



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: 5160/2025

In the matter between:

KEAMOGETSWE MOUMAKWE TRADING CC APPLICANT

And

**E K CONSTRUCTION AND ALL GENERAL
TRADING CC**

FIRST RESPONDENT

**MATHOBELA 2566 CIVILS AND TRADING
(PTY) LTD**

SECOND RESPONDENT

Date heard: 7 August 2026

Delivered: 4 September 2026

Coram: Reddy J

Summary: Opposed winding-up application — applicant undertook to furnish a master's certificate of security and to serve the Master, SARS, and the first respondent's employees and trade union — none of this was done — application dismissed for non-compliance with section 346 of the Companies Act 61 of 1973 — costs on Scale B — *locus standi* and the statutory demand also considered, in the alternative — *bona fide* dispute not decided.

JUDGMENT

REDDY J

Introduction

[1] On 7 August 2026, this application was dismissed, with the applicant ordered to pay the costs of the application on the party and party scale, Scale B. On 11 August 2026, pursuant to this order, the applicant filed a request for reasons in terms of rule 49(1)(c) of the Uniform Rules of Court. In compliance with that request the following reasons are furnished.

[2] What previously served before this Court was an opposed application. The applicant founded the application on an alleged debt of R4,327,753.50. It said this was due for sub-contracting work on two municipal road projects. The first respondent opposed the application. As appears below, the application was dismissed for want of compliance with the security and service requirements of section 346 of the Companies Act 61 of 1973¹. It was not necessary to resolve the parties' further disputes.

The parties

[3] For brevity, a concise description of the parties is fitting. The applicant is Keamogetswe Moumakwe Trading CC, a close corporation (KMT). The first respondent is E K Construction and All General Trading CC, a close corporation (EK Construction). The second respondent is Mathobela 2566 Civils and Trading (Pty) Ltd (Mathobela Civils). Mathobela Civils is cited as an interested party

¹ Schedule 5 to the Companies Act 71 of 2008 provides that despite the repeal of the Companies Act 71 of 1973 Chapter XIV of the 1973 Act continues to apply to the winding -up and the liquidation of insolvent companies until a date to be determined by the Minister, read with section 66(1) of the Close Corporations 69 of 1984. These provisions apply *mutatis mutandis* to liquidation of close corporations unable to pay their debts.

because of its alleged joint venture with KMT, from which the disputed debt is said to arise. No relief is sought against Mathobela Civils. It did not enter the fray.

Background facts

[4] During 2024, EK Construction was appointed as the main contractor on two municipal projects. The first was the construction of the Vaaltyn access road and stormwater system for the Greater Taung Local Municipality (the Taung Project). The second was the upgrading of a road from Ikopoleng to Mogokgwane Ward 3 for the Mahikeng Local Municipality (the Mahikeng Project). KMT alleged an oral joint venture with Mathobela Civils to accept sub-contractor appointment on both projects. EK Construction disputed the existence of any contractual relationship with KMT, and disputed that the resulting debt, claimed at R4,327,753.50, was due.

[5] KMT's founding affidavit addressed security and service, under the headings '*Certificate of the Master*' and '*Service of the Application*'. KMT undertook to procure a master's certificate of security before the hearing. It undertook to serve the application on the Master, the South African Revenue Service, and EK Construction's employees and any trade union.

[6] The papers showed an email to the South African Revenue Service, (SARS) dated 26 September 2025, and two returns of service dated 6 October 2025. Both the latter reflected service on Ms Chantelle Havenga, an administrator, at EK Construction's business address. One return was captioned to reflect service on EK Construction's employees and any trade union. It showed that Ms Havenga confirmed EK Construction had employees and a notice board, and that there was no trade union. What the papers failed to show was that any notice was affixed to that board. Significantly the papers contained no certificate by the Master, and no affidavit establishing service on the Master or on SARS.

[7] This application was disposed of on the points *in limine* raised. For ease of reading, I turn to set out same as raised by Advocate Hitge for EK Construction and the retort by Advocate Riley for KMT.

Points *in limine*, as raised by Advocate Hitge

[8] Advocate Hitge submitted that the points *in limine* raised had not been done so by way of ambush litigation. Advocate Hitge claimed that EK Construction's heads of argument were filed on 21 July 2026, some two weeks before the hearing. Advocate Hitge continued that in same, KMT had already been forewarned that there was no compliance with section 346. Notably Advocate Hitge states that EK Construction's cautioned KMT that it reserved rights to raise this point.

[9] Advocate Hitge further averred that KMT had also failed to furnish the master's certificate of security required by section 346(3). Counsel reasoned that was not disputed. Advocate Hitge argued that the email to SARS, unsupported by any affidavit of service, did not satisfy section 346(4A)(b). Advocate Hitge further contended that the return relied upon for service on EK Construction's employees in truth recorded service on Ms Chantelle Havenga, an administrator and representative of EK Construction, and not on any employee or trade union as section 346(4A)(a) requires. Advocate Hitge sought a dismissal of the application with costs on Scale B or C given KMT's material non-compliance with peremptory statutory requirements.

Response to points *in limine* by Advocate Riley

[10] Advocate Riley submitted that there had been proper service. Advocate Riley pointed to the return of service captioned for EK Construction's employees and any trade union, and submitted that it was, at least, *prima facie* proof of compliance. Advocate Riley argued that, under this Division's practice directives, proof of service by affidavit need only be filed by the return date of the rule *nisi*. That being

so Advocate Riley claimed that KMT was not yet in default in that regard. Advocate Riley proposed that any shortfall was in any event a minor and curable omission, and that KMT had at all times intended to prosecute the application. Advocate Riley did not dispute that no master's certificate of security had been furnished. In the alternative to dismissal, Advocate Riley requested that the application be postponed or removed, with costs reserved.

Findings on points *in limine*

[11] To my mind each point *in limine* raised must be addressed. Where one point *in limine* disposes of the application by reason of a material irregularity, it may not be necessary to address the others. Adopting wide consideration of the matter Given, I consider it prudent to address, in the alternative, the further points raised, so that this Court's reasoning on them is not left outstanding should that finding not survive appeal. This Court proceeds accordingly.

Non-compliance with section 346 of the Companies Act 61 of 1973

The law

[12] Section 66(1) of the Close Corporations Act 69 of 1984 applies Chapter XIV of the Companies Act 61 of 1973 to the winding-up of a close corporation unable to pay its debts.² Section 346(3) of that Chapter requires every application for winding-up, save one brought by the Master, to be accompanied by a certificate by the Master. That certificate must confirm that sufficient security has been given for the costs of the winding-up.³ The section reads:

‘Every application to the Court referred to in subsection (1), except an application by the Master in terms of paragraph (e) of that subsection, shall be accompanied by a certificate by the Master, issued not more than ten days before the date of the application, to the effect that sufficient security

² Section 66(1) of the Close Corporations Act 69 of 1984 applies Chapter XIV of the Companies Act 61 of 1973 *mutatis mutandis* to the winding-up of a close corporation unable to pay its debts.

³ Section 346(3) of the Companies Act 61 of 1973.

has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding-up.’

[13] Section 346(4A) (a) further requires an applicant, when the application is presented, to furnish a copy of it to every registered trade union representing the company's employees, to the employees themselves by affixing a copy at the company's premises, to the SARS, and to the company. Section 346(4A)(b) requires the applicant to file, before or during the hearing, an affidavit setting out how this was done.⁴ The section reads:

‘(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 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 application;

(iii) to the South African Revenue Service; and

(iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(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.’

⁴ Section 346(4A) (a) and (b) of the Companies Act 61 of 1973.

Discussion

[14] KMT acknowledged the applicability of these legislative requirements. Simply put, KMT undertook that a master's certificate of security would be made available at the hearing. Further it confirmed that the application would be served on the master, SARS, and EK Construction's employees and any trade union.

[15] To this end, there was no certificate by the master in the papers, and Advocate Riley did not suggest otherwise. Moreover, the email to SARS, though sent well in advance of the hearing, was not accompanied by any affidavit of service, as section 346(4A)(b) requires. The return captioned for service on EK Construction's employees and any trade union recorded only that Ms Havenga, an administrator, confirmed the existence of a notice board and the absence of a trade union. It did not record that a notice was ever affixed to that board. Personal service on one individual is not the affixing of a notice for the general attention of a company's employees that section 346(4A)(a) contemplates. Significantly there was no proof that any notice reached, or was displayed for, EK Construction's employees generally, still less any trade union. There was no proof that the application was ever served on the master.

[16] Advocate Riley posited that KMT was not yet in default of section 346(4A)(b) because proof of service could still be filed by the return date of the rule *nisi*. Even if that were correct as to the timing of the compliance affidavit, it does not answer the absence of the master's certificate required by section 346(3), which must accompany the application itself. As it stood it fails to cure the underlying failure to affix notice for EK Construction's employees in the first place. As noted in the finding an affidavit filed later could not attest to service that had not occurred.

[17] To my mind a postponement or removal was the not appropriate remedy . EK Construction's heads of argument, filed some two weeks before the hearing, had

already recorded this precise objection and reserved EK Construction's rights to raise it. It follows that given the timeline of the warning KMT accordingly had ample notice , and ample time, to remedy or explain the defects. KMT of its own accord elected to do neither.

Finding

[18] In the premises, this point *in limine* succeeded. KMT had not shown, on a bundle that it evinced as complete, that it complied with the security and service requirements of section 346(3) and (4A).

Locus standi

The law

[19] It is trite that in motion proceedings the founding affidavit constitutes both the pleadings and the evidence.⁵ A litigant must therefore set out, *ex facie* that affidavit, the facts necessary to establish its standing to claim the relief sought.

[20] Where a debt is said to be owed to an unincorporated joint venture, a question arises. May one member enforce the claim alone, or must all members act jointly? This turns on the intention of the parties, as recorded in the venture's constitutive agreement.⁶ In *Lephalale Local Municipality v Nanza Amamiya Ndlovu Joined Venture* the court declined to accept a bare assertion of standing, absent evidence of the joint venture's *essentialia*. It stands to reason that where the founding affidavit fails to identify the terms of the venture, or the rights of its members *inter se*, a court

⁵ *Lephalale Local Municipality v Nanza Amamiya Ndlovu Joined Venture* [2022] ZALMPPHC 28 paras [13] and [16] ; *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) at 200.

⁶ Christie's Law of Contract in South Africa 7th ed at 299, citing *BHT Water Treatment (Pty) Ltd v Leslie* [1993] 3 ALL SA 126 at 129.

cannot determine the nature of the arrangement or the standing of the party before it.

Discussion

[21] KMT's case was that it and Mathobela Civils formed an oral joint venture to accept appointment as sub-contractor on the two projects. That being said, KMT contended that the debt sued for was accordingly owed to that joint venture. Surprisingly the founding affidavit disclosed nothing of the venture's terms. The founding affidavit was terse on the following four substantive issues. Firstly, it did not mention whether the venture was a partnership. Secondly it did not disclose the parties' respective contributions or profit-sharing ratios. Thirdly and crucially, it failed to aver who had authority to bind the venture, or to litigate on its behalf. Fourthly and equally critical no averment was made as to whether the right to claim payment could be exercised by one member alone.

[22] In *lieu* of making essential averments, KMT proceeded on an all-encompassing phrase in the founding affidavit that stated only that the application was brought '*in its own right and not as a joint venture*'. This was grounded on the allegation that it had '*become apparent*' that Mathobela Civils was "*in cahoots*" with EK Construction in refusing to pay. That assertion was devoid of evidentiary support and was no other than blind speculation. It did not explain why Mathobela Civils, a co-venturer with a direct and substantial interest in the debt and in the outcome of this application, was neither joined nor accounted for. Conclusively, it failed to cite any authority, cession, or agreement entitling KMT to claim the whole of the debt in its sole name.

[23] This key omission could be overlooked. KMT's own heads of argument were extensive on the question of a *bona fide* dispute. It is silent on this objection

altogether. It went unanswered on the papers. The essential jurisdictional facts required to found KMT's *locus standi* were accordingly absent.

Finding

[24] Had it been necessary to decide, I would have found that KMT had failed to establish, *ex facie* its founding affidavit, that it had the requisite *locus standi* to bring this application in its own name.

The section 69(1)(a) Close Corporations Act 69 of 1984

The law

[25] Section 69(1)(a) of the Close Corporations Act 69 of 1984 deems a corporation unable to pay its debts in certain circumstances. A creditor must serve a demand on the corporation by delivering it at its registered office. The corporation must then neglect, for 21 days thereafter, to pay, secure, or compound the debt.⁷ Service at the corporation's registered office is not incidental to the subsection. It is the very act by which the deeming provision is triggered. The section reads:

‘ A corporation shall be deemed to be unable to pay its debts, if-

- (a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.’

Discussion

⁷ Section 69(1)(a) of the Close Corporations Act 69 of 1984.

[26] KMT's founding affidavit conceded, in terms, that the statutory demand was served at EK Construction's business address, not its registered address. KMT sought to overcome this by contending that the defect was immaterial. It said the demand in fact came to EK Construction's attention and was responded to. It relied for this proposition on an unreported judgment.⁸

[27] The subsection is peremptory in its terms. It is the mechanism by which KMT sought to invoke the statutory presumption of commercial insolvency, rather than proving actual inability to pay on ordinary principles. KMT elected to found its case on the deeming provision. KMT conceded non-compliance with the manner of service the provision peremptorily prescribes. It could not have invoked the presumption that provision was designed to create.

Finding

[28] Had it been necessary to decide, I would have found that the statutory demand relied upon did not give rise to the deeming provision in section 69(1)(a) of the Close Corporations Act.

Conclusion

[29] The finding on section 346 was dispositive of the application. Even had it not been, the alternative findings on *locus standi* and the statutory demand would independently have disposed of it. It was accordingly not necessary to determine the substantially disputed question whether the underlying debt was *bona fide* disputed within the meaning of the well-established rule in *Badenhorst v Northern Construction Enterprises*.⁹ That question, on the papers, turned on mutually destructive and seriously contested factual allegations. Each side accused the other

⁸ *Coetzee N.O. v Solar Africa Energy (Pty) Ltd* [2025] ZAGPPHC 929 para 64.

⁹ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) NNHJ at 347H.

of fabrication. Those were matters more properly resolved, if at all, in action proceedings.

[30] It followed that the application had to fail. EK Construction had given fair and timeous warning of the very defect on which the application failed. There was no reason why costs should not follow the result.

Costs

[31] Costs follow the result. This matter required consideration of the statutory formalities under section 346 of the Companies Act, and the complexity of the issues raised and argued takes it beyond the ambit of Scale A. The applicant was to pay the costs of the application on the party and party scale, Scale B.

Order

[32] In the result, the following order was made:

1. The application is dismissed for want of compliance with the requirements of section 346 of the Companies Act 61 of 1973.
2. The applicant is to pay the costs of the application, on the party and party scale, Scale B.



REDDY J

JUDGE OF THE HIGH COURT, SOUTH AFRICA,

NORTH WEST DIVISION

Appearances

For the Applicant: Advocate B Riley

Instructed by: Modiboa Attorneys Inc, Klerksdorp c/o Mahikeng

For the First Respondent: Advocate MG Hitge

Instructed by: Imraan Kaka Attorneys c/o Nienaber & Wissing Attorneys,
Mahikeng