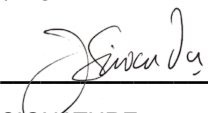


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022/5554

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES / NO
6 December 2023	
DATE	SIGNATURE

In the matter between:

ABSA BANK LIMITED

Applicant

and

93 QUARTZ STREET HILLBROW CC

Respondent

JUDGMENT

SIWENDU J

[1] This application involves the winding up of a Close Corporation registered in terms of the Close Corporations Act 69 of 1984 (“the Close Corporations Act”) and the effect of the repeal of certain provisions of the Close Corporations Act by the Companies Act 71 of 2008 (“the new Act”) on the winding up application. At issue is the source of the power of the Court to grant a winding up order in the light of the repealed provisions.

- [2] Absa Bank Limited (Absa), applied for the winding up of the respondent, 93 Quartz Street Hillbrow CC (93 Quartz Street), a Close Corporation registered in terms of the Close Corporations Act. 93 Quartz Street owns and operates the Hilton Plaza Hotel situated at 93 Quartz Street, Hillbrow.
- [3] In October 2015, Absa extended a loan facility to 93 Quartz Street for an aggregate amount of R9 728 000.00 (nine million seven hundred and twenty- eight thousand rand) on certain conditions. Absa claims that 93 Quartz Street defaulted on the repayment of the loan facility. Notwithstanding a demand made in terms of section 69(1)(a) of the Close Corporations Act, 93 Quartz Street failed to pay the amount due. As a result, it is deemed to be unable to pay its debts.
- [4] An interlocutory issue arose at the commencement of the hearing which must be disposed of first. Mr Mark Farber, the sole member 93 Quartz Street filed an application to intervene in the liquidation proceedings as an affected party. The intervention application had not been served on relevant and affected parties as required by the new Act. It was submitted on his behalf that the Court need not determine the application for intervention *per se*. What he sought was a postponement of the liquidation proceedings based on section 131 of the new Act.
- [5] Mr Farber did not bring a substantive application for postponement, but instead sought to impermissibly rely on the intervention application as a proxy for the postponement. Section 131 does not sanction a postponement of liquidation proceedings by an affected party. It is designed to allow an affected party to enter the merits of the case before court. Any other interpretation would be inconsistent with the expedited procedure envisaged in Chapter 6.
- [6] Rule 6(11)¹ and (14)² make specific provision for interlocutory and other applications incidental to proceedings, which must be brought on affidavit. In this instance the application for postponement was made from the bar. Absa correctly resisted it. The application for postponement was refused, and

¹ Rule 6(11) states that “[n]otwithstanding the foregoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge”.

² “The provisions of rules 10, 11, 12, 13 and 14 apply to all applications”.

Mr Farber was ordered to pay the costs as well as the wasted costs occasioned thereby.

- [7] Turning to the merits of the liquidation application, 93 Quartz Street challenged the basis for the application on the grounds that Absa sought the winding up order in terms of the repealed section 68(c) and (d) as read with section 69(1)(a) of the Close Corporations Act. It contends that Absa did not (further) plead a reliance on section 66 of the Close Corporations Act nor any of the applicable provisions of the Companies Act 61 of 1973 (the old Act), namely sections 344 and 345.
- [8] Regarding proof of an act of insolvency, 93 Quartz Street disputed the quantum of its indebtedness or that it was insolvent. It admitted that the hotel could not operate for a significant period of time due to the Covid pandemic and the ensuing national lockdowns. It stated that it only commenced operating at full capacity during January 2022, and is in a position to pay its debts and “will trade out of, its indebtedness to Absa”. It submitted that the Court should exercise its discretion against granting of the winding up order. 93 Quartz Street raised other defences pertaining to the loan facility. In view of the approach I take to the matter, it is not necessary to deal with the further defences beyond the denial of the indebtedness.
- [9] It merits mentioning that the challenge to the basis for the liquidation application emerged from the heads of argument filed by 93 Quartz Street, but not from its answering affidavit. 93 Quartz Street relied on a long-established line of authorities,³ and submitted that holding Absa to its pleaded case is not “pedantry”, as Absa cannot go beyond its pleaded case. The Court is similarly bound. While the challenge was first characterised as one of “a failure to plead a cause of action”, in my view, the true inquiry involves a failure by Absa to plead the source of the Court’s power to grant the liquidation of 93 Quartz Street.

³ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W); *Jacob and Goldrein Pleadings: Principles and Practice* (Sweet & Maxwell, 1990) at 8-9; *Minister of Agriculture and Land Affairs and Another v De Klerk and Others* [2013] ZASCA 142; 2014 (1) SA 212 (SCA); *SATAWU v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at paras 13-4.

[10] The point made raises an anterior question of law, whether section 69(1)(a) of the Close Corporation Act, confers a court with the power to wind up 93 Quartz Street as contended by Absa. The question emerges fully from the papers and is thus necessary for a decision in this case. The Court would have also been entitled to raise it *mero motu*.⁴ It thus falls to be determined first.

[11] Despite the coming into effect of the new Act in May 2011, and the subsequent decision of the Supreme Court of Appeal in *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others*,⁵ (“*Murray NO*”), this case illustrates a residual confusion on how the provisions of the new Act apply to the winding up of insolvent Close Corporations. In view of the submissions made during the hearing, it is necessary to restate the provisions to clarify the position.

[12] The change in the legal position of Close Corporations is embodied in section 224(2) of the new Act. It is necessary to refer to the whole section which reads as follows:

“224 Consequential amendments, repeal of laws, and transitional arrangements. —

- (1) The Companies Act, 1973 (Act No. 61 of 1973), is hereby repealed, subject to subsection (3).
- (2) The laws referred to in Schedule 3 are hereby amended in the manner set out in that Schedule.
- (3) The repeal of the Companies Act, 1973 (Act No. 61 of 1973), does not affect the transitional arrangements, which are set out in Schedule 5.”

[13] The relevant part of Schedule 3 referred to in section 224(2) is Item 7(3) of Schedule 3 of the new Act. It repeals s68 of the Close Corporations Act and reads as follows:

“Repeal of 68 of Act 69 of 1984

- (3) Section 68 of the Close Corporations Act is hereby repealed.”

⁴ *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA).

⁵ [2019] ZASCA 152; 2020 (2) SA 93 (SCA).

[14] Before dealing with the consequence of the repeal of section 68, which is the subject of the contestation in this matter, it is also necessary to refer to section 66 of the Close Corporations Act, amended subsequent to the new Act. Its current amended form reads as follows:

“66. Application of Companies Act, 1973 —

(1) The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.

.....

(2) For the purposes of subsection (1) —

(a) any reference in a relevant provision of the Companies Act, and in any provision of the Insolvency Act, 1936 (Act No. 24 of 1936), made applicable by any such provision—

(i) to a company, shall be construed as a reference to a corporation; ...”

[15] In my view, the consequence of the amendment of section 66 and the repeal of section 68 of the Close Corporation Act, which I deal in due course, is to incorporate the changes effected by section 224 and consolidate the provisions for the winding up of insolvent close corporations with those applicable to insolvent companies under the old Act.

[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 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.

[17] The repealed section 68 explicitly dealt with the winding up by a court and read as follows:

“Liquidation by Court

A corporation *may be wound up by a Court*, if—

- (a) members having more than one half of the total number of votes of members, have so resolved at a meeting of members called for the purpose of considering the winding-up of the corporation, and have signed a written resolution that the corporation be wound up by a Court;
- (b) the corporation has not commenced its business within a year from its registration, or has suspended its business for a whole year;
- (c) the corporation is unable to pay its debts; or
- (d) it appears on application to the Court that it is just and equitable that the corporation be wound up.” [Emphasis added.]

[18] Absa formulated its founding affidavit in the following manner:

“5. The causes of this application are –

5.1 that the respondent is unable to pay its debts as envisaged by the provisions of s 68(c) and (d) of the Close Corporations Act, No. 69 of 1984 (“the Close Corporations Act”) as read with the provisions of s 69(1)(a) of the Close Corporations Act;

5.2 that the applicant addressed a letter in terms of the provisions of s 69(1)(a) of the Close Corporations Act to the respondent, but despite proper service thereof upon the respondent, the respondent failed to pay the amount outstanding or to secure or compound for payment and, for that reason I respectfully state that the respondent is deemed to be unable to pay its debts; and

5.3 that the respondent committed a deed of insolvency within the meaning of s 8(g) of the Insolvency Act, No 24 of 1936 (“the Insolvency Act”).”

[19] During argument, Absa did not dispute that section 68 of the Close Corporations Act, on which it premised the application, was repealed. It submitted instead that it could base its application for liquidation on section 69(1)(a) of the Close Corporations Act which “survived the repeal”. It contended that the fact that 93 Quartz Street was unable to pay its debts had been “triggered” by the section 69(1)(a), and Absa could seek and be granted the winding-up order based on the section, so the argument went.

[20] Section 69(1)(a) of the Close Corporations Act, which has not been repealed, and on which Absa seeks to rely, reads as follows:

“69 Circumstances under which corporation deemed unable to pay debts. —

(1) *For the purposes of section 68 (c) a corporation shall be deemed to be unable to pay its debts, if —*

(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the corporation is returned by a sheriff, or a messenger of a magistrate's court, with an endorsement that he or she has not found sufficient disposable property to satisfy the judgment, decree or order, or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the corporation is unable to pay its debts.” [Emphasis added.]

[21] Absa submitted that the courts have been unanimous on the view that it may rely on section 69 for the liquidation order. It called in aid various court decisions, namely, *Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC and Another*⁶ (*Scania*); *Body Corporate Santa Fe Sectional Title Scheme No 61/1994 v Bassonia Four Zero Seven CC*⁷ (*Body Corporate Santa Fe*); and *ABSA Bank Ltd v Tamsui Empire Park 1 CC*⁸ (*Tamsui*).

[22] The submission by Absa conflates two interrelated but distinct legal requirements, articulated by the Constitutional Court in *Gcaba v Minister for Safety and Security and Others*⁹ namely; (a) jurisdictional factors - being the

⁶ 2013 (2) SA 439 (FB).

⁷ 2018 (3) SA 451 (GJ).

⁸ [2013] ZAWCHC 187.

⁹ [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

issues upon which a court will be called upon to adjudicate; contrasted with (b) jurisdiction - which is the legal basis of the claim under which the applicant has chosen to invoke the court's competence.¹⁰ It seems to me that the cases on which Absa relies engage a different coin of the inquiry from the one at issue. They are concerned with the jurisdictional factors required to grant the liquidation. They are not concerned with competence and the source of the court's power to do so. To the extent that it is suggested they confer jurisdiction on a court to grant a liquidation order, I do not consider myself bound.

- [23] From a plain reading, section 69(1)(a) exists “for the purpose of 68(c)”. It is not a standalone provision. It is complementary to, and must be read with, the repealed section 68(c). As 93 Quartz Street contends, section 69(1)(a) is not “the enabling provision”. By that it is meant that it does not confer the power on the court to grant the liquidation. It is a deeming provision to facilitate the proof of an act of insolvency for the purpose of the exercise by the Court of the jurisdiction to wind up.¹¹
- [24] Unlike in instances where a court is required to regulate its processes and procedures, or where the power derives from common law (now entrenched in section 173 of the Constitution),¹² the court has no inherent power to grant a liquidation order. The authority of the court to grant the liquidation derives from the statute, in this instance the old Act. Absa conceded that it did not base its application or refer to any of the relevant provisions, particularly, section 344 of the old Act, which on the strength of section 66 and the decision in *Murray NO* now apply to the liquidation of a close corporation.
- [25] In many respects, section 68 emulates the existing section 344 of the old Act. In particular, section 344(f) of the old Act mirrors section 68(c) which has been repealed. Both provisions deal with the jurisdiction of a court to wind up a close corporation when it is unable to pay its debts. What this means is that in the face of the repeal of section 68, Absa ought to have invoked the jurisdiction of the court in terms of section 344(f) of the old Act, read with section 69(1)(a) or

¹⁰ Id at paras 74-5.

¹¹ Kunst and Delpoit *Henochnsberg on the Close Corporations Act* (LexisNexis, Durban, 1997) Vol 3 Issue 29 Com-226(3) – Com-226(4).

¹² *Eke v Parsons* [2015] ZACC 30; 2015(11) BCLR 1319(CC); 2016 (3) SA 37 (CC) at para 40.

(c) of the Close Corporation Act. As the Constitutional Court held in *Chirwa*,¹³ jurisdiction is determined on the basis of the pleadings, and not the substantive merits of the case.¹⁴

[26] Confronted with the legislative scheme, Absa made supplementary submissions and contended that it could rely on sections 8(g) and 9 of the Insolvency Act 24 of 1936 (Insolvency Act) read with section 339 of the old Act and section 66 of the Close Corporations Act. Absa argued that section 8(g) of the Insolvency Act is a valid ground for liquidating 93 Quartz Street, since Mr Farber sought a restructure of the debt, and thus had expressly, alternatively impliedly, conceded that the respondent is unable to pay its debts. The basis for that view is that in terms of section 66 of the Close Corporations Act, the laws applicable to companies in terms of the old Act are applicable to close corporations.

[27] Sections 8(g) and 9 of the Insolvency Act state that:

8. Acts of insolvency. —A debtor commits an act of insolvency—

...

(g) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts.”

9 Petition for sequestration of estate. —

(1) A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of *the debtor*.”[emphasis added]

[28] On the other hand, section 339 of the old Act states that:

“In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act.”

¹³ *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC).

¹⁴ *Id* at paras 155 and 169.

[29] The submission by Absa comes into difficulty again. The Insolvency Act¹⁵ circumscribes a “debtor” by limiting the definition to “partnerships and natural persons”, and by specifically excluding companies from the definition. Since the “debtor” referred to in sections 8(g) and 9 of the Insolvency Act is of a different calibre from that in section 66(1) and (2) of the Close Corporations Act, the two provisions are mutually exclusive and are not compatible for the purposes of sections 8(g) and 9 of the Insolvency Act.

[30] To the extent that Absa seeks to rely on section 339 of the old Act, that too must fail as the section cannot be invoked at this stage of the proceedings. The court in *Kalil v Decotex (Pty) Ltd and Another*¹⁶ makes it plain that the words “in the winding up” refer to the process of the liquidation which commences after an order of winding-up has been granted. They do not apply to proceedings giving rise to the liquidation order. Section 339 is designed to address matters not specifically provided for by applicable legal provisions. This much was confirmed by the Court in *Nedcor Bank Ltd & Others v Master of the High Court, Pretoria & Others*.¹⁷ Absent an identifiable source of the power of the Court to grant the liquidation application, which must be pleaded by Absa, the Court lacks the inherent power to do so. The application must fail.

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

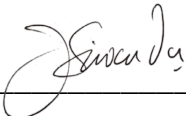
- a. The application for postponement is dismissed.
- b. The applicant in the postponement application is ordered to pay the costs of the application.
- c. The application for liquidation is dismissed.
- d. The applicant is ordered to pay the costs of the respondent.

¹⁵ “[D]ebtor”, in connection with the sequestration of the debtor’s estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies.”

¹⁶ 1988 (1) SA 943 (A) at 961A-C.

¹⁷ [2001] ZASCA 106; [2002] 2 All SA 281 (A).

This judgment was handed down electronically by circulation to the parties' legal representatives via email, and release to SAFLII. The date and time for hand down is deemed to be 6 December 2023 at 10: am.



NTY SIWENDU

Judge of the High Court

Johannesburg

Date of hearing: 19 October 2023

Date judgment delivered: 6 December 2023

Appearances

For the Applicant: Adv N Alli

Instructed by: Jay Mothobi Inc

For the Respondent: Adv L Hollander

Instructed by: Swartz Weil Van der Merwe Greenberg Inc

The Intervening party: Adv Sam Cohen

With: Adv Khosi Pama-Sihunu

Instructed by: Dempster McKinnon Incorporated