REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes/No
(2) OF INTEREST TO OTHER JUDGES: Yes/No

19/5/2025

DATE SIGNATURE

Case No: 2025-012156

In the matter between:

RENT A TANK JHB (PTY) LIMITED Applicant

and

FUELGIANTS (PTY) LIMITED Respondent

Case No: 2024-110421

In the matter between:

CHRISTIAAN CERVAAS HERBST Applicant

and

EXECUKIT (PTY) LIMITED (in business rescue) Respondent

Case No: 2025-012071

In the matter between:

VOLTEX (PTY) LIMITED Applicant

and

SINDISWA NKANGANE Respondent

Case No: 2024-081809

In the matter between:

ABSA BANK LIMITED Applicant

and

ALLO ROWED PROPERTIES CC Respondent

Case No: 2025-014518

In the matter between:

ROSSGRO BILLING (PTY) LIMITED Applicant

and

RAINBOW CASH ‘N CARRY (PTY) LIMITED Respondent

Case No: 2024-135130

In the matter between:

CHAB TRUCK & TRAILERS REPAIRS (PTY) LIMITED Applicant

and

AD TRAILERS SALES & REPAIRS (PTY) LIMITED Respondent

Case No: 2022-028800

In the matter between:

CREDIT GUARANTEE INSURANCE CORPORATION OF AFRICA LIMITED AND OTHERS Applicants

and

HABITECH FINANSIERING (PTY) LIMITED Respondent

Case No: 2024/052414

In the matter between:

KAGISO RATLOO MOOKANE AND 18 OTHERS Applicants

and

SAKHILE EZWENI GROUP (PTY) LIMITED Respondent

JUDGMENT / REASONS

Handed down electronically by circulation to the parties' legal representatives by email and/or by uploading to Caselines.

Gilbert AJ:

1. These extensive reasons are intended to give guidance to those approaching the dedicated insolvency court, or any other court, as to what is required in relation to what is colloquially known as the statutory formalities for the grant of liquidation and sequestration orders.

2. These reasons are aimed at preventing the enrolment of liquidation and sequestration applications that are manifestly non-compliant, and so alleviating the burden on court resources caused by such applications. This is especially relevant now upon the commencement in this Division of the pilot project of the dedicated insolvency court. Considerable judicial resources would have been saved had non-compliant applications not been enrolled in the first place or timely steps taken to address the deficiencies so that the matters could be finally disposed of when called.

3. Liquidation and sequestration orders have far-reaching consequences.

4. This is, for a respondent, self-evidently so, affecting the status of the respondent. There are all the consequences provided for in the insolvency legislation. For example, upon the grant of a liquidation order, all the property of the respondent company is deemed to be in the custody and under the control of the Master until a provisional liquidator is appointed,[1] whereafter the

[1] Section 361(1) of the Companies Act, 1973.

provisional liquidator and then final liquidator administers the estate according to his or her statutory powers. The directors, management and other office bearers lose their power to direct and manage the respondent company, including to effect valid transactions on behalf of the company.[2] Upon the grant of a sequestration order, the respondent is divested of his or her estate and the estate is vested in the Master until a trustee is appointed, and thereafter in the trustee.[3]

5. The effect of these orders goes beyond the interests of the applicant creditor and the respondent debtor.

6. Of particular concern are the rights and interests of the respondent's employees, not only as potential creditors but as employees. Hence the introduction in both the Insolvency Act, 1936 and the Companies Act, 1973 of detailed provisions to specifically protect the interests of employees. Particularly relevant for present purposes are the statutory provisions discussed later in this judgement requiring that employees be given effective notice of liquidation and sequestration proceedings relating to their respondent employer, and, if a provisional order is granted, of that order.

7. Upon a sequestration or liquidation order being granted, a *concursus creditorum* is established, which has the effect that nothing may be done that

[2] *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (in liquidation)* 2015 (6) SA 21 (GJ), para 15.
[3] Section 20(1) of the Insolvency Act, 1936

would result in the diminishing of the assets in an insolvent estate or which would prejudice the rights of creditors.[4]

8. It is not only the interests of the creditors in the form of the distribution they may receive through their participation in the concursus that are in play, but also the interests of those that did business with and were paid by the respondent company before the grant of a liquidation order.

9. Section 348 of the Companies Act, 1973 provides that a winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding-up. In nearly all cases there is a delay between when the application is presented to the court and when a winding-up order may be granted. This could be days (if the application is brought on an urgent basis), or months or even in some instances, years. This statutory retrospective deeming date of the commencement of the winding-up of the company has serious consequences for those that did business with a respondent company between the launch of the application and the date the liquidation order is made. Every disposition made during that period, including any payment made to a creditor even in good faith (such as payments made to employees during that period, such as for salaries) is automatically voided upon the grant of the liquidation order,

---

[4] *Ward v Barrett NO & Another* 1963 (2) SA 546 (A) at 552D–H.

unless the court orders otherwise.[5] This would include payments made to employees during that period, such as for salaries.

10. Given what may be a lengthy delay between the presentation of the application for winding-up and the grant of a winding-up order, there is substantial scope for a whole array of dispositions, even if made in good faith, to be automatically voided. This is but one of the serious consequences of the granting of a winding-up order, and which informs the need to expeditiously finalise winding-up proceedings, once launched.

11. There are many other far-reaching consequences of sequestration and winding-up orders for an array of persons. What is set out above is simply illustrative of those serious consequences.

12. Axiomatically, respondents and the trade unions, failing which the employees themselves, need to be given adequate notice of proceedings that bring about these far-reaching consequences so they can take advice and decide whether to oppose those proceedings or otherwise participate in the proceedings.

13. These concerns that adequate notice must be given before a sequestration or liquidation order is granted are evident from the amendment of the relevant insolvency statutes by way of the Insolvency Second Amendment Act 69 of 2002 with effect from 1 January 2003.

[5] Section 341(2) of the Companies Act, 1973. As to the wide reach of this voiding section, see the recent Supreme Court of Appeal decisions in *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* 2023 (1) SA 398 (SCA) and *Pride Milling Co (Pty) Ltd v Bekker NO and Another* 2022 (2) SA 410 (SCA).

14. Insofar as sequestration applications are concerned, section 9(4A) was inserted into the Insolvency Act:

"*(4A) (a) When a petition is presented to the court, the petitioner must furnish a copy of the petition—*

(i) to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and
(ii) to the employees themselves—

(aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or

(bb) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition;

(iii) to the South African Revenue Service; and
(iv) to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it.

(b) The petitioner must, before or during the hearing, file an affidavit by the person who furnished a copy of the petition which sets out the manner in which paragraph (a) was complied with."

15. If a *rule nisi* is granted provisionally sequestrating the estate of a respondent debtor, section 11 of the Insolvency Act was amended to provide for service

of the provisional order. Of particular relevance for present purposes are sections 11(2A) and 11(4):

"(2A) A copy of the rule nisi must be served on-

(a) any trade union referred to in subsection (4);

(b) the debtor's employees by affixing a copy of the petition to any notice board to which the employees have access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition; and

(c) the South African Revenue Service.

....

(4) For the purposes of serving the rule nisi in terms of subsection (2A), the sheriff must establish whether the employees are represented by a registered trade union and determine whether there is a notice board inside the employer's premises to which the employees have access."

16. Corresponding provisions are found by way of the amendment of the Companies Act, 1973.

17. Section 346(4A) provides that:

"(4A)(a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application –

(i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and

(ii) to the employees themselves -

(aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or

(bb) if there is no access to the premises by the applicant and the employees, by the affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the presentation of the application."

(b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with".

18. In relation to the service of a winding-up order once granted, section 346A of the Companies Act, 1973 as inserted provides:

"(1) A copy of a winding-up order must be served on-

(a) every trade union referred to in subsection (2);
(b) the employees of the company by affixing a copy of the application to any notice board to which the employees have access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing

which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the application;

(c) the South African Revenue Service; and

(d) the company, unless the application was made by the company.

(2) For the purposes of serving the winding-up order in terms of subsection (1), the sheriff must establish whether the employees of the company are represented by a registered trade union and determine whether there is a notice board inside the premises of the company to which the employees have access.

19. These provisions have been in place now for over two decades and have been the subject of many judgments, both reported and unreported.

20. It is with considerable concern that a pattern emerged from the sequestration and liquidation applications that had been enrolled before the court for the week, particularly on the unopposed roll. Little, if any, regard was had to these provisions and the requirement that the applications, or provisional orders, as the case may be, needed to be brought to the notice of the respondent and employees. Notably where effective notice had been given, generally opposition was forthcoming or there was some other reaction to the proceedings.

21. The following observations can be made from the unopposed matters that were enrolled before what was the first week of the dedicated insolvency court in the Gauteng Division of the High Court. This court is a pilot, the objective of which is to divert all insolvency related applications to the dedicated insolvency motion court, whether unopposed or opposed, on the general

unopposed motion roll, the general opposed motion roll or the urgent motion roll.[6]

22. As a result the sequestration and liquidation applications that would otherwise have been heard that week by diverse general unopposed motion courts[7] were instead heard by a single court. This allowed what may be a prevailing pattern across these type of matters to be discerned.

23. Of the twelve unopposed liquidation or sequestration applications enrolled for the week, only three were compliant when it came to the requirement for effective notice to employees.

24. In several of the matters where there had not been effective notice to respondents or employees, the deficiencies in the application went beyond the statutory formalities and related also to the substantive merits of the applications. As it would transpire, some of these matters were removed for one or other reason before or immediately upon being called in court and so without any engagement on the matter by the court. This judgment does not directly concern those matters. Suffice it to state a failure on the part of the applicants to give effective notice to respondents or employees was generally symptomatic of an overall disregard for or inattentiveness to what was required for a well-founded liquidation or sequestration application, both substantively and procedurally.

---

[6] See notice of the Office of the Deputy Judge President dated 10 March 2025.

[7] Generally, three motion courts each day, with not necessarily the same judges sitting each day and which includes acting judges,

25. Rather this judgment concerns those unopposed matters that remained enrolled and where orders were sought notwithstanding the ineffective notice to the respondent and/or employees and other deficiencies, whether procedurally or substantively.

26. It is not surprising that no opposition was forthcoming in those matters notwithstanding the serious consequences if the orders sought were granted. It may be that the respondents and employees were unaware that applications had been enrolled for the liquidation or sequestration of the respondent, as the case may be, because of the ineffective notice of the proceedings.

27. In each instance because of this non-compliance, the order being sought could not be granted. In some instances, this necessitated a removal of the matter from the roll so that the deficiencies could be addressed. In other instances, the applications were dismissed where the deficiencies also went to the merits of the applications.

28. In each instance, judicial resources were wasted in the court having to read papers and then hear the applications where if regard was had to the notice and other statutory requirements, these matters would not have been enrolled in the first instance or otherwise removed from the roll sufficiently in advance so as to address the deficiencies.

29. Particularly concerning was that in the court roll that had been published during the preceding week, the attention of the litigants' legal practitioners was directed to the notice and service requirements in sections 346(4A) and 346A of the Companies Act, 1973 and sections 9(4A) and 11 of the Insolvency Act,

1932, including the judgments of *Bravura Capital (Pty) Ltd v Drive Path Trade & Invest (Pty) Limited t/a Southern Energy*[8] and *CC v DC*.[9] This clear direction notwithstanding, in most of the matters before me on the unopposed roll, no regard had been had to this directive, and if regard was had to the directive, the legal practitioners for the applicants nonetheless persisted in moving for an order where manifestly there had been non-compliance.

30. In each instance, I enquired whether it would be appropriate not only for there to be no order of costs arising from what was effectively a wasted court attendance, but that an order should be granted precluding both the attorney and counsel (where counsel appeared on behalf of an applicant) from recovering a fee from their client attendant upon the wasted appearance. In each instance, either submissions were made as to why the court should not grant such an order or it was accepted that such an order may be appropriate.

31. The submissions as to why such an order should not be made were not persuasive. Particularly as not only should the formalities as described above be familiar to any legal practitioner that appears in insolvency matters, but also as there were specific directions forewarning of the requirement for effective notice and service in the published court roll.

32. Nothing that is set out in this judgment should be new. The statutory requirements introduced for purposes of effective notice to the respondent and employees has now been in place for over 22 years. There are several judgments dealing with this requirement, including those as specifically

[8] [2021] ZAGPJHC 3 (1 February 2021)
[9] [2020] ZAGPJHC 225 (12 August 2020)

referenced in the published roll. These matters should not have been enrolled or, if enrolled, should not have been persisted with.

33. Legal practitioners have been cautioned in several practice directives of this Division that orders of this kind precluding the legal practitioners from recovering a fee from their clients may be granted where there has not been proper regard to the process and/or which has resulted in a waste of judicial resources.

34. Before turning to each matter, and for ease of reference, I repeat what is set out in *Bravura Capital* when it comes to the notice requirements in respect of liquidation applications and in *CC v DC* when it comes to notice requirements in sequestration applications.

35. *Bravura Capital* was an instance of an applicant seeking a winding-up of the respondent based upon inability to pay its debts. There had been non-compliance with section 346(4A)(a)(ii) of the Companies Act in that the employees had not been adequately furnished with a copy of the application, and that precluded a final order from being granted.

36. Wallis JA in *EB Steam Company (Pty) Limited v Eskom Holdings SOC Limited* 2015 (2) SA 526 (SCA) at paragraphs 16, 17 and 23 held that although it is peremptory that the employees be furnished a copy of the application, the modes of doing so as set out in subsections (aa) and (bb) of section 346(4A)(a)(ii) of the Companies Act are directory such that the effective furnishing of the application can be achieved by other means. The court must

be satisfied that the method adopted was reasonably likely to make the application papers accessible to the employees.

37. In *Bravura Capital*, the applicant sought to rely upon a return of service that reflected that the application had been served upon employees at the registered address by affixing a copy of the process to the principal door at the registered address. The applicant did not file an affidavit by the person who furnished the affidavit to employees (which in this instance would be the deputy sheriff), as required in terms of section 346(4A)(b) and instead relied upon the deputy sheriff's return of service.

38. Often both attorneys and sheriffs fail to see the distinction between service of process, which is regulated by Uniform Rule 4, and the effective furnishing of the application to the specified persons as required by section 346(4A) of the Companies Act, 1973. Section 346(4A) does not require "service" of the application, but that the application be "furnished" to the particular person. "Service" ordinarily and in the context of court process, refers to the delivery of the document by the sheriff or deputy sheriff, in terms of the rules of the particular court. In contrast, "furnish" does not require formal service by the sheriff[10] but, in the context of section 346(4A), that a copy of the application be furnished to the particular person in a manner that is reasonably likely to bring that application to the attention of the person, or, in the context of employees, reasonably likely to make the application accessible to those employees.

[10] *Ex parte De Villiers Berrange NO v Samsudin & another* [2005] JOL 13692 (N) at p 29.

39. Section 346(4A), relating to the furnishing of the application, can be contrasted to section 346A of the Companies Act, 1973 relating to the service of the winding-up order, once granted. The latter section expressly refers to "service" of the order, and so requires service of the order by sheriff. And in effecting such service, the sheriff is required to have regard not only to the relevant rules of court, such as Uniform Rule 4, but also the specific requirements of section 346A.

40. When a provisional order is sought, the court is not concerned with the service of the order in terms of section 346A (as there is no order), but instead whether there has been effective furnishing of the application to employees (and the other parties listed in section 346(4A)).

41. In *Bravura Capital* I detailed why in that instance I was not satisfied that the application had been furnished in such a way that it was reasonably likely to make the application papers accessible to the employees. That then raised the consequence of non-compliance with section 346(4A).

42. Wallis JA in *EB Steam* furnished the answer - in those circumstances the court may still grant a provisional order. In *EB Steam* a final liquidation order was sought and granted by the court *a quo*. On appeal, Wallis JA found in paragraph 26 that the court *a quo* should instead have granted a provisional winding-up order, giving directions if necessary, on how the employees are to be served with the papers.

43. I accordingly found in *Bravura Capital* that it was not open to me in that matter to grant a final winding-up order as there had been non-compliance. I went on

to find that a provisional order should nevertheless be granted notwithstanding the deficiency in furnishing the application to the employees.

44. A point of distinction between *Bravura Capital* and the present matters is that *Bravura Capital* was fully opposed and so it was appropriate in those circumstances that the deficiencies in notice could be cured before the return date. In the present instances there is no opposition but where such opposition may have been forthcoming had there been effective notice of the application to the respondent and/or employees. As observed, those matters where there had been effective notice, opposition was generally forthcoming or there was some or other reaction to the application.

45. To use the language of Wallis JA in *EB Steam* at paragraph 8, the legislative purpose of those sections "*is not directed at providing a technical defence to the [respondent], invoked to avoid or postpone the evil hour when a winding-up order or sequestration order is made*". In contrast, in unopposed matters where there is no effective furnishing of the application to the respondent and/or employees, the position is different as the respondent and/or its employees are denied the opportunity to put forth meritorious opposition that may otherwise have been forthcoming.

46. I have already set out above the serious consequences of the grant of a liquidation order and so why a court should not readily grant even a provisional order of winding-up where there has not been effective notice to the respondent and/or its employees or substantial steps taken to achieve that.

47. The judgment in *CC v DC* is to similar effect but in the context of the notice requirements of section 9(4A) of the Insolvency Act in relation to the furnishing of sequestration applications.

48. In that matter, too, the applicant relied upon a return of service to establish that there had been notice given to the employees because it had been affixed to the principal door for the display of the employees. As that was a fully opposed matter, I granted a provisional order of sequestration and where deficiencies in relation to furnishing the application upon employees could then be addressed by the return date. But, again, that is distinguishable to unopposed matters where there is no effective furnishing of the application to the respondent and/or employees so as to enable them to oppose.

49. I now turn to deal with each matter.

Rent A Tank JHB (Pty) Limited v FuelGiants (Pty) Limited – Case No: 2025-012156

50. The applicant relies upon outstanding amounts due to it in terms of a written lease agreement pursuant to which it leased a tanker to the respondent. It appears from the founding affidavit that telephonic discussions took place between the applicant's legal representative and the respondent's director and which were followed-up by emails including the making of repayment proposals. The point is that there was a channel of communication between the parties.

51. This notwithstanding, when the time came for the application to be served upon the respondent, the applicant contented itself with the sheriff serving the

application at the registered address by affixing to the principal gate. The return of service records that:

> *"Note: The given address is known as a residential condominium type complex known as Madeline Close and consists of various units. This was therefore the only manner of service possible".*

52. No attempt was made to serve the application at the respondent's principal place of business, notwithstanding that the principal place of business in President Park, Midrand appears from the lease agreement.

53. Whilst it is permissible in terms of Uniform Rule 4(1)(a)(v) for process to be served upon a company at its registered office, it is clear from the return of service in this instance that the distinct possibility existed that the application would not have come to the attention of the respondent, attached as it was to the outer gate of a residential complex. The photographs showing this as attached to the service affidavit take the matter no further. If anything, the photographs show that the application as affixed to the outer gate is exposed to every passerby in the street.

54. In a similar fashion the applicant purported to furnish the application to employees as required in terms of section 346(4A)(a)(ii) by affixing a copy of the application to the principal gate of the same residential complex. The return of service again describes the address as a 'residential condominium type complex' and that the sheriff 'was unable to locate any employees in the employ of the respondent at the respondent's principal place of business'.

55. Although the address is described in the return of service as the respondent's principal place of business, this appears not to be so given the nature of the address. To the contrary, the place of business is elsewhere, in Midrand, to the knowledge of the applicant. It is not surprising that the sheriff was unable to locate any employees at the residential address in Roodepoort.

56. At the very least the applicant should have sought to ascertain whether the respondent was conducting business at the Midrand address and whether any employees were to be found there. As I have pointed out above, channels of communication were open and it should have been easy enough for the applicant to establish where the business address was of the respondent, and then to attend to furnish the application there both to the respondent itself and to employees. These endeavours could then have been set out in the service affidavit filed in terms of section 346(4A)(b).

57. It is not surprising that no opposition was forthcoming to the application as there is no evidence that the respondent or employees have any knowledge of the application. What the position may have been had more care been taken to ensure that the application came to the attention of the respondent and its employees is unknown.

58. Nothing is said in the papers about any attempt to furnish the application to any trade unions as required in terms of section 346(4A)(a)(i).

59. I am not satisfied that there had been substantial compliance with section 346(4A)(a)(i) and (ii) or even (iv).

60. The applicant as the business rescue practitioner of the respondent sought the discontinuation of the respondent's business rescue proceedings and for the respondent to be placed under final winding-up in terms of section 141(2)(a)(ii) of the Companies Act, 2008 on the basis that there was no reasonable prospect for the respondent to be rescued.

61. The applicant has been the business rescue practitioner since October 2023 and describes the steps taken by him during the course of the business rescue proceedings. This included conducting numerous meetings with the respondent's representatives, consulting with representatives of all affected parties and investigating the affairs of the respondent. This included obtaining and evaluating the latest financial documentation and relating information from the respondent. A first meeting of creditors was held in November 2023, as required in terms of section 141 of the Companies Act, 2008. The applicant describes how he subsequently came to the conclusion that there was no longer a further reasonable prospect for the respondent to be rescued and that instead the business rescue proceedings should be discontinued and the company placed under final winding-up. The applicant attached to his founding affidavit management financial statements for the year ended 28 February 2023. These statements show in the detailed statement of comprehensive income that some R2.6 million was spent on salaries and wages and some R291, 000 on staff welfare for 2023. Substantial amounts were also spent on salaries and wages and staff welfare the preceding year.

62. Chapter 6 of the Companies Act, 2008 regulating business rescue proceedings has special regard to the position of employees. For example, section 144 sets out the rights of employees during a company's business rescue proceedings, which includes representation by registered trade unions or otherwise by the employees themselves, notice of *inter alia* any court proceedings, participation in any court proceedings arising during the business rescue proceedings and consultation by the business rescue practitioner in relation to the development of a business rescue plan. Section 148 specifically requires of the business rescue practitioner within ten business days of being appointed to convene and preside over a first meeting of any employee's representatives and of which notice must be given to every registered trade union representing any employees or to the employees themselves, if not so represented.

63. It is therefore extraordinary that when it came for the applicant as the business rescue practitioner to comply with the requirement to furnish the application to the first respondent's employees and/or trade unions in terms of section 346(4A)(a) of the Companies Act, 1973, that the following is said by him under oath:

> *"Whether the respondent has any employees or not, falls outside my knowledge. I am further unaware of any trade unions. A copy of this application will be served on the respondent's employees and trade unions, if any, as envisaged in Section 346(A)(a)* [sic] *by affixing it to the notice board, alternatively the main door of the respondent at its registered address. A return of service will be submitted to the above Honourable Court."*

64. It is inconceivable, at least absent explanation, how the business rescue practitioner given his duties and responsibilities and the length of time that he has been a business rescue practitioner can state that he has no knowledge whether the respondent has any employees or of any trade unions. His duties as a business rescue practitioner specifically required of him to obtain this knowledge.

65. The applicant as business rescue practitioner is ideally placed to know about the respondent's employees and whether there are any trade unions and where they can be found so that effective notice of the application can be given to those employees and any trade unions.

66. Yet all the applicant does is to have the sheriff serve a copy of the application purportedly on the respondent's employees by attaching it to the principal gate of what is stated in the return of service to be 'the registered address of employees of respondent' in Boskruin. The return of service shows that those premises were locked. And how the employees, as distinct from the respondent company, can have a registered address is not explained. Rather this Boskruin address is the registered address of the respondent.

67. A further return of service is attached to the service affidavit reflecting that a copy of the notice of set down had been served upon the employees at their place of employment at West Tower, 2nd Floor, Nelson Mandela Square, Maude Street, Sandton by furnishing a copy thereof to a Ms Vivian, who is described as "*Admin*". Nothing is said in the papers, as far as I can establish, about this address being the place of employment of the employees. Further,

no explanation is given as to how the furnishing of the documents to a single person described as ‘admin’ can constitute effective furnishing of the application to the employees. A further return of service describes Ms Vivian as a responsible employee. But the same difficulty remains as to how this furnishing of the documents to a single person, even if an employee, can constitute effective notice to employees generally. There is also no explanation in an affidavit that the Sandton address is the business address of the respondent and therefore why it could be expected that employees would be found at that address. In contrast, the financial statements show a business address, at least as at 2023, in Strijdom Park and not in Sandton.

68. I am not satisfied that there had been substantial compliance with section 346(4A)(a)(i) and (ii) or even (iv).

Voltex (Pty) Limited v Sindiswa Nkangane – Case No: 2025-012071

69. Some years ago, during May 2019, the applicant obtained judgment against the respondent based upon a suretyship obligation. Nothing further is said in the founding affidavit as to what occurred until 6 November 2024 when a notice of appointment of new attorneys of record was served personally on the respondent at her residential address in Halfway House. The return of service indicates that personal service was effected at the respondent’s residential address on 6 November 2024, after two earlier unsuccessful attempts had been made on 4 and 5 November 2024 as the residence was locked.

70. The averment is made in the founding affidavit that an initial attempt was made to serve a re-issued warrant of execution on 27 November 2024 at the residence but that the residence was found locked. This was followed by a subsequent attempt on 3 December 2024 where again the residence was found locked. The sheriff stated in his return of service that after 'several attempts as listed below', he could find neither the execution debtor (the respondent) nor any attachable assets as the residence was constantly locked. The return of service also records that it cannot be ascertained whether the execution debtor resides at that address in Halfway House or has any attachable assets.

71. The applicant contends that this constitutes sufficient evidence to demonstrate an act of insolvency in terms of section 8(a) of the Insolvency Act, in that the respondent has departed from her dwelling or otherwise absents herself, with the intent by so doing to evade or delay the payment of her debts.

72. Although the sheriff stated that 'several attempts' were made to execute at the respondent's residence, as appears from the return of service only a single attempt was made and that was on 27 November 2024. Shortly before that personal service was achieved, on 6 November 2024, of the notice of appointment of attorneys. And that was after two unsuccessful attempts.

73. Remarkably, there is a return attached to the service affidavit that shows that the application was personally served on the respondent at her residence in Halfway House on 17 February 2025. This is remarkable because the averment is that during November 2024 the non-service of the warrant of

execution was because the respondent was absenting herself so as to evade or delay payment of her debts.

74. When it came to serving the notice of substitution of attorneys of record and the application, the applicant was able to succeed in obtaining personal service on the respondent, even if that meant several earlier failed attempts because the premises were locked. But persistence shows that personal service could be achieved. Yet, when it came to the attempted service of the warrant of execution which would form the basis for the act of insolvency, only a singular attempt was made. It is difficult to appreciate how it can be said that the respondent was seeking to evade or delay payment of her debts by absenting herself during late November and early December 2024 where personal service was achieved both before and after that of other documents.

75. I considered dismissing the application on its merits. Counsel sought that the application rather be removed so that there could be supplementation of the papers to address the deficiency. I was persuaded not to dismiss the application on its merits but to rather remove the application. The potential prejudice caused by a delay in the hearing of a sequestration application arising from the removal from the roll of the application is not as pronounced as in the case of a liquidation application. The grant of a sequestration order, as distinct from the granting of a winding-up order, does not have the serious consequence of automatically voiding otherwise valid transactions that

occurred during the period between the launch of the sequestration application and the grant of the sequestration order.[11]

76. As with the other matters, the deficiencies in the papers went further. The averment is made in the service affidavit that the applicant is unaware whether the respondent has any employees or whether they belong to a registered trade union but that nonetheless a copy of the application will be served at the respondent's chosen *domicilium citandi et executandi* and residential address for the attention of employees. There is however no proof that this then took place.

77. In any event, even if it did, absent further explanation this can hardly suffice for there to be effective notice to employees. The respondent's *domicilium citandi et executandi* address is not an address relevant to employees. In any event, the *domicilium* address that appears in the acknowledgement of debt pursuant to which judgment was granted is a different address.

78. As the applicant was able to make contact with the respondent, including by way of personal service of the application upon her on 17 February 2025, as appears from the return of service, it should have been a simple enough task for the appropriate enquiries to be made of the respondent whether she had any employees, such as domestic workers,[12] and if so where they could be located so that effective notice could be given to them.

---

[11] Contrast section 341(2) as read with section 348 of the Companies Act, 1973.
[12] See *Stratford and others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC) para 37 where the Constitutional Court found that employees for purposes of section 9(4A) includes all employees, and specifically domestic employees.

79. This too is another instance where no reasonable attempt was made to give effective notice to employees.

ABSA Bank Limited v Allo Rowed Properties CC – Case No: 2024-081809

80. On 7 November 2024 the respondent was placed under provisional winding-up, with a return date.

81. The applicant creditor seeks the final winding-up of the respondent as being deemed to be unable to pay its debts in terms of section 345(1)(a) of the Companies Act, 1973 in that demand had been made by the applicant of the respondent to make payment by way of a demand served on the respondent by leaving the demand at its registered office and where the respondent had for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the applicant creditor.

82. This demand is dated April 2024. The averment is made in the founding affidavit that it was served by sheriff upon the respondent at its registered address on 21 April 2023, a year earlier. However, the return of service that is attached in proof of this is a return of service that relates to service of a demand upon a different company and on a different date. This raises concern as to whether the applicant's reliance on the deeming inability to pay debts in section 345(1)(a) is well-founded as the jurisdictional facts for reliance upon that sub-section were lacking.

83. I further enquired of the applicant's attorney, who appeared to move the application, whether, and leaving aside that there was no proof that the

demand had been left at the respondent's registered office, the demand may be 'stale' and whether it should in those circumstances sustain a winding-up application in terms of that section.

84. My concern that the demand may be stale was fortified by the barest of averments made in the founding affidavit in support of the winding-up of the respondent. The indebtedness relied upon by the applicant is an indebtedness arising from a suretyship concluded in September 2016 and where the indebtedness is stated to be outstanding in an amount as at 19 July 2022. The certificate of balance that is attached to the founding affidavit in support of the balance is, as far as I can establish, undated and again describes the indebtedness as at 19 July 2022.

85. The general impression created by the founding affidavit is that it is based upon outdated information with no attempt to describe what may have happened since and particularly as to whether it was appropriate for the respondent to be placed under winding-up because of an alleged inability to pay its debts.

86. This too is a case where there has been no substantial effort made to serve the provisional order on the respondent's employees or trade unions as required in terms of section 346A(1) of the Companies Act, 1973. The applicant went no further than having the sheriff serve a copy of the provisional order at what is described in the return of service as the employees' *domicilium citandi et executandi* at an address in Linden Extension, Randburg. Self-evidently, the employees could not have chosen a *domicilium citandi et*

executandi. Further, the return of service states that the order was served upon a Mrs J S Badenhorst, receptionist of Odendaal & Co Auditors. This cannot constitute effective service where it appears that at best the address is the auditor's office, albeit the registered address of the respondent. It cannot be expected that any employees would be found at that address.

87. The same form of service was relied upon as service of the provisional order on the respondent itself. Again the address is described in the return of service as a *domicilium citandi et executandi,* this time of the respondent. Ordinarily and absent explanation, a *domicilium citandi et executandi* cannot serve as an address for service of a provisional order. Although that same address is described in the founding affidavit (but not in the return of service) as the "*known registered business*" of the respondent, the proof that is attached to the founding affidavit of this is an extract from records of the Companies and Intellectual Property Commission dating back to 25 January 2023.

88. Notably the application had also been served, for purposes of section 346(4A)(a)(ii) and (iv) at this same address. Those returns describe the address as an auditor's office and where the deputy sheriff was informed by the receptionist that the respondent is not one of their clients. This notwithstanding, once the provisional order was granted, the applicant made use of the same auditor's address.

89. The general impression gained from the papers is that no real attempt was made to furnish notice of the winding-up application (which too was served at the Linden address) or of the provisional order once granted to either the

respondent or its employees. A further impression gained from the papers, where the tersest of averments are made based on predominantly outdated information, is an ill-considered debt-collecting procedure without regard to the serious consequences that the granting of a winding-up order may have.

90. In my view, no justifiable purpose would be served in allowing these proceedings to continue. I gave serious consideration to discharging the provisional order rather than removing it from the roll, as sought by the applicant, particularly given the deficiencies in relation to the service of the section 345(1)(a) demand and concerns whether the demand was ‘stale’. I invited the applicant’s attorney to make written submissions as to whether the demand was ‘stale’ and should found the basis for a final winding-up as well as to the fate of the application.

91. Written submissions were furnished. During the course of preparing this submissions, the applicant’s attorney conducted an updated search of the records of the CIPC and ascertained that the respondent had been deregistered as far back as January 2024. This was before the liquidation application had been launched. The provisional order has been granted while the respondent is deregistered.

92. The applicant has indicated that it intends applying for the re-registration of the respondent.

93. As the respondent is presently deregistered, the appropriate order would be to remove the matter from the roll. It will be for the applicant to untangle the situation it has created that would have been avoided if the elementary step

was taken to conduct an updated CIPC search before launching the liquidation proceedings in July 2024 instead of relying upon a search that dated back to January 2023. That search already reflected that at that stage the respondent was in the process of being deregistered, although not yet actually deregistered.

94. The elementary step of first ascertaining whether the respondent was deregistered would also have avoided the wasted of judicial resources. Both the court that granted the provisional order and this court on the return date has had to read and attend to an application that should not have been enrolled, or even launched in the prevailing circumstances.

95. An order will follow precluding the applicant's legal representatives from recovering any fees or disbursements that relate to the enrolment of and hearing of this application on 12 May 2025.

Rossgro Billing (Pty) Limited v Rainbow Cash and Carry (Pty) Limited – Case No: 2025-014518

96. The applicant creditor launched proceedings on 4 February 2025 seeking the winding-up of the respondent. But, the applicant avers in a supplementary founding affidavit, after the launch of the application the respondent placed itself under voluntary winding-up by way of resolution. The applicant now seeks instead by way of an amended notice of motion that the voluntary winding-up of the respondent be converted to a winding-up by the court, with the deemed date of commencement of the winding-up being retrospective to

when its application for compulsory winding-up was issued on 4 February 2025.

97. Various difficulties presented themselves. This included the absence of any proof that the respondent had placed itself under voluntary winding-up. The document that was annexed in support of the averment related to a different company and so did not constitute proof of a voluntary winding-up. This was readily conceded by the applicant's counsel. Further, the amended notice of motion and supplementary founding affidavit now seeking a conversion of the voluntary winding-up to a compulsory winding-up, both dated 9 May 2025, had not been served at all in any form upon the respondent. Again, the applicant's counsel accepted that this presented a difficulty. A further difficulty is that in relation to the respondent being unable to pay its debts, the applicant relied upon a statutory demand in terms of section 345(1)(a) of the Companies Act, 1973 but where there was no proof that such demand had been served upon the respondent at its registered office as required in terms of the section. The document that had been attached in support of service of the demand does not support the averment at all.

98. But what is particularly relevant for purposes of this judgment is that this was another instance where no attempt had been made to give effective notice of this application to employees. The return of service relied upon for this purpose shows that whilst an application was served at the employees' principal place of business, that service was by way of furnishing a copy to a Mr Abdul, who is described as an employee. This does not constitute effective notice to employees, at least in the circumstances appearing from the papers.

Furnishing the application to a single employee does not constitute effective compliance with the requirements of section 346(4A)(a)(ii), particularly where it appears that there is access to the premises where the employees were situated and so absent explanation there was no reason why the application could not be furnished in the manner as described in terms of section 346(4A)(a)(ii)(aa), which is by affixing a copy of the application to any notice board to which the applicant and the employees have access inside those premises.

99. The same form of service was relied upon for furnishing the application to the trade unions. The return of service records that the Mr Abdul, an employee, confirmed that the trade unions are "still employed" at the respondent's principal place of business. Self-evidently the trade unions cannot be employed, and would not be found at the respondent's place of business.

100. For all these reasons, the application was removed from the roll, with a similar costs order as in the other matters.

Chab Truck and Trailers Repairs (Pty) Limited v AD Trailers Sales and Repairs (Pty) Limited – Case No: 2024-135130

101. In this matter, as with the preceding matters, the applicant contented itself with service of the application upon the respondent as well as its employees by no more than affixing a copy of the application to the main entrance gate of what is described as the respondent's registered address in New Redruth, Alberton. The Sheriff's return of service in each instance records that "*No intercom, no one is coming to the gate, private residence, premises locked*".

102. Similarly, the same form of service is advanced as proof of effective notice to the trade unions of the employees.

103. There are indications in the papers that the respondent may be operating from a different address and where employees could be located, being an address situated in Elsburg, Germiston and where the equipment that was leased by the respondent from the applicant and which resulted in the indebtedness is situated. Whilst it is so that the averment is made in the founding affidavit that the application will be served upon the respondent at both its registered address and principal place of business, the remarks made by the sheriff in his returns of service belies the New Redruth address as being the business address, more particularly as those premises were locked and constitute a private residence.

104. Again, I was not satisfied that there had been substantial compliance with or attempts to comply with furnishing the application to the respondent, the trade unions and the employees. The matter was removed from the roll with a costs order along the lines of the other matters.

Credit Guarantee Insurance Corporation of Africa Limited & Others v Habitech Finansiering (Pty) Limited – Case No: 2022/028800

105. The application for winding-up was launched during January 2025, notwithstanding the case number. It appears that the same case number was used as that in a preceding action between the parties which resulted in summary judgment being granted against the respondent and which forms the debt for purposes of the winding-up application.

106. Again, the deficient furnishing of notice to the respondent's employees was evident. It is not necessary to belabour the point any more other than to state that this is a further instance where the sheriff purported to serve a copy of the application on employees at what is described as the registered address of the respondent and where in this instance the sheriff was specifically informed by a named person at the premises that there were no employees of the respondent company at that given address. This notwithstanding, the applicant was content with an affixing of a copy of the application to the main entrance, with the knowledge that there are no employees at that address.

107. There is no evidence that the applicant made reasonable attempts to ascertain whether the respondent still traded and where the employees may be found, notwithstanding that the summary judgment proceedings that have led to the debt have been defended and so where the attorneys of record for the respondent could have been approached for further information.

108. As in the other matters, a similar order was made.

Kagiso Ratloo Mookane and 18 Others v Sakhile Ezweni Group (Pty) Ltd – Case No: 2024-052414

109. As will appear below, this is an application plagued with deficiencies.

110. On 13 May 2024, and by way of a notice of motion dated 11 April 2024, the nineteen applicants launched proceedings seeking the final winding-up of the respondent. The application was however only served on the respondent from nine months later, on 15 January 2025.

111. The applicants allege that the respondent as their erstwhile employer is indebted to them for unpaid employment benefits. The applicants obtained default judgment against the respondent on 24 January 2023. Attempts to execute upon the judgment resulted in the attachment of certain movable assets, which were insufficient to settle the indebtedness. The applicants however rely upon the deemed inability of the respondent to pay its debts as provided for in section 345(1)(a), that is, the neglect of the respondent to pay the sum demanded and to secure or compound for it to the reasonable satisfaction of the applicants consequent upon service of a demand upon the respondent at its registered office.

112. The founding affidavit appears to be commissioned as it is signed by a commissioner who has identified himself but there is no date that the oath was administered. There is no evidence as to when the founding affidavit was deposed to. Although I stood down the matter to enable the applicants' counsel to take instructions, this issue was not cleared up. At most, counsel submitted that there may have been other versions of the affidavit and that in uploading the documents to the electronic court file, something had gone awry.

113. The relevance of this is not so much as to whether the oath was properly administered (although that may be a concern), but rather as to how the absence of a date to the founding affidavit features in the delay of some nine months between when the application was launched on 11 April 2024 and when it was eventually served on the respondent on 15 January 2025. I raised this lengthy delay with the applicants' counsel and invited her submissions on

the delay and whether in the circumstances the application should be dismissed rather than removed from the roll as sought by counsel. I expressed my concern that if a liquidation order was granted pursuant to this application, the retrospective deemed date of commencement of the winding-up in terms of section 348 of the Companies Act, 1973 would be as far back as 11 April 2024. As cautioned earlier in this judgment, this would have the effect of automatically voiding all dispositions made by the respondent since 11 April 2024. By this stage, that is a period of some thirteen months, and should the matter be removed so that the deficiencies can be addressed, that period would be even longer.

114. Having stood the matter down so that counsel could take instructions, including as to the delay and the fate of the application, submissions were then made from the bar that the reasons for the delay were that there were no funds available for some time to enable the continued prosecution of the application, that there was a delay in signing the founding affidavit, that there was a delay in obtaining a court date and that on a previous occasion when the matter had been enrolled, it had to be removed because papers were not available electronically. Also, there has been settlement negotiations. No affidavit was filed and so these submissions were made from the bar rather than in the form of evidence.

115. Even accepting these submissions as made from the bar, these reasons do not explain the specific delay that concerns me, which is the delay between the launch of the application on 11 April 2024 and its service on the respondent only some nine months later on 15 January 2025. I fail to see how

a delay in the signing of the founding affidavit is of any relevance because presumably the founding affidavit accompanied the notice of motion. The notice of motion expressly refers to the founding affidavit accompanying the application and so the founding affidavit should have existed already at that stage. The founding affidavit could not have been signed afterwards if the application had already been launched. That there is no date indicating when the affidavit was deposed to only deepens the concern. Similarly, I do not see how delays in obtaining a date and then the subsequent removal of the matter from the roll on an earlier occasion relates to the delay with which I am concerned. The applicants could hardly have sought that the matter be enrolled before the application had been served.

116. There is therefore no cogent explanation as to the delay of nine months between the launching of the application and the service of the application on the respondent. This delay in prosecution in my view has the potential to be seriously prejudicial not only to the respondent but to all the other interested parties for the reasons I have described earlier in this judgment.

117. As to the furnishing of notice of the application to employees, there is no evidence at all that this took place. There is no affidavit as required in terms of section 346(4A)(b) setting out the manner in which notice had been given to the trade unions, where applicable, and to the employees. Counsel directed me to an affidavit by a person employed by the attorneys who attended to “serve” the application upon the respondent’s receptionist. This affidavit in no way pertains to giving notice to employees. Rather it is an affidavit that is

intended to constitute proof that the application was served upon the respondent.

118. Notably, there is no return of service by the sheriff that the sheriff or his or her deputy attended to serve the application on the respondent. The applicants appear to have contented themselves with "serving" the application on the respondent themselves through their attorneys rather than through the sheriff by way of Uniform Rule 4.

119. While I have described above the benefit of a candidate attorney or a well-informed messenger attending to furnish notice on employees in compliance with section 346(4A)(a), when it comes to furnishing a copy of the application to the respondent's employees and trade unions, ordinarily and absent explanation, when it comes to the respondent itself, the application should, given the seriousness of the relief sought, be served by way of sheriff.

120. I have also been unable to locate a certificate of tendered security from the Master as required in terms of section 346(3) nor proof that the application was furnished to the South African Revenue Services as required in terms of section 346(4A)(a)(iii) nor that a copy of the application was lodged upon the Master as required in terms of section 346(4) of the Companies Act, 1973. Ordinarily, compliance with these statutory formalities would be found in the affidavit furnished in terms of section 346(4A)(b) but, as stated, there is no such affidavit.

121. The applicants' counsel sought rather than that the application be dismissed, that it be removed from the roll so that the deficiencies could be addressed.

122. Given that the application bristles with deficiencies and given the potentially serious effect that a belated granting of a liquidation order would have by way of the operation of section 348 of the Companies Act, 1973 in the deemed date of commencement being retrospective to April 2024, I dismissed the application. Should the applicants be advised to persist in seeking the winding-up of the respondent, liquidation proceedings can be initiated afresh, without the potentially serious detrimental effect described above.

Rent A Tank JHB (Pty) Limited v FuelGiants (Pty) Limited – Case No: 2025-012156

123. The following order was made on 12 May 2025:

123.1. The application is removed from the roll, no order as to costs.

123.2. Both the attorneys and counsel for the applicant are precluded from recovering any fees or disbursements from their client relating to the enrolment and hearing of the application on 12 May 2025.

Christiaan Cervaas Herbst v Execukit (Pty) Limited (in business rescue) – Case No: 2024-110421

124. The following order was made on 12 May 2025:

124.1. The application is removed from the roll, no order as to costs.

124.2. Both the attorneys and counsel for the applicant are precluded from recovering any fees or disbursements from their client relating to the enrolment and hearing of the application on 12 May 2025.

Voltex (Pty) Limited v Sindiswa Nkangane – Case No: 2025-012071

125. The following order was made on 12 May 2025:

125.1. The application is removed from the roll, no order as to costs.

125.2. Both the attorneys and counsel for the applicant are precluded from recovering any fees or disbursements from their client relating to the enrolment and hearing of the application on 12 May 2025.

ABSA Bank Limited v Allo Row Properties CC – Case No: 2024-081809

126. The following order is made:

126.1. The application is removed from the roll, no order as to costs.

126.2. The applicant's legal representatives are precluded from recovering any fees or disbursements from their client relating to the enrolment and hearing of the application on 12 May 2025.

Rossgro Billing (Pty) Limited v Rainbow Cash 'n Carry (Pty) Limited – Case No: 2025-014518

127. The following order was made on 13 May 2025:

127.1. The application is removed from the roll, no order as to costs.

127.2. Both the attorneys and counsel for the applicant are precluded from recovering any fees or disbursements from their client relating to the enrolment and hearing of the application on 13 May 2025.

Chab Truck and Trailers Repairs (Pty) Limited v AD Trailers Sales and Repairs (Pty) Limited – Case No: 2024-135130

128. The following order was made on 14 May 2025:

128.1. The application is removed from the roll, no order as to costs.

128.2. Both the attorneys and counsel for the applicant are precluded from recovering any fees or disbursements from their client relating to the enrolment and hearing of the application on 14 May 2025.

Credit Guarantee Insurance Corporation of Africa Limited & Others v Habitech Finansiering (Pty) Limited – Case No: 2022/028800

129. The following order was made on 14 May 2025:

129.1. The application is removed from the roll, no order as to costs.

129.2. Both the attorneys and counsel for the applicant are precluded from recovering any fees or disbursements from their clients relating to the enrolment and hearing of the application on 14 May 2025.

Kagiso Ratloo Mookane and 18 Others v Sakhile Ezweni Group (Pty) Ltd – Case No: 2024/052414

130. The following order was made on 15 May 2025:

130.1. Application dismissed, no order as to costs.

B M Gilbert

Acting Judge

Dates of hearing:	12, 13, 14 & 15 May 2025
Date of judgment / reasons:	19 May 2025
Appearances:	Withheld