REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 14432/08

In the matter between:

FADEL HENDRICKS N.O.	First Applicant
IQBAL SURVé N.O.	Second Applicant
JOHANNES HENDRIKUS DE LOOR N.O.	Third Applicant
GATSHA MAZITHULELA N.O.	Fourth Applicant
NEIL STOCKINSTRÖM GARDINER N.O.	Fifth Applicant
NIGEL GWYNNE-EVANS N.O.	Sixth Applicant
SUSAN THERESE LARGIER HARRISON N.O.	Seventh Applicant

(In their capacities as trustees of the Cape Biotech Trust, Trust No. T2102/2003)

and

CAPE KINGDOM (PTY) LTD	Respondent

(Registration No. 2006/016604/07)

JUDGMENT DELIVERED ON 7 DECEMBER 2009

SHOLTO-DOUGLAS, AJ

[1] This is the extended return day of a provisional order for the winding-up of the respondent, granted on 4 November 2008. The

principal issue dealt with relates to the interpretation of and compliance with s 346(4A) and s 346A of the Companies Act 61 of 1973 ("the Act").

The legislation

[2] The Act was amended with effect from 1 January 2003 by the Insolvency Second Amendment Act 69 of 2002. The preamble to the latter Act reads as follows:

> *"To amend the Insolvency Act, 1936, so as to require notice of a petition for the sequestration of a debtor's estate to be given to employees of the debtor, registered trade unions representing such employees, the South African Revenue Service and the debtor; to provide for the service of sequestration orders on such employees, trade unions and the South African Revenue Service; to make further provision regarding a debtor's rights to compensation; and so as to effect certain textual corrections; to amend the Companies Act, 1973, so as to require notice of an application for the winding-up of a company to be given to employees of the company, registered trade unions representing such employees, the South African Revenue Service and the company; to provide for the service of winding-up orders on such employees, trade unions, the South African Revenue Service and the company; to make provision regarding a company's rights to compensation; and to provide for matters incidental thereto."*

[3] The amendments effected to the Act as are relevant to this application were the introduction of s 346(4A) and s 346A.

[4] Section 346(4A) reads as follows:

"(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."

[5] Section 346A reads as follows:

"(1) A copy of the winding-up order must be served on –

(a) every trade union referred to in subsection (2);

(b) the employees of the company by affixing a copy of the application to any notice board to which the employees have access inside the debtor'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 debtor conducted any business at the time of the presentation of the application;

(c) the South African Revenue Service; and

(d) the company, unless the application was made by the company.

(2) For the purposes of serving the winding-up order in terms of subsection (1), the sheriff must establish whether the employees of the company are represented by a registered trade union and determine whether there is a notice board inside the premises of the company to which the employees have access."

The facts

[6] Until 2008 the respondent carried on business as a producer, supplier and distributor of nutraceuticals, principally based on buchu, a small flowering shrub native to South Africa. It did so from its principal place of business in Westlake and a factory or bottling plant on a farm near Paarl.

[7] During the course of 2007 the respondent applied to the applicants, as trustees of the Cape Biotech Trust ("the trust"), a trust founded by the Department of Science & Technology as part of its strategy to facilitate and invest in the biotech economy, for funding for its operations. As a result, the trust having considered and approved the application, it made available a sum of approximately R10 million to the respondent on terms that entitled it to take shares in the respondent and appoint a director to its board. The loan was governed by the provisions of a shareholders' agreement in terms of which the respondent submitted a project plan and cash flow proposal to the trust to receive funding for the proposed project.

[8] At all material times one Mr. Stander ("Stander") was the managing director (or chief executive officer) of the respondent. The majority shareholder of the respondent was a trust wholly controlled by Stander. Until August 2008, four other persons held directorships in the respondent.

[9] From about April 2008 the respondent began to experience cash flow difficulties, a fact which was reflected in the draft financial statements prepared for the 16-month period ending 31 December 2007 and produced toward the middle of 2008.

[10] As a result of these and other concerns, the trust requested that a financial audit of the respondent be undertaken. Stander saw this as an attempt to *"dig up dirt"* on him. Nonetheless, he claims that he co-operated with the audit, which, whether correctly described as *"limited"* (by the trust) or *"the fullest possible"* (by Stander),

yielded information which troubled the trust. By 22 August 2008, when a meeting of the directors of the respondent was held, they expressed concern about the result of the audit and, in particular, Stander's allegedly irregular expenditure of company funds.

[11] Stander's reaction, on 27 August 2008, was forthwith to terminate the employment of the respondent's chief financial officer, to terminate the appointment of the auditors and to suspend and thereafter dismiss two employees of the respondent who had raised financial irregularities and cash flow difficulties with Stander.

[12] These events were followed by the resignation of the non-executive directors of the respondent, leaving only Stander and the trust's representative on the board as directors. To obviate this inconvenience, Stander appointed a wage-earning labourer employed by the respondent as a fellow director. Stander and his new fellow director were able to procure the payment of funds lent by the trust to the respondent from an account held at Investec Bank.

The winding-up application

[13] This application for the winding-up of the respondent was launched on 5 September 2008.

[14] Prior to the hearing of the application for a provisional order of liquidation, a candidate attorney in the employ of the trust's attorneys attempted to serve a copy of the liquidation application at

the respondent's principal place of business. This occurred over the lunch hour and she found the principal place of business locked and unoccupied. (Stander has made something of the fact that the attempt at service occurred over the lunch hour. He alleged that the premises were in fact occupied, but that the occupants had left the office for the duration of the lunch adjournment. Although nothing of substance turns on this dispute, it is significant that Stander makes no effort to identify who would have been present at the premises prior to and after the lunch adjournment on the day in question, or to furnish an affidavit by that person confirming the allegations. On the face of it, no one other than Stander was likely to have been found at the Westlake premises).

[15] Subsequently, another candidate attorney in the employ of the applicants' attorneys personally served a copy of the liquidation papers on two of the three employees referred to in the founding affidavit. An attorney subsequently served a copy of the application on the third employee. It is not insignificant that two of those employees subsequently deposed to affidavits in support of the trust's application to wind up the respondent.

[16] The respondent filed the answering affidavit of Stander after these service affidavits had been filed. Stander, deposed to a lengthy answering affidavit in which all manner of points were taken in an effort to defeat the trust's application. The trust's claim to be a creditor of the respondent was disputed, as was the trust's contention that the winding-up of the respondent would be just and equitable.

The basis of the opposition now advanced by Stander, namely that s 346(4A)(a)(ii) of the Act had not been complied with, was not raised.

[17] In the event, a provisional order of winding-up was made. This did not end Stander's involvement in the matter. Without applying to be joined as a party to the proceedings, he opposed a separate application brought by the provisional liquidators for an extension of the powers given to them by the Master ("the liquidators' application"). In that application he raised the contention that the provisional order had been improperly or incorrectly granted because there had been inadequate or improper service on the employees as required by s 346(4A)(a)(ii) of the Act. Notwithstanding this, the relief sought by the provisional liquidators was granted. I shall return briefly below to deal with that aspect of the judgment of the court dealing with the allegation of improper or incomplete service.

[18] Thereafter, and without seeking to be joined as a party to the winding-up proceedings, Stander filed further lengthy affidavits.

[19] At the hearing of the application for the provisional winding-up of the respondent, the position was that there had been no compliance with the provisions of the subsection, read literally, in that no copy of the application had been affixed to any notice board to which the applicant and the employees had access inside the premises of the company, nor had a copy of the application been affixed to the front gate of the premises, or to the front door of the premises from which the company conducted any business at the time of the application.

[20] What had occurred was that personal service of the application had been effected on three named employees of the respondent concerning whom the deponent to the founding affidavit had stated:

> *"I am aware that the Respondent has 3 employees (excluding Stander) none of whom are currently working at the Respondent's principal place of business."*

[21] In his opposing affidavit, Stander did not deal with the two important components of this statement, namely, that the respondent had three employees and that none of them were then to be found at the respondent's principal place of business.

[22] For the reasons set out above, any attempt at compliance with s 346(4A)(a)(ii) of the Act in the precise terms set out in that section would have been futile if its aim was to bring to the attention of those employees the existence and contents of the application.

[23] The provisional order was served by the Sheriff, who furnished his return in which he stated that service had been effected in compliance with s 346A of the Act (i.e., on the employees, by doing so upon Stander at the address indicated in the order). He added the comment that Stander had confirmed that there were no employees at the given address. Stander did not say to the sheriff that there were, however, employees elsewhere. In addition, a copy of the order was sent to each of the said employees by registered post.

[24] On 4 November 2009, shortly before the hearing of this application, Stander, again purporting to represent the respondent, filed a notice of intention to take a point *in limine* at the hearing of the matter which was accompanied by an affidavit deposed to by Stander. In it the allegation of defective service was squarely taken. Stander alleged that at 5 September 2008 the respondent had 12 employees. Three of those worked at the respondent's principal place of business and were those suspended on 27 August 2008. Three more were non-executive directors. Stander counted himself as an employee and listed four further employees employed at the farm near Paarl in addition to a Ms Perkins, who did not work at the principal place of the respondent's business. The trust was clearly unaware of her appointment as an employee, which is said probably to have taken place in the early part of September 2008, at about the time that this application was launched. The statement is made in such obviously vague terms as to the date of Ms Perkins' employment as to give rise to the inference that Stander would prefer that the court was kept in the dark in this regard.

[25] It is clear also that in addition to the service of the provisional order having been effected by the Sheriff as described above, a candidate attorney in the employ of the trust's attorneys served a copy of the application papers on one of the claimed employees of the respondent (co-incidentally the one appointed by Stander as a director) at the Paarl farm. As to the other three employees alleged to be working there, one was no longer employed at the farm, another had gone home for the day and the third was in hospital. The papers

were left with the only employee present on the farm. A copy of the papers was also served on Ms Perkins.

Discussion

[26] At the hearing before me, Stander was represented by counsel. The matter was argued as if Stander was entitled to be represented at the proceedings and to advance such arguments as were advanced on his behalf. I will accept that this is so, without deciding as much.

[27] In the heads of argument, filed purportedly on behalf of the respondent, but really on behalf of Stander, the argument was restricted to the contention that there had been non-compliance with the provisions of s 346(4A)(a)(ii) of the Act. (Although reference is made in the heads to non-compliance with s 346(4A)(b) of the Act, affidavits were filed, which, if there was compliance with s 346(4A)(a)(ii), would constitute compliance with s 346(4A)(b). The argument was not taken further in oral submissions). During argument, however, *Mr Burger*, who appeared with *Mr Farlam* for Stander, raised what he referred to as a "*new point*". He extended the objection to the nature of service effected on the employees prior to the grant of the provisional order of winding-up to an objection that the provisional order had not been properly served in terms of s 346A of the Act.

[28] While making no concession in regard to whether or not the trust had made out a proper case for the winding-up of the respondent on the

basis that it was unable to pay its debts or that it was just and equitable to do so, *Mr Burger* made no submissions in that regard at all and left the matter in the hands of the court. While this did not amount to an outright concession of the merits of the applicants' claim, the opposition was pertinently restricted to the service point. In my view, that was the correct approach to take. On a proper consideration of the papers it is clear that on the appropriate test, the trust has established the grounds for the winding-up of the respondent on which it relied in the founding affidavit. It is, to be fair, correct that the evidence in the founding affidavit was bolstered to some considerable extent by facts contained in affidavits filed after the granting of the order of provisional liquidation. However, those affidavits have been fully dealt with by Stander and there was no suggestion before me that either party had been prejudiced by the rather free and easy approach to the filing of the affidavits adopted in this matter.

[29] In the circumstances, the only issues to be decided in this application are the following:

[29.1] should the provisional order of liquidation be set aside because it was granted when there had not been proper compliance with the provisions of s 346(4A)(a)(ii) of the Act; and/or

[29.2] should the granting of a final order of liquidation be refused, postponed or otherwise dealt with because there has not been proper compliance with s 346A of the Act?

[30] *Mr Burger's* submission is that the provisional order should not have been granted because s 346(4A)(a)(ii) of the Act had not been complied with according to its terms. He submitted that an applicant is not enjoined by the language of the statute to launch an enquiry into the existence of employees and then to effect personal service on them; it is required simply to follow the method of notification set out in the section, irrespective of whether or not that serves the purpose of the section as articulated in the preamble to the amending legislation.

[31] It seems plain that the provisions of s 346(4A)(a)(ii) of the Act are peremptory in nature. This is the view to which Davis, J came in his judgment in the liquidators' application. He summarised his view, expressed in paragraph [29] of the judgment, as follows:

> *"To sum up, a court cannot condone non-compliance with the requirement that a copy of the application must be furnished on the parties which are specified in s 346(4A). I do not consider that the inherent jurisdiction would extend the power of the court."*

This view is in accordance with that of Blieden, J who reached the similar conclusion in *Roberts v The Taylor of Buckingham CC* (Unreported judgment in WLD, Case No. 21864/2008, handed down on 28 November 2008).

[32] In *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C), the court, in dealing with the essentially identical

corresponding section in the Insolvency Act, held as follows at 156B-D:

> *"It is clear from the above that the legislature used the word 'must' and did not use the word '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."*

[33] The trust did not contend that the provisions of s 346(4A)(a)(ii) or s 346A of the Act were anything other than peremptory. Rather, what was contended by *Mr Fitzgerald*, who appeared with *Mr Butler* for the trust, was that in the circumstances of this case, where the very employees whom the legislature intended should be given notice of a winding-up application would not be notified thereof by literal compliance with the section, and they were personally served with copies of the papers, s 346(4A)(a)(ii) of the Act was complied with.

[34] By the time the matter came before me, service of the papers had been effected on all the employees identified by Stander, save for the non-executive directors. Most of those received personal service and the service on the others was likely to have the desired effect of alerting them to the proceedings (of which they were no doubt already acutely aware).

[35] The argument was that there had in the circumstances been substantial compliance with the section. I was referred in this regard to the following passage from the judgment of Davis, J in the liquidators' application:

> *"[28] But the answer may well lie, not so much in the inherent jurisdiction of the court to condone non-compliance, as in the nature of the concept of compliance itself. In this connection L C Steyn: Die Uitleg van Wette (5de uitgawe) at 201, in dealing with the question of compliance, says the following:*
>
> > *"Somtyds egter word ook in hierdie verband slegs sogenaamde 'wesenlike' nakoming vereis, maar dit word oorwegend gegee dat die korrekte standpunt gestel is in Maharaj and Others v Rampersand 1964(4) SA 638 (A) at 646 C-D, waar verklaar word ...*
> >
> > > *The enquiry I suggest is not so much whether there has been exact, adequate or substantial compliance, but rather where there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that even though a position as it is not identical to what it ought to be the injunction has nevertheless been complied with. In deciding whether there has been compliance with the injunction, the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance."*
>
> *[29] To sum up, a court cannot condone non-compliance with the requirement that a copy of the application must be furnished on the*

> *parties which are specified in section 346(4A). I do not consider that the inherent jurisdiction would extend the power of the court. But a court may, in my view, determine whether the applicant has been in substantial compliance with each of these sections. In other words, it is for the court to determine whether the nature of the furnishing of the application, pursuant to the section, has been met.*
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> *[30] To express this point in another way, the means adopted by the applicant to comply with the section is something which the court is required to determine to decide whether there has been substantial compliance as I have set it out."*

[36] The approach suggested by Davis J accords with the approach in *Maharaj and Others v Rampersand* 1964 (4) SA 638 (A) at 646C-D, and *Moela v Shoniwe* 2005 (4) SA 357 (SCA) at [7] to [8]. In *Maharaj v Rampersad*, *supra* the Appellate Division emphasised that:

> *"[i]t is quite conceivable that a Court might hold that, even though the position as it is, is not identical with what it ought to be, the injunction has nevertheless been complied with."*

[37] In *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) par [24], Brand JA stated as follows in the context of the peremptory notice requirements of s4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998:

> *"The question whether in a particular case a deficient s 4(2) notice*

achieved its purpose, cannot be considered in the abstract. The answer must depend on what the respondents already knew. The appellant's contention to the contrary cannot be sustained. It would lead to results which are untenable. Take the example of a s 4(2) notice which failed to comply with s 4(5)(d) in that it did not inform the respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the application papers? Or if on the day of the hearing the respondents appeared with their legal aid attorney? Could it be suggested that in these circumstances the s 4(2) [notice] should still be regarded as fatally defective? I think not. In this case, both the municipality's cause of action and the facts upon which it relied appeared from the founding papers. The appellants accepted that this is so. If not, it would constitute a separate defence. When the respondents received the s 4(2) notice they therefore already knew what case they had to meet. In these circumstances it must, in my view, be held that, despite its stated defects, the s 4(2) notice served upon the respondents had substantially complied with the requirements of s 4(5).'

[38] In *Southern Witwatersrand Exploration Co Ltd v Bisichi Mining Plc* [1997] 3 All SA 691 (W), Cameron, J held that to determine whether or not a specific provision had been substantially complied with regard must be had to the rationale of the required procedure in order to give effect thereto. In this case that rationale is expressed in the preamble to the amending Act and is "*to require notice of an application for the winding-up of a company to be given to employees of the company*".

[39] In *African Christian Democratic Party v The Electoral Commission* 2006 (5) BCLR 579 (CC) at par [27]-[28] and par [33], O'Regan, J

writing for the majority, held the following in the context of the question of compliance with the provisions of ss 14 and 17 of the Local Government: Municipal Electoral Act 27 of 2000:

> *"[27] The purpose of section 14 (and section 17) is to ensure that a deposit is paid by a political party (or ward candidate) to establish that they have a serious intention of contesting the election. There is no central legislative purpose attached to the precise place where the deposit is to be paid. In my view, to interpret sections 14 and 17 in a manner which prohibits the Commission from making such a facility available to political parties would be to read the provision unduly narrowly and to misunderstand its central purpose. In effect, what the Commission did, after consulting with the Party Liaison Committees, was to make an additional method of payment available to parties in a manner which facilitated their participation in the elections. Many parties took advantage of this system. In so doing, the Commission did not offend the intention of the Legislature in requiring the payment of deposits as stipulated in sections 14 and 17 of the Municipal Electoral Act.*
>
> *[28] An interpretation of sections 14 and 17 which accepts that the Commission had the power to act in such a manner facilitates the participation in elections and is far more consistent with our constitutional values, than reading the section strictly to prohibit such a payment system. I conclude therefore that the provisions in sections 14 and 17 which state that payment should be made at the local office of the Commission, properly construed, do not prevent the Commission from establishing a system such as the central payment facility under consideration here. That facility was available to all those who wished to contest the elections and permitted them to make payment at an alternative venue to facilitate participation in the municipal elections.*
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> ...

> *[33] There would be little purpose served by a narrow interpretation of sections 14 and 17 concluding that that surplus did not constitute adequate compliance with the section. No other party or candidate is harmed by a more generous interpretation which would hold the provisions of sections 14 and 17 to have been met. The Electoral Commission itself had sought to relax the narrow manner in which the requirements of sections 14 and 17 could be met to facilitate participation in elections, in a manner consistent with the overall goals of our Constitution. To hold that the applicant had not complied with the provisions of sections 14 and 17 simply because it had failed expressly to ask the Commission to regard a portion of the surplus properly paid to the Commission for deposits in the elections to Cape Town promotes no legitimate purpose of the statute that I can discern."*

(See also *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA) at par [23].)

[40] By parity of reasoning, I am inclined to the view that to hold that where employees no longer attend the premises of the company that employs them and an application for the winding-up of their employer is furnished to them personally, rather than not at all – as would be the case should the section have been complied with literally – would promote no legitimate purpose of the statute. Indeed, in my view it would be contrary to its purpose.

[41] In their argument, counsel for Stander placed reliance on the judgment of Blieden, J in *Roberts v The Taylor of Buckingham CC and others, supra* in support for the contention that the section had not been complied with. On the facts before that court no attempt whatsoever had been made by the applicant to comply with the requirements of s 346(4A)(a)(i) of the Act and the only attempt to

comply with s 346(4A)(a)(ii) of the Act was made by the sheriff attaching the application to the notice board in the first respondent's premises 27 minutes before the matter was due to be called in court. That clearly does not constitute compliance with the section, whether it is interpreted on a literal or purposive basis. The question whether there has or has not been compliance with s 346(4A)(a)(ii) of the Act will obviously depend on the facts of each case.

[42] It follows that I am of the view that in this case, personal service of the application on the employees complies with s 346(4A)(a)(ii) of the Act.

[43] That, however, does not end the matter. Only the employees who worked at the Westlake premises received personal notification of the application. Those who worked at Paarl did not.

[44] The language of the section must be seen in the context of the stated purpose of the legislation as expressed in the preamble to the amending legislation. As I have said, the clear purpose of the section is to ensure that the employees at the company's *"premises"* received the requisite notice. Both s 346(4A) and s 346A refer to *"premises"*. In s 346(4A)(a)(ii) they are referred to as *"the premises of the company"*. It is on these premises that the first attempt at *"furnishing the application"* must be made. That attempt must be made by affixing a copy of the application to any notice board to which the employees and the applicant have access inside the premises. In s 346A they are referred to as *"the debtor's premises"*.

[45] If there is no access to the premises by the employees, a further

method of furnishing is prescribed. Nothing is said of what should occur if there is access to the premises, but there is no notice board. Nor is any provision made for the impracticality, if not impossibility, of affixing a substantial application (in this case 232 pages) to a notice board. On a literal interpretation, the section does not require that employees receive notice of the application, nor does it require that all reasonable steps be taken to bring the application to the attention of the employees. The section in fact requires only that the applicant take the mechanical steps stated in the section. Once that is done, the section is complied with. The requirement is satisfied even if, for example, there are no employees who come to the premises either at all or any more or for some other reason the applicant is aware that the employees are unlikely to come to know of the application if the section is complied with.

[46] Be that as it may, the second method of *"furnishing"*, which is to be resorted in default of the first method by reason of there being no access to the premises, is to affix a copy of the application to the front gate of the premises. If that is not *"applicable"*, a copy of the application is to be affixed to the front door of the premises.

[47] In this context *"premises"* appears to have a wider meaning than *"the premises of the company"* or *"the debtor's premises"*, because in terms of this alternative method of serving the application, it may be affixed to the front door of the premises from which the company (or debtor) conducted <u>any</u> business at the time of the application. The provision clearly postulates that the company (or debtor) might conduct business at more than one premises at the time of the

application and that such other premises are different from what the legislature chose to term the *"premises of the company"* (or *"debtor"*). The application may be affixed to the front door of the *"premises of the company"* (or *"debtor"*) or to the front door of any other premises from which the company (or debtor) conducted any business at the time of the application.

[48] If there is no front door on those premises, then presumably literal compliance with the provisions would not be achieved by affixing a copy of the application to the front gate of those premises or to the notice board inside such premises, for provision is made only for service in one particular manner in those circumstances.

[49] *"Premises of the company"* is not an expression found elsewhere in the Act. It would seem that by reference to *"premises of the company"* the legislature had in mind the principal place of business of the company. The fact that the section only contemplates notification at "*the premises from which the company conducted any business at the time of the application*" as an alternative to notification at "*the premises of the company*", logically implies that these are two different places. The *"premises of the company"* is clearly the main or principal place of business of the company. Where there are no longer any employees to be found at those premises, timeous and effective personal notification of the employees who previously worked at those premises must, in my view, constitute compliance with the section.

[50] Section 346A(1)(b) of the Act requires that the winding-up order (provisional and final) be served on the employees of the company in much the same way as they would be furnished with notification in terms of s 346(4A)(a)(ii) of the Act. Section 346A(2) makes it clear that service is to be effected by the sheriff. In terms of the order provisionally winding-up the respondent, the trust was ordered to effect service of the order, *inter alia*, *"by the Sheriff on the employees of the Applicant"* at the Westlake premises.

[51] The sheriff's return of service on the employees, records that he made three unsuccessful attempts at service before ultimately serving the order on Stander, who confirmed that there were no employees at the given address. The sheriff did not, therefore, affix the order to a notice board at the premises or to the front gate thereof. He handed the order to the managing director of the respondent. In addition, a copy of the order was sent by registered post to all of the employees and service of the application papers was effected as I have already recounted.

[52] To my mind, the purpose of s 346A(1)(b) of the Act has been met and the section complied with.

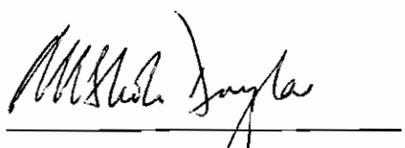
[53] In the circumstances, a final winding-up order should be granted. The only remaining issue is that of costs. As I have said, Stander took part in the proceedings – and was allowed to do so – notwithstanding that he was never a party thereto. He should not be placed in a better position than an intervening creditor who seeks to ward off a winding-up, but I am disinclined to make a costs order

against a non-party, even if doing so were uncontroversial. In my view, the appropriate order is one that the trust's costs be costs in the winding-up and that no order be made against Stander personally. He will obviously have to bear his own costs.

[54] I make the following order:

1. the provisional order for the winding-up of the respondent is made final;

2. the costs incurred by the applicants, including the costs of two counsel, are to be costs in the winding up of the respondent.



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