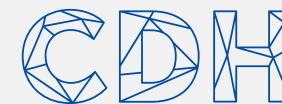


Corporate Debt, Turnaround & Restructuring and Dispute Resolution

ALERT | 7 May 2025



In this issue

SOUTH AFRICA

Look before you leap: Avoiding the chaos caused by multiple liquidation applications



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Look before you leap: Avoiding the chaos caused by multiple liquidation applications

On 31 March 2025, the Supreme Court of Appeal of South Africa (SCA) handed down judgment in the matter of *Resilient Rock (Pty) Ltd v Voltex (Pty) Ltd t/a Atlas Group* (1132/2023) [2025] ZASCA 33, which revolved around the application of section 347(5) of the Companies Act 61 of 1973 (1973 Companies Act), as read with item 9 of Schedule 5 of the Companies Act 71 of 2008.

The matter was heard on appeal from the full bench of the High Court of South Africa sitting in Johannesburg (Full Bench). The question before the SCA, simply put, was whether the Full Bench had jurisdiction to grant a final winding-up order when a provisional winding-up order had already been granted in another matter.

We set out below the curious and convoluted procedural history which led to the SCA hearing the matter.

Background

Voltex Proprietary Limited, trading as Atlas Group (Voltex) applied for the liquidation of Resilient Rock Proprietary Limited (Resilient) on the grounds of commercial insolvency, claiming that Resilient was unable to pay its debts. The court *a quo* dismissed Voltex's application, finding that Voltex had failed to prove Resilient's commercial insolvency. Voltex was granted leave to appeal to the Full Bench, the hearing for which was set down for 31 May 2023.

After the court *a quo* dismissed Voltex's application, but before Voltex's appeal to the Full Bench was heard, a different creditor, Trencon Construction Proprietary Limited (Trencon), also applied for Resilient's winding-up. This time the court agreed with Trencon and issued a provisional winding-up order on 9 May 2023, with a return date of 13 June 2025.

Before the *rule nisi* could be heard in the Trencon matter – and notwithstanding a postponement application by Resilient, supported by Voltex, in the Full Bench appeal matter – on 31 May 2023 Voltex's appeal was heard by the Full Bench. Despite the existing provisional order from Trencon's application the Full Bench proceeded to make an order placing Resilient into final winding-up with retrospective effect from the date on which Voltex brought its application. This led to the *rule nisi* in the Trencon application being removed from the roll.

Resilient then approached the SCA on the following key contention: Resilient argued that the Full Bench lacked the jurisdiction to issue a final winding-up order in circumstances where there was an existing provisional winding-up order (which had been granted to Trencon). In particular, it relied on section 347(5) of the 1973 Companies Act which deals with the jurisdiction of courts in granting final winding-up orders when a winding-up order has already been issued by another court. Section 347(5) provides that "[t]he court shall not grant a final winding-up order in the case of a company or other body corporate which is already being wound-up by order of court within the Republic."

**CORPORATE DEBT, TURNAROUND
& RESTRUCTURING AND
DISPUTE RESOLUTION
ALERT**

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CONTINUED



The SCA found that section 347(5) places an express prohibition on a court, even an appeal court, from granting a winding-up order where another winding-up order had already been granted. In the SCA's opinion the wording of section 347(5) "*make it crystal clear that the prohibition is peremptory*", meaning that there should be no confusion: the first successful winding-up order in **time** automatically precludes any further winding-up order from being made by a court. As a result, the SCA set aside the Full Bench's decision with costs.

Other case law

Interestingly, before the SCA handed down the present decision, a similar case was served before the High Court, that of *Standard Bank of South Africa Limited v Khewija Engineering and Construction Proprietary Limited*. In the *Khewija* case, the court ultimately found that the Full Bench's decision in the Voltex application could not be relied on and that the provisions of section 347(5) could not be ignored and thus held that it lacked the necessary jurisdiction to make a final winding-up order. The SCA noted the decision in *Khewija*, which reaffirms the approach that the Full Bench in the present case ought to have taken.

This case is significant in that it sets a legal precedent for future insolvency cases by providing guidance on how courts should approach a scenario where multiple liquidation applications against the same company are before different 'hierarchies' in the court system, and any one of those courts grants a winding-up order before the other. It establishes a clear legal framework which provides legal certainty.

Furthermore, the ruling has significant implications for insolvency proceedings in South Africa. It highlights the need for creditors and courts to carefully navigate procedural requirements when seeking and making liquidation orders. It is crucial that practitioners and litigants understand the intricacies of insolvency law and the procedural requirements under applicable insolvency laws.

Creditors may also want to think about joining efforts and supporting pending liquidation applications, as soon as those applications come to their knowledge.

This judgment serves as a healthy reminder to look before you leap.

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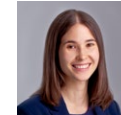
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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