



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

Case Number: **2026-032276**

In the matter between:

PLOT 432 SAXENBURG PARK CC

Applicant

(Registration No.: 1999/069365/23)

and

KALAHARI NAMAQUA KAROO (PTY) LIMITED

Respondent

(Registration No.: 2018/048292/07)

Coram: Janisch AJ

Heard: 31 August 2026

Delivered: 9 September 2026

Summary: Provisional liquidation of company – inability to pay debts in terms of s344(f) read with ss345(a) and (c) of Act 61 of 1973 – test for establishing *locus standi* and ground of winding-up at the provisional stage – applicant establishing these requirements – no basis to exercise discretion against making a winding-up order – applicant’s non-compliance with Rule 41A on these facts not precluding relief or warranting a different costs order.

ORDER

The Court makes the following order:

1. The Respondent is placed under provisional liquidation in the hands of the Master of this Court.
2. A rule *nisi* is issued calling upon all persons interested to appear and show cause, if any, to this Court on **20 October 2026** at 10h00 or as soon thereafter as the matter may be heard, why the following order should not be granted:
 - 2.1 That the Respondent be placed under final liquidation; and
 - 2.2 That the costs of the application be costs in the liquidation on a scale as between attorney and client.
3. Service of this provisional order shall be effected:
 - 3.1 By the Sheriff on the Respondent at its registered office;
 - 3.2 By the Sheriff on the South African Revenue Service;
 - 3.3 By the Sheriff on the Respondent's employees and any trade union to which such employees may belong; and
 - 3.4 By one publication in each of *The Cape Times* and *Die Burger* newspapers.

JUDGMENT

JANISCH AJ:

Introduction

[1] The Applicant seeks an order placing the Respondent under provisional liquidation, together with the usual ancillary relief (i.e. the issue of a rule nisi calling upon interested parties to show cause inter alia why the Respondent should not be finally liquidated, and directions for service of the provisional order).

[2] The Applicant is a close corporation known as Plot 432 Saxenburg Park CC. Its affidavits are deposed to by its sole member, Mr J Lear (*'Lear'*).

[3] The Respondent is a private company which goes by the name of Kalahari Namaqua Karoo (Pty) Limited. It owns a farming property in the Northern Cape Province and conducts farming operations there. It has two current directors, Mr W C le Roux (*'Le Roux'*) and Mr B J Botha (*'Botha'*).

[4] The application is brought in terms of s344(f) and s346(1)(b) of the Companies Act 61 of 1973 (*'the old Act'*), read with the transitional provisions of Item 9 of Schedule 5 of the Companies Act 71 of 2008 (*'the new Act'*).

[5] The Applicant claims that as a creditor of the Respondent, it is entitled to a winding-up order on the basis, as envisaged in s344(f) of the old Act, that the Respondent is unable to pay its debts as described in s345 thereof.

[6] The Respondent is deemed to be unable to pay its debts inter alia if a creditor to whom it is indebted in a sum of not less than R100 then due has served on it a

demand requiring it to pay the sum so due, and it has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor (s345(1)(a) of the old Act); or if it is proved to the satisfaction of the Court that the Respondent is unable to pay its debts (s345(1)(c) of the old Act).

[7] The Applicant seeks to establish the requirements of s344(f) of the old Act on both of the bases referred to above (i.e. both sub-paragraphs (a) and (c) of s345(1)). An inability to pay debts in this way constitutes a case of commercial insolvency, as opposed to factual insolvency where the entity's liabilities exceed its assets.

The factual background

[8] The material factual background to the present application is not in dispute.

[9] The Applicant is a registered credit provider in terms of the National Credit Act 34 of 2005.

[10] On 21 November 2023, 25 November 2023 and 28 November 2023, the Applicant entered into three separate written loan agreements with the Respondent, represented by Le Roux. In terms of those agreements, the Applicant agreed to loan amounts of R3 000 000, R3 600 000 and R1 900 000 respectively to the Respondent – a total of R8 500 000.

[11] The primary purpose of the loan was to enable the Respondent to purchase a farm called Rondekop, on which the Respondent intended to farm Angora goats, lucerne and wheat. A portion of the loan was also intended to be used to acquire farming assets and livestock.

[12] In this regard, the Respondent had on 9 November 2023 entered into a purchase agreement in respect of Rondekop with APC Nieuwoudt & Seun BK (*'the seller'*). The purchase price for the farm was R7 500 000. Of this, the Respondent

was obliged to pay a sum of R3 000 000 on transfer of title, with the remaining amount being payable in three instalments of R1 500 000 each (plus interest at an agreed rate) on 15 January of each of the years 2025, 2026 and 2027.

[13] Although not explained in the founding papers, it seems that the reason for there being three separate agreements was that the security provided for each was different. The R3 000 000 loan was secured by a mortgage bond over Rondekop, with each of Le Roux and Botha entering into a deed of suretyship in favour of the Applicant limited to R3000 000 plus accrued interest and costs; the R3 600 000 loan was secured by a bond over a residential property owned by Mr J and Mrs E le Roux, who entered into a deed of suretyship with the Applicant to the same amount; and the R1 900 000 loan was secured by a bond over a residential property owned by Ms O Muller, who also entered into a deed of suretyship with the Applicant to the same amount.

[14] Over the period from 26 October 2023 to 22 July 2024, the Applicant advanced the total sum of R9 137 600.35 to the Respondent. This included payments made to the Respondent directly and to third parties in settlement of amounts owing by the Respondent to those parties (in relation to the acquisition of farming equipment and livestock).

[15] The founding papers do not explain why the total actually advanced to the Respondent in this way exceeded the total undertaken to be advanced by more than R600 000. However, there is no dispute that the above amount was in fact advanced as a loan.

[16] Each of the loan agreements required the loan to be repaid in monthly instalments over a period of 36 months.

[17] It was an express term of each loan agreement that subject to the provisions of the National Credit Act, should the Respondent be in default under the agreement, 'then all amounts whatsoever owing to the Lender shall forthwith be payable in full,

and the Lender may institute proceedings for the recovery thereof and obtain an Order declaring the Property executable.’ Failure to pay any amount due in terms of the loan agreement would for this purpose place the Respondent in default.

[18] Save for an amount of R300 000 (or R150 000) to which I return below, it appears that the Respondent made no payments of any instalments on the loan agreement whatsoever. As at January 2026, the total amount owing to the Applicant (including interest) was calculated by the Applicant to amount to R11 453 049.80.

[19] In the Respondent’s answering affidavit, Le Roux denied that as at 31 January 2026 the Respondent was indebted to the Applicant in the above amount. In particular, he denied that the alleged balance:

‘accurately reflects:

67.1 all payments made by or on behalf of the Respondent

67.2 proper allocation of payments received;

67.3 the true capital amount outstanding from time to time; and

67.4 the correct contractual interest rate or rates.’

[20] In support of this, the Respondent provided what Le Roux called ‘an example’, being payments of R250 000 to the Respondent’s erstwhile attorney, Mr Erasmus and R50 000 to a firm called Boshoff Inc, these amounts having been paid ‘for the benefit of both the Applicant and the seller of the farm’. It alleged that some or all of this amount should be allocated to the Applicant, which would have an impact on the overall interest calculation.

[21] On this basis, the Respondent contends that ‘in the absence of a proper debatement and reconciliation of the account, the amount owing remains genuinely and materially disputed’.

[22] Over and above this ‘example’, the Respondent however put up no other concrete evidence of other payments having been made in relation to the loan

indebtedness. Nor was any more detail provided in relation to a dispute about applicable interest rates.

[23] On 14 October 2025, the Applicant's attorneys addressed and duly delivered to the Respondent a letter intended to comprise a notice in terms of s345(1)(a) of the old Act (*"the s345 letter"*).

[24] In the s345 letter, it was stated that despite an earlier letter of demand dated 9 September 2025, the Respondent had not made payment of the outstanding amount, and that in the circumstances, the full amount of R11 047 998.86 inclusive of interest was due and payable under the '*Loan Agreement*' (this should plainly have referred to '*Loan Agreements*', but I do not think that anything turns on this).

[25] The Applicant demanded payment or adequate security for payment of the full amount within three weeks of the date of service thereof, failing which the Respondent would be deemed to be unable to pay its debts in terms of s345(1)(a) and the Applicant would immediately institute liquidation proceedings. The Applicant's attorneys also advised that they had instructions to institute urgent proceedings against all sureties in the matter.

[26] Despite the s345 letter, the Respondent does not appear to have made any further payment to the Applicant within the three-week period or at all. The present application was launched on 12 February 2026.

[27] The application became opposed and on 24 March 2026 the parties agreed to postpone the matter for hearing on the semi-urgent roll on 31 August 2026, together with a timetable for the filing of further papers.

[28] The Respondent delivered its answering affidavit on 30 April 2026.

[29] Despite the agreed order requiring the delivery of any replying affidavit by 22 May 2026, the Applicant's reply (deposed to by Lear) was only delivered on 24 June

2026. It was accompanied by an affidavit from Botha (the other director of the Respondent) addressing certain allegations made by Le Roux in the answering affidavit.

[30] After receipt of the reply and Botha's affidavit, the Respondent indicated that it would seek leave to file a further affidavit in terms of Uniform Rule 6(5)(e) dealing with what it regarded as new matter in those affidavits. The Respondent did not resist this, and a further affidavit of Le Roux was duly delivered on 24 August 2026.

[31] At the hearing of the matter, the parties agreed that it would be appropriate for me formally to condone the late filing of the replying affidavit and to exercise my discretion to permit the further affidavit. I made orders to that effect. The Applicant elected not to file a further replying affidavit.

[32] In relation to procedure, the Respondent raised the fact that the Applicant had not complied with Uniform Rule 41A (pertaining to mediation as a dispute resolution mechanism) when launching the liquidation proceedings. I shall deal with that aspect at the conclusion of this judgment.

Legal Principles

[33] In an application for a provisional winding-up order based upon an alleged inability to pay debts, it is up to the applicant to establish the requirements for such an order on a *prima facie* basis. What this means was set out as follows in *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd* 2015 (4) SA 449 (WCC) ('*Orestisolve*') in paragraph 7:

'[Proof of an entitlement to a provisional winding-up order on a *prima facie* basis means] that the applicant must show that the balance of probabilities on the affidavits is in its favour (*Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 975J-979F). This would include the existence of the applicant's claim where such is disputed'.

[34] In other words, the special meaning of a *prima facie* case in provisional winding-up proceedings is not (as would be the case in other contexts) that a case has been established on the applicant's papers alone, without regard to any rebutting evidence, but that the requisite case for provisional winding-up is proven on a balance of probabilities, having regard to the affidavits as a whole (*Kalil v Decotex* at 976E-977C and at 978J-979C).

[35] In *Afgri Operations Limited v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) (*'Afgri Operations'*) in paragraph 9, the SCA endorsed this approach:

'Indeed, it is precisely by reason of the fact that a court may first make a provisional order of liquidation that, in *Kalil v Decotex*, a different test was applied from that in *Plascon-Evans* when setting out the circumstances that would be sufficient to justify the making of such an order of liquidation. It is that the affidavits must demonstrate a *prima facie* case in favour of the applicant. It may bear repeating that *Plascon-Evans* is the *locus classicus* as to the test in the factual inquiry before a *final* order can be made in motion proceedings.'

[36] Corbett JA in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) (*'Kalil v Decotex'*) at 979B-D also held that where a *prima facie* case in the above sense is established, a provisional order of winding-up should usually be granted and, save in exceptional circumstances, the court should not accede to an application by the respondent that the matter be referred to oral evidence. This does no lasting injustice to the respondent, Corbett JA held, for he will generally be given the opportunity on the return day, in a proper case and where he so asks, to present oral evidence on disputed issues.

[37] Moreover, a respondent, facing a final order, can seek leave to file further affidavits addressing the requirements for liquidation, and that application will be determined using the *Plascon-Evans* approach (*Plascon-Evans Paints Limited v Van Riebeek Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634E-G).

[38] To obtain a provisional order at this stage, the Applicant needs therefore to establish, *prima facie* (i.e. on all the affidavits):

- (a) Its *locus standi* (which will exist if the applicant establishes that it is a creditor of the company, even if contingent or prospective – see s346(1)(b) of the old Act); and
- (b) The existence of a ground of winding-up (in this case, that s345(1)(a) or (c) is present).

[39] Establishing, on a *prima facie* basis, that the company is indebted to the applicant (i.e. that the applicant is a creditor) is however not necessarily the end of the *locus standi* enquiry. It is in this sphere that the so-called '*Badenhorst rule*' may come into play. In *Afgri Operations*, it was stated in paragraph 6 that:

'It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on *bona fide* and reasonable grounds [see *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348 and *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 980D)]. This is known as the so-called "*Badenhorst rule*". Where, however, the respondent's indebtedness has, *prima facie*, been established, the onus is on it to show that the indebtedness is indeed disputed on *bona fide* and reasonable grounds.'

[40] In *Imobrite (Pty) Limited v DTL Boerdery CC* [2022] ZASCA 67, the SCA in paragraph 14 stated as follows:

'... winding-up proceedings ought not to be resorted [to] to enforce a debt that is *bona fide* (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused.'

[41] The *Badenhorst rule* was also acknowledged in *Kalil v Decotex* at 980B – F. Corbett JA pointed out (at 980F-G) that that rule:

'[W]ould tend to cut across the general approach to applications for a provisional order of winding-up ... as it is conceivable that the situation might arise that the applicant could show a balance of probabilities in his favour on the affidavits, while at

the same time the respondent established that its indebtedness to the applicant was disputed on bona fide and reasonable grounds.'

[42] Rogers J in paragraph 8 of *Orestisolve* said that the *Badenhorst* rule is part of the broader principle that the court's processes should not be abused, but that it is now treated as an independent rule, not dependent on proof of actual abuse of process. He then went on to state as follows:

'A distinction must thus be drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the applicant's claim, however, the court must consider not only where the balance of probability lies on the papers but also whether the claim is *bona fide* disputed on reasonable 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 (*Payslip Investment Holdings CC v Y2K Tec Limited* 2001 (4) SA 781 (C) at 783 G-I). 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 (*Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 218D-219C).'

[43] I shall deal further below with legal aspects pertaining to how an applicant establishes the existence of a ground of winding-up under sections 345(1)(a) and (c), having regard to the present facts.

[44] As a general principle, when the undischarged indebtedness has been *prima facie* established and the respondent has not shown that it is disputed on bona fide and reasonable grounds, and when a ground of winding-up is shown *prima facie* to exist, an unpaid creditor has a right *ex debito justitiae* (i.e. 'a right arising out of the justice of the matter') to a winding-up order (*Afgri Operations* in paragraph 12, including footnote 14).

[45] The *ex debito justitiae* principle however does not establish an inflexible rule or limitation on a court's discretion to make or refuse a winding-up order. It is recognised that circumstances may exist in which a court will nonetheless exercise a discretion against granting a winding-up order. The SCA in *Afgri Operations* nonetheless stated, as a principle, that:

‘the discretion of a court to refuse to grant a winding-up order when an unpaid creditor applies therefor is a “very narrow one” that is rarely exercised and then in special or unusual circumstances only’.

[46] Whether the court should exercise its discretion to refuse a winding-up must be considered on the special facts of each case. One example may be where a commercially insolvent company is shown not to be factually insolvent (i.e. where its assets exceed its liabilities). Even then, it is recognised that commercial insolvency is a more readily determinable and objective justification for winding-up in the face of factual solvency, inter alia because of the difficulties inherent in valuing assets and establishing that such assets are suitably liquid to enable it to meet its commercial obligations (see *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* 2014 (2) SA 518 (SCA) in paragraph 17).

[47] Thus the mere fact that an excess of assets over liabilities is established would not typically be enough to trigger the exception. The nature of the assets is important. As stated in *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597 E-F (endorsed in *Absa Bank Ltd v Rhebokskloof (Pty) Limited* 1993 (4) SA 436 (C) at 440H):

‘If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.’

[48] It has also been suggested that the refusal of winding-up may be justified where it appears that an indebted company could be saved by a particular

transaction, even in the absence of a counter-application for business rescue (e.g. *Dippenaar NO v Business Venture Investments No 134 (Pty) Ltd* [2014] 2 All SA 162 (WCC) in paragraphs 45 and 46 and the authorities referred to there).

[49] Ultimately, however, the discretion is a flexible one in relation to which no hard and fast rules may be set. In paragraph 18 of *Orestisolve*, it was stated that the *ex debito justitiae maxim*:

‘conveys no more than that, once a creditor has satisfied the requirements for a liquidation order, the court may not on a whim decline to grant the order. ... There must be some particular reason why, despite the making out of the requirements for liquidation, an order is withheld.’

[50] This finds support in *Electrolux South Africa (Pty) Ltd v Remtek Consulting (Pty) Ltd* 2023 (6) SA 452 (WCC) where the court said the following in paragraph 25:

‘It goes without saying that the exercise of a discretion in favour of not granting a liquidation order in circumstances where a company is commercially insolvent must be based on a solid factual foundation.’

[51] Against this legal backdrop, I proceed to address the merits of the present application.

Discussion

[52] Having regard to all the affidavits filed, it is apparent to me that the Applicant has established its locus standi as a creditor of the Respondent on a prima facie basis.

[53] It is not disputed that the Applicant entered into loan agreements with the Respondent and that it duly advanced the loan amount (and more) to the Respondent. Moreover, the Applicant has averred that it received no repayments, although pursuant to the information provided in the first answering affidavit it has conceded that an amount of R150 000 may be regarded as having been paid to it,

being half of the amount of R300 000 paid into the attorneys' trust accounts in part settlement of both the Applicant's and the seller's claims. The receipt of a single payment of R150 000 against a loan capital debt of in excess of R9 000 000 plainly does not assist the Respondent in any material sense.

[54] On my calculation, the monthly repayment under the three loan agreements for the first 12 months of the loan was R86 770, while for the final 24 months it was R401 116. Against these sums, payment of a single amount of R150 000 pales into insignificance when one is determining whether the Respondent is in default. It is therefore self-evident that the Respondent is in breach of its obligations under the loan agreements. In accordance with the terms of the loan agreements, the full amounts of capital and interest became payable immediately.

[55] The Applicant has therefore established that it was, at the time of launching the application, a creditor of the Respondent. Counsel for the Respondent conceded as much.

[56] The Respondent nonetheless seeks to rely on the *Badenhorst* rule. In its answering affidavit, it denies that the Applicant has established that the amount claimed was correctly stated or lawfully due. The high-water mark of its complaint is that the alleged indebtedness 'is based solely, alternatively primarily, on statements and schedules generated by or under the control of the Applicant, the correctness, completeness and reliability of which are disputed.' The Respondent goes on to make the statement set out in paragraph 19 above, and to highlight as an example of its dispute the non-inclusion of the R300 000 payment.

[57] What is entirely missing from the Respondent's affidavit is any factual basis (other than the R300 000 payment) for casting doubt on the correctness of the Applicant's contention that the Respondent is liable to it in the sum claimed. Le Roux, he says in his additional affidavit, was the director of the Respondent responsible for the Respondent's 'finances and administrative affairs'. One would therefore expect him to have knowledge of any payments actually made in

compliance with the loan agreements. Moreover, if there was any dispute about the amount of interest, he was best placed to explain it. The fact that he has resorted to the vague, unsubstantiated and formulaic statements as set out above suggests to me that there is no substance to these contentions. Certainly, the Respondent has failed to put up nearly sufficient evidence at this stage that the liability to the Applicant is disputed on bona fide and reasonable grounds, or indeed on any grounds at all.

[58] For these reasons I do not accept that this is a case in which reliance may be placed on the *Badenhorst* rule.

[59] The next question is whether the Applicant has established, on a prima facie basis, one or both grounds for winding-up relied upon by it.

[60] It is common cause that a s345 letter was served on the Respondent and that payment of the amount demanded was not made or satisfactorily secured within a three-week period.

[61] The Respondent however argues that s345(1)(a) was not triggered because the amount claimed in the letter had not been accurately established as due. The contention, as I understand it, is that the mere fact that the R300 000 amount (or an allotted half of it) has now been accepted to give rise to an adjustment to the Applicant's claim, means that the Applicant can no longer rely on the Respondent's non-compliance with the s345 letter as an independent ground of winding-up.

[62] The Respondent referred me to the decision of the Supreme Court of Appeal in *Lamprecht v Klipeiland (Pty) Limited* [2014] ZASCA 125, in which the application of s345(1)(a) was discussed. In that matter there had been a s345 letter claiming payment of R6 000 000. The parties had later taken an order by agreement that the applicant was a creditor of the respondent in a sum of no less than R100. The Court concluded that this meant that it was accepted that an amount of R100 was due and payable. In those circumstances, it held that s345(1)(a) was established.

[63] Of particular importance was the SCA's endorsement in paragraph 16 of the finding of Malan J in *Body Corporate of Fish Eagle v Group Twelve Investments* 2003 (5) SA 414 (W) at 428B-C, where the Court held that if the respondent admits a debt of over R100:

'even though the respondent's indebtedness is less than the amount demanded in terms of s345(1)(a), then on the respondent's own version, the applicant is entitled to succeed in its liquidation application...'

[64] The Respondent, having in its written heads of argument submitted that this principle applies 'where a debt exceeding the statutory minimum is admitted or otherwise established as due and payable' (my underlining), in oral argument retracted from this position. It now contended that that principle only applies where the lesser debt is admitted, but that otherwise the Applicant must fail on this ground if it cannot establish a liability in precisely the same amount as was demanded in the s345 letter.

[65] I do not agree with this submission. There are many ways in which the requisite indebtedness can be established. An admission is only one of these. If (as the courts held in *Fish Eagle* and *Lamprecht*) it does not matter for purpose of compliance with s345(1)(a) that the respondent has only admitted an indebtedness lower than the amount demanded, it should likewise also not matter that in the absence of an admission, the applicant has prima facie established an unsatisfied indebtedness in an amount lower than the demand, as long as it exceeds R100. The Respondent's approach is impractical and over-technical and would frustrate the purpose of s345(1)(a).

[66] I am for the reasons already given above satisfied that the Applicant has prima facie established that the Respondent is indebted to it in an amount which exceeds R100 by an order of magnitude. The fact that the Applicant now accepts that it ought to have allocated a payment of R150 000 to the debt whose payment it

demanded does not alter that conclusion and certainly cannot in my view invalidate reliance on the s345 letter.

[67] Finally in relation to the s345(1)(a) requirement, the Respondent sought to place reliance on my judgment in *The Body Corporate of The Decks Sectional Title Scheme v Prophax Properties 22 CC* (Unreported WCHC Case no. 2025-080033, 20 May 2026) ('*The Decks*'). The Respondent contends that both in relation to whether a debt had been prima facie established, and as to whether a bona fide dispute on reasonable grounds had been shown, the finding in *The Decks* is relevant. In that matter I dismissed an application for provisional winding-up for failure to establish the basis of the debt and because the respondent showed the existence of such a dispute.

[68] It will be apparent from a reading of the judgment in *The Decks* that the matter differed materially from the present one. The applicant there relied upon a debt relating to levy charges but based its claim on statements that included a range of other amounts, which were not explained. In the present case, the basis of the debt (the loan advances) has been properly explained and established. Moreover, in *The Decks*, the respondent provided concrete substantiation of the various disputes it wished to pursue, the quantum of which together exceeded the amount claimed. The Respondent in the present case has not done so.

[69] I therefore do not think that the judgment in *The Decks* is of any assistance to the Respondent in the present application.

[70] But even if I am incorrect in my conclusions in relation to s345(1)(a), I am of the view that on the papers before me, the Applicant has in any event established on the necessary prima facie basis that the Respondent is unable to pay its debts.

[71] In the first instance, the Applicant has demonstrated that over a period of at least two years from the time the first loan amount was disbursed, and a year and a

half from the final disbursement, the Respondent made no loan repayments (except for the R150 000 referred to above).

[72] As already stated, the Respondent has not put up anything approaching an explanation for its failure to pay the loan instalments. Its vague contentions of there being a 'substantive accounting dispute' are not borne out or substantiated on the papers. Despite being the person best placed to inform the Court about the financial affairs of the Respondent, Le Roux provides no concrete evidence of any bona fide dispute of the Respondent's obligation to pay. The very strong inference to be drawn from this, on a view of the papers, is that there is no explanation other than the fact that the Respondent is not able to pay.

[73] Moreover, the Respondent's only business is that of farming on Rondekop. If the Respondent is able to pay its debts, it must therefore do so from the proceeds of those farming operations.

[74] Le Roux's evidence as to how the farm generates income is vague and unsatisfactory. He mentions the Angora goats and says that 'this animal husbandry covers the costs of the farm and is sustainable in the long term'. However, he provides no evidence of any actual income having been earned, in what amount, and how that amount is allocated to farming costs. He certainly does not provide a basis to conclude that there is sufficient surplus to cover the Respondent's debts to the Applicant and/or its obligation to pay the remaining purchase price of the farm. He says nothing about the viability of the Angora operation or its ability to generate income in the short or medium term.

[75] Le Roux also says that the farm has capability to generate income from trees on the property, and that the Respondent is 'in the process of finalising procurement and lease agreements with various entities' that 'will enable the Respondent to generate sufficient income for profit and settle its debts in the ordinary course'. No concrete information, timelines or budgets for this endeavour are provided, as would

be expected if there were a real and imminent prospect of the Respondent being able to turn this alleged capital resource to account.

[76] Le Roux goes on to say that 'the Respondent's financial difficulties, to the extent that any have arisen, are temporary cash-flow pressures and not proof of commercial insolvency'. The fact that the Respondent has been unable to settle any of its ingoing indebtedness to the Applicant for a number of years (save for R150 000) speaks in my view to something far more serious than 'temporary cash flow pressures'. In the absence of any concrete explanation of this contention, the natural inference to be drawn is that the Respondent has been, and remains, simply unable to generate the farming income needed to enable it to pay its debts. There is also no evidence of any anticipated financial support likely to be forthcoming from another source.

[77] When the Applicant filed an affidavit by Botha (together with its reply) in which Botha, who conducts the farming activities, stated that the Respondent needs financial support and is unable to pay its debts, the Respondent was permitted to file a further affidavit dealing with what it regarded as new matter, including Botha's affidavit. Whether or not I give particular weight to Botha's evidence, the fact is that Le Roux had a chance to provide more information as to the Respondent's ability to pay its debts from the farming operations. His additional affidavit failed to add anything of value in this regard. On the contrary, he now acknowledged that the 'biomass opportunity' (i.e. the exploitation of the trees) was not yet a reality and that he did not ask the Court to find that the Respondent was commercially solvent on that basis. Moreover, he now acknowledged that Respondent had experienced 'serious cash-flow pressure,' a step up on the 'temporary cash-flow pressures' to which he had originally admitted.

[78] In my view, even leaving aside Botha's statement, on a view of all the affidavits the Applicant has comfortably established, at least for purposes of a provisional order, that the Respondent is not able to pay its debts.

[79] The final question is whether I should exercise my discretion to refuse a winding-up order.

[80] As stated, the power to refuse to grant a winding-up order where the statutory requirements have been met is a limited one, to be exercised only in special or unusual circumstances and based on a solid factual foundation.

[81] I do not see that the Respondent has put up any cognizable factual basis to warrant the exercise of a discretion in its favour. It has not been demonstrated that the company is factually solvent in that its assets exceed its liabilities. In any event, its assets (primarily the farm) are not liquid and there is no suggestion that any effort is being made to dispose of the farm to settle creditors.

[82] The extent of the Respondent's submissions in relation to the discretion, as I understood them, was that the circumstances in which Botha came to support the liquidation application had not been explained. This was against the background that the Applicant had not pursued Botha under his personal suretyship but had pursued Le Roux.

[83] I do not think that the above issues have any material bearing on why a winding-up order should not be granted. A creditor is not required to exhaust some or all of its security before applying for liquidation. The mere fact that Botha deposed to a supporting affidavit, and is apparently not being pursued as a surety, does not mean that the application is somehow an abuse of process or that liquidation is inappropriate. Le Roux had every opportunity to present rebutting evidence of the company's financial position, contrary to Botha's statements, but could not do so.

[84] In the circumstances, the Applicant is entitled to a provisional liquidation order *ex debito justitiae*.

The Rule 41A issue

[85] It remains to deal with the question of the Applicant's non-compliance with Rule 41A which deals with mediation as a dispute-resolution mechanism.

[86] It is common cause that the Applicant did not comply with Rule 41A by serving a notice on the Respondent indicating whether it agrees to or opposes the referral of the dispute to mediation.

[87] The Respondent however apparently served its own notice under Rule 41A indicating that it was willing to mediate the matter. The Applicant was not prepared to agree to a mediation and filed what it called a notice of objection to a referral to mediation.

[88] It seems to me that it was in principle incumbent upon the Applicant to have complied with Rule 41A, which applies to every new action or application proceeding. This includes a liquidation application. The question is what the consequence of non-compliance is.

[89] Rule 41A imposes no sanction for failure to comply (see *Growthpoint Properties Limited v Africa Master Blockchain Company (Pty) Limited* [2022] ZAGPJHC 836 ('*Growthpoint*') in paragraph 27). I am not aware of any case where relief has been refused merely because the plaintiff or applicant failed to give the notice. As stated in *Growthpoint*, with reference to the cases referred to in footnote 22 therein, the Courts have so far been disinclined to uphold technical objections of non-compliance with Rule 41A. One must also view this in light of the fact that mediation is not compulsory under the Rules and can only be entered into by agreement.

[90] At the same time, there may well be cases in which the court elects to compel the parties to comply with the Rule, and only to proceed to adjudicate the dispute if that process has not borne fruit.

[91] In the circumstances of the present case, despite the Applicant's non-compliance, I am not inclined to delay the matter or to refuse the provisional order sought merely because of this. The Respondent filed its own notice on the issue of mediation, to which the Applicant responded. The threshold purpose of the Rule, which is to ensure that the parties at least consider the prospects of mediation, was therefore achieved, even though no mediation ensued.

[92] I can imagine that there may be circumstances where, although the Court does not compel compliance, the manner in which the matter unfolds demonstrates that a useful purpose would in fact have been served by mediation. It may be proper, in such a case, to mulct the party that did not embrace the possibility of mediation in costs (i.e. in the exercise of the court's general discretion as to costs). The present however does not seem to me to be such a case. The Respondent has not put up any facts on which I could conclude that an alternative resolution of the dispute should have been pursued or would have succeeded.

[93] In particular, it has not provided a concrete basis to show that it would have realistically been able to offer the Applicant something that would have rendered a liquidation application unnecessary or resolved the dispute without litigation. I therefore cannot criticize the Applicant for its decision to press on with the application once all the facts were available, such that I might be inclined to deprive it of some or all of its costs.

[94] The approach I have adopted to this issue should not be read to suggest that parties may with impunity disregard the requirements of Rule 41A. Litigants and practitioners must give due regard to the obligations imposed under the Rules, which serve a valuable purpose. Cases will arise where non-compliance is properly met with a Court declining to entertain the matter or otherwise penalising a litigant. This is, however, not such a case, for the reasons given above.

Costs

[95] Costs orders are not typically made at the provisional stage in winding-up applications. The relief sought on the return day will include an order as to costs. This makes sense as on the return day the court will have all the information before it to make a costs order, which may include information that may demonstrate that the applicant, despite its success at the provisional stage, should not be entitled to costs, or facts that may more fully enable it to exercise its discretion in relation to the scale of costs.

[96] The relief sought in the notice of motion is for a rule nisi to be issued calling on interested parties to show cause why the costs of the application should not be costs in the liquidation on an attorney and client scale.

[97] It appears to me that if no further information is placed before the Court at the return day, there would be grounds to award the Applicant its costs (as costs in the liquidation) on an attorney and client scale. For the reasons given above, the Respondent's opposition to winding up lacks the concrete factual basis that may have given it a reasonable chance of success. The successful Applicant ought not to be out of pocket in relation to the costs of an opposed application in those circumstances.

[98] I am therefore prepared to issue a rule *nisi* on the basis sought by the Applicant. It will be for the Court on the return day to decide whether any other reason has arisen in the meantime to make a costs order on a different scale.

Order

[99] In the premises, I make the following orders:

1. The Respondent is placed under provisional liquidation in the hands of the Master of this Court.
2. A rule nisi is issued calling upon all persons interested to appear and show cause, if any, to this Court on 20 October 2026 at 10h00 or as soon

thereafter as the matter may be heard, why the following order should not be granted:

2.1. That the Respondent be placed under final liquidation; and

2.2. That the costs of the application be costs in the liquidation on a scale as between attorney and client.

3. Service of this provisional order shall be effected:

3.1. By the Sheriff on the Respondent at its registered office;

3.2. By the Sheriff on the South African Revenue Service;

3.3. By the Sheriff on the Respondent's employees and any trade union to which such employees may belong; and

3.4. By one publication in each of *The Cape Times* and *Die Burger* newspapers.

M W JANISCH
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant: R B Engela

Instructed by: VanderSpuy Attorneys

For the Respondent: M van der Berg

Instructed by: SDP Attorneys

