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

CASE NO: 2023 - 082122

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

20/10/2023
DATE

[redacted]
SIGNATURE

In the application by

LYCONET AUSTRIA GmbH	Intervening Applicant
and	
WEIGLHOFER, ALBERT	First Respondent
KRAMBECK, WAYNE	Second Respondent
ONICAFLEX (PTY) LTD	Third Respondent
LUTCHMAN, RALPH FARREL, NO	Fourth Respondent
KAAB, LINDIWE FLORENCE, NO	Fifth Respondent
LYCONET SOUTH AFRICA (PTY) LTD (in liquidation)	Sixth Respondent
MASTER OF THE HIGH COURT, JOHANNESBURG	Seventh Respondent

In re

WEIGLHOFER, ALBERT	First Applicant
KRAMBECK, WAYNE	Second Applicant
ONICAFLEX (PTY) LTD	Third Applicant
And	
LYCONET SOUTH AFRICA (PTY) LTD	Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Winding up – non-compliance with peremptory requirement of section 346(4A)(b) of the Companies Act 61 of 1973 – Final winding up order set aside in terms of section 354 of Act and provisional order substituted

Section 346(4A)(b) of Act requires that affidavit(s) by the person(s) who furnished a copy of application to the respondent company, the employees, any trade union, and SA Revenue Service be filed before or at the hearing of the application

Compliance in respect of respondent company can be dispensed with in terms of section 346(4A)(a)(iv), but condonation not provided for in respect of employees, trade unions, and SARS

There are conflicting judgments on the question whether a provisional order may be granted absent compliance with section 346(4A)(b), and the question whether the paragraph (b) is peremptory

Order

[1] In this matter I make the following order:

1. *The order of the Honourable Van Nieuwenhuizen AJ, granted on 12 September 2023, under the above case number, is set aside;*
2. *The sixth respondent is hereby placed under provisional winding up;*
3. *The liquidators appointed shall continue to act, as provisional liquidators;*

4. *All persons who have a legitimate interest are called upon to put forward their reasons why this court should not order the final winding up of the respondent on 29 January 2024 at 10:00 am or so soon thereafter as the matter may be heard;*
5. *A copy of this order must be served on the sixth respondent at its registered office;*
6. *A copy of this order must be published forthwith once in the Government Gazette;*
7. *A copy of this order must be forthwith forwarded to each known creditor by prepaid registered post or by electronically receipted telefax or electronic mail transmission;*
8. *A copy of this order must be served on –*
    - 8.1. *every trade union representing employees of the sixth respondent referred to in subsection (2);*
    - 8.2. *the employees of the sixth respondent by affixing a copy of the application to any notice board to which the employees have access inside the sixth respondent'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 sixth respondent conducted any business at the time of the presentation of the application;*
    - 8.3. *the South African Revenue Service; and*
    - 8.4. *the sixth respondent.*
9. *The intervening applicant is to deliver its answering affidavit to the main winding up application by no later than fifteen days after the granting of this order;*
10. *The first to third respondents are to deliver their replying affidavit, if any, by no later than ten days from the date of delivery of the intervening applicant's answering affidavit;*
11. *The first to third respondents are to file one or more affidavits in compliance with section 346(4A)(a) and (b) of the Companies Act 61 of 1973, to the satisfaction of the Court hearing the application;*
12. *The costs are reserved.*

[2] The reasons for the order follow below.

Introduction

[3] The sixth respondent ("Lyconet SA") was wound up on an urgent basis by the Court on 12 September 2023. The application was unopposed and was supported by its director. A final winding up order was granted.

[4] The intervening applicant ("Lyconet Austria") is a member of Lyconet SA and has *locus standi* to apply for an order in terms of section 354 of the Companies Act 61 of 1973[1] for the setting aside of the order of 12 September 2023, and it has done so in the Urgent Court. I am satisfied that the matter is sufficiently urgent to be heard in the Urgent Court.

The application for the setting aside is opposed by the three respondents who were the three applicants in the winding up application.

The liquidators and the company in liquidation are cited as the fourth, fifth and sixth respondents in this application. The liquidators abide the decision of the Court.

[5] Section 354 affords the Court a discretion to set aside a winding up order on proof to the satisfaction of the Court that such an order ought to be granted. The discretion is wide enough to encompass the setting aside of the order because of events that occurred subsequent to the granting of the order, or because it ought never to have been granted.[2] The present application resorts under the second of these grounds.

An application to set aside a winding up order on the ground that it ought never to have been granted will be granted only under exceptional circumstances.[3] It follows that the court should be hesitant to interfere, and should then limit its interference as much as possible.

An application under section 354 should also not be treated as an appeal against the

1 Read with clause 9 of Schedule 5 of the Companies Act, 71 of 2008.
2 *Ward* v *Smit: In re Gurr* v *Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA).
3 Meskin *Henochsberg on the Companies Act* 748.

earlier order.

[6] Lyconet Austria did not oppose the application for the winding up of Lyconet SA in September as it was not aware of the application and its failure to oppose the winding up application when it was first brought is adequately explained.

[7] In terms of section 346(4A)(a) of the Companies Act of 1973 a copy of a winding up application must be furnished

7.1 to every registered trade union that as far as the applicant can reasonably ascertain represented any of the employees of the company,[4]

7.2 to the employees themselves,[5]

7.3 to the South African Revenue Service (SARS) [6]

7.4 and to the company sought to be wound up. The court is granted a discretion to dispense with the furnishing of a copy to the company in the interests of the company and the creditors.[7]

[8] In practice, applications are usually if not almost always served on the respondent company by the Sheriff[8] and furnishing of the application in terms of section 346(4A)(a)(iv) is routinely dispensed with.

Importantly, the discretion to dispense with furnishing is not extended to the furnishing of the application to the employees, trade unions, or SARS.

[9] Section 346(4A)(b) stipulates that the applicant must before or during the hearing

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4 Section 346(4A)(a)(i).
5 Section 346(4A)(a)(ii).
6 Section 346(4A)(a)(iii).
7 Section 346(4A)(a)(iv).
8 Rule 4 of the Uniform Rules and section 43 of the Superior Courts Act 10 of 2013. 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.

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. It has been held in a number of decisions referred to below that these requirements are peremptory[9] and non-compliance cannot be condoned in respect of furnishing the application to employees, trade unions, or SARS. While the requirements of section 346(4A) are peremptory, the *methods* of furnishing the application papers are not peremptory.[10] There may be circumstances under which the methods of furnishing listed in the section would be ineffectual, and an applicant for winding would then have to consider other ways to bring the application to the notice of employees. Bulk whatsapp, sms messages, or email may be considered.

[10] An affidavit by one person stating that the application was furnished by another person does not constitute compliance if section 346(4A)(b) is to be regarded as peremptory. In the present matter the attorney acting for the applicants in the winding up application deposed to an affidavit referring the court to the returns of service issued by the Sheriff and confirming service by the Sheriff. The Sheriff was the *"person who furnished the copy of the application"* and what was required was an affidavit by the Sheriff. The deponent on the other hand was not the person who furnished the application and her affidavit does not constitute compliance with the Act.

[11] The conclusion that the requirements of section 346(4)(b) and its counterpart in the Insolvency Act 24 of 1936, namely section 9(4A) are peremptory requirements was arrived at in a number of judgments since the provisions came into effect in 2003.

[12] In 2005 Dlodlo J (as he then was) said in *Standard Bank of SA Ltd v Sewpersadh:*[11]

> *"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*

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9 See also Meskin *Henochsberg on the Companies Act* 724(2).

10 *EB Steam Co (Pty) Ltd v Eskom Holdings Society Ltd* 2015 (2) SA 526 (SCA) [2014] 1 All SA 294 (SCA) para 18.

11 *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) para 14. See also *Hannover Reinsurance Group Africa (Pty) Ltd v Gungudoo* 2012 (1) SA 125 (GSJ) para 14, *Corporate Money Managers (Pty) Ltd v Panamo Properties 49 (Pty) Ltd* 2013 (1) SA 522 (GNP) para 10 (overturned by the Supreme Court of Appeal in the *EB Steam* decision also referred to in this footnote but not in this respect), *Sphandile Trading Enterprise (Pty) Ltd v Hwibidu Security Services CC* 2014 (3) SA 231 (GJ) para 14, *EB Steam Co (Pty) Ltd v Eskom Holdings Society Ltd* 2015 (2) SA 526 (SCA) [2014] 1 All SA 294 (SCA) para 15, *Cassim NO v Ramagale Holdings (Pty) Ltd and Others* [2020] ZAGPJHC 149, and *Bees Winkel (Pty) Ltd v Mkhulu Tshukudu Holdings (Pty) Ltd* 2021 JDR 1760 (NWM).

> *(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."* [emphasis added]

[13] In *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* Kairinos AJ said in 2015:[12]

> *"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."*

[14] The principle was again confirmed earlier in 2023 by Kubushi J in *Brits v Sweet Equity Investments 2 (Pty) Ltd and another*.[13]

[15] Viljoen AJ in *Aqua Transport and Plant Hire v TST Brokers (Pty) Ltd t/a Thamzin and Thamzin,*[14] Adams J in *Intello Capital CC v Sigge Managed Solutions (Pty) Ltd*[15] adopted a different approach and held that a provisional winding up order could be granted in the absence of strict compliance with section 346(4A)(b). On this approach paragraph (b) is not peremptory.

[16] Mashile J in *Interturbo (Pty) Ltd and Others v Absa Bank and Others*[16] went further and held in effect[17] that a final winding up order can be granted without reference to an affidavit. The learned Justice said:

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12 *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* 2015 (2) SA 550 (GJ) para 36.
13 *Brits v Sweet Equity Investments 2 (Pty) Ltd and another* 2023 JDR 0920 (GP) para 15.
14 *Aqua Transport and Plant Hire v TST Brokers (Pty) Ltd t/a Thamzin and Thamzin* [2022] ZAGPJHC 1043, 2023 JDR 0191 (GJ)
15 *Intello Capital CC v Sigge Managed Solutions (Pty) Ltd,* unreported judgment, case number 5974/2022, ZAGPJHC, 6 March 2023.
16 *Interturbo (Pty) Ltd and Others v Absa Bank and Others* [2016] ZAGPJHC 215.
17 The application before the Court was a rescission application.

> *"The emphasis is on notifying them and not on the form of the notification. Accordingly, service of the application by the sheriff and how he went about effecting the service on the relevant parties should satisfy the requirements of the section."*

[17] These judgments were given in the Gauteng Division, Johannesburg. The judgments do not deal with the important phrase *"an affidavit by the person who furnished a copy"* in paragraph (b), or with the fact that condonation for non-compliance was possible in express terms in respect of furnishing the application to the respondent company, without referring to the possibility of condonation in the other instances.

Section 346(4A) was considered by the Supreme Court of Appeal in *EB Steam Co (Pty) Ltd v Eskom Holdings Society Ltd*[18] but the judgment also did not deal with these two aspects.[19] What is clear from the judgment is that section 346(4A) must ordinarily be complied with before a provisional order is sought *"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."*[20]

In the present matter it is not alleged that the three respondents were precluded by way of urgency or logistical problems from complying; their attitude is that they did comply and that paragraph (b) is not peremptory.

[18] What is equally clear from the *EB Steam* case is that the Supreme Court of Appeal made a distinction between a provisional and a final winding up order[21] and that the Court referred without any adverse comment to *Hendricks NO and Others v Cape Kingdom (Pty) Ltd*[22] where the Western Cape High Court seemingly relied on a Sheriff's return that was not supported by an affidavit in terms of section 346(4A)(b).

[19] The Court has a wide discretion under section 354 of the Companies Act of 1973[23] but the discretion does not extend to condoning an application in which an order was

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18 *EB Steam Co (Pty) Ltd v Eskom Holdings Society Ltd* 2015 (2) SA 526 (SCA) [2014] 1 All SA 294 (SCA).
19 Ibid para 15.
20 Ibid para 12.
21 Ibid para 29.
22 *Hendricks NO and Others v Cape Kingdom (Pty) Ltd* 2010 (5) SA 274 (WCC)
23 See *Klass v Contract Interiors CC (in liquidation) and others* 2010 (5) SA 40 (WLD) paras 65 to 66.

sought in the absence of compliance with peremptory statutory requirements. The failure to comply would constitute, in my view, exceptional circumstances.

However, when the very question whether the statutory requirements are peremptory when a provisional winding up order is granted is not settled and is subject to conflicting judgments in this Division, I would not be justified in setting aside the final order without substituting a provisional order. I must remind myself that I am not sitting in an appeal having to decide which of two conflicting judgments in correct.[24]

[20] In the present matter the application was served by the Sheriff on the respondent company, on the employees, and on trade unions by affixing it to the *"principal door of the registered address"* of the respondent company, of the trade unions and of the employees. There is nothing to suggest in the founding affidavit in the winding up application that -

20.1 the employees of the respondent company have what could be termed a *"registered address"* and that

20.2 any trade union shared a registered address with the respondent company.

The Sheriff's returns are deficient and are illustrative of the reasons why the legislature thought it necessary to place section 346(4A)(a) and (b) on the statute book.

[21] The order I make will not upset the *concursum creditorum* already established and what remains is for the intervening applicant to file answering affidavits and for the application to proceed.

[22] In the founding affidavit in the winding up application averments of serious misconduct is made and in the founding affidavit in the section 354 application the averments of misconduct are disputed. These disputes will be best dealt with when the winding up application is before court with a full set of affidavits.

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[24] See also the judgment by Kathree-Setiloane J (as she then was) in *Absa Bank Limited v Thermex Carbon Technologies* [2015] ZAGPJHC 294 para 34.

In appropriate cases interim relief might be necessary when a winding up order is set aside to protect the interests of litigants or third parties and the public interest but no such interim relief was identified in this application.

[23] For the reasons set out above I make the order in paragraph 1.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **20 OCTOBER 2023**.

COUNSEL FOR THE INTERVENING APPLICANT:	HC BOTHMA SC WJ BEZUIDENHOUT S MATHE
INSTRUCTED BY:	SKV ATTORNEYS
COUNSEL FOR THE FIRST, SECOND AND THIRD RESPONDENTS:	N CASSIM SC L ACKER
INSTRUCTED BY:	MAGDA KETZ ATTORNEYS
DATE OF ARGUMENT:	17 OCTOBER 2023
DATE OF JUDGMENT:	20 OCTOBER 2023