f) By approaching the local municipality, the Respondent has shown that they are attempting to rectify any potential problems that there might be and are doing all they can do to comply with any legal requirements. The Respondent however denied that it is running a share block scheme.

(g) Self-determination, as put forward in section 235 and read in conjunction with section 31 and section 185 of the Constitution of the Republic of South Africa refers to collective right of the South African people to determine their political status and

to pursue their economic, social and cultural development in accordance with the principles of equality, non-discrimination and free association as defined and protected by the Constitution.

(h) The Applicant will be the primary beneficiary of the liquidation of the Respondent in that he is currently a 50% shareholder who has already used approximately R2 230 607.00 of the funds that were raised for the establishment of the Respondent. The Applicant was aware and instrumental in establishing and advertising the initiative of self-determination.

[3] The Applicant responded as follows to the averments made above:

(i) The Respondent had already admitted in its answering affidavit opposing the provisional liquidation application that the people interested in joining the Respondent's farming community would apply, pay a sum of money, and in return they would be entitled to use an agreed portion of land within the borders of the farms.

(ii) If regard is had to a document marked Annexure "RA006" dated 21 November 2023 which was authored by Mr. Bartman and which was attached to the affidavit referred to above, it will be noted that Mr. Bartman was addressing a letter to the "All Zuidland Supporters" wherein he was inviting them to take up shares in the Respondent in exchange for designated portions of land ranging in size from 1000 square meter to 5000 square meter to erect a house on. According to the Applicant, this document is dispositive of this matter as the sale of shares for use of portion of agricultural land is unlawful as section5(1)(a) of the Act disallows any share block scheme to be operated in respect of agricultural land as defined by the Subdivision of Agricultural Land Act 70 of 1970.

(ii) The Respondent has now changed tack as it has now entered into lease agreements with "close to 30 families" to circumvent the Act. This change of tack underscores Respondent's contravention of the Act.

(iii) The bare denial of operating a business model which is in violation of the Act by the Respondent shows lack of *bona fides* because Mr. Bartman had placed a sale of

share agreement before the court in his answering affidavit submitted in an attempt to ward off the provisional order of liquidation.

(iv) Respondent's reliance on the Constitution is of no relevance.

(v) Respondent's lack of intention to establish a share block scheme is of no relevance, so is its attempt to rectify any potential problems that there might be. What is relevant is whether the Respondent factually contravened the Act or not.

Issues to be determined

[4] This Court is being called upon to decide whether the Respondent has succeeded in showing that it will not be just and equitable for this Court to grant a final liquidation order against it as its business is not unlawful and it has also not lost its substratum.

Applicable Law

[5] The winding up of solvent companies through a Court Order is governed by section 81 of the New Act. Section 81(1)(c)(ii) of the New Act states the following:

"A court may order a solvent company to be wound up if 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 it is otherwise just and equitable for the company to be wound up."

[6] Section 81(1)(d)(iii) of the New Act states the following:

"A court may order a solvent company to be wound up if the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that it is otherwise just and equitable for the company to be wound up"

[7] The circumstances in which a Court may wind up a company is governed by section 344 of the Old Act. Section 344(h) of the Old Act states the following:

"A company may be wound up by the Court if it appears to the Court that it is just and equitable that the company should be wound up."

[8] In *Thunder Cats v Nkonjane Economic Prospecting*[1], Malan JA explained that the phrase "otherwise just and equitable" in section 81(1)(d)(iii) is wide and is not confined to the specific statutory examples of deadlock.[2]

[9] The traditional categories remain relevant, including loss of substratum, illegality or fraud, oppression, deadlock, and cases analogous to the dissolution of a partnership.[3]

[10] In *Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc.*[4], Ponnan JA reiterated that the just and equitable provision is not to be limited to cases where the substratum of the company has disappeared or where there has been a complete deadlock. Where there is a partnership, in the

[1] Thunder Cats v Nkonjane Economic Prospecting 2014 (5) SA 1 (SCA)
[2] Ibid par 14
[3] Ibid par 16
[4] Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc. 2008 (5) SA 615 (SCA)

form of a private company, the circumstances which would justify the dissolution of the partnership would also justify the winding up of the company based on the just and equitable provision.[5]

[11] Ponnan JA further stated that actual deadlock is not always essential. All that is necessary is to satisfy a court that it is impossible for the partners to place that confidence in each other, which each has a right to expect and that such impossibility has not been caused by the person seeking to take advantage of it.[6]

[12] Malan JA confirmed that a lack of clean hands is not an absolute bar to seeking winding up on the grounds that it would be just and equitable to do so.[7] Malan instead stated that the Court must assess the respective contribution of each party to the breakdown to determine whether it would be just and equitable to liquidate. But a party's fault should not necessarily deter a court from winding up.[8]

[13] Restrictions on operating a share block scheme are governed by section 5 of the Act. Section 5(1)(a) of the Act states that no share block scheme shall be operated in respect of agricultural land as defined in section 1 of the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970),

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[5] Ibid par 18
[6] Ibid par 21
[7] Thunder Cats, supra par 27
[8] Ibid par 28

unless consent for the sale or the granting of a right to a portion of such agricultural land has previously been obtained in writing from the Minister of Agriculture by either the owner or the prospective buyer of such agricultural land.

[14] Section 16 of the Act which deals with the formalities that need to be complied with before a contract relating to a share and a use agreement can be recognised. This provision states the following:

"A contract for the acquisition of a share and a use agreement entered into, and any amendment or cession of any such contract or agreement, after the commencement of this Act, shall be reduced to writing and signed by the parties thereto or by their representatives acting on their written authority, failing which the contract, agreement, amendment or cession, as the case may be, shall, subject to the provisions of section 18, be of no force or effect."

[15] The contents of the abovementioned contract is dealt with by section 17 of the Act and the consequences of not complying with the formalities of the contract are set out in section 18 of the Act. Section 21 is clear as it says that any person who contravenes or fails to comply with the provisions of this Act shall be guilty of an offence and upon conviction liable to a fine or imprisonment.

[16] In *Cunninghame v First Ready Development 249*, Brand JA stated the following:

"As pointed out in the judgment by the court a quo (para 37) the courts, both in England and South Africa, have over the years evolved broad categories of circumstances in which

they would grant a winding-up order on the just and equitable ground (see eg Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W) at 350A-I). Although these categories do not constitute a complete and closed list, they do serve the purpose of useful practical guidelines. In the court a quo and in this court, the appellants sought to rely on three of these categories, namely: (a) illegality of the respondent's business objects; (b) disappearance of the respondent's substratum; and (c) misconduct in the management of its affairs. In the event, the court a quo held against the appellant on all three grounds."[9]

Application of the law to the facts

[17] With regards to the points in limine raised, Mr. Bartman has already averred in his affidavit that he deposed to on 11 June 2025 that he also deposed to that affidavit on behalf of the interested parties as he has been authorised to do so by these interested parties and he has attached proof to that effect. This Court therefore finds that it is unnecessary to join these interested parties. This Court also sees no reason to join or cite the Minister of Agriculture in these proceedings as it has not been alleged by the Respondent that his consent to regularize the alleged share block scheme has been sought.

[18] In his founding affidavit, the Applicant avers that he is bringing his winding up application in terms of section 81(1)(c)(iii) of the New Act. According to this provision, the Applicant may bring a winding up application on the grounds that it is just and equitable for the court to wind up the company only if he is a creditor of the company.

[9] Cunninghame v First Ready Development 249 2010 (5) SA 325 (SCA) at par 14

[19] To prove that he is the creditor of the Respondent, the Applicant averred that he has invested, R3 000 000.00 of his own money which was to serve as a loan account to the Respondent. The Applicant did not find it necessary to attach a Loan Agreement to his affidavit to corroborate his averment. This averment was denied by the Respondent, and this denial was never contested by the Applicant in reply. This Court therefore finds that the Applicant has not been able to prove that he is a creditor of the Respondent, that having been found, the Applicant can therefore not proceed against the Respondent in terms of section 81(1)(c)(ii) of the New Act. The Applicant can however proceed against the Respondent on the basis section 81(1)(d)(iii) of the New Act only as it has not been disputed that he is a shareholder of the Respondent.

[20] The Applicant will also not be able to proceed against the Respondent in terms of sections 344(h) and 345(1)(c) of the Old Act as the Applicant has made no attempt at all to prove to the satisfaction of this Court that the Respondent is unable to pay its debts. Moreover, the Applicant has admitted in its second set of heads of argument that the Respondent is solvent.

[21] Having disposed of the above, this Court has to decide whether it would be just and equitable to grant a final liquidation order in terms of section 81(1)(d)(iii) of the New Act herein based on the averments made by the Applicant that the Respondent is conducting an illegal business in that it has contravened the terms of section 5(1)(a) of the Act. The current application stems from the judgement of this Court which was handed down by Judge Meer on 8 June 2023 under Case No. 6482/2022. In that judgment, Judge Meer refused to deal with the issue of an alleged contravention of the

Act read with the definition of agricultural land in the Subdivision of Agricultural Land Act and that its continued functioning will be in contravention of the law. The refusal of Judge Meer to deal with the issue was because this point only came up for the first time in Applicant's replying affidavit.

[22] Subsequent to the above refusal by Judge Meer, *albeit*, two years later, the Applicant resolved to institute the current proceedings, and a provisional order was granted on 14 May 2025. The Respondent was then called upon to show cause why this provisional order should not be made final.

[23] However, in its affidavit dated 11 June 2025, the Respondent failed to extensively deal with the issue that it was operating a business that was in contravention of section 5(1)(a) of the Act. It instead spent the bulk of its time dealing with rights flowing from sections 31, 185 and 235 of the Constitution and flowing from various continental and international conventions. It insisted that its substratum remained the section 235 right guaranteed by the Constitution.

[24] However, the Respondent submitted in its supplementary heads of argument that initially, the Respondent was created with the intention of realizing a constitutional right which is contained in section 235 of the Constitution. However, after been informed by Judge Henney in Case No. 6482/2022 that the substratum of the Respondent could potentially be unlawful, it took immediate steps to rectify the flaw and looked for alternatives to the current *modus operandi*. It changed its *modus operandi*

from shares in the business to a guaranteed right of use of the property in terms of the lease agreement. The Respondent submitted further that it has also approached the local authority and the Department of Trade and Industry to look at other potential models that will allow the Respondent to continue to meet the objectives set out in its Memorandum of Incorporation.

[25] These submissions were also made in court and in addition thereto, the Respondent also submitted that it terminated its unlawful *modus operandi* as soon as the current proceedings were initiated.

[26] The submissions made in paragraphs 22 and 23 are concessions that the Respondent has indeed contravened section 5(1)(a) by operating a share block scheme on agricultural land. In *Cunninghame v First Ready Development*, Brand JA stated that a finding that the respondent is conducting an unlawful business should result in the termination of that business by way of a liquidation order as the finding renders it unnecessary to consider the further grounds advanced as to why the winding up of the respondent would be just and equitable. [10]

In the result, I grant the following order:

[27]

> [27.1] The rule nisi granted on 14 May 2025 as extended is made absolute and the Respondent is placed under final liquidation.

[10] Cunninghame supra par35

[27.2] The costs of this application are costs in the liquidation, including costs of counsel on Scale B.

TJ MGENGWANA
Acting Judge of the High Court

APPEARANCES:

For the Applicant:	Mr. van der Meer
Instructed by:	Van der Meer & Partners Inc.
For the Respondent:	Mr. R. Botha
Instructed by:	Geldenhuys Jonkers Inc.
	Mr. H. Le Roux