REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 2037/2023
(1) REPORTABLE: YES/**NO**
(2) OF INTEREST TO THE JUDGES: YES/**NO**
(3) REVISED.
DATE: 11/03/2025
SIGNATURE

In the matter between:

FIRSTRAND BANK LTD trading inter alia as Applicant
FIRST NATIONAL BANK
Registration Number: 1929/001225/06

And

DR BONGANI INVESTMENTS 066 CC Respondent
Registration Numbers: 2000/006155/06

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **11 March 2025**.

JUDGMENT

Makoti AJ

Introduction

[1] This is an opposed application for final winding up of the respondent. The root of the application is a loan agreement (agreement) which was concluded between the applicant and the respondent on 21 December 2018. In terms of the agreement the applicant advance a loan of **R1 000 000-00** (One Million Rand Only) to the respondent. Repayment of the loan was to be made on predetermined and agreed monthly instalments.

[2] The purpose of the loan was to refinance a property, Erf 4[...] Kengsington B, Gauteng. Amongst others, the respondent was required to ensure that the property is kept insured, its rates and taxes are up to-date etc. This is because the property was put up as security for the respondent's indebtedness to the applicant.

Applicant's case on breach and respondent's insolvency

[3] The applicant alleges that the respondent breached the loan agreement by:

[3.1] Failing to pay the amounts owing to the applicant as and when they became due;

[3.2] Respondent failing to furnish the applicant with proof of taxes, rentals, rates, license fees, other imposts and outgoings in respect of the property have been paid;

[3.3] Respondent failing to provide proof that property was insured in accordance with the minimum insurance replacement cover.

[4] According to the applicant on 26 August 2022 the respondent was in arrears with its repayments in the amount of **R27 487-12**. Demand was made on that same day requiring the respondent to pay the arrears. In addition, the applicant demanded from the respondent proof of payment of municipal rates and taxes and proof that the property was insured. The demands were no acceded to. As at 16 January 2023 the respondent's indebtedness stood at a figure of **R816 173-39**.

[5] The applicant made several demands requiring the respondent to make payment of the arrear amount. Apart from the demand on 26 August 2022, mentioned earlier, further demands were made on 14, 18 and 19 October of the same year. These were followed by another demand that was made on 15 November 2022. Then, on 20 January 2023, a notice in terms of section 69 of the Close Corporations Act,[1] read with Schedule 5(9) of the new Companies Act,[2] was issued through the applicant's legal representatives. Because of the unanswered notices the applicants averred in the founding affidavit that:

"40. By virtue of the respondent not having responded to the Notice and not making payment in full or at all to the applicant as demanded in the Notice, the respondent is deemed to be unable to pay its debts in terms of section 69(1)(a) of the Close Corporation Act."

[6] Section 69(1)(a) makes reference to liquidation in terms of the provisions of the now repealed section 68 of the Close Corporations Act, the latter of which provided

1 Act No. 69 of 1984.
2 Act No. 71 of 2008.

deeming provisions in terms of which a CC could be considered to be unable to pay its debts. Amongst such circumstances is where a Corporation has been served with a notice or demand for payment of the amount due and it has failed to do so within a period of 21 days of receiving the demand.[3] Also, a Corporation may be wound up where the court is satisfied that it is unable to pay its debts.[4]

[7] I did mention already that according to the applicant the respondent's indebtedness stood at **R816 173-39** as at 16 January 2023. That amount had become due and payable, also according to the applicant. Due to the failure to accede to the demands and notice, the applicant concluded that the respondents is to be deemed unable to pay its debts and that it ought to be finally wound up.

[8] The applicant contends that the respondent is unable to pay its debts and therefore commercially insolvent. It is opportune to reference what the court in *Murray and Another NNO v African Global Holdings (Pty) Ltd*[5] held commercial insolvency to be:

> *"*The argument about timing misunderstands the nature of commercial insolvency. It is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company "is able to meet its current liabilities, including contingent and prospective liabilities, as they come due" . . . .Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading." [Emphasis added]

---

3 Section 69(1)(a).
4 Section 69(1)(c).
5 Murray and Others v. NNO v. African Global Holdings (Pty) Ltd. and Others 2020 (2) SA 93 (SCA) at para 31.

[9] Apart from the allegations of commercial insolvency, the applicant did not provide much as to why it averred that the respondent was also factually insolvent. I deal with this matter on the basis, therefore, upon the allegation that the respondent is commercially insolvent.

Respondent's case

[10] To ward off the winding up case, the respondent raised four points *in limine* as well as substantive defenses. In the first place it asserts that this application ought to be kicked out on the basis of a defense of *lis alibi pendens*. The essence of this defense is that the applicant has initiated a money judgment against the respondent in Gauteng Local Division, Case No: 2023-020116, which case is still pending adjudication. Default judgment was granted against the respondent on 04 May 2023.

[11] This point avails no defense for the respondent. Though the same parties are involved in both suits, the causes of action and reliefs sought in both matters are not the same or similar. It is now settled that *lis alibi pendens* is a dilatory defense in which a respondent seeks a stay of proceedings on the basis that there is pending prior litigation between the same parties, based on the same cause of action, in respect of the same subject matter.[6] The party raising this defense bears the onus of satisfy the requirements.

[12] On this point I am not with the respondent and have no difficulty in dismissing the point *in limine*. This is not the same dispute as what was before the court where the applicant was pursuing a monetary claim.[7] In *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*, *lis pendens* as a defense was described thus:

---

6 George v Minister of Environmental Affairs & Tourism 2005 (6) SA 297 (EqC).

7 FirstRand Bank Limited v Mokoena and Others 2024 JDR 1722 (GJ) para [37]. Standard Bank of South Africa Limited and Another v Mandlakomoya Trade and Projects CC and Another (Counter Application) 2024 JDR 4505 (WCC) para [13]. Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd 2023 (6) SA 452 (WCC) para [15].

"[2] 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 a 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 differing conclusions. It is a plea that has been recognised by our courts for over 100 years." [Emphasis added]

[13] Then, the respondent also raised a defense of non-service on the South African Receiver of Revenue (SARS) and a trade union that represents its employees. The contention here is that section 346(4A)(a) and (b) of the old Companies Act[8] makes it obligatory for service to be effected on every registered trade union and to the employees by affixing a copy of the application on a notice board which is accessible to the employees. If upheld, this would also be dilatory. Section 346(4A) of the old Companies Act provides that:

"(a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application –

(i) registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and

(ii) to the employees themselves –

(aa) by affixing a copy of the application any noticeboard which the applicant and the employees access inside the premises of the company; or

[8] Act No. 61 of 1973.

(bb) there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted in a business at the time of the application;

(ii) the South African revenue service; and

(iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy if the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(b) the applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with."

[14] Concerning service on SARS, in *Pilot Freight v Von Landsberg Trading*[9] it was held that:

"[29] The furnishing to SARS is usually uncontroversial and an affidavit from the person who delivered the application to SARS, together with the stamp from SARS on the notice of motion acknowledging receipt thereof, would constitute sufficient proof that the application was furnished on SARS.

[15] Service to employees, either through a registered trade union or, where none exists, directly to the employee is peremptory. In *EB Steam Company (Pty) Ltd v Eskom Holdings SOC*[10] the Court held that:

9 2015 (2) SA 550 (GJ) at par [29].
10 Ltd [2014] All SA 294 (SCA) at paragraph [9].

> "The requirement that the application papers be furnished to the person specified in s346(4A) is peremptory, when furnishing them to the respondent's employees, that this be done in any of the ways specified in s346(4A)(a)(ii). If those modes of service are impossible or ineffectual another mode of service will satisfy the requirements of the section. If the applicant is unable to furnish the application papers to employees in one of the methods specified in the section, or those methods are ineffective to achieve that purpose and it has not devised some other effective manner, the court should be approached to give directions as to the manner in which this is to be done. Throughout the emphasis must be on achieving the statutory purpose of so far as reasonably possible bringing the application to the attention of the employees."

[16] With regard to SARS the applicant served through email transmission to various officials on 24 May 2023 and 06 June 2023. In relation to the employees and / or trade union, the application was served through the Sheriff on 08 March 2023 and a return of service was filed by the applicant as part of the papers before court. There is sufficient proof of service as required by legislation and the objection for non-service cannot be upheld. A service affidavit deposed to by Z.W Shabalala explaining how service was carried out in compliance with section 346(4A) accompanied this application.

[17] Another point that was raised by the respondents was that inability to pay debt is not a ground for winding up a close corporation. It is contended that section 68(c) of the Close Corporations Act is no longer part of the law as section 68 has been repealed. Further that, it was contended by the respondent, inability to pay debts is not an indication that a close corporation is insolvent. The contention was that section 81 of the Companies Act was applicable and that in terms of its provisions a winding up order can only be granted upon conclusion of business rescue and it is just and equitable to do so.

[18] There are no business rescue proceedings pending in this case. Neither have any such rescue proceedings been completed. On that basis the respondent contends that the application was prematurely instituted and that it should be dismissed. This as a point *in limine* is bad and does not make sense. I therefore dismiss it.

[19] The final point *in limine* was that the application was an abuse of court processes. It is connected to the first point of *lis pendens*. This point was raised because according to the respondent the applicant has instituted proceedings in two divisions, and in circumstances where the same parties are involved and the matters arose out of the same set of facts. The respondent then wants the application to be dismissed on the basis of its contentions mentioned above. Apart from its repetitious nature, it is difficult to fathom what in reality is this as a point *in limine*. It fails.

[20] Regarding its substantive defense, the respondent first contended that its indebtedness was not what the applicant claimed, but an amount of **R600 000-00** (Six Hundred Thousand Rand Only) has averred that it has made a number of payments of **R100 000-00** (One Hundred Thousand Rand Only) amounts. These were made in May 2024; June 2024; July 2024; August 2024; and September 2024. These payments were recorded in the respondent's supplementary affidavit that was filed on 31 October 2024. The acknowledgement of indebtedness in the amount of R600 000-00 is proof of the respondent's breach of its repayment obligations and, importantly, a concession of its inability to settle its liabilities when the fall due.

[21] When the case was eventually heard in November 2024, the respondent has provided no indication of further payments after the ones that have been mentioned above. Based on those payments, the respondent contends that it is neither commercially nor factually insolvent. It also contends that it is not just and equitable that an order for its winding up be granted. Thus, it contends, the application should be dismissed. The question is whether, with that pattern of payments the

respondent can be regarded as a party that is able to pay its debts when they become due.

Discussion

[22] Section 68 of the Close Corporations Act has been repealed. However, section 69 of the same legislation has survived the repeal. This provision caters for circumstances under which a close corporation may be deemed unable to pay its debts for purposes of winding up in terms of section 68 of the Act. This has created confusion.

[23] In *HBT Construction and Plant Hire CC v Uniplant Hire CC*[11] the court held that in light of the appeal of section 68, a close corporation may only be wound up if it is proven to be insolvent or if it is just and equitable that it be liquidated. A similar conclusion was reached a year later in *Herman and Another v Set-Mak Civils CC*,[12] the court reiterating that a close corporation may only be liquidated under section 81 of the 2008 Companies Act.

[24] Siwendu J recently held, with reference to *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others*,[13] in ABSA Bank Limited v 93 Quartz Street Hillbrow CC[14] that:

> "[16] The Court in *Murray NO*, has put to rest any previous debates about the pathway for the winding up of an insolvent company. It clarified the position that a company that is commercially insolvent is liable to be wound up in terms of Chapter 14 of the provisions of the old Act as provided in Schedule 5, Item 9 (1) of the new Act. By virtue of the amendment of section 66 of the Close Corporations Act referred to above, the decision in *Murray NO* applies with equal force to the winding up of insolvent close

11 2012 (5) SA 197 (FB).
12 2013 (1) SA 386 (FB) at [13] and [14].
13 2020 (2) SA 93 (SCA).
14 ABSA Bank Limited v 93 Quartz Street Hillbrow CC (2022/5554) [2023] ZAGPJHC 1416 (6 December 2023).

corporations. The nett result is that sections 344 to 348 of the old Act apply to a winding up of an insolvent close corporation by a court." {Emphasis added]

[25] I have mentioned the applicant's reliance for this liquidation application also on the terms of section 69 of the Close Corporations Act, read with Schedule 5(9) of the new Companies Act. Section 69 does not confer self-standing authority to liquidate a close corporation, but plays a subservient role to section 68 which is repealed.[15] The opening sentence to section 69 makes it clear that it is concerned with liquidation of a close corporation in terms of section 68. Thus, it is difficult to see how section 69 remains useful after the legislative demise of section 68.

[26] Schedule 5(9) deals with the continued application of the provisions of the old Companies Act in so far as winding up applications are concerned. The schedule reads *inter alia* that:

"(1) Despite the repeal of the previous Act, until the date determined in terms of subitem (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to subitems (2) and (3).

(2) Despite subitem (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.

(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of subitem (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails."

15 *Ibid*.

[27] What this does not mean, in my view, is that the deeming provisions contained in section 68 of the Close Corporations Act remain applicable and that, despite its repeal, an entity under that statute may be wound up because it is deemed unable to pay its debts.

[28] Ultimately, it seems that I am left to determine whether the respondent is either economically or factually insolvent. If so, liquidation may result. The same result may be reached if it is just and equitable to wind up the affairs of the respondent. A court may order a solvent company to be wound up if it is just and equitable for the company to be wound up.[16] The applicant has raised this as one of the grounds upon which it relies in seeking the winding up of the respondent. But this will become a consideration only if I find that the respondent is solvent.

[29] Liquidation of a solvent company was discussed in *Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting & Investment (Pty) Ltd* in which it was held as follows:

> "… postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up. The subsection is not confined to cases which were analogous to the grounds mentioned in other parts of the section. Nor can any general rule be laid down as to the nature of the circumstances that had to be considered to ascertain whether a case came within the phrase. There is no fixed category of circumstances which may provide a basis for a winding-up on the just and equitable ground."

[30] The facts before me raise serious questions on whether the respondent is economically solvent. By all accounts, even from the respondent's own version, it is not is a position to pay its liabilities or debts when they become due. The reveal even from the respondent's version that it made payments intermittently in June 2024, skipping July, then in August and September the same year. No record of payment for October and November 2024, during which months payments were still

16 Section 81(1)(d)(iii) of the new Companies Act.

to be made for amounts which became due. All what the respondent did was to show that it has recently made payments and according to it that should serve as proof that it is not commercially insolvent. Those do not prove commercial solvency.

[31] In my view, the full facts before me make it abundantly clear that the respondent is unable to pay its liabilities when they become due and that, for all intents and purposes, it is commercially insolvent. The applicant is entitled to a liquidation order where it is proven that the respondent is unable to discharge its debts,[17] which, in this case, was reflected by the acknowledgement of indebtedness to the tune of R600 000-00. In *Afrgri Operations Ltd*[18] it was held inter alia that:

> "[12] Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court a quo did not keep in view the specific principle that, generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt. Different considerations may apply where business rescue proceedings are being considered in terms of Part A of chapter six of the new Companies Act 71 of 2008. Those considerations are not relevant to these proceedings. The court a quo also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a 'very narrow one' that is rarely exercised and in special or unusual circumstances only." [Footnotes excluded]

[32] Upon reaching that conclusion that the respondent is commercially insolvent, it is not necessary to determine whether it is factually insolvent or that it is just and equitable within the contemplation of section 81(1)(d)(iii) of the Companies Act to liquidate the close corporation. The applicant proposed that the respondent be

---

17 Afgri Operations Ltd v Hamba Fleet (Pty) Ltd 2022 (1) SA 91 (SCA) para [12].
18 *Ibid*.

placed under provisional liquidation with ancillary orders as to service of the order to be made in this case.

[33] In applications of this nature, and in light of the ultimate decision which I have made, the applicants costs which were occasioned by this application are to be in the liquidation.

Order

[34] I make the following order:

[a] The applicant is placed under final liquidation.

[b] The applicant's costs are to be costs in the liquidation of the respondent.

_____

MOKGERWA MAKOTI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR APPLICANTS	**:**	**ADV M DE OLIVEIRA** **JASON MICHAEL SMITH INC ATT.** **C/O BOSMAN ATTORNEYS** **POLOKWANE**
FOR FIRST RESPONDENTS	**:**	**ADV M KUFA** **ADV M TSHIVHASE** **TALANE AND ASSOCIATES ATT.**

C/O LEBEPE & ASSOCIATES INC
POLOKWANE

HEARD ON	**:**	**18 NOVEMBER 2024**
DELIVERED ON	**:**	**11 MARCH 2025**