THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 585/11
Reportable

In the matter between:

SHAUN GUNGUDOO	**FIRST APPELLANT**
AYESHA GUNGUDOO	**SECOND APPELLANT**

and

HANNOVER REINSURANCE GROUP AFRICA (PTY) LTD	**FIRST RESPONDENT**
HANNOVER REINSURANCE AFRICA LTD	**SECOND RESPONDENT**

Neutral citation: *Gungudoo v Hannover Reinsurance Group Africa* (585/11) [2012] ZASCA 83 (30 May 2012)

Coram: Mthiyane DP, Nugent, Cachalia, Mhlantla JJA and Ndita AJA

Heard: **8 May 2012**

Delivered: **30 May 2012**

Summary: Sequestration – debtor failing to dispute claims on reasonable and bona fide grounds – Sections 9(4A), 11(2A) and 11(4) requiring service of sequestration application on employees of debtor – Service required only on employees of business, not all employees.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Tsoka J sitting as court of first instance):

The appeal is dismissed with costs of two counsel.

JUDGMENT

CACHALIA JA (MTHIYANE DP, NUGENT, MHLANTLA JJA AND NDITA AJA CONCURRING):

[1] This is an appeal against an order of the South Gauteng High Court (Tsoka J) finally sequestrating the joint estate of the appellants who are married in community of property. The appellants come before us with leave of the high court.

[2] The appellants do not contest the finding that they are insolvent. They confine their appeal to three grounds. First, that the respondents had failed to make out a case for relief in their founding papers; second, that the respondents' claims were disputed on bona fide and reasonable grounds; and finally, that the respondents had not properly notified the appellants' employees of the sequestration proceedings in line with the relevant provisions of the Insolvency Act 24 of 1936.

[3] It is important to understand the circumstances that led to the respondents instituting sequestration proceedings against the appellants. The second respondent is a wholly owned subsidiary of the first respondent and carries on business as a re-insurer. The first appellant, Mr Gungudoo, commenced working for the first respondent as an accounting clerk in 1986. In April 1995 he was promoted to the position of Investment Manager, and in July 2002, to Senior Investment Manager of the Investment Unit. Here, he was responsible for managing the company's investment assets valued at R3,4 billion, which evidently required a high level of trust. A significant portion of these assets were invested in listed equities and corporate bonds. Mr Gungudoo was, effectively, the only person authorised to instruct stockbrokers on these investments.

[4] During July and August 2009 the first respondent's audit committee discovered that Mr Gungudoo had taken a number of allegedly unauthorised 'short positions' in the equity market, which resulted in a loss to the respondents of R9,5 million. Such transactions, known as 'short sales', differ from the usual 'long sale' of stocks where an investor buys stock in the expectation that it will increase in value. In a short sale the investor will sell short if he believes that a stock is overpriced, and expects its price to decline.

[5] A short sale works this way: The investor identifies an overpriced stock, which he does not own. He needs to sell it at a higher price before buying it back at a lower price to take advantage of the expected decline in the price of the stock. To enable the physical transfer of the stock to the buyer, he borrows the share temporarily, through a broker, from the owner. Once he has physical possession of the stock, he sells it in the market, and pays the proceeds of the sale to the lender as collateral. After a period the investor will buy the stock back at an expected lower price than the price for which it was sold. He will then return the stock to the lender who in turn will repay the collateral. The difference between the price paid for the stock by the investor and the amount of the repaid collateral represents the investor's profit. Of course if the share price does not

decline as expected, but instead improves, and the investor is compelled to sell it at the increased price, he will incur a loss. These transactions are complex and risky. In this case when the respondents became aware of the transactions they decided to close the short positions immediately incurring losses in the process.

[6] When the respondents confronted Mr Gungudoo with this discovery, he resigned suddenly on 4 August 2009, without explanation. At that stage he had had twenty-three years of service. He was immediately placed on special leave pending further investigation. The company's auditors, Deloitte, prepared a report identifying another potential loss to the second respondent of R23 million, flowing from Mr Gungudoo's alleged misrepresentations to Sanlam Private Investments (Pty) Ltd. As this is not a liquidated claim, nothing further need be said about it.

[7] On 20 August 2009 the respondents launched proceedings, on a semi-urgent basis, to sequestrate the appellants. The alleged loss of R9,5 million was made up of five transactions and formed the basis of their cause of action. The founding affidavit stated presciently that Mr Gungudoo's affairs were still under investigation and that further claims were likely to come to light.

[8] Mr Gungudoo filed his answering affidavit on 30 August 2009. He admitted the transactions, and stated that he had had his employer's authority to take short positions. He asserted that the respondents' Investment Committee and its top management were aware of this practice since 1995, when he became the investment manager, but he produced no proof to support this assertion. The senior managers of the Investment Committee subsequently all made affidavits denying that the practice of short trading was part of their investment strategy, or that they were aware that Mr Gungudoo was trading in this manner.

[9] On 11 September 2009 the respondents filed their replying affidavit in which they stated that Deloitte had been tasked with reconciling all the transactions recorded in the second respondent's data capturing system with

those recorded in the brokers' notes for the period January 2007 to June 2009. The purpose of this exercise was to ascertain whether Mr Gungudoo had misappropriated any of the second respondent's shares or cash.

[10] The respondents discovered, as they had predicted they would when preparing their founding affidavit, that during the period under investigation Mr Gungudoo had transferred shares and cash to the value of some R27 million from its brokers Barnard Jacobs Mellet (BJM) and Sanlam Private Investments (Pty) Ltd (SPI) broker accounts to a close corporation, Shaneil, of which Mr Gungudoo is the sole member. It appeared that Mr Gungudoo had used the assets of the respondents as collateral to conclude short sale transactions for the benefit of his close corporation. These transactions involved shares of Anglo American (Anglo), Sappi, Harmony, Goldfields, Dynamic Cables and certain cash transfers. (The amount of R27 million was later reduced to R25 million after Mr Gungudoo had provided an explanation for R2 million involving the Goldfields transaction.)

[11] In addition to these transfers, the respondents ascertained that three other share transfers from the respondents' broker accounts into the accounts of third parties had been made. The shares were of Goldfields, Absa and Cape Empowerment, and resulted in a further loss of R16 million. The respondents allege that as Mr Gungudoo had the sole mandate to trade on the first respondent's broker accounts, which is not disputed, only he could have brought about these transactions. They say that he not only concealed the transactions from the Investment Committee, but disguised them to look like inter-group business deals by the careful use of encryption codes so that it appeared that Shaneil was a public company and a subsidiary of the respondents.

[12] The respondents convincingly demonstrated this deception in their replying affidavit by reference to a document – the 'securities borrowing agreement' – which they obtained from BJM on 18 August 2009. The parties to

this agreement were the respondents, Shaneil Financial Management Limited, Compass Insurance Company Ltd – all defined as part of the Hannover-Re Group – and Finsettle (Pty) Ltd, an inter-broker house. Mr Gungudoo and Mr Bill Skirving, the respondents' compliance officer, signed the agreement on behalf of respondents. Mr Skirving had no recollection of the agreement and says that Mr Gungudoo had probably placed the document before him for signature; he had signed it without reading it – as he had done with other documents. What is clear is that the agreement unmistakeably and falsely misrepresented Shaneil as being a member of the Hannover-Re Group.

[13] A perusal of the front page of the agreement reveals that Shaneil is falsely described as a public company by the use of the word 'Limited', and is given a registration number – 97/055477/06 – that has artfully been changed to substitute the suffix '23' to '06'. The suffix '06' is used to designate a public company, and the suffix '23', a close corporation.

[14] Mr Gungudoo's explanation – proffered in a further affidavit – of how his close corporation came to be described as a public company and included in this agreement was that BJM had made this error. But this account lacks credibility. He signed the agreement knowing that Shaneil was not part of the Hannover–Re Group. And he falsely suggested that the suffix which reflects '06' instead of '23' was a bona fide error on his part; it is obvious that the suffix was consciously inserted to make Shaneil appear to be a public company that was associated with the Group.

[15] The first respondent also revealed in a further affidavit that Mr Gungudoo had signed a Financial Intelligence Centre Act 38 of 2001 (FICA) compliance document soon after concluding the securities borrowing agreement, and had submitted it to BJM. The document falsely misrepresents the respondents' Group Managing Director and its then Financial Officer as directors of Shaneil. Again,

Mr Gungudoo was not able to offer a plausible explanation for how he came to sign a document that contained patently false information.

[16] So it is hardly surprising that both Willis J, who granted the provisional sequestration order against the appellants, and Tsoka J, in granting the final order, concluded that Mr Gungudoo had fraudulently woven a close corporation, owned and controlled by him, into the fabric of the respondents' relationship with their stockbrokers to facilitate the movement of shares between the respondents and Shaneil. This finding is relevant, though not conclusive, in the assessment of whether the appellants are contesting the respondents' claims on reasonable and bona fide grounds.

[17] But I must begin with the first ground of appeal – the alleged failure of the respondents to make out a case for the relief claimed in their founding affidavit. The point can be disposed of quickly. In their founding affidavit the respondents stated that the sequestration proceedings were brought in haste after the discovery of some irregular transactions, and that further investigations were likely to uncover more claims. In the face of Mr Gungudoo's denial of any wrongdoing in his answering affidavit the respondents set out details of the additional claims in their replying affidavit. The dispute was then ventilated fully in further affidavits filed with leave of the court. In addition to his answering affidavit, Mr Gungudoo filed four further sets of affidavits and the respondents filed two more after their replying affidavit. In granting the provisional and final orders the high court considered all the material before it. In the absence of any attack by the appellants on the exercise of the court's discretion in permitting the filing of further affidavits, and to consider all the evidence before it, this ground must fail.[1]

[18] I turn to consider whether Mr Gungudoo disputes the claims against him on reasonable and bona fide grounds – the second ground of appeal. It was not in issue that the claims against the appellants involving the misappropriation of

[1] *Ganes & another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) para 21.

shares[2] and cash were all liquidated claims. Mr Gungudoo was therefore required, in good faith, to adduce facts which, if proved at trial, would constitute good defences to each of the claims against him.[3] For its part, all that the respondents need establish before us is a single claim in excess of R100, as s 9(1) of the Insolvency Act 24 of 1936 requires, which the appellants are unable to contest on reasonable and bona fide grounds.

[19] Regarding the transactions that make up the claim for R25 million mentioned earlier, it is convenient to deal with the Anglo, Sappi and Harmony shares together. These shares were transferred on Mr Gungudoo's instructions from the second respondent to Shaneil. On the face of it, therefore, the shares were misappropriated from the second respondent. Mr Gungudoo asserts that Shaneil is the beneficial owner of those shares and had lent them to the second respondent in a short sale transaction; and that the transfer of the shares to Shaneil constituted a return of those shares. Cumulatively the transfer of these shares amounted to R17 366 100. Mr Gungudoo, therefore, had to adduce facts to show that Shaneil was the beneficial owner of the shares and that they were transferred to Shaneil as a loan. In this regard I assume in his favour that he was authorised to engage in transactions of this nature.

[20] The Anglo transaction involved the transfer of 20 000 shares from the second respondent's account at BJM to Shaneil's BJM account on 22 May 2008. To substantiate his assertion that this was a short sale transaction, and constituted a return of the shares Shaneil had lent to the second respondent, Mr Gungudoo relied on a statement purporting to be Shaneil's BJM statement for the period ending 28 December 2007, which bore the description 'delivered to you'. This demonstrated, he asserted, that Shaneil delivered these shares to the second respondent as a loan.

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[2] *Samsudin v De Villiers Berange NO* [2006] SCA 79 (RSA) para 35.
[3] *Helderberg Laboratories CC v Sola Technologies* 2008 (2) SA 627 (C) para 23.

[21] To verify this, the respondents' attorneys obtained a copy of the original BJM statement from BJM. Upon perusal, the copy of the original statement appeared to be exactly the same as the copy on which Gungudoo relied, except that in place of the entry bearing the 'delivered to you' description, the narrative 'sold' appeared in its place. Further investigations by the respondents showed conclusively, from a contract note found on Mr Gungudoo's laptop, that these shares were in fact sold on 4 December 2007. The change in the narrative invited the inference that Mr Gungudoo had tampered with the document on which he relied in an attempt to demonstrate that it supported his version that Shaneil had lent the shares to the second respondent.

[22] Faced with this inconsistency, Mr Gungudoo changed tack. In his supplementary further affidavit he attributed the inconsistency to an error that BJM had made when capturing the data – an assertion for which there was no confirmation, and contradicted Mr Gungudoo's earlier assertion under oath that the shares were delivered to the second respondent as part of a short sale transaction during December 2007.

[23] Mr Gungudoo then stated that Shaneil had transferred the shares to the respondents during February 2006, and not in December 2007, as he had said earlier. He supported this changed stance by reference to another BJM statement recording Shaneil's transactions for February 2006. One of the entries on this statement recorded that 20 000 shares were 'delivered to you', which Mr Gungudoo claimed was a delivery of the shares to Shaneil. However, the respondents refuted this by pointing to a second recordal on the same statement showing that the shares were 'received from you'. This demonstrated, the respondents contended persuasively, that there had been a broker error, which is confirmed by a BJM Broker Dealer Account report showing a number of broker errors on 6 February 2006.

[24] Mr Gungudoo's version is in any event inherently improbable: there was no need for the second respondent to have borrowed shares from Shaneil as the very same BJM statement for February 2006 that he had relied upon to prove that the transaction represented the closing of a short position also shows that the second respondent bought 30 000 Anglo shares on 30 January 2006, a month before the alleged borrowing of the 20 000 shares occurred. The papers show that as at February 2006, the second respondent held 90 000 Anglo shares.

[25] In yet another affidavit – the appellants' second supplementary further affidavit – Mr Gungudoo again attempted to show by reference to two further BJM broker statements for May 2008 that the transaction demonstrated the closing of a short position. He asserted that the narratives 'collateral delivered', 'col due to you', 'col position closed' and 'collateral returned' in the second respondent's statement from BJM were all consistent with the transaction having been a short sale transaction.

[26] The assertion does not bear scrutiny. Mr Gungudoo's transfer of 20 000 Anglo shares on 22 May 2008 from the second respondent's accounts created a negative position of 792 Anglo shares in its account. This appears to explain the use of the narratives in the second respondent's May statement. The transfer on 22 May 2008 reduced Shaneil's negative opening balance of 50 468 shares to a still negative balance of 30 368 shares. And this clarifies why the narratives 'received from you', 'loan returned by you' and 'loan position closed' appear on the May 2008 statement of Shaneil. The narratives are, therefore, consistent with the second respondent's shareholding going into a negative shareholding position after the share transfer to Shaneil on 22 May 2008, and negate Mr Gungudoo's suggestion that they demonstrate the closing of a short position.

[27] It thus becomes apparent that Mr Gungudoo transferred the 20 000 shares to Shaneil on 22 May 2008 to offset the negative balance in its accounts.

So even if we assume in his favour that he was authorised to engage in short sale transactions, he produced no proof that Shaneil was the beneficial owner of the Anglo shares. The transaction was, therefore, obviously an unlawful transfer of shares to Shaneil.

[28] In any event I think that Mr Gungudoo's assertion that he executed the Anglo transaction and the other transactions in issue with the authority and knowledge of the respondents is also inherently improbable. There is just no evidence, other than his say so, that these transactions were authorised. I cannot imagine the senior managers of the respondents approving transactions between them and a close corporation in which their investment manager not only has a direct interest, but is effectively acting on behalf of both sides.

[29] Moreover, the respondents have demonstrated by reference to the securities borrowing agreement and the FICA document that Mr Gungudoo had engaged in an elaborate subterfuge to make this transaction between his close corporation and the second respondent – as he did with other transactions – appear to be legitimate. Mr Gungudoo produced no evidence at all to show that Shaneil had been the beneficial owner of these shares at any stage, and has therefore not been able to reasonably and in good faith dispute the respondents' claim that he misappropriated the shares to the value of R10 840 000. That being so, it is unnecessary to examine any of the other transactions in issue.

[30] I turn to consider the appellants' third and final ground of appeal – the respondents' alleged non-compliance with the provisions of the Act requiring notice of the sequestration proceedings to be given to a debtor's employees, and where applicable, to their trade unions. First, the appellants contend that by omitting to serve the sequestration application on the appellants' employees before obtaining the provisional order the respondents did not comply with s 9(4A)*(a)*(ii) of the Act; second, they assert that by neglecting to notify the employees of the extensions and the actual return day of the provisional order

the respondents did not act in accordance with s 11(2A); and third, they claim that the respondents did not ensure that the sheriff of the high court complied with his obligation to establish whether the employees were represented by any trade unions or whether there was a notice board inside the appellants' premises so that service on the unions could be effected by affixing a copy of the petition on the notice board in a manner contemplated by s 11(4) of the Insolvency Act. The appellants submit that non-compliance with any and all of these peremptory requirements of the Act vitiates the application.

[31] Before I consider this submission a brief factual background is necessary. The respondents sought and obtained a provisional order on 31 August 2010. On 27 October 2010, shortly before the return day of the provisional order on 2 November 2010, the appellants filed a further affidavit alleging that the respondents had not complied with s 9(4A)*(a)*(ii) of the Insolvency Act because they had failed to serve a copy of the sequestration application on the appellants' employees before the provisional order was granted – an assertion that the high court was not asked to consider at the provisional sequestration hearing. Mr Gungudoo identified seven such employees: one security guard, two other security guards who are also drivers, three domestic workers and a bookkeeper-administrator. They each filed affidavits confirming their employment with the Gungudoos, but none asserted any interest in the sequestration proceedings, and importantly for present purposes, none claimed to be employed in any business of the appellants, nor did the Gungudoos make such a claim.

[32] On 2 November 2010, the return day, the provisional order was extended until 16 November 2010 to allow the respondents to serve the papers on the employees. On 14 November 2010, respondents' legal representative served the papers at the Gungudoo's residence. On 16 November 2010, the matter was postponed, and thereafter it was postponed once more. It was finally heard on 22 March 2011. The appellants also complain that the employees were not given notice of the actual date of the hearing.

[33] As is apparent the respondents had not served the application on the employees before obtaining the provisional order. The argument before us, and before the court below, was concerned primarily with two aspects. First, whether the relevant provisions of the Insolvency Act, 9(4A)(a), 11(2A) and 11(4), applied to the seven employees even though they were not employees of any business of the Gungudoos; and secondly if the provisions did apply to them, whether they were peremptory or directory in nature. I turn to consider the first question.

[34] Section 9(4A)(a) provides as follows:

'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;

. . .'

Sections 11(2A) and 11(4) provide as follows:

Section 11(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;

. . .'

Section 11(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.'

[35] Before considering the purpose and effect of these provisions, some background to the adoption of the legislation is necessary. In 2002 the Insolvency Act and the Companies Act 61 of 1973 were amended by Act 69 of 2002. Among the objects of these amendments was to ensure that employees of debtors facing sequestration or winding-up were notified of the proceedings. The amended s 9(4A) of the Insolvency Act[4] was inserted to require that notice be given to the debtor's employees before a provisional order was granted and the amended s 11(4)[5] provided for service of a rule *nisi* on the employees. Likewise, the amended s 346(4A)[6] of the Companies Act called for notice to be given to the company's employees before the grant of a provisional order, and the amended s 346A[7], for service of the winding-up order on the company's employees. The Amendment Act came into effect on 1 January 2003.

[36] It is significant that these amendments were preceded by an amendment to the Labour Relations Act 66 of 1995 (the LRA). The LRA amendment, s 197B[8], which came into operation on 1 August 2002, requires an employer facing financial difficulties that may result in sequestration or winding-up to notify a 'consulting party' contemplated in s 189(1) of the LRA of this fact. An employer that applies to be wound up or sequestrated, or receives an application for its

[4] Subsection (4A) inserted by s 2 of Act 69 of 2002.
[5] Section 11 substituted by s 3 of Act 69 of 2002.
[6] Subsection (4A) inserted by s 7 of Act 69 of 2002.
[7] Section 346A inserted by s 8 of Act 69 of 2002.
[8] Section 197B inserted by s 50 of Act 12 of 2002: '**Disclosure of information concerning insolvency**
(1) An employer that is facing financial difficulties that may reasonably result in the winding-up or sequestration of the employer, must advise a consulting party contemplated in section 189 (1).
(2) *(a)* An employer that applies to be wound up or sequestrated, whether in terms of the Insolvency Act, 1936, or any other law, must at the time of making application, provide a consulting party contemplated in section 189 (1) with a copy of the application.
(b) An employer that receives an application for its winding-up or sequestration must supply a copy of the application to any consulting party contemplated in section 189 (1), within two days of receipt, or if the proceedings are urgent, within 12 hours.'

winding-up or sequestration, must supply a copy of the application to the 'consulting party'.[9]

[37] A 'consulting party' is not defined in the LRA, but s 189(1) of the LRA calls for an employer that contemplates dismissing one or more workers for operational requirements to consult employees in terms of a collective agreement, or in the absence of a collective agreement, with a workplace forum, trade union or other representative body of the employees. So, s 189 requires the employer to consult only with employees that face dismissal for the operational requirements of the employer – not all employees that fall within the broad definition of an employee in s 213 of the LRA.[10] It need hardly be stated that 'operational requirements' of an employer can refer only to the employer's business requirements.[11] The rationale for s 189(1) is to enable employees engaged in the employer's business operations, or their representatives, to explore possible solutions with their employer to obviate the need for dismissal or to limit the number of dismissals for operational reasons. It follows that s 197B of the LRA requires an employer to disclose information concerning an insolvency only to those employees that are employed in the employer's business.

[38] In the instant case there is no suggestion that the seven employees of appellants were employed for any business purpose or in any business of the appellants. And the appellants, correctly, did not suggest that they had any duty to disclose any information to these employees regarding the sequestration proceedings against them – indeed it is common cause that they did not. It can thus hardly be contended that the respondents had an obligation to inform the

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[9] Sections 197B(2)*(a)* and 197B(2)*(b)* of the LRA.
[10] Section 213: "**employee'** means-
(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*; and
(b) any other person who in any manner assists in carrying on or conducting the business of an employer,
and **'employed'** and **'employment'** have meanings corresponding to that of 'employee'; *Sibiya & others v Amalgamated Beverages Ltd* (2001) 22 ILJ 961 (LC).
[11] Section 213 of the LRA says that operational requirements concern 'requirements based on the economic technological, structural or similar needs of an employer'.

debtor's employees of the sequestration proceedings when the employer had no such duty.

[39] A closer examination of the language used in the relevant provisions of the Insolvency Act bears this out. It is significant that s 9 (4A)*(a)*(i) commences with the requirement that the sequestration 'petition' be 'furnished' to 'every trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees'. This suggests that the draftsman had employees of a business in mind. This view is fortified by the petitioner's obligation, in s 9(4A)*(a)*(ii)*(aa)*, to furnish a copy of the petition to the 'employees themselves' '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'. A notice board is associated with a business – not a private residence – and the word 'premises' is usually used to refer to a house or building occupied by a business or for an official purpose.[12] Any doubt that the object of the notice obligation is aimed at the employees of a business must surely be dispelled by the language requiring notice to be given to the employees, both in s 9(4A)*(a)*(ii)*(bb)* and s 11(2A)*(b)*, at 'the premises from which the debtor conducted business at the time of the presentation of the petition'.

[40] Sections 346(4A) and 346A of the 1973 Companies Act[13] are virtually the mirror images of ss 9(4A) and 11(2A) of the Act. While s 346(4A) refers to notice

[12] Concise Oxford English Dictionary 12 ed p 1132.
[13] Section 346(4A): '**Application for winding-up of company**
(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 fixing 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

of the winding-up application being served on the employees of the company at its premises, s 346A says that the winding-up order is to be served on the employees at the 'debtor's premises'. This obviously refers the company's business premises,[14] which again strengthens my view that the reference to the 'debtor's premises' in the ss 9(4A)(ii)*(aa)* and 11(2A)*(b)* of the Insolvency Act also relates to business premises.

[41] What emerges from this analysis is that the purpose of the relevant provisions of the LRA, Insolvency Act and 1973 Companies Act, which were adopted as a package, was to ensure that where a debtor conducts a business, notice of sequestration or winding-up proceedings must be given to employees of the business. In the present case none of the Gungudoos' employees were employed in a business operation; so the respondents did not attract any obligation to notify them of the sequestration proceedings. It follows that there is no merit in the appellants' submission that the respondents' failure to comply with ss 9(4A), 11(2A) and 11(4) of the Insolvency Act either invalidated the provisional order or precluded the final order from being granted.

(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.'
Section 346A: '**Service of winding-up order**
(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.'
[14]*Hendricks NO & others v Cape Kingdom (Pty) Ltd* 2010 (5) SA 274 (WCC); Meskin *Henochsberg on the Companies Act* Butterworths Vol 1 Issue 32 p 724 (3).

[42] The appellants' contention, that these provisions are peremptory and not directory therefore need not be considered. I expressly leave this question open.

[43] In these circumstances the appeal is dismissed with costs of two counsel.

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A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For Appellant:	A G South Instructed by: F Vally Attorneys, Pretoria Honey Attorneys, Bloemfontein
For Respondent:	M R Hellens SC (with him C L Robertson) Instructed by: Webber Wentzel, Johannesburg Lovius Block, Bloemfontein