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

Case number: 40/2024

In the matter between: -

ALGERINA CORREIA NO	First Applicant
ALBERT TAPPENDEN NO	Second Applicant
JOSHKIA (PTY) LTD	Third Applicant

and

SUMMIT CRANE HIRE (PTY) LTD	Respondent

***Coram*:**		Van Zyl, AJ
Heard on:		5 May 2026
Judgment:	:	3 August 2026

Summary: Provisional liquidation – general principles – whether applicants' claims disputed on *bona fide* and reasonable grounds – on the facts, claims either so disputed or creditor lacks *locus standi* – application dismissed

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ORDER

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1. The application for the respondent's liquidation is dismissed, with costs, including counsel's fees taxed on Scale B.

2. The costs of the respondent's rescission application, which stood over for determination in the liquidation application, shall be paid by the applicants, inclusive of counsel's fees taxed on Scale B.

JUDGMENT

VAN ZYL, J:

Introduction

1. This application for the provisional winding up of the respondent is brought on four bases:

1.1 First, the respondent is indebted to the first and second applicants (in their capacities as the (then) duly appointed curators acting on behalf of the respondent's creditor, Mr Da Silva) in the sum of R2 million. Mr da Silva has passed away[1] since the institution of these proceedings, and the first and second applicants have been substituted by the executor appointed in Mr Da Silva's deceased estate, namely the first applicant.[2]

1.2 Second, the respondent is indebted to the third applicant ("Joshkia") in the sum of about R3,135 million.

1.3 Third, the respondent is unable to pay its debts as contemplated in section 344(f), read with section 345 (in particular, section

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1 In November 2025.

2 There are some issues with the manner in which the substitution was effected, but nothing much turns thereon at this point. The heading to the papers and to this judgment still reflect the names of Mr Da Silva's curators.

345(1)(a)[3]) of the Companies Act 61 of 1973 ("the 1973 Companies Act"). It is no longer trading.

1.4 Fourth, it is just and equitable that the respondent be wound up. In this respect, the respondent criticises the applicants for not expressly relying on this ground in the founding papers.

2. The respondent opposes this application on the following grounds:

2.1 First, the demand in terms of section 345(1)(a) of the 1973 Companies Act on which the applicants rely, was not properly authorised.

2.2 Second, the section 345 demand is in any event stale.

2.3 Third, the liquidation application was not properly served.

2.4 Fourth, the applicants' claims are disputed on reasonable grounds.

<u>The relevant factual and procedural history</u>

3. The respondent was incorporated in 2010 as a close corporation, and was converted to a company in 2013. It business involved the provision of mobile cranes, trained operators, and related vehicles and rigging services to clients. It was, at its prime, the dominant mobile crane provider in the Western, Northern and Eastern Cape.

4. Joshkia's director, Mr Correia, was employed with the respondent from its inception. He oversaw its financial functions. The Covid-19 pandemic had a devastating effect on the respondent's business. As a result, the respondent

[3] Section 345(1)(a): "*(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; … 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; …*"

had to wind down its business, retrench its employees, and sell its physical assets.

5. On 22 July 2022 Mr Da Silva caused a letter of demand (which was dated 30 June 2022) to be served at the respondent's registered office. The letter was addressed under section 345 of the 1973 Companies Act, and demanded the repayment of loans made by Mr Da Silva to the respondent between 2011 and 2014 in respect of which an amount of R2 million was alleged to be outstanding. Interest was also claimed, at the rate of R20 000.00 per month.

6. The respondent's attorneys responded on 12 August 2022, disputing the veracity of Mr Da Silva's claim. They also denied that the respondent was either commercially or factually insolvent. The letter further recorded that:

"After the change of management in our client, the veracity of your client's claim was accepted as being correct and our client incorrectly continued with the monthly payments to your client without further investigation; and after proper consideration of the financial records our client is constrained to record that your client's alleged claim has no legal foundation and a high probability exists that the claim was included irregularly in the financial statements of our client."

7. This application was issued on 8 January 2024, and served at the respondent's registered office on the same date. A provisional winding-up order was granted on 12 February 2024, and was served at the respondent's registered office on 29 February 2024. A final liquidation order was granted on 2 April 2024. These orders were both granted on an unopposed basis.

8. It was, however, to be Groundhog Day for the applicants. The respondent applied to have the orders rescinded, *inter alia* on the basis that the proceedings had not come to the respondent's attention. The rescission application was heard on 15 November 2024, and both the provisional and final liquidation orders were set aside on 13 January 2025. The application for provisional liquidation is thus before this court again, on an opposed basis.

The applicable legal principles

9. Section 346(1)(b)[4] of the 1973 Companies Act confers *locus standi* on a creditor, including a contingent or prospective creditor, to apply for a company's winding-up. Section 344(f)[5] of the 1973 Companies Act empowers the court to wind up a company that is unable to pay its debts as described in section 345. Section 344(h) empowers the court to wind up a company where it appears just and equitable to do so.

10. An inability to pay debts may be established in any of the ways described in section 345(1) of the 1973 Companies Act. Under section 345(1)(a), a company is deemed unable to pay its debts where a creditor, by cession or otherwise, for a sum of not less than R100 then due has served the statutory demand referred to in the section, and the company has for three weeks thereafter neglected to pay, secure or compound the debt.

11. Under section 345(1)(c) of the 1973 Companies Act, a company is deemed to be unable to pay its debts if it is proved to the satisfaction of the court that it is unable to pay. In both enquiries (under section 345(1)(a) and section 345(1)(c)), the court must, in terms of section 345(2), take into account the company's contingent and prospective liabilities.

12. Commercial insolvency is the established test under section 345(1)(c). A company is in a state of commercial insolvency where it is unable to meet the current demands upon it, that is, its day-to-day liabilities in the ordinary course of business. An excess of assets over liabilities does not preclude such a finding where the assets are not liquid or readily realisable.[6] The primary question is thus whether the company has liquid or readily realisable assets to meet its liabilities as they fall due in the ordinary course of business

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4 Section 346(1)(b): "*(1) An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made- … (b) by one or more of its creditors (including contingent or prospective creditors);* …"

5 Section 344(f): "*A company may be wound up by the Court if- … (f) the company is unable to pay its debts as described in section 345*."

6 *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597C-H.

and thereafter to carry on normal trading: can it meet current demands and remain "*buoyant*"?[7]

13. The enquiry is not whether all debts due on a single day have been paid, but whether the company can meet its current liabilities, including contingent and prospective liabilities, as they come due, examined as at the present and in the immediate future. Where it cannot, the court should hold it unable to pay its debts.

14. While the court retains a discretion to refuse an order where the company is solvent in the balance-sheet sense, that discretion is "*limited*" where there is a creditor whose debt the company cannot pay, such a creditor being entitled *ex debito justitiae* to a winding-up order.[8] Factual insolvency, while not in itself a ground for winding-up, is a relevant factor.

15. Section 344(h) of the 1973 Companies Act provides that a company may be wound up by the court when it is just and equitable to do so. A winding-up on this basis postulates "*not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up*". The subsection is not confined to cases which were analogous to the grounds mentioned in other parts of the section. No general rule can be laid down as to the nature of the circumstances that have to be considered to ascertain whether a case comes within the phrase, and there is no fixed category of circumstances which may provide a basis for a winding-up on the just and equitable ground.[9]

16. As regards a court's discretion in winding-up proceedings, it was held as follows in *Standard Bank of South Africa Ltd v R-Bay Logistics CC*:[10]

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7 See *Murray NO and others v African Global Holdings (Pty) Ltd and others* 2020 (2) SA 93 (SCA) paras 23, and 28-31.

8 *Afgri Operations Ltd v Hambs Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) para 12: *"… generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt. … in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a 'very narrow one' that is rarely exercised and then in special or unusual circumstances only*".

9 *Thunder Cats Investments 92 (Pty) Ltd and another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and others* 2014 (5) SA 1 (SCA) paras 15-16.

10 2013 (2) SA 295 (KZD) para 27.

"*[27] There has been judicial debate about whether, for the purposes of s 344(f) of the old Companies Act, it is possible for the court to conclude, upon evidence of actual insolvency, that a company is 'unable to pay its debts'. Certainly, proof of the actual insolvency of a respondent company might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts, but that conclusion does not necessarily follow. On the other hand, if there is evidence that the respondent company is commercially insolvent (ie cannot pay its debts when they fall due) that is enough for a court to find that the required case under s 344(f) has been proved. At that level, the possible actual solvency of the 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)*."

17. The respondent argues that the applicant relies solely on the section 345(1)(a) demand for the respondent's winding-up. I agree with the applicants' contention, however, that this argument adopts an unduly narrow approach to the interplay between sections 344 and 345 of the 1973 Companies Act in the context of the present case. Section 344(f), upon which the applicants expressly rely, provides that a company may be wound up if it is unable to pay its debts in any of the scenarios contemplated in section 345 of the 1973 Companies Act. Section 345(1) sets out the circumstances in which a company shall be deemed to be unable to pay its debts. It cannot reasonably be argued – particularly not on the facts of the present matter – that because the applicants make specific reference to section 345(1)(a), the court cannot have regard to the circumstances contemplated in section 345(1)(c) in determining the application.

18. The onus is on the applicants to establish that they are creditors of the respondent.[11] At the provisional stage, they should do so by at least *prima facie* establishing the existence of their claim on a balance of probabilities. If they fail to do so, the requirement of *locus standi* would not have been met. The next step is to enquire whether the existence of the claim is disputed by

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[11] *Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd* 1978 (1) SA 70 (D) at 71H–72A.

the respondent on *bona fide* and reasonable grounds. If it is disputed on reasonable grounds, the requirement of *locus standi* would also not have been met. In terms of the so-called the *Badenhorst* rule,[12] winding-up proceedings ought not to be used to enforce a debt that is disputed on *bona fide* and reasonable grounds, because these proceedings not designed to resolve genuine disputes as to the existence of a debt.

19. Where, however, indebtedness is *prima facie* established, the onus rests on the company to show that the debt is *bona fide* disputed on reasonable grounds. A defence that is far-fetched, untenable or dishonest does not qualify.[13] Thus, the dispute raised by the debtor company must be genuine and honest, and must be founded on reasonable grounds, so that a defence which is inherently improbable, or patently false or dishonest, does not qualify as a *bona fide* dispute:[14]

"*[20] A distinction is thus drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. <u>At the provisional stage the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the respondent's liability, on the other hand, the question is whether the applicant's claim is disputed on reasonable and bona fide grounds; a court may reach this conclusion, even though on a balance of probabilities (based on the papers) the applicant's claim has been made out … However, where the applicant at the provisional stage shows that the debt prima facie exists, the onus is on the company to show that it is bona fide disputed on reasonable grounds</u> …*

[21] There was some debate before me as to how far a respondent need go in order to discharge the burden of proving that a debt which is prima facie due and payable is bona fide disputed on reasonable grounds. Both parties referred me to statements made by Thring J in Hülse-Reutter supra. It is desirable that I quote fully what the learned judge said at 219F – 220C:

> *'I think that it is important to bear in mind exactly what it is that the trustees have to establish in order to resist this application with success. <u>Apart from</u>*

[12] See *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H-348B.

[13] *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 980C-G.

[14] *Kyle v Maritz & Pieterse Inc*. [2002] 3 All SA 223 (T) para 13.

the fact that they dispute the applicants' claims, and do so bona fide, … what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not, in this matter, have to prove the company's defence in any such proceedings. All they have to satisfy me of is that the grounds which they advance for their and their company's disputing these claims are not unreasonable. ... It seems to me to be sufficient for the trustees in the present application, as long as they do so bona fide .. to allege facts which, if approved at a trial, would constitute a good defence to the claims made against the company … subject of course to the qualifications which I have mentioned and, in particular, to the Court being satisfied, as it is in this case, of their bona fides.'"[15]

20. *Bona fides* in this context relates to the respondent's subjective state of mind, and whether it genuinely believes the facts it asserts to be true. Reasonableness, in turn, is the objective question whether the facts alleged, if proved, would in law constitute a defence. The two are interrelated: the objective requirement of reasonable grounds is not met by bald allegations lacking in particularity, and such bald allegations may themselves indicate that the respondent is not *bona fide* in asserting them. A defence that is "needlessly bald, vague or sketchy" may be weighed against the respondent on both elements.[16] Counsel for the respondent has nevertheless emphasised that the threshold for the establishment of a reasonable and *bona fide* dispute in relation to the applicants' claims is low:

21. I consider the present application against these principles.

The section 345 demand

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15 *GAP Merchant Recycling CC v Goal Reach Trading 55 CC* 2016 (1) SA 261 (WCC) paras 20-21 (my emphasis).

16 *GAP Merchant Recycling CC v Goal Reach Trading supra* para 26.

22. As indicated, the section 345 demand was served on the respondent on 22 July 2022. The respondent's view in August 2022 was that, after investigating the relevant management accounts, financial statements and financial records, no proof of any loan agreement with Mr Da Silva could be traced, no proof of payment by Mr Da Silva had been provided, and there was no proof that the interest rate of R20 000,00 per month had ever been agreed upon between the respondent and Mr Da Silva.

23. The respondent impugns the section 345 demand in particular on the basis that its issue and service were never authorised, and further that it was in any event "stale" by the time that this application was instituted.

Authorisation

24. The applicant emphasises that the validity of the section 345 demand was not questioned at the time it was responded to in August 2022, or at any point prior to the rescission application in 2024. The question was raised for the first time in the rescission application, when the respondent contended that the notice was invalid on the basis that the late Mr Da Silva was of unsound mind at the time that the demand was drafted, and that he would therefore not have been in a position to provide his attorneys with the necessary instructions for the compilation and service of the demand.

25. Although the demand was dated 30 June 2022, it was only served on 22 July 2022, which was the same day on which Mr Da Silva was formally – by court order - declared to be of unsound mind. The first and second applicants were appointed as curators *bonis*. In the preparation of the demand, the applicants' attorney of record acted on the first applicant's instructions, who held a general power of attorney on behalf of Mr Da Silva.

26. The applicants criticise the respondent for asking this court to assume that Mr Da Silva must have been mentally incapable earlier than 22 July 2022, as a result of which the power of attorney must be assumed to have lapsed. The applicants argue that it is not possible to speculate as to a date, prior to the

date on which Mr Da Silva was placed under curatorship by court order, as being the date on which the power of attorney lapsed.

27. The general rule is that majors are presumed mentally and legally competent to manage their own affairs until the contrary is proved. The onus of proving that a transaction is invalid for want of mental capacity normally rests on the party alleging it.[17] Where the court has declared a person to be of unsound mind, and incapable of managing his or her own affairs, such certification creates a rebuttable presumption of incapacity, shifting the burden of proof to the party who wants to hold the certified person bound by the transaction.[18]

28. The applicants say that, at the time the section 345 demand was drafted (assuming that it was done on 30 June 2022, which is the date on the demand), Mr Da Silva was not yet declared to be of unsound mind. They argue, therefore, that the first-mentioned presumption applies. Mr Da Silva must be presumed to have been mentally and legally competent to manage his own affairs on 30 June 2022. Absent any evidence to the contrary, and in circumstances where this court is not tasked with an inquiry into the mental capacity of Mr Da Silva prior to 22 July 2022, it cannot be presumed that Mr Da Silva did not, at the particular time when he provided instructions for the drafting and service of the demand, have the requisite mental capacity prior to being placed under curatorship, despite what the medical reports submitted in support of the application for the appointment of his curators *bonis* may have contained.

29. I agree with the applicants' approach on this issue. It is impossible to say, on the evidence before this court, whether Mr Da Silva was competent to provide instructions to his attorneys at any particular time prior to 22 July 2022. It follows that I do not regard the section 345 demand to have been compiled and served without the requisite authority.

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[17] See, for example, *De Villiers and another v Espach and another* 1958 (3) SA 91 (T) at 95-96; *Pheasant v Warne* 1922 AD 481 at 489.

[18] *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669 at 672-673.

Staleness

30. The question of staleness is – potentially, at least, depending on the facts - a horse of a different colour. The respondent complains that, by the time the liquidation application was instituted, the applicants could no longer rely on the section 345 demand given the time lapse of almost a year and a half between its service and the institution of the application. The consequences of neglecting to respond to a section 345 letter cannot endure indefinitely. Such a neglect merely creates a presumption, which loses its force over time, because facts invariably change over time. The law further requires that legal challenges be brought within a reasonable time. This is because an unreasonable delay itself leads to a different presumption, namely that a party elected not to proceed with his or her threatened action.

31. There is force in these contentions, even though I accept that there is no provision in the 1973 Companies Act to the effect that a statutory notice cannot be older than six months, which is the legitimate "lifespan" suggested by the respondent. The focus should rather be on whether it is shown that there was any change on the respondent's circumstances between service of the demand and the institution of the liquidation application.

32. The applicants say, and I accept in their favour, that the respondent does not show any change in its economic and financial circumstances between the time of service of the demand and the delivery of its answering affidavit in opposition to the liquidation application. The respondent suggests that, during 2020, the decision was made to wind down its business, and to sell its physical assets, which were put up for auction in April 2021. The section 345 demand was served on 22 July 2022, almost two years after the decision was taken to wind down the business. Its circumstances have not changed. There is thus no factual basis on which to contend that the deeming provision in section 345(1)(a) of the 1973 Companies Act could no longer be relied on, or that the respondent is in fact able to pay its debts.

Service of the application

33. The respondent alleges that it did not receive proper service of the liquidation application in terms of section 346(4A) of the 1973 Companies Act. The respondent says that its administrative offices and principal place of business were relocated to Durban in 2022, and that the applicants knew this. The issue was hotly debated, but it seems to me that it is not an argument that goes anywhere at this stage. The respondent's rescission application (where this issue was raised) was granted, and the present application was fully opposed and argued.

34. It is in any event common cause that the application was served at the respondent's registered office as currently indicated in the official records. It was served, on the same day and same time, on any employees of the respondent by delivering a further copy of the application to a receptionist there.

35. In *Arendsnes Sweefspoor CC v Botha*[19] the court accepted service on a close corporation that had ceased activities, at its registered office. The court confirmed the decision in *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd*[20] where it was held that service at the registered office of a company in the absence of a responsible person thereof, by delivery of the document to be served to another person at such address (not an employee of the company), was good and proper service.

36. The principle has, moreover, repeatedly been laid down that the court is entitled to overlook, in proper cases, any irregularity in procedure which does not work any substantial prejudice to the other side: "... *technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits*".[21]

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[19] 2013 (5) SA 399 (SCA) paras 15-15.
[20] 2011 (3) SA 477 (KZP) para 15.
[21] *Trans-African Insurance Co. Ltd* v *Maluleka* 1956 (2) SA 273 (AD) at 278E-G.

37. The present matter is one where there is, at least after the grant of the rescission application, no substantial prejudice to the respondent, who by now has had a full opportunity of placing its case before the court. The question of service is, in the circumstances, no longer one that poses a hurdle in the way of the proper determination of the application.

<u>Are the applicants' claims disputed on *bona fide* and reasonable grounds?</u>

38. It is at this point that the applicants run into difficulties.

39. The respondent contends that the applicants' claims against it are *bona fide* disputed on reasonable grounds. Not so, say the applicants, because the respondent has essentially admitted to being factually insolvent. It no longer trades, and has provided no cogent defence on the merits.

40. Mr Jacobs, the deponent to the answering affidavit in the winding-up application, is also the deponent to the founding affidavit in the rescission application. He states that the respondent's majority shareholder, Vulindlela Jacobs Summit (Pty) Ltd ("Vulindlela"), has a subordinated loan claim in the respondent of more than R28 million. He alleges further that the respondent has the following assets: a claim against Hollard Insurance Company Ltd ("Hollard") in the amount of R4,291,044.45, an investment in the amount of R160,343.87; and a claim against Joshkia's director, Mr Clint Correia, that has yet to be quantified.

41. The applicant argues that the claim against Hollard is a contingent claim, and the claim against Mr Correia has not yet been instituted. The respondent's only asset, therefore, is an investment of R160,343.87. The only ground put forward by the respondent to contend that it is not insolvent, is that Vulindlela has subordinated any claim it might have against the respondent. The fact that Vulindlela has subordinated its claim does not assist the respondent. Section 345(2) of the 1973 Companies Act provides that, in determining whether a company is unable to pay its debts, the court shall also take into

account the contingent and prospective liabilities[22] of the company. These liabilities are not treated as if they are due and payable, but are regarded as one of the factors affecting the decision as to whether the company is unable to pay its debts. The fact that Vulindlela has not yet called in its claim remains a consideration when determining whether or not the respondent is unable to pay its debts.[23]

42. On the respondent's own version it is factually insolvent. What, then, about the applicants' status, and their claims?

<u>Mr Da Silva's claim</u>

43. The respondent challenges the existence of Mr Da Silva's claim by arguing, strenuously, that aside from the entries in the respondent's financial statements there is no proof of the loan, or of the interest rate at which it was to have been repaid.

44. The applicants point out that the loan had been reflected in the annual financial statements over a number of years, and the respondent is not accusing any of the parties involved in preparing those statements of dishonesty.[24] The annual financial statements were audited by independent auditors. The loan, which was (on the applicants' version) incurred over the period 2011 to 2014, was disputed for the first time in August 2022 in response to the section 345 demand.

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22 A contingent liability is one which, by reason of an existing *vinculum juris* between the creditor and the company, may become an enforceable liability on the happening of some future event. A prospective liability is one which, by reason of an existing *vinculum juris* 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.

23 *Barclays Bank (D, C & O) and another v Riverside Dried Fruit Co (Pty) Ltd* 1949 (1) SA 937 (C) at 949-950. In that matter the respondent had "*considerable liquid or nearly liquid assets which it can use to meet any pressing present due and payable claims which can be presented to it*" (at 949), and a final liquidation order was refused *inter alia* on that basis despite the presence of what the applicant argued were contingent liabilities.

24 In terms of section 29(6), read with section 214(2), of the Companies Act 71 of 2008, a person is guilty of an offence if they are a party to the preparation, approval, dissemination or publication of financial statements that are materially false or misleading.

45. Mr Jacobs, on the respondent's behalf, states that he "*has every reason to believe that the loans are fictitious*". The applicants submit that he has known of the loan for many years. In 2016 Mr Jacobs, through an affiliated company, Jacobs Capital (Pty) Ltd ("Jacobs Capital"), commenced negotiations to acquire the majority shareholding in the respondent. Vulindlela was incorporated for that purpose. Jacobs Capital, in anticipation of the acquisition, conducted a thorough due diligence in respect of the respondent at a time when the Da Silva loan already existed, and expressly mentioned in the financial statements. The loan was not queried, and all loans were subsequently (and as before) signed off by independent auditors every year to confirm the balance owing.

46. The existence of the loan was also minuted at an executive management meeting held on 25 August 2016. The minutes reflect Mr Jacobs as being in attendance, and note that the "*Da Silva Loan – will repay when adequate cash reserves are in place*". At an executive management meeting held on 25 January 2019, at which Mr Jacobs was also present, the existence of the "*Da Silva loan*" is again mentioned in the minutes.

47. In June 2020 Mr Jacobs dispatched an email regarding proposals for the winding down of the respondent, attaching a spreadsheet called "*Loans*", which shows the Da Silva loan of R2 million in the breakdown of the respondent's non-current liabilities. In May 2021, Mr Jacobs requested a detailed update of the respondent's assets and liabilities. The update provided to him included, under the heading "Non-Current Liabilities", the loan from Mr Da Silva.

48. The respondent does not take issue with this chronology of events. It concedes that Mr Da Silva's claim of R2 million was reflected in the respondent's annual financial statements for 2019 and 2020. It concedes,

too, that the claim has not been extinguished by prescription, *inter alia* by virtue of section 13(1)(a)[25] of the Prescription Act.

49. The respondent disputes the claim for different reasons and, in my view, a compelling context. I have already indicated that the respondent was established in 2010 as a close corporation. It was converted to a private company in 2013. By 2017, Vulindlela held 80% of the shareholding in the respondent. The remaining shares were held by Joshkia (10%) and a Mr Leonard Openshaw (10%).

50. Joshkia is a company belonging to Mr Clint Correia. Mr Correia and a Ms Colleen Rabie were the respondent's only directors from 2017 until 2020, when the respondent came under pressure due to the Covid-19 lockdown. It was then that Mr Jacobs stepped in to investigate the respondent's financial affairs. It was decided to wind the respondent's business down and to sell its physical assets. Mr Correia was placed in charge of the winding down process, and tasked to ensure that all necessary steps were taken to protect the respondent's interests during the process.

51. The respondent's assets were conservatively valued at more than R63 million at the time. Mr Correia was in control of the site where the assets, consisting of cranes and parts and spares were held. However, between November 2020 and April 2021, there was widespread thieving and misappropriation of these assets, whilst Mr Correia was in exclusive control of the site. As Mr Jacobs became more involved in the respondent's business, he became increasingly concerned about the manner in which Mr Correia, along with Ms Rabie, had conducted the business. Mr Jacobs' investigations were then extended to the alleged claims of Mr Da Silva and Joshkia against the respondent, and he came to the conclusion that these claims were either

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25 "*13(1)(a) If the creditor is a minor or is a person with a mental or intellectual disability, disorder or incapacity, or is affected by any other factor that the court deems appropriate with regard to any offence referred to in section 12(4), or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1) … the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)*."

fictitious or unenforceable. When all of this became apparent, Mr Correia and Ms Rabie resigned as directors in May 2021.

52. The upshot of all of this is that, at present, the respondent has an insurance claim of R4 291 044.45 against Hollard arising from the theft of its cranes, and summons has already been instituted in the Gauteng Division against Hollard for payment of this amount. The respondent also has a claim against Mr Correia arising from the breach of his duties and responsibilities as a director and employee of the respondent, but this claim is still to be quantified.

53. Mr Correia is the late Mr Da Silva's sone-in-law, as he is married to the first applicant, who is Mr Da Silva's daughter. Mr Correia has been unable to provide Mr Jacobs with proof of the loan or loans that his father-in-law allegedly made to the respondent. Likewise, no proof of the disbursement of the alleged loans has been provided. The highwater mark of the applicants' case is that the alleged loan was previously included in the respondent's financial statements, and Mr Jacobs was therefore aware of its existence. The relevant statements and minutes had, however, been signed by Mr Jacobs at a time when he had no reason to doubt Mr Correia in the manner that the respondent's affairs were being conducted. By the time that the winding-up proceedings had commenced, however, the irregularities in the manner in which the respondent's business had been conducted had become apparent.

54. I agree with the respondent that it is, in this context, *bona fide* and reasonable in disputing the veracity of the Da Silva claim. It has reasonable grounds for questioning the documents upon which the applicants rely in seeking to establish the claim, in the absence of any explanation concerning the origin of the alleged indebtedness.

55. I therefore do not regard the Da Silva loan as a claim upon which the respondent's liquidation should be granted.

The Joshkia claims

56. The applicants argue that the respondent is also indebted to Joshkia in an amount of R3,134,786.26.[26] This is quantified as follows:

56.1 First, a loan of R155 555.56 (excluding interest) advanced by Joshkia to the respondent during March 2020. The loan was repayable by 31 March 2021. It came about as follows: during March 2020 the respondent received letters of demand from four creditors. The total amount demanded was R4,184,620.84. To meet the demand, the respondent called on its shareholders to lend it the necessary funds. Joshkia's contribution was subsequently recorded in a resolution taken by the respondent's directors.

56.2 Second, an amount of R213 749.00 in respect of a credit loan account in favour of Joshkia, which arose when the respondent's original shareholder, Mr Mike Grant, sold his shares and loan account both to Joshkia and a Mr Leonard Openshaw in equal proportions. This is reflected in the respondent's 2017 annual financial statements. The amount owing to Joshkia comprises Joshkia's portion of the loan account, plus accrued interest.

56.3 Third, Joshkia's shareholding in the respondent, which Joshkia says is worth R2,738,669.00, based on a forecast distribution schedule prepared by Mr Jacobs himself.

57. The respondent points out that Joshkia's claim of R155 555.56 arises from a loan that Joshkia allegedly advanced to the respondent during March 2020, more than six years ago. Likewise, Joshkia's claim of R213 749.00 arises from a credit loan account that was recorded in the respondent's 2020 annual financial statements, more than six years ago.

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[26] The respondent relies on the fact that Joshkia ceded its claims to ABSA Bank in terms of a guarantee. The full amount of the guarantee has, however, since been paid to ABSA, and the cession has been released.

58. Section 12(1) of the Prescription Act 68 of 1969 provides that prescription shall commence to run as soon as a debt is due. The debt arising from the loan agreement became due on 31 March 2021, which is when it allegedly had to be repaid. The debt arising from the credit loan account, in turn, does not appear to have had any repayment terms and was therefore, for purposes of prescription, immediately claimable at the election of Joshkia. It is common cause that the respondent did not acknowledge of the existence of these alleged debts within the past three years.

59. I agree with the respondent's submission that, in the circumstances, both debts (the loan of R155 555.56 as well as the credit loan account of R213 749.00) have been extinguished by prescription in terms of section 11 of the Prescription Act.

60. An application for liquidation does not suspend the running of prescription, as it is not a legal process by which a creditor claims payment of a debt.[27] Joshkia has therefore failed to establish that it has a valid claim against the respondent arising from the alleged loan, or the alleged credit loan account.

61. As to Joshkia's third claim, the fact that it is a shareholder of the respondent with shares that might have had a value of R2 738 669.00 in the past, clearly does not make Joshkia a creditor of the respondent within the meaning of section 346(1)(b) of the 1973 Companies Act. To the extent that section 346(1)(c) provides that a liquidation application can also be brought by one or more of the members of a company, it is trite that a member cannot do so on the basis that the company is unable to pay its debts.[28] Joshkia's shareholding in the respondent does not, therefore, clothe it with the necessary *locus standi* in this application.

<u>Further aspects relevant to the exercise of the court's discretion</u>

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27 *WP Koöperatief v Louw* 1995 (4) SA 978 (C) at 987G.

28 *Wiseman v Ace Table Soccer (Pty) Ltd* 1991 (4) SA 171 (W) at 178H.

62. In the evaluation of any liquidation application, the court exercises a discretionary power.[29] In the present matter the respondent argues that there are further reasons why this discretion should be exercised in the respondent's favour.

63. Firstly, on the applicants' version they would obtain no benefit from the respondent's liquidation, because the respondent has no assets, and no creditor would receive any dividend. The applicant could not, through the institution of this application, have expected to gain any financial benefit. The respondent's continued existence would, however, hold substantial advantage for its shareholders, of which Vulindlela is by far the biggest (80% as opposed to Joshkia's 10%). It would also hold substantial advantage for the respondent's creditors, of which Vulindlela is also the biggest, with its subrogated loan claim of R28 million. Vulindlela is not in favour of the respondent's liquidation.

64. I am in agreement with the respondent on this first aspect.

65. The respondent argues, secondly, that its liquidation would result in Mr Correia escaping liability for the alleged breach of his duties as director. The respondent contends that this is the true reason why this application was instituted. The prevention of further steps against Mr Correia is thus the only advantage that the applicants can derive from the application. As such, the application has not been brought for purposes of achieving the liquidation of the respondent for its own sake, but for an ulterior purpose, which amounts to an abuse.

66. There does appear, in light of the facts considered holistically, to be some merit in the contention that the application may have been brought for an ulterior purpose. The legal threshold for the abuse defence is stringent. In *Western Province Rugby Football Union v Western Province Rugby (Pty)*

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29 *Irvin & Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson Ltd and another* 1954 (1) SA 231 (E) at 244E.

Ltd[30] the respondent and the intervening creditor contended that the winding-up had been engineered,[31] and was intended not for the achievement of a *concursus* but for the applicant's own commercial ends, including escaping a burdensome contract.

67. The court confirmed[32] that where a proper case for winding-up has been made out, the court will refuse the application on grounds of abuse only if the applicant's ulterior purpose is shown to have been the sole, or at least the predominant, actuating factor in the bringing of the application:

> "*[9] It is well established that a creditor is ordinarily, subject to the possible effect of any opposing views by its fellow creditors, entitled ex debito justitiae to execute its unpaid claim against a company by means of winding-up proceedings. <u>It is trite, however, that the court is vested with a discretionary power to withhold a winding-up order, which it will be disposed to exercise if it is satisfied that resort to the liquidation procedure in the given circumstances amounted to an abuse of process</u>; … The approach that is adopted in this regard is that <u>if a proper case for winding-up has been made out, a court will generally refuse the application on grounds of abusiveness only if the applicant's ulterior purpose is shown to have been the sole, or at least the predominant, actuating factor in the bringing of the application</u>. …"*

68. The court held,[33] however, that if the applicant "*has a genuine interest in seeking the remedy for a proper purpose, it is not sufficient for a party opposing an application for the winding-up of a company on the grounds of abuse of process merely to show that the applicant has other, perhaps more important, motives for bringing the proceedings than to bring about a concursus creditorum.*"

69. The court accepted that the applicant before it was "*to a material degree motivated to institute the proceedings as a means to eventually being placed in a position to continue the company's business without some of its current*

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30 *Western Province Rugby Football Union v Western Province Rugby (Pty) Ltd; Ex parte Van Zyl NO and another* [2016] ZAWCHC 194 (20 December 2016).

31 See para 8.

32 At para 9. My emphasis.

33 *Western Province Rugby Football Union supra* para 12.

encumbrances". It nevertheless held that this "*does not derogate … from its genuine intention to bring about a concursus*."[34]

70. I do not, however, think that Mr Correia would necessarily "escape" should the respondent be liquidated. In *Sunny South Canners (Pty) Ltd v Mbangxa and others NNO*[35] the SCA held that the existence of a pending claim that might, if successful, restore the company's solvency was a neutral factor in the consideration of the application, because liquidation does not affect the claim. The liquidator may prosecute it, and the company's members and creditors continue to enjoy every benefit they would otherwise have had:

"*[37] The institution of the liquidation proceedings after a trial date in the action had been obtained is more worrisome. Reference was made by counsel to a number of decisions dealing with similar or comparable cases. But in the end <u>the question is a factual one: was the creditor who brought the liquidation application motivated by an improper motive</u>?*

[38] The Court a quo held on the facts that the liquidators were not motivated by an improper motive. I agree. The liquidators had a claim exceeding R11 million against the appellant which could not bona fide be disputed. The appellant had closed its business three years earlier. It had disposed of its moveable assets. Its only asset was a disputed claim against the liquidators and the RSA government. There was no reason why it would proceed with the action for damages against the CAC, which had already been placed in liquidation. <u>If the appellant were placed in liquidation, its liquidators could proceed with the action, if so advised. Liquidating the appellant cannot deprive the creditors of the appellant of any rights which they enjoyed prior to its liquidation. In the result, I fail to see how one can say that the liquidators intended to stifle the appellant's claim or that they acted mala fide or abused the process of the Court</u>.

…

[41] The only claim which can have a material effect on the appellant's solvency is that against the RSA government. The existence of that claim does not, in my view, stand in the way of the winding-up the appellant. As stated before, <u>the liquidation of the appellant does not affect the claim. If successful, the appellant's members and</u>

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34 At para 27.

35 *Sunny South Canners (Pty) Ltd v Mbangxa and others NNO* 2001 (2) SA 49 (SCA) paras 37-41 (my emphasis).

creditors will enjoy every benefit and advantage to which they would have been entitled had the appellant not been liquidated. The alleged existence of the claim is, therefore, at best for the appellant, a neutral factor."

71. In the circumstances of the present matter I do not have to make any finding as to whether the application was in fact an abuse of process. I have already found that the Da Silva claim is disputed on *bona fide* and reasonable grounds, and that Joshkia lacks *locus standi* to seek the respondent's winding-up. I have further taken into account the respondent's first contention above in relation to the exercise of my discretion in the respondent's favour, and against the grant of a provisional liquidation order. I do not regard the respondent's winding-up as just and equitable at this stage.

Conclusion and costs

72. I accordingly conclude that the applicants have not made out a case for the respondent's provisional liquidation. In accordance with the general rule as to costs, the applicants must bear the costs of the liquidation application.

73. The costs of the respondent's rescission application stood over for determination in the course of the liquidation application. Given the outcome of the liquidation application, it is fair that the applicants should pay the costs of the rescission application.

74. In the exercise of my discretion under Rule 67A, I am of the view that counsel's fees should in both cases be taxed on Scale B.

Order

75. It is ordered as follows:

1. **The application for the respondent's liquidation is dismissed, with costs, including counsel's costs taxed on Scale B.**

2. **The costs of the respondent's rescission application, which stood over for determination in the liquidation application, are to be paid by the applicants, inclusive of counsel's fees on Scale B.**

P. S. VAN ZYL
Judge of the High Court

Appearances:

For the applicant:	Ms P. Gabriel
Instructed by:	Van Zyl Kruger Incorporated
For the respondent:	Mr R. Engela
Instructed by:	Van der Spuy, Cape Town