

IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

CASE NO: 38849/2014

16/4/2015

In the matter between:-

MARALCO BUSINESS ADVISORS

CC t/a MARALCO CC

Applicant

~~DELETE WHICHEVER IS NOT APPLICABLE~~

and

() REPORTABLE : ~~YES~~/NO

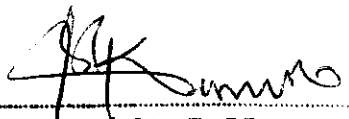
() OF INTEREST TO OTHER JUDGES : ~~YES~~/NO

() REVISED

MARISTO PROJECT MANAGERS

(PROPRIETARY) LTD

TE


SIGNATURE

(Registration no. 2009/018774/07)

Respondent

JUDGMENT

SKOSANA AJ

[1] In this matter the applicant brought an application seeking the following order:

"[1.1] That the respondent be wound up in the hands of the Master of the High Court (North Gauteng).

[1.2] That the costs of the application be costs in the winding up of the respondent."

[2] The application is opposed by the respondent and it has filed an opposing affidavit. However, the applicant did not file a replying affidavit. Before the commencement of the hearing, I was requested by the respondent's counsel for an opportunity to consider a service affidavit filed by the applicant on 13 January 2015 but which was apparently handed over to the respondent on the date of hearing, being 13 April 2015.

[3] Thereafter it was proposed by the respondent, with the acquiescence of the applicant, that the issue of service be argued and dealt with separately before the application to strike out certain portions of the applicant's founding affidavit and the merits of the application are heard. I accepted the proposal and therefore deliver this judgment only in regard to the issue of service.

[4] The respondent argue that the application for liquidation had not been served in accordance with the provisions of section 346(4A) of the Companies Act no. 61 of 1973 ("the Companies Act"). Counsel for the respondent relied heavily on the unreported decision of **Pilot Freight (Pty) Ltd v Von Lansberg**

Trading (Pty) Ltd 2015(2) SA 550 (G-J) to the effect that the service of the winding up application which does not comply with the aforesaid section ought to be dismissed on that ground alone¹.

[5] It was further argued on behalf of the respondent that the applicant had in its founding affidavit undertaken to serve the application in accordance with the Companies Act. However, the applicant only served the papers on the attorneys of the respondent.

[6] It was also argued that the applicant has 75 employees². Such employees or their trade union were not served with the application as required by section 346(4A) (a) of the Companies Act.

[7] On the other hand, counsel for the applicant argued that the respondent had been properly served in accordance with the relevant provisions of the Companies Act, in that:

[7.1] The respondent had applied for credit from the applicant using its business address, being 325 Albert Adamson, Garsfontein, Pretoria and such application was approved by the applicant. Moreover, such business address is admitted by the respondent.

¹ See Pilot Freight case para 37

² See respondent's answering affidavit para 34.3 p. 73 of the papers

[7.2] The applicant then instructed the Sheriff to serve the application at the aforesaid business address of the respondent but, as appears from the return of service, the Sheriff found that the building at that address had been demolished.

[7.3] On 12 May 2014, the applicant's attorney's sent a letter to the respondent by e-mail stating among other things that they were instructed to proceed with an application for the liquidation of the respondent should the demand not be complied with by the respondent within 5 days of such letter. A response to the letter came from the current attorneys of the respondent on 15 May 2014 wherein they confirmed that they represent the respondent and one Mr CJ Van Zyl who had headed them a copy of the letter of demand from the applicant. The letter further states that the applicant's letter of demand threatens liquidation and that they will accept service on behalf of the respondent of any and all actions and/or applications and have instructions to defend.

[7.4] Thereupon the applicant served the liquidation application on the attorneys for the respondent. Counsel for the applicant also points out that the respondent in its opposing affidavit only confirmed that their former business address is a vacant stand but does not state anything further and does not provide another business address at which they continue to conduct business.

[7.5] Furthermore, counsel for the applicant was adamant that the respondent does not have any employees since it did not attach to its opposing affidavit any

confirmatory affidavits by such employees or representatives of trade unions. Moreover, so he argued, the financial statements attached to the respondent's opposing affidavit show that the respondent does not have employees.

[7.6] He added that the reference in such financial statements to sub-contractors cannot be regarded as a reference to employees of the respondent. He made an alternative submission however that, should I find that the employees of the respondent ought to have been served and were in fact not so served, I should grant a postponement so that service can be effected accordingly and that the wasted costs occasioned by such postponement should be paid by the respondent.

[8] Upon reflection, it appears that the following factors are common cause:

[8.1] The business address furnished by the respondent to the applicant is that which is contained in its application for credit and is a business address at which the Sheriff attempted service of the application but found the place vacant.

[8.2] The application for liquidation ought to be served on the respondent in terms of section 346(4A)(a)(iv).

[8.3] The attorneys for the respondent were aware that the applicant intended to bring the liquidation application when they provided their address as the address of service for all applications and actions by the applicant.

[9] Section 346(4A)(a)(iv) does not specify the manner in which service on a company must take place and whether or not such service should take place at the registered office or principal place of business of the company. However, Rule 4(1)(v) provides that service on a company may take place by delivering a copy of the process on an employee of a company at its registered office or principal place of business or by affixing a copy to the main door of such registered office or place of business or "*in any manner provided by law*"

[10] In this case, the respondent's attorneys unequivocally stated that the service of all applications or actions should be effected at their offices on behalf of the respondent. This was stated with a full knowledge that the applicant intended to bring an application for the liquidation of the respondent.

[11] I agree with the sentiments expressed by Walis JA (quoted in the **Pilot Freight** case) that the requirements of section 346(4A) are not meant to constitute technical defence to a respondent. In this case, it is a clearly technical defence for the respondent to contend that service on its attorneys, after such attorneys had indicated that they have been authorized by the respondent to

accept such service, is fatally defective since it does not comply with the requirements of the aforesaid section.

[12] Section 346(4A) must be read together with the Uniform Rules of Court. Moreover, Rule 4(1)(v) ends with a broad category, namely "*or in any manner provided by law*".

[13] Moreover, the method of service followed by the applicant in servicing the respondent satisfies the statutory purpose of section 346(4A), by taking all reasonable measures to ensure that the application is brought to the attention of the respondent. In any event, the respondent has filed an opposing affidavit in this case thereby confirming that it was fully aware of the application. To me therefore, the defence that there has been no compliance with the requirements of the Companies Act is purely technical.

[14] As regards the service on the employees of the respondent, counsel for the applicant was at pains in trying to explain the reason for not filing the replying affidavit to refute the respondent's allegation that it had 75 employees. The contention that the respondent could not have had such employees as its financial statements do not reflect that is to me not of assistance to the applicant.

[15] The allegation is made under oath by the deponent to the respondent's opposing affidavit. In my view, it even outweighs the respondent's counsel's statement from the Bar that the respondent had only sub-contractors and service providers. Similarly, the contention that the allegation of 75 employees is contradicted by the financial statements is made from the Bar by the counsel for the applicant and is of no value compared to a counter statement made under oath, taking into account that such statement, if falsely made, may be visited with a criminal sanction for perjury.

[16] Moreover, it is trite law that where the applicant fails to file a replying affidavit, allegations made in the respondent's opposing affidavit which are in conflict with the applicant's averments, must be accepted as correct³. It follows therefore that I must accept that the applicant had employees and that therefore service on such employees should have taken place in terms of section 346(4A)(a)(ii) of the Companies Act. In fact, I did not understand the applicant's counsel to argue to the contrary.

[17] The employees of the respondent are parties that have a direct and substantial in the matter and will certainly be adversely affected by the respondent's liquidation. For this reason the Act requires service upon them.

[18] It is common cause that such service did not take place in this case. I am not persuaded by the applicant's argument that it is the duty of the respondent to

³ Plascon Events Paints v Van Riebeck Paints 1984(3) SA 623 A

inform it employees of such application, if I understood the argument correctly. That cannot be correct in view of the clear and express provisions of section 346(4A)(a) of the Companies Act.

[19] It is clear from the above that I intend postponing this application with a view to grant the applicant an opportunity to comply with the provisions of the Companies Act by serving the employees of the applicant with the application as well as any registered trade union, if any.

[20] With regard to the wasted costs, applicant's counsel though insisting that such costs must be paid by the respondent, stated that the service affidavit was only provided to the respondent on the date of the hearing of this application.

[21] Although section 346(4A)(b) gives the applicant the right to file such affidavit before or during the hearing, that does not remove the prejudice to the respondent. Counsel for the applicant argued that in terms of this sub-section, the applicant is not required to serve such service affidavit on the respondent at any given time.

[22] To me, that does not change the fact that the respondent did not have the opportunity to deal with the allegations contained in such affidavit. Moreover, the applicant knew that the issue of service of the application for sequestration is an

highly contested as early as May 2014 and when the respondent filed its opposing affidavit in September 2014.

[23] On the other hand, I am mindful of the fact that the applicant was seemingly not aware that the respondent has employees until the answering affidavit was filed in September 2014. I also take into account that section 346(4)A(b) does not *stricto sensu* require the applicant to serve the service affidavit on the respondent.

[24] In the circumstances, I am of the view that this is a case where no order of costs should be made against any party.

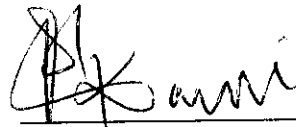
[25] In the result, I make the following order:

[25.1] The application is postponed *sine die*.

[25.2] The respondent is ordered to provide the applicant with its business address within 5 days of this order.

[25.3] If the respondent does not comply with paragraph 2 above, the applicant is granted leave to bring this application on the same set of facts or papers before this court.

[25.4] There is no order as to costs.



DT SKOSANA

Acting Judge of the High Court

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