A their acts, found by me to constitute *injuriae,* were "in respect of anything done" in pursuance of the Police Act 7 of 1958; or it might conclude that it was in fact objectively impossible for the plaintiff to have instituted action within the time permitted by the Act. I have given thought to the propriety and implications of granting partial leave to appeal. In my view B the wording of s 20 (5) (*a*) of the Supreme Court Act permits of the grant of leave in a proper case to appeal against part of a judgment. The section provides:

> "Any leave required in terms of ss (4) for an appeal against a judgment or order of a Court given on appeal to it may be granted subject to such conditions as the Court concerned, or the Appellate Division, according to whether leave is granted by that Court or the Appellate Division, may determine, and such C conditions may include a condition that the applicant shall pay the costs of the appeal."

As to whether this is a proper case for the compartmentalisation of the appeal in the manner indicated, I believe that there should be no difficulty in separating relevant from irrelevant material. The starting point will of D course be my finding that the defendants concerned committed an *injuria* in the manner and at the time and place indicated in my judgment. The factual issues will centre around the question of the *bona fides* or lack thereof of the defendants concerned and on the question whether it was possible for the plaintiff to have sued in time. Only part of the record need be studied by the Court of appeal. Only a small part of the voluminous E exhibits need become part of the appeal record. The parties should be able to agree on what need be included in the appeal record and what could be excluded. The issues are in my view fairly crisp and there should be no difficulty in identifying that much of the record which becomes necessary for the consideration of the appeal.

That brings me to the matter of costs.

F [The learned Judge dealt with this aspect, concluding as follows.]

I make the following order:

1. I grant leave to appeal against para A.2 of my order.
2. I do not, in terms of s 20 (2) (*a*) of Act 59 of 1959, direct that the appeal should be heard by the Full Bench of this Division.
3. G I direct that the applicant (plaintiff) is to provide security for the costs of the appeal to the Appellate Division in an amount laid down by the Registrar of the Appellate Division.
4. Save as set out above the application for leave to appeal is refused.
5. As regards the seventh, eighth, ninth and tenth defendants, the H applicant is to pay their costs of opposition. As regards the remaining defendants, the costs of this application shall be costs in the appeal. For purposes of taxation it must be assumed that it was reasonable to have retained two counsel only.

Applicant's Attorneys: *Webber, Wentzel & Co.* Respondents' Attor- I ney: *State Attorney.*

RAND AIR (PTY) LTD v RAY BESTER INVESTMENTS (PTY) LTD A

(WITWATERSRAND LOCAL DIVISION)

1984 *December* 11, 14 COETZEE J B

Company—Winding up—Application for on grounds of inability to pay debts as intended in s 344 (f) read with s 345 (1) (a) *of Act 61 of 1973 —Service of summons upon respondent company not sufficing as a "demand requiring the company to pay the sum so due" called for in* C *s 345 (1)* (a) *(i).*

Company—Winding up—Application for in terms of s 344 (h) *of Act 61 of 1973—Courts have established five broad categories for winding up on the "just and equitable" ground—Such categories, which are independent of the preceding grounds listed in s 344, not constituting a* D numerus clausus, *but further additions thereto unlikely—The "just and equitable" ground is not some "catch-all" ground for winding up a company .*

In an application for the winding up of a company on the grounds of inability to pay its debts as intended in s 344 (*f*) as read with s 345 (1) (*a*) of the E Companies Act 61 of 1973, the service of summons upon the respondent company cannot be equated with the service of a "demand requiring the company to pay the sum so due" called for in s 345 (1) (*a*) (i) and will not suffice as such.

Since the time that the grounds for winding up which now appear in s 344 of the Companies Act were introduced, the "just and equitable" basis referred to F in s 344 (*h*) has become a rather special ground under which only certain features of the way in which a company is being run can be questioned. It is an independent ground for winding up and it is no longer necessary that the circumstances should be analogous to those which justify an order on one or more of the specific grounds preceding it in s 344; consequently new kinds of cases may be brought under this head by judicial interpretation. However, five broad categories of cases may be isolated under the "just and equitable" G ground: (1) disappearance of the company's *substratum*; (2) illegality of the objects of the company and fraud in connection therewith; (3) a deadlock in the management of the company's affairs which can only be resolved by winding it up; (4) grounds analogous to those for the dissolution of partnerships and (5) oppression. While these categories do not constitute any kind of *numerus clausus,* the Courts have, for a number of decades, not found H it necessary to devise further categories and it is difficult to think of anything else which might fall into the existing *genus* of categories. The "just and equitable" ground is not some "catch-all" ground for winding up a company.

Application for a winding up order. The facts appear from the reasons for judgment. I

S E Marcus for the applicant.

No appearance for the respondent.

Cur adv vult.

Postea (December 14). J

A COETZEE J: This is an application for the winding up of the respondent company. When the matter was called I raised certain difficulties with counsel regarding the validity of the grounds for liquidation on which the applicant relies.

The respondent is alleged to be indebted to the applicant in the sum of B R13 893,24 in respect of the hire by the respondent of certain plant and equipment up to October 1984.

The first basis on which the applicant seeks to obtain the winding up order is rather unusual. It is alleged that the respondent is unable to pay its debts "in terms of s 344 (*f*) of the Companies Act, read with C s 345 (1) (*a*) of the Companies Act". The inability to pay referred to in s 345 (1) (*a*) of the Act is the one if, after a demand having been served on the company by leaving the same at its registered office, requiring it to pay the sum so due, it fails for three weeks thereafter to pay, secure or compound for it to the reasonable satisfaction of the creditor.

D The demand relied on *in casu* is not a letter or anything of the kind, but a summons commencing action, which was served on the respondent for the recovery of the alleged debt in respect of the hire of the equipment. The failure of respondent for a period of more than three weeks thereafter to pay that sum is then relied upon, the summons and its service being equated to the demand referred to in s 345 (1) (*a*).

E I suppose it can be thought that a summons, being what is also described as a judicial *interpellatio,* is such a form of demand and that failure to respond to it by way of payment in the case of a claim sounding in money falls within the purview of s 345 (1) (*a*). It is true that for the purpose of calculating *mora* interest and determining whether a person is F in *mora,* summons is regarded as an *interpellatio.* Whether it should for all purposes or specifically for the purpose of this section of the Companies Act be so regarded, is another matter. There are two approaches to this question.

Firstly, whether the summons can be regarded at all as "a *demand* G requiring the company *to pay* the sum so due". (My italics.) Summons in the Supreme Court is an initiating process which is not directed at the defendant. It is in fact addressed to the Sheriff or his deputy. The summons *in casu* reads that the Sheriff or his deputy is ordered *to inform* the defendant, that the plaintiff

H "... hereby institutes action against it in which action the plaintiff claims the relief and on the grounds set out in the particulars annexed hereto. Inform the defendant further that if it disputes the claim and wishes to defend the action, it shall:

(i) within 10 days of the service upon it of this summons, file with the Registrar of this Court notice of its intention to defend and serve I a copy thereof on the plaintiff's attorney, which notice shall give an address for the service upon the defendant of all notices and documents in the action;

(ii) thereafter, and within 21 days after filing and serving notice of intention to defend as aforesaid, file with the Registrar and serve upon the plaintiff a plea, exception, notice to strike out, with or J without the counterclaim. Inform the defendant further that if it

fails to file and serve notice as aforesaid, judgment as claimed may A be given against it without further notice to it, or if, having filed and served such notice, it fails to plead, except, make application to strike out or counterclaim, judgment may be given against it. And immediately thereafter serve on the defendant a copy of this summons and return the same to the Registrar with whatsoever B you have done thereupon."

It is signed by the Registrar of the Supreme Court.

I am not persuaded that summons can for the purposes of this section be a demand. It is as I have pointed out, not directed at or addressed to a defendant at all, and there is no demand of any sort that it is required to pay a sum therein alleged to be due. It really is a *command,* to the C Sheriff, to inform the defendant of certain facts. The most important are that an action has been instituted against the defendant in which certain relief is claimed on certain grounds set out in the particulars annexed to the summons and how it should act if it is to stave off default judgment. It does not comply with the requirements of the section for two reasons: D (*a*) it is not, literally, a demand and (*b*) it does not require a defendant "to pay". The section ought to be strictly construed.

Secondly (and possibly even a better reason for not holding that a summons qualifies as a demand for purposes of this section), one should read the section as a whole in its proper setting in the Act and thus E determine what the intention of the Legislature must have been in enacting this provision. It is important to note that there are three bases upon which a company is deemed to be unable to pay its debts. The demand to satisfy the debt and failure to pay for three weeks or longer, is the first. But the presence of the second one, I believe, is important in deciding that the Legislature could not possibly have intended to render F a mere judicial *interpellatio* of this nature a demand within the meaning of ss (*a*). It reads as follows:

"(*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 messenger with an endorsement that he has not found sufficient disposable property to satisfy G the judgment, decree or order or that any disposable property found did not upon sale satisfy such process."

If the mere service of a summons and failure to pay were sufficient to deem a company unable to pay its debts, it is to my mind perfectly pointless to provide the second ground which postulates that there had been such service of a summons and that the matter had in fact proceeded H to judgment; not only proceeded to judgment, but that thereafter a warrant of execution was issued and what is usually referred to as a *nulla bona* return rendered by the sheriff. This ground would then be completely tautologous and unnecessary. In every such case, the mere service of the summons would be sufficient and nothing further need be I done. I do not think that the section ought to be interpreted in such a fashion as to make this ground superfluous. This is a time-honoured act of insolvency, namely the failure to point out to a sheriff, when the warrant of execution is served, sufficient property or assets with which to satisfy the judgment. It is rather the failure to satisfy a judgment properly obtained which is the real indication of inability to pay, not failure to pay after the mere institution of action. J

If it were otherwise, it would also mean that a summons need merely be served and that thereafter no further steps need be taken by the plaintiff even after the entry of appearance, because even if appearance is entered, the summons remains a so-called demand that was served on the company. Once action is instituted, a company can face every time, three weeks after service, liquidation proceedings on the basis that the summons was served and that it did not pay. This result contradicts the notion and purpose of summons as a form of process for institution of an action, which is all that it is in modern practice. The fact that it can also serve as a judicial *interpellatio* for purpose of establishing that the defendant is in *mora*, should not detract from this conclusion.

I should also touch in passing again on the words used in s 345 (*a*), which do not require service either in the way which that word is defined in the Companies Act or in the Rules of Court, but in a specific fashion, that is ". . . by leaving the same at its registered office". This unqualified injunction describing a particular method of service is also a pointer. This, as I decided in *Phase Electric Co (Pty) Ltd* v *Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W), means that only service in that fashion will do for the purposes of making this subsection applicable and that the other kinds of service referred to in the Act cannot be resorted to. There is some veiled criticism of this in Henochsberg *On The Companies Act* 3rd ed at 72. The editors seem to appreciate the basis of that judgment, namely the specific provision in s 345, laying down exactly how service has to take place, specifically *by leaving the same at its registered office*. They do seem to suggest, however, that s 71 of the Companies Act, which provides that any notice, order or any document which is required to be served upon any company, may be served by delivering it at or sending it by registered post to the registered office or postal address of the company, nevertheless applies. They go on to say:

"The learned Judge does not seem to have been referred to the provisions of s 7 of the Interpretation Act, as the first demand in that case was not addressed to the company's registered office and the second one was proved never to have been left there."

It is not a case of not having been referred to the provisions of s 7 of the Interpretation Act. I was well aware of them. I think the editors have not realised that the Interpretation Act, s 7 included, only applies when the particular legislation which falls for interpretation does not in virtue of the context in which words and expressions are used or defined mean anything different. That is the very basis of the *Phase Electric* case, namely that this section, which specifically describes what, for the purposes of this requirement, constitutes service, cannot include any other kind of service as defined either elsewhere in this Act or in the Interpretation Act.

I conclude, therefore, that the service of the summons and failure to pay is not a sufficient ground for liquidation. The matter, however, does not end there because a second ground is relied on. That is that ". . . it is just and equitable that the respondent be placed under a winding up order in terms of s 344 (*h*) of the Act" and furthermore that ". . . the respondent is commercially, if not factually, insolvent."

As far as the just and equitable ground is concerned, this is said by the applicant:

"9. The applicant further humbly submits that it would be just and equitable to the general body of the creditors of the respondent for a liquidator, duly appointed by the Master of this honourable Court, to take charge of the respondent's affairs to negotiate with any interested party regarding the submission of an offer and/or the availability of interim finance, alternatively to cause the respondent's assets to be realised in the best possible manner in the interests of the general body of the respondent's creditors the proceeds of such realisation to be dealt with in accordance with the proper order of preference.

10. The applicant believes that it will be just and equitable to the general body of creditors of the respondent for the respondent to be wound up as soon as possible, in that; in the absence of the grant of such an order, any creditor who obtains judgment against the respondent and who causes its assets to be located and attached, thereafter to be sold in execution, would benefit therefrom to the exclusion and detriment of those creditors who do not participate in the proceeds of such sales. This would in addition result in accumulation of costs.

11. A liquidator duly appointed by the Master of this honourable Court would furthermore make impartial enquiry and investigation into the existence of assets, liabilities, and/or preferences of which the applicant and other creditors of the respondent may be unaware and might take such steps as he deemed expedient to protect and preserve the rights of the general body of creditors."

These three paragraphs which I have quoted are almost standard paragraphs in applications of this kind which come in large numbers before this Court. At times one finds an expansion of the themes which are expressed therein, so substantially that this aspect sometimes runs to eight, nine or ten pages. They only contribute to the bulk and weight of the applications — and of course to the costs. I have often wondered why these paragraphs are so frequently inserted in these applications. Is it force of habit? Or is it due to ignorance? Possibly, in some cases, to inflate the bills which are taxed subsequently, something which cannot be said of the present application, because these matters are succinctly stated in only three paragraphs. I think it is probably due to lack of proper appreciation of what this ground, which appears in s 344 (*h*) of the Companies Act, really means and of its purpose. It is not some kind of "catch-all" ground. It used to be but is now very far from that.

This particular ground has a long history and it appears as a "circumstance" in Companies Acts in England in the middle of the last century, in which a company may be wound up by a Court. At that stage the English Courts used this "circumstance" also as a basis for winding up in cases of inability to pay or some form of commercial insolvency. It is unnecessary to refer to these Acts more particularly. There came a time towards the end of the last century that the ground of inability to pay debts, as it now appears in all these Companies Acts, and the others, were first introduced. Since the time that the grounds which now appear in s 344 and which have appeared in all the predecessors of the 1973 Act were introduced, the "just and equitable" basis is rather a special ground under which only certain features of the way in which a company is being run or conducted can be questioned to the point of requesting the Court to wind it up.

The type of case in which it would apply is very adequately described by Pennington in *Company Law* 4th ed at 691 *et seq*. The learned author points out that this is an independent and separate ground for a winding

A up order and that it is no longer, as it used to be, necessary that the circumstances should be analogous to those which justify an order on one or more of the specific grounds which precede this one; that consequently new kinds of cases may be brought under this head by judicial interpretation, but the cases which have so far been decided, the author points B out, in England, and that is also the position in South Africa, have fallen into only five broad categories. It should be emphasized that these categories may be extended by the Courts in the future, but more about that later. Only a very broad description of these categories is called for. They are the following.

C The first is the disappearance of the company's *substratum*. Where the company was formed for a particular purpose for instance, and that purpose can no longer be achieved at all, its *raison d'être*, its *substratum* has gone and it may be fair and equitable to the incorporators under those circumstances to wind it up. There are a variety of circumstances which can possibly lead to the disappearance of a company's *substratum*.

D Secondly, illegality of the objects of the company and fraud committed in connection therewith. If a company is promoted in order to perpetrate a serious fraud or deception on the persons who are invited to subscribe for its shares, it is the kind of case in which the persons who are defrauded in that fashion can take the promoters to Court and, provided the E circumstances demand that, ask that the company be wound up.

The third is that of deadlock which results in the management of companies' affairs, because the voting power at board and general meeting level is so divided between dissenting groups that there is no way of resolving the deadlock other than by making a winding up order. The F kind of case which falls most frequently to be dealt with under this heading is the one where there are only two directors or only two shareholders, usually in a private company, who hold equal voting shares or rights and have irreconcilably fallen out.

Fourthly, grounds analogous to those for the dissolution of partnerships. Where the company is a private one and its share capital is held G wholly or mainly by the directors and it is in substance a partnership in corporate form, the Court will order its winding up in the same kind of situation that it would order the dissolution of a partnership on the ground that it is just and equitable to do that.

Fifthly, there is oppression. Where the persons who control the H company have been guilty of oppression towards the minority shareholders whether in their capacity as shareholders or in some other capacity, a winding up order in suitable cases may be made. This is in addition to other remedies in the Companies Act, which are available to oppressed minorities to obtain not only dissolution, but also a money judgment.

I Now, whilst it is true that these categories certainly do not constitute any kind of *numerus clausus*, leaving it open to the Courts to devise other categories in future, it is nevertheless useful and instructive to list them in this fashion so as to illustrate the kind of thing which can be complained of under this heading. For a number of decades already, the Courts have not found it necessary to devise further categories. It is indeed difficult to think of anything else which could possibly fall into this *genus* of J categories. Most definitely not the kind of thing which has been alleged

in this case. These points mentioned by the applicant are for the most part A common to all liquidations. When one deals particularly with a solvent company, and it should be borne in mind that all these categories that I have enumerated really relate to solvent companies, a Court will have to be persuaded on very adequate grounds that there is need for a further category, such as merely the advisability of having its affairs investigated B in this particular way. In my view this does not lie within the general line of thrust of legislative intention as interpreted by Courts here and in England.

Consequently, in the present case there are not sufficient grounds for liquidation, certainly not at this stage before there is a judgment and C subsequently a *nulla bona* return.

The application is refused.

Applicant's Attorneys: *Kallmeyer & Sarkin.*

D

CARSTENS v CARSTENS

(SOUTH EASTERN CAPE LOCAL DIVISION)

1984 *November* 20; *December* 4 MULLINS J E

Husband and wife—Divorce—Application under Rule of Court 43 — Court not to be required to search for and peruse another file of papers (eg the file in the main action)—Rule 43 proceedings to be self-contained.

Husband and wife—Divorce—Contribution towards costs—Wife forfeiting right of support entitled to costs as she may have patrimonial claim in respect of assets of joint estate. F

Husband and wife—Divorce—Maintenance for spouse—Application for maintenance pendente lite *in terms of Rule 43—Against public policy that woman entitled to claim such from husband when living flagrantly and deliberately as man and wife with another man.* G

Uniform Rule 43 (2) requires the applicant's sworn statement to set out "the relief claimed and the grounds therefor". This suggests that Rule 43 proceedings should be self-contained and the Court should not be required to search for and peruse another file of papers, such as the file of papers in the main H action between the parties.

A wife who has forfeited her right to support is entitled to a contribution towards costs as she may have some patrimonial claim in respect of the assets of the joint estate.

Chamani v *Chamani* 1979 (4) SA 804 (W) distinguished.

It is against public policy that a woman should be entitled to claim maintenance I *pendente lite* from her husband when she is flagrantly and deliberately living as man and wife with another man.

Application in terms of Rule of Court 43. The facts appear from the reasons for judgment.

S H Cole for the applicant.

L E Leach for the respondent. J