REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT, JOHANNESBURG LOCAL DIVISION

CASE NO: 14/01430

(1) Reportable: Yes
(2) Of interest to other judges: Yes
(3) Revised.

05 December 2014 .....
DATE SIGNATURE

In the matter between:

ABSA BANK LTD **APPLICANT**

And

AFRICA'S BEST MINERALS 146 LTD **RESPONDENT**

AND

KENNETH KGUGUDI SEKHUKHUNE N.O **APPLICANT (In Intervention)**

And

ABSA BANK LTD **RESPONDENT (In Intervention)**

JUDGMENT

Vally J:

Introduction and background facts

1. On 13 September 2010 the applicant, ABSA BANK LTD (ABSA) and the respondent, AFRICAN BEST MINERALS LTD (ABM), entered into a written loan agreement in terms of which ABSA advanced an amount of R 9 550 000 to ABM, which was to be repaid by ABM over a period of 83 months at the rate of R170 998.42 per month. On or about 11 May 2011 an addendum to the loan agreement was concluded by the two parties in terms of which an outstanding amount of R7 014 491.54 was payable over a period of 76 months at a rate of R131 486.37 per month. One of the terms of the loan agreement was that, should ABM fail to make any monthly payment due, the full outstanding amount became due and payable. There is also the usual "*no indulgence and full agreement*" clause in the agreement. ABM defaulted by failing to make payment as required.

2. ABSA seeks a final order for the winding up of ABM. The application was launched on 21 January 2014.The matter was called in Court on 4 June 2014 but was postponed. ABM opposed the application. It delivered its answering affidavit on or about 14 July 2014 and ABSA replied thereto on or about 03 September 2014. The matter was set down for hearing on 17 November 2014. In terms of the Practice Directive of this Court ABSA was to file its heads of argument before setting the matter down and ABM should have filed its heads of argument on or about 27 October 2014. On 23 October 2014 an application was received from the honourable King Kenneth Kgagudi Sekhukhune (King Sekhukhune) who sought to intervene in the matter on a number of grounds. This was not opposed

by ABSA, who decided to adopt the view that the founding affidavit supporting the intervention application should, if the application were granted, be treated as a further answering affidavit and that its own answer thereto should be treated as a further replying affidavit.

3. ABM brought an application for the postponement of the hearing, which application was supported by King Sekhukhune. The application was opposed by ABSA. The application for postponement was tied to the application for leave to intervene. The deponent to the founding affidavit in support of the application for postponement claimed that the matter was not ripe for hearing because the intervention application would have to be determined first, and that application was not ripe for hearing. However, this ground was abandoned at the hearing as by then the papers in the intervention application were all filed, and the intervener had acknowledged that the matter was ripe for hearing. The intervener was represented by the same counsel that represented ABM. As a result of the concession on the part of the intervener that the matter was ripe for hearing, it was agreed that the most convenient approach to the matter was to hear and determine the intervention first, followed by the postponement application and, if necessary, the main application last.

The intervention application

4. King Sekhukhune asked for wide ranging and far-reaching relief.[1]The founding affidavit supporting the application is deposed to by a Mr Komane Canius Mampuru (Mr Mampuru), who says he is "*a traditional and civic leader at the seat of the tribal authority (Kgoro) of the Bapedi Nation at Mohlaletse Sekhukhune district, Limpopo province*." He is "*a member of the Royal Council of the Bapedi Nation acting under the auspices of Kogoshi Kenneth Kgagudi Sekhukhune*." King Sekhukhune filed a "*supporting affidavit*" wherein he states, "*The draft answering* (sic) *affidavit by Komane Canius Mampuru has been read and represented to me and I confirm, support and adopt it.*" Mr Mampuru also says that he is "*an executive member of the African Success & Entrepreneurship Foundation ("AFSEF"), of its Forensic Constitutional Task Force ("FCTF")."* The reference to AFSEF is relevant as prayer 4.1 asks that this Court orders that King Sekhukhune is given leave to "*represent the companies forming part of the AFSEF model* (sic)*.*"

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[1]The material aspects of the relief sought reads:

"1. ...

2. Granting leave to the Applicant, supported (sic) by other traditional and civic leaders who file supporting affidavits, to intervene as co-respondent(s) in the winding-up application launched by the Respondent (ABSA);

3. ...

4. Granting further and/or alternative relief to the Applicant, and, without derogating from the generality of this prayer, specifically:

4.1. Granting leave to the Applicant to represent the companies forming part of the AFSEF model as referred to in the Founding affidavit as contemplated in terms of section 165 of the Companies Act, 2008;

4.2. Developing the principles of the common law relating to representation on the basis that the leaders and representatives of beneficiaries for the purpose of constitutional restitution and/or the protection of their common fundamental constitutional rights, whether in terms of customary or constitutional law, may represent any corporation or entity established to secure the intended constitutional restitution or protection of the beneficiaries they represent as aforesaid."

5. No case is made out in the founding affidavit of Mr Mampuru or in the "supporting affidavit" of King Sekhukhune for granting an order allowing the King to represent "*the companies forming part of the AFSEF model*". In fact the full list of the companies that form part of AFSEF is not spelt out in either affidavit. No details about these companies are given. These papers have not been served on those companies and no claim is made that either Mr Mampuru or King Sekhukhune is authorised to act, or speak, for these companies. In these circumstances, prayer 4.1 cannot be acceded to.

6. Prayer 4.2 is strange. The relief asked for is:

> "(d)eveloping the principles of the common law relating to representation on the basis that leaders and representatives of beneficiaries for the purpose of constitutional restitution and/or the protection of their common fundamental constitutional rights, whether in terms of customary or constitutional law, may represent any corporation or entity established to secure the intended constitutional restitution or protection of the beneficiaries they represent as aforesaid."

7. I have difficulty in understanding what order is being sought. At the hearing I put this difficulty to counsel for King Sekhukhune. He responded by stating that the Court should order that King Sekhukhune and the traditional leaders (who are not identified) have the right to represent "*any corporation or entity established to secure the intended constitutional restitution or protection of the beneficiaries they represent"* in any proceeding where they or *"the beneficiaries*" may have an interest. Unfortunately, the suggestion only compounded my difficulty. Firstly, an order of this nature would certainly be unintelligible. It also was not indicated, either on the papers or in the oral submissions received, why this Court should

make an order that is so general and all encompassing that it would allow King Sekhukhune and all traditional leaders to represent "*any corporation or entity established to secure the intended constitutional restitution or protection of the beneficiaries they represent*", in any matter where these beneficiaries may have an interest, in any Court in the land. Secondly, such a wide-ranging order is beyond the scope of this Court in this matter. The corporations or entities that would have King Sekhukhune and the traditional leaders imposed upon them as their representatives in any proceeding where the communities (supposedly represented by King Sekhukhune and the traditional leaders) have an interest have not been identified, let alone been heard. Thirdly, assuming for the moment that such relief is competent, there is no link between it and the case of ABSA or the case of ABM in this matter. Finally, no case is made out as to why this relief is necessary in this matter: nothing is said in the founding affidavit or the supporting affidavit as to why this relief is sought, or why it is required. Hence, in my view, such an order is, without doubt, legally incompetent. Accordingly, I decline the request for an order in terms of prayer 4.2 of the notice of motion.

8. The only relevant prayer left is prayer 2, which asks for leave to intervene in the winding-up application and it is to that that I now turn.

The intervention application

9. King Sekhukhune asks that he be granted leave, "*supported (sic) by other traditional and civic leaders who file supporting affidavits, to intervene as co-*

respondent(s) in the winding-up application launched by" ABSA. No supporting affidavits were filed by any other traditional and civic leader, except for Mr Mampuru who deposed to the founding affidavit. It is thus not clear which other traditional or civic leader should be granted leave to intervene as co-respondents in the matter. In these circumstances the only applicant who could be granted leave to intervene is King Sekhukhune. When presented with this dilemma his counsel elected to persist with the application on the basis that only King Sekhukhune should be allowed to intervene in the application.

10. In order to succeed in the quest to intervene King Sekhukhune must satisfy this Court that he, or the community he represents, has a direct and substantial interests in the application to wind-up ABM, which could be prejudiced should the Court issue an order winding-up it up. He must satisfy this Court that the application is not brought frivolously and that the facts or allegations it wishes to draw the attention of the Court to will affect the course of the judgment and any order that follows in a material respect. Furthermore, the direct and substantial interest has to be an interest in the right to challenge the winding-up application and not just a mere financial interest.[2]

[2]*Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In Re: Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (Tk GD) at 678H-679C. See also: *Registrar of Banks v Regal Treasury Private Bank Ltd (under curatorship) and Another (Regal Treasury Bank Holdings Ltd Intervening)* 2004 (3) SA 560 (W) at 573E-F.

11. The grounds for intervening are to stop the alleged unlawful conduct of ABSA and to protect the interests of the communities and AFSEF, which together have an interest in the amount of R24 million in ABM.

12. It is alleged that the actions of ABSA in bringing the application to wind-up ABM are unlawful because:

12.1. they are in breach of its (ABSA's) duties "*to communities entitled to constitutional restitution and redress, in terms of the Financial Sector Charter*"[3] (the FSC); and,

12.2. the firm of attorneys that previously represented ABSA in this matter was conflicted in that it previously (i.e. before this matter arose) represented the communities involved in AFSEF in a dispute with First Rand Bank Ltd and a company styled Southnet.[4] Hence, that firm of attorneys acted unlawfully.

13. On the first claim, it is important to note that it is based on an allegation that ABSA owes a duty to "*communities entitled to constitutional restitution*" (the communities) and not to ABM. There is no claim that ABSA owed ABM any duty. More importantly, even if ABSA owed these communities a duty, and assuming that ABSA was in breach of such a duty, it would then be open to these communities to sue ABSA for its breach. The existence of such a duty borne, and

[3]Intervention application, Founding Affidavit, para 5, p 7
[4]Intervention application, Founding Affidavit, para 6, p 7

its breach, by ABSA does not give cause to King Sekhukhune to intervene in what is a straightforward winding-up application of ABM. The interest of King Sekhukhune (as the representative of these communities) is not to be found in the winding-up application of ABM but is located in a different and separate matter (assuming the communities are able to establish a cause of action) not related to the winding-up application. The winding-up of ABM does not affect, let alone destroy, any cause of action the communities (who are allegedly owed the duty) are able to establish against ABSA. Furthermore, whatever rights the communities have over ABSA do not have any bearing on the application to wind-up ABM: those rights cannot affect the outcome of this matter. Thus, the communities have not established that they have any interest in this matter which requires protection, nor have they established that the protection of such interest will affect the outcome of the winding-up application.

14. The second reason furnished for why the application to wind-up ABM is unlawful is that ABSA had previously employed the services of a firm of attorneys that represented some groups within AFSEF, and maybe even AFSEF, in another matter. This resulted in that firm of attorneys being conflicted when the winding-up application was launched. It is alleged that those attorneys had consulted with "*representatives of the Bapedi Nation and communities regarding the defense of their constitutional rights in the context of the FSC and the commitments the major banks, including ABSA, had made, and that they are therefore breaching*

(sic) the legal professional privilege (sic) *that arise in these circumstances*."[5]This allegation is not very sensible. At best for the communities on whose behalf the intervention application is brought, it can be read to mean that they have been harmed by the erstwhile attorneys of ABSA, and that they may have a legal claim against the said attorneys. That, however, does not make the application by ABSA to wind-up ABM unlawful: ABSA cannot be held accountable for the alleged harmful conduct of its erstwhile attorneys, and ABM is not affected by the alleged harm committed against the communities. Hence, even this ground of intervention fails to establish that the communities, on whose behalf King Sekukhune brings this application, have a direct and substantial interest in the winding-up application. This ground for intervention is legally unsound and no more need be said about it.

15. The other ground for intervening is that the communities and AFSEF hold an interest of R24m in ABM. The averment in this regard is crafted in the following terms in the founding affidavit:

> "ABM itself is a partner institution in AFSEF which is of key importance to provide access to capital and to serve as a joint venture institution to enable the communities that have partnered through AFSEF, and especially for this purpose the Bapedi (sic), to exploit the mineral rights that legitimately vest in them through their heritage.
> Jan Strydom and James Mitchell, AFSEF partners, have held an interest of AFSEF and the communities that partnered through them as nominees in an amount of R24 million. Kgoshi Kgolo (King Sekhukhune) holds that interest directly."[6]

[5]Intervention application, Founding Affidavit, para 13, p 9
[6]Intervention application, Founding Affidavit, paras 23.37 - 23.38, p 17

16. I read this averment to mean that King Sekhukhune holds an interest of R24m in ABM. However, at the hearing I was informed by counsel for King Sekhukhune that it means that the King is a creditor of ABM in the amount of R24m and that the intervention is sought not to protect the interest of King Sekhukhune as a shareholder, but rather as that of a creditor. I find this submission startling for the very next averment leaves no doubt that the leave to intervene is sought on the basis that King Sekhukhune is a shareholder, albeit that the shareholding is held on behalf of others (the communities and the partners in AFSEF). The averment reads:

> "The investment in ABM that AFSEF and the communities that partnered through it had committed themselves to was in part dedicated to a joint venture for beneficiation of the gold and to establish a refinery at the site of the mine."[7]

17. Apart from asserting the existence of a shareholding (or a loan, if the oral submission is to be accepted), no further factual substratum is provided to show that the intervention, if allowed, is necessary and will affect the outcome of the winding-up application. As mentioned above, the law is settled on this score: a party that wishes to intervene must demonstrate an interest in the proceeding that is not just a mere financial interest. An application to intervene solely as a shareholder or solely as a creditor is insufficient. The aspirant intervener must demonstrate that he has a legal interest to protect and not just a financial interest in the matter. The legal interest must also be material enough to affect the outcome of the winding-up application. Anything less than that will not do.

[7]Intervention application, Founding Affidavit, paras 23.39, pp 17 - 18

18. Finally it need be said that the founding papers in the application for intervention consist of 471 pages, made up mainly of annexures relating to the business structure and the business dealings of the persons involved in the AFSEF conglomeration of individuals, associations and/or partnerships. None of it concerns the debt of ABM with ABSA and, therefore, none of it has any real or potential probative value in the winding-up application. To admit such evidence would be wasteful and would result in the inefficient use of litigation as well as judicial resources.

19. For all of the aforesaid reasons, the application to intervene has to be dismissed. As ABSA did not seek a cost order should the application be dismissed, it would not be appropriate to make one.

The application for postponement

20. As mentioned above, ABM brought an application to postpone the hearing which application was initially grounded in the fact that there was an application for leave to intervene which was not ripe for hearing as, by the time the application for postponement was launched, not all the papers in the intervention application were filed. However, this was no longer the case when the hearing was held and as a result this ground for the postponement fell away. Nevertheless, ABM persisted with the application for postponement. The application was based on the contention that, as far as the winding-up application was concerned, this Court was bound by a decision of the Supreme Court of Appeal (SCA) in

Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd[8], thus rendering the opposition of ABM to the winding-up application in this Court valueless. This makes it necessary for ABM to seek leave from the Constitutional Court (CC) for direct access, in order to ensure that its right to challenge the pronouncement of the SCA regarding winding-up applications of this nature. Hence, ABM contended that the winding-up application should only be heard after the CC has pronounced on its application for direct access. It has not yet launched an application for direct access, but asks that this Court postpone this matter pending "*the filing of an application for leave for direct access*". In its oral submissions ABM indicated that such an application could be brought by 19 December 2014.

21. The winding up application is based on an allegation that ABM is commercially insolvent. The application is brought in terms of s 344(f) read with s 345 of Companies Act, 61 of 1973 (the 1973 Act). The SCA has ruled that s 344(f) read with s 345 of the 1973 Act allows for the winding-up of an insolvent company. In such a case the applicant does not have to prove that there are just and equitable grounds for the winding up of the insolvent company. ABM wants an opportunity to call upon the CC to allow it to challenge this finding without having to present its case in this Court and in the SCA. Absent that opportunity, it claims that justice cannot be done to its case. This it says is so because this Court is bound by the decision of the SCA. Accordingly, it says that there is no purpose for it to continue with its opposition except if it gets an opportunity to present its

[8] 2014 (2) SA 518 (SCA)

case to the CC, where it will be able to challenge the correctness of the SCA's decision. ABM claims that the SCA's decision is wrong because it failed to impose upon an applicant for the winding-up of an insolvent company the duty to show that, notwithstanding the company's insolvency, it is just and equitable for it to be wound-up.

22. ABM has yet to launch an application to the CC for direct access. It asks this Court to postpone this matter pending "*the filing of an application for leave for direct access*". In its oral submissions ABM indicated that such an application could be brought by 19 December 2014. No explanation was furnished as to why ABM, if it believed that this option was best suited to its case, had not already filed and served such an application. After all, the SCA judgment that ABM complains of was delivered on 28 November 2013. This winding-up application was brought on 21 January 2014 The answering affidavit of ABM was filed 14 July 2014.The point that ABM wish to take the matter up directly with the CC was not raised in the answering affidavit. It was only raised at the hearing of this matter, and it was raised as a basis for the postponement application.

23. ABSA submitted that the application was brought merely to delay the proceedings. This, it says, is manifest in the manner and the timing of the application. I hold that there is great merit in this submission. ABM does not give any substantive reasons why the SCA was wrong in *Boschpoort*.

24. In my view, to grant this application would only encourage litigants like ABM to flood the CC with applications for direct access simply because they believe, however unreasonable that belief may be, they would not be able to fully ventilate their case in this Court and in the SCA. In my view there is only one judiciary and one system of law in this country. The judiciary is, for good reason, organised along hierarchical lines. Litigants must present their cases in the lowest applicable court in the first instance and, if they have a deserving case, go through the various stages of the courts before they should be able to call on the attention of the highest court. This is the only way the rule of law can be maintained. For the rule of law to function effectively the highest court should only in rare cases be asked to sit as a court of first and final instance. The CC has already on numerous occasions over the last twenty years alerted litigants to this basic principle. Identifying those authorities would only serve to pad this judgment with unnecessary citations. However, one authority does stand out:

> "It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.@[9]

25. Further, it must be borne in mind that this Court has a duty to the litigants before it, to the SCA and to the CC (should the matter receive either, or both, of those Courts' attention) to sanitise the issues before it and to articulate its reasoning for

[9] *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) at [8].

the order(s) it makes before the SCA, and ultimately the CC, should be engaged. This does not mean that an application to have a matter postponed pending an application for direct access to the CC must automatically fail. There may be good grounds to grant such an application. However, to do so it must at least be satisfied that the application for direct access has a reasonable prospect of succeeding. In the present case, ABM does not even attempt to make out a case in this regard.

26. Lastly, should ABM lose, it can attempt to take its case to the SCA and there is no reason why it cannot ask the SCA to reconsider its previous decision. Hence, its claim that its case can only be fairly adjudicated at the CC is without merit.

27. For these reasons, the application for postponed was denied.

The winding-up application

28. It is not disputed that:

28.1. ABM is indebted to ABSA pursuant to it concluding a loan agreement with ABSA involving the amount of R9 550 000, and the amount owing as at 19 October 2012 was R8 020 451. 38. This was the full outstanding amount as at that date and it became due as a result of ABM failing to meet its instalment payments on due date;

28.2. Despite demand, ABM failed to pay this amount. In compliance with s 345 of the 1973 Act ABSA, on 1 November 2012, and again on 18 July 2013, sent ABM a letter of demand. ABM, nevertheless, failed to pay the amount due. It did, however, make a payment in the amount of R50 000.00 on 19 September 2013 but this was well short of the amount due.

28.3. ABM is commercially insolvent.

29. In these circumstances the only issue before this Court is whether it should grant a winding-up order. ABM initially opposed the application on the grounds that ABSA had failed to comply with the provisions of s 81(1) (c) of the Companies Act, 71 of 2008 (the 2008 Act). This was raised as a point *in limine*. Later on during the proceedings, ABM abandoned this as a point *in limiine*, but relied on the substance thereof by contending that it is, nevertheless, a requirement for a an applicant bringing an application to wind-up a company to show that it is "*just and equitable*" for the company to be wound-up. ABM claims ABSA has not shown this.

30. The application is brought in terms of s 344(f) read with s 345 of the 1973 Act. Section 344(f) provides that a company may be wound-up if it "*is unable to pay its debts in terms of s 345*". Section 345 is a deeming provision. In terms of this provision a company is deemed unable to pay its debts if a debt exceeding R100.00 is due, the creditor has served a demand for payment and the company has for three weeks thereafter failed to meet the demand. There is no debate that

ABSA has shown this to be the case. Thus, ABSA argues that there is no need for it to show that it is "*just and equitable*" for ABM to be wound-up.

31. The 2008 Act has repealed most, but not all, of the 1973 Act. It is those provisions in the 1973 Act that have survived the 2008 Act that ABSA relies upon. In terms of item 9 of Schedule 5 of the 2008 Act, the 1973 Act remains applicable to winding-up and liquidation of companies. Item 9 reads:

> "Continued application of previous Act to winding up and liquidation
> (1) Despite the repeal of the previous Act, until the determined in terms of sub-item (4), chapter 14 of this 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).
> (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."

32. Sub-item (2) unequivocally states that sections 343, 344, 346 and 348 to 353 are not applicable to the winding-up of "*solvent*" companies. It makes no reference to insolvent companies. The clear implication is that the said sections still apply to insolvent companies. Insolvent companies are those that are unable to pay their debts when due. In the present case, ABM is alleged to be insolvent, albeit commercially insolvent. A company whose assets are not liquid enough for it to meet its financial obligations during its ordinary business is regarded as being commercially insolvent.[10] A company may be said to be commercially insolvent

[10] *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 440F-H

even if it is factually solvent.[11] For purposes of a winding-up application the distinction between commercial and factual solvency can, at times, be blurred.

33. The only defence put up by ABM is, that despite its financial woes, it would be unjust and inequitable for it to be wound-up. It concedes that the provisions of section 344(f) read with section 345 of the 1973 Act do not require ABSA to show that it is "*just and equitable*" for it to be wound-up, but argues that this requirement should be introduced by this Court by developing the common law to this end. Should this Court agree with ABM then, without doubt, the winding-up application should fail, as ABSA has not made out any case to the effect that it is "*just and equitable*" to wind-up ABM. It was suggested that this should be done in order to bring the provisions of s 344(f) read with s 345 of the 1973 Act in line with the provision of s 81(1)(c) of the 2008 Act. Section 81(1)(c) of the 2008 Act allows for the winding-up of a "*solvent*" company if "*it is otherwise just and equitable for the company to be wound-up*". It is immediately noticeable that this provision applies to solvent companies only. Hence, even the 2008 Act does not require that it be shown that it is "*just and equitable*" to wind-up an insolvent company. In fact, as far as an insolvent company is concerned it has left the law as enunciated in the 1973 Act unchanged. Moreover, it has, in terms of item 9 of Schedule 5, done so explicitly.[12] To follow the course suggested by ABM would,

[11]Factual solvency refers to a situation where the assets of the company exceed its current, as well as long-term, liabilities.

[12] In which case it is not even necessary to consider the applicability of the maxim *unius est alterius exclusio*, which, of course, has to be guardedly engaged, see *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A) at 37F - H

if followed, result in this Court amending the legislation. That, without doubt, falls outside the remit of this Court.

34. In *Boschpoort*, the SCA has reiterated that there are good grounds to wind-up a commercially insolvent company. It expressed the reasons in this way:

> "That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money – and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets. Were the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the new Act, set out in s7*(l)* thereof."[13]

35. In the present case, ABSA has, without doubt, made out a case for the relief it seeks in the winding-up application. It is entitled to an order in this regard.

The order

36. The following orders are made:

1. The intervention application is dismissed.
2. The application for the matter to be postponed is dismissed.
3. The respondent is placed under final liquidation in the hands of the Master of the High Court.

[13]Note at above at [17]

4. The costs of the application shall be costs in the liquidation

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Vally J
Judge of the Gauteng High Court
December 2014

Appearances:

For the Applicant	:	Adv R Strydom SC
Instructed by	:	Cliff Decker Hofmeyr Attorneys
For the Respondent	:	Adv H.J.S Meyer
Instructed by	:	Pule Inc
For the Intervener	:	Adv H.J.S Meyer
Instructed by	:	De Jager du Plessis & Associates
Date of hearing	:	18 - 20 November 2014
Date of judgment	:	5 December 2014