REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 2020/11605

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

12 June 2020,
Corrected 22 June 2020
.....
DATE

.....
SIGNATURE

CASSIM, ZAHEER, N.O. — **APPLICANT**

and

RAMAGALE HOLDINGS (PTY) LTD — **1ST RESPONDENT**

RAMAITE, PETER NALEDZANI — **2ND RESPONDENT**

MANENTI, LORENSO — **3RD RESPONDENT**

J U D G M E N T

MOORCROFT AJ:

INTRODUCTION

1 This is an application brought by the business rescue practitioner of the first respondent (nomine officio) for an order that the first respondent ("the first respondent") be placed in provisional winding up. The second

and third respondents are shareholders and directors of the first respondent and they opposed the application. Their application for leave to intervene as respondents was not opposed by the applicant, and correctly so.

2 The applicant avers that the company is unable to pay its debts and is commercially and factually insolvent. More than three months has elapsed since he was appointed as business rescue practitioner on 7 December 2018. He brings the application in terms of section 141 (2) (a) (ii) and 81 (1) (b) of the Companies Act 71 of 2008, read with the provisions of chapter XIV of the Companies Act 61 of 1973.

3 The second and third respondent did not dispute the urgent nature of the application and the concession is rightly made. Urgency should be determined on the basis of the applicant's averments and the application is urgent.

4 The only aspect argued was compliance with section 346 (4A) of the Companies Act of 1973. The section is quoted below. The applicant relies on an affidavit by Ms. Cassim, an attorney, who informs the court that she was advised by the Sheriff that the application had been served on the company. This is self-evident as the company purported to enter appearance to defend and the second and third respondents applied for leave to intervene as respondents. More problematic is the following averments in her affidavit:

4.1 The deponent informs the court that the application was served on the employees at the company's addresses in Rivonia at the registered address and in Nigel at the principal place of business, and also by bulk sms. Service in Rivonia and in Nigel was however not carried out by the attorney who deposed to the affidavit and that she relies on the returns of service issued by the Sheriff. The sheriff also communicated that the employees were not represented by a trade union.

4.2 The deponent also refers the court to the acknowledgement by the South African revenue service reflected on the notice of motion to prove service on the South African Revenue Service (SARS.)

5 A second attorney, Ms. van der Merwe, deposed to an affidavit confirming that bulk sms's were sent to SARS and to employees to inform them of the application. The bulk sms's did not incorporate copies of the application but referred the recipients to the application available from the applicant's attorneys.

6 The question that arises is whether these affidavits comply with section 346 (4A) (b) of the 1973 Act. Section 346 (4) (a) and (b) provides as follows:

> *(4A) (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. [emphasis added]

[Sub-s. (4A) inserted by s. 7 of Act 69 of 2002.]

7 The failure to furnish a copy to the company itself may be dispensed with where the Court is satisfied that it would be in the interest of the company or creditors to do so. Condonation is not provided for in respect of the employees or SARS and the legislature made a clear distinction in this regard.

8 The deponent to the service and compliance affidavit did not see to service personally but relies entirely on the returns of service issued by the Sheriff and the acknowledgement by SARS.

9 In our law service is usually proved by a return of service issued by the Sheriff[1] but section 346 (4A) of the Companies Act of 2008 as well as in section 9 (4A) (a) of the Insolvency Act 24 of 1936 contain specific provisions introduced in 2002 relating to service. The legislative background is dealt with in *EB Steam Co (Pty) Ltd v Eskom Holdings Society Ltd.*[2] The provisions of the Superior Courts Act relating to service are general provisions and do not apply when there are specific legislative provisions such as those found in the Companies Act or the Insolvency Act in respect of service. It is therefore to section 346 (4A) of the Companies Act of 1973 that one must turn, and not section 43 of the Superior Courts Act.

10 The question also arises whether the bulk sms's to the employees and SARS suffice, seeing there is an affidavit by the attorney who sent these sms's. In my view it does not. The Act requires a 'copy of the application' to be furnished but the sms's merely informed the employees and SARS of the application. What we have therefore are affidavits by the two

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[1] Rule 4 of the Uniform Rules and section 43 of the Superior Courts Act 10 of 2013. (1) The sheriff must, subject to the applicable rules, execute all sentences, judgments, writs, summonses, rules, orders, warrants, commands and processes of any Superior Court directed to the sheriff and must make return of the manner of execution thereof to the court and to the party at whose instance they were issued.

[2] *EB Steam Co (Pty) Ltd v Eskom Holdings Society Ltd 2015 (2) SA 526 (SCA) ([2014] 1 All SA 294; [2013] ZASCA 167) paras 5 et seq.*

attorneys referring to returns of the Sheriff and the acknowledgement of receipt by SARS, as well as confirming the bulk sms's that they sent themselves and have personal knowledge of, but without attaching a copy of the whole application as it is referred to in section 346 (4A) (a).

11 The deponents are quite simply not persons "who furnished a copy of the application" accordance with section 346 (4A) (b). The Sheriff furnished the application to the employees, but the Sheriff's affidavit is not before court.

12 In a number of decided cases it was held that section 346 (4A) (b) and section 9 (4A) are peremptory: *Standard Bank of SA Ltd v Sewpersadh*;[3] *Hannover Reinsurance Group Africa (Pty) Ltd v Gungudoo;*[4] *Corporate Money Managers (Pty) Ltd v Panamo Properties 49 (Pty),*[5] *Sphandile Trading Enterprise (Pty) Ltd v Hwibidu Security Services;*[6] *EB Steam Co (Pty) Ltd v Eskom Holdings Soc Ltd,*[7] *Pilot Freight (Pty) Ltd v Von*

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[3] ***Standard Bank of SA Ltd v Sewpersadh 2005 (4) SA 148 (C) para 14:*** **"It is clear from the above that the Legislature used the word 'must' and did not use 'may'. The furnishing of copies of the application to the Commissioner for Inland Revenue, the employees and trade unions was therefore made peremptory (obligatory) and not permissive. (See *Berman v Cape Society of Accountants 1928 (2) PH M47 (C)*.) The word 'must' was also used by the Legislature in defining the obligation of the petitioner as far as proof of service is concerned."**

[4] ***Hannover Reinsurance Group Africa (Pty) Ltd v Gungudoo 2012 (1) SA 125 (GSJ) para 14*:** **"In terms of the provisions of s 9(4A)(b), applicants' attorneys were obliged to file an affidavit either before or during the hearing of the application wherein the steps taken by the applicants in compliance with the provisions of s 9(4A) are set out."**

[5] ***Corporate Money Managers (Pty) Ltd v Panamo Properties 49 (Pty) Ltd 2013 (1) SA 522 (GNP) para 10*:** **"Proof of such furnishing by means of an affidavit is ... peremptory"**

[6] ***Sphandile Trading Enterprise (Pty) Ltd v Hwibidu Security Services CC 2014 (3) SA 231 (GJ) para 14*:** **"It is clear that compliance with s 346(4A)(a)(iii) is peremptory in the sense that a copy of the application must be furnished to SARS. The same applies to proof of service on SARS by means of an affidavit (s 346(4A)(b)."**

[7] ***EB Steam Co (Pty) Ltd v Eskom Holdings Society Ltd 2015 (2) SA 526 (SCA) ([2014] 1 All SA 294; [2013] ZASCA 167) para 15.***

Landsberg Trading (Pty) Ltd.[8] These cases require an affidavit by the person who furnished the application.

13 The decision in *Corporate Money Managers (Pty) Ltd v Panamo Properties 49 (Pty) Ltd* was overruled by the Supreme Court of Appeal[9] but only in respect of the question as to *when* the application papers must be furnished to the specified persons and not in respect of section 346 (4A) (b).

14 However, *EB Steam Co (Pty) Ltd v Eskom Holdings Soc Ltd,*[10] is also authority that the court may by reasons of urgency or logistical problems grant a provisional order even when the application papers have not yet been furnished to employees. Wallis JA said:

> *[12] .... It is also unnecessary to spell out the circumstances in which a court should be prepared at the stage when a provisional winding-up order is sought to grant an order notwithstanding the fact that the application papers have not yet been furnished to employees. Ordinarily this should be done before a provisional order is granted but reasons of urgency or logistical problems in furnishing them with the application papers may provide grounds for a court to allow them to be furnished after the grant of a provisional order.*

15 At first sight it seems as though the Supreme Court of Appeal gave its

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[8] ***Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd 2015 (2) SA 550 (GJ) para 36: "What is clear from s 346(4A)(b) is that whoever furnishes the application, on any of the parties referred to in the section, must depose to an affidavit which sets out the manner in which s 346(4A)(a) was complied with."***

[9] ***EB Steam Co (Pty) Ltd v Eskom Holdings Society Ltd 2015 (2) SA 526 (SCA) ([2014] 1 All SA 294; [2013] ZASCA 167) para 12.***

[10] ***EB Steam Co (Pty) Ltd v Eskom Holdings Society Ltd 2015 (2) SA 526 (SCA) ([2014] 1 All SA 294; [2013] ZASCA 167) para 15.***

blessing to the granting of a provisional order under circumstances where the application was not served in terms of section 346 (4A). In the context however the judgment does not say that non-compliance with section 346 (4A) (b) may be condoned under appropriate circumstances (such as extreme urgency which is not the case in the present matter) but only that it might appear from the affidavit, for instance, that employees could not have been furnished with the application papers because even though it was affixed to the main gate because all the employees had left the premises. The judgment says nothing about not requiring the affidavit.

16 Reading the judgement as a whole makes it clear however that the statement quoted above relates to the question whether the steps taken were sufficient and not with the question whether the court may condone non-compliance with section 346 (4A) (b). The Learned Justice of Appeal went on to say:

> *[14] It cannot, however, be the case that courts are hamstrung and precluded from dealing with applications for winding-up or sequestration because they are uncertain whether the application has in fact come to the attention of all employees. That is not a sensible construction of this requirement. [11][11] Were that the case the statutory methods of placing the application papers on a notice board to which the employees have access, or fastening them to the gates of premises where the employees work, could never be accepted as sufficient. The usual way of achieving certainty in*

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[11] ***Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund 2010 (2) SA 498 (SCA) paras 12 – 14; Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18.***

regard to the receipt of documents is by requiring service in accordance with the rules of court, but that is not what the section demands. In my view the proper interpretation of the requirement that the application papers be 'furnished' to the identified persons is that they must be made available in a manner reasonably likely to make them accessible to the employees. It is not a requirement that the court must be satisfied that the application papers have as a matter of fact come to the attention of those persons. It is in that sense that I refer hereafter to furnishing the application papers to employees.

17 The SCA judgment is authority for the proposition that in urgent matters the Court may consider the affidavit by the person who furnished the application who did not affix a copy of the application at the premises but who used some other, perhaps more efficient means under the circumstances. In cases of extreme urgency it may even be that a Court could condone the failure to strictly comply with section 346 (4A) but accept substantial compliance when presented with a service affidavit setting out the reasons for the failure to strictly comply. That is not the case in the present matter – the application is urgent but more than two weeks have elapsed since the application was initiated and there was sufficient time to comply with section 346 (4A) (b).

18 I conclude that the affidavit by Ms. Cassim does not comply with section 346 (4A) (b) as she is not the person who furnished the affidavit, that the bulk sms's did not cure the defect as it did not contain a copy of the application as required and as no case is made out for deviating from the provisions of section 346 (4A) (a) (ii) (aa) and (bb), and that non-

compliance can not be condoned.

19 Section 346 (4A) (b) must be complied with in respect of SARS and the employees. Affidavits by the Sheriff and the person who furnished a copy to the SARS should suffice.

20 The following order is made:

1. The second and third respondents are granted leave to intervene in the application;
2. The matter is removed from the roll;
3. The applicant is directed to file an affidavit or affidavits in compliance with section 346A (4) (b) of the Companies Act 61 of 1973 before re-enrolling the matter in the Urgent Court;
4. The costs shall be costs in the application.

MOORCROFT AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing: **12 June 2020**

Judgment delivered: **12 June 2020**

Corrected: **22 June 2020**

Attorneys for the Applicant:

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