IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA MAIN SEAT)

CASE NUMBER: 526/2025

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: YES

[redacted] 6/08/2026

SIGNATURE DATE

In the matter between:

FIRST RAND BANK **APPLICANT**

and

PROSPEROUS PROP 111 (PTY) LTD **RESPONDENT**

This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. This Order is further placed on the Court file of this matter by the Judge or her/his Secretary. The date of this order is deemed to be 6 August 2026.

JUDGMENT

GUMEDE AJ

1. The applicant seeks an order for the final winding-up of the respondent, a private company of which Mr Surprise Thabo Lukhele is the sole director, on the grounds of deemed inability to pay its debts following a notice given in terms of section 345 of the Companies Act 61 of 1973, read with item 9 of Schedule 5 to the Companies Act 71 of 2008.

2. There is a related application under case number 525/2025, in which the applicant seeks a money judgment against Mr Lukhele personally as surety and co-principal debtor for the same underlying indebtedness. That application was enrolled and argued together with this matter. I have dealt with that application in a separate judgment.

Background

3. In October 2018 the applicant and the respondent concluded a written loan agreement in terms of which the applicant advanced R980,000.00 to the

respondent. This loan was secured by a registered mortgage bond over three sectional title units of the respondent.

4. When the respondent fell into arrears, the applicant gave notice in terms of section 345 of the Companies Act 61 of 1973 demanding payment. The respondent failed to honour the demand. It is on that basis the applicant contends that the respondent is deemed unable to pay its debts and should be wound up.

5. The Respondent opposes the application on the following grounds:

    (i) that the applicant was obliged to pursue mediation under Rule 41A before proceeding;

    (ii) that the debt relied upon by the application in terms of section 345 notice was not due as there was not outstanding arrears at the date the notice was given;

    (iii) that the debt is bona fide disputed on reasonable grounds that a winding-up order should not be granted (the rule in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T));

    (iv) that the Applicant, being a secured creditor with adequate security over three units, is abusing the winding-up process as a debtcollection mechanism in circumstances where ordinary enforcement of its security was available to it; and

(v) that this court should exercise its residual discretion to refuse the order as the full settlement is imminent through a pending property sale.

6. The papers contain a notice of motion which refers to a supplementary answering affidavit.[1] I could not find the said affidavit, however, I have had regard to the supplementary affidavit filed in the related application, which contends that the respondent had sold one of the units secured by a mortgage bond for R725,000.00 and that the applicant's conveyancing attorneys received, a guarantee from The Standard Bank of South Africa Limited in the sum of R477,719.23 which is the full amount owing on the loan account. This amount is payable to the applicant on registration of transfer.

Rule 41A

7. I concluded in the related judgment in case 525/2025 that Rule 41A does not, as a matter of law, impose mediation as a jurisdictional precondition to the institution of legal proceedings.

[1] Section 048, caselines

8. In fact, the applicant did file its Rule 41A notice which stated that it does not agree to referral of this matter to mediation for reasons that the respondent had made undertakings to pay which the respondent failed to do.

9. This point in limine is dismissed.

Section 345 of the Companies Act 61 of 1973

10. The deemed inability to pay debts under section 345(1)(a) requires proof that the company was, at the relevant time, indebted in a sum then due, that a written demand for that sum was served, and that the company thereafter failed, within three weeks, to pay, secure, or compound the debt to the creditor's reasonable satisfaction.

11. The court retains a wide discretion to grant or refuse an order even where a prima facie case has been made out.[2]

12. The respondent urged this court to apply the rule in *Badenhorst*, that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt the existence of which is bona fide disputed on reasonable grounds, this being part of the broader principle that the court's processes should not be abused

[2] Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A)

13. Where the applicant shows a prima facie case, the onus shifts to the company to show that the debt is bona fide disputed on reasonable grounds; but even absent such a dispute, the Court's discretion under *Kalil v Decotex* is not excluded, particularly where winding-up is sought for a purpose other than a genuine inability to pay.

14. I am inclined to exercise my discretion in refusing the order sought for the following reasons:

15. The Respondent contends that its account was not in arrears as of 11 December 2024, the day on which the section 345 notice was given because a payment of R55,485.10 had been made on 7 December 2024.[3]

16. Moreover, the applicant holds a registered mortgage bond over three sectional title units of the respondent as security for this debt. The applicant can enforce this security but even more persuasive for the benefit of the respondent is the fact that the applicant has already accepted a guarantee for the precise amount presently claimed as owing.

17. Simply stated, the applicant is using the winding-up of the respondent to collect a debt that is already in the course of being paid through alternative means to which the applicant has consented.

[3] Answering affidavit, para 13.5

18. A winding-up order granted at this stage would suspend or terminate that process pending the appointment of a liquidator, to the detriment of the general body of creditors it is intended to benefit.

19. I am not persuaded that this is an appropriate case for a final winding-up but I also keep in mind that the underlying debt remains outstanding.

20. Should the anticipated settlement not materialise, the applicant should not be left without recourse.

21. In the premises, I make the following order:

    1. The point in limine based on alleged non-compliance with Rule 41A of the Uniform Rules of Court is dismissed.

    2. The application for winding up is postponed sine die.

    3. The applicant is granted leave to re-enrol the application on the same papers, duly supplemented if necessary on notice to the respondent, in the event that the sum of R477,719.23, or such other sum as may then be properly due, is not paid to the applicant within 90 (ninety) days of this order.

    4. The costs of the application to date are reserved for determination by the court hearing the application upon its re-enrolment, alternatively by agreement between the parties.

[redacted]

Zodwa Gumede

Acting Judge of the High Court

APPEARANCES

For the applicant: Mr WP Steyn Instructed by: Thethe Swart Inc, c/o Combrink Greyling Attorneys

For the respondent: Mr J du Toit Instructed by: Gerrie Groenewald Attorneys Inc

Heard on	3 March 2026
Judgment	6 August 2026