IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2024-040109

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

15 June 2026 _____

Date **K. La M Manamela**

In the matter between:

ABSA BANK LIMITED Applicant

and

JICAMA 51 (PTY) LIMITED Respondent
(Registration number: 2004/009266/07)

DATE OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge's secretary. The date of the judgment is deemed to be 15 June 2026.

JUDGMENT

Manamela, J
Introduction

[1] This is an application for the final winding-up of the respondent private company, Jicama 51, brought by ABSA Bank Limited, the applicant, on the basis that the respondent is unable to pay its debts, as envisaged in section 344(f),[1] read with section 345(1)[2] of the Companies Act 61 of 1973 ('CA 1973'). The respondent's indebtedness (in the amount of R581 700.11 when this litigation commenced in early 2024) towards the applicant arose from an overdraft facility agreement in terms of which the applicant advanced monies to the respondent limited to R930 000. The application is opposed by the respondent.

[2] The provisional winding-up order was granted on 3 April 2025 with a return date of 28 May 2025, but was thereafter extended a few more times until 9 February 2026 when the matter came before me. The matter was before the Court even earlier than the date of the provisional winding-up order when another order was granted on 14 June 2024 for the service of the application for winding-up on the respondent by way of substituted service. The latter aspect has some significance to the primary defence against winding-up raised by the respondent regarding service of the pre-liquidation statutory demand.[3]

[3] The application, as already indicated, came before me on 9 February 2026 in the Insolvency Motion Court. Mr JH Jooste appeared for the applicant, whilst Mr MR Maphutha and Ms N Sibanyoni appeared for the respondent. I then reserved this judgment.

[4] The respondent has raised what is labelled preliminary objection(s). But upon a closer scrutiny the material under that label serves as the respondent's actual defence on the merits

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1 Par [21] below on the wording of s 344(f) of the Companies Act 61 of 1973.
2 Par [22] below for a reading of s 345(1) of the Companies Act 61 of 1973.
3 Pars [34]-[42] below.

or opposition of the granting of final winding-up. Therefore, the discussion of the issues under that label would not precede the other issues forming part of the respondent's case. This was also the approach adopted by the parties at the hearing. I commence the discussion with summaries of the parties' respective cases. The background to the matter would emerge from the discussion.

Applicant's case (summarised)

[5] The essence of the case put forward by the applicant and the submissions by Mr JH Jooste, as counsel for the applicant, may be summarised as appearing below.

[6] I commence the discussion on the late delivery of the applicant's replying affidavit. The applicant explained (in the affidavit itself) why the affidavit was late and sought condonation for its late delivery. The applicant cited the unsuccessful attempts to amicably resolve the matter between the parties, through the medium of their respective attorneys. The applicant's attorneys had communicated to their counterpart for the respondent about the timing of the delivery of the replying affidavit. It is stated that the respondent did not object to the delivery of the affidavit or raise anything to indicate a resultant prejudice. I, also, did not consider this to be prejudicial to the respondent, and neither was I alerted to the existence of same. I also agree with the applicant's assertion that it would be in the interests of justice to have regard to the contents of the belated affidavit. On these considerations the replying affidavit was - without demur - admitted to form part of the documents before the Court.

[7] The material point of departure for this matter is the written overdraft facility agreement concluded on 23 July 2020 by the applicant and the respondent. The agreement was for the provision of funds or credit by way of an overdraft facility to the respondent ('the overdraft facility agreement' or, simply, 'the agreement', interchangeably). The overdraft facility was limited to an amount of R930 000. It was to be reduced gradually by payment of

an amount of R100 000 every month with effect from 31 July 2020. The respondent was bound to pay money into its transactional account held with the applicant to ensure that the overdraft facility remained within the gradually reduced limit.

[8] As security for the overdraft facility, limited suretyships were furnished by three individuals including by its proprietors and a private company called Leruo Investments ranging from R1 million to R1, 8 million. The sureties bound themselves as such and as co-principal debtors, jointly and severally, with the respondent for the repayment of the monies availed in terms of the overdraft facility agreement. Also, a mortgage bond was registered over an immovable property situated in the North West province in the amount of R1 5 million.

[9] It is part of the applicant's case that the respondent breached the agreement by failing to deposit money into the transactional account for the overdraft facility to remain within the reduced limit. As a result, at some stage, the overdraft facility exceeded the reduced limit. The last payment by the respondent was on 30 November 2021.

[10] On 24 May 2022, the applicant directed a written demand - in terms of section 345(1)(a) of the CA 1973 - for payment of the amount of R473 842.80 (together with interest and costs) within a period of three weeks, lest an application to wind-up the respondent is brought ('the Demand'). The respondent failed or neglected 'to pay the sum, or to secure or compound for it to the reasonable satisfaction' of the applicant.[4] This application ensued in April 2024 and, a year later, the provisional winding-up order was granted on 3 April 2025, as stated above.

Respondent's case (summarised)

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4 Par [22] below for a reading of s 345(1) of the CA 1973.

[11] The essence of the case put forward by the respondent and the submissions by Mr MR Maphutha (accompanied by Ms N Sibanyoni) on its behalf are summarised under this part.

[12] The respondent admits the agreement concluded in July 2020 in terms of which the applicant made funds available to the respondent in terms of the overdraft facility limited to R930 000. The respondent, further, acknowledges that the applicant is entitled to recover the amount which may be outstanding in terms of the overdraft facility agreement, together with collection costs and fees. But the respondent denies that it is in breach of the agreement.

[13] The respondent, also, denies that it is insolvent or unable to pay its debts. It raises many defences against the confirmation of the provisional winding-up order. In the main, the respondent contends that there was non-compliance with the provisions of section 345(1)(a) of the CA 1973 in respect of the delivery of the Demand.

[14] Mr Elias Thapelo Tshephe ('Mr Tshephe'), the deponent to the respondent's answering affidavit, states that he elected or designated in terms of his suretyship agreement with the applicant as the *domicilium citandi et executandi* (domicile of summons and execution)[5] the following address: 4[...] W[...] Street, Plot 426, Waterkloof Estate, Rustenburg, 0299 ('the domicilium address'). He further explicitly states that the domicilium address was to be used for service or receipt of all notices and legal process in terms of the suretyship agreement with the applicant. The Demand was not served at the domicilium address, but the offices of the respondent's erstwhile accountant. The address at which the Demand was served by the sheriff is no longer used by the respondent. This was conveyed to the sheriff by the people at the latter address, but the sheriff nevertheless proceeded to deliver or serve the Demand there.

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5 VG Hiemstra and HL Gonin, *Trilingual Legal Dictionary* (3rd edn, Juta 1992).

[15] According to the respondent the service of the Demand by the sheriff is ineffective for want of compliance with the provisions of section 345(1) of the CA 1973. This means that there is no conclusive proof of the respondent's inability to pay its debts arising from the Demand in the vein of section 345(1)(a) of the CA 1973. The respondent also stated that it owns, among others, movable and immovable assets valued in millions and, thus, cannot be unable to pay its debts or the applicant's debt in terms of the Demand.

[16] Further, the respondent states that it had made arrangements for the applicant to debit Mr Tshephe's personal bank account in the amount of R50 000 monthly in order to settle the debt or outstanding amount in terms of the overdraft facility agreement. The applicant failed to carry out the respondent's instruction on the creation of the debit order.

Issues for determination

[17] As already indicated above, what ought to be determined in this matter is whether the provisional winding-up order should be made final. This is the primary issue to be determined. But its determination would be a composite enquiry involving other issues, ancillary or secondary to it, as the primary issue.

[18] The following are the ancillary or secondary issues requiring determination: (a) breach of the terms of the overdraft facility agreement; (b) delivery of the applicant's demand in terms of section 345(1)(a) of the CA 1973; (c) the respondent's alleged insolvency or inability to pay its debts; (d) the R50 000 monthly debit or settlement order, and (e) requirements for final liquidation. The discussion of the issues would not follow this sequence and some of the issues will be discussed jointly.

[19] Additional issues may arise during the discussion, but the above issues would be the rubrics in use to guide the determination. I will return to these issues after setting out the major statutory or legal principles applicable to the issues.

Applicable legal principles

[20] Some of the legal or statutory principles may have already been referred to above. But, I deem it necessary to reflect the primary legal principles applicable to this matter, as an application for the winding-up of the respondent company. Naturally, the primary legal principles will be those from the provisions of Chapter XIV (i.e. sections 337 to 426) of the Companies Act 61 of 1973 (i.e. the CA 1973). Despite the repeal of the CA 1973 by the Companies Act 71 of 2008 ('CA 2008'),[6] Chapter XIV of the CA 1973 remains in force and still provides for the winding-up of insolvent companies.[7]

[21] Section 344(f) of the CA 1973 states, as one of the circumstances under which the court may wind up a company, that a 'company may be wound up by the Court if …[it] is unable to pay its debts as described in section 345'.

[22] Section 345(1) of the CA 1973 provides for when a company may be deemed to be unable to pay its debts and reads as follows:

> (1) A company or body corporate shall be deemed to be unable to pay its debts if-
> *(a)* a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-
> (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
> (ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct,
> and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
> *(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 the messenger with an endorsement that he has not found sufficient disposable property to satisfy the

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6 Preamble and section 224(1) of the CA 2008.

7 Item 9 of schedule 5 of the CA 2008 retains – as a transitional measure effective from 1 May 2011 – Chapter XIV of the CA 1973, despite the repeal of the CA 1973. But when winding-up commercially solvent companies regard should be had to the CA 2008. See Chapter 2 Part G (ss 79–83) CA 2008 read with item 9 schedule 5 of the CA 2008; *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* [2013] ZASCA 173; 2014 (2) SA 518 (SCA); [2014] 1 All SA 507 (SCA) [20]-[22]; *Superior Macadamias (Pty) Ltd and Others v Emvest Agricultural Corporation (Mauritius) Ltd and Another* (865/2022) [2024] ZASCA 182 (24 December 2024) [5]. See also Eberhard Bertelsmann and others, *Mars: The Law of Insolvency* (Juta 10th Ed, 2019) at 10th Ed, 2019, p 747.

judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

[23] In *Henochsberg on the Companies Act 61 of 1973*[8] the following commentary is provided on the delivery or service of a written demand at the registered office address of a debtor-company in terms of section 345(1) of the CA 1973, quoted in the material part:

> It suffices to prove that the demand was delivered *by hand* to the company at its registered office. It is submitted that there is also compliance with the delivery requirement if it is proved that the demand was posted by registered post to the address of the registered office and there is no evidence that it was not in fact left at such address: for in the absence of such evidence the Court will assume that it was so left by the postman …
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> As to the requirements for an effective change of the situation of the registered office … Thus, a demand left at an address which would have been the address of the registered office as changed is not a demand for the purposes of s **345**(1)(a) where at the time of the leaving of the demand the change has not become effective (*BP & JM* case *supra*). Nor is a demand which is left at a former registered office after an effective change of the situation thereof (*Emcom Communications Transvaal (Pty) Ltd* v *Procourts (Pty) Ltd* 1982 (3) SA 252 (W)).[9]

[24] Section 170 of the CA 1973 – which existed alongside section 345(1)(a) before its repeal[10] - provided for the requirement of a postal address and registered office address of company as follows:

> (1) Every company including every external company shall have in the Republic—
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> (*a*) a postal address to which all communications and notices may be addressed; and
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> (*b*) a registered office to which all communications and notices may be addressed and at which all process may be served.
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> (2) (*a*) Upon incorporation of a company, notice of the situation of the registered office and of the postal address shall be given to the Registrar.
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> (*b*) At least twenty-one days' notice of any intended change in the situation of the registered office or of the postal address shall be given to the Registrar: Provided that if less than twenty-one days' notice of an intended change in the situation of the registered office or postal address is given, the Registrar may determine the date on which the change will take effect.

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8 Jennifer A Kunst, Piet Delport and Quintus Vorster, *Henochsberg on the Companies Act 61 of 1973* (LexisNexis, June 2011).

9 *Henochsberg on the Companies Act 61 of 1973* at 708(1).

10 Footnote 7 above.

(*c*) Particulars of which notice was given to the Registrar in terms of paragraph (a) or (b), shall be recorded by the Registrar, and he shall notify the company of the date on which the particulars of any change referred to in paragraph (b) have been recorded by him.
(*d*) A change in the situation of the registered office or of the postal address of a company shall for the purposes of this Act not take effect unless the Registrar has recorded the particulars thereof.
(3) Any notice referred to in subsection (2) shall be in the prescribed form.
(4) A company which fails to comply with any requirements of this section, shall be guilty of an offence.

[25] The current equivalent to section 170 of the CA 1973 is section 23(3) of the CA 2008, to be read with regulation 21 of the Companies Regulations, 2011. It provides for the requirement of a registered office address for companies, as follows:

Each company or external company must—
(*a*) continuously maintain at least one office in the Republic; and
(*b*) register the address of its office, or its principal office if it has more than one office—
(i) initially in the case of—
(*aa*) a company, by providing the required information on its Notice of Incorporation …; and
(ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.

[26] An informative commentary to section 23(3) of the CA 2008 is provided in *Henochsberg on the Companies Act 71 of 2008*[11] as follows in the material part:

Registered office.—A company and an external company registered as such must (1) maintain at least one office in the Republic and (2) register the address of its office in the manner described in sub-s (3) (b), or if it has more than one office, it must register it's principal office: see also Practice Note 1 of 2024 (No. 4356 in *Government Gazette* 50105 of 9 February 2024) for submissions to the Companies and Intellectual Property Commission that must be accompanied by certified evidence of the office. Until there has been registration by the Commission of an office as its registered office a company has no registered office (*BP & JM Investments* (*Pty*) *Ltd v Hardroad* (*Pty*) *Ltd* 1978 (2) SA 481 (T) at 485 differing from an *obiter* contrary observation by McEwan J in *Hardroad* (*Pty*) *Ltd v Oribi Motors* (*Pty*) *Ltd* 1977 (2) SA 576 (W) at 579). Notice of any intended change in the situation of the registered office must also be given to the Commission on CoR 21.1 in terms of reg 21 and also reg 30 (7) in respect of changes to be notified to the Commission and General Note on s 16. The change becomes effective as from the later of the date of the notice given to the Commission or five business days after

[11] Piet Delport, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis, November 2025) at 118(9).

> the date on which the notice was filed (reg 21; *Basfour 3752* (*Pty*) *Ltd and Others v KVL Developments and Others* (8579/2014) [2015] ZAKZPHC 29 (19 May 2015) para 11). "This address as registered is the place where the company may be found and a place where it conducts its business; a place where court processes may be served. The registered office of the company serves the same purpose as a *domicilium citandi et executandi*. By registering an office or a principal office in accordance with the provisions of s 23 (3), a company indicates clearly where it can be found for any purposes or where legal processes can be served. It says services of any legal processes will only be valid if served at the registered office or principal office. It guarantees that in the event of it changing its registered office, it will notify the public by filing a proper notice as required by s 23 (3) (b) (ii).": *Southernera Diamonds Incorporated v San Contracting Services* CC (2161/13) [2014] ZAGPPHC 622 (22 August 2014) para 15, although the reference to an office *or* a principal office is confusing as the principal office should be the registered office.[12]

[27] The above statutory provisions and authorities contain legal principles which would be useful in the discussion of the issues identified above as requiring determination to dispose of this matter, to which I turn.

The respondent's alleged breach of the terms of the overdraft facility agreement and the R50 000 monthly debit or settlement order

[28] The respondent, as stated above, admits the overdraft facility agreement with the applicant in terms of which it had access to funds or an overdraft to a maximum amount of R930 000. And that upon breach of the terms of the agreement the applicant is entitled to recover the amount used in the overdraft facility, together with collection costs and fees. According to the applicant the respondent owed an amount of R581 700.11 as at 7 November 2023. But the respondent denies that it breached the agreement.

[29] The respondent raises the fact that the repayment of the funds used in the facility agreement was secured by various forms of security, including cession and pledge of proceeds of contracts and insurance policies. The security covered the applicant's risk in the event of non-payment of the overdraft funds by the respondent. The respondent says that it

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12 Piet Delport, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis, November 2025) at 118(9).

expected clarity or information in this regard, ostensibly from the applicant, before it felt obliged to repay the monies by itself.

[30] On the other hand, the respondent contends that the overdraft amount was fully repaid in March 2022. It was informed by someone from the applicant or from its quarters about this. At that time, the only person with access to the account was the respondent's accountant. The denial by the applicant on the basis of the inaccuracy of the assertion is considered by the respondent to be based on generic and ambiguous statement. Besides, the applicant has not provided details of any repayments by the respondent, but only indicated that an amount of R930 000 was advanced to the respondent in terms of the overdraft facility, the contention concludes.

[31] The respondent also alleges that there was misappropriation of its funds in its quarters, particularly an amount of R400 000 meant to repay the applicant. It appears that the respondent blames the applicant for not having appropriate measures in place prior to the approval of the further extension of the loan or overdraft amount.

[32] When the misappropriation was discovered the respondent's deponent (i.e. Mr Tshephe) made arrangements to repay the monies owing to the applicant through payment of an amount of R50 000 per month. It instructed the applicant to debit the amount, monthly, from Mr Tshephe's personal account, but the applicant failed to 'create a debit order'. Reliance in this regard is placed by the respondent on two letters by its attorneys. In the one letter, dated 25 July 2024, by the respondent's attorneys to their counterpart for the applicant, the applicant was informed that it may 'deduct R50 000.00 (FIFTY THOUSAND RANDS) per month from [Mr Tshephe's] personal account to settle the debt'. The applicant reacted to the offer in terms of a letter, dated 17 September 2024, by its attorneys to the respondent's attorneys, and proposed that: (a) the applicant would accept - without prejudice - payment of

R50 000 towards settlement of the debt; (b) the arrangement should be reviewable after a period of six months; (c) the arrangement should take the form of a settlement agreement incorporating an acknowledgment of debt, and (d) the respondent's attorneys were to accept the applicant's proposals and indicate when the applicant can expect payment of the first instalment. There was no response and, according, to the applicant no payment was made or proof of payment furnished, despite the applicant's request of same on 12 November 2024 through its attorneys and threat of legal action. According to the applicant, the respondent has not made any payment since this application was launched. In my view, on the facts of this matter, the respondent cannot blame the applicant for the fact that the intended debit order in the amount of R50 000 per month did not materialise. And the alleged breach of the agreement would persist despite the respondent's own internal misappropriation or theft of funds from the facility.

[33] To conclude on this part, I confirm that I find that the respondent indeed breached the terms of the overdraft facility agreement with the applicant, primarily, by not timeously making payment and the respondent remains indebted to the applicant. Further confirmation of this aspect would appear in the discussion of the other issues below. I agree with the applicant that in terms of the overdraft facility agreement all payments became due on or before 30 April 2021 and, thus, the applicant was not required to place the respondent in *mora*. Also, the enforcement of the terms of the agreement by the applicant does not offend public policy or *ubuntu* values on the basis of unfairness or unreasonableness. The enforcement is based on a statutory provision and does not amount to abusive litigation. I now turn to the Demand for payment by the applicant.

Demand in terms of section 345(1)(a) of the CA 1973 and the respondent's defence(s)

[34] The applicant considered the respondent to be unable to pay its debts and, under these perceived circumstances, decided to commence with the process to wind up the respondent in terms of section 344(f) of the CA 1973.[13] This provision forms part of a list of circumstances under which a company may be wound up by the court.[14]

[35] Section 344(f) does not explain what an applicant ought to establish to satisfy the court that it should exercise its discretion in favour of winding-up of the company due to its inability to pay its debts. This is the purpose of section 345(1) of the CA 1973.[15] The provision postulates three situations in which a company 'shall be deemed to be unable to pay its debts'.[16] The situations are commonly referred to as presumptions (or 'statutory fiction'[17] or 'conclusion of law'[18]) of inability to pay debts and, once established, are rebuttable at the instance of the debtor-company.[19] In this application, reliance is placed on two of the three situations: (a) failure to satisfy a demand for payment of a debt within three weeks of the demand (i.e. section 345(1)(a)) and where satisfactory proof is furnished to the court establishing the debtor-company's inability to pay its debts (i.e. section 345(1)(c)).[20] The latter situation does not appear to involve a presumption but a factual finding of the court.

[36] Invoking section 345(1)(a) of the CA 1973, the applicant as stated above, on 24 May 2022, directed to the respondent in terms of the provision a written demand for payment of the amount of R473 842.80 within a period of three weeks (i.e. the Demand). It is submitted that the Demand was: (a) dispatched to the respondent by way of registered post; (b) served

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13 Par [21] above on s 344(f) of the CA 1973.

14 *Henochsberg on the Companies Act 61 of 1973* – section 344, General Note, with reference to *Ex parte Muller: In re PL Myburgh (Edms) Bpk* 1979 (2) SA 339 (N) at 340.

15 Par [22] above on s 345(1) of the CA 1973.

16 *Ibid.*

17 M S Blackman and others, *Commentary on the Companies Act* (Juta Revision Service 9, 2012) RS 5, 2008 ch14-p120 – p121 and the authorities cited there.

18 *Henochsberg on the Companies Act 61 of 1973* at 707.

19 *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) [5].

20 The third situation concerns where the sheriff issued a *nulla bona* return upon execution of a judgment requiring payment by the company: s 345(1)(b), quoted in par [22] above.

by the sheriff of this Court by leaving a copy thereof at the respondent's registered office, and (c) the respondent was given a period of three weeks to meet the Demand, but failed to do so. The respondent, consequently, was deemed to be unable to pay its debts, justifying an application for its winding-up, as envisaged in section 344(f).

[37] The respondent disputes that the Demand complied with the provisions of section 345(1)(a). The respondent says that it did not receive the Demand. It only became aware of same upon receipt of the subsequent liquidation application where the Demand serves as an annexure. This part of the dispute concerns the place or address of delivery or service of the Demand. The Demand was delivered or served (by way of affixing a copy) by the sheriff of this Court at Tayba House, 453 Luttig Street (Off Rebecca Street), Pretoria West 0183.[21] It is common cause that this is the registered office address of the respondent in terms of the records in the custody of the Companies and Intellectual Property Commission ('CIPC').[22]

[38] The respondent says that a different address from its registered address ought to have been used. It refers to the domicilium address cited by Mr Tshephe in his suretyship furnished to the applicant, referred to above.[23] The domicilium address was not an address chosen by the respondent in its loan instruments with the applicant and the respondent was not a party to the suretyship between Mr Tshephe and the applicant. The sheriff is criticised for having affixed the Demand to the principal door at the address, as the receptionist of an entity called MMT Financial Services refused to accept the documents on the respondent's behalf as it 'is no longer there for years now'.[24] Therefore, the Demand does not demonstrate that the respondent was placed in *mora* and it is unable to pay its debts as and when they become due, as contemplated in section 345(1)(a), it is contended on behalf of the respondent.

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21 Sheriff's return of service attached to the founding affidavit as annexure 'FA 14', CL 02-84.

22 Updated CIPC search on the respondent dated 27 May 2024, CL 27-3 to 27-4. See pars [23]-[26] above on the legal principles concerning registered office address.

23 Par [14] above.

24 Annexure 'FA 14', CL 02-84.

[39] I disagree with the respondent's assertions. The statutory provision for the mechanism for winding-up in terms of section 345(1)(a) of the CA 1973 is very clear about where the written demand is to be delivered or served. It explicitly directs that the demand should be delivered or served at the 'registered office' of the company.[25] And the authorities confirm this.[26] The applicant properly served the Demand using the services of the sheriff. It is irrelevant, for purposes of the provision, that the parties may have cited or requested – in terms of an agreement - the use of other addresses than the registered office address or that the creditor was aware that the debtor has moved from the registered office address.[27] I should also point out that a company has a statutory obligation to formally notify the CIPC of its change of address for the amendment of the applicable records kept by the CIPC.[28] Also, the provision envisages that the demand may be served or delivered in any manner rather than being handed to a natural person. It refers to the demand being 'served on the company, by leaving the same at its registered office'.[29] I supplied the underlining.

[40] A demand based on section 345(1)(a) does not deprive the debtor-company from rebutting any presumption of inability to pay its debts by clear evidence of its commercial solvency. This, essentially, would be achieved by the respondent establishing that it is able to pay its debts and would have been able to do so within the three weeks from the date of the delivery of the written demand, even if it had challenges to receive the demand properly delivered at its registered office. A debtor-company is entitled to complain about the circumstances or even contents of the written demand made in terms of the provision, but

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25 Par [22], read with pars [23]-[26] above.

26 Pars [23]-[26] above.

27 *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* (13/25839) [2014] ZAGPJHC 203; 2015 (2) SA 550 (GJ) (25 July 2014) is not authority for service of the statutory demand in terms of s 345(1)(a), but the filing of an affidavit on the service of an application for liquidation, as envisaged in 346(4A)(b) of the CA 1973.

28 Section 23(3) of the CA 2008, quoted in par [25] above and with authoritative commentary in par [26] above. See par [24] above for the provisions of s 170 of the CA 1973, comparable to the former provision.

29 Pars [23] and [26] above.

such complaints are futile if they do not go to the substance of the provision, being that the demand was properly delivered at its registered office. I also depart from the submission on behalf of the respondent that the fact that the respondent claims not to have received the Demand and only to have become aware of same upon receipt of the founding papers in this liquidation application would assist the respondent. The requirement is not proof of receipt of the statutory demand, but delivery of same at the registered office of the respondent-company. This was clearly done in this matter. It is also notable that the applicant had to secure an order of this Court, granted on 14 June 2024, allowing the liquidation application to be served by way of substituted service to steer away from the address of the respondent's registered office.[30] But it ought to be borne in mind that service of the application for winding-up has its own requirements,[31] different from those for a statutory demand under section 345(1)(a). Be that as it may, I do not agree that the situation is comparable to that in the decision of the Constitutional Court in *Sebola and Another v Standard Bank of South Africa and Another*[32] regarding the dispatch of a notice and proof that it has reached the destination postal branch in terms of the provisions of sections 129 and 130 of the National Credit Act 34 of 2005.[33] I reiterate that the requirement under section 345(1)(a) is not proof of receipt of the statutory demand, but proof of delivery of same at the registered office of the respondent-company. Therefore, the Demand constitutes a proper demand in terms of the

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30 Substituted service order was granted on 14 June 2024. See CL 22-1 to 22-4.

31 Section 346(4A) of the CA 1973. See also regulation 7 (and annexure 3 (table CR 3)) of the Companies Regulations, 2011. See generally rule 4(1)(v) of the Uniform Rules of this Court.

32 *Sebola and Another v Standard Bank of South Africa Ltd and Another* (CCT 98/11) [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (7 June 2012) *per* Cameron J for the majority of that court.

33 The essence (for current purposes) of the decision in *Sebola v Standard Bank* is captured in its par [86] which reads: '…I conclude that the obligation section 130(1)(a) imposes on a credit provider to "deliver" a notice to the consumer is ordinarily satisfied by proof that the credit provider sent the notice by registered mail to the address stipulated by the consumer in the credit agreement, and that the notice was delivered to the post office of the intended recipient for collection there.'

provision as it was served at the registered office of the respondent and not the alleged domicilium address or elsewhere.[34]

[41] The substance of the provision is that a company facing a written demand by a creditor with a debt of 'not less than one hundred rand' delivered at its registered office would be presumed to be unable to pay its debts if a period of three weeks lapses and the company has 'neglected to pay the sum [demanded], or to secure or compound for it to the reasonable satisfaction of the creditor'.[35]

[42] Considering the above, I agree with the applicant that the respondent should be presumed to be unable to pay its debts, as provided by section 345(1)(a). The respondent's contentions regarding the manner or form of delivery of the Demand does not rebut the presumption. Even if they could (without allowing substance to yield to form), I am satisfied on the basis of the facts of or evidence in this matter that the respondent is also unable to pay its debts, as envisaged in section 345(1)(c) of the CA 1973.[36] The applicant also relied on the latter ground in this matter. I expand on this under the next rubric.

Respondent's alleged insolvency or inability to pay its debts

[43] As stated above, in the event that a written demand in terms of section 345(1)(a) of the CA 1973 is unmet (through payment, furnishing of security or compounding for it) within a period of three weeks of its delivery, the recipient company would be deemed unable to pay its debts. This would bring about what is commonly referred to as 'commercial insolvency': the inability to meet current demands relating to the 'day-to-day liabilities in the ordinary course of business'.[37]

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34 *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) [5].
35 Par [22] above.
36 *BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd* 1978 (2) SA 481 (T) 487. See also Blackman *Commentary on the Companies Act* OS, 2002 ch14-p139.
37 Blackman *Commentary on the Companies Act* OS, 2002 ch14-p129 and the authorities cited there.

[44] The applicant says that the respondent is commercially insolvent for failing to meet the Demand. This is denied by the respondent including on the basis of the value of its assets or financial position. Among others, the respondent is said to own two immovable properties with a combined value of R17 000 000 and movable assets with a combined value of R335 500. But, it is submitted on behalf of the applicant that the assertion of solvency is negated by the fact that according to the respondent's financial statements, its liabilities are exceeded by its assets. The same financial statements negate the respondent's other averments to do with the amount of revenue generated; budgets and cash flow forecasts; liquidity and solvency position of the company. The following remarks from the decision in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others*[38] renders the decision a *locus classicus* (authoritative or leading case)[39] on what commercial insolvency entails:

> The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)*(c)* as read with s 344*(f)* of the Companies Act 61 of 1973 and is accordingly liable to be wound up.

[45] Evidence before the Court, which I find to be satisfactory, is that the respondent failed to pay the monies demanded by the applicant. Payment of a debt for purposes of section 345(1)(a) of the CA 1973 ought to be made by the affected debtor-company from such

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38 *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* [1993] 2 All SA 534 (C), 1993 (4) SA 436 (C) 440. See also *Topfix (Pty) Ltd v Go Business (Pty) Ltd and Another* (020590/2024) [2025] ZAGPPHC 115 (30 January 2025) [29]; *Coetzee NO v Solar Africa Energy (Pty) Ltd* (053561/2024) [2025] ZAGPPHC 929 (27 August 2025) [70].

39 Hiemstra and Gonin, *Trilingual Legal Dictionary*.

company's current revenue or readily available resources.[40] The determination in this regard is not a mechanical comparison of assets and liabilities, but based on 'commercial reality in the light of all the circumstances of the case'.[41] It constitutes a consideration of the entire financial condition of a company.[42]

[46] The applicant claims that the respondent is insolvent on another basis. It contends that the respondent is factually insolvent. Factual or actual insolvency is established by showing that a company's liabilities exceed its assets.[43] Actual insolvency will not *per se* (by itself; on its own)[44] be a ground for liquidation, but a factor worthy of consideration by a court in the exercise of its discretion to liquidate or not to liquidate a company on the basis of its inability to pay its debts (i.e. commercial insolvency).[45] Factual insolvency may indicate the inability of a company to pay its debts.[46]

[47] The respondent denies that it is factually insolvent. The respondent invokes the support of its financial records, existing contracts, and cash flow, and information and disclosures made by the accountants in the respondent's financial statements, to support its denial of insolvency. It says its financial position ought to be considered, including that its audited financial statements reflect monthly revenue of about R400 000. It is submitted that the respondent cannot be insolvent or should it be case the Court ought to exercise its

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40 *Absa Bank v Rhebokskloof* at 440, quoted in par [44] above and cited in *Topfix v Go Business* [29]; *Coetzee v Solar Africa Energy* [70]. See also Blackman *Commentary on the Companies Act* OS, 2002 ch14-p129 - p131.

41 Blackman *Commentary on the Companies Act* OS, 2002 ch14-p130 and the authorities cited there.

42 *Ibid.*

43 *Henochsberg on the Companies Act 61 of 1973* at 710.

44 Hiemstra and Gonin, *Trilingual Legal Dictionary*.

45 *Johnson* v *Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) [6]. See also *Henochsberg on the Companies Act 61 of 1973* at 710.

46 *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) 993. See also *Henochsberg on the Companies Act 61 of 1973* at 710; Blackman *Commentary on the Companies Act* RS 6, 2009 ch14- p130 - p131.

discretion under section 354[47] of the CA 1973 to overturn the existing provisional winding-up order.

[48] I agree that factual insolvency cannot without commercial insolvency justify winding-up of a company due to its inability to pay debts in terms of section 344(h), read with section 345(1)(a), both of the CA 1973. Factual insolvency would be a secondary or supporting consideration (to/of commercial insolvency) in the determination of whether a company ought to be wound up based on these provisions. In this matter, commercial insolvency is established on the basis of section 345(1)(a) and (c) of the CA 1973.[48]

Determination of a liquidation or winding-up application: requirements (formal and substantive) and the court's discretion for granting a final order

[49] When a court is seized with an application for winding-up it is empowered to either grant or dismiss such application, or adjourn the hearing of the application (with or without conditions) or make an interim or other order it may deem just.[49] In this matter the Court granted an order incorporating a rule *nisi* and provisional winding-up of the respondent on 3 April 2025.

[50] The ultimate determination to be made by this Court in this matter is whether the provisional winding-up order should be made final. The determination is to be made on the basis of the facts in the matter judged against the statutory requirements for winding-up.

[51] Regarding the requirements for winding-up it is common cause that the applicant (i.e. ABSA Bank Limited) is indeed a creditor envisaged in section 346(1) of the CA 1973 to

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47 Section 354 of the CA 1973 deals with staying or setting aside of winding up and appears irrelevant to the respondent's proposition or for current purposes.

48 Par [22] above for a reading of s 345(1)(a) and (b) of the CA 1973 and pars [35] *et seq* on the discussion of the provisions. See also Blackman *Commentary on the Companies Act* RS 3, 2006 ch14-p165.

49 Section 347 of CA 1973.

apply for liquidation.[50] It has a claim that is due and payable of more than one hundred rand computed to be in the amount of R473 842.80, as at the time of the Demand.[51] Therefore, the applicant had the requisite *locus standi in iudicio* (a right of appearance (in court as a party); standing in court)[52] to apply for the winding-up of the respondent - at least on a *prima facie* (on the face of it)[53] basis when the provisional order was granted,[54] and now on the elevated threshold of a balance of probabilities for a final winding-up order.[55] The same applies to the prescribed formalities relating security for costs and service of the provisional order as set out in the order.

Conclusion and costs

[53] On the basis of what appears above, I am satisfied that the requirements for the final winding-up of the respondent have been satisfied. The provisional order for the winding-up of the respondent granted on 3 April 2025 will be made final. Costs of the application will be costs in the winding-up of the respondent.

Order

[54] In the result, I make an order in the following terms:

1. the rule *nisi* issued on 3 April 2025 is hereby confirmed and the respondent, JICAMA 51 (Pty) Limited (registration number: 2004/009266/07) is placed in final winding-up, and

2. the costs of the application shall be costs in the winding-up of the respondent.

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50 Section 346(1)(b) of the CA 1973. See also Blackman *Commentary on the Companies Act* RS 1, 2004 ch14-p148 to p150.

51 Pars [18], [23], [31]-[32] above. See Blackman *Commentary on the Companies Act* RS 1, 2004 ch14-p150 to p156, generally, on who constitutes a creditor.

52 Hiemstra and Gonin, *Trilingual Legal Dictionary*.

53 *Ibid*.

54 *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) 976C *et seq*. See also Blackman *Commentary on the Companies Act* RS 6, 2009 ch14-p179 to p180; p186 to p186-1 and the authorities cited there.

55 *Kalil v Decotex* at 979-980. See also Blackman *Commentary on the Companies Act* RS 6, 2009 ch14-p179-p180.

Khashane La M. Manamela
Judge of the High Court

Date of Hearing	**:**	**9 February 2026**
Date of Judgment	**:**	**15 June 2026**

Appearances:

For the applicant	:	Mr JH Jooste
Instructed by	:	Dyason Incorporated, Nieuw Muckleneuk, Pretoria
For the respondent	:	Mr M R Maphutha (with Ms N Sibanyoni)
Instructed by	:	K Montjane Incorporated Attorneys, Menlyn, Pretoria