IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 55018/2011

Date: 20 February 2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

20/2/2014 ..... DATE SIGNATURE

In the matter between:

LAK INVESTMENT COMPANY NO 26 (PTY) LTD Applicant

And

PRESSURE ADVANCE TECHNOLOGY CC First Respondent

JUDGMENT

PRETORIUS J,

[1] This is an application for rescission of a final liquidation order granted on 28 March 2012. The respondent applies in this application, to set aside or rescind the winding-up order.

[2] On 26 September 2011 the applicant issued a winding-up application against the respondent. This application was served by the Sheriff by forwarding it by registered post to the respondent in terms of rule 4(1)(a)(v) of the Uniform Rules of Court.

[3] Rule 4(1)(a)(v) provides as follows:

> *"(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one of the following manners:*
>
> > *(v) in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principle place of business within the court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law; "*

[4] The winding-up application was served on the respondent by forwarding it by registered post by the sheriff, although the rule does not provide for service in such a way. A copy of the application was affixed to the main front door of the respondent's place of business and the sheriff alleged in the return of service that this was done in terms of rule 4(1)(a)(ii). Rule 4(1)(a)(ii) provides:

"*(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one of the following manners:*

(ii) by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age…"

[5] It is quite clear from the return of service by the sheriff that he did not comply with the rule at all. The sheriff reported in the return of service: *"I certify that on the 14th day of OCT 2011 and at GALLOWAY STR MEYERTON which is the RESPONDENT'S place of business, I served the annexed NOTICE OF MOTION, AFFIDAVIT – WD ANGERMAIER by affixing a copy to the main front door."*

The respondent alleges that it never received the application.

[6] A provisional liquidation order was granted on 2 November 2011. According to the documents this order was served on the respondent by the sheriff on 4 January 2012 by affixing a copy of the order to the main front door of the respondent's place of business, without setting out the time of service or why no other service was possible. He reported:

"I certify that on the 4TH day of JAN 2012 and at 55 GALLOWAY STR MEYERTON which is the RESPONDENT'S place of business, I served the annexed COURT ORDER – 2 NOV 2011 by affixing a copy to the main front door."

[7] Service on the respondent's employees were dealt with as follows according to the applicant in the founding affidavit:

"It is not within the knowledge of the applicant if the respondent has any employees. A copy of this application will be served at the respondent's main place of business by attachment to the main gate or main door of the business premises as notice to all employees at 55 Galloway Street, Meyerton."

[8] There is no indication that the application or order for provisional liquidation was served on the employees as envisaged by the Act. There is no return of service by the sheriff, indicating that there has been any service or attempt of service of the provisional liquidation order on any employee or Trade Union.

[9] Rule 4(1)(a)(v) provides that service on a company such as the respondent should take place by delivering a copy of the application to a responsible employee at the registered office or principle place of business of the company.

[10] This rule does not provide for service by registered post. The sheriff did not comply with the rule and furthermore gave no reason for the non-compliance in the return of service.

[11] Rule 42 provides in regards to rescission of orders or judgments as follows:

> *"The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> > *An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;"*

[12] The respondent relies on rule 42 to have this winding-up order set aside, due to the alleged lack of proper service on the respondent and the employees and/or trade union of the respondent. If the court finds that it stands to be set aside or rescinded as the judgment was erroneously sought or granted, the need to show good cause falls away.

[13] In **Standard Bank of SA Limited v Sewpersadh and Another 2005 (4) SA 148 (C)** on 156 B – D where Dlodlo J held"

> *"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. The applicant was left with no option of filing an affidavit. It was necessary to do so."

[14] In **Hendricks NO v Cape Kingdom (Pty) Ltd 2010 (5) SA 274 (WCC)** the court determined that in regards to section 346(4)(A)(a)(ii), which prescribes how notice must be given to employees that the court cannot grant condonation due to the non-compliance with the requirement that an application must be furnished to employees, as the provision is premptory.

[15] Blieden J held in the unreported case of Peter **Wayne Roberts v The Taylor of Buckingham CC Case No 2008/21864** in paragraph 13:

"... The application for winding-up, when it was lodged with the Registrar, required that the applicant at that time complied with the requirements of subsection 346 (4A). Had the court been aware that there had been no such compliance the matter would have been struck off the roll. The fact that the matter has now been fully argued does not change the position. The application should not have been heard in the first place. It was not properly before the court "

[16] The facts in this application for rescission is similar to that of the Wayne Roberts case.

[17] In **Fraind v Nothmann 1991 (3) SA 837 (W)** at 839 H Streicher J found:

> *"In the premises, there had not been service of the summons on the applicant and the judgment should not have been granted against him. Judgment was therefore granted erroneously in the absence of the applicant and is liable to be set aside in terms of Rule 42(1)(a)."*

[18] The sheriff did not set out any particulars as to why he affixed the copy of the notice of motion and affidavit to the front door of the business. There is no indication in the return of service as to why it was not served on a person on 14 October 2011 at the place or registered business address of the respondent or that any attempt was made to serve the application for winding up and/or the provisional court order as set out by Rule 4(1)(a)(v) or 4(1)(a)(ii).

[19] There is no indication on any returns of service that an effort had been made to serve the notice of motion and affidavit for the provisional liquidation of the applicant on the employees or a trade union.

[20] There is no mention of employees or a trade union in any of the returns of service. The applicant did not comply with the provisions of section 346 A (a)(i) and (ii) or section 346 (4(A)(iv)) pertaining to service on the employees or the trade union.

[21] It is also telling that no track and trace reports from the Post Office were submitted and the court cannot make a finding that it was sent and delivered to the correct post office.

[22] No special circumstances exist for the court to make the inference that it has been proved that the respondent, employee and the trade union received notice and were aware of the application.

[23] The court cannot condone non-compliance with section 346 (4A) and with section 346 A, as these provisions are peremptory.

[24] In **Sebola and Another v Standard Bank of SA ltd 2012 (5) SA 142 (CC)** the court dealt, inter alia, with the meaning of the words "provide" and "deliver" dealing with the National Credit Act. The court stressed that the consumer has to receive notice of his rights. In this instance, where the status of an entity is involved, it will be even be more important to ensure that the respondent, its employees and the trade union are informed of the winding-up proceedings.

[25] In **Stride v Castelein 2000 (3) SA 662 (W) Marais J** found at 667 I:

> *"The granting of a provisional sequestration order has the most drastic consequences. It involves a change in status; it divests the respondent of his assets and vests them in a provisional trustee as soon as the latter is appointed; it affects the ability of the respondent to conduct his business and trade; it affects his reputation as a person and a trader. In my view, it is wholly wrong to cause this massive prejudice to a man who may, if given notice, be able to resist the application."*

[26] In the present appeal there can be no doubt that the *audi alterem partem* rule had not been complied with as the respondent, employees and trade union had not known of the application and final windingup order granted by the court.

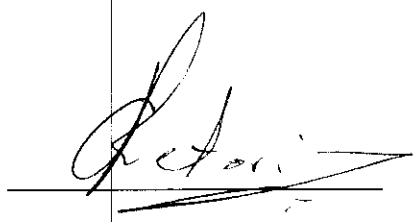
[27] The only conclusion the court can come to having regards to the facts, the arguments, the pleadings and the authorities referred to, is that there had been no proper service on the respondent, the respondent's employees or trade union.

[28] Rule 42(1)(a) makes provision that the court may set aside an order which had erroneously been sought or erroneously given. In this

instance the court finds that there was no service or no proper service on the respondent, the employees or the trade union and therefor it is necessary to set aside the application as it was erroneously granted.

[29] I make the following order:

1. The final winding-up order granted on 28 March 2012 is rescinded;
2. The respondent is granted the opportunity to oppose the application;
3. The applicant to pay the costs of this application.



Judge C Pretorius

Case number	: 55018/2011
Heard on	: 3 February 2014
For the Applicant / Plaintiff	: Adv SM Maritz
Instructed by	: Mills & Groenewald
For the Respondent	: Adv JE Ferreira
Instructed by	: HW Smith & Marais
Date of Judgment	: 20 February 2013