

REPUBLIC OF SOUTH AFRICA



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

CASE NO : **2023-029115**

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE

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SIGNATURE

In the matter between:

SINOSA TECH (PTY) LIMITED

Applicant

and

MACLA MINING (PTY) LIMITED

Respondent

JUDGMENT

THERON AJ:

[1] The Applicant is Sinosa Tech (Pty) Limited ("Sinosa"), and the Respondent is Macla Mining (Pty) Limited ("Macla").

[2] Macla was provisionally liquidated on 9 July 2024 by Todd AJ. His judgment is reported on the reporting service of the Southern African Legal Information Institute (SAFLII) as *Sinosa Tech (Pty) Limited v Macla Mining (Pty) Limited* (2022/029115) [2024] ZAGPJHC 624 (9 July 2024).

[3] I highlight some of his conclusions:

"[33] In my view, the Applicant has discharged the onus on it to establish the Respondent's indebtedness to it, at least on a prima facie basis. Indeed, it seems to me that it has established the Respondent's indebtedness applying the test in Plascon Evans."

and

"[41] In summary, the evidence relied upon by the Respondent is tenuous and improbable as a basis for establishing either a

breach of contract by the Applicant or unfair competition by it. It also does not establish any reasonable basis for contending that the Respondent in fact suffered the damages alleged."

and

"[42] It follows that I agree with Mr Spiller that the Respondent has raised no bona fide dispute that it is indebted to the Applicant in the amount of R11 498 831.00, and the Respondent's alleged counterclaim fails to establish bona fide or reasonable grounds on which to dispute that indebtedness."

- [4] I agree with Todd AJ's reasoning and conclusions.
- [5] I am now called upon to decide whether an order of final liquidation should follow.
- [6] I find that the Applicant is entitled to a final order on the merits of the application.
- [7] Mr Bhima, for the Respondent, raised, for the first time, at the hearing of the matter, alleged deficient service for want of exact compliance with Section 346(4A) of the Companies Act, No. 61 of 1973 ("the old

Act") concerning service on the employees of the Respondent.

- [8] This was not foreshadowed in any practice note, joint or otherwise, nor in heads of argument.
- [9] I heard both parties on this issue and ordered that supplementary heads of argument be filed.
- [10] Forewarning, as is required in a practice note, would have ensured a more fruitful engagement with counsel.
- [11] I surmise that the Respondent did not want to spoil the surprise and postpone the inevitable if its point was to be upheld.
- [12] Counsel for the Respondent relied, in his supplementary heads of argument, on *Pilot Freight (Pty) Limited v Von Landsberg Trading (Pty) Limited* 2015 (2) SA 550 (GJ) ("*Pilot Freight*"), a judgment by Kairinos AJ.
- [13] Counsel for the Applicant referred me to *Lyconet Austria GmbH v Weigelhoffer and Others* [2023] ZAGPJH 1197 ("*Lyconet*"), a judgment by Moorcroft AJ and the judgment of the Supreme Court of Appeal in *EB Steam Company (Pty) Limited v Eskom Holdings SOC Limited*

2015 (2) SA 526 (SCA). He also referred me to *Pilot Freight*.

[14] There are also two other judgments by Moorcroft AJ¹, one by Peterson AJ², one by Viljoen AJ³, one by Kathree-Setiloane J (as she then was)⁴ and a reported judgment by Sholto-Douglas AJ.⁵

[15] These judgments are not all harmonious. The

[16] Supreme Court of Appeal considered the provisions relating to service in Section 346(4A) of the old Act in *EB Steam Co (Pty) Limited v Eskom Holdings SOC Limited* 2015 (2) SA 526 (SCA).

[17] It will serve no useful purpose to draw a timeline of the judgments in this division as neither I nor the other judges' attention was drawn to all the relevant authorities preceding their judgment and mine.

¹ *Cassim NO v Ramgale Holdings (Pty) Limited and Others* [2020] JOL 47600 (GJ) and *Cassim NO v Ramgale Holdings (Pty) Limited* (2020/11605 [2020] ZAGPJHC 149 (12 June 2020)

² *Beeswinkel (Pty) Limited v Mkhulu Tsukudu Holdings (Pty) Limited* (UM252/2020) [2021] ZANWHC 13 (4 March 2021)

³ *Aqua Transport and Plant Hire (Pty) Limited v TST Brokers (Pty) Limited t/a Thamzin and Thamzin* (21/12085) [2022] ZAGPJHC 1043 (21 November 2022)

⁴ *ABSA Bank Limited v Themex Carbon Technologies* (2013/25849) [2015] ZAGPJH 249 (December 2015)

⁵ *Hendricks NO and Others v Cape Kingdom (Pty) Limited* 2010 (5) SA 274 (WCC)

[18] Suffice it to say that where I expressly or by necessary implication find something different from previous judgments in this division, I politely decline to follow them.

[19] I disagree with the judgments that found that where the sheriff served on employees, only the sheriff can depose to the affidavit required by Section 346(4A)(b).

[20] "*Furnish*" is defined in the Concise Oxford Dictionary to mean:

"be a source of; provide, supply with"

and in the Collins English Dictionary:

"to supply or provide"

[21] I don't see why the ordinary meaning of "*furnish*" as a verb does not include an attorney's stating under oath that he gave the application papers to the sheriff and that he received a return of service, which he identifies and attaches to his affidavit in terms of Section 346(4A)(b).

[22] The application papers are undoubtedly "... *processes of the Superior*

Court ...".⁶

[23] Entry on private property by anyone without permission is trespass, but not if the sheriff does so when serving an application.⁷

[24] A sheriff is obliged to make a return of service⁸ but not to make an affidavit of service.

[25] To my mind, a stamped copy evidencing service on the South African Revenue Services and the Master complies with the Uniform Rules of Court for proof of service on them.⁹

[26] The sheriff's return of service is *prima facie* evidence of the matters stated therein.¹⁰

[27] The sufficiency of the information in the return of service is a different question.

[28] The old Companies Act does not differentiate between an application

⁶ Section 43 Superior Courts Act 10 of 2013 and *Garrett v Sea Hobbs Milton & Co* 1979 (4) SA 922 (W)

⁷ *Ex parte Kaefer Insulation (Pty) Limited In re Kaefer Insulation (Pty) Limited v Scharneck* 1984 (3) SA 533 (W) at 535 E-G

⁸ Section 43(1) of the Superior Courts Act

⁹ Uniform Rule 4(6)(b)

¹⁰ Section 43(2) Superior Courts Act

seeking a provisional as opposed to a final winding-up.

[29] I agree with Viljoen AJ that filing a service affidavit is not an absolute *sine qua non* for a provisional order of liquidation¹¹ for the reasons set out therein.¹²

[30] If a court is satisfied that the method adopted by the Applicant to furnish the application papers to the employees is satisfactory and reasonably likely to make them accessible to the employees, there is no reason to refuse a final winding-up order.¹³

[31] If it is so satisfied, the court should grant an order even if it is not satisfied that the application papers have come to the attention of all employees.¹⁴

[32] If a court is satisfied by an affidavit in terms of Section 346(4A)(b) or a return of service, or both that all that could reasonably have been done to make the application papers available to employees had been done,

¹¹ *Aqua Transport and Plant Hire (Pty) Limited v TSD Brokers (Pty) Limited t/a Tamsyn and Tamsyn* (21/12085) [2022] ZAGPJHC 1043 (21 November 2022) at paragraph [39]

¹² paragraph [38]. See also *ABSA Bank Limited v Thermex Golden Technologies* (2013/25849) [2015] ZAGPJHC 249 (10 December 2025)

¹³ *EB Steam Co (Pty) Limited v Eskom Holdings SOC Limited* 2015 (2) SA 526 (SCA) at paragraph [19]

¹⁴ *EB Steam Co (Pty) Limited v Eskom Holdings SOC Limited* 2015 (2) SA 526 (SCA) at paragraph [19]

the requirements of the section are satisfied.¹⁵

[33] An applicant relying on a return of service runs a risk that the information on the return is too terse or insufficient to satisfy a court as set out above.

[34] To illustrate this, I refer only to some of the facts in *Pilot Freight*.

[35] In *Pilot Freight*, the court knew that there were four employees but was not satisfied that the sheriff had left the application at a place where it could come to the employees' attention.¹⁶

[36] In this matter, the Applicant furnished a service affidavit and attached sheriff's returns. It further explained several other steps taken to bring the application to the employees' attention.

[37] I am satisfied by the affidavit and the returns that all that could reasonably have been done to make the application papers available to employees had been done.

[38] I intend to give specific directions for service in terms of Section 346A

¹⁵ *EB Steam Co (Pty) Limited v Eskom Holdings SOC Limited* 2015 (2) SA 526 (SCA) at paragraph [16]

¹⁶ paragraph [16]

of my order. These directions take into account the exigencies of the Respondent's winding-up.

I make the following order:

1. The Respondent, Macla Mining (Pty) Limited, is placed in final winding-up.
2. A copy of this order must be served on:
 - 2.1 the employees of the Respondent by transmitting it via e-mail to dacorte101@gmail.com and alex@macla.co.za;
 - 2.2 the South African Revenue Services; and
 - 2.3 the company at its registered address.
3. The costs of the application are costs in the administration of Macla Mining (Pty) Limited (in liquidation) on a party and party scale taxable on scale C.



THERON AJ
Acting Judge of the High Court

Date of hearing: 4 November 2024

Date of judgment: 20 November 2024

Appearances:

Counsel for Applicant: Advocate L Spiller
Instructed by: Pinsent Masons South Africa Incorporated

Counsel for Respondent: R Bhima
Instructed by: Andraos Hatchet Incorporated