THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1325/2023

In the matter between:

SELECTIVE EMPOWERMENT INVESTMENTS 1 LIMITED **APPELLANT**

and

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **RESPONDENT**

Neutral citation: *Selective Empowerment Investments 1 Ltd v Companies and Intellectual Property Commission* (1325/2023) [2025] ZASCA 71 (30 May 2025)

Coram: MOKGOHLOA ADP, MOCUMIE, UNTERHALTER and KOEN JJA and NORMAN AJA

Heard: 28 February 2025

Delivered: 29 May 2025

Summary: Public company – grounds for winding-up – failure to comply with statutory requirements of the Companies Act 71 of 2008 (the Act) alternatively on the ground that it is just and equitable – section 81 – application for winding-up of a solvent company – whether the Commission has standing to rely on the just and equitable rubric where it failed to satisfy the jurisdictional requirements in section 81(1)*(f)* – whether the Commission is an interested party as envisaged

in section 79(3) – whether appellant received adequate notice for winding-up as an insolvent company – whether appellant is insolvent.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Snyman AJ sitting as a court of first instance):

1 The appeal is upheld with costs, such costs to include costs of two Counsel, where so employed.

2 The order of the high court is set aside and substituted with the following: 'The application is dismissed with costs, such costs to include costs of two counsel, where so employed.'

JUDGMENT

Koen JA (Unterhalter JA concurring):

Introduction

[1] The appellant, Selective Empowerment Investments 1 Ltd (Selective), has been placed under a final winding-up order by the Gauteng Division of the High Court, Pretoria (the high court) at the instance of the respondent, the Companies and Intellectual Property Commission (the Commission). The high court found that it was just and equitable to do so. Selective appeals against the order[1] with the leave of this Court.

[1] In its heads of argument Selective states that it appeals against the 'whole judgment and orders' granted by the high court, but then confined itself to the two issues listed in paragraph 2 of this judgment. The argument before this Court however drifted wider than these two issues. In the high court: Selective had also raised *lis alibi pendens* as a point *in limine,* it also sought leave to file a supplementary answering affidavit; and the Commission applied for certain allegations in Selective's answering affidavit, describing certain conduct as 'disingenuous', that the deponent 'verily believe[s]', and that the application was motivated by racism or an attempt to discriminate against it because it is black owned, to be struck out. Selective's *lis alibi pendens* defence and its application for leave to file a supplementary answering affidavit were dismissed. The Commission's applications to strike out were

[2] Selective correctly maintains that it could be wound up on the basis that it is just and equitable to do so if it is insolvent. The high court found that it was insolvent. Selective contends that the high court was not entitled to find that it was insolvent, because: it was a conclusion arrived at without affording the parties an opportunity to advance arguments on the issue; and it was a finding of fact not founded on the evidence. These were the only issues identified by Selective in its heads of argument as arising for determination in this appeal.[2]

[3] All references to statutory provisions hereafter are to sections of the Companies Act 71 of 2008 (the Act), unless stated otherwise. Where reference is made to the Companies Act 61 of 1973, it shall be referred to as the 1973 Act.

Background

[4] Selective presents itself to the general public as an investment company which primarily invests in companies listed on the Johannesburg Stock Exchange (JSE). It is a public company. It was established to offer small retail investors, of whom there are approximately 26 000 across diverse groups, with an opportunity to invest in JSE listed shares without incurring large fees. It is said to be owned by black and previously disadvantaged investors.[3] Its raison d'etre and substratum accordingly was to provide affordable access to the JSE to these previously disadvantaged individuals who otherwise would not have had an opportunity to invest in listed shares on their own.

---

granted. These rulings have not been attacked in Selective's heads of argument, did not feature during argument before this Court, and are accordingly not considered in this judgment.

[2] The issues in the high court, according to a joint practice notice filed, were: whether the Commission had complied with the provisions of s 81(1)*(f)*(i) and (ii) of the 2008 Act and was entitled to a winding-up order in terms of the provisions, alternatively, whether as regulator it was entitled in terms of s 344*(h)* of the Companies Act 61 of 1973 (the 1973 Act) as read together with the Companies Act 71 of 2008, it was entitled to an order that Selective be wound up on the ground that it is just and equitable to do so.

[3] Selective has not disputed that it has not maintained a proper security register of shareholders for an extended period. As a result, its shareholders could not trade in their shares. The identities of its shareholders accordingly remain a matter of some uncertainty.

[5] The Commission is the regulatory authority responsible for enforcing compliance with the provisions of the Act. It is a juristic person established in terms of s 185. It functions as an organ of State within the public administration, but as an institution outside the public service. Its objectives, in terms of s 186(1),[4] include the promotion of compliance with the Act and any other applicable legislation, and the efficient, effective and widest possible enforcement of the Act and any other legislation listed in Schedule 4 thereto.[5]

[6] The functions of the Commission are various and in terms of s 187(1) to (4)[6] include: monitoring proper compliance with the Act; receiving or initiating

---

[4] Section 186(1) provides:
'(1) The objectives of the Commission are –
(a) the efficient and effective registration of –
(i) companies, and external companies, in terms of this Act;
(ii) other juristic persons, in terms of any applicable legislation referred to in Schedule 4; and
(iii) intellectual property rights, in terms of any relevant legislation;
(b) the maintenance of accurate, up-to-date and relevant information concerning companies, foreign companies and other juristic persons contemplated in subsection (1)*(a)*(ii), and concerning intellectual property rights, and the provision of that information to the public and to other organs of state;
(c) the promotion of education and awareness of company and intellectual property laws, and related matters;
(d) the promotion of compliance with this Act, and any other applicable legislation; and
(e) the efficient, effective and widest possible enforcement of this Act, and any other legislation listed in Schedule 4.
(2) To achieve its objectives, the Commission may –
(a) have regard to international developments in the field of company and intellectual property law; or
(b) consult any person, organisation or institution with regard to any matter.'

[5] The 'other legislation' listed in schedule 4 is not directly relevant to this judgment but include, for example also, Part A of chapter 4 of the Consumer Protection Act, 2008 (Act 68 of 2008).

[6] Section 187(1) to (4) provide:
'(1) In this section, 'this Act' has the meaning set out in section 1, but also includes any legislation listed in Schedule 4.
(2) Other than with respect to matters within the jurisdiction of the Takeover Regulation Panel, the Commission must enforce this Act, by, among other things –
(a) promoting voluntary resolution of disputes arising in terms of this Act between a company on the one hand and a shareholder or director on the other, as contemplated in Part C of Chapter 7, without intervening in, or adjudicating any such dispute;
(b) monitoring proper compliance with this Act;
(c) receiving or initiating complaints concerning alleged contraventions of this Act, evaluating those complaints, and initiating investigations into complaints;
(d) receiving directions from the Minister in terms of section 190, concerning investigations to be conducted into alleged contraventions of this Act, or other circumstances, and conducting any such investigation;
(e) ensuring that contraventions of this Act are promptly and properly investigated;
(f) negotiating and concluding undertakings and consent orders contemplated in section 169(1)*(b)* and 173;
(g) issuing and enforcing compliance notices;
(h) referring alleged offences in terms of this Act to the National Prosecuting Authority; and
(i) referring matters to a court, and appearing before the court or the Companies Tribunal, as permitted or required by this Act.
(3) The Commission must promote the reliability of financial statements by, among other things-
(a) monitoring patterns of compliance with, and contraventions of, financial reporting standards; and

complaints concerning alleged contraventions of the Act; evaluating those complaints; initiating investigations into complaints; ensuring that contraventions of the Act are promptly and properly investigated; issuing and enforcing compliance notices; and referring matters to court. Specifically, the Commission, inter alia, must promote the reliability of financial statements by, amongst others, monitoring patterns of compliance with, and contraventions of financial reporting standards, and making recommendations to secure better reliability and compliance. In general terms, the Commission is tasked with providing a corporate milieu of integrity and a minimum threshold level of responsibility in respect of corporate entities registered and operating in the Republic of South Africa.

[7] The Act imposes a plethora of compliance and other requirements on companies. These include, amongst others: s 24(4),[7] which requires that an up to

(b) making recommendations to the Council for amendments to financial reporting standards, to secure better reliability and compliance.
(4) The Commission must-
(a) establish and maintain in the prescribed manner and form –
(i) a companies register; and
(ii) any other register contemplated in this Act, or in any other legislation that assigns a registry function to the Commission;
(b) receive and deposit in the registry any documents required to be filed in terms of this Act;
(c) make the information in those registers efficiently and effectively available to the public, and to other organs of state;
(d) register and deregister companies, directors, business names and intellectual property rights, in accordance with relevant legislation; and
(e) perform any related functions assigned to it by legislation, or reasonably necessary to carry out its assigned registry functions.'

[7] Section 24(4) provides:
'(4) In addition to the requirements of subsection (3), every company must maintain –
(a) a securities register or its equivalent, as required by section 50, in the case of a profit company, or a member's register in the case of a non-profit company that has members; and
(b) the records required in terms of section 85, if that section applies to the company.'

date share register be kept and that it be verified;[8] s 30(1),[9] which requires the submission of audited annual financial statements;[10] s 33(1)*(a)*, which requires that a company must file an annual return;[11] s 61(7),[12] which requires the holding of annual general meetings of shareholders; and s 214(1)*(d)*,[13] which prohibits

---

[8] Section 50 provides:
'(1) Every company must –
(a) establish or cause to be established a register of its issued securities in the prescribed form; and
(b) maintain its securities register in accordance with the prescribed standards.
(2) As soon as practicable after issuing any securities a company must enter or cause to be entered in its securities register, in respect of every class of securities that it has issued –
(a) the total number of those securities that are held in uncertificated form; and
(b) with respect to certificated securities-
(i) the names and addresses of the persons to whom the securities were issued;
(ii) the number of securities issued to each of them;
(iii) the number of, and prescribed circumstances relating to, any securities-
(aa) that have been placed in trust as contemplated in section 40 (6)*(d)*; or
(bb) whose transfer has been restricted;
(iv) in the case of securities contemplated in section 43 –
(aa) the number of those securities issued and outstanding; and
(bb) the names and addresses of the registered owner of the security and any holders of a beneficial interest in the security; and
(v) any other prescribed information.
(3) If a company has issued uncertificated securities, or has issued securities that have ceased to be certificated, as contemplated in section 49(5), a record must be administered and maintained by a participant or central securities depository in the prescribed form, as the company's uncertificated securities register, which –
(a) forms part of that company's securities register; and
(b) must contain, with respect to all securities contemplated in this subsection, any details-
(i) referred to in subsection (2)*(b)*, read with the changes required by the context; or
(ii) determined by the rules of the central securities depository.
(3A)*(a)* A company that does not fall within the meaning of an 'affected company' must record in its securities register prescribed information regarding the natural persons who are the beneficial owners of the company, in the prescribed form, and must ensure that this information is updated within the prescribed period after any changes in beneficial ownership have occurred.
(b) The prescribed requirements referred to in paragraph *(a)* must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001).
(4) A securities register, or an uncertificated securities register, maintained in accordance with this Act is sufficient proof of the facts recorded in it, in the absence of evidence to the contrary.
(5) Unless all the shares of a company rank equally for all purposes, the company's shares, or each class of shares, and any other securities, must be distinguished by an appropriate numbering system.'

[9] Section 30(1) provides:
'(1) Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61(7).'

[10] Annual financial statements are of crucial interest to anyone with an interest in a company – *Pinfold and Others v Edge to Edge Global Investments Ltd* [2013] ZAKZDHC 52; 2014 (1) SA 206 (KZD) para 11.

[11] The annual return must be filed on form CoR 30.1.

[12] Section 61(7) provides:
'(7) A public company must convene an annual general meeting of its shareholders –
(a) initially, no more than 18 months after the company's date of incorporation; and
(b) thereafter, once in every calendar year, but no more than 15 months after the date of the previous annual general meeting, or within an extended time allowed by the Companies Tribunal, on good cause shown.'

[13] Section 214(1)*(d)* provides:
'(1) A person is guilty of an offence if the person –
. . .
(d) is a party to the preparation, approval, dissemination or publication of a prospectus or a written statement contemplated in section 101, that contains an 'untrue statement' as defined and described in section 95.'

false statements being prepared and issued. These requirements seek to protect the interests of shareholders, creditors and members of the public, and promote good corporate governance.

[8] Section 22(1)[14] requires that a company must not conduct its business recklessly, with gross negligence, with intent to defraud any person, or for any fraudulent purpose. If the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by s 22(1), or is unable to pay its debts as they become due and payable in the normal course of business, the Commission may issue a 'notice to show cause' to the company as to why it should be permitted to continue carrying on business, or to trade, as the case may be.[15]

[9] If a company to whom a notice to show cause has been issued fails, within 20 business days, to satisfy the Commission that it is not carrying on its business recklessly with gross negligence, with intent to defraud, or for any fraudulent purpose as contemplated in s 22(1), or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a 'compliance notice' to the company requiring it to cease carrying on its business or trading, as the case may be.[16] A compliance notice may also be issued in terms of s 171,[17] where there is non-compliance with other provisions of the Act.

---

[14] Section 22(1) provides:
'(1) A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.'
[15] Section 22(2) reads:
'(2) If the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), or is unable to pay its debts as they become due and payable in the normal course of business, the Commission may issue a notice to the company to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.'
[16] Section 22(3) reads:
'(3) If a company to whom a notice has been issued in terms of subsection (2) fails within 20 business days to satisfy the Commission that it is not engaging in conduct prohibited by subsection (1), or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be.'
[17] Section 171(1) and (2) provide:

[10] If and when the requirements of a compliance notice have been satisfied fully, s 171(6) requires the Commission, or the Executive Director to issue a compliance certificate.[18] A compliance notice remains in force until: it is set aside by the Companies Tribunal; or a court reviews the notice; or it is set aside by the Takeover Special Committee; or, the Commission, or its Executive Director, as the case may be, issues a 'compliance certificate', contemplated in s 171(6),[19] that the particular non-compliance identified has been remedied.[20]

[11] Selective has a long history,[21] confirmed by the reports of various vetting committees, including the Prospectus Vetting Committee dated 11 March 2016, and investigations of the Commission, inter alia on 17 October 2016 and on numerous occasions thereafter, of egregious deliberate non-compliance with, and

---

'(1) Subject to subsection (3), the Commission, or the Executive Director of the Panel, may issue a compliance notice in the prescribed form to any person whom the Commission or Executive Director, as the case may be, on reasonable grounds believes –
(a) has contravened this Act; or
(b) assented to, was implicated in, or directly or indirectly benefited from, a contravention of this Act,
unless the alleged contravention could otherwise be addressed in terms of this Act by an application to a court or to the Companies Tribunal.
(2) A compliance notice may require the person to whom it is addressed to –
(a) cease, correct or reverse any action in contravention of this Act;
(b) take any action required by this Act;
(c) restore assets or their value to a company or any other person;
(d) provide a community service, in the case of a notice issued by the Commission; or
(e) take any other steps reasonably related to the contravention and designed to rectify its effect.'

[18] Section 171(6) reads:
'(6) If the requirements of a compliance notice issued in terms of subsection (1) have been satisfied, the Commission or the Executive Director, as the case may be, must issue a compliance certificate.'

[19] Section 171(5) provides:
'(5) A compliance notice issued in terms of this section, or any part of it, remains in force until –
(a) it is set aside by –
(i) the Companies Tribunal, or a court upon a review of the notice, in the case of a notice issued by the Commission; or
(ii) the Takeover Special Committee, or a court upon a review of the notice, in the case of a notice issued by the Executive Director; or
(b) the Commission, or Executive Director, as the case may be, issues a compliance certificate contemplated in subsection (6).'

[20] If a compliance notice is not complied with then the Commission or Executive Director may apply to court for the imposition of an administrative fine or refer the matter to the National Prosecuting Authority for prosecution as an offence. Section 171(7) reads:
'(7) If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission or the Executive Director, as the case may be, may either –
(a) apply to a court for the imposition of an administrative fine; or
(b) refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 214 (3),
but may not do both in respect of any particular compliance notice.'

[21] The Financial Services Board, as it was then known, already in December 2011 issued an inspection report. Selective had also reported a 34% loss.

transgressions of, various provisions of the Act. These include: s 22(1) – reckless trading, due to the failure to properly maintain a share register, to comply with conditions set in prospectuses, and to prepare annual financial statements within six months after the end of each financial year; s 24(4) – failing to maintain the securities register as required by s 50; s 30(1) – failing to prepare annual financial statements on a regular basis, within six months after the end of each financial year, which for Selective was 30 June; s 50(1)*(b)* – failing to maintain an accurate securities register in accordance with the prescribed standards; s 61(7) – failing to hold annual general meetings (from 2014 until 2017); s 72(4)[22] and regulation 43(2) – failing to constitute a social and ethics committee; s 73(6)[23] – failing to keep minutes of meetings of the audit committee and social committee; s 86(4)[24] – failing to fill the vacancy in the office of the company secretary within 60 business days; s 94(6)[25] – failing to fill vacancies on the audit committee within 40 business days after the vacancies arose; s 108(6)[26] – failing to raise capital in terms of its prospectus; s 214(1)*(d)* – making false statements, and reckless conduct, in failing to provide an alternative trading platform; and failing to submit a tax return for assessment within 12 months after the end of financial years, as required in terms of s 66 of the Income Tax Act 58 of 1962 read with s 25 of the

---

[22] Section 72(4) provides:
'(4) The Minister, by regulation, may prescribe –
(a) a category of companies that must each have a social and ethics committee, if it is desirable in the public interest, having regard to –
(i) annual turnover;
(ii) workforce size; or
(iii) the nature and extent of the activities of such companies;
(b) the functions to be performed by social and ethics committees required by this subsection; and
(c) rules governing the composition and conduct of social and ethics committees.'

[23] Section 73(6) provides:
'(6) A company must keep minutes of the meetings of the board, and any of its committees, and include in the minutes
(a) any declaration given by notice or made by a director as required by section 75; and
(b) every resolution adopted by the board.'

[24] Section 86(4) provides:
'(4) Within 60 business days after a vacancy arises in the office of company secretary, the board must fill the vacancy by appointing a person whom the directors consider to have the requisite knowledge and experience.'

[25] Section 94(6) provides:
'(6) The board of a company contemplated in section 84(1) must appoint a person to fill any vacancy on the audit committee within 40 business days after the vacancy arises.'

[26] Section 108(6) provides:
'(6) If the circumstances contemplated in subsection (2) have not been realised within 40 business days after the issue of the prospectus, all amounts received from applicants must be repaid to them promptly without interest.'

Tax Administration Act 28 of 2011. It also ignored the demand to demonstrate without delay, that it was not trading in insolvent circumstances.

[12] As a result, Selective was issued with notices to show cause that it was not trading recklessly or under insolvent circumstances, as contemplated in s 22, on 17 October 2016 and 7 December 2017. The notice to show cause dated 17 October 2016 in addition listed contraventions of: s 30, regarding the failure to file the annual financial statements for the 2014 and 2015 financial years; s 24(4)*(a)*, the failure to raise any capital for prospectuses registered on 23 January 2012, 16 July 2012, 16 October 2012, 16 January 2013, 25 April 2013 and 18 November 2013; and the non-negotiability of securities held. The notice to show cause dated 7 December 2017 detailed contraventions of: s 24(4), failing to maintain the securities register as required by s 50 which is deemed to be a contravention of s 24(4); s 30(1), in that the 2017 financial year statements were not prepared within six months of the financial year end; s 61(7), the failure to convene annual general meetings after 31 January 2014; and s 214(1)*(d),* relating to false statements and reckless conduct.

[13] Both the above notices: recorded that they were issued in terms of s 22(2); reminded Selective that it could apply to review the notice; confirmed that it was required to provide the information required to the Commission within 20 days; and required it to show cause why it should be permitted to carry on business or to trade. The notices recorded that if Selective failed, within the 20 days, to respond to the notice or to satisfy the Commission that it is not carrying on business recklessly, or with intent to defraud,[27] and is able to pay its debts as they become due in the ordinary course of business, the Commission may issue a compliance notice requiring Selective to cease carrying on business.

[27] Being conduct prohibited by s 22(1).

[14] Selective does not dispute receiving these notices. Nor did it seek to review the notices. In its response, dated 5 December 2016, it undertook vaguely to implement 'remedial actions.' Yet, in a further response on 16 January 2018, to the notice dated 7 December 2017, it conceded that it had still not complied with various provisions of the Act. Significantly, whilst acknowledging the obligation to have to apply for a review if it disputed the notices, it elected that it 'will not, despite advice to the contrary, seek to review the [n]otice on these grounds at this stage'. It has also never sought to respond in any one of the ways required by the Act outlined in paragraph 10 above.

[15] When the notices to show cause were not responded to, compliance notices, as contemplated in s 171 and s 22(3), were issued on 16 January 2017, 19 September 2017 and 14 February 2018. The compliance notices all advised Selective that it had the right, within 15 business days, to apply for an order confirming, modifying or setting aside all or part of the notices, confirmed that the notices would remain in force until set aside on review or until a compliance certificate is issued, and cautioned that the failure to file overdue returns may result in the deregistration of Selective. All three compliance notices recorded, in particular, that Selective had failed to comply with s 30 (the failure to prepare annual financial statements).

[16] Selective does not dispute receiving the compliance notices either. None was ever reviewed and set aside as provided in s 171(5).[28] Nor was any

[28] The second judgment asserts that the high court ignored that Selective did not remain supine when it was served with notices and in some instances asked for support and guidance from the Commission, that the Commission did not tell it that it could not give it guidance or support, and that it is part of its responsibilities to do so. That respectfully, is not so. The evidence revealed that Selective adopted a supine approach. On its own version, it deliberately set its mind against responding to some of the notices. It never, if it had complied fully and timeously with any of the demands raised, took steps to obtain compliance certificates. But more fundamentally, it ignored its own responsibilities in law to ensure compliance with what any reasonable business person would understand is required, namely the timeous preparation of, for example, audited annual financial statements, maintaining a securities register, preparing minutes of annual general meetings, and the like. It is not the responsibility of the Commission in law, to attend to these or to 'support' the preparation thereof. No 'guidance' from the Commission is required for Selective to prepare annual financial statements, hold annual general meetings and maintain an up-to-date share register. What the scheme of the Act makes clear is that these basic responsibilities cannot be shirked by blaming the Commission.

compliance certificate ever issued. Consequently, the complaints listed stand. The instances of non-compliance raised by the Commission were, as a matter of fact, if not deemed by the Act, not to have been remedied.

[17] The compliance notice dated 16 January 2017 required Selective to: submit to the Commission copies of the annual financial statements for 2014 and 2015 signed by the registered auditor and approved and signed by the directors; provide reasons why the annual financial statements of February 2012 were not timeously prepared by the directors; submit the minutes of the annual general meetings and the securities register. Selective provided draft annual financial statements as at 30 June 2015, but these did not comply with the request. Selective conceded that any attempt to justify not having timeously prepared the 2012 statement would be untenable, so it provided none. It provided a copy of what purported to be minutes of the last general meeting, which was held in January 2014, some three years earlier. Finally, as regards the securities register it said that it had employed Stakeholder Data Services to assist the directors to rectify the shareholders register and that this 'project' was 'well underway'. The Commission points out that a copy of the register has still not been provided.

[18] The compliance notice dated 19 September 2017 required Selective: to provide the Commission with its annual financial statements for the 2016 financial year (which ended on 30 June 2016) signed by the registered auditor and approved and signed by the directors; to provide reasons why the annual financial statements of 30 June 2016 were not timeously prepared by the directors; to submit the minutes of the annual general meeting; to submit proof of compliance with s 24(4)*(a)*; and to provide a report on how instances of non-compliance detected during an audit would be remedied to avoid a future repeat of non-compliance.

[19] A subsequent report by the inspectors of the Commission dated 7 December 2017, confirmed that Selective had not remedied its various defaults. Accordingly, the notice to show cause dated 7 December 2017, was issued. A further inspectors' report dated 14 February 2018 confirmed that Selective remained in default. It recommended that a compliance notice should be issued to Selective to demand that it cease carrying on its business or trading.

[20] The compliance notice issued on 14 February 2018, pursuant to that recommendation, detailed the history of notices and contraventions, evaluated Selective's responses, recorded clearly that the responses were inadequate, and required Selective to cease carrying on its business or trading until various conditions were all complied with. These conditions included: providing certification that the share register was up to date and the verification thereof completed; submitting the annual financial statements for the year ended 30 June 2017; submitting the notice, agenda and minutes of legally constituted annual general meetings; and, as regards false statements and reckless conduct, to provide proof of the existence of an alternative platform to trade in the securities issued by Selective. Failing compliance with any one condition, the Commission would apply for the winding-up of Selective.

[21] The second judgment maintains that there was proper compliance with reference to an isolated statement, dated 9 September 2020 (some three months after the date of the founding affidavit) from the Commissioner CIPC, which refers to the receipt of 'annual returns' for Selective for the years 2013, 2014, 2015, 2016, 2017, 2018 and 2019. It maintains further that this has not been placed in issue in the Commission's replying affidavit and must be accepted as correct and any allegations that at the time the matter was heard by the high court there were outstanding annual financial statements, must be rejected. I respectfully disagree.

[22] Courts decide matters on the allegations in the affidavits. The replying affidavit, in three instances at the outset, namely in paragraphs 6, 9 and 10 deny the allegations in the answering affidavit that are in contradiction to what has been stated in the founding affidavit, or not specifically dealt with, and repeats that Selective had not overcome the challenges. The statement referred to accordingly was placed in dispute.

[23] Furthermore, as regards any criticism that the certificate was not responded to separately, a party to litigation is not required to trawl through annexures to an affidavit to identify what might or might not possibly be relevant and relied upon. It was incumbent on Selective to have specifically raised its alleged compliance, for example, by having submitted all annual financial statements, in the text of its answering affidavit.[29] Selective failed to do so.

[24] An annual return in terms of s 33 is something different to the requirement of annual financial statements. What might be meant by the 'annual return' and that it had allegedly been complied with, and if so, what impact that would have, was not raised with the Commission's counsel and the Commission accordingly never had the opportunity to respond thereto during argument.

[25] The same applies to the alleged certification by the company secretary, except that in addition, the alleged certification constitutes inadmissible hearsay evidence as it is relied upon for the truth of the contents thereof, although no confirmatory affidavit was filed from the company secretary. Similarly with regard to the share register. It is, incorrect that the 'Commission chose not to deal with these facts in the replying affidavit'. It denied the allegations in the answering affidavit insofar as they were in contradiction to the founding affidavit. There is no other way to dispute that the share register is properly updated, than

---

[29] *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and others* 2008 (2) SA 184 (SCA) at para 43, approved by the Constitutional Court in *Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another* 2017 (6) SA 1 (CC) at para 171.

to deny it. Significantly again, Selective never applied for compliance certificates to be issued if it was of the view that it had complied.

[26] Selective accordingly did not even begin to comply with the obligations, which it had been called upon repeatedly to comply with. Further, separate and distinct from any compliance issues, it failed to show that it was not trading recklessly or fraudulently and that its assets properly valued exceeded its liabilities.

[27] As the conditions stipulated were not complied with and as the various instances of non-compliance were not attended to satisfactorily, the Commission brought an application (the delinquency application) to have some of the directors of Selective declared delinquent directors. This application is apparently still pending. The Commission also launched the liquidation application, which is the subject of this appeal.

[28] In summary, Selective's answer to the various allegations of non-compliance, include, *inter alia*, the following:

(a) It admitted that it and some of its directors failed on numerous occasions to timeously comply with various statutory duties;

(b) It admitted that annual financial statements were not prepared as required;

(c) It raised, by way of explanation, that a new board appointed in August 2017, consisting of four members and Mr Moses Maja (Mr Maja), the deponent to the answering affidavit who continued as a director and, it seems, is its sole executive director:[30] was seeking to undo the damage resulting from self-confessed poor management and litigation; had prepared and published 'various annual reports' (but only one for the year ended 30 June 2017/2018 was attached); had subsequently complied with

[30] According to the 2017/2018 annual report Mr Maja appears to still be the person mainly charged with the administration of Selective, and its only executive director, the other four being non-executive directors.

its tax obligations, annexing what purports to be a tax compliance status certificate; and that it had entered into an agreement with Singular Systems (Pty) Ltd (Singular) to 'clean up' the share register and provide certain services, including maintaining the register and providing a trading platform;

(d) It denied that it was at any time unable to pay its debts as they became due and payable in the normal course of business; and that it was trading whilst not able to pay its debts, but without having reviewed any notices or obtaining a compliance certificate to that effect and without producing proof thereof;

(e) The annual financial statements for the year ended 30 June 2018, which were the only full annual financial statements annexed, were already late.

[29] Selective's approach in answering the pertinent allegations of non-compliance made against it was one of vagueness, lacking in detail, failing to provide proof of proper compliance, and was thus unacceptable. The directors were in serial default of their duties, variously by reason of indifference, ignorance or careless disregard. They failed in their duty to Selective to comply properly and timeously, and in no small measure, at all, with the provisions of the Act, and their legal and fiduciary duties and responsibilities. It is not the function nor responsibility of the Commission to advise on the 'day to day running' of Selective. The Commission is the regulator and must maintain a professional distance from all the companies it regulates. It would be a matter of impossibility and likely overreach for the Commission to help and advise on the day to day running of all companies and close corporations registered with it. The failure on the part of Selective, represented by Mr Maja, to recognise and accept Selective's most basic general corporate governance responsibility is damning and disturbing. And very little has changed in Selective after all these notices. Mr Maja is still the sole executive director, even of the 'new board'.

[30] Save for a few specific responses, some being pregnant denials of non-compliance but unsupported by documentary proof of compliance, the remaining allegations of non-compliance were simply met with an omnibus response that where a factual allegation had been made in the founding affidavit and it conflicts with what is set out in the answering affidavit, it should simply be considered to be denied. Selective did not enjoy the luxury of such an answer. When the facts averred in an opposed application are such that the respondent must necessarily possesses knowledge of them it must provide proof of compliance. Instead of providing a substantiated answer, Selective rests its defence on a bare or ambiguous denial, in which circumstances a court is entitled to adopt a robust view of the matter[31] and infer that there was no proper compliance.

[31] Specifically, Selective denied a contravention of s 30 (annual financial statements), s 24(4)*(a)* (failure to maintain a securities register or its equivalent as required in terms of s 50), failure to raise any capital for prospectuses registered on 23 January 2012, 16 July 2012, 16 October 2012, 16 January 2013, 25 April 2013 and 18 November 2013, and denied the non-negotiability of securities held. Selective had a positive duty, if it denied non-compliance, to provide proof of proper compliance by annexing copies of these documents, or at least formally tendering copies thereof in terms of rule 35(12). It failed to do so.

[32] It relied, in its answer, on a Report of an Independent External Auditor. The contents of this report are not confirmed under oath. That notwithstanding, the report, which is dated 24 July 2019, records results for the interim period ended on 31 December 2018. The interim results were also late in being issued only on 24 July 2019. The breaches of provisions of the Act continue. The new board too, has failed to ensure full and proper compliance with the provisions of the Act, notwithstanding a reasonable period having elapsed since its appointment.

---

[31] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 13.

[33] If Selective was not guilty of this egregious disregard of virtually everything required of it and if it was to properly conduct itself as a public company, then it should have obtained the necessary compliance certificates. It failed to do so. The overall picture that emerges on the totality of the evidence is that Selective blunders along recklessly, without timeous and proper financial statements, openly in default of many of its obligations in law, without a proper shareholders' register and certainty as to who its investors are. The only reasonable inference must be that it is unable to do so despite repeated demands, to demonstrate that its assets exceed its liabilities and that it is not trading recklessly.

[34] And the persons who stand to suffer, are the disadvantaged individuals it has recruited as shareholders with the promise of investment growth. These are persons who would otherwise not be able to afford to invest on the JSE and who are likely unable to hold their 'board' to account, that is even if properly convened annual general meetings were convened. The negative impact on their rights, speaks for itself.

The liquidation of companies

[35] The winding-up of companies is regulated by the provisions of the Act. The 1973 Act did not draw a distinction between the winding-up of insolvent and solvent companies. The Act, however, draws that distinction, but it does not define what is meant by solvency or insolvency. This Court, in *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*,[32] recognised the forms of insolvency as factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities). The test is not as stated in the second judgment whether the company

[32] *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* [2014] 1 All SA 507 (SCA); 2014 (2) SA 518 (SCA) para 16; *Ex parte De Villiers and Another NNO: In re Carbon Developments* 1993 (1) SA 493 (SCA) 502D.

in winding-up, that is after liquidation of all its assets, can pay its debts. It is sufficient if it cannot pay its debts as they fall due without first liquidating fixed assets and investments, that is, that it is commercially insolvent. The net asset value of R145 056 597 (of Selective) is not the sole determinant of whether the company is insolvent.

[36] Nor is the statement of the audit committee that Selective 'complies in all respects with the requirements of the Act' of assistance. This is a conclusion of unidentified persons, not under oath, and thus inadmissible hearsay, and which, in any event, was denied in reply. Section 345 is furthermore not, with respect, 'a safeguard to avoid liquidating a company without evidence to prove . . . that it may be insolvent'. Section 345 assists as pointed out in the second judgment in establishing commercial insolvency when a creditor seeks the winding-up of a company. But a company may also be wound up by a variety of other persons, other than creditors, for whom s 345 would hold no benefit. Ultimately, the issue is whether on a conspectus of all the evidence the company is, or, in casu, may be commercially insolvent. Every case must be decided on its own facts.

[37] Nothing is achieved by drawing comparisons with the actual financial position of companies in other cases as the second judgment seeks to do with reference to *Boschpoort*. Although, at the time of the filing of the answering affidavit, annual financial statements beyond the 2018 financial year should have been available and annexed, Selective chose to annex only the 2018 statements for reasons which remain unexplained, but at the level of inference probably was because these were the only ones available. And these statements demonstrate that it is commercially insolvent, as I shall explain below.

[38] The distinction between solvent and insolvent companies is not the only new aspect of the Act. A company could in the past always also be wound-up on the grounds that it would be just and equitable to do so, whether it was solvent or

insolvent. The 1973 Act also provided that the Trade Minister, who had Ministerial oversight functions, could apply for the winding-up of any company. This power of the Minister was removed by the Act and, it can be safely accepted, was given to the Commission[33] which remains responsible to exercise the oversight function.

[39] The responsibilities of the Minister have under the Act been transferred to the Commission. There is no reason why these powers should be restricted, in the case of winding-up of a company, and at the instance of the Commission, to only the instances in s 81(2)*(f)*.

[40] The present position in respect of insolvent companies is the same as it was under the 1973 Act. As has been held:

'It has also long been a construction of interpretation of statutes that, in the absence of express wording to the contrary, the legislature did not intend to alter the law as it had previously stood . . ..'[34]

The context and purpose of the Act are even more supportive of the aforesaid construction.

The winding-up of solvent companies

[41] Section 79(1) and (2) provide that:

'(1) A solvent company may be dissolved by –

(a) voluntary winding-up initiated by the company as contemplated in section 80, and conducted either-

(i) by the company; or

(ii) by the company's creditors, as determined by the resolution of the company; or

(b) winding-up and liquidation by court order, as contemplated in section 81.

---

[33] *Recycling & Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) para 129.

[34] *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 20214 (2) SA 518 (SCA) para 19.

(2) The procedures for winding-up and liquidation of a solvent company, whether voluntary or by court order, are governed by this Part[35] and, to the extent applicable, by the laws referred to or contemplated in item 9 of Schedule 5.'[36]

[42] As regards the winding-up of a solvent company by a court order, s 81 specifies the grounds on which the company itself; a business rescue practitioner; one or more of the company's creditors; the company, directors or shareholders; a shareholder with the leave of the court; and the Commission or the Takeover Regulation Panel may apply for a winding-up order. Section 81(1)*(f)* provides that:

'(1) A court may order a solvent company to be wound up if –

. . .

(f) the Commission or Panel has applied to the court for an order to wind up the company on the grounds that –

(i) the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal, the Commission or Panel, as the case may be, has issued a compliance notice in respect of that conduct, and the company has failed to comply with that compliance notice; and

(ii) within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act, 1984 (Act 69 of 1984), were taken against the company, its directors or prescribed officers, or other persons in control of the company for substantially the same conduct, resulting in an administrative fine, or conviction for an offence; . . .'

The winding-up of insolvent companies

[43] Item 9 of schedule 5 to the Act provides for the continued application of provisions of the 1973 Act in respect of the liquidation of insolvent companies. It provides:

'(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (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 sub-items (2) and (3).

---

[35] That is Part G of Chapter 2 of the Act. It comprises sections 79 to 83 of the Act.
[36] Item 9 of Schedule 5 is set out in paragraph 29 below.

(2) Despite sub-item (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 sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provisions of this Act prevail.

(4) The Minister, by notice in the Gazette, may –

(a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and

(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act to the provisions of the alternative legislation contemplated in paragraph *(a)*.'

[44] Section 344 of the 1973 Act, which continues to apply, provides:

'A company may be wound up by the Court if –

(a) the company has by special resolution resolved that it be wound up by the Court;

(b) the company commenced business before the Registrar certified that it was entitled to commence business;

(c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;

(d) in the case of a public company, the number of members has been reduced below seven;

(e) seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company;

(f) the company is unable to pay its debts as described in section 345;

(g) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding-up its affairs;

(h) it appears to the Court that it is just and equitable that the company should be wound up.' (Emphasis added)

[45] As to what might be 'just and equitable', the jurisprudence is well established and will include: 'the disappearance of the company's substratum'; 'illegality of the objects of the company and fraud committed in connection

therewith'; a 'deadlock which results in the management of the company's affairs'; 'grounds analogous to those for the dissolution of a partnership'; and '[where there has been] oppression'.[37] This list is not exhaustive. The grounds are furthermore not confined to instances which are analogous to those in other parts of the section. No general rule can be laid down as to the nature of the circumstances that have to be considered to ascertain whether a case comes within the phrase.[38]

[46] Although 'just and equitable' is not a catch all ground for winding-up a company,[39] our courts are empowered to exercise their own discretion, to prevent the continuation of a company if it would be detrimental to its shareholders or the public interest, on the basis that it is just and equitable that it be wound up.

[47] Section 79(3) makes it clear that the just and equitable criterion is to be applied also to companies which are insolvent or may be insolvent. It has been held in the past that s 344*(h)* postulates not facts, but only a broad conclusion of law, 'justice and equity as a ground for winding-up'.[40] This principle, undoubtedly, also holds true in the determination of what may constitute just and equitable grounds for the purpose of s 79(3).

[48] What is just and equitable is furthermore constantly undergoing development as new instances of liquidating a company on that ground develop, are recognised and are accepted. This flexibility is necessary to cater for changing business circumstances. It is also consistent with the provisions of s 158 of the Act. Section 158 provides:

---

[37] These five categories were recognised in, for example, *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) (*Rand Air*) at 350A-H.
[38] *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others* [2013] ZASCA 164; [2014] 1 All SA 474 (SCA); 2014 (5) SA 1 (SCA) para 15.
[39] *Rand Air* fn 30 above at 349F.
[40] *Apco Africa (Pty) Ltd v Apco Worldwide Incorporated* [2008] ZASCA 64; [2008] 4 All SA 1 (SCA); 2008 (5) SA 615 (SCA) para 16.

'When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act –

(a) a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and

(b) the Commission, the Panel, the Companies Tribunal or a court –

(i) must promote the spirit, purpose and objects of this Act; and

(ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.'

Provisional winding-up orders

[49] Ordinarily, following an application for the liquidation of a company and the exchange of affidavits, the usual procedure[41] is to grant a provisional order of winding-up and a rule *nisi* calling on all interested persons to show cause why a final winding-up order should not be granted. This procedure is not laid down in the Act or any of its predecessors. It is, however, in our law, a well-established practice.[42] Granting an outright final winding-up order might be suggested in some practice manuals or directives of divisions of our high court, but usually only where there are good reasons to do so. However, the grant, firstly, of a provisional winding-up order should be ordinarily preferred, where this is appropriate and required in the interests of justice.

[50] That is because there is much to commend first granting a provisional winding-up order. It allows an opportunity for a respondent company to oppose the final winding-up order on the return day, when the test is different to that which applies at the provisional stage. It also affords interested third parties with notice of the provisional winding-up order, thereby allowing them to participate in the proceedings. By proceeding directly to the grant of a final order, without

---

[41] *Wackrill v Sandton International Removals (Pty) Ltd and Others* 1984 (1) SA 282 (W) (*Wackrill*) at 285B-D. Quoted with approval in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A); [1988] 2 All SA 159 (A) para 59.

[42] P A Delport *Henochsberg on the Companies Act 71 of 2008* Vol 3 SI 36 (2024) at 724(3).

first granting a provisional order, interested parties are denied the opportunity to be heard. They are then presented with a final order, as a *fait accompli.*

[51] The process of a provisional order, where appropriate, preceding the adjudication of a final winding-up order, is therefore a salutary practice. This is particularly so in the case of the winding-up of a public company, with its exposure to the general public and its shareholders often running into many thousands of persons. It is all the more so where the company's share register is incomplete or otherwise inadequate, as is the case with Selective. Third parties who are in the possession of facts material to the winding-up will become aware of the provisional winding-up order and can then place their views, whether in favour or against the liquidation before the court. The court should then be better informed when it has to decide whether a final order should be granted. That did not happen in this instance.

In the high court

[52] The factual basis on which the high court was required to make its findings, and the evidentiary matrix on which this appeal is to be decided, are the facts alleged in the affidavits. Those were the facts known to the high court when adjudicating the winding-up application.[43]

[53] The high court found that the grounds in s 81(1)*(f)* were not satisfied. The correctness of that finding has rightly not been disputed, and it has not featured further. Any reliance on the provisions of s 81(1) for the winding-up of Selective as a solvent company would, in any event, not have been competent if it were in fact insolvent.

---

[43] *Trencon Construction v Industrial Development Corporation* 2015 (5) SA 245 (CC) para 51 and 52.

[54] Section 81(1)*(f)* was not the only basis on which the Commission brought its application. It relied, in the alternative, on the ground that it would be just and equitable that Selective should be wound-up.

[55] The high court concluded that Selective was insolvent. Selective had only placed its 2018 annual financial statements before the high court.[44] The high court found that Selective had made a past operating loss of more than R11 million. It uses capital raised through the sale of its shares to purchase shares listed on the JSE, dealing with the investments of its shareholders and making a loss of this nature. The high court correctly viewed this as of necessity meaning that its liabilities exceed its assets, its assets being the shares in other companies. Apart from day-to-day expenses such as rent and salaries, the liability to its shareholders remains.

[56] The high court however continued by saying that insofar as 's 344*(h)* does not only apply to insolvent companies, [the court] need not rely on this finding' of insolvency only. Presumably what the high court had in mind were the provisions of s 79(2) that '[the] procedures for winding-up and liquidation of a solvent company' are governed by Part G[45] *to the extent applicable*, by the laws referred to or contemplated in item 9 of Schedule 5. Item 9(2) also provides that despite s 344 and other provisions not applying to the winding-up of a solvent company, it does apply, 'to the extent necessary to give full effect to the provisions of Part G of Chapter 2'.[46]

[44] The judgment recorded that despite Selective having claimed that all audited statements had been filed and uploaded on case lines no such documents were before the court. The issue is however not whether they were uploaded on case lines. They need to be introduced by affidavit, and insofar as the proposed supplementary affidavit might have purported to do so, it was disallowed. According to it, it is not evidence before the court.
[45] Part G is contained in Chapter 2 of the Act and includes sections 79 to 83.
[46] In view of the conclusion to which I have come in this judgment it is not necessary to consider this conclusion further.

[57] The high court concluded that: it being common cause that Selective acted illegally and did not comply with the compliance notices issued to it or complied only in certain respects; or complied only much later and long after having undertaken to do so; its directors, realising that it is insolvent and the value of its shares ever diminishing, still did not put a motion for voluntary liquidation to the vote before an annual general meeting of shareholders, that it would be just and equitable for a winding-up order to be granted. In this respect the high court invoked the provisions of s 158.[47]

[58] The second judgment concludes that the processes in s 346[48]of the 1973 Act were not adhered to. It seems that the complaint relates specifically to the requirements of s 346(3) and possibly s 346(4). It is highly unlikely that the high court order would have been granted absent compliance with these provisions of s 346. Non-compliance was however never raised as a ground of appeal, nor during argument. It cannot now be found as a proven fact, and for a conclusion that adequate notice was not given. It is simply unknown when these requirements might have been complied with. But, in any event, no minimum 'notice' period is prescribed. Section 346 of the 1973 Act simply provides that the certificate from the Master must not have been issued more than 10 days before the application is moved. In practice the security is often provided and the certificate obtained on the day the application is heard. The certificate, and the Master's report, are then handed up by counsel in court when moving for the order of provisional winding-up.

[59] The high court concluded that as a result of the matter 'having been argued fully', there was no need to grant a provisional order. It granted a final order.

---

[47] The relevant part of s 158 is quoted in paragraph 32 above.

[48] Section 346(3) requires that every application to court shall be accompanied by a certificate by the Master , issued not more than ten days before the date of the application, to the effect that security has been given for the payment of all fees and charges necessary for the prosecution of the winding-up proceedings and the costs of administering the company in liquidation until a provisional liquidator has been appointed. Section 346(4) provides that before an application for the winding-up of a company is presented to a court, a copy thereof shall be lodged with the Master who may then report to the court.

Was Selective taken by surprise?

[60] Whether Selective was taken by surprise regarding the issue whether it is insolvent or may be insolvent requires an examination of the case which it had to meet, as set out in the Commission's founding affidavit. It is trite law that although specific statutory provisions relied upon in support of a cause of action are often alleged with reference to number and in terms in affidavits, this is not an invariable rule. It is sufficient if a respondent is appraised of the basis of the claim against it in the context of the applicable law, to enable it to respond meaningfully thereto.[49] This requirement was met on the facts of this appeal.

[61] The Commission sought Selective's winding-up, in the alternative, to its application based on s 8(1)*(f)*, on the basis that it would be just and equitable to do so. Selective correctly recognises that this would require a finding as to its solvency. Section 79(3), in express terms, requires that a determination be made as to whether the company is insolvent or may be insolvent. That contemplates, or at least permits of a determination coming about in the course of proceedings and after the exchange of affidavits, even if not specifically pleaded. Not surprising, Selective on its own admission was alive to the fact that its solvency was in issue.

[62] It would be contrary to the text and purpose of s 79(3) to adopt an interpretation of the provisions of the Act which would permit an application for the winding-up of a solvent company, based on one of the grounds in s 81, to be defeated by the company establishing that it is insolvent, thereby escaping its winding-up notwithstanding its insolvency, unless and until a separate substantive application based on its insolvency is brought. It would result in a multiplicity of proceedings, and the possibility of conflicting judgments on a company's solvency.

---

[49] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 27.

[63] The provisions of s 79(3), perhaps inelegantly but nevertheless plainly, exclude that possibility. They preserve the provisions of the 1973 Act, including s 344*(h)* for the winding-up of a company, *inter alia*, on the grounds that it would be just and equitable to do so, on the application by any interested party, when in an application for the winding-up of a company alleged to be solvent, it turns out to be insolvent.

[64] The grounds for winding-up in the 1973 Act are, in terms of s 79(3), available not only where it is determined that a company is insolvent, which would include *de facto* and commercial insolvency,[50] but also where a court determines that it 'may be insolvent'. If determined that it 'may be insolvent', then, provided the other requirements of s 79(3) are satisfied, namely that there is an application by an 'interested party', the court hearing the application in terms of s 81 may proceed and wind-up the company if, it is, just and equitable to do so. That is what happened in this case.

[65] The founding affidavit provided that the winding-up of Selective was sought on the basis of s 81(1)*(f),* and alternatively to s 81(1)*(f)*, on the basis that it would be just and equitable to do so. Although terse, the founding affidavit also included specific allegations under a separate heading of 'Just and Equitable': that Selective was carrying on its business recklessly thus evincing a lack of any genuine concern for the prosperity of Selective; that a director, Mr Maja, himself was of the opinion that Selective required the assistance of regulatory bodies, such as the Commission, to ensure that shareholders and their monies were protected; that Selective be placed under curatorship, if deemed necessary under the circumstances; and that the directors, or at least Mr Maja, had questioned the

[50] *Standard Bank of South Africa Ltd v R-Bay Logistics CC* [2012] ZAKZDHC 69; [2013] 1 All SA 364 (KZD); 2013 (2) SA 295 (KZD) para 29.

viability of Selective, expressing the concern that it is doubtful and highly unlikely that Selective could achieve its *raison d'etre*.

[66] The founding affidavit did not specifically allege that Selective was insolvent. That is not surprising.[51] It could hardly be expected of the deponent to the Commission's founding affidavit to have alleged as a fact under oath, that Selective was insolvent. Selective had failed to provide its annual financial statements for many years.

[67] The annual financial statement for the year ended 30 June 2018 found its way into the proceedings before the high court as an annexure to the answering affidavit. The deponent to the founding affidavit, paying due regard to the fact that the Commission is not in the position of a creditor or shareholder of Selective with knowledge of its liabilities, could not independently positively swear under oath that Selective was insolvent.

[68] Selective would not have been taken by surprise. Indeed, it annexed its annual financial statements for the year ended 30 June 2018 to its answering affidavit, no doubt in an attempt to show that it was compliant. Unfortunately, the 2019 financials were by then already overdue, which demonstrates that Selective was still non-compliant.

[69] But the 2018 financials, being presumably the most up to date financials available at the time of deposing to the answering affidavit, did contain factual information as to Selective's insolvency. That would inevitably have to be assessed for a court to determine whether s 79(3) would find application. To the extent that Selective might at the time have under-estimated the importance of the

---

[51] It is not necessary to plead legal conclusions or to label the cause of action in pleadings – *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* [2003] 1 All SA (C) para 28 confirmed in *Van Heerden v Bronkhorst* 2020 JDR 2363 (SCA) para 26.

issue of its insolvency, it only had itself to blame. But it will not have been irreparably prejudiced in the light of the order that I propose granting below.

[70] The requirements to be considered in determining whether Selective should have been placed under a winding-up order are whether there was an application for the winding-up of Selective by any interested person and whether Selective was or may be insolvent. For convenience I shall deal first with whether the Commission was 'an interested person' as contemplated by s 79(3), then whether the high court faced an 'application', and then whether Selective 'is or may be insolvent.'

The Commission as an 'interested person'

[71] Section 79(3) requires that where it is determined that a company is or may be insolvent, it can be wound up on the application of an interested person. The phrase 'interested person' is not defined. The provision must be seen in its historical legislative context. Doing so and having regard to the objectives of the Commission stated in s 186, the irresistible conclusion is that the Commission would qualify as an interested person.[52]

[72] It is incorrect to conclude, as the second judgment does, that an application for the winding-up of a company which might have been believed to be solvent,

---

[52] Under the 1973 Act, the Minister could bring such an application. It has however been suggested that the Minister would not qualify as a person under the Act – see *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs* [2019] ZASCA 1; [2019] 2 All SA 1 (SCA); 2019 (3) SA 251 (SCA) paras 121-131. The Commission however is a 'person'. A 'person' is defined in s 1 of the Act to include a juristic person. Over and above its ordinary common law meaning, a 'juristic person' is given an extended meaning. Section 185 establishes the Commission as a juristic person. The Minister had the power to bring applications for the liquidation of companies under the 1973 Act. The Minister under the Act reports matters for investigation to the Commission. The legislature, having regard to the text, context and purpose of the Act, would not have left a lacuna that where following investigations a case exists for the liquidation of a company that has flouted the requirements of the Act and is or may be insolvent, and has not established, despite being required by the Act to address the issue in a particular manner, that it is not trading in insolvent circumstances, that it cannot be liquidated at the instance of the Commission. To the extent that there may be any ambiguity in this regard, the provisions of s 158*(b)*(ii) will find application as best promoting the spirit and purpose of the Act and best improving the realisation and enjoyment of rights, including the rights of the general public to be protected against public companies who conduct themselves thus.

for the purposes of s 81, but when determined that it is or may be insolvent as contemplated in s 79(3), can then only be wound up on the application of those categories of persons in s 81 in respect of whom the legislature in s 81 expressly provided where 'it is otherwise just and equitable for the company to be wound-up.' Such a provision appears only in: s 81(1)*(c)* in a winding-up by one or more creditors, and s 81(1)*(d)* in a winding-up by the company, one or more directors, or one or more shareholders on the ground stated therein.[53] That is not surprising. The legislature wanted to provide, in respect of those persons, that a court would have the power to wind-up a company on the grounds of it being just and equitable to do so, even if solvent. But it does not affect the position of insolvent companies.

[73] The position is altogether different if during the course of any proceedings in terms of s 81, that is at the instance of any of the persons listed in s 81(1)*(a)* through to *(f)* it is determined that the company 'is or may be insolvent'. It may then be wound-up on the grounds stated in s 79(3) which include undisputedly, the ground of it being just and equitable', on the application of an 'interested person'. If the intention of the legislature was to confine such an application to the sub-categories of persons listed in the sub-paragraphs of s 81 where express reference is made to 'it is otherwise just and equitable for the company to be wound-up', then it would have said so, and referred to the persons in s 81(1)*(c)*, and *(d)* rather than an 'interested person'. It did not do so, but deliberately chose instead, to confer this right to apply for the winding-up, on any 'interested person'.

[74] These sections all appear in the same chapter of the Act. The legislature must be taken to have in mind the existing law when it passes new legislation and

---

[53] There are no such reference in the case of subparagraphs *(a)*, applications by the company, *(b)* in the case of business rescue practitioners, or *(e)* applications by a shareholder where directors or other persons in control of the company acted in a fraudulent or otherwise illegal manner or the company's assets are misplaced or wasted; and *(f)* relating to applications by the Commission.

frames new legislation with reference to the existing law.[54] There is furthermore also no reason to interpret the meaning of 'interested person' with reference to what is meant by 'interest' in the context of deciding on the joinder of parties to litigation. Joinder might require 'a direct and substantial interest' but in s 79(3) the words 'interested person' are used in an unqualified way, for an altogether different purpose, in an altogether different context and in the widest sense.

[75] Selective has failed to comply with various statutory requirements. It is the function of the Commission to ensure proper compliance with these requirements. Not only has Selective failed to comply with these requirements, but it is also commercially, if not actually, insolvent. It is difficult to contemplate a party having a more real interest than the Commission, as regulator with broad supervisory powers, to seek the winding-up of a company that is insolvent.

[76] This conclusion is also consistent with s 157 which provides for 'extending standing to apply for remedies'. It provides:

'(1) When, in terms of this Act, an application can be made to, or a matter can be brought before a court . . . the right to make the application or bring the matter may be exercised by a person–

(a) Directly *contemplated*[55] in the particular provision of this Act;

(b) . . .' (Emphasis added)

Standing has also received a wider interpretation in our constitutional dispensation.[56]

---

[54] *Independent Institute of Education (Pty) Ltd v KZN Law Society* 2020 (2) SA 325 (CC) para 38.

[55] Not expressly referred to in the Act.

[56] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1, the Constitutional Court set out the criteria for evaluating whether an applicant should be given leave to act in the 'public interest'. In the context of the matter before this Court, the evaluation includes considering: (i) the nature of the allegations advanced as to why the public interest is implicated; (ii) the relevant provisions of the Act, which provide the context of the allegations; (iii) the provisions of the Act for addressing such allegations; (iv) whether there are other reasonable and effective ways in which the challenge may be brought; and (v) the range of persons or groups who may be directly or indirectly affected by any order of the court and the opportunity that those persons or groups have had to present evidence and argument to the court.

[77] There is no reason why the 'interested person' contemplated in s 79(3) should not include an applicant in an application under s 81. The Commission, as the official regulator, is a person who would have a very real interest in the winding-up of Selective. Selective had failed to respond to notices from the Commission to show that it was not trading in insolvent circumstances, its administration reveals a dismal failure to comply with basic statutory requirements, and notwithstanding undertakings to correct this position also by the intervention of a newly constituted board, it had not done so. The Commission had standing to apply for the winding-up of Selective on the alternative basis of it being just and equitable, as it is an interested party.

The requirement of 'an application'

[78] Accepting that the Commission would qualify as an interested party, Selective disputed that there was an application for it to be wound up as an insolvent company. Selective contended, somewhat weakly, that a separate substantive application setting out the basis upon which the winding-up would be sought, for example that it was just and equitable to do so, of which Selective would have to be given notice, was required.

[79] There is no reason that the application should emanate from a third party, and why it could not also emanate from the Commission. Any other interpretation would be absurd.[57] It would also fly in the face of the purpose underlying s 79(3), namely to provide a court with the power to liquidate Selective at the instance of the Commission, as an applicant in an application in terms of s 81, if the court determines that Selective may be insolvent.

[57] Just as an application for a deviation in terms of s 105 of the Tax Administration Act may be brought in the same application that other substantive relief is claimed in a tax appeal, as opposed to it being claimed in a separate application – see *United Manganese of Kalahari (Pty) Ltd v Commissioner for SARS* and four other cases [2025] ZACC 2 para 64.

[80] There is no need for a separate substantive application. Selective had been given notice in the application by the Commission that its winding-up would be sought, in the alternative, on the grounds of it being just and equitable to do so, which is the basis for liquidation contemplated in s 79(3). There is absolutely no reason, in principle, why this could not be done in the same application. Section 79(3) does not require a separate substantive application. The requirement of an application was accordingly satisfied.

Should a final winding-up order have been granted?

[81] Whether a company should be wound up on the ground of it being just and equitable to do so, is a wide enquiry that requires to be assessed holistically. This is all the more so in the case of a public company.

[82] The high court concluded that 'as a result of the matter having been argued fully', there was 'no need to grant a provisional order'. Potentially interested parties, including shareholders and creditors were therefore denied the benefits of the two-stage procedure where a provisional order is first granted. In acting thus, the high court, on the specific facts of this case, erred. The issues in this case concerned a public company and the interests of many shareholders, in circumstances where considerable doubt exists as to the reliability and integrity of its shareholders' register.

[83] I am therefore disposed to setting aside the final winding-up order. The Commission contended that if this Court was disposed to setting aside the final winding-up order, it should substitute the order of the high court with a provisional winding-up order. It is through the prism of the test which is to be applied at the grant of a provisional order that I then consider what relief, if any, the Commission had established it was entitled to.

Should Selective have been wound up provisionally by the high court as insolvent?

[84] The test whether a provisional order should be granted is different to that when a final order is sought. The grant of a provisional order has the result, *inter alia*, of securing the assets of the company in the interest of creditors and shareholders without delay and to avoid a possible dissipation of assets. Provisional orders are generally granted on the affidavits. Disputes of fact, unless inconsistent with the probabilities, are generally not referred to oral evidence at the provisional stage.

[85] An applicant for a provisional winding-up order needs to establish a *prima facie* case.[58] As to what is meant by a *prima facie* case at the stage of a provisional order in an opposed sequestration,[59] has been accepted as also definitive of the approach in provisional winding-up applications, Trollip J in the *Provincial Building Society*[60] said that:

'My reasons for expressing that view are that, firstly, the whole procedure at this initial stage is designed to afford the creditor a simple and speedy remedy for preserving the debtor's estate and enforcing his claim; . . . and if the facility of *viva voce* evidence was generally to be accorded to the debtor at this stage, it might well prolong the proceedings unduly and thus stultify the whole object of the procedure. Secondly, the Act contemplates . . . that at this stage the matter should ordinarily be disposed of on the petition and affidavits (cf too *Daitsch and Another v Osrin and Another*, 1950 (2) SA 343 (C) at p 346). Thirdly, generally the hearing of oral evidence at an interlocutory or interim stage of any proceedings is inappropriate because it might involve giving findings on credibility and otherwise prejudging issues which properly belong to the Court of final instance (*Zondo v Union & National & General Assurance Co of SA Ltd*, 1954 (3) SA 541 (W)).

I am not unmindful in arriving at the above conclusions that the granting of a provisional order can have serious consequences to the debtor, but that consideration is offset by the fact that the

---

[58] *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A); [1988] 2 All SA 159 (A) para 59.

[59] *Provincial Building Society of South Africa v Du Bois* 1966 (3) SA 76 (W) (*Provincial Building Society)*; *Prudential Shippers SA Ltd v Tempest Clothing Co Ltd and Others* 1976 (2) SA 856 (W) at 867 A-C; *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W); *Wackrill v Sandton International Removals (Pty) Ltd and Others* 1984 (1) SA 282 (W) at 285G.

[60] *Provincial Building Society* fn 44 above at 80B-F.

Court must first be satisfied that a *prima facie* case has been made out; that even then it has a discretion to grant or refuse an order: and that in any event in exceptional circumstances it can hear *viva voce* evidence on any relevant aspect of the matter.'

[86] There are differences between the liquidation of a company and the sequestration of a debtor's estate: a winding-up may be obtained on grounds other than the insolvency of the company; and the 1973 Act and the Act do not contain wording similar to s 10 of the Insolvency Act 24 of 1936, which requires merely a *prima facie* case when a provisional order is sought. However, similar approaches are adopted when provisional orders are sought. A court always has the inherent power to order its own procedures,[61] having regard generally, to the fair and expeditious administration of justice.

[87] In *Kalil v Decotex*,[62] this Court indicated that in applications for a provisional order of winding-up, the term '*prima facie* case' should continue to be used, as it has been used for some years in this context, provided that it is understood as denoting a balance of probabilities on all the affidavits. If on the affidavits there is a *prima facie* case in favour of the applicant seeking the provisional winding-up, then a provisional order of winding-up should normally be granted. There is no lasting injustice to the respondent, if there is one at all because, on the return day, it will be given the opportunity to dispute, and in a proper case even to present oral evidence on disputed issues.[63]

[88] Section 79(3) requires that it had to be determined whether Selective was insolvent or that it 'may be insolvent'. These words must be accorded their ordinary meaning in the context of the Act and having regard to its purpose.[64] The

---

[61] *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G-H.
[62] Fn 44 above.
[63] *Standard Bank of South Africa Ltd v R-Bay Logistics CC R-Bay Logistics CC* [2012] ZAKZDHC 69; [2013] 1 All SA 364 (KZD); 2013 (2) SA 295 (KZD) para 11.
[64] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

question to be answered is whether on the relevant material facts, the probabilities, on a preponderance, favoured the conclusion that Selective was or may be insolvent and should be wound up provisionally.

[89] The factual basis on which the winding-up application fell to be decided was on the allegations contained in the founding affidavit and the answering affidavit.[65] At a minimum, commercial insolvency was required to be established. Commercial insolvency enquires into whether a company's liquid asset is available to meet ongoing and expected obligations in the immediate future.[66]

[90] The question whether the Commission had established its case clearly favoured to be answered in favour of the Commission: Selective had suffered a significant financial loss; it had committed and was still committing various irregularities which had been reported by regulatory bodies, which the Commission had found to exist[67] and which, notwithstanding demand, had not been remedied; it is a public company soliciting investments from the public but its securities register remained deficient; it had failed for several years to obtain subscriptions to new shares and did not receive investments after publishing prospectuses; according to the annual financial statements for the period ending 30 June 2018 Selective was, if not *de facto* insolvent, then at least commercially insolvent; it was cash strapped, lacked liquidity and had to sell assets to pay ongoing expenses. It was selling down its equity holdings to pay creditors, lost

---

[65] The second judgment refers to what is said to have a huge bearing on the outcome reached by the high court, namely a reliance by it that '[d]espite claiming in the supplementary affidavit that all audited financial statements had been filed and uploaded on case lines no such documents are before court. The only audited financial statements before court are those for the 2018 financial year'. No adverse credibility finding was made based on this statement. It simply confirms what was the true evidentiary material before the court, namely that contained in the affidavits. Even if financial statements had been uploaded on to case lines, they would, in the absence of some agreement as to their evidentiary status, have had no evidentiary value whatsoever. The supplementary affidavit has not been considered in preparing this judgment at all.

[66] *Murray and Other NNO v African Global Holdings (Pty) Ltd and Others* [2019] ZASCA 152; [2020] 1 All SA 64 (SCA); 2020 (2) SA 93 (SCA) para 31.

[67] Where a finding is made and reported by a regulator charged with the administration of certain provisions that it is expedient in the public interest that a company should be wound up, the fact that the regulator has reached such a conclusion is certain a factor, without it being decisive, that ought to be given weight by the court. Compare *Re Luben, Rosen and Associates Ltd* [1975] 1 WLR. 122; [1975] 1 All ER 577 (Ch) at 582.

significant capital over the years, failed to produce annual financial statements for many years, had a negative cash flow and conducted itself in a manner in serial default of what the Act requires, thereby giving rise to the conclusion that it may be insolvent. This, having regard to the test which applies at the stage of the grant of a provisional order, was sufficient to trigger the application of the provisions of item 9 of Schedule 5 of the Act, as contemplated in s 79(3).

[91] The jurisdictional facts in s 79(3) were satisfied. Section 79(3) was not created because the legislature sought to provide, as the second judgment suggests, for the 'instances where a Commission or shareholder brings an application for the winding-up of a solvent company in terms of ss 8(1)*(f)* and whilst that application is pending, a creditor who has established that the company is unable to pay its debts (for having failed to meet the s 345 demand) brings an application based on the insolvent status of the company. The separate second application brought by a creditor in those circumstances will be an application in its own right, to be pursued and dealt with separately by the applicant creditor, as *dominus litis* in that application. Indeed, there would be no need for a s 79(3), or any provision like it in that situation.

[92] Section 79(3) specifically finds application where an application had relied on the company being solvent. In this instance the Commission did not 'change it stance' and it has certainly not conflated the grounds for winding-up. It is also not a case of affording the Commission a 'second bite at the cherry by changing the grounds for winding-up from solvent to insolvent without much effort'. It is the very effect of the ordinary plain meaning of the words employed by the legislature in s 79(3). That is the purpose of s 79(3). That is the context in which its clear meaning must be given effect to.

[93] As to whether it was just and equitable that Selective be wound up provisionally, it was at least commercially insolvent, or it appeared (that is all that

is required) that it may be commercially insolvent; it had failed to comply with some of the most basic statutory formalities; it supposedly sought to improve the financial position of persons who most require or would benefit from economic empowerment, yet it jettisons its most basic accountability responsibilities; despite being required to show cause that it was not trading under insolvent circumstances or recklessly, it not only failed to do so, but deliberately elected not to do so, contrary to the spirit, purpose and object of the Act, and in what can only be inferred to be an attempt to defeat the realisation and enjoyment of rights and the scheme in the Act. It is in the interests of justice that the hand of the law be laid upon the estate of Selective and that its assets be preserved to ensure an orderly treatment of all its creditors and all its shareholders whether recorded in its share register, or not. Selective has not demonstrated in what respects, having regard to its finances, it was solvent or, at least, commercially solvent.

[94] The only inference to be drawn from Selective's serial non-compliances with the provisions of the Act, is that it was trading recklessly and under insolvent circumstances. There can be no doubt that these considerations require that Selective should be liquidated to preserve some of the funds for its existing investors, whoever they all may be. Those are compelling just and equitable reasons for Selective's winding-up. Shareholders and their investments must be protected.

Conclusion

[95] The Commission had established that it was entitled to a provisional winding-up order in the proceedings before the high court. It is in the interests of justice that the order of the high court be substituted with a provisional winding-up order, with the usual attendant directions providing for publication of the order to interested parties, calling upon them to show cause why a final order should, or should not, be granted.

[96] Public notification is very important. The physical residential locations of Selective's shareholders, as a target audience, remain largely uncertain. All we have been told is that Selective's shareholders, numbering approximately 26 000, are black and previously disadvantaged investors across all living standard measure groups. An appropriate form of publication will be in the Sowetan newspaper circulating in the greater Johannesburg area, to cover the most densely populated area near Selective's place of business, and City Press, as a national newspaper, to cover the rest of the country. This is provided for in the order below.

[97] What impact the order may have on the administration of the estate of Selective, the status of the liquidators who have been appointed, and what powers they have, is left to the Master, the liquidators, and any court orders that might be sought hereafter.

Costs

[98] Although the appeal succeeds partly, it does not result in an order as sought by Selective. Selective is still in a state of being wound up, save that the order is now for its provisional winding-up, as opposed to it being under a final winding-up order. Whether the winding-up order will ultimately be discharged, or whether a final winding-up order will be granted, can only be determined in due course. As regards the costs of the respondent, it is appropriate that its costs, including the costs consequent upon the employment of two counsel, be paid by Selective as part of the costs in the administration of Selective in the winding-up.

The order

[99] I would therefore have granted the following order:

1 The appeal is upheld to the extent set out in paragraph 3 below.

2 The respondent's costs of the appeal, including the costs consequent upon the employment of two counsel, are directed to be paid by the appellant as part of the costs of administration in its winding-up.

3 The final winding-up order granted by the high court is set aside and substituted with the following order:

'(a) The respondent is placed under a provisional winding-up order;

(b) The respondent and all interested parties are called upon to show cause before this court sitting at Pretoria at 10h00 on 22 July 2025, or as soon thereafter as the matter may be heard, why a final winding-up order in respect of the respondent should not be granted;

(c) The applicant is directed to serve a copy of this order on the respondent at its registered address forthwith;

(d) The applicant is directed to publish a copy of this order in the Government Gazette, the Sowetan and City Press newspapers on or before 27 June 2025.'

_____

P A KOEN
JUDGE OF APPEAL

Norman AJA (Mokgohloa ADP and Mocumie JA concurring):

[100] I have had the pleasure of reading the judgment of my brother Koen JA (the first judgment). I am grateful to him for the narration of the facts. However, there are some facts that I wish to record in line with my reasoning. I respectfully part ways with the first judgment on the order and the findings upon which it is based.

[101] In the first judgment it is stated that Selective 'presents itself as an investment company', however, the Commission in its founding affidavit described Selective as follows:

'SEI 1 was established, during or about 2007, to be an investment company for small investors to invest primarily on the Johannesburg Stock Exchange ("JSE") and also to take advantage of Broad- Based Black Economic Empowerment and other investment opportunities.'

[102] It also attached annexure GS1, showing several name changes of Selective. Annexure GS1 is a company report, from Lexis SA Company, describing the principal business of Selective as 'investments'. It appears from the documentation attached by the Commission that Selective is indeed an investment company.

[103] For context, the application that was made by the Commission in terms of s 81 (1) *(f)* of the Act, is relevant for the purpose of defining the scope and standing of the Commission; and in determining whether it should benefit from the just and equitable standard set out in the Act. That enquiry, in my view, will have a bearing on the order which I intend to make in the end.

In the high court

[104] The parties agreed that the issues for determination by the high court were: First, whether the Commission had complied with the provisions of s 81 (1)*(f)*(i) and (ii) of the Act and was entitled to a winding-up order. Second, whether the Commission as a regulator, in terms of s 344 *(h)* of the 1973 Act read together with the Act, was entitled to an order under the rubric of just and equitable, in winding-up Selective.

[105] Selective had raised certain points *in limine*, such as that the Commission lacks standing to bring winding-up proceedings under the rubric of just and equitable; *lis alibi pendens*, because the Commission had brought an application seeking to have some directors of Selective declared as delinquent directors; and that certain documents relied upon by the Commission constituted hearsay evidence, as they have not been supported by affidavits. All the points *in limine* were dismissed. Selective also applied for leave to file a further or supplementary affidavit and that application was also dismissed.

[106] The high court made the following findings: The Commission is an interested person as contemplated in s 79, read with item 9 of schedule 5 of the Act, and that those provisions bestow authority on the Commission to launch the winding-up proceedings. A reliance on s 344(*h*) is not only limited to creditors of a company, nor does the company need to be insolvent. The Commission is not an entity listed in s 346 that would entitle it to launch the proceedings. The requirements in s 81(1)*(f)* are technical and not substantial. Those requirements have not been met and for that reason Selective cannot be liquidated based on the provisions of s 81(1)*(f)*. In terms of s 262 of the 1973 Act, the Commissioner could apply to court for the liquidation of the company where it is just and equitable to do so.

[107] The high court also found that Selective was insolvent. It based this finding mainly on the audited financial statements for the 2018 financial year, which according to the high court, revealed that Selective made an operating loss of more than R11 million; it used the capital raised through the sale of its shares to purchase shares; it deals with public money and making a loss of this nature must of necessity mean that its liabilities exceed its assets; its assets are the shares in other companies and on the face of it , it seems clear that Selective is insolvent.

[108] It also relied on the 2011 report issued by the Financial Services Board which reported that Selective had made a loss of 34% and that, according to the high court, became clear that Selective was conducting business in insolvent circumstances; it will be in the interests of the shareholders and would be just and equitable to wind up Selective; the court is obliged to develop the common law in terms of s 158 of the Act; and because the matter was argued fully there was no need to grant a provisional order, but a final winding-up order.

In this Court

[109] Selective submitted that when the high court made the finding that the requirements set out in s 81(1)(*f*)(i) and (ii) of the Act were not met, that ought to have been the end of the matter. The high court, by winding-up Selective based on the finding that it was insolvent, in circumstances where the Commission had accepted that Selective was solvent, erred. That finding was contrary to the pleaded case that Selective was called to meet and thus constituted a material misdirection. As a result of the findings of the high court, not based on the pleaded case, Selective contends that it could not have pleaded facts dealing with the case based on insolvency because that was not a case it was called upon to meet.

[110] Selective submitted further, that the high court erred in relying on s 344 (*h*) of the 1973 Act because it (Selective) was solvent. It contended that the Commission had no standing to liquidate Selective based on the just and equitable standard. To do so is not in the public interest because Selective does not use public purse funding. It contended that it was solvent and there has been no misappropriation of funds. It further submitted that granting a winding-up order will do more harm to investee companies of Selective, its stakeholders and their families. It contended that the Commission was using liquidation proceedings to enforce compliance with its statutory mandate. The liquidation of a company on the basis that it is just and equitable can only happen if the company is insolvent as envisaged in s 79 of the Act.

[111] The Commission conceded that the requirements of s 81(1)(*f*) of the Act were not fulfilled and thus the high court was correct in refusing to wind up Selective on that basis. The Commission relied on the same contraventions upon which the winding-up application was based, in terms of s 81(1)(*f*), for the support of a winding-up order of Selective under the just and equitable standard. It reiterated its stance, that there were persistent contraventions of ss 22(1); 30(1) (failure to prepare financial statements for the years 2014, 2015, 2016 and 2017); 24(4) and 50(1)(*b*) (failure to maintain a securities register); 61(7) (convening of

shareholders meeting); 72(4) (no social or ethics committee); 73(6) (no minutes of the audit and social committees); 86(4)(filling of a company secretary's vacancy); 94(6) (failure to fill vacancies on the audit committee); 108(6) (failure to raise capital in terms of its prospectus) and 214(1)*(d)* (making false statements, reckless conduct and failure to provide an alternative trading platform) of the Act. That Selective failed to prepare its financial statements for the 2014 and 2015 years and was accordingly not able to apply the objective requirement that the company will satisfy the solvency and liquidity test.

[112] The Commission further submitted that the shareholders were not receiving dividends, and, in this regard, reliance was placed by the Commission on the 2017/2018 annual report. This report, contends the Commission, shows that Selective is not able to meet its day-to-day liabilities in the ordinary course of its business. Section 79(3) does not, by implication, contemplate a separate application by another person. The dysfunction of Selective can only be cured by a winding-up order and the liquidator to unravel the disorder. The Commission prayed for the dismissal of the appeal, with costs consequent upon the employment of two counsel.

Discussion

[113] As a starting point, I deal with a point that may appear to be trivial, yet it bears heavily on the outcome reached by the high court. Although the high court had dismissed the application for the admission of a further or supplementary affidavit, upon an application by Selective, it nevertheless had regard to it in its judgment. It stated at paragraphs 101 and 102:

'It is however also clear that the respondent is insolvent. Despite claiming in the supplementary affidavit that all audited statements had been filed and uploaded on caselines no such documents are before court.

The only audited financial statements before court are those for the 2018 financial year. In those statements it is clear that the respondent made an operating loss of more than R11 million.

Respondent used the capital raised through the sale of its shares to purchase shares. It deals with public money and making a loss of this nature clearly must of necessity mean that its liabilities exceed its assets. Its assets are the shares in other companies. Apart from the day-to-day expenses such as rent and salaries, the liability to its own shareholders still remain.'

[114] There is a fundamental difficulty with the approach adopted by the high court in this regard. It dismissed the application to receive a further or supplementary affidavit from Selective. However, as indicated in paragraph 101, it considered the contents of the supplementary affidavit, selectively, in its judgment, in a manner that was prejudicial to Selective. If the supplementary affidavit had been admitted into evidence, the high court would have raised the issue of the uploading of the audited financial statements on case lines, with Selective, instead of raising it in the judgment. In any event, after dismissing the application for the admission of the further or supplementary affidavit, the high court, in my view, was barred from considering that affidavit in its judgment, as it was *functus officio* in relation to that aspect.[68]

[115] In *Mncwabe v President of the Republic of South Africa and Others; Mathenjwa v President of the Republic and Others*,[69] the Constitutional Court found that 'this doctrine entails that once something is done, it cannot be undone, reversed or otherwise altered by the decision-maker. This is because the decision maker would have exhausted her authority and relinquished her jurisdiction over the matter by taking a final decision. The finality of the decision is central to the doctrine's operation. The doctrine promotes certainty and stability, and it ameliorates prejudice and injustice occasioned to those who would rely on

[68] *Mncwabe v President of the Republic of South Africa and Others; Mathenjwa v President of the Republic of South Africa and Others* [2023] (11) BCLR 1342 (CC); 2024 (1) SACR 447 (CC) (*Mncwabe*) para 42. See also *Hulisani Viccel Sithangu v Capricon District Municipality* (593/2022) [2023] ZASCA 151 (14 November 2023) para 18 where this Court applied the *functus officio* principle and stated inter alia '[t]his Court held that it was not open for the high court to revisit the point it had dismissed earlier, as in relation thereto, it had become *functus officio* and that its second order undermined the principle of finality of litigation'. Quoting *Thobejane and Others v Premier of the Limpopo Province and Another* [2020] ZASCA 176 para 6.

[69] Ibid *Mncwabe* para 42

otherwise wavering decisions'.[70] It follows that , in reaching its findings, the high court revisited the further or supplementary affidavit that it had dismissed, and by so doing , it erred.

Facts that were ignored by the high court

[116] It is common ground that Selective had received various compliance notices from the Commission for failure to comply with its statutory obligations in terms of the Act. Those notices were issued over the years. Selective complied with some and did not comply timeously with others and had conveyed the difficulties that it was experiencing in complying timeously with the notices to the Commission. A thorough scrutiny of the notices and correspondence reveals that Selective did not remain supine when it was served with notices. In some instances, it had asked for support and guidance from the Commission. However, the Commission did not indicate its ability to provide such guidance or support, despite it being part of its responsibilities.

[117] The Commission relies, as one of the grounds for winding-up Selective, on the approximate 34% loss of the invested monies that was incurred by Selective at some point. That loss is based on a report that was issued by the Financial Services Board on 28 February 2010. Selective admitted this loss and explained that an investor may incur such a loss without blame on the part of the directors. It is an important fact that the loss occurred approximately ten years before the institution of the winding-up proceedings and 13 years prior to the issuing of the final winding-up order by the high court. The fact that a company has made losses ten years ago does not automatically mean that a company is insolvent.

[70] Ibid.

[118] Selective had attached, to its answering affidavit, an Abridged Certificate for Annual Returns issued by the Commission on Wednesday, 9 September 2020, which recorded:

'CIPC received an annual return filing for SELECTIVE EMPOWERMENT INVESTMENT 1 with enterprise number 2007/033697/06 for the following annual return year (s): 2013 . . . 2014 . . . 2015 . . . 2016 . . . 2017 . . . 2018 . . . [and] . . . 2019.'

It bears the name of Adv. Rory Voller: Commissioner CIPC.

[119] This certificate and its authenticity has not been placed in issue by the Commission in the replying affidavit. As such, it must be accepted as correct and any allegations that at the time that the matter was heard by the high court there were outstanding returns must be rejected.

[120] Selective attached to its answering affidavit a certification by the company secretary to the effect that:

'In terms of Section 88(2)*(e)* of the Companies Act 71 of 2008, as amended, I certify that the company has lodged with the Commissioner all such returns as are required of a public company in terms of the Act and that all such returns are true, correct and up to date'.

It must accordingly be accepted that both certificates from the Commission and the one from South African Revenue Service (SARS) were accepted by the Commission, otherwise the Commission would have challenged them.

[121] On or about 29 January 2020, the legal representatives of Selective wrote to the Commission and referred to a meeting that was held between the parties on 8 August 2019. They recorded that the share register had been updated and attached it as 'Annexure A' to the letter. They also indicated that Selective had entered into a Service Level Agreement with Singular Systems on 19 November 2019 and mentioned the services that Singular Systems was providing. A status report from Singular Systems was also attached. They further indicated that it was not in the interests of the company to be liquidated. The Commission chose not

to deal with these facts in its replying affidavit. It follows that they ought to be accepted in favour of Selective in line with the principle enunciated in *Plascon-Evans Paints Ltd v Van Riebeek Paint (Pty) Ltd*.[71]

[122] Similarly, a certificate issued by SARS reflecting the 'tax compliance status' of Selective, dated 11 September 2020, as being compliant was not considered by the high court. Selective attached the certificate from SARS to its answering affidavit. Nothing was said by the Commission about it, in fact the replying affidavit makes no reference to the relevant paragraph attaching the SARS document at all. In the first judgment it is suggested that, that certificate '*purports*' to be a SARS certificate. There are no allegations made by the Commission to support that finding. That certificate too, must be accepted as evidence in support of Selective's version.

[123] Selective stated that it was functioning under the hand of a new board. The independent auditors' report, Mkiva Incorporated, dated 30 October 2018 stated that 'the annual financial statements [were] prepared [in respect of Selective as a going concern] in accordance with all applicable International Financial Reporting Standards (IFRS), which includes all applicable IFRSs, International Accounting Standards (IASs) and Interpretations issued by the IFRS Interpretations Committee and the requirements of the . . . Act'. They further recorded that on a going concern basis, they presumed that funds will be available to finance future operations and that the realisation of assets and settlement of liabilities, contingent obligations and commitments will occur in the ordinary course of business. The auditors reflected on the errors that were on the share register. They further stated that a data analytics firm was appointed, and the errors were corrected. Those errors were recorded on the financial statements.

[71] Refer to *Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A), which clarifies the rule in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C).

They confirmed that where there were lapses in compliance, Selective had rectified those.

[124] An investigation report, dated 19 September 2017, filed by the deponent to the founding affidavit, Mr Gideon Johan Schutte (Mr Schutte), on behalf of the Commission, confirms the version of Selective that it had complied with the notices, although it accepted that compliance was not timeous. For example, Mr Schutte, in his report, listed numerically the requests made to Selective in the 20 January 2017 compliance notice. Those are:

'1. To submit to the Commission copies of the Annual Financial Statements for the 2014 and 2015 financial years signed by the registered auditor. Copies of the Annual Financial Statements must also be approved and signed by the directors of the relevant corporate entity.

2. Provide reasons to the Commission why the annual financial statements of 28 February 2012 were not timeously prepared by the directors of the company.

3. To submit to the Commission the minutes of the annual general meeting called as per section 61 (7) of the . . . Act . . .

4. To submit to the Commission a copy of a securities register.'

[125] He stated in his report in relation to the above listed requests:

'The Selective Empowerment Investment 1 Limited *complied with requests 1, 2 and 3*. The Companies Tribunal made an order that the Annual General Meeting should be convened within six weeks after case 10067/2015 was finalised by the Gauteng Division of the High Court of South Africa.' (My emphasis.)

[126] Strangely, although Mr Schutte recorded that there was compliance with three out of four requests, in the recommendations, he recorded that there must be submission of the annual financial statements for the 2016 and 2017 financial years; Selective must provide reasons why the financial statements were not timeously provided and why annual general meetings were not held timeously; to provide proof that the securities register has been maintained according to prescribed standards; and provide a report on how the non-compliance identified during the audit will be remedied to avoid a repeat of the non-compliance .

[127] I mention this example because Mr Schutte accepted that there was compliance with the demand for the 2014 and 2015 financial years. Instead of issuing a separate notice demanding compliance with the 2016 and 2017 financial years, he included such demand in his response to the 20 January 2017 compliance notice. Again, although Mr Schutte had made reference to the decision of the Tribunal, he continued to demand an explanation on why annual general meetings were not timeously held. This is just one of the examples that show some inconsistencies in the notices and the conduct of the Commission.

[128] All these facts and the documentation referred to in the preceding paragraphs, considered objectively, do not support the finding in the first judgment that Selective, *inter alia*, 'failed to provide proof of proper compliance'. The documents referred to, above, demonstrate that even if there were delays in complying with the notices, by the time the high court heard the application there were documents that were placed before it to prove compliance with the Commission's notices. Most importantly, the financial statements for the 2017/2018 do not evince any concerns such as that the substratum of the company has changed or that it may be insolvent.

Was there adequate notice to Selective that it was being wound up based on insolvent status?

[129] Selective contended that the case it was called upon to meet was based on it being solvent and not insolvent. It contended that for that reason it was not heard on the allegations of insolvency. In the first judgment, it is found that Selective was given notice of the winding-up of the company based on the just and equitable standard.

[130] In the correspondence exchanged between the parties about the winding-up of Selective, there is no mention of the just and equitable standard. The Commission made it clear that it would seek the winding-up of Selective based

on s 81(1)*(f)* of the Act. This meant that the winding-up of Selective would be based on its solvent status. On 6 March 2020, the Commission in a letter to the legal representatives of Selective persisted in its stance that there was no compliance with the notice and indicated, *inter alia*, that:

'. . . .

4. CIPC therefor continue with case no 6275/2018 and will file an application to wind up the company in terms of section 81(1)*(f)* of the Companies Act 71 of 2008.

. . . .'

[131] Section 346 of the 1973 Act deals with the procedure that must be followed when there is an application to wind up a company (legal requirements). These include a certificate that accompanies the application from the Master, issued not more than ten days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings. Before that application is presented to the court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged, for example, with the Master of the High Court (the Master), served on a registered trade union for employees; and on SARS. Before the hearing, the applicant is required to file an affidavit which sets out the manner in which service of the application as aforementioned was effected. Most importantly, the affidavit must set out facts upon which it relies for its allegations that a company is insolvent because it is unable to pay its debts when they become due and payable.

[132] I mention these processes because none of them have been adhered to in this matter. The process that I have outlined above is elaborate because the purpose thereof is to ensure that the company to be wound up is given sufficient notice and is afforded an opportunity to deal with the facts of the alleged insolvent status, adequately. The Master is also afforded an opportunity to satisfy himself or herself that on the facts it appears to him or her that the company may be

insolvent. These processes are critical because when a company is being wound up on the basis that it is commercially insolvent, it, as a respondent, in resisting the relief sought, bears the onus to prove that it is solvent.

[133] It is for that reason that facts relating to its debts, assets and/or liabilities must be apparent from the founding affidavit. That is the adequate notice that is required when a drastic order with serious implications, not only for Selective but its other companies, such as the winding-up, is sought. Adequate notice is an essential element of procedural fairness in legal proceedings. It ensures that a party is given sufficient information and time to prepare their case and respond to the issues at hand.

[134] There is no evidence at all that has been adduced by the Commission to support its general sweeping statement that the company may be insolvent. Selective has about 26 000 investors and holds on behalf of the shareholders, shares to the value of R110 420 785.26 before the high court or before this Court. Their rights have not been considered nor mentioned at all prior to the order being made because none of the s 346 requirements were met.

[135] The Commission relied, for example, on presentations made by Mr Maja on 4 July 2017, where he was providing information about the status of the Selective companies and not just Selective in this case. He sought help and support to ensure that shareholders and their monies are protected; to assist in obtaining legal opinion and advice on day to day running of the Selective companies; and to put the companies under curatorship, if deemed necessary. The Commission relied on what Mr Maja said about curatorship in justifying its winding-up application. Mr Maja admitted the allegations, but stated that the presentation that he made had since been overtaken by events including the appointment of the current board of directors. He sought assistance from the Commission as a regulator. He denied that he sought the placement of Selective

under curatorship in the legal sense. The application for the winding-up of Selective was brought some three years after the presentation by Mr Maja. This is the context in which Mr Maja made the statements the Commission now relies upon for the liquidation of Selective, which the high court ignored totally.

[136] The investors have an interest in the monies invested in the company. They have a right to bring winding-up applications against Selective if they are not satisfied with the manner in which the company is being run. The Legislature, when promulgating the Act, was alive to the fact that the rights of the shareholders (investors in this case) or directors must be taken into account. Absent adequate facts based on the inability of a company to pay its debts, as envisaged in s 345 of the 1973 Act, Selective is justified in its complaint that there was no adequate notice that it would be wound up on the allegations of insolvency.

Is Selective insolvent?

[137] According to Meskin, '[t]he test when a company is to be declared insolvent, is whether the company in winding-up can pay its debts. It requires a weighing up of assets and liabilities, and not merely a determination of whether it is commercially solvent'.[72] For instance if one has regard to the very annual report of 2018 relied upon by the Commission and the high court, the auditors recorded that the company's net asset value was about R145 million. The audit committee recorded that the company complies in all material respects with the requirements of the Act.

[138] The objectives and functions of the Commission are set out in ss 186(1) and 187(1) to (4), respectively, and have been quoted extensively in the first judgment. The Act itself provides for its purpose in s 7 as follows : '[T]o: promote compliance with the Bill of Rights as provided for in the Constitution in the

[72] P M Meskin *Henochsberg on the Companies Act* Vol 1 SI 26 (2008) at 670(2).

application of company laws' (s 7(*a*)); 'balance the rights and obligations of shareholders and directors within companies' (s 7(*i*)), 'encourage the efficient and responsible management of companies' (s 7(*j*)); 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders' (s 7(k)). This means that when the objectives and functions of the Commission are considered in relation to companies, including Selective, they must be viewed with the constitutional lens provided for in s 7.

[139] A reliable determinant of factual or commercial insolvency is a company's inability to pay its debts when they become due and payable or where it has more liabilities than assets on its balance sheet. That is the reason that s 345 of the 1973 Act is utilised as a safeguard to avoid liquidating a company without evidence to prove, even at a *prima facie* level, that it may be insolvent.[73]

[140] Section 345 reads:

'(1) A company or body corporate shall be deemed to be unable to pay its debts if-

(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of anybody corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

[73] See *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) 979 at 979B where the court observed that '*prima facie case*' entails that the balance of probabilities on all affidavits favour the making of provisional sequestration or liquidation order. See also *Afgri Operations Limited v Hamba Fleet (Pty) Limited* [2017] ZASCA 24; 2022 (1) SA 91 (SCA) para 9; *Valerio Engineering CC v Designatech (Pty) Ltd* para 18. See further E Bertelsmann *et al Mars*: *The Law of Insolvency* 10 ed (2019) at 125.

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he 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 company is unable to pay its debts.*

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.' (Emphasis added.)

[141] In this matter there is no question of creditors being involved and therefore one can accept that the provisions of s 345 have not been invoked. There is no creditor to whom the company was indebted that has served on it a demand requiring it to pay the amount due. There are no allegations that for three weeks the company had neglected to pay the sum demanded and there are also no allegations that the sheriff had returned what is known as the *nulla bona* return.

[142] Insolvency of a company may not be inferred, unless such inference is drawn from positive facts relating to the company's insolvent status due to, amongst others, the company's non- compliance with a s 345 demand. Section 344 deals with instances where a company may be wound up by the court. It is telling that where a company is deemed to be unable to pay its debts, s 344*(f)* links s 345 to the inability to pay its debts by stating '*as described in [s] 345*' of the 1973 Act.

[143] This Court, in *Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore NO and Others*,[74] stated that '[a]ffidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence

[74] *Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore NO* and Others [2015] ZASCA 37; [2015] JOL 33031 (SCA).

before the court. They must contain factual averments that are sufficient to support the relief sought.'[75]

[144] In the first judgment, reliance is placed on *Boschpoort Onderneming (Pty) Ltd v Absa Bank Ltd (Boschpoort)*,[76] which deals with forms of insolvency, being factual and commercial insolvency. Of importance is that both forms of insolvency have a bearing on the company's liabilities and assets. Factual insolvency occurs where a company's liabilities exceed its assets, while commercial insolvency occurs when the company is in such a state of illiquidity that it is unable to pay its debts even though its assets may exceed its liabilities. Tritely, there must be facts to support either form of insolvency.

[145] For instance in *Boschpoort*, the brief factual matrix relating to the company's assets and liabilities was that it had been in arrears in respect of its obligations to pay the bank more than R29 million, it had trade creditors to whom it was indebted in excess of R11 million, it owed the First Rand Bank Ltd approximately R 9 million and owed SARS an amount of about R2 million. It had been served with a demand in terms of s 345 of the 1973 Act and was in default in respect thereof. These facts set the *Boschpoort* decision apart from the facts of the case at hand. I say so for the following reasons.

[146] First, in *Boschpoort* there was a s 345 demand which was not met within the three weeks, with payment or security to the reasonable satisfaction of the creditor. The court was therefore furnished with facts which demonstrated that the company was not able to pay its debts. Second, Part G of chapter 2 of the Act excludes the application of ss 343, 344, 346 and 348 to 353 of the 1973 Act, where an application relates to the winding-up of a solvent company.

---

[75] Ibid para 13.
[76] *Boschpoort Onderneming (Pty) Ltd v Absa Bank Ltd* [2013] ZASCA 173; [2014] 1 All SA 507 (SCA); 2014 (2) SA 518 (SCA).

[147] Accordingly, absent the facts relating to the assets of Selective, what its liabilities are and what are the debts that it has been unable to pay, the winding-up order was not justified. The Commission sought a final winding-up order and 'had to establish [its] case on a balance of probabilities rather than on the lower level of *prima facie* basis, which is the degree of proof required for a provisional order'.[77] On the facts, it failed to satisfy the onus which it attracted. The high court should have exercised its discretion in favour of Selective and refused the relief sought by the Commission.

Does the Commission have standing to bring winding-up proceedings based on the just and equitable standard?

[148] Selective raised as a point *in limine*, squarely and unambiguously, that the Commission has no standing to seek an order to wind it up based on the rubric of just and equitable. As aforementioned the high court dismissed the point *in limine*.

[149] The persons who may bring winding-up proceedings against a company are provided for in s 344 of the 1973 Act,[78] for example, instances where a company resolves that it be wound up, if it is a public company its members have been reduced to below seven, or 75% percent of its share capital is lost. Section 344*(f)* makes reference to the provisions of s 345 of the 1973 Act.

---

[77] *Cuninghame and Another v First Ready Development 249* [2009] ZASCA 120; [2010] 1 All SA 473 (SCA); 2010 (5) SA 325 (SCA) para 1.

[78] 'A company may be wound up by the Court if –
(a) the company has by special resolution resolved that it be wound up by the Court;
(*b*) the company commenced business before the Registrar certified that it was entitled to commence business;
(*c*) the company has not commenced its business within a year from its incorporation, or has suspended it business for a whole year;
(*d*) in the case of a public company, the number of members has been reduced below seven;
(*e*) seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company;
(f) the company is unable to pay its debts as described in section 345;
(*g)* in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;
(*h*) it appears to the Court that it is just and equitable that the company should be wound up.'

[150] In dealing with this question, one must resort to the provisions of s 81 of the Act. I refer to it solely for interpretation purposes. The relevant parts of s 81 read as follows:

'(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 –

(i) the company's business rescue proceedings have ended in the manner contemplated in section 132(2)*(b)* or *(c)*(i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up; or

(ii) *it is otherwise just and equitable for the company to be wound up;*

(*d*) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that –

(i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and –

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

(ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or

(iii) *it is otherwise just and equitable for the company to be wound up;*

. . . .

(*f*) *the Commission or Panel has applied to the court for an order to wind up the company on the grounds that –*

(i) the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal, the Commission or Panel, as the case may be, has issued a compliance notice in respect of that conduct, and the company has failed to comply with that compliance notice; and

(ii) within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act, 1984 (Act No. 69 of 1984), were

taken against the company, its directors or prescribed officers, or other persons in control of the company for substantially the same conduct, *resulting in an administrative fine, or conviction for an offence*.

. . . .' (Emphasis added.)

[151] In answering the question '*what is just and equitable*?, in the context of winding-up of companies where it is just and equitable to do so D A Smallbone[79] states:

'12. In identifying the cause of action, consideration of the statute is not only vital: it is the starting point. It is a truism that satisfaction of a condition that something be "just and equitable" must begin with the terms of the power itself. What is it that the statute confers power to do? What is it that the statute says must be "just and equitable" before that power can be exercised?

13. From that starting point, one turns to consider the purpose for which the power was conferred. Sometimes these objects are expressly stated in the statute. When they are not expressly stated, or not stated exhaustively, "they must be determined by implication from the subject matter, scope and purpose of the Act.'

[152] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*,[80] Ngcobo J, states the following, when dealing with the interpretation of statutes in a constitutional context:

'The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court "must promote the spirit, purport and objects of the Bill of Rights" when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights "is a cornerstone of [our constitutional] democracy." It "affirms the democratic values of human dignity, equality and

[79] D A Smallbone *What is Just and Equitable*? Available at https://fjc.net.au/wp-content/uploads/2018/06/David-Smallbone-What-is-Just-and-Equitable.pdf [Accessed on 30 April 2025].
[80] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

freedom." In interpreting section 2*(j)*, therefore, we must promote the values of our constitutional democracy. But what are these values?"[81]

[153] This constitutional context approach to interpretation of the provisions of the Act is mandated by the Act itself. The foundational principle of the Act is, *inter alia*, the transformation of the commercial laws. That is the legislative scheme. The Commission and its existence are anchored on the Act. It cannot act outside the ambit of that Act. As a Regulatory body, it is a creature of statute.

[154] The Legislature when formulating s 81, consciously placed the '*it is otherwise just and equitable*' in instances where the applicant in a winding-up of a solvent company is: the company itself that has adopted a special resolution to be wound up voluntarily (subsec (1)*(a)*); or the business rescue practitioner who brought the application (subsec (1)*(b)*); or where one or more of the company's creditors (subssec (1)*(c)*) brought the application; and; by one or more directors or one or more shareholders where there is an unbreakable deadlock of either the directors or the shareholders (subsec 1*(d)*).

[155] Where there is provision for the Commission or Panel to apply for the winding-up of the company, in s 81(1)*(f)*, the Legislature *did not insert*, the words '*it is otherwise just and equitable for the company to be wound up*', as it did in s 81(1)*(c)* and *(d)* as aforementioned. If the words are not included in s 81(1)*(f)*, there is accordingly no legal basis for the Commission or the high court to include them.

[156] The Legislature, by so doing, in my view, wanted to avoid the very mischief that the Commission committed in this case, being: First, the Commission failed to take the steps that were legally permissible and available as enforcement procedures provided for in s 171(7)*(a)* and *(b)* of the Act. For the

[81] Ibid para 72.

sake of completeness those options are: to apply to court for the imposition of an administrative fine (subsec 7*(a)*); or refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of s 214(3), and subsec 7*(b)*. It may not do both in respect of any particular compliance notice.[82] In other words, it ignored the remedies available to it. The Commission proffered no explanation for such failure. Second, despite its failure to act in terms of s 171(1)*(a)* or *(b)*, it approached the court for a winding-up of Selective as a solvent company in terms of s 81(1)*(f)*, when it knew that in order for it to succeed it must have first utilised the remedies available to it. Notwithstanding its non–compliance with the remedies available to it, it proceeded with the application.

[157] Absent the jurisdictional facts, as correctly found by the high court, the Commission did not satisfy the requirements of s 81(1)*(f)*. That ought to have been the end of the matter because the absence of those jurisdictional facts was fatal to the Commission's application. Instead of dismissing the application the high court threw the Commission a lifeline based on the 'just and equitable' standard.

[158] The absence of the words '*it is otherwise just and equitable for the company to be wound up*' in s 81(1)*(f)*, was deliberate. First, the Legislature must have been alive to the fact that a regulator such as the Commission may bring winding-up proceedings against a company prior to it (the Commission) satisfying or completing all the enforcement processes provided for in the Act, hence the pre-requisites of an administrative fine or a conviction. Second, the Legislature, omitted the words in order to keep the powers of the Commission under scrutiny and to minimise prejudice to companies that have disputes with the Commission. It wanted to avoid conflation of non- compliance infractions in terms of the company laws with factual or commercial insolvency. Under the 'just

[82] Section 171(7)*(a)* and *(b)*.

and equitable' standard there is a risk of the Commission using the term that it is acting in the public interest whilst causing harm to the company.

[159] That, in fact, is what the Commission has done in this case. It has brought the winding-up proceedings of a solvent company, but in the same proceedings relied on the insolvency of the company inferred from its non-compliance with its notices. It advanced no facts that relate to the insolvency or commercial insolvency of Selective.

[160] The mischief of the Commission is stated in its founding affidavit as thus: '. . . .

B. PURPOSE OF THE APPLICATION

7. This is an application for the winding up of SEI 1 in terms of section 81(1)*(f)* of the Companies Act, 2008, alternatively, that it will be just and equitable if SEI 1 is wound up;

. . . .

J2. *Just and Equitable*

80. Notwithstanding that SEI 1 is liable to be wound up in terms of section 81(1)*(f)* of Section 108(6) of Act 71 of 2008, it will be just and equitable if SEI 1 is wound up.

81. SEI 1 is carrying on its business recklessly, constantly transgressing the provisions of Section 108(6) of Act 71 of 2008, which evinces a lack of any genuine concern for the prosperity of the respondent.

74. (*sic*) Mr Maja himself was of the opinion, as set out in his presentation that:

74.1. the regulatory bodies should assist SEI 1 to ensure that shareholders and their monies are protected;

74.2. the regulatory bodies give an opinion on what needs to be done;

74.3. SEI 1 be placed under curatorship, if deemed necessary, under the current circumstances;

82. The directors, or at least Mr Maja on behalf of SEI 1, questions the viability of SEI 1 and having regard to the continued dispute with Virtus and lack of staff of SEI 1, after taking over the responsibilities from Virtus, it is doubtful and highly unlikely that SE1 can achieve its raison d'être.

83. I submit that it will, furthermore, be just and equitable if SEI 1 is wound up.

. . . .' (Emphasis added.)

[161] The Commission relied on the exact same alleged transgressions by Selective which were placed before the high court in support of the s 81(1)*(f)* application. The limited powers of the Commission in the winding-up of a company are consistent with its objectives, which are, amongst others, the promotion of education and awareness of company and intellectual property laws and related matters; and the promotion of compliance with the Act and any other applicable legislation and the efficient effective and widest possible enforcement of the Act.[83]

[162] In *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs*,[84] this Court had to deal with the question whether s 157(1)*(d)* of the Act gave the Minister the power to wind up a solvent company in the public interest, this Court found:

'Of course, there may be indications in the statute itself that ''person'' includes the government as represented by a minister. But there is no such indication in the . . . Act. It is apparent that when a minister or *regulatory agency* established by statute exercises a public power or performs a public function they do so per se in the public interest. *When the lawmaker intends to give a minister the power to bring proceedings specifically in the public interest, it says so.*'[85] (Emphasis added.)

These remarks apply equally in this case.

[163] In the first judgment, at paragraphs 56 and 57, it is found that the Commission had the power to rely on the past infractions to meet a case of 'just and equitable' as envisaged in the Act. I disagree, with respect, for these reasons:

(a) Section 81(1)*(f)* makes no provision for the Commission to bring a winding-up of a solvent company based on a 'just and equitable' standard.

---

[83] The provisions of s 186 (1)*(c)* and *(d)* are set out fully in the first judgment at paragraph 5 fn 3.

[84] *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs* [2019] ZASCA 1; [2019] 2 All SA 1 (SCA); 2019 (3) SA 251 (SCA).

[85] Ibid para 131.

(b) As a statutory entity, a winding-up application must be based on it (the Commission) meeting the jurisdictional facts set out in s 81(1)*(f)*(i) and (ii) of the Act and nothing else. Section 81(1)*(f)* was enacted for that purpose.

[164] The injustice that would result if the Commission were to benefit from the use of the 'just and equitable' standard is that the Commission would simply issue compliance notices, one after the other, and not pursue those up to the stage where there are administrative fines or convictions imposed. Thereafter, and when it is convenient to it, bring winding- up proceedings on the grounds that it is 'just and equitable' to do so.

[165] Having regard to the express language employed in s 81(1)*(f)* of the Act and the purpose of the provisions relating to the Commission, the Commission has no standing to bring winding-up proceedings against a company on the 'just and equitable' standard.

Is the Commission an interested party as envisaged in s 79(3)?

[166] In the first judgment, one of the findings at paragraphs 59 and 60 is that the Legislature in s 79(3) did not envisage a situation where another application must be brought by a third party for the winding-up of Selective. To do so, it is stated, would be ludicrous. It was further found that Selective was wound up on the ground that 'it would be just and equitable for Selective to be wound up' on application by the Commission as an interested person.

[167] Section 79(1) of the Act provides:

'(1) A solvent company may be dissolved by–

(a) voluntary winding-up initiated by the company as contemplated in section 80, and conducted either

(i) by the company; or

(ii) by the company's creditors, as determined by the resolution of the company; or

(b) winding-up and liquidation by court order, as contemplated in section 81.

(2) The procedures for winding-up and liquidation of a solvent company, whether voluntary or by court order, are governed by this Part and, to the extent applicable, by the laws referred to or contemplated in item 9 of Schedule 5.[86]

(3) If, at any time after a company has adopted a resolution contemplated in section 80, or *after an application* has been made to a court as contemplated in section 81, it is determined that the company to be wound up is or may be insolvent, *a court, on application by any interested person,* may order that the company be wound up as an insolvent company in terms of the laws referred to or contemplated in item 9 of Schedule 5.' (Emphasis added.)

[168] In *Snyders and Others v De Jager (Joinder)*, the Constitutional Court, when dealing with a direct and substantial interest for the purposes of joinder of a party, stated:

'A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. . .[87]'

[169] In *Absa Bank Ltd v Naude NO and Others*,[88] this Court dealt with the test applicable where there is a non-joinder of creditors in an application to set aside

---

[86] Item 9 of Schedule 5 reads:
'(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (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 sub- item (2) and (3).
(2) Despite sub-item (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 sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provisions of this Act prevail.
(4) The Minister, by notice in the Gazette, may -
(a) determine a date on which this item ceases to have effect, but bo such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding- up and liquidation of insolvent companies; and
(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act to the provisions of the alternative legislation contemplated in paragraph (a).'

[87] *Snyders and Others v De Jager (Joinder)* [2016] ZACC 54; 2017 (5) BCLR 604 (CC) para 9.

[88] *Absa Bank Ltd v Naude NO and Others* [2015] ZASCA 97; 2016 (6) SA 540 (SCA).

a business rescue plan and whether such failure to join them was fatal to the relief claimed. This Court set out the test thus:

'The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject- matter of the litigation which may prejudice the party that has not been joined.'[89]

[170] The enquiry that this Court had to conduct when assessing the creditor's interests in the *Absa Bank case*, above, applies equally herein. That enquiry must be: '*Whether the Commission has a direct and substantial interest in the winding-up of Selective*'. As a regulator, the Commission has no direct and substantial interest such that it would be prejudiced by the winding-up of Selective. It has a right to bring winding-up proceedings of a solvent company, if it has met the jurisdictional facts.

[171] The Legislature realised that there would be instances where a Commission or shareholder brings an application for the winding-up of a solvent company in terms of s 81(1)*(f)* and whilst that application is pending, a creditor who has established that the company is unable to pay its debts (for having failed to meet the s 345 demand), such creditor brings an application based on the insolvent status of the company. That is what is envisaged in the section, otherwise why would the Legislature have two 'applications' in one section? Again, how can the Commission that relied on solvency change its stance in the same proceedings and rely on insolvency? That is a very controversial approach, which would conflate the grounds for winding-up as demonstrated above. Consequently, I find that the plain text of the section envisages two applications.

[172] The approach I postulate herein is consistent with the limited grounds upon which the Commission may bring winding-up proceedings against a solvent company as contemplated in s 81(1)*(f)*. The Legislature clearly intended that the

[89] Ibid para 10.

pending first application would be based on the solvent status of the company by the applicant such as the Commission and the second application by an interested party, such as a creditor, shareholder or director or even the company itself, would bring the application based on the company's insolvent status. The Act does not authorise the Commission to bring a winding-up of a company based on insolvency.

[173] The approach contended for in the first judgment would, with respect, lead to two unconscionable results, namely, that what was initially a s 81(1)*(f)* application by the Commission could simultaneously change colour just like a chameleon into a s 344 application, by the same Commission. Second, it would absolve the Commission from meeting the jurisdictional facts canvassed above, and afford it a second bite at the cherry by changing the grounds for winding-up from solvent to insolvent without much effort. Over and above, the Commission would bring the application as the applicant in the s 81(1)*(f)* application but also without bringing another application, in the same proceedings be an interested person and rely on insolvency. That would lead to absurdity and unjust results, which the legislature by no means could have contemplated.

[174] Lastly, the conclusion in the first judgment, in paragraphs 59 and 60 with respect, does not seem to find support from the findings of this Court in *Boschpoort* at paragraphs 12 and 13, where it is stated:

'Section 80 of the new Act relates to the voluntary winding-up of a ''solvent company''. Section 81 of the new Act relates to the winding-up, also of a ''solvent company'', by a court. In terms of s 81(1)*(c)*(ii) of the new Act (upon which the court below based its decision to liquidate the appellant), a court may order the winding-up of a company *where a creditor has applied for such an order* on the grounds that ''it is otherwise just and equitable for the company to be wound up.''

There have been discordant views on the circumstances under which a company may be wound up under the new Act, on the one hand, or the old Act on the other. It is clear, however, that ss 79 to 81 of the new Act apply to the liquidation of ''solvent'' companies. Section 79(3) of

the new Act provides, however, that if it becomes apparent during the liquidation proceedings of a ‘‘solvent’’ company, that it is or may be ‘‘insolvent’’, the transitional provisions referred to in item 9 of schedule 5 of the new Act apply: the winding-up of the insolvent company may take place under the old Act.’[90] (Emphasis added.)

[175] I accordingly find that the Commission is not an interested person as envisaged in s 79(3). In this regard, the high court misdirected itself in the exercise of its discretion and this Court is at large to interfere with its decision.[91]

How is the provisional order of winding-up of Selective prejudicial?

[176] Once a provisional order is granted, the company is divested of its assets, and they are immediately placed in the hands of the Master. The liquidators take control of the assets. All contracts of employment are automatically terminated. This applies to all companies irrespective of their size. Therein lies the prejudice. In *Commissioner, South African Revenue Service v Pieters and Others*,[92] this Court held:

‘The company had some 700 employees. Their employment contracts were in terms of s 38(1) of the Insolvency Act 24 of 1936 (the Act), suspended on the date of the commencement of the winding -up on 7 December 2012. The contracts came to an automatic end 45 days later by virtue of the provisions contained in s 38(9) of the Act. At the time of the commencement of the company’s winding-up, leave pay had accrued to the employees.’[93]

[177] The fact that the winding-up of Selective was granted by the high court, without facts supporting that it was insolvent, calls for the immediate setting aside of that order. A provisional winding-up order that is issued by an appellate court, in the circumstances of this case, should not be countenanced. It will not be in

---

[90] Ibid para 10.
[91] See *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) paras 88 and 89; *Hotz and Others v University of Cape Town* [2017] ZACC 10; 2017 (7) BCLR 815 (CC); 20178 (1) SA 369 (CC) para 28.
[92] *Commissioner for the South African Revenue Service v Pieters and Others* [2018] ZASCA 128; 2020 (1) SA 22 (SCA); 82 SATC 12.
[93] Ibid para 2.

accordance with the interests of justice. Besides, the Commission sought a final order and not a provisional order before the high court.

Costs

[178] There is no basis to depart from the normal rule that the successful party is entitled to its costs.

[179] I make the following order:

1 The appeal is upheld with costs, such costs to include costs of two Counsel, where so employed.

2 The order of the high court is set aside and substituted with the following: 'The application is dismissed with costs, such costs to include costs of two counsel, where so employed.'

_____

T V NORMAN

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	M R Maphutha and M Matlala (The heads of argument were prepared by T Ngcukaitobi SC and M R Maphutha)
Instructed by:	Matlala and Associates, Pretoria Webbers Attorneys, Bloemfontein
For the respondent:	H C Janse van Rensburg and P Nyapholi-Motsie
Instructed by:	The State Attorney, Pretoria The State Attorney, Bloemfontein.