IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 21/12085

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

DATE: 21 November 2022

In the matter between:

AQUA TRANSPORT AND PLANT HIRE (PTY) LTD Applicant

And

TST BROKERS (PTY) LTD T/A THAMZIN & THAMZIN Respondent

JUDGMENT

VILJOEN AJ

[1] This is an application for the winding-up of the respondent on the basis that it is unable to pay its debts as described in s 345 of the *Companies Act*, 1973.

The facts

[2] During the period April 2020 to August 2020, the respondent rented 20 refuse compactor trucks from the applicant on a rate per hour per truck basis subject to an agreed minimum. Payment of the rental would be made no later than 30 days from invoice. The terms of the rental agreement are not in dispute.

[3] The applicant rendered monthly invoices. The respondent paid the invoices in respect of April and May 2020 in full. It paid all but one of the invoices in respect of June 2020, invoice ATP198927 in the amount of R430,672.12. Of the invoices in respect of July and August 2020, the respondent paid nothing. The respondent's payments are not in dispute.

[4] On 2 December 2020, the applicant served a notice in terms of s 345(1)(a) of the *Companies Act*, 1973, demanding payment of the aforesaid outstanding invoices within 3 weeks. The demand was left at the registered office of the respondent. The respondent does not dispute the notice or its effectiveness.

[5] The respondent did not pay the amount demanded or secured or compounded for it. The respondent responded to the demand on 22 January 2021. It denied any liability to the applicant but did not motivate the denial.

[6] The present application followed in March 2021.

[7] In its answering affidavit, the respondent admits to not paying invoice ATP198927 referred to above and those that followed. It denies liability for payment of the outstanding invoices on the basis that:

> *"[It] has no knowledge of the existence of invoices bringing about the alleged indebtedness."*

and

> *"[It] has no knowledge of any service having been rendered by the Applicant for the period under review. It therefore follows that the Respondent [sic] no knowledge of the alleged indebtedness to the Applicant."*

[8] It transpires that the shares in the respondent were the subject of a sale of shares agreement concluded between the respondent's deponent and an entity by the name of Camel Logs Trading and Projects (Pty) Ltd. It is alleged that Camel Logs Trading and Projects took over the management of the respondent on 26 June 2020. The significance of this fact is not disclosed in the answering papers. The respondent, however, attempts the amplification of these facts in its heads of argument, as I shall point out.

The respondent's opposition

[9] The respondent in opposing its winding-up contends as follows:

9.1. the applicant lacks *locus standi*;

9.2. the founding affidavit is irregular in that the Commissioner of Oaths did not indicate whether the deponent thereto is male or female;

9.3. the applicant did not comply with the service requirements of the application for winding-up; and

9.4. the debt upon which the applicant relies is disputed on *bona fide* and reasonable grounds, thus precluding an order winding the respondent up.[1]

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1 *Badenhorst v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (T) at 348B

Locus standi

[10] The respondent raises a preliminary in its answering affidavit under the heading "*Point in Limine 1 – Locus Standi*". The heading is perhaps somewhat deceptive. The respondent contends that "*the Applicant lacks authority to institute these proceedings against the Respondent*." In its heads of argument, the respondent refines its point *in limine* to a challenge to the authority of the applicant's attorneys. The point thus does not relate to the applicant's *locus standi*.

[11] Be that as it may, the respondent's preliminary point is premised on the fact that the applicant is not represented herein by the same attorneys who are authorised in a resolution attached to the founding affidavit *inter alia* to launch and pursue this application.

[12] It is well established that challenges to the authority of attorneys to institute and prosecute proceedings on behalf of a client ought to be made in terms of the provisions of Rule 7.[2] This the respondent has not done.

[13] Further, the replying affidavit is accompanied by a resolution of the applicant confirming the authority of its attorneys. The second resolution, in my view, puts an end to the enquiry. I am satisfied that the applicant's attorneys are authorised to act on its behalf.

[14] The first point *in limine* is dismissed.

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2 *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at [14]

Administration of the oath

[15] The respondent points out that the commissioner of oaths attesting to the founding affidavit did not indicate in his certificate whether the applicant's deponent is, in the words of the respondent's heads of argument "*a he or she*". With reference to the judgment in *Absa Bank Ltd v Botha NO and others,*[3] the respondent contends that this omission by the commissioner of oaths renders the affidavit invalid.

[16] There is a significant body of evidence indicating that regulations governing the attestation of affidavits[4] are directory and not peremptory.[5] Non-compliance with the regulation, therefore, is not *per se* destructive of the affidavit.[6] The court has the discretion to refuse to accept an affidavit that is attested not in accordance with the regulations, the determining factor being whether substantial compliance with the regulations has been established.[7]

[17] The, with respect, quite formalistic approach adopted in *Absa Bank* appears to me somewhat at odds with the bulk of authorities on the directory nature of the regulations and the court's discretion. The judgment is the subject of some criticism.

[18] In *Malan v Minister of South African Police Services NO and others*,[8] the court remarked:

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3 2013 (5) SA 563 (GNP)
4 Issued in terms of the *Justices of the Peace and Commissioners of Oaths Act,* 1963
5 See e.g. *S v Munn* 1973 (3) SA 734 (NC) at 737E
6 *Cape Sheet Metal Works (Pty) Ltd v JJ Calitz Builder* 1981 (1) SA 697 (O) at 699B
7 *S v Munn* at 738B
8 2019 (2) SACR 469 (GJ) at [42]

"I have some doubts about the correctness of the approach which was adopted by the court in ABSA Bank matter because the approach adopted therein seems, with due respect, highly technical and based on elevating form over substance."

[19] In *Goncalves and another v Franchising to Africa (Pty) Ltd*,[9] the court found:

"I respectfully disagree with the judgment in Absa Bank Ltd v Botha NO & Others 2013 (5} SA 563 (GNP). In practice, the "he/she" reference in the oath section of affidavits is a frequent occurrence, as is an incorrect reference to gender. These are innocuous and inadvertent errors in the main. I am of the respectful view that judicial notice may be taken of this established fact, and that one should subordinate form to substance. It is plain from the body of Evy's affidavit that she is female and from the body of Pedro's affidavit that he is male. The affidavits in casu substantially complied with the formalities prescribed by the Justice of the Peace and Commissioner of Oaths Act 16 of 1963."

[20] The judgment in *Christodoulos v Jacobs*[10] declines to enter the debate whether *Absa Bank* was correctly decided. It distinguishes *Absa Bank* on the facts. In *Absa Bank,* the commissioner of oaths indicated the incorrect gender of the deponent. In *Christodoulos,* the commissioner of oaths failed to delete one or the other of the pronouns "he/she". The court found there to have been substantial compliance with the regulations.

[21] I respectfully adopt the reasoning and conclusion in *Christodoulos*. Consequently, I dismiss the second point *in limine*.

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9 [2016] ZAGPPHC 960 (2 November 2016) at [28]
10 [2019] ZAGPJHC 178 (11 March 2019)

Service of the application

[22] In a supplementary practice note, the respondent raised a third point *in limine*. It contended that the applicant had failed to comply with section 346(4A) of the *Companies Act*, 1973.

[23] Section 346(4A)(a) reads:

> *"(a) When an application is presented to the court in terms of this section, the Applicant must furnish a copy of the application-*
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> *(i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and*
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> *(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*
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> *(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;*
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> *(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.*

[24] S 346(4A)(b) requires that proof that the application was furnished to the persons and entities mentioned in subsection (a) be presented by way of "*an*

affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with".

[25] When the matter was first called on 13 October 2022, the applicant had not uploaded a service affidavit. Given that s 346(4A)(b) provides for the filing of such a service affidavit "*before or during*" the hearing, I stood the hearing down for the applicant to file an affidavit of service.

[26] The applicant uploaded a service affidavit by one Ben Cronjé on the afternoon of 13 October 2022. I invited the parties to address me on the admission of the service affidavit and its content on 14 October 2022.

[27] Mr Zwane, the respondent's attorney who argued the matter on 14 October 2022, submitted that the service affidavit should not be allowed. He submitted that if a service affidavit is not handed up at the commencement of the hearing, there should be no further opportunity to present a service affidavit later during the hearing.

[28] Nothing in the text of s 346(4A)(b) supports the respondent's submission, however. A court is empowered to accept further papers at any time during a hearing, subject obviously to any prejudice that the other party may suffer. Mr Zwane fairly conceded that the belated service affidavit occasioned his client no prejudice. There is thus no reason to disregard Cronjé's service affidavit or the content thereof.

[29] Cronjé's service affidavit confirms delivery of the application to the South African Revenue Service, but it says nothing of the application being furnished to the respondent's employees or their trade union.

[30] The respondent's counsel submitted that in the absence of a service affidavit addressing service on all the persons and entities listed in s 346(4A)(a) the application fell to be dismissed. He referred me to the unreported judgment in *Bees Winkel (Pty) Ltd v Mkhulu Tshukudu Holdings (Pty) Ltd.*[11] This judgment, it was submitted, is authority for the proposition that the requirement that an affidavit of service be filed in terms of s 346(4A)(b) before any order may be granted is absolute, and that an affidavit is required even in the event of the sheriff purporting to furnish a copy of the application papers.

[31] The judgment in the *Bees Winkel* matter relies on two other judgments, *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd*[12] and *Cassim NO v Ramagale Holdings (Pty) Ltd and others*.[13] Both these matters, in turn referred *inter alia* to the judgment of the Supreme Court of Appeal in *E B Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd.*[14]

[32] A brief discussion of the judgment in *E B Steam* is necessary. In that matter, the court *a quo* granted final orders of liquidation of E B Steam and 19 other companies. E B Steam and the other companies appealed the order. The appellant companies' sole defence to the winding-up applications was that their employees had not been furnished with the applications as required by s 346(4A)(a).[15] From the judgment, it appears that the sheriff purported to serve the applications on the appellants' employees by affixing a copy of the

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11 [2021] ZANWHC 13 (4 March 2021)
12 2015 (2) SA 550 (GJ) at [32]
13 [2020] JOL 47600 (GJ)
14 2015 (2) SA 526 (SCA)
15 At [2]

application to the front door of the respondents' registered offices all situated at the same address.[16]

[33] The court found that compliance with s 346(4A) was peremptory before a *final* order of liquidation could be granted.[17] However, the court found that a *provisional* winding-up order was possible even in the event of non-compliance with s 346(4A);[18] that provision "*is not directed at providing a technical defence*" to a respondent company.[19] The court did not spell out the circumstances in which a provisional order might be granted in the event of noncompliance with s 346(4A).

[34] With reference to service on the employees as required by s 346(4A)(a), the court found that an applicant needs to no more than make the application available to employees in a manner that is reasonably likely to bring it to their attention.[20] The method of service needed to effective;[21] the provisions of s 346(4A)(a)(ii)(aa) and (bb) are directory only.

[35] The Supreme Court of Appeal found that the court *a quo* ought not to have been satisfied that there had been compliance with s 346(4A). Consequently, it upheld the appeal and replaced the final orders of liquidation granted by the court *a quo* with provisional orders. The court further, premised on the provisions of s 197B of the *Labour Relations Act*, 1995, issued directions to

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16 At [3]
17 At [12]
18 At [12] and [25]
19 At [8]
20 At [14]
21 At [17]

the appellants *inter alia* to furnish their employees with copies of the applications.

[36] In the *Pilot Freight* judgment, the court, after considering the conclusion in the *E B Steam* judgment as to the purpose of service on employees, found:

> *"[31] The requirement that the application for liquidation be furnished to the employees is therefore to enable the employees to protect their interests and the provisions of s 346(4A) should therefore be construed taking into account this purpose.*
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> *[32] Interpreting s 346(4A)(b) with this purpose in mind and bearing in mind that a court may give directions if it is not satisfied with service on the employees, the court would require something more detailed than the usual cryptic return of service from a sheriff. An affidavit in compliance with s 346(4A)(b) would have to set out precisely what the person who furnished the affidavit did when he came to the place of employment of the employees, what circumstances that person found there, what steps were taken to bring the application to the notice of the employees (if any) and what steps were taken to ascertain whether the employees belonged to any trade union. The only person who would have personal knowledge of these facts would be the person who physically attended upon the premises. The applicant and/or the attorney of record would not necessarily have personal knowledge, unless they were the person who physically attended upon the premises and furnished the application to the relevant parties as required by s 346(4A)"*

[37] In the *Cassim* matter, the court, also with reference to the *E B Steam* judgment found:

> *[15] At first sight it seems as though the Supreme Court of Appeal gave its 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 noncompliance 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.

…

[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).

[38] I find myself in respectful disagreement with the conclusions in the judgments of *Pilot Freight, Cassim* and *Bees Winkel* insofar as those judgments elevate a service affidavit to an indispensable requirement for the granting of a provisional order. I say this for four reasons:

38.1. Firstly, in the *E B Steam* matter, the Supreme Court of Appeal considered whether a final order of liquidation had been granted correctly. The court considered the need for and the required content of a service affidavit in the context of a final order.

38.2. Secondly, according to the exposition of the facts found in the *E B Steam* judgment, the application papers contained no information

against which the efficacy of the service on the employees could be judged but for the sheriff's return. There is no mention of a service affidavit. Despite the apparent absence of a service affidavit, the court considered the content of the return of service and found it insufficient to prove that the application had been furnished to employees. Although there was no service affidavit and no compliance with s 346(4A)(a)(i) and (ii), the court granted a provisional order of winding up. If this judgment is interpreted to require a service affidavit, and a comprehensive one at that, as a prerequisite for a provisional order, a disconnect between the court's findings and the eventual order follows. In my view, a judgment must be interpreted in such a way as to preserve the integrity thereof.

38.3. Thirdly, the *E B Steam* matter distinguishes between "*service*" in terms of the rules of court and the "*furnishing*" of a copy of the application to employees. The court found the methods of "*furnishing*" set out in that section not to be peremptory. I do not read the judgment as suggesting that "*service*", an endeavour aimed at achieving certainty of receipt beyond that required by s 346(4A)(a), is unacceptable as means of complying with that section. "*Service*" is proven by a sheriff's return.[22] Thus, the court was quite prepared, as I mentioned above, to determine the matter of the furnishing of copies to employees on the evidence provided by the sheriff's return in the absence of a service affidavit by the sheriff or anybody else. It stands to reason that if the sheriff's return

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22 S 43(1) of the *Superior Courts Act,* 2013

is accepted as *prima facie* evidence of service for purposes of the institution of proceedings, a return of service should in principle be acceptable proof of service on interested parties.

38.4. Fourthly, an overly strict approach to proof of service of the application on employees undermines the caution expressed in the *E B Steam* judgment that s 346(4A) is not intended to provide a respondent with technical defences. Its intention is to provide employees and their representatives adequate opportunity to protect their interests in the event of the insolvency of their employer. This aim is effectively achieved by an order in the terms of that granted by the Supreme Court of Appeal.

[39] I thus conclude that the filing of a service affidavit is not an absolute *sine qua non* for a provisional order of liquidation.

[40] As I stated above, the applicant's service affidavit did not address service on the respondent's employees. Evidence of such service was provided by a return of service of the sheriff. The sheriff attempted service on the employees at the respondent's registered office. He was, according to his return of non-service, informed that the respondent is unknown at that address. It follows that the application for the winding up of the respondent was neither made available to its employees nor came to their knowledge.

[41] Mr Wannenburg, for the applicant, conceded that the unsuccessful service on the employees of the respondent precluded a final order of liquidation. He submitted, however, with reference to the *E B Steam* judgment that an order placing the respondent in provisional liquidation should be granted.

[42] The papers reveal very little about the respondent; it is not known where its places of business are, whether it has any employee, and, if so, how many employees there are. I am, however, persuaded by the absence of any *prima facie* defence to the applicant's claim that an order is warranted in the circumstances.

Bona fide and reasonable dispute

[43] I have set out the facts as they appear from the papers above.

[44] In his heads of argument, the respondent's counsel sought to introduce evidence of alleged malfeasance by and collusion between the applicant and Camel Logs Trading and Projects. It need not be stated that this is not a proper way to introduce evidence.

[45] If the "evidence" contained in the respondent's heads of argument is left out of the equation, the totality of the respondent's case is a bare denial of liability premised upon a lack of knowledge. A bare denial, in my view, does not establish on a balance of probability that the debt is disputed *bona fide* and on reasonable grounds.[23]

[46] My discretion to refuse the winding-up order is limited in the circumstances of the respondent's inability to pay a debt that is not disputed on *bona fide* and reasonable grounds.[24]

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23 See *Badenhorst, loc cit*

24 *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and others* 1993 (4) SA 436 (C) at 440I to 441A

Conclusion

[47] Given the complete lack of any cognisable defence to the applicant's claim, there is an overwhelming case made for the winding-up of the respondent. Refusing an order of provisional winding-up in the circumstances will most likely only delay the inevitable to the potential detriment of the very persons whose interests are at issue.

[48] In the above premises, I make the following order:

1. The respondent, TST Brokers (Pty) Ltd, with registration number: 2020/459476/07, is placed under provisional liquidation;

2. 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 16 January 2023 at 10:00 or so soon thereafter as the matter may be heard;

3. A copy of this order must be served on the respondent at its registered office;

4. A copy of this order shall be published forthwith once in the Government Gazette and a national newspaper;

5. A copy of this order shall be forwarded to each known creditor by prepaid post or by electronic mail;

6. A copy of the order shall be served on the South African Revenue Service;

7. The respondent is directed by no later than 15 December 2022 to furnish to the employees of the company a copy of the application papers in that application and within one week thereafter to deliver an affidavit setting out details of its employees, and when and in what manner it has complied with this order;

8. The costs of this application shall be costs in the liquidation.

H M VILJOEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Delivered: This judgement was prepared and authored by the 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 for hand-down is deemed to be 21 November 2022.

Date of hearing: 12 and 14 October 2022

Date of judgment: 21 November 2022

Appearances:

Attorneys for the applicant: FOURIE VAN PLETZEN INC

Counsel for the applicant: ADV W F WANNENBURG

Attorneys for the respondent: PETER ZWANE ATTORNEYS

Counsel for the respondent: ADV W B NDLOVU (ON 12 OCTOBER 2022);

ATTORNEY P ZWANE (ON 14 OCTOBER 2022)