CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 62/14

In the matter between:

IVOR CHARLES STRATFORD	First Appellant
SHEILA MARGARET STRATFORD	Second Appellant
CLEAN NGOMA	Third Appellant
ERIC DLOKOLO	Fourth Appellant
ANDRIES ADONIS	Fifth Appellant

and

INVESTEC BANK LIMITED	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
MINISTER OF LABOUR	Third Respondent

Neutral citation:	*Stratford and Others v Investec Bank Limited and Others* [2014] ZACC 38
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J
Judgment:	Leeuw AJ (unanimous)
Heard on:	2 September 2014
Decided on:	19 December 2014

Summary: Insolvency Act 24 of 1936 — section 9(4A) — "employees" includes domestic employees

Insolvency Act 24 of 1936 — section 9(4A) — peremptory nature of "furnish" — petition must be made available in a manner reasonably likely to make it accessible to the employees — section cannot be used as a technical defence

Insolvency Act 24 of 1936 — section 12(1) — advantage to creditors — means a reasonable prospect that some pecuniary benefit will result — "advantage" is broad and should not be rigidified

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ORDER

On appeal from the Western Cape Division of the High Court, Cape Town (Mantame J):

1. The appeal is dismissed except to the extent set out below.
2. It is declared that the word "employees" in section 9(4A) of the Insolvency Act 24 of 1936 includes domestic employees.
3. The order in paragraph 2 is not retrospective, except to the following extent:
    (a) If in a pending application for sequestration a provisional order was granted but a copy of the application was not furnished to the debtor's domestic employee(s), before a final order is granted—
        (i) the petitioner must furnish the debtor's domestic employee(s) with a copy of the application papers, either personally or in a manner likely to make them accessible to the employee(s);
        (ii) the petitioner must deliver an affidavit setting out details of when and how he or she has done so; and

(iii) if necessary, the court must extend the rule *nisi* to allow the petitioner to comply with this requirement.

(b) If a final sequestration order has been granted and is subject to an appeal but a copy of the application was not furnished to the debtor's domestic employee(s)—

(i) the final order must be set aside and replaced by a provisional sequestration order; and

(ii) a copy of the rule *nisi* must be served on the debtor's domestic employee(s) with a copy of the application papers, in accordance with section 11(2A) read with section 11(4) of the Insolvency Act 24 of 1936.

4. There is no order as to costs.

JUDGMENT

LEEUW AJ (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This is an appeal against the final sequestration order and dismissal of a counter-application by the Western Cape Division of the High Court, Cape Town[1] (High Court), the Supreme Court of Appeal having refused leave to appeal. In terms of the Insolvency Act[2] a sequestration order granted against a debtor has the effect of suspending contracts of service of the debtor's employees with immediate effect.[3]

[1] *Investec Bank Limited v Stratford and Another* [2013] ZAWCHC 207.

[2] 24 of 1936.

[3] Section 38(1) provides: "The contracts of service of employees whose employer has been sequestrated are suspended with effect from the date of the granting of a sequestration order." A "sequestration order" is defined

The effect of the suspension is that the employees are not entitled to any remuneration and no employment benefits accrue to the employees,[4] save for unemployment benefits[5] in terms of section 35 of the Unemployment Insurance Act.[6]

[2] An amendment to the Insolvency Act in 2002 inserted section 9(4A).[7] It provides that a copy of the sequestration application must be furnished to employees of the insolvent debtor before an order for provisional sequestration may be granted.[8] The Supreme Court of Appeal in *Gungudoo*[9] interpreted this amendment to apply only to employees of the insolvent's business, to the exclusion of domestic employees.[10] The appellants assert that this interpretation is wrong and that domestic employees[11] must be included in the term "employees" in section 9(4A).

Parties

[3] The first appellant (Mr Stratford) is a chartered accountant and former director of several companies that formed part of the Pinnacle Point Group which was engaged

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in section 2 as "any order of court whereby an estate is sequestrated and includes a provisional order, when it has not been set aside".

[4] Section 38(2) provides:

> "Without limiting subsection (1), during the period of suspension of a contract of service referred to in subsection (1)—
>
> (a) an employee whose contract is suspended is not required to render services in terms of the contract and is not entitled to any remuneration in terms of the contract; and
>
> (b) no employment benefit accrues to an employee in terms of the contract of service which is suspended."

[5] Section 38(3) provides:

> "An employee whose contract of service is suspended is entitled to unemployment benefits in terms of section 35 of the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), from the date of such suspension, subject to the provisions of that Act."

[6] 30 of 1966. This legislation has since been repealed but the benefits accrued in terms of section 35 have been retained by schedule 1 of the Unemployment Insurance Act 63 of 2001.

[7] See section 2 of the Insolvency Second Amendment Act 69 of 2002.

[8] Section 9(4A)(a) quoted at [18].

[9] *Gungudoo and Another v Hannover Reinsurance Group Africa (Pty) Ltd and Another* [2012] ZASCA 83; 2012 (6) SA 537 (SCA) (*Gungudoo*).

[10] Id at para 41.

[11] According to section 17 of the Labour Relations Act 66 of 1995 (LRA) domestic employees will include those employees in the "domestic sector" "engaged in domestic work in their employers' homes or on the property on which the home is situated."

in the business of developing luxury properties in Nigeria, the Seychelles and South Africa. Pinnacle Point Group Limited (PPG Limited), its holding company, had dual listings on the Nigerian and Johannesburg Stock Exchanges. PPG Limited has since been placed in final liquidation and an enquiry into its affairs has commenced. Before its liquidation, Mr Stratford was the non-executive deputy chairperson of PPG Limited, as well as a director of a number of its subsidiary companies.

[4] The second appellant (Ms Stratford) has been joined to these proceedings in terms of section 17 of the Matrimonial Property Act[12] by virtue of her marriage to Mr Stratford in community of property. The third appellant (Mr Ngoma), the fourth appellant (Mr Dlokolo) and the fifth appellant (Mr Adonis) (together, the domestic employees) are employed by Mr and Ms Stratford (Stratfords) as a domestic worker, gardener and handyman respectively.

[5] The first respondent, Investec Bank Limited (Investec), is a financial institution conducting business as a private bank in accordance with the company and banking laws of the Republic of South Africa. The second respondent, the Minister of Justice and Constitutional Development (Minister of Justice), and the third respondent, the Minister of Labour, are joined in these proceedings in terms of rule 5 of the Rules of this Court. The Minister of Justice opposes the appeal while the Minister of Labour does not.

Litigation history

[6] Investec entered into various agreements with Mr Stratford, in terms of which he bound himself as surety and co-principal debtor, jointly and severally, with various entities in the Pinnacle Point Group. Almost all these entities are either in liquidation or have been sequestrated. Investec also entered into a loan agreement with Mr Stratford. The Stratfords were unable to satisfy a judgment debt of over R19 million granted in favour of Rand Merchant Bank.

[12] 88 of 1984.

[7] On 29 May 2012, Investec launched sequestration proceedings on an urgent basis against the Stratfords in the High Court, alleging that the Stratfords owed it over R240 million, plus interest. A candidate attorney, employed by the attorneys representing Investec, furnished a copy of the notice of motion and the founding affidavit to the Stratfords. She also enquired from the Stratfords whether they had a domestic employee. The Stratfords informed her that they had a domestic worker, but did not disclose that they also had two other domestic employees in their employ. The candidate attorney then left a copy of the petition[13] on the kitchen table for the identified domestic worker, Mr Ngoma, without directing that the Stratfords bring it to the attention of the domestic worker.

[8] The application was set down for hearing in the High Court on 4 June 2012. By agreement between the parties, it was heard only on 15 October 2012. Cloete AJ refused an application for a postponement by the Stratfords and granted a provisional order of sequestration. On 24 October 2012, the sheriff served a copy of the provisional order of sequestration on Mr Stratford and Mr Ngoma and, on 30 October 2012, a copy was served on Ms Stratford, Mr Adonis and Mr Dlokolo. A rule *nisi* was issued in terms of the provisional sequestration order calling upon the Stratfords, and all interested parties, to show cause why a final sequestration order should not be granted on 26 November 2012. The Stratfords opposed the sequestration application on 23 November 2012 and baldly denied that Investec had a liquidated claim against them[14] and that they had committed an act of insolvency as required by section 8(b) of the Insolvency Act.[15] On the same date, the domestic

[13] The Insolvency Act uses the word "petition", which is the equivalent of a notice of motion and founding affidavit.

[14] In terms of section 9(1) of the Insolvency Act:

> "A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the Court for the sequestration of the estate of the debtor."

[15] Section 8(b) provides that a debtor commits an act of insolvency—

> "if a Court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property

employees filed an application to intervene as applicants in the proceedings, which was granted.

[9] In February 2013, the domestic employees – together with the Stratfords – launched a counter-application joining the Minister of Labour and the Minister of Justice and seeking an order declaring that: (1) section 9(4A) is unconstitutional in that it indirectly discriminates against domestic employees; and (2) failure to notify them of the sequestration proceedings, amounted to a breach of their constitutional right to fair labour practices and the right of access to courts. They submitted that had they been given prior notice of the provisional sequestration proceedings, they would have sought legal assistance and opposed the application.

[10] The constitutional challenge was not raised at the time the answering papers were filed. They explained that this was because they were not aware of the judgment of *Gungudoo*. They, however, pointed out that they believed at the time that the definition of "employees" in section 9(4A) was wide enough to be interpreted as including domestic employees. They consequently contended that *Gungudoo*'s interpretation of "employees" is incorrect.

[11] Investec presented evidence to the High Court which indicated that the Stratfords had made various dispositions of property and monies, through the Pinnacle Point Group and other entities, which had the effect of prejudicing the creditors as envisaged by section 8(c)[16] of the Insolvency Act. Investec detailed known assets as well as an extensive list of potentially impeachable transactions to a total of over R37 million.

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sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment".

[16] Section 8(c) provides that a debtor commits an act of insolvency—

> "if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another".

[12] On 14 August 2013, the High Court (Mantame J) found that the Stratfords had committed an act of insolvency and had failed to explain their financial situation.[17] The Court further found that Investec had proved, on a balance of probabilities, that there were prospects of pecuniary benefit to creditors. The Court was satisfied that a proper investigation by the trustee would likely uncover a substantial amount of assets from the Stratfords' joint estate.

[13] With respect to the constitutional challenge in the counter-application, the Court held that compliance with the provisions of section 9(4A) is peremptory and that failure to comply with the section would result in the discharge of the rule *nisi*. Nonetheless, the Court concluded that the provision did not require the petition to be served on each and every domestic employee or that it be brought directly to the attention of the employee or that each employee be personally advised of the sequestration application.[18] The Court expressed the view that the Stratfords and the domestic employees had interpreted the statute more broadly than what the Legislature had intended.[19] The Court gave effect to the decision in *Gungudoo* and held that given the protections in the LRA and the Basic Conditions of Employment Act[20] (BCEA), the domestic employees could not argue that they had been discriminated against.[21] Furthermore, the Court concluded that in any event the domestic employees had not lost their employment and had failed to present valid grounds to oppose the granting of the provisional sequestration order.

[14] The Court further held that the petition had in any event actually been served on the domestic employees when the candidate attorney left the petition on the kitchen table of the Stratford's household, and that it was "rather absurd" to argue that the domestic employees had not been "served" with the petition.[22] Consequently, the

[17] *Investec Bank Limited* above n 1 at para 36.

[18] Id at para 42.

[19] Id.

[20] 75 of 1997.

[21] *Investec Bank Limited* above n 1 at para 32.

[22] Id at para 42.

Court held that since there was compliance with section 9(4A) in respect of domestic employees, it was not necessary to determine the constitutional challenge to the section. The Stratfords' estate was placed under final sequestration and the counter-application dismissed with no order as to costs.

[15] The appellants sought leave to appeal directly to this Court. That application was dismissed as it was not in the interests of justice to hear the matter at that stage. The appellants then reverted to the High Court and sought leave to appeal to the Supreme Court of Appeal. It was refused. The appellants then applied for leave to appeal directly to the Supreme Court of Appeal. That Court dismissed the application with costs.

In this Court

[16] Leave to appeal was granted on 4 June 2014. The appellants persist in their constitutional challenge raised before the High Court that *Gungudoo*'s interpretation of section 9(4A) renders the section unconstitutional in that it infringes the right to equality,[23] the right to human dignity,[24] the right to fair labour practices[25] and the right of access to courts.[26] They add that differentiation between domestic and business employees amounts to indirect discrimination against domestic employees. They submit that a reasonable interpretation consistent with the Constitution is that section 9(4A) includes domestic employees. They also say a final sequestration order should not have been granted because the requirement that there be an advantage to creditors was not satisfied.[27]

Issues

[17] The issues to be decided are—

[23] Section 9.

[24] Section 10.

[25] Section 23(1).

[26] Section 34.

[27] In terms of section 12 of the Insolvency Act. This section is set out at n 53 below.

1. whether section 9(4A) includes domestic employees;
2. if not, whether the differentiation renders the provision inconsistent with the Constitution;
3. whether compliance with the section is peremptory or directory; and
4. whether the granting of a final sequestration order by the High Court was correct.

Does section 9(4A) include domestic employees?

[18] Section 9(4A)(a) provides:

> "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
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> (ii) to the employees themselves—
>
> (aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or
>
> (bb) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition;
>
> (iii) to the South African Revenue Service; and
>
> (iv) to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it."

[19] In determining whether section 9(4A) includes domestic employees, we must be guided by the Constitution. Section 39(2) of the Constitution requires courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. The Constitution, therefore, requires that section 9(4A) be interpreted in

conformity with it. Thus, if there is a reasonable interpretation that promotes the spirit, purport and objects of the Bill of Rights, that interpretation must be preferred.[28]

[20] There are "three interrelated riders" to the basic principle of statutory interpretation. They were adumbrated in *Cool Ideas*, where Majiedt AJ stated:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
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> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provision must be properly contextualised; and
>
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[29] (Footnotes omitted.)

[21] The term "employees" is not defined in the Insolvency Act except for the definition of "employee" in section 98A(5),[30] which is similar to the definition of "employee" in the LRA. However, it is apparent from section 9(4A) that "employees" is capable of including domestic employees because it does not distinguish between a debtor's domestic employees and those who are employed in the debtor's place of business.

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[28] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22-3.

[29] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28.

[30] Section 98A(5) provides in part:

> "For the purposes of this section—
>
> (a) 'employee' means any person, excluding an independent contractor, who works for another person and who—
>
> (i) receives, or is entitled to receive, any salary or wages; or
>
> (ii) in any manner assists in carrying on or in conducting the business of an employer".

[22] The Minister of Justice concedes that from a reading of section 9(4A) the word "employees" is unqualified and hence capable of including domestic employees. However, he argues that given the context – including the background and apparent scope and purpose of the section and related provisions in the Insolvency Act – "employees" means persons employed in a business conducted by a debtor. This approach in relation to the package of legislation amended in 2002, that includes amendments to the LRA, the Insolvency Act and the old Companies Act,[31] was adopted by the Supreme Court of Appeal in *Gungudoo* in its interpretation of "employees" in section 9(4A).

[23] In *Gungudoo,* one of the grounds of appeal was similarly that the domestic employees of Gungudoo, who was the insolvent debtor, were not furnished with the petition before the provisional sequestration order was granted. They argued that compliance with both sections 9(4A) and 11(2A) is peremptory and that non-compliance made the entire application defective. This latter issue was left open. The Supreme Court of Appeal held that a debtor's "employees" in section 9(4A) refers to the insolvent debtor's employees in the employ of his or her business to the exclusion of his or her domestic employees.

[24] The Supreme Court of Appeal,[32] in evaluating the package of legislation, looked at the amended section 197B of the LRA, which behoves an employer who applies for voluntary sequestration or against whom an application for compulsory sequestration has been launched, to "provide a consulting party contemplated in section 189(1) with a copy of the application".[33] The Court reasoned that because

[31] 61 of 1973 (old Companies Act).

[32] *Gungudoo* above n 9 at para 36.

[33] Section 197B, entitled "Disclosure of information concerning insolvency", provides:

> "(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).

"consulting party" is not defined, section 189(1)[34] requires the employer to consult only with employees that face dismissal for operational requirements of the employer, which operational requirements can only refer to an employer's business requirements.[35]

[25] The Court held that the language used in sections 9(4A) and 11(2A)[36] of the Insolvency Act suggests that only business employees are affected because notice of

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(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."

[34] Section 189 of the LRA, entitled "Dismissals based on operational requirements", provides in part:

"(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult—

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation—

(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."

[35] *Gungudoo* above n 9 at para 37, where the Court held:

"The rationale for section 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 requirements of an employee in section 213 of the LRA. It follows that section 197B of the LRA requires an employer to disclose information concerning insolvency *only to those employees that are employed in the employer's business*." (Emphasis added.)

[36] Section 11(2A) provides:

"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

the application should be furnished "at the *premises* from which the debtor conducted business".[37] "Premises", like "employees", is not defined in the Insolvency Act.[38]

[26] The exclusion of domestic employees, according to the Court's interpretation, suggests that sections 9(4A) and 11(2A) of the Insolvency Act have no bearing on those employers who do not conduct any form of business but nonetheless have employees in their private homes. Thus the Court used provisions of the LRA to bolster a conclusion that section 9(4A) of the Insolvency Act excludes domestic employees. Ordinarily, sequestration proceedings relate to a person who or a partnership that has employees including domestic employees.[39] In view of the fact that *Gungudoo* did not deal with the constitutional issues raised in this case, I respectfully disagree with the Court's analysis of the LRA and its impact on the interpretation of section 9(4A).

[27] Although the definition of "employee" in section 213 of the LRA is not directly applicable, it gives a strong indication of the kinds of employees the package of legislation that simultaneously amended insolvency procedures had in mind. It envisages two types of employees, namely those—

(a) employed by a person or the State and who receive or are entitled to a salary or remuneration; or

(b) who assist in carrying on or conducting the business of an employer.[40]

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to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition; and

(c) the South African Revenue Service."

[37] *Gungudoo* above n 9 at para 39. The Court noted at para 40 that sections 9(4A) and 11(2A) are mirror images of sections 346(4A) and 346A of the old Companies Act respectively.

[38] See section 2, entitled "Definitions", of the Insolvency Act.

[39] In the Insolvency Act "debtor" means—

"a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies".

[40] In terms of section 213, entitled "Definitions", "employee" means—

I am of the view that a domestic employee not employed in his or her employer's place of business falls within the category of section 213.

[28] Section 213 defines "operational requirements" as concerning "requirements based on the economic, technological, structural or similar needs of an employer". It is accepted that economic needs of an employer include financial needs which may result in an employer not being able to afford the salaries of employees. This may occur to an employer who does not conduct a business but employs domestic employees, who for that reason would be dismissed for operational requirements of that employer.

[29] When section 197B prescribes that an employer must provide a copy of a sequestration application to a "consulting party" contemplated in section 189(1) of the LRA, "consulting party" applies to employees in both a domestic and a business context.

[30] Section 189(1) does not define consulting party. It however provides that where the employer contemplates dismissing one or more employees he or she must consult: (1) a person identified as a "consulting party" in terms of the collective agreement; (2) if there is no collective agreement, a workplace forum and registered trade union; (3) where there is no workplace forum, a registered trade union; or (4) where (1), (2) and (3) are not applicable, the employees or their representatives directly. The latter category should be interpreted to include employees such as domestic employees. Thus this section does not distinguish between employees defined in section 213 when providing for dismissals based on operational requirements.

"(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'."

[31] The Minister of Justice and Investec argue that the purpose of notice in section 9(4A) is to: (1) initiate consultation in respect of section 189 of the LRA; and (2) if provisional sequestration is granted, to initiate consultation in respect of section 38(5)[41] and (6)[42] of the Insolvency Act. The respondents submit that the purpose of consultation is only to save the total or part of the business, which the domestic employees cannot meaningfully participate in, thus resulting in notice being superfluous for them and further, that giving notice to domestic employees will create additional costs and administrative burdens for the creditor.

[32] The respondents' argument overlooks the fact that the consultation envisaged in section 38 must happen regardless of the notice envisaged in section 9(4A) as it is the trustee who must initiate such consultation if the trustee intends on terminating

[41] Section 38(5) provides:

> "A trustee may not terminate a contract of service unless the trustee has consulted with—
>
> (a) any person with whom the insolvent employer was required to consult, immediately before the sequestration, in terms of a collective agreement defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995);
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> (b) (i) a workplace forum defined in section 213 of the Labour Relations Act, 1995; and
>
> (ii) any registered trade union whose members are likely to be affected by the termination of the contract of service, if there is no such collective agreement that existed immediately prior to the sequestration;
>
> (c) a registered trade union representing employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service, if there is no such workplace forum; or
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> (d) the employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service or their representatives nominated for that purpose, if there is no such trade union."

[42] Section 38(6) provides:

> "The consultation referred to in subsection (5) must be aimed at reaching consensus on appropriate measures to save or rescue the whole or part of the business of the insolvent employer—
>
> (a) by the sale of the whole or part of the business of the insolvent employer; or
>
> (b) by a transfer as contemplated in section 197A of the Labour Relations Act, 1995; or
>
> (c) by a scheme or compromise referred to in section 311 of the Companies Act, 1973; or
>
> (d) in any other manner."

contracts. From this it is clear that consultation and notice are distinctly separate issues. And there is nothing in the text of section 38 to indicate otherwise.

[33] The parties agree that where section 38(1)[43] of the Insolvency Act refers to "employees", it envisages all employees including domestic employees. Thus, the section suspends the employment contracts of all employees upon a provisional sequestration order being granted. This means that the contracts of domestic employees are effectively suspended without notice, while their business counterparts who could conceivably be doing the same kind of work in the insolvent employer's business will receive notice.

[34] Notice prevents a situation where employees would show up at work and suddenly find out that they can no longer render their services or receive remuneration. Notice at an earlier stage, before a provisional sequestration order, will not only warn an employee of the tumultuous financial state of the employer, but also meaningfully enable employees to find alternative jobs or make alternative arrangements. These are the virtues of being informed of the possibility of a sequestration. Notice, ultimately, signifies respect for the human dignity of employees.

[35] The interconnection between the right to dignity and work has long been articulated by this Court. In *Affordable Medicines* it held:

> "One's work is part of one's identity and it is constitutive of one's dignity. . . . And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity, it is the foundation of the person's existence'."[44] (Footnote omitted.)

[43] See above n 3.

[44] *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 59.

The impact of a narrow reading of "employees" on their right to dignity, so illustrated, tilts the interpretive balance decisively in favour of a wider reading. And this is indeed required by section 39(2) of the Bill of Rights.

[36] The respondents acknowledge the vulnerability of domestic employees but contend that their plight is not as a result of the conduct of the creditors, but rather as a result of the conduct of their employers. Investec stated poignantly:

> "It is indeed unfortunate that their employers are insolvent and can no longer employ them. This is not as a consequence of the [first respondent's] making but is a consequence of the manner in which the [Stratfords] have managed their financial affairs."

This is of course true. But to interpret the statute as including domestic employees will protect their dignity in situations where their employers face sequestration. This interpretation better promotes the spirit, purport and objects of the Bill of Rights.[45] Also, it will give them timeous notice and an opportunity to re-arrange their affairs going forward.

[37] Finally, given the ordinary meaning of "employees", the interpretation of various provisions in the LRA and constitutional considerations, I conclude that "employees" in section 9(4A) includes *all* employees, as well as domestic employees. The challenge to the constitutional validity of the provision therefore falls away.

Is compliance with section 9(4A) peremptory or directory?

[38] The appellants contend that the order of sequestration must be set aside because the domestic employees were not properly furnished with the petition when the order

[45] See *Minister of Home Affairs and Others v Watchenuka and Another* [2003] ZASCA 142; 2004 (4) SA 326 (SCA) at para 27 where Nugent JA held:

> "The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity . . . for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful."

for provisional sequestration was sought. Investec argues that even if it were to be assumed that section 9(4A) includes domestic employees, it has nonetheless complied with the provision.

[39] *Gungudoo* left open the question whether section 9(4A) is peremptory. In other words, it did not decide whether non-compliance with the provision is fatal to the granting of a provisional order. However in *EB Steam Company*,[46] the Supreme Court of Appeal dealt with section 346(4A)[47] of the old Companies Act – a section almost identical to section 9(4A) of the Insolvency Act. There it held that compliance with section 346(4A) is peremptory whilst the method in which a creditor furnishes the application to the employees is directory.[48] The appellants accepted *EB Steam Company* as correct.

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[46] *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* [2013] ZASCA 167; 2014 (1) All SA 294 (SCA) (*EB Steam Company*).

[47] Section 346(4A) provides:

> "(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."

[48] *EB Steam Company* above n 46 at para 17, where the Court held—

> "whilst the obligation to furnish the application papers to the employees is peremptory, *the modes of doing so indicated in the section are directory and alternative effective means may be adopted.* In other words the methods for furnishing employees with the application papers as set out in section 346(4A)(a)(ii) are no more than guides." (Emphasis added.)

[40] The fact that "furnish" is used in section 9(4A) and the word "serve" is used in section 11(2A)[49] of the Insolvency Act indicates that the legislation envisaged a lower threshold for notifying the employees than service in respect of section 11(2A). I am of the view that "furnish" requires that petitions "must be made available in a manner reasonably likely to make them accessible to the employees".[50]

[41] What needs to be determined in the present case is whether the candidate attorney, on behalf of Investec, made the petition available in a manner that was reasonably likely to become accessible to the employees. The following observations are relevant:

(a) The candidate attorney, according to the Stratfords, enquired whether they had a domestic employee and they answered that they had one domestic employee (referring to Mr Ngoma).

(b) She then left a copy of the petition on the kitchen table for Mr Ngoma after having alerted the Stratfords that it was for the employee.

(c) It was reasonable of her to assume that the Stratfords would pass on the information to their employees (after she said that a copy of the petition was for their employee).

(d) The candidate attorney could not have been aware that there were other employees because of the Stratfords' failure to disclose that fact to her.

(e) The Stratfords, as the employer, had a duty to bring the application to the attention of the employees in terms of section 197B of the LRA.

I conclude that the candidate attorney's effort to furnish the petition on the employees was sufficient to meet the standard set by *EB Steam Company*.

[49] Quoted above at n 36.

[50] *EB Steam Company* above n 46 at para 14.

[42] Failure to furnish the employees with the petition may not be relied upon by the debtor for opposing sequestration when the question to be decided is whether sequestration is to the advantage of creditors. In *EB Steam Company* the Supreme Court of Appeal stated that the purpose is not to provide a "technical defence to the employer, invoked to avoid or postpone the evil hour when a winding-up or sequestration order is made".[51] I agree. There may be instances where a provisional order should be granted to avoid the concealing of assets or for other urgent reasons in circumstances where a delay would substantially prejudice the creditors. Thus, non-compliance will not always render the granting of an order fatal, but this should be only in exceptional circumstances.

Was the granting of a final sequestration order correct?

[43] In terms of the Insolvency Act, a court may grant a sequestration order, either provisionally[52] or finally,[53] if "there is reason to believe that it will be to the advantage

[51] Id at para 8.

[52] Section 10, entitled "Provisional sequestration", provides:

> "If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie*—
>
> (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
>
> (b) the debtor has committed an act of insolvency or is insolvent; and
>
> (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
>
> it may make an order sequestrating the estate of the debtor provisionally."

[53] Section 12, entitled "Final sequestration or dismissal of petition for sequestration", provides:

> "(1) If at the hearing pursuant to the aforesaid rule *nisi* the court is satisfied that—
>
> (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
>
> (b) the debtor has committed an act of insolvency or is insolvent; and
>
> (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
>
> it may sequestrate the estate of the debtor.
>
> (2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*."

of creditors of the debtor if his estate is sequestrated".[54] It is the petitioner who bears the onus of demonstrating that there is reason to believe that this is so.[55] In *Friedman* the Court held:

> "[T]he facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the [Insolvency Act] some may be revealed or recovered for the benefit of creditors, that is sufficient".[56]

[44] The meaning of the term "advantage" is broad and should not be rigidified. This includes the nebulous "not-negligible" pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or "not-negligible" benefit in the context of a hostile sequestration where there could be many creditors is unhelpful.[57] Meskin et al state that—

> "the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor's predicament is likely to yield a larger such payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order."[58] (Footnotes omitted.)

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[54] See sections 10(c) and 12(1)(c).

[55] *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) at 112C-D.

[56] *Meskin & Co v Friedman* 1948 (2) SA 555 (W) (*Friedman*) at 559.

[57] Courts have required a not-negligible benefit to be shown in the context of a single creditor. See *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1066 (N) at 1069H-1070A, and, in respect of friendly sequestrations, *Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzkin; Botha v Botha* 1990 (4) SA 580 (W) at 585H and 586A-C and *Epstein v Epstein* 1987 (4) SA 606 (C) at 609B-D.

[58] Meskin et al *Insolvency Law* Service Issue 42 (2014) at 2.4.1.

[45] The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in *Friedman*.[59] For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body;[60] that there is a substantial estate from which the creditors cannot get payment except through sequestration;[61] or that some pecuniary benefit will result for the creditors.[62]

[46] Given the potential impeachable transactions detailed by Investec, totalling over R37 million, it is evident that there is reason to believe that there will be an advantage to creditors. It is apparent from the facts that the sequestration is inevitable. I will not interfere with the final sequestration order.[63]

Remedy

[47] The appellants failed in the appeal except in relation to the correct interpretation of section 9(4A). A declaration will be made to that effect. The remaining question is whether the declaration should operate retrospectively.[64] In my view, it should not. I would, in the circumstances, declare that the proper interpretation of section 9(4A) includes domestic employees and limit the retrospective effect of the interpretation.[65] This is just and equitable in the circumstances given that many petitioners would have acted on the decision given in *Gungudoo*.

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[59] *Friedman* above n 56.

[60] *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D) at 591G.

[61] *Realizations Ltd v Ager* 1961 (4) SA 10 (D) at 11D-E.

[62] *BP Southern Africa (Pty) Ltd v Furstenburg* 1966 (1) SA 717 (O) at 720E-G.

[63] For a detailed explanation as to when this Court will interfere with the exercise of discretion by a lower court, see *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC).

[64] For an analysis on a court's powers in respect of retrospective orders, see *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 96-7.

[65] In terms of section 172(1) of the Constitution.

[48] We are indebted to counsel for the Minister of Justice, who provided us with a draft order which we adopt in part. Our order will not affect any application for the sequestration of an estate that has been made final and where no appeal is pending or the time for filing an application for leave to appeal has expired.[66]

Costs

[49] The appellants have partially succeeded. They have succeeded in their interpretation of section 9(4A) but failed to show that section 12(1)(c) of the Insolvency Act was not satisfied. In addition, a costs order against the Stratfords would be ineffectual, given that their estate is to be sequestrated. There should be no order as to costs.

Order

[50] The order is as follows:

1. The appeal is dismissed except to the extent set out below.
2. It is declared that the word "employees" in section 9(4A) of the Insolvency Act 24 of 1936 includes domestic employees.
3. The order in paragraph 2 is not retrospective, except to the following extent:
    (a) If in a pending application for sequestration a provisional order was granted but a copy of the application was not furnished to the debtor's domestic employee(s), before a final order is granted—
        (i) the petitioner must furnish the debtor's domestic employee(s) with a copy of the application papers, either personally or in a manner likely to make them accessible to the employee(s);
        (ii) the petitioner must deliver an affidavit setting out details of when and how he or she has done so; and

[66] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) at 47-8.

(iii) if necessary, the court must extend the rule *nisi* to allow the petitioner to comply with this requirement.

(b) If a final sequestration order has been granted and is subject to an appeal but a copy of the application was not furnished to the debtor's domestic employee(s)—

(i) the final order must be set aside and replaced by a provisional sequestration order; and

(ii) a copy of the rule *nisi* must be served on the debtor's domestic employee(s) with a copy of the application papers, in accordance with section 11(2A) read with section 11(4) of the Insolvency Act 24 of 1936.

4. There is no order as to costs.

For the Appellants:	L J Van Rensburg instructed by Van Rensburg & Co.
For the First Respondent:	B J Manca SC and M L Norton instructed by ENS Africa Inc.
For the Second Respondent:	A M Breitenbach SC and N Mangcu-Lockwood instructed by the State Attorney.