REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **45884 /2012**

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

……………………………………… ……………………….
SIGNATURE **DATE**

In the matter between:

INTERTURBO (PTY) LTD (IN LIQUIDATION) **1st Applicant**

SUSARA SUSANNA ELIZABETH DU PREEZ **2nd Applicant**

DANIEL ASPELING DU PREEZ **3rd Applicant**

And

ABSA BANK LTD **1Respondent**

AGRICOM KOPERASIE (PTY) LTD **2nd Respondent**

MASTER OF THE HIGH COURT,

JOHANNESBURG **3rd Respondent**

CHAVONNES BARDENHORST

ST CLAIR COOPER N.O. **4th Respondent**

RICHARD APRIL MASUKUN.O. **5th Respondent**

SOUTH AFRICA REVENUE SERVICE **6th Respondent**

JUDGMENT

<u>MASHILE J</u>

[1] The First Applicant is a company in liquidation it having been finally liquidated by an order of this Court dated 26 February 2013 per Masipa J. This application has as its primary objective the setting aside and rescission of the order. If the notice of motion is

anything to utilize to establish the basis of the application, it is founded on the provisions of Section 354 of the **Companies Act No 61 of 1973** (hereinafter "the 1973 Act") as read with Item 9 of Schedule 5 of the **Companies Act No 71 of 2008** (hereinafter "the 2008 Act"). That said, it is manifest from the founding affidavit, the heads of argument and counsel's address in court that the application is also premised on Uniform Rule of Court 42(1)(a).

[2] The Applicants have also applied for condonation of the late launching of the rescission application. Save for the fact that the First Respondent does point out that an application based on Section 354 of the 1973 Act or on Rule 42(1)(a) must be brought within a reasonable time, I did not see any opposing papers. However, the approach that this Court will adopt in this judgment renders the consideration of the condonation application superfluous

[3] The First Respondent is opposing the main rescission application but has served and filed its answering affidavit well out of time prescribed by the rules as a result of which it has launched an application seeking condonation of the late service and filing thereof. The Applicants have opposed the application. Before turning to the rescission application, it will be convenient to dispose of the condonation application as a resolution of that issue could be dispositive of the whole application depending of course on the outcome.

[4] It appears from the affidavit of the First Respondent that the late filing of the answering affidavit was brought about by the lack of

availability of First Respondent's Counsel. Its Counsel is alleged to have been the only Counsel who had dealt with the matter from inception and was therefore familiar with the papers such that he would not be required to put as much effort into the comprehension of the papers. The Applicants have slated this excuse stating that a party cannot always shield behind the incompetence of his lawyers to the detriment of the other party and have for that reason asked the court to dismiss it.

[5] It is not entirely correct to equate unavailability of counsel to lack of skill of lawyers. That said though, the justification for the late filing does sound feeble but it is nonetheless understandable why a party would at times not want to change lawyers in the middle of a case such as this one. A disregard of the rules is viewed deleteriously by courts but in the circumstances I choose to exercise my discretion in favour of allowing the answering affidavit. Similarly and to the extent necessary, the condonation for the late launching of this rescission application is condoned so that the matter can be properly ventilated. The condonation issues having been resolved, I turn to the circumstances that brought about this application for rescission.

[6] The First Respondent advanced a loan of R 2 700 000.00 to the First Applicant and secured it by the registration of a mortgage bond over the immovable property of the First Applicant (hereinafter "the farm"). The Third Applicant executed a suretyship in favour of the First Respondent in terms whereof he bound himself as surety and co-principal debtor in *solidum*, jointly and severally, the one paying the other to be absolved, with the Applicant for the due payment by him to the First Respondent of all amounts which

he may be liable to pay to the First Respondent under the loan agreement and for any claims, losses, liabilities, costs and expenses which the First Respondent may sustain as a consequence of having advanced the loan to the First Applicant.

[7] Following the First Applicant's default on its obligations arising from the loan agreement, the First Respondent issued summons against the applicants and according to the return of service which forms part of the body of documents constituting evidence before this Court, the sheriff effected personal service on the Second Applicant at the farm. The Applicants (Defendants) gave notice of intention to defend on 2 July 2012.

[8] On 16 August 2012, the Free State Provincial Division (hereinafter "the Free State Division") granted summary judgment against the Applicants. On the same day, the First Respondent received a letter from the attorney of the Applicants, Peach & Du Preez, advising that an application for finance had been made in order to settle the indebtedness of the First Applicant to the First Respondent. On 18 September 2012, Mr Johan Du Preez (hereinafter "Du Preez"), father of the Third Applicant and husband of the Second Applicant probably representing all the Applicants, attended a meeting with the First Respondent's attorneys at which he advised them that the First Applicant had managed to arrange alternative finance for its indebtedness to the First Respondent and that it would be signing an agreement by 26 September 2012 with guarantees to be issued by 15 October 2012.

[9] Du Preez advised further that the First Applicant owned movable

assets to the value of about R2 000 000.00, which were situated on the farm. Du Preez advised that the Third Applicant was carrying out farming while he was running his accounting practice and a guest house business at the farm. He also claimed that all the movables on the farm were paid for except a tractor in respect of which R200 000.00 was owed.

[10] On 11 October 2012 Mr Olivier of the First Respondent’s attorneys caused a section 345 letter to be served at the address of the auditors of the First Applicant reflected on the CIPC as its registered address. On 1 November 2012, the attorneys of the First Respondent received a letter from the auditors, Rabie Deysel, informing them that they had resigned as auditors some years back and had no information available regarding the then auditors or shareholders of the First Applicant. They included correspondence dating back to 2010 that they forwarded to du Preez and the First Respondent stating that since Du Preez took over the shares in the First Applicant they had never been provided with any information to complete the financial statements.

[11] On 11 December 2012, when payment from the First Applicant was not forthcoming as promised, the Sheriff attached the movable assets on the farm belonging to the First Applicant to which the Sheriff attached an estimated value of at R1 582 405.00. Pursuant to the lapse of the period of three weeks in the section 345 notice and after the execution process had indicated that the movable assets of the First Applicant were inadequate to settle its indebtedness to the First Respondent, the latter proceeded with the liquidation application.

[12] The liquidation application was served at the farm upon Mr Thobela, apparently representing the employees and on Du Preez, the financial manager of the First Respondent. In response thereto, the First Applicant instructed its attorneys, BMV, to oppose it. When the First Applicant failed to serve and file its answering affidavit, the First Respondent served and filed a notice of set down on 19 February 2013 notifying the First Applicant that the application would be heard on 26 February 2013 on which date this Court granted a final liquidation order.

[13] On 21 October 2013 and 31 January 2014, the sheriff attempted to attach the movable property of the sureties situated at the farm but on each occasion was told by the Third Applicant, and the Second and Third Applicants respectively that the movable property on the farm belonged to the First Applicant. The Applicants have been aware of the liquidation order because as early as 20 August 2013 Du Preez wrote to Carel van Heerden who was apparently his counsel, advising that Esme, a secretary to one of the directors of the First Applicant's attorneys had contacted him to advise him of the liquidation.

[14] On 30 July 2013, Du Preez, supported by the second and third applicants, launched an application for leave to appeal coupled with a purported condonation application notwithstanding knowledge of this Court's order of 26 February 2013 since July 2013. When the Applicants and Du Preez took no steps to have the appeal before court, the First Respondent successfully set it down and had it dismissed by this Court on 2 June 2015.

[15] The Applicants then instructed Luis Teixeira Attorneys to apply for the rescission of the final order. The attorneys subsequently withdrew the application on 10 June 2015 as it was defective. Luis Teixeira Attorneys too withdrew as attorneys of record on 22 July 2015. On 5 August 2015, RMB Wands Attorneys ostensibly acting under instructions of the Applicants placed themselves on record and on 1 September 2015 launched this current application. At that stage, the First, Fourth and Fifth Respondents had already taken steps to have the farm sold by auction.

[16] The auction occurred on 4 September 2015 on which date it was sold for R2 400 000.00 excluding VAT but including commission in the sum of R120 000.00 plus VAT. The auction went ahead despite that the Respondents had received the application for rescission at the time.

[17] The court is asked to resolve the following questions:

17.1 Can the final order be rescinded on the basis of the provisions of Section 354 of the 1973 Act?

17.2 Can the Applicants contest the judgment of the Free State High Court at this stage?

17.3 Is the solvency of the First Applicant pertinent in these proceedings?

17.4 Did the First Respondent comply with the provisions of Section 346(4)(b) of the 1973 Act?

[18] The Applicants contend that the First Respondent has failed to comply with the following peremptory statutory requirements as envisaged in the 1973 Act:

18.1 To furnish the letter demanding payment on the registered address of the First Applicant;

18.2 Serve the application on the employees of the First Applicant, and if it was not able to locate all the employees, it was to affix the application to the gate, door or notice board of the company;

18.3 Furnish an affidavit describing the service in terms of the following:

18.3.1 the attempts made to determine who the employees are and where they reside;

18.3.2 attempt to come on an alternative day to locate employees of the First Applicant;

18.3.3 attempts made to determine the number of temporary employees and permanent employees;

18.3.4 describe how it came to discover that there were only temporary employees of the First Applicant;

18.3.5 attempt to leave the application on a gate, door or notice board and whether it was in fact possible or not;

18.3.6 describe whether the sheriff attempted to serve on any of the directors of the company;

18.3.7 spell out all and any non-compliance with the peremptory requirements of service.

18.4 To furnish the Court with the Master's certificate at least 10 days before the application was to be heard.

[19] The First Respondent has also failed to prove that the First Applicant was unable to pay its debt and Failed to explain service on the employees and the First Applicant in its founding affidavit. In view of the First Respondent's failure to comply with these statutory peremptory requirements, the liquidation order was erroneously sought or erroneously granted.

[20] Insofar as rescission in terms of the Section 354 is concerned, the First Respondent asserts that the Applicants have not only failed to demonstrate the existence of exceptional or special circumstances but have also not furnished satisfactory explanation for their failure to oppose or appeal the order. For those reasons, the First Respondent urged this Court to exercise its discretion against granting relief as prayed for by the Applicants. If, however, the court feels inclined to grant the relief in favour of the Applicants, the First Respondent implored this Court to protect the rights and interest of the purchaser of the farm.

[21] With reference to the non-compliance with Section 346(4)(b) of the 1973 Act, the First Respondent has argued that it has substantially complied because the objective of the section is to ensure that the employees are notified so that they can choose whether or not to exercise their rights. 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.

[22] The summary judgment granted by the order of the Free State High Court against the Applicants is irrelevant to these proceedings and is in any event res judicata. This Court cannot rescind that order and the Applicants are not asking it to do so anyway. The question of the solvency of the First Applicant is also immaterial in this matter because it is trite that liquidation concerns itself with the inability to pay and not whether or not a party is solvent or insolvent.

[23] Section 149(2) of the Insolvency Act No. 24 of 1936 provides:

> *"The court may rescind or vary any order made by it under the provisions of this Act."*

Section 354 of the 1973 Act provides:

> *"(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.*
>
> *(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence."*

[24] Rule 42(1)(a) provides:

> *"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;".*

[25] Section 345 of the 1973 Act is headed, When Company Deemed Unable to Pay Its Debts, and Subsection (1) (a) (i) provides as follows:

> *"(1) A company or body corporate shall be deemed to be unable to pay its debts if -*
>
> > *(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-*
> >
> > > *(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; …."*

[26] For inexplicable reasons the Applicants refer to Section 354 of the 1973 Act and 149(2) of the Insolvency Act No 24 of 1936 but fail to elaborate on both these sections in the founding affidavit. That said though, I agree with the First Respondent and the views of the authors to which this Court has been referred on the subject. In

addition, it could be instructive to refer to the following passage, which I uplifted from STORTI V NUGENT 2001 (3) SA 783 (W) where this Court, after reference to numerous case law, stated:

> *"The principles to be gleaned from the authorities, often not harmonious, are in my view the following:*
>
> *(1) The Court's discretionary power conferred by this section is not limited to rescission on common-law grounds.*
>
> *(2) Unusual or special or exceptional circumstances must exist to justify such relief.*
>
> *(3) The section cannot be invoked to obtain a rehearing of the merits of the sequestration proceedings.*
>
> *(4) Where it is alleged that the order should not have been granted, the facts should at least support a cause of action for a common-law rescission.*
>
> *(5) Where reliance is placed on supervening events, it should for some reason involve unnecessary hardship to be confined to the ordinary rehabilitation machinery, or the circumstances should be very exceptional.*
>
> *(6) A Court will not exercise its discretion in favour of such an application if undesirable consequences would follow."*

[27] The Applicants have failed to show the existence of any unusual or special or exceptional circumstances entitling them to the relief that

they seek in terms of this Section. Besides, it is this Court's opinion that it should not exercise its discretion in favour of granting the relief sought especially in view of the fact that ownership of the farm has already passed to a third party. Granting the relief therefore under such circumstances will undoubtedly have 'undesirable consequences' especially on the purchaser of the farm.

[28] That leaves this Court to direct its energy to the other issues. The First Respondent has denied service of the demand at its registered address yet there is proof that on 11 October 2012 that the attorneys of the First Respondent caused a section 345 letter to be served on its registered address being the address of its auditors as per the CIPC. A copy of the letter is attached to the liquidation application and the Applicants must have been aware of its existence even prior to launching this application. There is accordingly no merit in this assertion and it is rejected.

[29] The final liquidation order which the Applicants seek to rescind is the aftermath of the Free State Provincial Division order (hereinafter "the Free State order"). It is common cause that the Applicants wilfully failed to oppose the summary judgment application resulting in the Free State Division granting the order without opposition whatsoever. Whether or not the lack of opposition was as a result of bad legal advice is besides the point. In this application, the Applicants are challenging the grounds on which the Free State order was granted and that is fallacious because that order remains valid and very pertinent to the final liquidation order granted by this Court.

[30] In the circumstances, the existence of the Free State order will, for as long as it is not rescinded, stand as an impediment to any remedy that the Applicants may seek. I agree that the Free State order has rendered the issue res judicata, thus this Court cannot entertain it and moreover , it could not even if it were asked to do so simply because it lacks jurisdiction.

[31] Turning to the First Applicant's solvency. I note that Counsel for the First Respondent has gone to great lengths explaining why the First Applicant was not only insolvent but also unable to pay its debts. This Court's opinion is that it was not necessary to explore the matter to the extent the First Respondent has done. The question pertaining to the First Applicant's solvency is inseparable to the Free State order. That must be so because the premise and essence of the Free State order was the First Applicant's inability to pay its debts.

[32] It being trite that it is not the solvency that determines the liquidation of a party but its inability to settle its debts, it is rather testing to decipher its pertinence here. See, **Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd 2014 (2) SA 518 (SCA)**. The case aforesaid has also finally confirmed that it is commercial insolvency that must be established such that factual insolvency does not have to be demonstrated first. Accordingly, the matter cannot be entertained once it has been concluded that the First Applicant was unable to settle the debt as demanded and that the Free State Division even granted judgment against it.

[33] It must be borne in mind that the deemed inability to pay as envisaged in sub-s 345 (1) (a) is a conclusion of law. In this regard, Henochsberg in its commentary on the 1973 Act outlines the point as follows:

> *"It is respectfully submitted that the intention is that in any of the situations set out in sub-s (1)(a), (b) and (c) the conclusion that the company is unable to pay its debts is to be a conclusion of law, ie, for the purpose of the exercise by the Court of the jurisdiction to wind up under s 344(f), the company is, where any of such situations exists, in law unable to pay its debts even if in fact it is able to pay them….."*

[34] It is conceivable for a solvent company to be declared unable to pay its debts even though it can. The point is did the company pay and not whether or not it can pay. Thus failure to settle a debt demanded in terms of Section 345(1)(a)(i) of the 1973 Act or to settle a judgment validly obtained, as is the case in the instant case, could result in a legitimate winding-up. I therefore agree with the conclusion of the First respondent's Counsel that given the aforesaid exposition of the situation, assuming that the winding up order were to be rescinded, the Applicants would nonetheless fail in their opposition of the liquidation application.

[35] Does the sheriff's return of service constitute satisfactory or substantial compliance with Section 346(4)(b) of the 1973 Act? This issue requires exhaustive scrutiny. The attitude of the Applicants is one of strict compliance – Non-compliance with the section renders the process fatally defective. If no affidavit is filed describing who was served and how such service was effected then

the provisions of the section will not have been satisfied or substantially complied with. Conversely, the approach of the First Respondent is liberal and progressive and more in accord with recent case law –service upon the employees cannot be compromised but the form can.

[36] It is common cause that the sheriff,Mr Laabuschagne, served the application on one Thobela, ostensibly one of the people in the employ of the First Respondent, and Du Preez whose relationship to the Applicants has been explained earlier. The service of the process and how it was served is evident from the return of service itself, which the First Respondent has attached to its answering affidavit. The legal position is that a sheriff's return of service constitutes prima facie proof of what the sheriff claims to have executed.

[37] In the absence of any challenge to the contents of the return, this Court must accept it as proof that the sheriff carried out the service in the manner described therein. The Applicants have pointed out that the return does not in many ways state what must be alleged in terms of Section 346(4)(b) and cannot therefore be valid. In response the First Respondent, albeit ex post facto, obtained an affidavit from the sheriff wherein he supplemented his return.

[38] I must agree with Counsel for the First Respondent that at the time when the liquidation application was heard, a properly executed return of service was among the court papers and that is not to say that it contained all the information contemplated in Section

345(4)(b) of the 1973 Act. However, the supplementary affidavit of the sheriff that was subsequently served and filed added whatever missing information there might have been.

[39] According to the contents of the return of service:

39.1 It was served on Thobelo, an adult male at the farm;

39.2 Thobelo appeared to the sheriff to have been not less than 16 years old;

39.3 He seemingly resided or was employed at the farm;

39.4 He seemed to have been in authority.

[40] From the sheriff's observation that "all employees at Farm Karmel are temporary employees", it is inexorable to conclude that he must have enquired around to placate himself that there were employees at the farm upon whom he could serve the process. In his affidavit supplementing the information that he had provided in his return of the liquidation application, the sheriff declares that:

40.1 Du Preez, the financial and farm manager, confirmed to him that the First Respondent did not have any permanent employees and that all employees are temporary which Du Preez collects from various townships and then brings them to the farm to work on a temporary basis;

40.2 There were no staff houses on the farm;

40.3 There was neither a notice board for purposes of employees nor one to which they had access;

40.4 It was not pragmatic to affix a copy of the liquidation application to the front gate of the premises because the property is a farm nor could he do so to the front door of the premises as there was none.

[41] In terms of the decision in EB STEAM COMPANY (PTY) LTD V ESKOM HOLDINGS SOC LTD [2014] 1 ALL SA 294 (SCA), a case to which Counsel for the First Respondent referred this Court, the objective of Section 346(4b) of the Companies Act is not to provide a technical defence to the employer to avoid or postpone the evil hour when the winding-up or sequestration order is to be made. The aim is to draw the attention of the employees of the company to the application. On the facts of this matter, the sheriff effected the best possible service on any such temporary employees as might have been employed by the First Applicant.

[42] It is worth remarking that if Thobelo was a total stranger to Du Preez, as the Applicants would have this Court believe, then it leaves one completely confounded why Du Preez would not stop the sheriff. The only sound inference to draw from these facts is that Thobelo was indeed one of the employees, permanent or not. His silence also suggests that he did not point out the permanent employees because he noted that the sheriff had found one of them and that was Thobelo.

[43] There is no legal requirement at least in terms of the 1973 Act that service of the application on the company must be on a director.

Thus service effected on an employee of the company such as Du Preez was sufficient. Similarly it is safe to surmise that the application having been served upon Du Preez, the Second Respondent's husband and the Third's father, all the Respondents received it and this is confirmed by the Applicants' service and filing of a notice of their intention to oppose.

[44] With regard to knowledge of the liquidation order it is clear from Du Preez's subsequent actions beginning with his letter of 20 August 2013 wherein he confesses to Ms Carol Van Heeden that Asme had told him about the liquidation order. The First Respondent has provided instances that cogently demonstrate that the Applicants were aware of the order even after August 2013.

[45] To the extent that the case authority mentioned by the Applicants is at variance with what Wallis JA stated in the EB Steam Co (Pty) Ltd case supra, it is rejected. The passage from the case reads:

> *"[23] To sum up thus far the position is as follows. The requirement that the application papers be furnished to the persons specified in s 346(4A) is peremptory. It is not however peremptory, when furnishing them to the respondent's employees, that this be done in any of the ways specified in s 346(4A)(a)(ii). If those modes of service are impossible or ineffectual another mode of service that is reasonably likely to make them accessible to the employees will satisfy the requirements of the section. If the applicant is unable to furnish the application papers to employees in one of the methods specified in the section, or those methods are ineffective to achieve that purpose and it has not devised*

some other effective manner, the court should be approached to give directions as to the manner in which this is to be done. Throughout the emphasis must be on achieving the statutory purpose of so far as reasonably possible bringing the application to the attention of the employees."

[46] There can be no better clear authority than the EB Steam Co (Pty) Ltd case supra to justify the manner of service of the application upon the parties who were entitled to be notified. I reiterate that service cannot be compromised but the method of service can. It is the finding of this Court that the sheriff's return of service constituted substantial compliance with the provisions of Section 346(4)(b) of the 1973 Act.

[47] That ruling means that Rule 42(1)(a) cannot find application in this instance. The court detected nothing wrong with the application when it decided to grant the order on 26 February 2013 and this Court also confirms that there was nothing irregular with the manner in which judgment was granted in favour of the First Respondent. Against that background the application fails and I make the following order:

1. *The application is dismissed with costs* such costs shall be those in the winding-up of the First Applicant

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B A MASHILE

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT: R ANDREWS

INSTRUCTED BY: RMB WANDS ATTORNEYS

COUNSEL FOR THE RESPONDENTS: AC BOTHA

INSTRUCTED BY: JAY MOTHOBU INCORPORATED

DATE OF HEARING: 9 MAY 2016

DATE OF JUDGMENT: 1 AUGUST 2016