IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 2024-124949

Date of hearing: 7 February 2025

Date delivered: 17 February 2025

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

18/2/25 ...... [redacted]

DATE SIGNATURE

In the application of:

OUTDOOR ILLUMINATION (PTY) LTD	**Applicant**
and	
MUNWAP CAFÉ (PTY) LTD	**Respondent**

JUDGMENT

SWANEPOEL J:

[1] The applicant seeks the winding up of the respondent. The applicant's cause of action arises from services rendered by the applicant to the respondent to the value of R 166 750.

[2] The applicant relies upon the provisions of section 344 (f) of the Companies Act 61 of 1973 ("the Act") which provides that a company may be wound up if it is unable to pay its debts as described in section 345 of the Act.

[3] The applicant furthermore relies upon the deeming provisions in section 345 (1) (a) (i) to support its contention that the respondent is unable to pay its debts. The relevant provision reads as follows:

"345 **When a company deemed unable to pay its debts.**

(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 of 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; or

(ii) ....

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound it to the reasonable satisfaction of the creditor; or...."

[4] I have highlighted the relevant passage in the above quote as it is on these words that this application turns. On 11 September 2024 the applicant caused a section 345 (1) (a) (i) demand to be dispatched to the respondent. Although the letter was addressed to the respondent's registered office, it was sent by registered mail.

[5] The applicant's case is based entirely upon the deeming provision in section 345 (1) (a) (i). It did not seek to provide any other evidence regarding the respondent's inability to pay its debts. At the hearing of the matter in the unopposed motion court I sought counsel's submissions on whether the dispatch of the letter by registered mail satisfied the requirements set out in section 345 (1) (a) (i) of the Act, in that it was my prima facie view that a letter sent by registered mail did not constitute "leaving at the registered office". The applicant's counsel conveyed to me that his attorney was adamant that the demand had been properly served, which did nothing to assuage my concerns. I therefore invited counsel to submit heads of argument to me on this issue.

[6] Counsel did not submit heads of argument, but he did send me an email in which he conceded that he could not contend that there had been proper service of the demand. Counsel also assisted me by providing authority on the issue.

[7] In *Bank of Baroda v Annex Distribution (Pty) Ltd*[1] the applicant had attempted to serve the section 345 demand at the respondent's registered office. The premises were, however, found to be occupied by

an unrelated third party who refused to accept the notice. The notice was also emailed to the respondent's sole director. The court held that the delivery of the notice was not in accordance with the provisions of section 345 (1) (a) (i), and that there must be strict compliance with the requirement that the notice should be left at the respondent's registered office. In *Bank of Baroda* the applicant relied upon the authority of *Nathaniel & Efthymarkis Properties Hartbeesspruit Landgoed CC*[2] to argue that strict compliance with the wording of section 345 was not required. In the latter case the applicant had tried on numerous occasions to deliver a notice in terms of section 69 (1) (a) of the Close Corporations Act, 69 of 1984 (the provisions of which are to all intents and purposes identical to section 345 (1) (a) (i)) upon the respondent, but had found that the registered office was unattended. The applicant realized that the managing member of the corporation resided at an adjacent property, and it delivered the notice to the managing member personally.

[8] On the question whether the delivery of the notice at a different address to the registered office was proper compliance with section 69, Van Dijkhorst J distinguished *Nathaniel* from *Phase Electric Co (Pty) Ltd v Zinman's Electric Sales (Pty) Ltd*[3] (upon which the respondent relied in *Nathaniel*) and said:

"I hold that the requirement that the demand must be served on the corporation is peremptory but that the requirement that it must be done at the registered office is not and that substantial compliance would suffice."

[9] In *Phase Electric* the applicant relied upon a demand sent in terms of section 112 (a) of the Companies Act, 46 of 1926 (also essentially the same as section 345 (1) (a) (i)). The demand had been sent by registered mail, and the point was taken that such method did not comply with the provisions of section 112. The Court held[4]:

"The way in which this section is framed is significant. Only if the prerequisites enumerated in a conditional clause exist, does the Court have the power to order a winding up of the company on this ground. Hence each of the conditions contained in this sub-section must be satisfied *a priori*. 'Service' on the company of a demand is required and the method of its service is exclusively described as 'by leaving the same at its registered office'."

[10] In *BP and JP Investments (Pty) Ltd v Hardroad (Pty) Ltd*[5] the court, relying on *Phase Electric*, emphasized that for the deeming provision in section 345 (1) (a) (i) to apply, there had to be strict compliance with the requirement that the notice be left at the companies registered office. This approach was approved on appeal by a Full Court[6].

[11] However, in consonance with the approach applied in *Nathaniel's* case, that form should not triumph over substance, the court held in *Wellington Board of Executors Ltd v Schutex Industries (Pty) Ltd*[7] that delivery of a notice in terms of section 112 of the Companies Act, 1926 by registered mail was sufficient compliance with the section, in circumstances where the respondent had received the notice and had acknowledged receipt of it.

[12] From the above cases the following principles can be distilled. Generally, it is necessary for a section 345 (1) (a) (i) notice to be left at the registered office. It is advantageous to an applicant to arrange for the delivery to be made by the Sheriff, as it then gains the advantage of a presumption that the contents of the return of service are correct. However, it is not a requirement that service must be effected by the Sheriff, and if the applicant can prove delivery by someone else, that is sufficient to trigger the deeming provision.

[13] The notice must be left at the registered office, but in cases where the applicant can prove that the respondent actually received the notice, even if delivery occurred at a place other than the registered office, (as in *Nathaniel* and *Wellington's* cases), such delivery may be sufficient compliance with section 345 (1) (a) (i).

[14] That brings me to the facts of this matter. There is no evidence that the respondent actually received the notice. The applicant has not left the notice at the registered office, and it may well be that the notice is still at the Post Office. Therefore, the deeming provision in section 345 (1) (a) (i) has not been triggered. The entire substratum of the application has failed and the application must be dismissed.

[15] I make an order in the following terms:

The application is dismissed.

[redacted]

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

Counsel for the applicant:	**Adv. D Broodryk**
Instructed by:	**Serfontein Viljoen & SWart**
Date heard:	**7 February 2025**
Date of judgment:	**17 February 2025**

---

[1] Unreported Pretoria High Court case number 38591/2019 dated 14 May 2020; [2020] JOL 47332 (GP)
[2] [1996] 2 All SA 317 (T)
[3] 1973 (3) SA 914 (W)
[4] At 917 C
[5] 1977 (3) SA 753 (W)
[6] BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd 1978 (2) SA 481 (T)
[7] 1952 (3) SA 170 (C)

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GUATENG DIVISION, JOHANNESBURGE

Case No: 2024-124949

OUTDOOR ILLUMINATION (PTY) LTD V MUNWAP CAFÉ: (Per Swanepoel J)

Triggering the deeming provisions in section 345 (1) (a) (i) of the Companies Act, 1973

SUMMARY

---

[1] The applicant sought a winding up order against the respondent in the unopposed motion court. The application was brought under section 344 (f) of the Companies Act, 1973 ("the Act"), read with the provisions of section 345 (1) (a) (i) of the Act, which reads:

"**345 When a company deemed unable to pay its debts.**

(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 of 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; or

(ii) ....;

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound it to the reasonable satisfaction of the creditor; or...." (writer's emphasis)

[2] In this case the applicant had dispatched a section 345 (1) (a) (i) demand by registered mail. There was no evidence that the respondent had in fact received the notice. The applicant also did not present any evidence that the respondent was unable to pay its debts, and it relied entirely on the deeming provision in section 345 (1) (a) (i).

[3] The court enquired from counsel whether there was authority to the effect that dispatch of a section 345 (1) notice by registered mail satisfied the provisions of the section. Counsel later provided authority to the effect that strict compliance with the provisions of section 345 (1) (a) (i) was required, ie that the notice had to be left at the registered address.

[4] The court considered all of the authorities on this topic, and held that strict compliance with the provisions of the section was required to trigger the deeming provision. The notice must be left at the registered office, and generally, dispatch by registered mail is not sufficient. The notice should, ideally, be served by the Sheriff as that affords the applicant the advantage of the presumption that the contents of the return of service is correct. However, the section does not require service by Sheriff, and if the applicant can prove that the notice was left at the registered office by another person, that is sufficient compliance with the section.

[5] The court also pointed out that in two cases courts had held that delivery of the notice at an address other than the registered address constituted substantially compliance with section 345 (1) (a) (i). The first was *Nathaniel & Efthymarkis Properties v Hartbeesspruit Landgoed CC [1996] 2 ALL SA 317 (T)* in which the applicant proved personal delivery of a notice to the managing member of a close corporation in terms of section 69 of the Close Corporations Act, 1984 (which essentially mirrors section 345 (1) (a) (i)), in circumstances where the registered office was found to have been vacated.

[6] The second was *Wellington Board of Executors Ltd v Schutex Industries (Pty) Ltd 1952 (3) SA 170 (C)* in which a demand in terms of section 112 of the Companies Act, 1926 was sent by registered mail, in circumstances where the respondent received the notice, and acknowledged receipt thereof.

[7] In the two cases mentioned above the courts applied the principle that form should not trump substance, and if it is proven that the respondent actually received the notice, the deeming provision is triggered.

[8] In view of the fact that the notice had not been left at the registered address, and there was no evidence that the respondent had received the notice, the application was dismissed.

"X4"

[redacted] 4/2/25

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-057156

ON 14 February 2025
BEFORE THE HONOURABLE SWANEPOEL J

In the matter between:

PHUTI MABOTSANA GEORGINA MALEBANE **Plaintiff**

and

NOKO BILLY KGOMO **Defendant**

ORDER

HAVING read the documents filed of record, and having heard counsel, an order is made in the following terms:

1. The matter is postponed sine die.
2. The Family Advocate shall conduct an enquiry into the best interests of the parties' two minor children pertaining to their primary residence and the contact arrangements contained in clause 2.5 of the settlement agreement dated 4 November 2024.

BY ORDER OF COURT

[redacted]

REGISTRAR