REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED	
14 October 2020	**C.J. COLLIS**
DATE	SIGNATURE

CASE NO: 14886/16

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **APPLICANT**

and

ZIKHULISE CLEANING MAINTENANCE AND TRANSPORT SERVICE **RESPONDENT**

and

CASE NO: 18101/16

In the matter between:

MABONGI FLORA-JUNIOR MPISANE **APPLICANT**

and

ZIKHULISE CLEANING MAINTENANCE AND TRANSPORT CC **FIRST RESPONDENT**

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **SECOND RESPONDENT**

JUDGMENT

COLLIS J

INTRODUCTION

[1] In the present application brought under case number 14886/16, the applicant (SARS) seeks the final winding up of the respondent (ZCMT) on the *return date*.

[2] In June 2019, the matter was argued before me where after judgment was reserved. Subsequently, during October 2019 ZCMT directed correspondence to my office requesting that judgment should be delayed to await the outcome of its tax appeal which had been enrolled for hearing during September 2019.

[3] Pursuant thereto and during January 2020 ZCMT thereafter brought a substantive application to file a further affidavit. The application was unopposed and subsequently granted by this court, after SARS had been afforded an indulgence to file a reply to the further affidavit.

[4] On the eve of the hearing of the application before this court during May 2019, ZCMT brought an application in terms of Uniform Rule 6(5)(d) (iii). The preliminary point it raised was premised on the provisions of section 347(5) of the Companies Act 71 of 2008 and it was opposed by SARS. This court upon hearing argument on the request deemed it prudent that the point should rather be considered as part of the main application so as to not frustrate the adjudication of the matter in its entirety. For the purposes of this judgment this will be a convenient point of departure.

BACKGROUND

[5] By way of background: ZCMT conducts business as a successful construction company in the KwaZulu Natal area, where it provides low-cost housing, schools and medical facilities for the Ethekweni Municipality and other local authorities in KwaZulu Natal. ZCMT competes for this business by way of public tender issued by the municipality, which tenders are regulated, *inter alia* by the municipality's supply chain management policy.[1] ZCMT's registered address as per the founding papers is cited as 21 The Broads, Mulbarton Johannesburg.[2]

[6] On 25 February 2016, SARS launched an urgent application for the winding-up of ZCMT.

[7] On 7 March 2016 after the liquidation application had been launched, a member of ZCMT brought an application to place it under supervision and to commence business

[1] Founding Affidavit para 11-12 Vol 1 p 10 Business Rescue Application Case 18101/16
[2] Founding Affidavit para 12-13 Vol 1 p 10 Liquidation Application Case 14886/16 and annexure "PE1"

rescue proceedings under case number 18101/16. On 12 June 2017, Ranchod J simultaneously heard the business rescue application, together with the liquidation application. On 22 August 2017, he dismissed the business rescue application.

[8] In accordance with section 131(4) of the Companies Act, Act 71 of 2008 he then granted the provisional winding-up of ZCMT.[3] The matter thereafter became opposed.

[9] As to the *onus* to be discharged by an applicant when it applies for the winding up of a respondent, it is important to note that at the stage of a provisional winding up order being granted that the applicant only needs to show *prima facie* that it is a creditor of the respondent. At the stage when a final winding up order is sought the *onus* resting on the applicant is to show on a balance of probabilities that the debt is not bona fide disputed on reasonable grounds. [4]

[10] In Kyle and Others v Maritz & Pieterse Incorporated 2002 (3) All SA 223 (T) at [13] Moseneke J (as he was then) considered the dispute of an applicant's claim in a liquidation application and found as follows:

> "Where the claim of the applicant is disputed the respondent bears the onus to establish the existence of a bona fide dispute on reasonable grounds. See

[3] Section 131(4) provides as follows:

'' After considering an application in terms of sub-section (1), the Court may-

(a) Make an order placing the company under supervision and commencing business rescue proceedings, if the Court is satisfied that-
  (i) The company is finally distressed;
  (ii) The company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation or contract, with respect to employment-related matters; or
  (iii) It is otherwise just and equitable to do so for financial reasons and there is a reasonable prospect of rescuing the company; or
(b) Dismissing the application together with any further necessary and appropriate order, including an order placing the company under liquidation."

[4] Orestisolve (Pty) Ltd t/a Essa Investments v NFDT Investment Holdings (Pty) Ltd 2015 (4) SA 429 (WCC) at para 7-13.

Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd 2000 (4) SA 598 (C) at 606. The dispute raised by the debtor company must be in good faith. It must be genuine and honest. The dispute so raised must of course be based on reasonable grounds. Therefore, a defence that is inherently improbable or patently false or dishonest would not qualify as a bona fide dispute:

> '(A) debt is not **bona fide** disputed simply because the respondent company says that it is disputed. A dispute must not only be **bona fide** or genuine but must be on good, reasonable or substantial grounds The expression "genuine dispute" connotes a plausible contention requiring some sort of consideration as serious question to be tried'." [5]

[11] In Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) Corbett JA explained the nature of the onus which rests upon the respondent in winding-up proceedings as follows:

> "In regard to **locus standi** as a creditor, it has been held, following certain English authority that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the Court will refuse the winding-up order. The **onus** on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on **bona fide** and reasonable grounds."

[5] See LAWSA Vol 4 Part 3 para 113 Joubert (ed)

[12] In the present application, SARS applies for the winding up of ZCMT on the following basis:

12.1 that it is a creditor of ZCMT as envisage in terms of section 346 of the Companies Act;

12.2 that ZCMT is factually and commercially insolvent; and

12.3. further that it would be just and equitable to wind-up ZCMT in terms of section 344(h) of the Companies Act.

SECTION 347(5) OF THE COMPANIES ACT, 1973

[13] In this regard the argument advanced by ZCMT is that when Ranchod J had placed it under provisional liquidation by exercising his discretion in terms of section 131(4), that a concursus creditorum commenced from the date of the grant of the provisional winding-up order in the business rescue application.[6]

[14] Furthermore, that in terms of section 347(5) of the Companies Act, 1973 a court is precluded from granting a final winding-up order in the case of a company which is already being wound up by an order of court within the Republic. The relevant section reads as follows:

"The Court shall not grant a final winding-up order in the case of a company or other body corporate which is already being wound up by order of Court within the Republic."

[15] Section 347(5) of the Companies Act, 1973 forms part of Chapter 14 thereof. In terms of Schedule 5 of the Companies Act, 71 of 2008, titled Transitional Arrangement,

[6] Respondents Notice of Application dated 9 May 2019.

section 9(1) thereof provides that there shall be continued application of the Companies Act, 1973 to winding-up and liquidations and despite the repeal of the Companies Act, 1973, Chapter 14 of that Act continues to apply with respect to winding-up and liquidation of companies under the Companies Act, 71 of 2008, as if the Companies Act, 1973 has not been repealed.

[16] As SARS had enrolled the liquidation application on the third court motion roll, there as such exists no basis to seek a final winding-up order in the liquidation application as ZCMT has already been placed under winding-up by a provisional winding-up order, which was granted in the business rescue application.

[17] As both the liquidation and business rescue applications are separate and distinct applications under separate case numbers, and albeit that both applications were considered by Ranchod J, the argument advanced, is that it is at best the business rescue application which should have been enrolled for a final winding-up of ZCMT and not the liquidation application itself.

[18] It is on this basis that ZCMT contends that the enrolment of the liquidation applications is tantamount to an abuse of court process and for this reasons it requested the court, if the court agrees with it, to exercise its powers in terms of section 347(1A) of the Companies Act, 1973 and award it compensation suffered in opposing the liquidation application.

[19] In opposition to the *point in limine* raised by ZCMT, SARS had advanced the following arguments:[7]

19.1 Firstly, that Ranchod J had placed the respondent under provisional winding-up, this after the both the business rescue application together with the liquidation application by agreement between the parties were enrolled before the court as a special motions and indeed considered by Ranchod J.

19.2 Furthermore, that when the order was granted it reflected the parties in both applications and that it came about after Ranchod J had given consideration not only to the founding affidavit in the business rescue application, but also after regard was given to the answering affidavit to the business rescue application, which answering affidavit had incorporated in it the entire liquidation application.

19.3 Upon the provisional liquidation order being granted, the said provisional order was thereafter extended several times by agreement between the parties, until it ultimately was enrolled in the third court.

19.4 What therefore is before the court is the return date of the provisional winding-up order wherein the applicant seeks confirmation of the order and the respondent a discharge of the order and not a separate new liquidation application as contended by the respondent. As such the applicant argues that the provisions of section 347(5) finds no applicability and that the *point in limine* raised falls to be dismissed with costs.

[20] Now it is common cause between the parties, that both the business rescue application together with the liquidation application served before Ranchod J when he

[7] Commissioner's Affidavit Opposing the Notice of Application dated 21 May 2019.

exercised his discretion and granted a provisional winding-up of ZCMT upon a dismissal of the business rescue application. It is further common cause that not only did Ranchod J have regard to the evidence set out in the founding affidavit filed in support of the business rescue application, but it follows that he must have had regard to the evidence set out by SARS in its answer in opposition to the said business rescue application. This I say so, as he would not have found that ZCMT was not capable of being placed under supervision and to commence business rescue proceedings if he had not considered the answer filed in opposition thereto.

[21] Ranchod J before exercising his discretion in terms of section 131(4)(b) had concluded that there was no merit in placing ZCMT under business rescue, and it for this reason that he dismissed the business rescue application.

[22] As such the argument advanced by ZCMT that SARS should have enrolled the business rescue application before the third court as a motion, cannot find favour as it would lead to the untenable situation, where an application previously dismissed is again enrolled for adjudication.

[23] As a consequence it therefore must follow, that Ranchod J by granting the provisional winding-up order to bring finality to this application, could only mean that the liquidation application ought to be enrolled in future for a court to either discharge or confirm the provisional winding-up order so made by Ranchod J.

[24] Of relevance also is that both the liquidation application as well as the business rescue application involves to a certain extent the same parties before this court. The

only difference being that in the liquidation application the Commissioner for the South African Revenue Service is the applicant whereas in the business rescue application it finds itself being cited as one the respondents, with the sole member of the respondent being cited as the applicant. This aspect is of relevance as the provisions of section 347(5) relied upon by ZCMT find applicability as I see it, where a third party other than the parties cited in the business rescue application or even in a liquidation application as is the position before this court, wishes to apply for the liquidation of an entity against whom a provisional order for winding-up has already been granted. This step so undertaken by a third party would then be impermissible as logically the process of provisional winding-up ought first to be concluded.

[25] This is not the scenario at play in the present application which this court was called upon to finally adjudicate. Before this court are the same parties involved in the present liquidation application and they were to a large extent the same parties involved in the previously adjudicated business rescue application.

[26] It therefore must follow, that the argument advanced that the liquidation application ought not be have been enrolled is devoid of any merit and consequently it cannot be argued that the liquidation application is tantamount to an abuse of court procedure or that it is malicious or vexatious.

[27] For the reasons set out to above, the *point in limine* must as a consequence fail. Similarly, it is for these reasons that it is dismissed with costs, inclusive of costs consequent upon the employment of three counsel.

CONSIDERATION OF THE LIQUIDATION APPLICATION

JURISDICTION

[28] Winding-up proceedings of close corporations by a Court are governed by the provisions of Part IX of the Close Corporations Act 69 of 1984, in part by Chapter XIV of the Companies Act 61 of 1973 and certain provisions of the Insolvency Act 24 of 1936 and finally the Companies Act 71 of 2008.

[29] Despite the repeal of section 68 of the Close Corporations Act, and the amendments to section 66 and 67 thereof, and the repeal of the Companies Act 61 of 1973, section 66(1) of the Close Corporations Act provides that the laws mentioned in Item 9 of Schedule 5 will apply to the winding-up and liquidation insolvent close corporations, until the date to be determined in terms of Item 9(4).

[30] Accordingly, for the purposes of winding-up, the Court having jurisdiction over the registered address of the close corporation, being the same address as its principal place or only place of business, has the requisite jurisdiction.

[31] In the present matter albeit that ZCMT has around 1 February 2017 and after the institution of the liquidation proceedings converted from a close corporation to a company, if one considers the certificate issued by the Registrar of Companies and Close Corporations dated 8 February 2016, I am satisfied that at the time of the commencement of the liquidation proceedings that this Court had the requisite

jurisdiction over ZCMT as its registered address is situated within this Court's jurisdiction.[8]

LOCUS STANDI OF THE APPLICANT

[32] Under the Act parties having *locus standi* who wishes apply for a company's winding-up may do so under specific grounds only.

[33] In the present instance, SARS alleges that it is a creditor of ZCMT in respect of tax debts and that it approaches this court in terms of section 177(3) of the Tax Administration Act.[9] It as such relies on two basis upon which it approaches this court for the liquidation of ZCMT.

[34] With reference to section 177(3) of the Tax Administration Act, SARS in its notice of motion has included a prayer wherein it seeks the Court's leave in terms of this section. In addition to this SARS alleges that its *locus standi* as a creditor of ZCMT is also premised on the provisions of section 346(1)(b) of the Companies Act, Act 61 of 1973.[10]

[35] Section 346 of the Company's Act provides as follows:

> "**Application for winding-up of a company.** -(1) An application to the Court for the winding up of a company may, subject to the provisions of the section, be made-
>
> (a)……;

[8] Founding Affidavit Business Rescue Application Vol 1 para 6 p 8 and Annexure 'MF1' together with electronic search conducted of the Company and Intellectual Property Commission- See annexure "PE1".
[9] Founding Affidavit Liquidation Application Vol 1 para 10 p 9; Tax Administration Act 28 of 2011
[10] Applicant's Heads of Argument para 27

(b) by one or more of its creditors (including contingent or prospective creditors);

(c) ……."

[36] Section 177 of the Tax Administration Act provides:

"**Institution of sequestration, liquidation or winding-up proceedings**. -(1) A senior SARS official my authorise the institution of proceedings for the sequestration, liquidation or winding-up of a person for outstanding tax debt.

(2) SARS may institute the proceedings whether or not the person-

(a) is present on the Republic; or

(b) has assets in the Republic.

(3) If the tax debt is subject to an objection or appeal under Chapter 9 or a further appeal against a decision by the tax court under section 129, the proceedings may only be instituted with leave of the court before which proceedings are brought."

[37] Now having regard to the answering affidavit, no express challenge is mounted by way of a denial that SARS is a creditor of ZCMT. As such there is no express denial to SARS' *locus standi* in pursuing this liquidation application in terms of section 346(1)(b) of the Company's Act.

[38] The challenge raised by ZCMT in respect of *locus standi* relates to the fact that SARS before it launched the liquidation proceedings failed to obtain leave from the Court as is envisage in terms of section 177(3) of the Tax Administration Act. In this

regard I take it that such leave should first have been obtained from Ranchod J before he exercised his discretion in terms of section 131(4)(b) of the Companies Act.

[39] From the judgment by Ranchod J, the learned Judge clearly deemed it necessary to determine the merits of the business rescue application and in so doing had exercised his unfettered discretion in terms of section 131(4)(b) of the Companies Act by placing ZCMT under provisional liquidation. Ranchod J, this Court must accept, exercised his discretion judicially by concluding that ZCMT should be placed under provisional liquidation and if it was not satisfied with this decision, it ought to have pursued an appeal of this decision before a higher court. This step ZCMT elected not to pursue to its finality.

[40] In my view, the type of leave envisaged that SARS must obtain in terms of section 177(3) of the Tax Administration Act, is not leave that ought to be sought separately from the liquidation application, but instead such leave is considered and if merited, it is to be granted by the Court that is adjudicating on the liquidation application.

[41] As mentioned, SARS as per its notice of motion had sought the necessary leave from this Court to institute these proceedings in terms of section 177(3) of the Tax Administration Act.

[42] As a starting point, the section does not prescribe how this leave should be applied for to the court. By way of an example the section is silent as to whether a separate and distinct substantive application should have been brought before the Court which

will ultimately decide on the liquidation application or as by the route elected by SARS, whether the inclusion of a mere prayer in the notice of motion will suffice.

[43] Be that as it may, a court requested to decide on whether to grant such leave or not, cannot determine this request without considering the entire evidence placed before it.

[44] To my mind the procedure envisaged is similar to a condonation application where the court determining such request will have to consider the merits of the affidavit for which condonation is being sought in order to make a determination as to whether the condonation itself should be granted or refused.

[45] If the Court when considering as to whether or not it should grant a request for leave or refuse it fails to have regard to the merits of the application itself, such Court will consider the request blindfolded, which is not what the legislature could have envisaged. Differently put, if there is no merit in the application to liquidate, it would simply serve no purpose to even begin to consider such a request.

[46] This court has previously considered the interpretation of section 177(3) in the reported judgment of the **Commissioner, South African Revenue Service v Miles Plant Hire (Pty) Ltd 2014 (3) SA 143 (GP)** per Van Niekerk AJ, and found at p148D-E as follows:

> "In short, in my view, the words 'the proceedings may only be instituted with the leave of the court before which the proceedings are brought' mean that the disputed tax debt is not recoverable under the 'pay now, argue later' rule during

winding-up proceedings, unless the court before which those proceedings serve permits it. Such an interpretation affirms the court's inherent discretion in winding-up proceedings, and empowers the court to evaluate all of the appropriate facts and circumstances — including the merits of any objection and pending appeal — and to make an appropriate order."

[47] The above decision was taken on appeal to the Supreme Court of Appeal as **Miles Plant Hire (Pty) Ltd v Commissioner for the South African Revenue Service - 2015 JDR 1023 (SCA)**. However, as is apparent from the court decision at p11 thereof, the SCA decided not to deal with Miles' prospects of success on appeal in relation to the interpretation of s 177 of the TAA. This was because the court found that the facts of that case showed flagrant breaches of the rules of the court without any acceptable explanation therefor and decided the case on that basis.

[48] I am fortified in my view also based on the abovementioned judgment. Therefore, argument by ZCMT that it is Ranchod J who should have considered the request for leave and not the court which is tasked to adjudicate the final liquidation application, simply cannot hold water.

[49] At the appropriate time in this judgment, I shall return to this point.

GROUNDS OF LIQUIDATION

[50] As section 68 of the Close Corporations Act has been repealed, an application can no longer be based on the grounds set out therein, and an applicant must rely on

the grounds set out in section 344 and 345 of the Companies Act 61 of 1973.[11] The deeming provisions of section 69 have however been retained, and it is assumed that reliance be placed thereon when an application is based on the provisions of section 344(f) of the Companies Act 61 of 1973.

[51] In this regard the applicant carries the *onus* to show the inability on the part of the corporation to pay its debt, which can be demonstrated in more than one way i.e.

51.1 that a demand for payment has not been met-section 344 (f) Companies Act 61 of 1973; it must be alleged that the applicant is a creditor for the sum of not less than R 100.00 then due and payable and that a demand requiring payment of the sum has been effected and that the company has for three weeks thereafter neglected to pay the sum or to secure or compound for to the reasonable satisfaction of the creditor.

51.2 a nulla bona return has been obtained in respect of the corporation- see section 344(f) Companies Act 61 of 1973, read with s 69 (1)(b) Close Corporation Act; and

51.3 it is proved that the corporation is unable to pay its debts- section 344(f) Companies Act 61 of 1973.[12]

51.4 it is just and equitable that the company be wound up-section 344(h) Companies Act 61 of 1973.

[52] As per the founding affidavit, SARS sets out that as at 1 February 2016, that ZCMT was indebted to SARS in an amount of excess of R 122 million, of which about

[11] FirstRand Bank Ltd v Lodhi 5 Properties Investment CC 2013 (3) SA 212 (GNP) at [35].
[12] Van Zyl v Look Good Clothing CC 1996 (3) SA 523(SE) at 530B-G.

R 50 million is undisputed by the respondent. Furthermore, that SARS has made attempts to collect this indebtedness but that these attempts have been frustrated by ZCMT in that it has commence steps to dissipate its assets and more specifically by channelling debts due to it to third parties by way of cession.[13]

[53] In paragraph 18 of its founding affidavit SARS in greater detail sets out the extent of ZCMT's outstanding tax liabilities. More specifically SARS sets out:

> 53.1 the disputed tax indebtedness which is subject to an appeal noted in terms of section 107 of the Tax Administration Act-See paragraph 18.3 of the founding affidavit;
>
> 53.2 The debt in respect of tax indebtedness in respect of VAT relating to the 2014 year of assessment, in respect of which the taxpayer still has an opportunity to raise an objection. In this regard an assessment has been raised of R 19 853 402.75-See paragraph 18.4 of the founding affidavit and paragraph 102;
>
> 53.3 the undisputed tax indebtedness (either based on the respondent's own returns or where no objection to an assessment has been filed)- See paragraphs 81.1, 18.2, 18.5 and 18.6 of the founding affidavit.

[54] In relation to ZCMT's tax indebtedness for the 2014 year of assessment at the time when the Replying Affidavit was deposed to, it is alleged that ZCMT had failed to object to the assessment raised and as such the assessment became final and conclusive in terms of section 100 of the Tax Administration Act.

[13] Founding affidavit Liquidation application Vol 1 para 11 p 9.

[55] Specifically, and as per the Founding Affidavit SARS sets out that during 2013, it commenced with an audit for the 2008-2012 years of assessment regarding ZCMT's income tax, STC, Dividends Tax and PAYE this after ZCMT contracted the services of PricewaterhouseCoopers ('PwC') to assist SARS with a forensic analysis of documentation presented to its officials when a field audit was conducted by them. Based on this assessment, ZCMT was assessed which resulted in a total indebtedness of R41 024 224.28 as at 1 February 2016.[14]

[56] In paragraph 64 SARS makes further allegations that although ZCMT submitted ADR1 forms in respect of all the assessments raised, having regard to the letter of objection setting out the grounds of the objection against each of the assessments raised, it is evident that only the income tax and VAT assessments are disputed as well as the imposition of understatement penalties and interest. The PAYE and STC raised remained undisputed (save for the imposition of understatement penalties and interest) and are final and conclusive in terms of section 100 of the Tax Administrative Act. As such SARS contends that the undisputed outstanding indebtedness for the period in question due in terms of the assessments raised is an amount of R 15 470 627.84 as at 1 February 2016.[15]

[57] As to ZCMT's undisputed indebtedness and in answer to the above allegations it denied that its total indebtedness to SARS amounts to R 122 million. In the business rescue proceedings, it had admitted to an undisputed total indebtedness to SARS in the amount of "approximately R 40 million" and where all payments made by it was

[14] Founding affidavit Liquidation application Vol 1 para 40 & 58 p 23.
[15] Founding affidavit Liquidation Application Vol 1 para 64 & 65 p 19.

properly taken into account and reconciled it contended that its undisputed amount only amounts to R 7 483 444.20. [16] In respect of this amount ZCMT further contends that the KwaDukuza Municipality currently holds a retention amount of R 7 6000 000.81 on behalf of ZCMT and that in fact the applicant has demanded that the municipality pay this amount to it in the form of a Notice of Third Party Appointment but that this could not take place in the absence of a valid tax clearance certificate being issued to ZCMT. If SARS was to issue it with a valid tax clearance certificate albeit for the period to affect payment of the retention money to be paid to it, that this will result in the undisputed tax amount of tax to be paid to SARS.[17]

[58] Based on the above, ZCMT further contends that if this was to occur, that it would then be in a position to request a suspension of the payment of the disputed tax amount in terms of the provisions of Section 167 of the Tax Administration Act, the effect of which will result in the postponement of the disputed tax liability.[18]

[59] Therefore, the main defences raised by ZCMT as per the Answering Affidavit are that:

59.1 the respondent's undisputed indebtedness to SARS is an amount of only R 7 483 444.20;

59.2 that their disputed portion of the tax debt amounting to R 110 633 183.50 is subject to a tax appeal; and

[16] Answering affidavit Liquidation Application Vol 11 para 16 & 17 p 997.
[17] Answering affidavit Liquidation Application Vol 11 para 35-40 p 1003 & Joint Liquidators First Progress Report Vol 11 p 1090.
[18] Answering affidavit Liquidation Application Vol 11 para 39 p 1004.

59.3 that SARS has not complied with the requirements of section 177(3) of the Tax Administration Act.[19]

ANALYSIS

[60] As to ZCMT's **undisputed tax indebtedness** to SARS in the amount of R 7 483 444.20 and with reference to the answering affidavit, ZCMT provides no basis on which it alleges that this amount is due in respect of its undisputed indebtedness.[20] This much is confirmed by SARS in its replying affidavit and SARS further denied that ZCMT's undisputed tax indebtedness only amounts to R 7 483 444.20. In fact, SARS contends that ZCMT's undisputed tax liability is far in access of the tax liability forming the subject of the tax appeal.[21]

[61] As mentioned earlier in the judgment ZCMT after the matter had been argued before me, applied to this court for leave to file a further affidavit, this after the tax appeal had been finalised in respect of the disputed portion of the tax debt.

[62] As per this further affidavit, ZCMT sets out that it would **not** be in the interest of justice if it is to be liquidated in circumstances where following the tax appeal it has now been established that SARS' assessments for 2008-2012 were wrong and significantly overstated, whilst the assessments for the subsequent years are still in dispute.

[19] Replying affidavit Liquidation application Vol 12 para 6 p 1126.
[20] Answering Affidavit Vol 11 para 34 p 1003.
[21] Replying Affidavit para 89 & 95 p 1153.

[63] In respect of the **2008-2012** tax years and in amplification of the above as per this further affidavit[22] ZCMT sets out that before the Tax Court and by agreement between the parties, it was established that there has been an overpayment of tax by ZCMT in respect of income tax. It further alleges that in respect of VAT and PAYE for the period in question a refund is in fact due to it in the amount of approximately R 32 million and that no tax liability exists.

[64] In response to these assertions, SARS in an affidavit filed on 12 February 2020, denies that as a result of settlement reached before the Tax Court and the objection pertaining to the 2014 income tax assessment that there no longer exists a substantial tax debt due by the respondent.[23]

[65] In amplification of the above, SARS specifically sets out that as at date of the provisional order being granted and having recalculated and reallocated the payments made with specific reference to the settlement reached in the Tax Court that the total tax indebtedness of ZCMT reflected a total calculation in the amount of R 64 939 812.07 [24] and that this amount does not include any understatement penalties or section 89*quat* interest of assessments that formed the subject matter of the appeal.

[66] In respect of the **objection to the 2014** Income Tax Assessment, it is denied that this objection has any merit, but even if it was it will only result in that ZCMT would be in a refund position of R 20 897 497.03.[25]

[22] Further Affidavit Liquidation application Vol 20 para 33 p 2361.
[23] Replying Affidavit to Respondent's Further Affidavit in terms of Court order dated 22 January 2020. See Volume 23 para 7-46 p 2580-2594.
[24] Replying Affidavit to Respondent's Further Affidavit Vol 23 para 47 p 2595.
[25] Replying Affidavit to Respondent's Further Affidavit dated in terms of Court order dated 22 January 2020 para 49 & 50.5 Vol 23 p 2597.

[67] As such SARS contends that as at date of the provisional order having been granted and even taking into account the settlement reached between the parties and the 2014 additional income tax assessments that it remains a creditor of ZCMT.

[68] In answer to the above, ZCMT denies that if 100% successful, with the 2014 objection that the refund due to it will only amount to R 20 897 497.03 but instead asserts that its refund due would be approximately R 40 million. It further asserts that it would serve no purpose in addressing the merits of the 2014 objection as this will in due course be decided in the Tax Court as it intends lodging a notice of appeal.[26]

[69] It is noteworthy that once again ZCMT without substantiation makes the bold assertion that in the event of being 100% successful with its 2014 objection that the refund due to it will be approximately R 40 million. It further makes the assertion that as such this court should conclude that based on this basis that the 2014 assessment is bona fide disputed by it.

[70] This court in the absence of proof cannot by mere bold and unsubstantiated assertions draw a conclusion that in fact the refund due to ZCMT in respect of the 2014 Income Tax Assessment is approximately R 40 million instead of R 20 897 497.03. In addition to the above, albeit that ZCMT alleges that it intends lodging an appeal to the outcome of the 2014 objection, to date this court has not been furnished with proof that indeed such appeal has been pursued.

[26] Respondent's Further Replying Affidavit para 14-16 p 2852.

[71] In the absence thereof, I must therefore accept that the refund due to the respondent is an amount of R 20 897 497.03 and that this amount would not be sufficient to expunge ZCMT's tax liability in its entirety.

FACTUALLY AND COMMERCIALLY INSOLVENT

[72] As previously mentioned, it is common cause between the parties that ZCMT had stopped trading at the end of October 2015.[27] This was also confirmed in the joint liquidators first report.[28]

[73] As per the founding affidavit, SARS also contends that ZCMT is also commercially insolvent. In amplification of this assertion, SARS alleges that ZCMT during or about November 2014, caused PAYE and VAT returns to be submitted, wherein it declared certain taxes due, but failed to effect payment in respect thereof.[29] In addition to the above, and having regard to the breakdown provided by SARS, it alleges that ZCMT has a further undisputed indebtedness to SARS on its own declarations in returns submitted in the amount of R 17 511 846.52.[30]

[74] To the above allegation of being commercially insolvent, ZCMT is silent. In its Answering Affidavit, this allegation is not disputed, nor was any response proffered.

[27] Answering Affidavit Liquidation Application Vol 11 para 45 p 1005.
[28] Joint Liquidators First Report para 18 p 1079.
[29] Founding Affidavit Liquidation Application Vol 1 para 71 p 27.
[30] Founding Affidavit Liquidation Application Vol 1 para 77 p 30.

[75] In addition to the above, SARS also in its answering affidavit to the business rescue application alleged that ZCMT is not financially distressed, but that it is factually and commercially insolvent.[31]

[76] In reply to the above, ZCMT replied that it will not be commercially insolvent in the event of it being placed under business rescue in light of the tenders which it has won.[32] Significant with this reply, is that ZCMT did not expressly deny the allegation made by SARS in the business rescue application that it is factually insolvent.

[77] In any event, what we now know, is that this Court, by order of Ranchod J, already had ruled against ZCMT being found financially distressed and unable to be rescued and it proceeded to placed it under provisional liquidation.

[78] As to ZCMT being factually insolvent, SARS alleges that ZCMT's disclosed liabilities exceed its disclosed assets.[33]

[79] If one has regard to the reply provided by ZCMT in its Answering Affidavit, in relation to its assets, the allegation is made that ZCMT's fixed and current assets is approximately R 20 million and in addition to this should be added its retention money being withheld by the KwaDukuza Municipality in the amount of R 7 600 000.00 and the Department of KZN Works in the amount of R 7 906 181.05.[34]

[31] Answering Affidavit Business Rescue Application Vol 7 para 113 p 616.
[32] Applicant's Replying affidavit in the Business Rescue Application Vol 8 para 27 p 751.
[33] Founding Affidavit Liquidation Application Vol 1 para 169-173 p 63-65.
[34] Answering Affidavit Liquidation Application Vol 11 para 48 p 1007.

[80] If one, however, has regard to the cession agreement annexed to the liquidation application it is clear that the retention monies held by the KwaDukuza Municipality was in fact ceded and assigned to BANZETT CC and as such it is no longer due to ZCMT. As to the amount due to her by the KZN Municipality, with reference to annexure G to her answering affidavit, the retention money due to her is an amount of only R 939 703.97 and not an amount of R 7.9 million as contended for by her.[35]

[81] Premised on the above, the inescapable conclusion to be drawn is that ZCMT in fact is both factually and commercially insolvent.

JUST AND EQUITABLE

[82] As per the Founding Affidavit and specifically paragraph 180 thereof, SARS sets out that it would also be just and equitable to have ZCMT liquidated as envisaged in section 344(h) of the Companies Act.

[83] In amplification of the above, SARS specifically sets out that ZCMT over an extended period of time failed to comply with its tax obligations, both in regard to the submission of complete and accurate returns and in regard to payment of taxes due.

[84] Furthermore, that ZCMT has failed to demonstrate good faith in respect of its admitted and undisputed tax liabilities, by *inter alia*:

84.1 repeatedly seeking extensions of time while failing to make payments in reduction thereof in the interim;

[35] Answering Affidavit Liquidation Application Vol 11 p 1053.

84.2 allegedly stop trading at the business address, whilst without advising SARS thereof;

84.3 ceding outstanding funds payable to it in respect of work completed, to another creditor, to the detriment of its creditors, amongst others the applicant; and

84.4 submitting returns, but failing to make payment of the accompanying liability due to the applicant.

[85] In addition to the above, SARS alleges that ZCMT continues to receive and disburse its income for the benefit of its member without discharging or making adequate provision for payment of its taxes and thereby increasing the risk that the tax debt will be irrecoverable.

[86] Furthermore, that albeit that ZCMT had ceased to conduct its business in 2015, and that it has been unable to procure or engage in further business in the construction industry as a result of not being in possession of a current valid tax clearance certificate, it is not however entitled to be issued with a tax clearance certificate as it is in default with its obligations towards SARS.

[87] Lastly, after SARS obtained judgment against ZCMT, ZCMT proceeded to the detriment of SARS and other creditors to enter into cession agreements with a single creditor in terms whereof the full income stream relating to two projects was ceded to such creditor.

[88] In its Answering Affidavit, ZCMT does not expressly deny that it will not also be just and equitable to wound it up as contended by SARS. In fact, ZCMT fails to deal *ad seriatum* with the allegations specifically alleged in paragraph 180 of the Founding Affidavit.

[89] Counsel for SARS referred this court to the decision Weare and Another v Ndebele NO and Others 2009 (1) SA 600 (CC) at [42], where the Constitutional Court defined the test for 'just and equitable' as follows:

> "A decision as to what is just and equitable involves a balancing of the interest of the individuals affected with the interest of good governance and the smooth administration of justice."

[90] In addition to the above, this court was also referred to the decision of Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd,[36] where Wunsh J considered the circumstances under which a company may be liquidated on the grounds of "just and equitable". In this said judgment Wunsh J referred with approval to the judgment of O' Donovan J in Sweet v Finbain[37] where it was found that:

> "With deference to counsel for the respondent and the argument so skilfully presented, I do not consider that the principles stated are inflexible or indeed applicable in the present case. A winding-up order made on just and equitable grounds, Trollip J stated in Moosa NO v Mavjee Bhawan (Pty) Ltd and Another 1967 (3) SA 131 (T) at 136H, postulates not fact but a broad conclusion of law,

[36] [1999] 2 All SA 268 (W).
[37] 1984 (3) SA 441 (W) at 444H -445A.

justice and equity. The ground is to be widely construed; it confers a wide discretion and is not to be interpreted so as to exclude matters which are not **eius dem generis** with the other grounds specified in section 344. The fact that the Courts have evolved certain principles as guides in particular cases or examples of situations where the discretion to grant a winding-up order will be exercised, does not require or entitle the Court to cut down the generality of the words just and equitable".

[91] In support of this test, the argument placed before this court by counsel for SARS is that the business of ZCMT consists of construction work undertaken in terms of public tenders and contracts concluded with various Government Departments and Municipalities. Furthermore, that these public works are funded by the *fiscus* from taxes recovered. It is on this basis that counsel had argued that ZCMT cannot claim entitlement to be awarded tenders but not pay taxes due, resulting from income derived from these contracts as this would be contrary to all principles of fairness, good governance, the law and our Constitution.

[92] In respect of this ground ZCMT in turn referred this Court to the decision of Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W) at 350 where five broad categories of circumstances were set out under which a court will consider granting a winding-up order on a just and equitable ground. As mentioned in the Moosa judgment, supra, the ground is to be widely construed and it is not to be interpreted to exclude matters which are not specified in section 344.

[93] Having regard to the absence of any rebuttal evidence on point and in exercising this Court's wide judicial discretion, I cannot but conclude that it will also be just and equitable for ZCMT to be liquidated.

[94] Given the conspectus of evidence being placed before this Court, I cannot but find that SARS applicant has discharged its onus to be granted leave in terms of section 177(3) of the Tax Administration Act and accordingly it is granted such leave by this Court.

FORMAL STATUTORY REQUIREMENTS

[95] As per the order granted by Ranchod J the learned Judge ordered the provisional order to be served on ZCMT, its employees any trade unions and the Master of the High Court.

[96] In addition to the above, the Court also ordered publication of the provisional order in the Sunday Times as well as the Rapport newspapers.

[97] As per the Founding Affidavit SARS specifically addressed the formal requirements. In this regard it specifically sets out that it holds no security for payment of the amounts owing by ZCMT.[38]

[98] Furthermore, that it will ensure compliance with section 346(3), section 346(4A) (a) and section 346(4A) (b) of the Old Companies Act.

[38] Founding Affidavit Liquidation Application Vol 1 para 183 p 77.

[99] Having regard to the above, this Court is satisfied that there has been compliance with the statutory requirements in terms of the Old Companies Act.

ORDER

[100] In the result the following order is made:

100.1 The applicant is granted leave in terms of section 177 (3) of the Tax Administration Act, Act 28 of 2011 to institute these proceedings.

100.2 The *point in limine* raised by the respondent in terms of section 347(5) of the Companies Act 1973, is dismissed with costs, including the costs consequent upon the employment of three counsel.

100.3 The *rule nisi* issued by Ranchod J on 22 August 2019 is hereby confirmed and the respondent is placed under final winding-up.

100.4 The respondent is ordered to pay the costs of the application, including the costs of three counsel.

C.J. COLLIS
JUDGE OF THE HIGH COURT

Appearances

Date of Hearing	: 10 June 2019 and 28 February 2020
Date of Judgment	: 14 October 2020
Counsel for the Applicant	: Adv. E.M Coetzee SC; Adv C Naude and Adv K. Ramaimela
Attorney for the Applicant	: MACROBERT Attorneys
Counsel for the Respondent	: Adv. S.K. Dayal SC and Adv C. Louw SC
Attorney for the Respondent	: FABER GOERTZ ELLIS AUSTEN INC

Judgment transmitted electronically.