

SOUTH AFRICA / JUDGMENT

Sayers v Snaid and Morris Incorporated (130616/2023) [2025] ZAGPJHC 665 (8 July 2025) [2025] ZAGPJHC 665

COURT

South Gauteng High Court, Johannesburg

BEFORE

Engelbrecht

CASE / FILE NUMBER

130616/2023

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FLYNOTES:

COMPANY – Winding up – Just and equitable – Fraudulent and unlawful conduct regarding payment of legal fees – Issuing invoices directly to creditors – Lack of a legal nexus between parties for direct payment – Failing to correct erroneous amounts in L&D account despite knowing amounts were incorrect – Pursuing a writ of execution for an inflated sum – Disputed debt arose from misrepresentations and unlawful conduct – Disregard for rights of creditors – Final winding-up order granted – Companies Act 61 of 1973, s 344(h) – Companies Act 71 of 2008, s 81(1)(c)(ii).
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO: 130616/2023
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED.

8
July 2025
T
ENGELBRECHT
In

the matter between:

SAYERS,
JOHN MEYRICK
WILLIAM APPLICANT
and
SNAID
& MORRIS
INCORPORATED
RESPONDENT

This order is made an
Order of Court by the Judge whose name is reflected herein, duly
stamped by the Registrar of the Court and
is submitted electronically
to the Parties/their legal representatives by email. The Order
is further uploaded to the electronic
file of this matter on
Caselines by the Judge his/her secretary. The date of this
Order is deemed to be 8 July 2025.

JUDGMENT

ENGELBRECHT, AJ

Introduction

- [1] This is an application wherein the Applicant applies for the provisional winding up of the Respondent in terms of Section 344 (h) of the Companies Act, 61 of 1973, because it is just and equitable. The Respondent opposes this application and requests the dismissal of the application with attorney and client costs. Section 344 (h) of the Companies Act 61 of 1973 reads as follows:

“A company may be wound up by the Court if:

- (h) It appears to the Court that it is just and equitable that the Company should be wound up”.

- [2] During the argument, Advocate Hollander argued correctly so, that the application should be considered in terms of Section 81(1)(c (ii) of the new Companies Act 71 of 2008 as amended, which reads as follows:

“81.(1) A court may order a solvent company to be wound up if:

- (c) One or more of the company’s creditors have applied to the court for an order to wind up the company on the grounds that’

(ii) It is otherwise just and equitable for the company to be wound up”.

[3] In terms of the joint practice note, the following issues are in dispute:

[3.1] Whether the Applicant is a creditor of the Respondent.

[3/2] Whether the Respondent is unable to pay its debt

[3.3] Whether the winding-up of the Respondent would be just and equitable.

[3.4] Whether the Respondent is to be wound up provisionally or finally.

[3.5] Whether the application is to be dismissed.

[4] As a result of the argument by Advocate Hollander, response by Advocate Newton and the supplementary heads filed by Advocate Newton, I believe that the issues in dispute has now increased also to determine whether the Applicant is entitled to have this matter heard on a section in different legislation and whether this matter is now a complete new matter placed before court and should therefore be dismissed as requested by Advocate Newton.

APPLICANT’S CASE

[5] In the Founding Affidavit, the Applicant argues that he and Jackie Eckersley are creditors in the insolvent estate of Slick Aircraft Company (Pty) Ltd(“Slick”) in liquidation, which is stated to be common cause in the Joint Practice Note. The co-liquidators, Johannes Hendrik Du Plessis and Krishna Ruben Vengadesan, were granted consent by the Master to conduct an inquiry in terms of Sections 417 and 418 of the Companies Act 61 of 1973.

[5.1] The Applicant stated that the Applicant and Eckersley have never consented to appoint any legal representatives to act on behalf of the co-liquidators as required in Section 73 of the Insolvency Act, 24 of 1936 to hold this enquiry. This point was not pursued during argument. Therefore, the Applicant and Eckersley have never consented to any legal charges incurred by the co-liquidators and/or Slick, the company in liquidation, being paid directly by the Applicant and Eckersley to such legal representatives. The Respondent started to send the Applicant’s invoices directly and requested that the Applicant make payments. As a layperson, the Applicant accepted that such payments would be made into the personal account of the Respondent, as the legal representatives of the co-liquidators.

[5.2] These invoices were sent to a total of R 750,179.20, minus a credit note of R 236,405.50. The Applicant made a payment of R 377,576.30, which left a balance of R 136,197.40. The Applicant disputed this amount as he did not believe the Respondent provided such services. These invoices were also made out to Slick, the company in liquidation, but the bank details were those of the Respondent's bank account.

[5.3] In paying towards these invoices, the Applicant believed that as a creditor, he was liable for the costs of the enquiry. However, after receiving legal advice, the Applicant was informed that such expenses should have been requested from Slick, the company in liquidation, and paid by the estate if any funds were available. Only the shortfall was to be claimed from the Applicant.

[5.4] On 11 and 12 October 2023, letters of demand were issued by the Respondent. On 20 November 2023, the Director of the Respondent, Morris, deposed to an affidavit supporting the issuance of writs against the Applicant and Jackie Eckersley claiming the full amount of R 750 179,20. After negotiations with the attorney of record of the Applicant, Furman, the Respondent agreed only to have an attachment order issued by the Sheriff, which is to date not lifted.

[5.5] From the L&D account attached to the Founding Affidavit, the Applicant alleges that it is evident that the Respondent is driving the process. From the L&D account, the payment of R 377,576.30 is not reflected; however, an amount of R 78,389.36 is reflected for certain services, such as the service of subpoenas, to an entity known as Corporate Legal Advisers. When the Applicant contacted them, it was determined that they are not a legal services provider. Therefore, the services so indicated, which were paid for in the amount of R 78 389,36, could not have been provided by the entity. Furthermore, subpoenas in a Section 417 proceedings may only be served by Sheriff. The Applicant is now reviewing the complete L&D account as a result of these discrepancies.

[5.6] Even though the correct figures were available, Morris, on behalf of the Respondent, still issued a warrant with the full value of the invoices. This, the Applicant alleges, is fraudulent, intentional and unlawful behaviour as the Respondent was well aware of the correct figures.

[5.7] Applicant alleges the Respondent also fraudulently misrepresented to him and Eckersley that they were liable for the co-liquidators' legal fees directly to the Respondent. The Applicant alleged that the Respondent fraudulently misrepresented the reasoning for the claimed amount while it was used for the Respondent's own benefit. The Respondent has not repaid the amount despite the Applicant's legal representative's demand.

[5.8] The Applicant also argues that the Respondent held himself out to be an experienced legal practitioner who must have been aware that the Applicant and Eckersley were not liable for the legal fees directly to the Respondent. Due to the fraudulent behaviour of the Respondent, the Applicant believes it would be just and equitable to wind up the Respondent.

[5.9] At the hearing of this matter, Advocate Hollander argued that this matter should rather be considered in terms of Section 81(1)(c) (ii) of the Companies Act 71 of 2008 and not section 344 (h) of the old Companies Act 61 of 1973. The Section in the old Companies Act refers to insolvent companies, and the section in the new Companies Act refers to solvent companies.

[5.10] In amplifying this argument, the Applicant now requests the Court to consider the matter in terms of different sections in another Act. Advocate Hollander referred me to three new cases that are not on the Applicant's heads or appear in the Applicant's list of authorities. I extended an invitation to the Respondent to address this argument and provide the court with other case law against these so provided by Advocate Hollander. The Respondent then filed supplementary heads uploaded onto Caselines on 9 April 2025 supported by a list of authorities.

. [5.11] Advocate Hollander argued that the winding up of an entity may rely

on any specific legislation and that there is no problem when reference is made to a different section of different acts in the

pleadings. It is also argued that any objection to the argument that this matter may now be considered in terms of different legislation

is against the mentioned authorities.

[5.12] During the argument, Advocate Hollander indicated that it is in the court's discretion, although a narrow discretion, to grant a final order even though the Applicant only applied for a provisional order. Advocate Hollander argued that there is no suggestion of further information to be provided by the Respondent, no factual basis for a provisional order, and no reason to allow the Respondent an additional opportunity. Advocate Hollander also argued that the Respondent must convince the court to grant a provisional order.

[5.13] Advocate Hollander argued that the court should only have reference to the Founding Affidavit and Answering Affidavit and should ignore the Replying Affidavit, except for the reference to the paragraphs concerning the other cases against the Respondent also referred to by Advocate Newton in his argument. In the Replying Affidavit, reference is made to an order for *de bonis propriis* costs, which Advocate Hollander indicated will not be proceeded with.

RESPONDENT'S CASE

[6] In the Answering Affidavit, the Respondent alleges that this application is vexatious and a *mala fide* abuse of the court process to defame, harass and embarrass the Respondent as a result of the Respondent levying a contribution against the applicant in the insolvent estate of Slick, which the Applicant denies. The Respondent asked for the application to be dismissed with costs on the attorney-client scale.

[6.1] The Respondent argues that the application is fatally defective as it does not make out a case in its papers that the Respondent is insolvent and cannot pay towards its debts, which is required in terms of Section 344 (h) of the old Companies Act.

[6.2] Respondent denies that the letter of demand was irrelevant or that the Respondent's conduct is unlawful. The Respondent further alleges that there is no bona fide dispute regarding the Respondent's fees concerning the letters from the Respondent's legal representative. When requests did not work, it resorted to formally demanding payment and issuing warrants of execution.

[6.3] The Respondent denies that section 73 is available for this claim for the winding up of the Respondent.

[6.4] The Respondent further alleges that the mistake of not setting off the R 377 576,30 in the L&D account was an unfortunate error on the part of the Respondent's cost consultant who drew up the bill of costs. The Respondent alleges that this was a bona fide error that will be corrected in the second liquidation and distribution account and is not a fraudulent intent on the Respondent's part.

[6.4.1] The Respondent alleges that the Applicant is still liable for the payment of R 136,427.40. It is also admitted that the Applicant has launched an application to review the liquidation and distribution account.

[6.4.2] The Respondent denies that the Applicant is a creditor of the Respondent and is therefore not entitled to the order claimed in this application.

[6.5] At the hearing Advocate Newton argued that the specific case made out in the Founding Affidavit referred to Section 344(h) of the Old Companies Act and that what was placed before court was a completely new case with reference to Section 81 (1(c)) (ii) and for a final order as it was never pleaded in the Founding Affidavit. It was also argued that the Applicant cannot be allowed to cherry-pick how he wants to deal with this matter, as it needs to be restricted to what was pleaded in the papers. Advocate Newton also argued that Advocate Hollander is arguing off the papers, as what he requests is not on the papers.

[6.6] Advocate Newton argued that you can ask for less than what was pleaded for in the papers, not more, and therefore, the Applicant cannot ask for a final winding up order. Advocate Newton argued that the Applicant never made any averments that the Respondent is insolvent and that there is no doubt about what the case is placed before court with reference to the Replying Affidavit of the Applicant.

[6.6.1] The paragraphs referred to three further cases, two defamation cases for R 10 million, case 16103/2022 where an order was granted for costs against the Respondent jointly and severally with their client being the same liquidators as in the Slick matter and a counterclaim by Ms. Cabral against the Respondent for an amount of R 95 000,00 for legal fees paid to the Respondent against the same liquidators as in the present matter where the same conduct was detected and a further paragraph where the Applicant states that as a result of these further cases

"I reasonably doubt that the Respondent can make payments of such an amount, or any ordered substantial payments concerning the abovementioned claims".

[6.6.2] Advocate Newton argued that the Applicant clearly made out a case of insolvency by referring to these liabilities of the Applicant and also argued that these claims are commercial claims and therefore cannot support the argument that this matter can now be considered in terms of the New Companies Act.

[6.7] Advocate Newton argued that the Applicant is alleging that the Respondent did not subtract the amount and included the full amount into the L&D account. Still, the Applicant made no efforts to claim the amount back from the Respondent. As the issue is only an error in the L&D account, it will be rectified in the review application submitted by the Applicant, which is still pending. The Respondent denies that this error is dishonesty on the part of the Respondent. Also, it is argued that the L&D account was laid open for inspection during which time the Applicant could object to the account.

[6.8] Advocate Newton also argued that it is obvious that the Applicant was to pay for the authorised enquiry and referred me to the minutes of the three proven creditors and argued that those minutes confirm the obligation of the Applicant to the Respondent. Advocate Newton also argued that this is a red herring as there were no funds in the estate and therefore the Applicant was ultimately responsible for the payment of the enquiry.

[6.9] I was also referred to the Master's order, which it was argued indicates that the Applicant must pay for the costs of the enquiry. Therefore, the Respondent acted correctly in issuing a letter of demand and requesting payment; otherwise, costs would have been requested from the Applicant.

[6.10] No case before this court for the winding up of the Respondent, just as a result of the fact that the paid amount was not subtracted from the amount as stated in the L&D account. Advocate Newton argued that there is no difference in whether the amount is to be paid to the Respondent or the Liquidators, as the Respondent was working on behalf of the Liquidators. The Applicant indemnified the Liquidators and, therefore, the Respondent against such costs. In the correspondence, the Applicant agreed to pay these costs.

[6.11] Advocate Newton also referred to the facts that the Applicant first paid and then objected to the work of the Respondent when the outstanding amount was requested after they had agreed to pay as the Applicant alleged they cannot pay the legal representatives of the liquidators.

[6.12] Advocate Newton argued that the bottom line is that the Respondent made a mistake, with the wrong amount in the L&D accounts, which will be rectified. Therefore, it is not fraudulent, as the L&D account is subject to review.

[6.13] Advocate Newton then summarised the case of the Respondent by stating that the Applicant is not a creditor of the Respondent, that the Applicant did not pay the Respondent's debt, did not pay the account sent, and the Respondent is not responsible for the costs of the enquiry. Therefore, the Applicant undoubtedly owes the cost of the enquiry and must settle it by paying the amount directly to the Respondent.

[6.14] Matter is to be dismissed with attorney-client costs.

ANALYSIS

[7] In amplification of the argument by Advocate Hollander that the court is allowed to consider a matter in terms of a different section in a different Act, the court was referred to the following caselaw:

[7.1] Minister of Justice, Nationwide Truck Hire (Pty) Ltd 1981(4) SA 826(A) 833G – 834D “As to (a) and (b) it is true that the respondent did not specifically rely on s 171(1) (a) in its affidavit supporting the application to the Court a quo. But its counsel invoked, and the relief claimed in its application was wide enough to cover the relief granted under the provision.Hence, provided all the relevant facts were before the court a quo, the issue whether or not the vehicle was returnable to respond under s171(1)(a) was one of law which the Court a quo could entertain and determine even though it was not specifically raised or relied on in the affidavits supporting respondent’s application. See Van Rensburg v VVan Rensburg en Andere 1963(1) SA 505 (A) and 510 B and Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) (Bpk) 1970(3) SA 367(A) at 404D – G The question is, were all the relevant facts before the Court a quo.

[7.2] In the matter of Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others 1999(2) SA 279 (T) 324(h) – 325 (C) reference is made to the Heckroodt NO v Gamiet 1959(4) SA 244 (T) at 246 A – C and Van Rensburg v Van Rensburg en Andere 1963 (1) SA 505 A at 509 E – 510 B where it was held that “a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts so alleged. As was held in Cabinet for the Territory of South West Africa v Chikane and Another 1989(1) SA 349 (A) at 360G the principle is clear but its application is not without difficulty. In Minister van Wet en Orde v Mashoba 1990(1) SA 280 (A) at 285G it was held that this principle “word egter gekwalifiseer deur die voorbehoud dat die Hof alleen so kan optree as daar geen onbillikheid teenoor die respondent geskied nie. In die sake word hierdie element gewoonlik uitgedruk deur te vereis dat alle relevante feite voor die Hof moet wees... Hierdeur word die mees voor die hand liggende bron van moontlike onbillike benadeling van die respondent uitgeskakel”. In determining whether there is prejudice, regard must be had to the case that has to be met. It is not permissible to consider ...the affidavit in isolation. To the extent that the parties' affidavits went further than may have been necessary to answer the case as presented, it cannot be postulated a priori that that party would not be prejudiced if their affidavits are relied upon to determine the nature and ambit of the hearing that took place”.

[7.3] The Respondent opposed this in his Supplementary Heads and during argument as he argues that the Respondent met the case made out by the Applicant in the Respondent’s Answering Affidavit as the Respondent denied that he was insolvent, pointing out that its conduct in having invoiced for the costs of the enquiry could not possibly amount to fraud, that the liquidators were authorised to hold the enquiry in terms of the resolutions adopted by Slick’s proven creditor and that the Master has ordered that the Applicant is to bear the costs of the

enquiry. The argument in terms of Section 344(h) persisted in the Applicant's heads of argument, although the entire argument was revised at the hearing of the matter. At the hearing of the matter, the Replying Affidavit was abandoned, reliance on Section 73 was abandoned, any suggestion that the Respondent is insolvent was abandoned, and an argument was provided in terms of section 81(1) (c) (ii).

[7.3.1] Respondent also argues that the court should dismiss the approach of Advocate Hollander on behalf of the Applicant as it amounts to an impermissible ambush, as an entirely different case is now placed before the court as it is a different case not supported by the averments made in the Founding Affidavit and that the Answering Affidavit stands as none of the averments made by the Respondent were answered to as Advocate Hollander abandoned the Replying Affidavit.

[7.3.2] In amplification of this argument, Advocate Newton argues that in civil litigation parties should be held by the averments made in their pleadings with reference to Fischer and Another v Ramahlele and Others 2014(4)SA 614 (SCA) and the Constitutional Case of One Movement SA NPC v President of the RSA 2024 (2) SA 148 (C C).

[7.3.3] Concerning the caselaw so provided by Advocate Hollander as referred to above, Advocate Newton argues that the same provides no basis to permit this court to grant relief not sought by the Applicant in its founding papers on an entirely different basis to that relied upon in its founding papers. Advocate Newton also argues that the court should notice that whatever was pleaded by the Respondent in its Answering Affidavit now stands uncontested as the Applicant abandons the Replying Affidavit.

[7.4] Following the caselaw referred to above, the only time that this court can consider the matter in terms of section 81(1) (c)(ii) now is if all the facts in this matter are pleaded in the Founding Affidavit by the Applicant to ensure that there is no prejudice against the Respondent.

[7.5] The crux of this matter concerns the mistaken belief on the side of the Applicant and the belief on the side of the Respondent that the costs of the enquiry are to be paid to the Respondent directly by the Applicant and Eckersley. This is taken from the order of the Master dated 26 November 2021 which reads as follows:

“That JOHN MEYRICK WILLIAM SAYERS AND JACKIE ECKERSLEY be ordered to pay the costs of the enquiry subject to the right to approach the Master of the High Court for an order that the costs of the enquiry be paid as costs in the administration of SLICK AIRCRAFT COMPANY (PTY) LTD (IN LIQUIDATION), should the estate as a result of the enquiry recover assets for the benefit of the general body of creditors of the estate.

[7.5.1] In reading the order it is clear that the enquiry must be held. Then it must be determined through the administration of the estate whether there are assets found from which the cost of the enquiry may be paid with the consent of the Master. Then, only, if there is a shortfall, the costs can be claimed from the Applicant and Eckersley.

[7.6] From the facts as pleaded in the Founding Affidavit by the Applicant, the Master granted consent to the Co-liquidators to hold an enquiry, the Applicant alleges that it never gave permission to the Co-Liquidators to appoint a legal representative and the Applicant and his legal representative were under the mistaken belief that it owed the Respondent.

[7.7] The invoices were issued from 31/08/2021 to 30/04/2022, totalling R 750 179,20 and payments were made on 08/12/2021, 24/02/2022, and 06/05/2022, totalling R 377 576,30. As a result of this mistaken belief, an amount of R 377 576,30 was paid directly to the Respondent.

[7.8] The Respondent then sent further invoices and requested the remainder of the alleged amount owed, amounting to R 136,197.40. The Applicant disputed this amount, and it was subsequently determined that it had no direct obligation to the Respondent for any amount.

[7.9] The Respondent also relies on the letters exchanged between himself and the legal representative of the Applicant, Furham, who was under the mistaken belief that the Applicant must pay such costs, including the request for indemnity, although this alleged indemnity was not attached to the Answering Affidavit and that these costs must be paid directly to the Respondent.

[7.10] The Applicant sets out why the Applicant disputes the alleged remaining amount and attaches the invoices to the Founding Affidavit, which references the Respondent's bank account. These invoices were also made out to Slick, the company in liquidation.

[7.11] In the Founding Affidavit, the Applicants attached the Resolution of the creditors dated 7 June 2021 with specific reference to paragraph 5 thereof which read as follows:

“The Liquidator be and is hereby authorised in his sole and absolute discretion to employ and engage the services of attorneys and/or counsel (senior and/or junior) and /or accountants and/or bookkeepers and/or any employee of the insolvent and/or recording gents and/or any other persons who in the sole discretion of the Liquidator may be of assistance in the winding up of the company in relation to any matter referred to in 4 above and further to pay all the costs thereof of whatsoever nature out of the estate as costs incurred in the liquidation. (my emphasis)

4.3 Hold any inquiry in the affairs of the company and/or any matter relating thereto.

[7.12] On 29 September 2021, the Respondent requested indemnity from the Applicant for the cost of the enquiry, including costs for the venue and transcription, but this indemnity was never attached to the Answering Affidavit.

[7.13] From the above, the resolution of the creditors stipulates that the costs of the enquiry must be paid from the estate, where the order of the Master stipulates that the Applicant will be held responsible for these costs although same can be paid from the estate on application to the Master. This defeats any indemnity that might or might not have been granted, as certain steps must first be taken by the Liquidators before any costs could have been claimed from the Applicants.

[7.14] The Applicant then sets out the writ of executions that the Respondent issued for an amount of R 738 752,60 against Ms Eckersley and an amount of R 11 480,64 against the Applicant for a total of R 750 233,40 dated 20 November 2023 with no explanation on why these specific amounts are claimed from the respective parties, neither is the amount paid reflected or the amount for which a credit note was issued. As a result, assets were attached, which attachment has to date not been lifted.

[7.15] The fact that a letter of demand was sent to the Applicant and why they ignored it is explained in the explanation of the attachment by the Sheriff. The court is then referred to the L&D account which was approved on 12 September 2023. This proves that the invoices referred to above was issued nearly 2 years before the L& D account submitted to the Master, which shows that the majority of the expenses are in the name of the Respondent, amounting to R 584,148.75 which does reflect the credit note amount but not the amount so paid by the Applicant. The Applicant then further explains why they dispute the complete L&D account in a letter dated 22 November 2023.

[7.15.1] The Applicant also raised in the Founding Affidavit that the Respondent did not correct the incorrect amounts in the L & D account and did not explain these invoices.

[7.15.2] The Applicant also raised the misrepresentation to the Applicant, the Master by the submission of the L&D account in the Founding Affidavit, which the Applicant alleges confirms that the winding up of the Respondent will be just and equitable.

[7.16] From the aforementioned facts, I accept that all applicable facts have been placed before this court, which granted the Respondent the right to answer thereto in his Answering Affidavit and therefore that the matter can be considered in terms of Section 81(a)(c)(ii). I am of the view that there is no prejudice that the Respondent would suffer if the matter is considered in terms of section 81(1)(c)(ii) instead of 344(h).

[8] In terms of the argument that there is an entirely different case before this court and that this is an ambush, as the Applicant is to be restricted to what is pleaded in the Founding Affidavit. It is trite that the legal basis for winding up under Subsection 81(1)(c) (ii) of the new Companies Act 71 of 2008 is the same as that under section 344 (h) of the old Companies Act 61 of 1973. This aspect has been dealt with in *Muller v Lilly Valley (Pty) Ltd* [2012]1 ALL SA 187 (GSJ), *Budge NO, Midnight Storm Investments 256 (Pty) Ltd* 2012(2) SA 28 (GSJ) at 34 pars (5) - [12] and *Thunder Cats Investments 92 (Pty) Ltd and Nkomyane Economics Prospecting & Investment (Pty) Ltd* 2014(5) SA (SCA) at pars [12]- [20].

[8.1] Both of these sections in the different legislation refer to winding up when the court determines that it is just and equitable.

[8.2] In the matter of *Budge v Midnight Storm Investments* 2012(2) SA 28, Judge Meyer refers to the five broad categories under which an insolvent company under section 344 (h) of the Old Companies Act

and Section 81 (1)(c) (ii) may be considered in an application for winding up if just and equitable. However, the court is not

restricted thereto. This is stipulated in *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985(2) Sa 345 (W) at 349G – 350H which includes the illegality of objects of the Company and fraud committed in connection therewith. Judge Meyer also refers to the matter of *Wray v Minister of the Interior and Another* 1973(3) SA 544 (W) at 561 A where Judge Coetzee stated that

“It is trite law that when the words of an older statute are either incorporated or made part of a latter statute, this is understood to be done with the object of adopting legal interpretation which has been applied to them by the Courts”.

[8.3] On the evidence before me, it is clear that a case has not been made out that the Respondent is insolvent, although reference is made to the other three cases and the Applicant doubts that the Respondent would be able to pay all his liabilities. That being the case, the winding up of the Respondent should be considered in terms of section 81(1)(c) (ii) of the Companies Act 71 of 2008 and not section 344 (h) of the Companies Act 61 of 1973. In *Knipe v Kameelhoek* 2014(1) SA 52 Judge Daffue stated in par [23] that:

“Having said this, the approach in considering whether it is just and equitable to wind up a company in terms of the Companies Act 71 of 2008 is, in essence, not different to what is or was in accordance with the 1973 Act, which still applies to the winding-up of companies which are not solvent. The legal basis for winding-up remains the same.(my emphasis)

[8.4] Considering the authorities and facts referred to herein, I cannot agree with the argument that a completely different case is now placed before this court or that this is an ambush.

[9] In the matter of *Thunder Cats v Nkonjane Economic Prospectus* 2014 95) SA 1 at par [15] Judge Malan considered the application for winding up when it is considered to be just and equitable and stated:

*“A winding-up on this basis postulates not facts but only a broad conclusion of law, justice and equity as a ground of winding-up. The subsection is not confined to cases which were analogous to the grounds mentioned in other parts of the section. Nor can a general rule be laid down as to the nature of the circumstances that had to be considered to ascertain whether a case is 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. In *Sweet and Finbain* 1984(3) SA 441 (W), it was said*

“The ground is to be widely construed, it confers a wide judicial discretion and it is not to be interpreted so as to exclude matters

which are not *eiusdem generis* with the other grounds specified in s 344.

[9.1] In *Herman and another v Set-Mak Civis CC* 2013(1) SA 386 FB the court specifically agree that it would be just and equitable to place a company in liquidation where there is a total disregard for the rights and claims of its creditors.

[9.2] This principle that a court has a discretion was confirmed in the matter of Afgri Operations Limited v Hamba Fleet (Pty) Ltd Limited 2022(1) SA 91 (SCA) at para 12 where it was held that

“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.

[9.3] From the Answering Affidavit and the argument before the court, it is evident that the justification for the argument by the Respondent that the Applicant had an obligation to pay these invoices is taken from the Master's orders and the minutes of the creditors. The Resolution of the Creditors was issued on 7 June 2021, and the Master's orders were issued on 26 November 2021. These invoices were sent from 31 August 2021, prior to the Master's order but after the Resolution of Creditors.

[9.4] The Resolutions of the creditors stipulate that all costs of any legal representatives were to be paid from the estate. The Master's order indicates that the Applicant and Eckersley were to pay these costs, subject to the condition that the Master may be requested to allow that such expenses be paid from the estate, if funds are available. This placed an obligation on the co-liquidators and/or the Respondent as their appointed legal representative, that the L&D account was to be compiled, submitted to the Master and only when it is found that there are no funds or a shortfall of the costs in this estate, then such costs or the shortfall may be claimed from the Applicant and Eckersley by the liquidators. I agree with Advocate Hollander that there is no obligation on the Applicant to pay these costs directly to the Respondent and that the nexus exists through the co-liquidators to the estate and the invoices was also made out to Slick(the company in liquidation) where these co-liquidators first had to take specific steps before any such claims could have been made from the Applicant and Eckersley.

[9.5] It is clear that the invoices and the writ of execution predate the L&D account; therefore, the Respondent could not have had any information when the writ and invoices were issued that the estate had no funds, the L&D account was not approved as yet, the enquiry was not even held when the first invoices were send and therefore no obligation existed for the Applicant and Eckersley to pay.

[9.6] In the Founding Affidavit, it is also stated that the Applicant is now reviewing the L&D account. However, the Respondent indicates in the affidavit and during argument that they intend to rectify the L&D account through the review process. The question remains whether this would have been remedied if the Applicant had simply proceeded to pay the amount claimed by the Respondent, as there is no evidence before this court that the Respondent has taken any action to rectify this alleged error.

[9.7] It is also noted that the Respondent issued a writ in 2023 for the wrong amount R738 752,60 (to Eckersley) + R11 480,14 (to Applicant) =

R 750 233,24, allowing the attachment of assets to this amount. This was done despite the Respondent being aware that the amount was incorrect and not even the amount stipulated in the L&D account (although that amount is also wrong). The attachment has not been lifted to date, despite full knowledge that the wrong amount was attached.

[9.8] There is no evidence placed before me that the Respondent has done anything to correct these wrong amounts on the writ or the L&D account except to state that it is an error in the L&D account which will be rectified now that the Applicant has issued a review application against the L&D account but at what and whose costs. It is also evident from the evidence that the Respondent to date still believes that he is correct in claiming such funds from the Applicant and that he bases it on the Master's orders or the Resolutions for the creditors, which does not state that the Respondent is allowed to claim such funds directly from the Applicant.

[9.9] The Applicant alleged that, as a result of the misrepresentation and fraud by the Respondent to both himself and Eckersley, they, as creditors in this winding-up application, were to pay the costs of the enquiry directly to the Respondent. Consequently, costs for R 377,576.30 were paid in error.

[9.10] I agree with the argument of the Applicant that the behaviour of the Respondent was intentional and unlawful. This conduct is damaging to the rule of law, which allows an attorney to proceed to request funds directly from a creditor in winding-up proceedings.

[9.11] The Respondent, as a seasoned practitioner with experience in liquidations, acted before the Master's orders by issuing invoices directly to the Respondent and after the Resolution of the Creditors, which stated that the costs of legal representation are to be paid from the estate. Despite that, the Respondent represented to the Applicant that he and Eckersley is to pay the costs of the enquiry directly to the Respondent and rely on the Master's orders. This misrepresentation of the facts led to the payment of the funds to the Respondent.

[9.12] Making things even worse, a writ of execution was then issued for the total amount of R750,233.24, and the attachment, which was issued after negotiations between the Respondent and Mr. Furham on behalf of the Applicant and Eckersley, has to date not been lifted. The Respondent has also taken no action to amend the amount submitted to the Master on the L&D account and is now pleased that the matter is under review by the Applicant, as the error will be corrected. It would have been expected that the Respondent would do everything in its power to amend the L&D account or at least uplift the attachment order, but nothing has been done.

[9.13] There is also no accounting for these amounts, no attempt to rectify the invoices, no justification of the fees so claimed or the fees, which are all aspects which have been raised in the Founding Affidavit. The Respondent also alleged that a formal bill of costs drawn up by its costs consultant on request from Mr Furham the legal representatives of the Applicant. Still, neither this bill nor a confirmation from the alleged costs consultant is attached to the Answering Affidavit, nor is an indication even given that the same is to be provided in further affidavits.

[10] Considering the facts in light of the applicable timeline, what was ordered by the Master and what was decided by the creditors, I am of the view that the Applicant is a creditor of the Respondent, as the Respondent's dispute that such debt was due is not based on reasonable grounds. If the denials are stripped off the Respondent's answering affidavit, it remains that these funds were not due to be paid to the Respondent, as there is no nexus between the Applicant and the Respondent and therefore stands to be repaid to the Applicant.

[11] Following the joint practice note, the Applicant requested either a provisional or a final order, which the Respondent objected to as the Applicant only applied for a provisional winding-up order in the Notice of Motion. In the matter of *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) at par 9, the Supreme Court of Appeal held that

"The Act does not require a final order to be preceded by a provisional order. From the information given to us by counsel, it would seem that there is no longer a uniform practice in this regard throughout the country. According to the Practice Manual of the Transvaal Provincial Division, a judge of that Division appears to have a wide discretion to grant a provincial order or a final winding-up order, as the case may require and is under no constraint to issue a provisional order as a matter of course."

[11.1] In the matter of *Hans Merensky Landowners association (Pty) Ltd v Southern Sky Residential Properties (Pty) Ltd* (2025/080158)[2025] ZALMPPHC125(24 June 2025) at par 60 with reference to the matter of *Business Partners Limited v Montache Villas (Pty) Ltd* (62454/2021) [2023]ZAGPPHC 1147 (6 September 2023) Vorster AJ stated that which Van Wyk AJ held, as being correct:

60.3 Neither the old nor the new Companies Act requires a final order to be preceded by a provincial order. The default position is therefore that a final order should be granted. (This is in line with the practice manual of the Gauteng divisions) unless the court is satisfied, on facts properly established on affidavit, that the interests of all affected or interested parties will not be adequately safeguarded if a final winding up order is granted. In which case, a provisional order should be granted.

[11.2] The issues in this matter have been fully ventilated and the Respondent has put nothing forward to persuade me that other relevant facts would come forward if a rule nisi is granted.

CONCLUSION

[12] Based on the authorities and facts in this matter, I am of the view that there is no legally sustainable defence to the Applicant's claim for a winding up. There are also no relevant facts which can persuade me not to grant a final order.

COSTS

[13] The Applicant requests costs in the estate on Party and Party Scale C, alternatively that costs be in the final winding up of the Respondent. I cannot find any reason why costs should not be granted.

[14] Therefore, the following order is made.

[14.1] The Respondent is placed under final winding up in the hands of the master of the High Court

[14.2] The costs of the application are costs in the final winding up of the Respondent.

ENGELBRECHT T

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Delivered: This judgment and order were prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 8 July 2025.

Appearances:

For the Applicant: Advocate Hollander

For the Respondent: Advocate Newton

Date of Hearing: 18 March 2025 plus extra heads received on 9 April 2025

Date of Judgment: 08 July 2025

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Prepared on 11 October 2026 · Esheria