



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 12499/2024

In the matter between:

**BANK OF CHINA LIMITED
JOHANNESBURG BRANCH**

APPLICANT

(Registration Number: 2000/00843410)

and

MATROX INVESTMENTS (PTY) LTD
(Registration Number: 1997/013464/07)

RESPONDENT

ORDER

The following order is made:

1. The respondent is placed under provisional winding-up in the hands of the Master of the High Court, Pietermaritzburg.
2. That a *rule nisi* do issue calling upon the respondent and all other interested parties to show cause to this Court on the 27th of November 2026 at 9h30, or so soon thereafter as the matter may be heard, why the respondent should not be finally wound up.
3. The copy of this order:
 - 3.1. be published on or before 15 October 2026 in one edition of The Mercury newspaper and in one edition of the Government Gazette;

3.2. served in compliance with s 346A of the Companies Act 61 of 1973.

4. Costs reserved.

JUDGMENT

Sipunzi J

Introduction

[1] This is an opposed application in terms of which the applicant, Bank of China Limited ('BOC') seeks the provisional winding-up of the respondent (Matrox) on the ground that it is commercially insolvent as it is deemed to be unable to pay its debts¹ in terms of s 345(2) of the Companies Act 61 of 1973 ('the 1973 Companies Act').

[2] Matrox opposed the application. It raised various defences to contend that the provisional winding-up sought by BOC could not be sustained. Such defences included it having a genuine and bona fide defence against its alleged indebtedness to BOC. Matrox also contended that there was a pending action that was instituted by BOC against it, arising from the same alleged debt. Also, that BOC had already instituted a winding-up application against Educor and A1 Capital on the basis of the same alleged debt. Matrox also opposed the application on the basis that the suretyship agreement which BOC sought to enforce was null and void and of no effect due to the failure by Matrox and A1 Capital to comply with the mandatory requirements of s 45 of the Companies Act 71 of 2008 ('the Act'), when they provided financial assistance to Educor.

The parties

[3] BOC is an authorised and registered financial and credit services provider. In the ordinary course of its business, over a period of time, and on various occasions, it advanced four credit facility agreements to Educor Holdings (Pty) Ltd ('Educor').

¹ Section 345(1)(c) provides that: '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) ...

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

Educor had failed repay the debts and was therefore allegedly in breach of its credit facility agreements.

[4] Educor was a subsidiary of A1 Capital (Pty) Ltd ('A1 Capital'), the holding company. A1 Capital was the sole shareholder of Educor. The shareholders of A1 Capital were the Baobab Family Trust; Leo Chetty Family Trust and Vadivaloo Family Trust. Baobab Family Trust was the holding company of Success College which owned Matrox. Matrox, Educor and A1 Capital had their principal places of business at the same premises, 5[...] U[...] Road, Pinetown, KwaZulu-Natal.

[5] The respondent is Matrox Investments (Pty) Ltd, a private company duly registered and incorporated in terms of the Act, with registration number 1997/013464/07. Matrox stood as surety for the indebtedness owed by Educor to BOC.

Background

[6] On 26 November 2016, BOC and Educor concluded a credit facility agreement in terms of which a R200 million demand loan credit facility was advanced to Educor. The facility was advanced for a term of 12 months, with 18 November 2017 as the expiry date, with interest to be repaid quarterly. When the debt became due for repayment, Educor failed to meet its obligations in terms of the facility agreement. Subsequent interactions between BOC and Educor resulted in the review and extension of their initial agreement. Then, a second facility agreement, with 15 December 2018 as the expiry date, was concluded.

[7] At the instance of Educor a review of the second facility agreement was initiated on 15 October 2018. Pursuant thereto, on 31 December 2018, a third facility agreement was concluded and BOC continued to provide a demand loan credit facility to Educor for R200 million. The new expiry date was amended to 13 March 2020. Starting from 26 November 2016 when the first loan facility agreement was concluded, they were all secured by A1 Capital for a limited suretyship of an amount of R200 million.

[8] When payment became due on 13 March 2020, Educor failed to honour the facility agreement. As a result, on 22 July 2020, BOC issued a breach notice to Educor, demanding payment of R208 031 072.18, with interest. Notwithstanding the efforts in demanding payment, the debt remained unpaid. Instead, Educor approached BOC for a new agreement which would restructure the debt due.

[9] Consequently, on 25 September 2020 the fourth facility agreement was concluded between Educor and BOC. The material terms of this facility agreement were that BOC provided a credit facility to Educor in the amount of R200 million. This agreement was a restructuring of the debt that had become overdue under the prior existing facility agreements between Educor and BOC. The payments that had become overdue from the third facility agreement would be repaid on a monthly basis commencing from 31 October 2020, up to 31 March 2021. This facility agreement was secured by Matrox's suretyship to the amount of R100 million, in favour of BOC. As collateral thereto, Matrox also committed an immovable property and ceded the proceeds of its three building insurances policies on behalf of Educor.

[10] On 29 September 2020, Success College, as the shareholder of Matrox passed a special resolution in terms of which:

- (i) Matrox would bind itself as surety and principal debtor in favour of BOC for fulfilment of the debt owed by Educor to BOC to the limit of R100 million; supported by the collateral of:
 - (a) registration of a continuing covering mortgage bond for an amount of R100 million plus 20 percent of the remainder of Erf 4[...], Z[...] V[...] KwaZulu-Natal in the name of Matrox and the registration of same to commence within one week of signing of the fourth facility agreement; and
 - (b) cession of AIG South Africa Limited Building Insurance Policy and SASRIA Cover Coupon.
- (ii) Ms Johnson, the director of Matrox was authorised to sign the suretyship and other related documents on behalf of Matrox;
- (iii) Munsami signed on behalf of Success College.

[11] This was followed by a Matrox resolution on 29 September 2020, which stated that:

'In terms of section 45 of the 2008 Companies act, the directors had considered all reasonably foreseeable financial circumstances of the company in applying the solvency and liquidity test and had had sight of the shareholder resolution in respect of the unlimited suretyship. That the terms of the financial assistance in the form of a suretyship were fair and reasonable. That the assets of the company or, if the company is a member of a group of companies, the aggregate assets of the company, as fair valued, equal or exceed the liabilities of the company, or, if the company is a member of a group of companies, the aggregate liabilities of the company, as fair valued.'²

[12] Subsequent thereto, on 7 October 2020, the resolution that Matrox's assets exceeded its liabilities was certified by its auditors and based on the draft annual financial statements for year ended 28 February 2019, Matrox reported that its assets exceeded its liabilities. In adopting s 45 resolution, the directors of Matrox would have considered all reasonably foreseeable financial circumstances of Matrox by applying the solvency and liquidity test. On 9 October 2020, at the request of BOC, it was furnished with the structure of the group of companies; and how they were connected to each other. This information included Matrox's company documents; the title deed of the immovable property it owned; the ceded insurance documents; Matrox's insolvency certificate; and the resolution.

[13] On 28 October 2020, the suretyship agreement was signed by Matrox to secure the debt owed by Educor to BOC for up to R100 million. The agreement specifically stated that all the appropriate consents or special resolutions had been obtained in terms of s 45 of the Act.³ Matrox also recorded that its constitutional and incorporation documents did not prohibit or limit the provision of financial assistance by suretyship; the terms of which were fair and reasonable and that assets of Matrox were fairly valued and exceeded its liabilities.

[14] On the payment due date, 31 March 2021, Educor failed to pay the full loan amount and interest to BOC. Against the debt of R200 million, Educor had paid up to R4,5 million by 31 December 2021, leaving a balance of R195 million. According to

² Replying affidavit, para 44.7; the fourth facility agreement, annexure "BC16".

³ Annexure "BC18", clause 26; replying affidavit, para 44.9.

the certificate of balance that was issued by BOC dated 7 June 2023, the outstanding amount owed by Educor was R301 457 514.21.

[15] Matrox was accordingly informed of Educor's failure to meet its commitments and failed demand.⁴ BOC sought to enforce the security that was provided by Matrox, to the extent that Matrox was implicated. On 9 September 2022, the first statutory demand in terms of s 345(1)(a) of the 1973 Companies Act was sent to Matrox. Despite receipt of the second statutory demand on 13 October 2022 and the third demand on 3 November 2022, Matrox failed to meet its obligations in terms of the suretyship agreement. The efforts of BOC led to the current dispute. On 25 April 2023, BOC also instituted action proceedings against Matrox under case number: D4412/2023. In addition, on 8 September 2023, BOC launched liquidation proceedings against Educor under case number: D9983/2023 and also against A1 Capital under case number: D9982/2023, out of the Durban High Court. The liquidation applications and action proceedings were opposed and still pending when this application was argued.

Issues

[16] The main questions that arise from Matrox's resistance *in casu* shall be predicated below under subheadings.

Did Matrox provide financial assistance to Educor

[17] It is common cause that Matrox was engaged in property investment as its principal business activity. As part of its property portfolio, Matrox owned immovable property, described as Erf 4[...], Z[...] V[...] KwaZulu-Natal. The security that was provided by Matrox to Educor's debt was as set out below:

2.2. Proposed security

2.2.1. Limited suretyship of R100 000 000.00 from Matrox Investments (Pty) Ltd Registration number: 1997/013464/07, supported by collateral referred to below.

2.2.2. Registration of CCMB for an amount of R100 000 000 00 plus 20% cover clause over Remainder of Erf 4[...], Z[...] V[...] KwaZulu Natal in the name of Matrox Investment (Pty) Ltd for the Borrower in favour of the Bank.

⁴ This was compliance with Clause 3.6 of the fourth facility agreement.

2.2.3. Cession of AIG South Africa Limited Building Insurance Policy Number: 4[...] and SASRIA Cover Coupon: FE 12014050/2019, Policy Number 0[...]. Building insurance cover is not to reduce below R200 000 000.00. The registration of the mentioned collateral in cluse 2.2.2 to commence within one week of the signing of Facility Agreement.’

[18] Educor was registered as an educational institution that was providing tuition for various education qualifications. Although Educor and Matrox shared the same business address premises at 5[...] U[...] Road, Pinetown, KwaZulu-Natal, there had been no indication that Educor had any involvement or contribution and influence in the operations, interest or control of Matrox and vice versa.

[19] Section 45(1) of the Act defines financial assistance as:

- ‘(a) *includes* lending money, guaranteeing a loan or other obligation, and *securing any debt or obligation*; but
- (b) does not include-
 - (i) lending money in the ordinary course of business by a company whose primary business is the lending of money;’ (My emphasis.)

The section therefore excluded those whose primary business is the lending of money, and the loan is made in the ordinary cause of that business.⁵

[20] The definition of financial assistance must be applied to the factual matrix that characterised the provision of security by Matrox, in favour of BOC for a debt that was owed by Educor. At the time that this security was provided, and on a closer reading of s 45(1), Matrox was neither lending money to Educor in the ordinary course of its business nor was it engaged in the business of lending of money. Matrox was also not providing an accountable advance to Educor for purposes of legal expenses nor was there any anticipated expenses to be incurred by any person on behalf of Educor. Accordingly, by securing the debt or obligation of Educor to BOC to the limit of R100 million, Matrox provided financial assistance as contemplated in s 45(1)(a).

⁵ *Henochsberg on the Companies Act 71 of 2008* (Service Issue 40, May 2026) at 196.

Any relation or inter-relation between Matrox and Educor

[21] The next question that must be answered is whether the provision of the financial assistance fell within the ambit of ss 45(2)-(4) of the Act. This brings to the fore, the question of whether Educor and Matrox were related or inter-related or the assistance was to “to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsections (3) and (4)”.⁶

[22] In terms of ss 45(3) and (4) of the Act:

‘(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless-

(a) *the particular provision of financial assistance is-*

- (i) pursuant to an employee share scheme that satisfies the requirements of section 97; or
- (ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(b) the board is satisfied *that-*

- (i) immediately *after providing* the financial assistance, the company would satisfy the solvency and liquidity test; and
- (ii) the terms *under* which the financial assistance is proposed to be given are fair and reasonable to the company.

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.’ (My emphasis.)

[23] An outline of s 2 of the Act becomes imperative. It provides that:

‘2. Related and inter-related persons, and control

(1) For all purposes of this Act-

- (a) an individual is related to another individual if they-
 - (i) are married, or live together in a relationship similar to a marriage; or

⁶ Section 45(2) of the Act.

- (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;
 - (b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and
 - (c) a juristic person is related to another juristic person if-
 - (i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);
 - (ii) either is a subsidiary of the other; or
 - (iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).
- (2) For the purpose of subsection (1), a person controls a juristic person, or its business, if-
- (a) in the case of a juristic person that is a company-
 - (i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3 (1) (a); or
 - (ii) that first person together with any related or inter-related person, is-
 - (aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or
 - (bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;
 - (b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in the close corporation;
 - (c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or
 - (d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).' (My underlining.)

[24] The starting point is that BOC noted that it was aware of the links and relationships between the various entities illustrated under the organigram that was provided to it by Matrox on 9 October 2020. However, according to BOC, neither Educor nor Matrox were related nor inter-related within the meaning of the provisions

of s 2.⁷ And therefore on that basis, the security of the debt provided by Matrox was not subject to the requirements set out under ss 45(2) and (3).

[25] In this regard, Mr *Mentjies* for BOC submitted:

‘(a) that the funds were advanced in the BOC’s ordinary cause of business and in order to secure that debt, BOC obtained security from A1 Capital and Matrox.

(b) when the funds were advanced, BOC held no shares and was neither involved or exercised control of a majority of the voting rights of the securities or the right to appoint or elect or control the appointment or election of a majority of directors in either Educor or A1 Capital or Matrox.’⁸

[26] In addition, it was contended that for purposes of determining whether Matrox and Educor were related or inter-related, the enquiry was whether either entity directly or indirectly controlled the other, or whether a common person directly or indirectly controlled both entities, within the meaning of s 2 of the Act. In this regard, reliance was placed on the statutory indication of control, including the ability to exercise or control the exercise of a majority of the voting rights, or the right to appoint or elect, or control the appointment or election of, directors who control a majority of the votes at a board meeting.

[27] On the other hand, Matrox persisted that it was the fact that these entities were related or inter-related which created the obligation for compliance with s 45 and the failure of which rendered the suretyship agreements which BOC sought to enforce to be null and void, and of no effect. Matrox highlighted that Educor was a 100 percent subsidiary of A1 Capital whose shareholders were the Baobab Family Trust (the second tier holding company of Matrox); Leo Chetty Trust and Vadivaloo Family Trust. Matrox was therefore related/inter-related to A1 Capital, as A1 Capital shareholders also exercised control directly or indirectly over Matrox and Educor.⁹

[28] In order to reach a determination on this issue, there must be a close examination of the amount of *control, if any*, that each of the companies or entities exercised over the other. The basic layout being that A1 Capital was the holding

⁷ Replying affidavit, paras 34-36.

⁸ The applicant’s heads of argument, para 89.

⁹ Respondent’s heads of arguments, page 14, paras 36 and 37.

company of Educor and a series of other subsidiary companies. Educor was solely owned and therefore controlled by A1 Capital. Baobab Family Trust held 37 percent shares in A1 Capital. Baobab Family Trust held 100 percent shares in Success College, which held 100 percent shares in Matrox.

[29] The central question that arises from the above layout is whether the shareholding of Baobab Family Trust in A1 Capital induced any relations or inter-relations between A1 Capital; Educor and Matrox. It must be noted that as a 37 percent shareholder in A1 Capital, Baobab Family Trust was not the majority shareholder and exercised no majority control or material influence and therefore not a controller in A1 Capital. Matrox did not feature in the shareholding or memorandum of incorporation that granted it some exercise of control and did not have any material influence in Educor and vice versa.

[30] Baobab Family Trust was registered as a trust in 2011, with three trustees, namely Chetty; Govender and Delgado. The Trust held 100 percent shares in Success College. It is common cause that A1 Capital is the sole shareholder of Success College, which is the sole shareholder of Matrox. Then, it would be correct to classify Matrox as an indirect subsidiary (second tier) of Baobab Family Trust, which was one of the three shareholders of A1 Capital. However, Baobab Family Trust shareholding in A1 Capital was 37 percent, which was a minority shareholding, and not a controller. Educor which was a subsidiary of A1 Capital, which did not hold any shares in Matrox and Baobab Family Trust and with no controlling power over Educor. There was also no memorandum of incorporation or any agreement in place that granted either Educor or A1 Capital control that gave them material influence over the operations of Matrox.

[31] On the facts, Matrox held no shares or rights, either to vote or control in Educor and A1 Capital. Conversely, neither Educor nor A1 Capital exercised control or majority shareholding in Matrox. Therefore, there was no basis for the proposition that Matrox was related or inter-related to Educor. The fact that Baobab Family Trust held 100 percent in Success College, which wholly owned Matrox, and 37 percent in A1 Capital shareholding, did not establish the requisite control. The 37 percent held by Baobab Family Trust in A1 Capital did not confer unto its majority control over A1

Capital or its board. There had been no evidence to indicate that Baobab Family Trust possessed any material or majority influence in A1 Capital's policies in a way that is contemplated in s 2(2)(d) of the Act.

[32] In *Kuttel v Master of the High Court and Others*¹⁰ the Supreme Court of Appeal (SCA) observed that control exists where there is sufficient voting power and the ability to materially influence the company's policy. *In casu*, there was no basis or there were no factors which suggest that Baobab Family Trust exercised majority control over A1 Capital, and if there was any arrangement or agreement that granted it majority voting powers or any material influence in the affairs of Educor. Therefore, in the absence of any evidence to imply otherwise, there was no inter-relations or relations between Educor and Matrox, either directly or indirectly within the meaning of s 2 of the Act. Ultimately, when Matrox decided to secure Educor's debt in favour of BOC, it was not engaged with a company that was related or inter-related to it, as there was no relations or inter-relations established between Matrox and Educor.

[33] Therefore, the mere fact that Baobab Family Trust controlled Success College, and through it, Matrox, while holding 37 percent interest in A1 Capital, does not suffice, in the absence of any other requisite voting rights, or control in the appointment of directors, to accord Baobab Family Trust direct or indirect control on Matrox and Educor. These characteristics of Baobab Family Trust do not establish the necessary statutory connection of control between Matrox and Educor. Upon a closer examination of the influence or lack thereof of Baobab Family Trust within A1 Capital, Matrox operated and functioned entirely independent from A1 Capital and Baobab Family Trust. The link between A1 Capital and Baobab Family Trust is not sufficient to induce any form of relation/inter-relation between Educor and Matrox within the meaning of s 2 of the Act.

[34] As to whether there was relations or inter-relations between A1 Capital and Educor, it was common cause that Educor was the subsidiary company of A1 Capital. A1 Capital also exercised complete control over the operations and policies of Educor, as its holding company. According to the organigram of the entities that

¹⁰ *Kuttel v Master of the High Court and Others* [2022] ZASCA 156; 2023 (3) SA 498 (SCA).

were registered under the umbrella of A1 Capital, Educor's name appears. Therefore, on the basis of this connection, A1 Capital directly or indirectly controlled Educor, or its business as its subsidiary. Educor was thus related to A1 Capital as contemplated in s 2(1)(c) of the Act.

[35] However, in this regard, BOC contended that, in terms of the 2024 amendment to s 45 of the Act and by virtue of Educor being a subsidiary of A1 Capital, the exemption from compliance with s 45 applied. This shall be examined closely below.

Was there compliance with s 45 of the Act

[36] BOC contended that even though compliance with s 45 was not necessary for the validity of Matrox's suretyship that it sought to enforce, Matrox and A1 Capital had satisfied both the solvency and liquidity tests when they secured Educor's debts in favour of BOC.¹¹ Further thereto, BOC argued that, by virtue of Educor being the subsidiary of A1 Capital, A1 Capital's compliance with s 45 was not a prerequisite for the validity of the security that was provided by Matrox. BOC also argued for retrospective application of s 45(2A) which came into operation in December 2024, for the purposes of A1 Capital's suretyship. According to BOC, a retrospective application of s 45(2A) would imply that compliance with s 45 requirements was no longer a prerequisite for the validity of the A1 Capital suretyship because Educor was its subsidiary.

[37] In demonstration of the alleged compliance with s 45 by both Matrox and A1 Capital, BOC highlighted that:

- (a) On 17 November 2016, A1 Capital shareholders passed a special resolution in terms of which it would bind A1 Capital as surety and co-principal debtor in favour of BOC for due fulfilment of obligations that arose or which could arise in future for Educor or for which Educor could become contingently liable to BOC and the suretyship was limited to R200 million. This was signed by shareholder representatives; the directors and the auditor of A1 Capital.

¹¹ Replying affidavit, para 40.

- (b) On the same day, a resolution was signed by A1 Capital directors. They resolved that:

'in terms of s 45 of the companies Act of 2008, the directors of the company had considered all reasonably foreseeable financial circumstances of the company in applying the solvency and liquidity test and had had sight of the special resolution of the shareholders in respect of the unlimited suretyship below. The terms of the financial assistance in the form of a suretyship are fair and reasonable. The assets of the company or, if the company is a member of a group of companies, the aggregate assets of the company, as fairly valued, equal or exceed the liabilities of the company or, if the company is a member of a group of companies, the aggregate liabilities of the company as fairly valued.'

[38] BOC highlighted that Matrox, had denied that there were s 45 resolutions when it pleaded to the action proceedings that were instituted under case number: D4412/2023. Furthermore, through Ms Johnson, Matrox was emphatic that neither its board nor that of A1 Capital applied the liquidity test on the basis that they were required to only consider the solvency test.¹²

[39] On the other hand, still on the question of s 45 compliance, Matrox gave mutually destructive versions as to whether there were s 45 resolutions or not. In the answering affidavits deposed to by Ms Johnson dated 27 November 2023 and 19 January 2024, she denied the existence of such resolutions. She emphasized that she had personal knowledge of it. In her affidavit dated 26 September 2024, her version changed and she admitted the existence of the s 45 resolutions. However, she claimed that the existing resolutions were inadequate due to there being no substantive compliance with s 45.¹³

[40] Matrox's case was that relations and inter-relations between itself, A1 Capital and Educor, were always known to BOC and that these attracted the applicability of s 45. Matrox also contended that BOC had conceded that the Matrox suretyship; and the bond and cessions which BOC sought to enforce constituted financial assistance within the meaning of s 45. In this regard, Matrox referred to the following

¹² Applicant's heads of argument, para 139.

¹³ Answering affidavit dated 26 September 2024, Vol xi, page 837, para 133; page 840, para 149.

communication between Mr Trevor Dou of BOC, and Ms Johnson dated 27 October 2021:

'Hello Trevor attached please find the A1 Group structure and that of Matrox for reference to Item 2 below. You will note that both have baobab Family Trust as shareholders, which is where the link is to the group.'

[41] According to Matrox, BOC failed to provide evidence that the directors of Matrox applied the correct solvency and liquidity tests. Matrox insisted that the correct application of the test, which was not followed in its instance, would have been for the board of directors, immediately after providing the financial assistance, firstly, to consider all reasonable and foreseeable financial circumstances of Matrox at the time and if its assets, when fairly valued, equalled or exceeded the liabilities of Matrox. Secondly that they failed to consider if Matrox would be able to pay its debts as they became due in the ordinary course of its business for a period of 12 months after the date when they applied the test.

[42] Matrox contended that BOC did not give its board the opportunity to adequately comply with s 45 in that they could not engage with the terms for the proper solvency and liquidity tests. Instead, it was BOC which presented resolutions that it drafted, wherein BOC dictated terms. Matrox therefore argued that the financial assistance it provided in the form of a suretyship and/or mortgage bond and cession were void and unenforceable in terms of s 45(6). It was contended that the validity of Matrox's suretyship was a condition for the fourth facility agreement and its invalidity rendered the facility void *ab initio*. According to Matrox the question of the validity of the suretyship agreement laid in the failure by its directors to comply with s 45 requirements to the extent that the failure rendered the agreements null and void and of no effect.

[43] What constitutes compliance with s 45 was settled in *Constantia Insurance Co Ltd v Master, Johannesburg High Court and Others*¹⁴ where the SCA held that: "the board of a company must adopt a resolution to provide financial assistance to a company or person mentioned in s 45(2)"; if it is satisfied that "after providing the

¹⁴ *Constantia Insurance Co Ltd v Master, Johannesburg High Court and Others* [2022] ZASCA 17; 2023 (5) SA 88 (SCA (*Constantia Insurance*) para 27.

financial assistance, the company would satisfy the solvency and liquidity test”;¹⁵ and that “the terms under which the financial assistance is proposed to be given are fair and reasonable to the company”.¹⁶ The board must satisfy itself, in terms of s 45(3)(b) that “it was appropriate to place its assets at risk” in terms of the financial assistance provided.¹⁷ The SCA also clarified that:

‘Formal and procedural requirements must be distinguished from substantive requirements for the validity of a resolution or agreement... The requirements that the board of a company must resolve to provide financial assistance under s 45 and that it must be satisfied of the matters mentioned in s 45(3)(b), are substantive requirements.’¹⁸

[44] The starting point should be to record that contrary to the evidence of Matrox, for both A1 Capital and the Matrox suretyships, including the collateral mortgage bond and cession, there were resolutions passed by the respective shareholders and the board of directors. However, the point that remains to be determined would be the value, if any, that could be attached to these resolutions in regard to whether they fulfilled the requirements of s 45, where necessary. The main complaint by Matrox is that, although these resolutions, which they earlier denied existed, sought to satisfy the solvency and the liquidity tests, they were inadequate and fell below the threshold of substantive and substantial compliance requirements.

[45] In regard to Matrox, evidence shows that on 25 September 2020, Success College as the sole shareholder of Matrox passed a special resolution in terms of which Matrox would bind itself as surety and principal debtor in favour of BOC for fulfilment of debts owed by Educor to the limit of R100 million. This was followed by a resolution of Matrox on 29 September 2020 wherein directors applied the solvency and liquidity test and resolved that they considered all reasonably foreseeable financial circumstances of the company. In addition, thereto, this resolution was later endorsed by their auditors on 7 October 2020, wherein the solvency of Matrox was confirmed. On 13 October 2020, Matrox furnished BOC with its annual financial statements for the period that ended February 2020. Subsequent thereto, on 28 October 2020 the suretyship was executed.

¹⁵ Ibid para 28.

¹⁶ Ibid.

¹⁷ Ibid para 31.

¹⁸ Ibid para 34.

[46] Before the first credit facility agreement dated 17 November 2016 was concluded, the directors of A1 Capital recorded their resolution that “they considered all reasonably foreseeable financial circumstances of the company in applying the solvency and liquidity test and had sight of the special resolution of shareholders in respect of the unlimited suretyship”.¹⁹ Notably, clauses 1-4 of the resolution reflected, verbatim, the requirements for compliance as contemplated in s 45(3)(b) of the Act and *Constantia Insurance*. This resolution finds consistency in clause 2.1 of the facility agreement that was between Educor and BOC, dated 18 November 2016 and concluded on 26 November 2016, and the annual financial statements for December 2018 of A1 Capital endorsed that both the solvency and the liquidity tests were performed.²⁰

[47] The processes followed, as illustrated above, involved and purposeful compliance with s 45 requirements in regard to the factual and commercial solvency of both Matrox and A1 Capital. They also demonstrate that when the resolutions were passed, the respective decision makers were not merely going through the motions. The passing of these resolutions are not consistent with Matrox’s allegations that the resolutions were drafted by BOC and merely given to individual directors to append their respective signatures. The endorsements by the respective auditors and sharing of annual financial statements with BOC (13 October 2020 in respect of Matrox and 2 November 2020 in respect of A1 Capital) strengthen BOC’s argument that there was meaningful consideration of the s 45(3) requirements.

[48] With reference to *Ekurhuleni Municipality v Germiston Municipality Retirement Fund*,²¹ regard must also be had to context in which these suretyship agreements were executed. It seems that compliance with the requirements in s 45 was motivated by BOC. It would be fair to conclude that in all likelihood, BOC was conscious of its importance to the facility agreements that were under consideration and the financial assistance that was to be extended to Educor. Even as the various boards proposed the respective sureties, BOC was actively involved to ensure their

¹⁹ Resolution passed by directors of A1 Capital in terms of s 45 of the Act.

²⁰ A1 Capital annual financial statement for the year ended 31 December 2018, Vol viii, page 592.

²¹ *Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13.

validity. These efforts on the part of BOC must also be viewed in light of the realities that, it had no control on the internal operations of all the entities that were involved but still made efforts to safeguard the integrity of the agreements, as funds were advanced to Educor.

[49] It must be noted further that although Matrox was initially untruthful about the existence of the s 45 resolutions, at a later stage when they were presented, it no longer persisted that there was complete non-compliance but changed its stance to allege that compliance was inadequate. Despite the mutually destructive versions of Ms Johnson in this regard, evidence had been presented to demonstrate that s 45 resolutions were passed, and were correct procedurally and in substance, at the levels of the shareholders and directors. There were annual financial statements and endorsements by the auditors.

[50] On a conspectus of the evidence; having closely examined the substance and processes in the s 45 resolutions, and fortified by *Constantia Insurance*, nothing would render as invalid, the suretyship agreement that was concluded by Matrox. Accordingly, Matrox's suretyship to the fourth facility agreement fully complied with s 45 and is valid.

[51] Matrox also attacked BOC's reliance on the Matrox surety agreement on the basis that they were invalid and void for the reason that A1 Capital's suretyship had failed to comply with s 45 mandatory requirements when they secured the first to the third facility agreements. Matrox contended that, because the fourth facility agreement was an extension of the first three agreements, it followed that the suretyship it concluded in favour of BOC also fell to be invalid and void. It argued that it was this invalidity that rendered the Matrox suretyship agreement to be invalid and void. This was Matrox's case after it had earlier pleaded in the action proceedings, that no s 45 resolutions were passed at all. However, when these resolutions were provided by BOC, the version of Matrox changed to admit the existence of the resolutions. However, the goal post shifted with Matrox claiming that

the existing resolutions were inadequate due to no substantive compliance with s 45.²²

[52] On the other hand, BOC argued that this argument was absurd, and referred to *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers*,²³ to make the point that, requiring BOC to establish that the directors applied both liquidity and solvency tests would amount to paternalism, which was contrary to the caveat subscriber rule.²⁴ BOC also submitted that, even if it were found that the A1 Capital resolution was invalid for failure to comply with s 45, such defect should not negatively affect the validity of the Matrox suretyship agreement. BOC argued that the A1 Capital suretyship agreement of the first to third facility agreements had no bearing on the fourth facility agreement and the validity of the Matrox suretyship agreement.

[53] The argument by Matrox failed to appreciate that A1 Capital directors recorded that there were adequate financial resources to continue operating for the foreseeable future and that the consolidated annual financial statements had been prepared. They were satisfied that A1 Capital was in a sound financial position and had access to sufficient borrowing facilities to meet foreseeable cash requirements. The directors had reported that they were not aware of any material non-compliance with statutory and regulatory requirements or of any pending changes to legislation that could affect the company.²⁵

[54] The financial statements of 31 December 2018 also record A1 Capital's financial liabilities, which acknowledged that:

'The company (Educor) had a facility agreement with the bank of China amounting to R200M, with interest at the 3 months JIAR plus 3 % per annum, the interest was payable quarterly. Further that the facility was secured by limited suretyship of R200M from A1 Capital.'²⁶

I agree with BOC's argument that the detail and substance of the resolution, and to the extent that it may present with some faults and weaknesses, should not be imputed on BOC and have no negative bearing on the validity of the subsequent

²² Answering affidavit dated 26 September 2024, Vol xi, page 837, para 133; page 840, para 149.

²³ *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* [2006] ZASCA 10; 2007 (2) SA 599 (SCA para 9.

²⁴ The applicant's heads of argument, page 150, para 133.5.

²⁵ Ibid page 540, para 8.

²⁶ Ibid page 592.

suretyship agreement. Having said that, upon consideration of the particulars and the purpose for which the resolutions were made, I am satisfied that on a balance of probabilities there was adequate compliance with s 45 when the security was provided by A1 Capital to Educor's facility agreements.

[55] Mr *Harpur* SC for Matrox argued that s 20(7) of the Act, alternatively common law estoppel did not apply to s 45 non-compliance. He further argued that estoppel could not render valid a contract that was void in terms of the statute.

[56] As to the question of the applicability of s 20(7) of the Act, in light of the finding above, I consider it unnecessary to traverse this question. Overall, BOC has demonstrated material factors that also distinguished its issues from those in *Constantia Insurance*, where there was no evidence that the board had considered the matters mentioned in s 45(3)(b) in respect of entering into indemnity.²⁷ In the case of Matrox and Educor, any proposition that there was no compliance with s 45 does not find support in the technical evidence to the contrary and cannot be sustained. There was full compliance, even though the two entities were neither related nor inter-related. Accordingly, the contention that alleged non-compliance with s 45 rendered the Matrox suretyship agreement null and void and of no effect fails. In the circumstances s 45(6) has no effect on the Matrox suretyship.

Should A1 Capital suretyship agreements have any impact on the validity of Matrox's suretyship

[57] The initial facility agreements between Educor and BOC were secured by A1 Capital. Educor was the subsidiary of A1 Capital when the financial assistance was provided to in favour of BOC.

[58] When the first debt became due for payment, and when Educor had failed to pay the debt, BOC did not enforce the A1 Capital suretyship that was in operation. Instead, second and third facility agreements were concluded, extending and revising the terms of the initial agreement/s. Still the debt remained unpaid. Then the

²⁷ *Constantia Insurance* para 31.

fourth facility agreement that was in part secured by Matrox was concluded. This too was not paid by Educor.

[59] Matrox also attacked the validity of its suretyship by arguing that, since the suretyship provided by A1 Capital to the other facility agreements was void and of no effect, then it followed that the suretyship provided by Matrox also fell to be void and of no effect.

[60] According to Matrox, although it had earlier disputed the existence of A1 Capital's 45 resolutions, after they were presented, it argued that those resolutions did not adequately comply with s 45, which rendered them to be void and of no effect. Further with that being the precursor to the fourth facility agreement, the suretyship agreements of A1 Capital were intertwined and inseparable to that of Matrox, which secured the fourth facility agreement. On that basis, Matrox argued, the invalidity of the A1 Capital suretyship rendered the Matrox suretyship invalid and of no force.

[61] In my view, the inclination to integrate the A1 Capital suretyship into the Matrox suretyship should be rejected for it fails to appreciate that:

'[11] A contract of suretyship is distinct from the contract or contracts between the principal debtor and the creditor that give rise to the principal indebtedness, but it is accessory to that contractual relationship and the principal debtor's obligations under it. Subject to any specific limitation, such as a suretyship in a limited amount, the surety's obligations are coterminous with those of the principal debtor. Where the surety signs as a co-principal debtor, as did ..., the addition of those words shows that the surety is assuming the same obligations as the principal debtor. In other words, the obligation of the surety is the same as that of the principal debtor. It follows from the accessory nature of the surety's undertaking that the liability of the surety is dependent on the obligation of the principal debtor.

[12] A consequence of this is that, if the principal debtor's debt is discharged, whether by payment or release, the surety's obligation is likewise discharged.'²⁸ (Footnotes omitted.)

²⁸ *Van Zyl v Auto Commodities (Pty) Ltd* [2021] ZASCA 67; 2021 (5) SA 171 (SCA). See also *Trevo Capital Ltd and Others v Steinhoff International Holdings (Pty) Ltd and Others* 2021 (6) SA 260 (WCC) para 126.

[62] Furthermore, for the validity of the Matrox suretyship, it should suffice that it complied with s 6 of the General Law Amendment Act 50 of 1956; that it secured the fourth facility agreement which was successive to the initial facility agreements; and that it was an independent contract that was not extending and incorporating the surety agreements of A1 Capital. More particularly that the fourth facility agreement was concluded with its own terms that were unique to it.²⁹ Indeed, Matrox secured a debt the fourth credit facility agreement after the first three agreements, which were secured by A1 Capital. However, there is no legal basis upon which Matrox suretyship agreement should be susceptible to the A1 Capital suretyship agreements. If at all, the validity of Matrox's suretyship agreement could only be impacted by the invalidity of the principal debt, which was the fourth facility agreement in this instance.³⁰

[63] *In casu*, the suretyship agreement in favour of BOC, by Matrox, is a distinct contract that does not engage A1 Capital's suretyship in any way or form. A1 Capital had no obligations to Matrox, and vice versa, arising from the suretyship that was executed by Matrox in favour of BOC. The debt owed to BOC by Educor remained unpaid, at least to the extent that Matrox was implicated by the suretyship agreement, Matrox's liability to BOC depended on the existence of Educor's indebtedness to BOC and not on the validity of a separate suretyship that was furnished by A1 Capital to the other facility agreements. The involvement of A1 Capital's surety agreements have no bearing whatsoever to the alleged obligations of Matrox to BOC.

[64] The Matrox's suretyship constituted a separate and independent agreement from any suretyship furnished by A1 Capital. Furthermore, in the absence of any provision in the Matrox suretyship agreement that it was expressly conditional upon the validity of the A1 Capital suretyship, there is clearly no legal reason for treating these suretyship agreements as inseparable. A1 Capital suretyship agreements are distinct and of no effect to the Matrox suretyship agreement. Therefore, as Educor's indebtedness to BOC has not been discharged, Matrox's accessory obligation as surety likewise remains extant and enforceable.

²⁹ *Neon and Cold Cathode Illuminations Pty Ltd v Ephron* 1978 (1) SA 463 (A).

³⁰ *Kilroe-Daley v Barclays National Bank* 1984 (4) SA 609 (A).

Did the 2024 amendment of s 45 have retrospective application

[65] Section 45(2)(A) provides that:

‘The provisions of this section do not apply to the giving by a company of financial assistance to or for the benefit of its subsidiaries.’

This amendment came into operation on 27 December 2024. Bearing in mind that the conclusion of the suretyships by Matrox and A1 Capital preceded the date on which this provision commence, the question that arises is whether the exemption provided by s 45(2A) should apply to the financial assistance that was provided to Educor.

[66] In this regard, Mr *Mentjies* emphasised that, if for any reason, the entities affected were found to be related or inter-related in the context of the Act, it should be found that by virtue of this amendment, Matrox and A1 Capital were exempt from compliance with ss 45(2) and (3).

[67] BOC further argued that the s 45(2A) amendment served as a safeguard to counter abuse of control and regulate disclosure in certain circumstances. BOC submitted that for this reason the amendment should apply retrospectively in these proceedings. Mr *Mentjies* gave the following four grounds in support of this argument:

- (a) that failure to give it such effect would lead to an absurdity or practical injustice as the new provision sought to rectify an inequitable state of affairs;
- (b) the use of the word ‘shall’ in the text sought to impose certainty;
- (c) retrospective application meant that creditors were relieved of the risk of having their agreements declared void and debtors would not have comply with the cumbersome compliance requirements; and
- (d) no one’s rights would be impaired by retrospective application and there would be no more obligations and duties or adverse consequences for both creditors and debtors.

[68] BOC insisted that even in the absence of express retrospectivity in the Act, the need to remove the apparent injustice or unintended consequences of the mandatory requirement had already materialised when the impugned suretyship

agreements were executed. Hence it should apply in the instance to A1 Capital and Matrox.

[69] On the other hand, Mr *Harpur* submitted that the contention that the 2024 amendment applied retrospectively was without merit. He argued, with reference to *National Iranian Tanker CO v MV Pericles GC*,³¹ that a statute does not apply retrospectively unless there is an express provision to that effect. He also argued that retrospective application would not assist BOC because Educor was not the subsidiary of Matrox.

[70] A historical perspective together with the developments in the build-up of this amendment may be of guidance when one engages with the question of whether s 45(2A) should apply retrospectively. It remains a fact that the conception of the amendment dates back to 2011; with some further reconsiderations in 2018 and 2021. However, the reality remains that the amendment which came into effect on 27 December 2024 was expressly silent on retrospectivity.

[71] Further thereto, whilst it must be appreciated that the amendment sought to remove procedural barriers to promote efficiency and agility in doing business, in the circumstances at hand, in affording retrospective application must be alive to the general sentiment against giving retrospective effect to legislative amendments, as consistently expressed in developed jurisprudence.³² In *National Director of Public Prosecutions v Carolus and Others*,³³ the SCA provided clarity on the circumstances that would justify retrospective application. The SCA reinforced that courts should lean against interpretations in the sense of taking away or impairing a vested right acquired under existing laws.

³¹ The respondent's heads of argument, para 14; *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) at 483H-I.

³² *Mudau v Municipal Employees Pension Fund and Others* [2023] ZACC 26; (2023) 44 ILJ 2641 (CC)

where the Constitutional Court cautioned that retrospective rules or legislative amendments ought not apply prior to their formal registration or promulgations, safeguarding accrued benefits and vested rights. In *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 65 the Constitutional Court emphasized the presumption against retrospectivity to legislative amendments.

³³ *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA).

[72] With all that said, the point of departure should be whether the provisions of s 45(2A) find application to the matrix between BOC and Matrox. The answer to this question lies in the purpose and literal text of the amendment, which expressly relates to subsidiaries and their holding companies. As already found above, Matrox and Educor are neither related nor inter-related and Educor was simply not the subsidiary of Matrox when the financial assistance was provided. So, even if the suretyship agreement in issue was concluded after 27 December 2024, it would not have been subject to s 45(2A). For that reason, even if retrospectivity was assumed, s 45(2A) would not have been applicable to Educor and Matrox.

[73] For the purposes of A1 Capital, as a holding company of Educor, whose relations would have been covered by the s 45(2A) amendment, to the extent that retrospective application would have some consideration, guidance must be sought from the general approach in which the courts always favoured the interpretation that maintains stability in corporate matters over retrospectivity.

[74] Having due regard to the matters at hand, a case has not been made out to justify a determination that retrospective application of s 45(2A) is warranted herein. This position in my view is fortified by the earlier determination that A1 Capital's suretyship agreement was distinct from that of Matrox and one agreement had no impact whatsoever on the other. Perhaps, much more than what is contained in the available evidence would be necessary to induce an informed determination on the retrospective application of s 45(2A) to A1 Capital's suretyship agreement. One ought to be reminded that the enquiry in these proceedings was less about the validity of A1 Capital's suretyship than it was about the validity and enforceability of the Matrox suretyship.

[75] Having considered BOC's argument, I am not persuaded that s 45(2A) applies to Matrox and Educor and that retrospective application is warranted in relation to A1 Capital and Educor, and to the extent that they may have any bearing on the validity of Matrox's suretyship.

The pending litigation and/or lis alibi pendens

[76] On 25 April 2023, BOC instituted action proceedings for a money judgment against Matrox under case number: D4412/2023. BOC sought to enforce the suretyship agreement that was concluded by Matrox in its favour. BOC claimed payment of an amount of R100 million, and that the immovable property against which Matrox executed a mortgage bond be declared specifically executable.

[77] Matrox defended the claim and on 2 November 2023 filed its plea. This was followed by an application for summary judgment that was launched on 23 November 2023, which Matrox also defended.

[78] In resisting the summary judgment application, Matrox argued that the debt which BOC sought to enforce was already secured by means of a mortgage bond, which had a municipal value of R100,87 million. Matrox contended that the further security that was available to BOC was the ceded benefits from the insurance policies of Matrox. Matrox also contended that BOC's claim was not founded on a liquidated amount and had no certificate of balance and therefore fell outside the ambit of Uniform rule 32(1).

[79] Matrox further contended that it had a bona fide defence to the claim on the basis that BOC had failed to disclose that there were other preceding facility agreements that were concluded before the suretyship agreement which implicated Matrox. Among others, Matrox raised the defence of non-compliance with s 45 of the Act, asserting that BOC's action was based on a suretyship agreement that was null and void.

[80] On 4 March 2024 Matrox was granted leave to defend the action. BOC persisted that the defences raised by Matrox failed to raise issues for trial and did not amount to a bona fide defence but were meant to delay an inevitable judgment against it. BOC contended that when Matrox answered and/or pleaded to the action and application proceedings that were instituted under case number: D4412/2023, Ms Johnson, who deposed to the answering affidavits swore that there were no s 45 resolutions passed at all. However, when these resolutions were attached to the founding affidavit, her version changed and she admitted the existence of the resolutions.

[81] The liquidation applications were opposed and still pending when this application was argued. The subject matter of the dispute *in casu* arise from the fourth loan facility agreement that was secured by Matrox in favour of BOC.³⁴

[82] The BOC submitted that the *Badenhorst* principle³⁵ found no application in this matter. It referred to *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*³⁶ to make the point that:

‘When the dispute about the debt is not whether it existed or its amount but about its eligibility, things are different. Then the doubt arises from a disputed principle, not contested facts. This means that the liquidation or sequestrating court is not diverted into a time-consuming and complex factual enquiry. The only point before it is a law point.’³⁷

[83] Matrox contended that the fourth facility agreement superseded the initial three facility agreements on the basis that those initial agreements were void and unenforceable because they failed to comply with s 45 of the Act, which required the shareholders’ and directors’ resolutions. Matrox also protested that “BOC has failed to allege that there were valid section 45 resolutions signed in respect of the other security agreements”.³⁸ Matrox however later changed this version and admitted that the resolutions had been concluded.

[84] The *Badenhorst* principle remains instructive in that winding-up proceedings may not be resorted to as a means of enforcing payment of a debt which is bona fide and reasonably disputed. In essence, regard must be had to whether it was competent for BOC to institute these insolvency proceedings while there was action proceedings against Matrox and liquidation proceedings against Educor and A1 Capital.

[85] If regard be had to the questions in the liquidation application against Matrox, when considering the dispute, it must also be borne in mind that, in *Trinity Asset Management*, the legal point was the prescription of Trinity’s claim. The

³⁴ Founding affidavit of Arne Alfred Dittrich, para 31 deals specifically with the fourth facility agreement that implicated Matrox.

³⁵ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T).

³⁶ *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* [2017] ZACC 32; 2018 (1) SA 94 (CC) (*Trinity Asset Management*).

³⁷ *Ibid* para 87.

³⁸ Answering affidavit of Ms. Johnson in case number: D9983/2023, Bundle XI, page 676, para 46.

Constitutional Court had to determine whether the high court was wrong, as a matter of law, to decide the law point. Cameron J, concurring with the majority held that the *Badenhorst* principle did not preclude the determination of a straightforward law point by a liquidation or sequestration court, if it was a killer point based on common cause facts.³⁹

[86] The legal point raised by Matrox was the failure to comply with the mandatory procedures under s 45 of the Act, which is a point of law, and if proven on a balance of probabilities would amount to a bona fide defence. Having said that, and at the risk of repetition, this legal point has been traversed in detail hereabove and was found to be unsustainable. This I said on the basis that, Ms Johnson who swore under oath on behalf of Educor and Matrox, gave false versions about the existence of the s 45 resolutions. After having admitted their existence, she then introduced another defence that the resolutions failed to fully comply with the s 45 liquidity and solvency tests. Furthermore, an in-depth examination of the s 45 resolutions, the financial statements and endorsements by auditors, that were later accepted to exist, demonstrated unequivocal compliance in substance and in process.

[87] According to BOC, although there is pending litigation between the same parties, the objectives of the liquidation proceedings are to set the machinery in motion to have Matrox declared insolvent, as opposed to the action proceedings that seek to have a money judgment. BOC submitted that the outcome of this matter will affect the civil status of Matrox and there is no claim for redress or for recovery of the rights of BOC. BOC also referred to ss 346(1) and 345(2) of the 1973 Companies Act to make a point that for purposes of liquidation, the creditor's claim need not be actually payable.

[88] In demonstrating that the disputes are not the same, BOC emphasised the distinction between the liquidation proceedings and the action proceedings, their respective enquiries and outcomes for both the creditor and the alleged debtor. BOC referred to *ABSA Bank Limited v Van der Merwe*⁴⁰ where the plea of *lis alibi pendens*

³⁹ *Trinity Asset Management* paras 86; 92-93.

⁴⁰ *ABSA Bank Limited v Van der Merwe* [2018] ZAGPPHC 968.

was dismissed on the basis that the sequestration application was not based on the same cause of action as the pending money judgment. The court held:⁴¹

‘...In the action, the applicant is endeavouring to enforce a right against the respondent and for that purpose have to prove a contract, its breach and its entitlement to claim a specific amount of money from respondent. A sequestration application is sanctioned by the Insolvency Act. This act prescribes the requirements which must be met before such order shall be made. Apart from showing that the respondent is indebted to the applicant in a prescribed minimum amount the other requirements are totally different from the cause of action in the action proceedings.’

[89] Matrox argued that the distinction upon which BOC relied between the cause of action in the action proceedings and in the winding-up proceedings could not be sustained, mainly because the dispute in both proceedings arose from the s 45 defence.⁴² According to Matrox, BOC’s contention that *lis pendens* does not apply was incorrectly based on form over substance and it ignored established jurisprudence on the doctrine.⁴³

[90] Matrox referred to *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others*,⁴⁴ where the SCA held:

‘As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach different conclusions...’

Matrox asserted that, given the identical issues arising from the pending action and the application, particularly where s 45 is concerned, it was not possible to divorce the issues *in casu* to those that are to be determined in the action proceedings.

⁴¹ Ibid para 38.

⁴² Respondent’s heads of arguments, para 18.

⁴³ Ibid para 19.

⁴⁴ *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* [2013] ZASCA 129; 2013 (6) SA 499 (SCA) (*Caesarstone*) para 2.

[91] The leading case on the approach to *lis pendens* remains *Nestlé (South Africa) (Pty) Ltd v Mars Inc*,⁴⁵ where the SCA stated:

‘There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions....’

[92] In evaluation of the pending action proceedings and the defence of *lis alibi pendens*, it can be noted that before the action proceedings were instituted, on 9 March 2021, Matrox had registered a mortgage bond against its property, in favour of BOC. This can be viewed as a concession or acknowledgment by Matrox that it was indebted to BOC and that in earnest, Matrox needed to pay the amount of R100 million that was due to BOC, as undertaken in the suretyship agreement. It is also important to note that the action proceedings sought a money judgment whereas the proceedings herein seek insolvency processes and therefore do not overlap as they seek distinct outcomes.

[93] If considered on the basis of *Nestlé*, these are distinct processes with different objectives and therefore the defence of *lis alibi pendens* does not add value to Matrox’s resistance to the provisional liquidation sought. Without engaging in the merits of the action proceedings under case number: D4412/2023, and as discussed in this judgment in detail, the defence of non-compliance with s 45 of the Act does not advance Matrox’s efforts to resist the relief sought by BOC. In the case of Matrox there was no legal obligation on the part of Matrox to comply with s 45 of the Act. Nonetheless, it must also be recorded, that Matrox fully complied with s 45 when it provided financial assistance to Educor.

[94] Therefore, if considered in light of the underpinning policy in *Caesarstone*, although the same parties are involved, it is not the same dispute/issues that are engaged and the courts involved will not be exposed to the risk of pronouncing on the same issue. Accordingly, one finds no true duplication of proceedings in the action proceedings pursued under case number: D4412/2023 and the insolvency proceedings *in casu*. The two proceedings pursued by BOC cannot by any measure

⁴⁵ *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) (*Nestlé*) para 17.

be described as parallel; the disputes are distinct and they involve the application of distinct legal principles to different issues; and they seek different outcomes.⁴⁶ Furthermore, it must be borne in mind, that according to *FirstRand Bank Ltd v Kona and Another*,⁴⁷ even if BOC had launched this liquidation application with the objective of claiming the debt, it is immaterial, if regard is had to the fact that insolvency proceedings aim “to set the machinery of the law in motion to declare a debtor declared insolvent”, with implications for both parties involved and third parties.⁴⁸

[95] Upon consideration of the *Badenhorst* principle and that the alleged non-compliance or the alleged inadequate non-compliance would amount to a bona fide and genuine defence, there remains no ground upon which BOC could be barred from pursuing the liquidation proceedings at hand. Accordingly, Matrox’s claim of *lis alibi pendens* in this instance fails.

Was Matrox commercially insolvent (s 345)

[96] The critical question that must be answered is whether Matrox was unable or neglected to pay the debt of more than R100, after having been served with the demand to pay the amount owed, which was due, and failed or neglected to pay or provide security for it to the satisfaction of BOC.⁴⁹

[97] According to BOC, in compliance with s 345(1)(a) of the 1973 Companies Act, Matrox was served with statutory demands, which lapsed without any payment or any security given to the reasonable satisfaction of BOC. BOC argued that the defence that there was a mortgage bond secured in its favour did not translate to the reasonable satisfaction of its demand, as this was inadequate.⁵⁰ For example, Matrox had an annual income of R21 million, which was not enough to pay a debt of R100 million. Further, on its own accord, Matrox admitted that according to its annual financial statements (dated 30 September 2020, 31 October 2020, 28 February 2021

⁴⁶ *MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra-Marine SA* [2010] ZASCA 118; 2010 (6) SA 493 (SCA).

⁴⁷ *FirstRand Bank Ltd v Kona and Another* [2015] ZASCA 11; 2015 (5) SA 235 (SCA).

⁴⁸ *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd* 2023 (6) SA 452 (WCC) para 15.

⁴⁹ Section 345(1)(a) of the 1973 Companies Act.

⁵⁰ Applicant’s heads of argument, page 206, para 112.

and 28 February 2022) its liabilities exceeded its assets.⁵¹ Furthermore, the income that Matrox would have earned through its rental income had been ceded to BOC which was permissible as held in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*.⁵²

[98] Matrox contended that the mortgage bond and cession concluded could not stand as security to the debt owed to BOC. The basis for this submission was that as these collaterals amounted to financial assistance, they ought to have followed the s 45 compliance procedure, which they did not. Matrox highlighted that, unlike in the Matrox and A1 Capital agreements where BOC presented resolutions, none were presented in regard to these collaterals. So, there was no compliance with s 45 and therefore, the collaterals fell to be void and of no effect.

[99] Furthermore, upon service with the third statutory demand on 13 October 2022, Matrox's correspondence dated 3 November 2022 was communicated to BOC. In essence, Matrox argued that it was still in negotiations with BOC for the settlement by raising the ceding of Matrox's rights in the insurance policies and the registration of the mortgage bond of the immovable property in favour of BOC. Matrox also contended that the inability to pay the debt was occasioned by effects of the Covid 19 pandemic and the floods in KZN, which negatively affected the business cash flow. Educor was also reliant on Matrox consenting to the sale of the implicated immovable property on open market, which did not materialise, leaving the debt unpaid. This in part occasioned the failure to pay the Educor debt, a consequence of which was BOC's institution of action proceedings seeking a money judgment under case number: D4412/2023 against Matrox on 25 April 2023.

[100] The requirements under s 345 of the 1973 Companies Act are straight forward. It remained incontestable that BOC was an undisputed creditor of Matrox and owed the amount of R100 million by Matrox, as it stood as surety for a debt that was owed by Educor. It remains common cause that the debt owed had remained

⁵¹ Ibid, page 207, para 113.6; and Volume 10, page 884.

⁵² *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] ZASCA 68; 2013 (4) SA 539 (SCA) para 36. See also the applicant's heads of arguments, para 113.9.

unpaid, and BOC continues to be embroiled in protracted litigation in its quest to have the debt paid. As also emphasised in *ABSA Bank Ltd v Tamsui Empire Park 1 CC*,⁵³ BOC was alive to its responsibility to serve the demand notices on Matrox and also engaged constructively to have Matrox fulfil its obligations. Despite various notices as required by the 1973 Companies Act,⁵⁴ Matrox had failed to make good of its commitment in terms of the suretyship agreement that was executed in favour of BOC but instead continued to raise technical defences. Even after the loan settlement letters of 7 June 2023 and 18 August 2023, the debt remained unpaid. The failure to meet its obligations or put in place reasonable means in lieu of its debt to BOC, necessitated the proposal by which Matrox would consent to the sale of its property or shares on open market. Consistently, Matrox persisted in its failure and refusal to pay its liabilities to BOC.

[101] In this instance, the efforts by BOC to enforce the Matrox suretyship were in vain. In its resistance to the relief being sought herein, Matrox also raised other defences including that it had a bona fide defence to the claim on the proper application of the *Badenhorst* principle as well as *alibi lis pendens*. As discussed in detail above, Matrox has not demonstrated that its indebtedness is indeed disputed on bona fide and reasonable grounds⁵⁵ and also failed on the *lis alibi pendens* defence.

Conclusion

[102] Matrox's defence that its suretyship was void and of no effect could not stand scrutiny. This finding is also fortified by the annual financial statements, in which it was recorded that, 'The directors had performed the required liquidity and solvency tests as required by the Companies Act of South Africa, prior to the granting of financial assistance to the related parties and declaration of dividends as set out in the statement of changes of equity.'⁵⁶

⁵³ *ABSA Bank Ltd v Tamsui Empire Park 1 CC* [2013] ZAWCHC 187.

⁵⁴ Statutory notices dated 3 November 2022; 9 June 2023; 19 April 2024, to which Matrox responded by raising the *Badenhorst* principle.

⁵⁵ *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* [2017] ZASCA 24; 2022 (1) SA 91 (SCA).

⁵⁶ Consolidated annual financial statements for the year ended 31 December 2018, Vol viii, page 540, para 14.

[103] It can be accepted that A1 Capital's liability by means of the suretyship agreement in favour of BOC was always common cause and not a subject of dispute between Matrox and BOC. It is however noteworthy that A1 Capital's consolidated annual financial statements for the year ended 31 December 2018 expressly recorded that A1 Capital conceded in terms of the limited suretyship that it was liable to BOC as it secured the facility agreement to Educor. A1 Capital also acknowledged that funds would be available to finance the settlement of its liabilities in the ordinary course of business.⁵⁷

[104] In both A1 Capital's annual financial statements (ending December 2018) and Matrox's (year ending February 2019), there were resolutions by each company that there had been compliance with legislation, thus rendering the defence of the applicability and non-compliance with s 45 an afterthought that falls short of absolving Matrox from liability to BOC.

[105] When Matrox provided financial assistance to Educor in the form of a suretyship agreement, the two entities were not related or inter-related within the meaning of s 2 of the Act. Therefore, financial assistance that was provided by Matrox to Educor did not trigger the application of the regulatory obligations under s 45. As discussed above, it has been illustrated that although Matrox was not legally required to comply with s45, nonetheless, it did so, presumably, out of abundance of caution.

[106] The defences raised by Matrox, namely the existence of a bona fide and genuine defence and *lis alibi pendens* could not withstand scrutiny. Upon closer examination of the substance of these defences, no sound legal ground could bar BOC from pursuing the provisional liquidation of Matrox as set out in its notice of motion. After due service with various statutory demand notices, Matrox still unduly failed to meet its obligations in terms of the suretyship agreement that it executed in favour of BOC.

[107] Due to the failure of Educor to pay or meet its obligations to BOC in terms of the fourth facility agreement concluded on 25 September 2020 and executed on 28

⁵⁷ Consolidated annual financial statements for the year ended 31 December 2018, page 51, para 37.

October 2020, BOC was within its rights to seek to enforce the suretyship agreement against Matrox. Matrox has no legal basis to resist its liability, as it remains indebted to BOC in the amount of R100 million. Furthermore, Matrox on 9 March 2021, when the mortgage bond was registered in favour of BOC, expressly declared its indebtedness to BOC to the sum of R100 million. As part of the acknowledgment of its indebtedness to BOC, on 30 July 2021, Matrox ceded its rights arising from the insurance policies to BOC.

[108] Undoubtedly, despite the statutory demands dated 27 July 2022 and 9 September 2022, in terms of s 345(1)(a) of the 1973 Companies Act, served on 2 August 2022 and 13 October 2022, Matrox failed and refused to pay this debt. Matrox has thus been shown to be insolvent and unable to pay its debts within the meaning of s 345 of the Act.

[109] In as much as evidence has demonstrated that Matrox is insolvent and ought to be liquidated, a final winding-up order may not be the correct approach at this stage. A provisional winding-up order will be beneficial to the greater body of creditors and also safeguard the integrity of the process. Therefore, upon an in-depth consideration of the evidence and various factors peculiar to the circumstances between Matrox and BOC, and on the exercise of this court's due discretion, a provisional winding-up order is the most suitable.

Costs

[110] In the notice of motion, the BOC did not seek an order in the determination of costs. BOC neither sought to amend its notice of motion to cater for the costs of this application. In the circumstances this court is not empowered to exercise its due discretion in the absence of any relief sought in this regard. Accordingly, the issue of costs of this application is reserved.

Order

[111] In the result, the following order is made:

1. The respondent is placed under provisional winding-up in the hands of the Master of the High Court, Pietermaritzburg.
2. That a *rule nisi* do issue calling upon the respondent and all other interested parties to show cause to this Court on the 27TH of November 2026 at 9h30, or so soon thereafter as the matter may be heard, why the respondent should not be finally wound up.
3. The copy of this order:
 - 3.1 be published on or before 13 October 2026 in one edition of The Mercury newspaper and in one edition of the Government Gazette;
 - 3.2 served in compliance with s 346A of the Companies Act 61 of 1973.
4. Costs reserved.

SIPUNZI J

CASE INFORMATION

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FOR RESPONDENT(S):

G Harpur SC

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Attorneys

HEARING DATE:

17 April 2026

DATE HANDED DOWN:

21 August 2026