REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

……………………… …………………………

DATE MOKOSE SNI

CASE NO: 2024 - 147172

In the matter between:

KHUTSO-NAKETSI COMMUNAL

PROPERTY ASSOCIATION

(REG NO: 08/1143/A) Applicant

and

KHUTSO-NAKETSI AGRI (PTY) LIMITED	Respondent
HENNING PETRUS NICOLAAS PRETORIUS	First Intervening Party
HPN BESTUUR (PTY) LIMITED	Second Intervening Party
STEPHAN PRETORIUS	Third Intervening Party
THE EMPLOYEES OF THE RESPONDENT	Fourth Intervening Party

JUDGMENT

MOKOSE J

[1] The applicant, on 12 December 2024 applied on an urgent basis for the winding-up of the respondent on the basis of its inability to pay its debts, alternatively that it is just and equitable to wind up the company under Sections 344(f) and 344(h) of the Companies Act 1973 ("the Act"). The application was struck for lack of urgency. On 10 March 2025 intervention applications were instituted on behalf of Mr HPN Pretorius, a minority shareholder in the company, his son Stephan Pretorius, HPN Bestuur (Pty) Limited and the employees, which application was granted on 12 August 2025.

[2] The applicant is of the view that as the matter has been fully ventilated, the order sought is now for the final winding up of the company. The notice of motion has been accordingly amended.

[3] The brief facts are as follows: the North-West Department of Agriculture, Land Reform and Rural Development ("the Department") purchased a farm for the purposes of land reform. The property was transferred to the communal property association (the CPA), the applicant, in terms of the Communal Property Associations Act of 1996. For the purposes of skills transfer, the Department recommended that the new landowner, the CPA, conclude a joint venture agreement with the previous owner of the farm, HPN Bestuur (Pty) Limited ("HPN"). KNA (Khutso Naketsi Agri) was established for the purposes of this joint venture partnership in which the CPA holds 70% of the shareholding in KNA whilst the balance of 30% is held by HPN. KNA was the vehicle through which the farm was controlled and managed. HPN was appointed to manage the farm's operations and KNA's business for the duration of the joint venture.

[4] In terms of the shareholder's agreement the joint venture between the CPA and HNP would endure for a period of five years commencing on 26 June 2019 until 24 June 2024 whereafter it would be terminated. At the commencement of the joint venture, the Department approved funding in the sum of R87,1 million to be used by the CPA to fund the KNA's operations.

[5] On 24 June 2024 the joint venture between the CPA and HNP terminated. The lease over the farm also lapsed on 25 June 2024. However, the applicant contends that it allowed KNA to continue

occupying the farm until 30 September 2024. The CPA initially intended to cause KNA's business to be wound down without the need for formal liquidation proceedings. To this end, several directors of CPA were appointed to KNA's board of directors in September 2024. However, it became apparent to the directors that there was a need for formal liquidation proceedings to be launched against KNA as it was insolvent and could not pay its debts, one of them being a debt to CPA for R1 245 568,86. Furthermore, its former employees were owed at least R6 million. They had since been retrenched and the company had ceased trading and was merely an empty shell with liabilities. This was the reason for this application presently before the court.

[6] The application is not opposed by KNA which admits its insolvency. The application is however, opposed by the intervening parties, Henning Pretorius, a director and shareholder of HPN and his son Stephan Pretorius, HPN itself and the employees of the respondent.

[7] The intervening parties deny that KNA is unable to pay its debts, deny that it will be just and equitable to liquidate KNA. They contend that the liquidation application is an abuse and a mere ploy to circumvent the CPA's contractually imposed obligation to buy out the intervening parties' share in KNA. Furthermore, the intervening parties contend that there is silence in respect of the sixty million rands that was availed and earmarked for vegetable farming by the department. An action for the winding up the company in the present circumstances is a mechanism of avoiding its liability upon grounds which are disputed on bona fide and reasonable grounds.

[8] The applicant contends that the intervening parties' opposition to the application should be seen in the following context:

(i) that at the commencement of the partnership in June 2019 the department approved funding in the sum of R87,1 million to be used by the CPA in funding KNA's operations. At the inception of the partnership the intervening parties projected an EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) in 2019 in the sum of R20million. This never materialised despite having conducted farming operations for 5 years under the management of HPN. KNA was also never paid a distribution of profits in that time to the CPA.

(ii) No meaningful explanation was given to the CPA by the intervening parties as to how KNA operated unprofitably for the last five years. No reliable management accounts detailing KNA's finances for that period were furnished by the respondents nor were financial statements furnished. Those statements which were furnished could not be relied upon.

(iii) On 31 July 2024 KNA paid to the intervening parties the sum of R2 million. A further amount of R6 million was paid to them on 31 August 2024 ostensibly as repayment of HPN's loan account.

(iv) Pertaining to the funding from the department, all that is known is that a substantial amount was paid over to fund the operations of KNA which is now insolvent and unable to pay its debts.

(v) The applicants believe that KNA has been mismanaged and that the funding by the State has been misappropriated.

[9] The applicant is of the view that KNA should be would up as it unable to pay its debts in terms of Section 344(f) and Section 345(1)(c) of the Companies Act. The applicant contends that it became apparent when KNA's new board of directors were appointed that its affairs had not been properly conducted. No financial provision had been taken for the retrenchment of the more than 300 employees of KNA in anticipation of the cessation of its operations. KNA's former employees were retrenched after the board of directors took advice having taken note of such. Their contracts were terminated a couple of days prior to the liquidation application being launched. Severance pay, notice pay and accrued leave was not paid to them and is now due and payable and KNA is unable to pay the debt which stands at approximately R6 million.

[10] The applicant further contends that KNA is also indebted to the CPA in the sum of R1 245 568,86 being in respect of the rental for the use of the farm and CPA's assets which were sold and the proceeds thereof not paid over to the CPA. The applicant contends that the intervening parties' denial of the debt is not *bona fide* as Stephan was present when an agreement was reached pertaining to the schedule of the amounts being drawn up.

[11] Furthermore, the applicant contends that it is just and equitable for KNA to be wound up in terms of Section 344(h) of the Act.

[12] The intervening parties deny that the respondent is unable to pay its debts and that it is just and equitable that the respondent is wound up. As stated, the intervening parties contend that the liquidation application is a mere ploy to circumvent the CPA's contractually imposed obligation to buy out the intervening parties' share in the respondent, abscond from its liability and responsibilities towards the employees and to lay claim to an amount of R60 000 000,00 which held to the benefit of the respondent to be utilised for its earmarked purpose of vegetable farming.

[13] It is trite that our law recognises two forms of insolvency – factual insolvency and commercial insolvency. In respect of the former, the company's liabilities exceed its assets and in respect of the latter, the company is in such a state of illiquidity that it is unable to pay its debts even though its assets may exceed its liabilities.

[14] Section 344(f) and Section 345(1)(a) and (c) of the Companies Act (1973) read as follows:

*"**344. Circumstances in which a company may be wound up by a Court** – A company may be wound up by a Court if –*

…………

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

………..

***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 of 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

……….

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."

[15] A liquidated amount due to a creditor which is not disputed and which has not been paid when demand has been made is *prima facie* evidence of the company's inability to pay such debt. Where a debtor is unable to pay its debts, an unpaid creditor is entitled *ex debito justitiae* to a winding up order.[1] Furthermore, liquidation applications should not be resorted to as a means of enforcing a debt, the existence of which is bona fide disputed by the company on reasonable grounds.[2] The test for a final winding up order differs from the test in respect of a provisional order. When seeking a final order of winding up, the applicant must establish on a balance of probabilities and not *prima facie* evidence. If there are irreconcilable facts in dispute, a final order cannot be granted. The court would be obliged to either dismiss the application or refer the matter to oral evidence.

[16] The versions of both the applicant and the intervening parties are clearly contradictory and irreconcilable. Motion proceedings are designed to resolve legal questions and not questions of fact. The general rule is that final relief in motion proceedings may only be granted if those facts as stated by the respondent, together with those facts stated by the applicant that are admitted by the respondent (the intervening parties in this matter), justify the granting of the application, unless it can be said that the denial by the respondent of the facts alleged by the applicant is not such as to raise a real, genuine and *bona fide* dispute of fact.

[17] In assessing whether a dispute of fact on the papers has been genuinely raised, the court does not go into the merits of the intervening parties' defence. It merely considers whether the intervening parties' averments, if they were to be established in a trial, would make out a defence to the applicant's claim. The court would also assess whether the intervening parties' averments making out a defence are made *bona fide.*

[18] It is clear from the papers that the intervening parties dispute the claim. The court cannot dismiss the dispute as not being *bona fide.* Accordingly, the order sought by the applicant cannot succeed on this basis.

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[1] Sammel & Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662

[22] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347 - 348

[19] The applicant further contends that it is just and equitable for the company to be would up. Section 344(h) provides as follows:

*"**344. Circumstances in which company may be would up by Court** – A company may be would up by the Court if –*

…………

(h) it appears to the Court that it is just and equitable that the company should be would up."

[20] Over the years our Courts evolved broad categories of circumstances in which they would grant the winding up of a company on the just and equitable ground. A winding up on this basis 'postulates not facts but only a broad conclusion of law, justice and equity as a ground for the winding up'.[3] There is no fixed category of circumstances which may provide a basis for a winding up of a company on this basis. The court in the matter of *Sweet v Finbain*[4] held as follows:

"The ground is to be widely construed; it confers a wide judicial discretion, and it is not to be interpreted so as to exclude matters which are not euisdem generis with the other grounds specified in S344. The fact that the Courts have evolved certain principles as guides in particular cases, or examples of situations where the discretion to grant a winding up order will be exercised, does not require or entitle the Court to cut down the generality of the words "just and equitable". Section 344(h) gave the Court a wide discretion in the exercise of which certain other sections of the Act had to be taken into account."

[21] The applicant suggests that the mismanagement of a company and the disappearance of the company's substratum are reasons which the court should consider in the winding up of the company in terms of Section 344(h). The applicant contends that the object or distinct purpose for which the company was formed or which constitutes the foundation of the company, can no longer be carried out at all or fully. As such, the company should be would up.

[22] It is noted that the CPA own the farm which was previously owned by HPN. It was purchased by the Department for the purpose of land reform and to utilise it for the benefit of land beneficiaries. The intention for the transaction was to facilitate skills transfer by the intervening

[3] Moosa N.O. v Mavjee Bhawan (Pty) Ltd 1967 (3) SA 131 (T) at 136H-I
[4] 1984 (3(SA 441 (W)

parties to the CPA and KNA was formed for such purpose for a five-year period from June 2019 to June 2024. As stated above, the period was extended to September 2024. The applicant contends that the substratum has since been lost as KNA has ceased trading and has retrenched its employees. On that basis alone, the company should be wound up.

[23] Section 344(h) requires the court to exercise a discretion however, prevailing facts presented by the respondents (intervening parties in this matter) should be taken into consideration. The intervening parties contend that should the order be granted on this ground, the applicant would be allowed to circumvent its obligations in terms of the Labour Relations Act in respect of the employees. Furthermore, it would be relieved of the contractual obligation to purchase the intervening parties' shares in the respondent and will also have access to the available funds currently held for the benefit of the respondent.

[24] I have considered the submissions of both the applicant and the intervening parties in this regard. I note that it would be impossible for KNA to be able to continue with the conduct of its business as it appears to be insolvent. No meaningful explanations have been given in respect of the financial affairs of the company for the period of the agreement. No audited financial statements have been prepared for that period that the company can rely upon, nor have management accounts been prepared for the said period. The court in the matter of *Storti v Nugent and Others*[5] held as follows:

"It is difficult to see how one can show a Court with any degree of confidence that a company is solvent, without the audited financial statements. Although I look at this state only at the allegations in the founding affidavit, and treat them as being correct for the purposes of deciding whether the founding affidavit discloses a cause of action, I consider that a Court would be very reluctant to accept the mere say-so of a director as to the financial position of a company in the absence of audited financial statements, particularly where there has been criticism since 1994 of the failure to produce same….."

I respectfully align myself with these sentiments in view of the contentions in the founding affidavit pertaining to the state of the financial affairs of the company which have not been strenuously refuted.

[5] 2001 (3) SA 783 (W) at 808

[25] Insofar as the employees are concerned, they are protected by Section 197 of the Labour Relations Act that if a transfer of a business takes place and unless otherwise agreed, the new employer is automatically substituted in place of the old employer in respect of all contracts of employment in existence before the date of transfer. Furthermore, all the rights and obligations between the old employer and the employees at the time of transfer continue in force as if they had been rights and obligations between the new employer and the employees.

[26] However, in the matter in *casu,* Section 197 would not apply as the employees had been retrenched prior to this application being launched. No transfer of business had taken place.

[27] The intervening parties claim in their counterapplication, relief in terms of Section 163 of the 2008 Companies Act. Section 163(1) provides as follows:

"(1) A shareholder or a director of a company may apply to a court for relief if-

(a) Any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or unfairly disregards the interests of the applicant;

(b) The business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interest of, the applicant; or

(c) The powers of a director of prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant."

[28] The claim by the first, second and third intervening parties pertains to the CPA's refusal to accept an offer from the second intervening party which will financially cater for KNA's employees in circumstances where an agreement to that effect was already concluded and reneged upon. Such conduct constitutes oppressive conduct in terms of Section 163. Furthermore, the intervening parties allege that the CPA refuses to engage at board level to oppose the liquidation application and that any shareholder that has access to R60 000 000,00 and wishes to cease being operational can only be oppressive towards the minority shareholder.

[29] It is noted that Stephan is not a shareholder of KNA and as such has no *locus standi* in the application. Secondly, the second intervening party undertook to be bound by the decisions of the prescribed majority. CPA hold 70% of the shares in KNA. Accordingly, I agree with counsel for the applicant that no case has been made by the first, second and third intervening parties.

[30] Accordingly, I am satisfied that on a balance of probabilities the applicant has shown that it is just and equitable for the respondent, KNA to be wound up in terms of Section 344(h). The following order is granted:

1. The respondent is placed in final winding up;

2. The costs of the winding up application are costs in the winding up of the respondent;

3. The intervening parties' counter application is dismissed;

4. The first to the third intervening parties, jointly and severally, the one paying the other be absolved, are ordered to pay the costs of the counter application including the costs of counsel on Scale "C".

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SNI MOKOSE J
Judge of the High Court of South Africa
Gauteng Division, Pretoria

For the Applicant: Adv M Costa

On instructions of: Cox Yeats

For the Respondent: Adv J Hershensohn SC

On instructions of: Langenhoven Pistorius & Modihapula

Date of Judgement: 11 June 2026