

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-010203

(1)	REPORTABLE: ☒ YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED: YES ☒ NO
21/1/26	
DATE	SIGNATURE

In the matter between:

ABSA BANK LIMITED

Applicant

and

93 QUARTZ STREET HILLBROW CC

Respondent

JUDGMENT

P F LOUW, AJ

- [1] The applicant applies for the final winding-up of the respondent on the ground that the latter failed to pay a debt owing to the applicant (a bank loan secured by a mortgage bond) after a statutory demand as meant in section 69(1)(a) of the

Close Corporations Act 69 of 1984 had been served on it. The demand was allegedly served on 29 October 2021. The amount claimed was not paid and on 18 March 2022 the applicant applied for the respondent's liquidation. For the reasons that will become apparent, this application is referred to as the first application. The first application was heard on 19 October 2023 by Siwendu J who dismissed it. The judgment is reported as **ABSA Bank Ltd v 93 Quartz Street Hillbrow CC** 2025 2 SA 450 (GJ). The applicant relied in the first application on the repealed section 68(c) and (d) of the Close Corporations Act read with the not-repealed section 69(1)(a) thereof. The court held that section 69 only serves as a deeming provision to facilitate proof of an act of insolvency and that it does not by itself confer power on the court to grant a liquidation order. The court found that given the repeal of section 68 of the Close Corporations Act the applicant ought to have invoked the jurisdiction of the court in terms of section 344(f) of the 1973 Companies Act read with section 69 of the Close Corporations Act.

- [1] The applicant then brought the present proceedings, still based on the October 2021 section 69 notice. The present application was issued on 1 February 2024. The applicant makes allegations herein to bring the matter in line with the judgment of Siwendu J. The respondent, however, denies that the applicant is entitled to rely on the October 2021 notice. The respondent also raises other defences. I mention this because I had the opportunity to consider the respondent's answers to the present application. In my view they require close consideration and cannot be dismissed out of hand as elements of a stratagem to postpone the inevitable.
- [2] When the matter was called on Tuesday 20 January 2026, I was unaware of a dispute that had developed about compliance by the applicant with the requirements of section 346A of the 1973 Companies Act of which sub-section (1)(b) reads as follows:

“1. A copy of a winding-up order must be served on -

(a) ... ;

- (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 ...".

[3] Although the heading of the section indicates that it deals with the service of the winding-up order, subsection 1(b) identifies a copy of the application as the document that must be served in terms of the section in the manner prescribed thereby. This is also how the section has been interpreted by Gilbert AJ in **Rent a Tank Johannesburg (Pty) Ltd v Fuel Giants (Pty) Ltd** 2025 5 SA 527 (GJ) passim and by Wallis JA in his judgment for the court in **EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd** 2015 2 SA 526 (SCA). The section in terms requires that an application for liquidation must be served on the employees of the company before the court can make an order. In his judgment Gilbert AJ highlighted the importance of compliance with the requirements of the section (after having recorded that the local practice had become lax in this regard). In his judgment in Eskom, Wallis JA dealt with the situation which may arise when an applicant has done what it can to comply with the provisions of the section but strict compliance turns out to be impossible. The section in clear terms and in descending order requires service on the employees first by affixing a copy of the application to any notice board to which the employees have access inside the debtor's premises. Only if there is no access to the interior of the premises by the employees may the applicant affix a copy of the application to the front gate (the second form) or to the front door of the premises from which the debtor conducted business at the time of the presentation of the application (the third form). Wallis JA interpreted the section teleologically and concluded that whilst the requirement to furnish the application to the employees is couched in peremptory terms, the methods stipulated in the section for furnishing the application to employees are directory. (See paragraphs 14, 17 and 22 to 23 of the judgment). In Eskom's case the situation was that Tsoka J had issued a final winding-up order in the court below. The appellant argued that the order could

not have been granted because there had been non-compliance with the section. It was common ground that the section had not been complied with. Instead of setting the order a quo aside and dismissing the application, the Supreme Court of Appeal upheld the appeal (in part), set aside the order and replaced it with a provisional order coupled to a rule nisi. As part of the provisional order, the court formulated an order directing how service on the applicants in that matter had to be effected. The Supreme Court of Appeal did, however, on my reading of the Eskom judgment not introduce a new rule of practice in the nature of a law of the Medes and Persians that courts must grant interim orders (where they are of course satisfied on the merits) where compliance with section 346A relating to employees was not possible coupled with directions as to how the service must be effected. This is a possibility, but so is postponing the hearing together with a directive.

- [4] The facts concerning compliance with the section in the present application may be summarised as follows. The matter was enrolled for hearing before Motoa J on 18 August 2025. Motoa J was not satisfied that there had been compliance with section 346A. The case was postponed to afford the applicant the opportunity to comply with the section, but no directives were issued as to how to effect such service. On the 19th of September 2025 a candidate attorney of the attorneys of record of the applicant deposed to an affidavit in which he alleged that he attended at the place of business of the respondent on 12th September 2025 to ascertain whether the respondent had any employees who carry out daily duties. He testified that when he arrived there, the property's principal door was locked and there was no other way to obtain access into the property. No employees could be found. He then added that there was no notice board that could be found (which is, I may remark, a strange comment as the candidate attorney was on his own say-so not inside the premises). He was advised by street vendors that the property "is hardly open or operating but for one unknown individual who enters the property once in a while". He then concluded that the respondent operates no business and has no employees. The upshot of this affidavit is that the requirements of section 346A(1)(b) need not, nay, cannot be complied with.

- [5] The respondent did not accept the evidence of the candidate attorney. Ms Farber, a member of the respondent, deposed to an affidavit on the 9th of January 2026 wherein the following points are made. In the first place, a hotel is conducted at the premises (sporting the improbable name, Hilton Plaza). The hotel is owned and operated by the respondent. Ms Farber stated that the hotel was open and operating as a hotel and bar throughout 2025 and it is open and operating to the day the affidavit was made. She pointed out that the respondent has 21 staff members working at the hotel. It operates a bank account. It has a current paid-for liquor license for 2026 that was issued on 3 November 2025. She annexed photographs depicting the hotel from the outside and photographs of the reception and bar areas, a shop adjacent to the entrance of the hotel where customers play "pool". She also attached copies of the liquor license and an extract of the respondent's bank account. She states that the affidavit of the candidate attorney is a blatant lie and adds: "The only conclusion to be drawn is that he did not attend the property as alleged. It is submitted that this is serious misconduct on the part of a representative of the applicant's attorneys." She annexed affidavits by two managers at the hotel from which it would appear that the hotel was operating on 19 September.
- [6] On the 14th of January 2026 an attorney of the applicant's attorneys of record, Mr Baloyi, deposed to an affidavit in which he referred to events on the 13th of January 2026. He stated that he (accompanied by the mentioned candidate attorney) went to the hotel to affix the complete application and notice of set-down. The principal gate and front door were open. They entered the premises, saw two people sitting in the foyer who said they were employees of the respondent. Mr Baloyi and the candidate were then taken to an office where they explained that they came to affix the application onto the notice board. One of the employees said that there is no notice board upon which a copy of the application was handed to her. She then said that she had to contact her superior to confirm whether she could accept the application. The employee (identified as Zandile) spoke to someone on her cellular phone and handed the phone to Mr Baloyi. He spoke to someone who identified himself as Mark. Mr Baloyi stated in his affidavit that "Mark then informed me that I could hand a copy of the application to Zandile and he would collect it at a later stage". Thereafter he had

a conversation with Zandile who informed him that the hotel had previously been closed. It was only after the affidavit of the candidate attorney came to hand that Zandile and her colleagues were instructed to return to the hotel and report for duty and that she and another employee were instructed to depose to affidavits confirming that the hotel had been open when this was not the case. Mr Baloyi then sought further information of the employees, but Zandile and her colleague became unco-operative and declined to provide further information. His affidavit ended by a statement that “given the absence of a notice board on site” they were required to affix the application to the principal door of the building, which as open, and to take pictures thereof.

- [7] The affidavit of Mr Baloyi was dealt with in an affidavit dated 15 January 2026 by one Zandile Prescilla Nxumalo. She disputes Mr Baloyi’s evidence on crucial points. She, for instance, denies that a set of papers was handed to her. All she got from Mr Baloyi was a three-page document namely the notice of set-down. She said that she informed Mr Baloyi that the premises “are never closed and that they were open in September 2025”. She added that Mr Baloyi said in answer that he (and thus not the candidate attorney) was the person who had attempted to enter the premises in September 2025 “but he got lost”. She also denies that she had become unco-operative. She however admits that Mr Baloyi affixed a document to the principal door, which was the four-page notice of motion without any further attachments. She removed the document. The next day, 14 January 2026, Mr Baloyi returned and handed a full copy of the application with annexures to her. She had removed the notice of motion that had been attached to the front door the previous day and she did not give the application to other employees. She states emphatically that the other employees are unaware of the application.
- [8] Mr Farber, an erstwhile member of the respondent and now a representative thereof, also deposed to an affidavit dated 15 January 2025. He gives his version of what transpired between him and Mr Baloyi when they spoke on the phone. According to Mr Farber he asked Mr Baloyi whether he was the person who signed an affidavit stating that the premises were locked in September 2025. He confirmed that it was him. Mr Farber then told him that he lied in his affidavit

because the hotel was open in September 2025. He continued to point out that the hotel is the only trading entity of the respondent and that the hotel's finances are managed by another entity (HCI Inner City Properties). He annexed a rental summary for the period 1 July 2025 to 31 October 2025 for the Hilton Plaza Hotel which evidences that throughout the relevant period, including September 2025, the hotel had been open and operative with tenants in occupation. He also annexed a copy of the respondent's bank statement for the period 8 September to 18 September 2025 to prove that multiple credit transactions were recorded on the account throughout the period.

- [9] The affidavits were handed to me without any debate about the right of the parties to deliver further sets of affidavits. There was also no structured argument on the issue of compliance with section 346A of the 1973 Companies Act. Mr Alli, counsel for the applicant, very properly drew these events to my attention and identified the preliminary issue that had to be determined to be whether it can be found that there was compliance with the section and, if not, how the matter should proceed. Both Mr Alli and his colleague for the respondent, Mr Cohen, made helpful submissions.
- [10] After the issues concerning compliance with section 346A had been dealt with by counsel, I conditionally stood the matter down to Friday the 23rd of January 2026 for argument on the merits of the matter. The condition was that I would make a ruling whether the merits should be dealt with on the 23rd or whether the matter should be postponed together with a directive about how the section should be complied with in the circumstances that have developed. There would be two possible outcomes if the matter were to be heard on the merits. The first being that the application could be dismissed on the merits which would bring an end to the controversy concerning section 346A. Should, however, the application be granted the question whether it should be in final form or in the form of a rule nisi containing directives for compliance with the section would arise.
- [11] In the event I concluded that the application should not proceed on the merits. The application should be postponed, and an order should be formulated directing compliance with section 346A. I invited counsel to make

representations about the directive. The provided a joint proposal and the directive contained at the end hereof is based on it.

[12] The reasons for my decision not to deal with the merits at this point, to postpone the application and to issue directives for compliance with the section are the following. In the first place the application is one of some maturity. No urgency is alleged. The present application was issued in April 2024, almost two years ago. That will of course be the date of the concursus creditorum and the applicant's rights are consequently protected in this manner. Secondly, I have concerns about the conduct of the representatives of both the parties. I cannot determine on the affidavits where the truth lies. The versions are mutually destructive. Furthermore, a finding that Mr Baloyi and the candidate attorney of the applicant lied (i.e. the version of the deponents on behalf of the respondent on the service issue) might very well be considered when weighing up whether not to grant a provisional or final liquidation order. Justice requires that the allegations made in the affidavits be considered carefully. Having formed an initial view that the respondent's case is not without substance and taking into account the extreme prejudice which follows from a provisional order and given the uncertainties in the matter, it would in my view be better for the application to be heard once the service issue had been finalised. In my view this is a matter where - but for the service issue - there would be no need for a provisional order. Given the murky evidence on the point of service, it is not beyond the pale that there could be a further service issue after a provisional order had been given which may lead to extensions of the rule nisi. I think it is better to get clarity in the circumstances of this case about the service before the application is dealt with on the merits. I have come to this conclusion not because of any binding rule of law but because I deem it to be a better outcome seen from the procedural justice perspective.

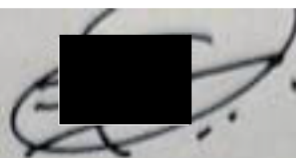
[13] In conclusion I should mention the obvious. The order that I made herein is not an order for substituted service in terms of rule 4 of the Uniform Rules of Court. Section 346A of the 1973 Act does not deal with service as contemplated in the rules. The Act and not the rules prescribes that service must be effected and it sets out the different forms of service. Although the language of section

346A(1)(b) does not at first blush confer the power on a court to make rules about service at variance with what is contained in the section, as found by the Supreme Court of Appeal in Eskom, such power is clearly implicated by the section. The section essentially deals with the process of the court and it seems to me that section 173 of the Constitution (which provides for the inherent power of the superior courts to protect and regulate their own process) allows for such an order to be made.

[14] In the light of these remarks I make the following order:

- a. The application is postponed sine die;
- b. each party will bear its own costs relating to the postponement;
- c. the costs of the appearance on 20 January 2026 are costs in the cause;
- d. service of the application as required by section 346A of the Companies Act 71 of 1973 shall be effected in the following manner:
 - i. the applicant's attorney (Mr Baloyi) and candidate attorney (Mr Sekgala) shall attend at the respondent's premises at 93 Quartz Street, Hillbrow, at 10.00 on 3 February 2026;
 - ii. the manager of the respondent's business at the premises (Ms Nxumalo) will receive them and direct them to a place where the full winding up application under the above case number will be placed or affixed for perusal by the respondent's employees;
 - iii. the aforesaid will constitute service on the respondent's employees as contemplated in the said section 346A;
 - iv. the applicant is directed to deliver an affidavit confirming compliance with these directives before re-enrolling the application.

This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand down is deemed to be 21 January 2026 at 15:55

A handwritten signature in black ink, which appears to be "P F Louw", is written over a horizontal line. A black rectangular redaction box covers the middle portion of the signature.

P F LOUW

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 20 January 2026

Date of judgment delivered : 21 January 2026

Appearances:

For the Appellant: Mr N Alli

Instructed by: J Mothobi Inc

For the Respondent: Mr S Cohen

Instructed by: Dempster McKinnon Incorporated