REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 048263/2022

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

17/03/2025 [redacted]

DATE SIGNATURE

In the matter between:

INVESTEC BANK LIMITED Applicant

and

CULVERWELL CATTLE COMPANY (PTY) LTD Respondent

JUDGMENT

MAHALELO J

Introduction

[1] This is an application brought by the applicant for an order placing the respondent under final winding up in the hands of the Master, with the costs of the application to be costs in the administration of the respondent.

[2] For ease of reference, the applicant and the respondent are referred to as "Investec" and "Culverwell Cattle Company" or "Culverwell", respectively, in this judgment.

[3] Investec avers that Culverwell Cattle Company is unable to pay its debts and is commercially and factually insolvent. It brings this application in terms of sections 344 (f) and 345(1)(c) of the Companies Act 61 of 1973 ("the old Companies Act"), read with items 7 and 9 of Schedules 3 and 5 of the Companies Act 71 of 2008.

[4] In opposing the application, Culverwell raised various defenses and a point *in limine* in its papers, premised on the requirements for the furnishing the application as provided in section 346(4A) of the old Companies Act.

[5] Section 346(4A) of the Companies Act provides that:

"(a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application –

(i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and

(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

(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;

(iii) to the South African revenue service; and

..."

[6] Counsel for Culverwell contended that these provisions are peremptory and that non-compliance renders Investec's application fatally defective, warranting its dismissal.

[7] During argument, counsel for Investec submitted that it had caused an affidavit by the relevant Deputy Sheriff to be filed of record; therefore, that part of the complaint has become academic. With regard to service on the employees, he argued that Investec has complied with Section 346(4A)(ii) by furnishing a copy of the application to Culverwell's employees, even though the sheriff was unable to find any such employees, with the consequence that service could not be effected on trade unions. Based on these facts, he proposed that an interim order be granted against Culverwell together with a *rule nisi* and a return date, including a proviso that service be made on Culverwell's employees and any trade unions involved. He relied on the judgments in *Aqua Transport*[1] and *Intello Capital*.[2]

[8] In *Aqua Transport*, the applicant relied on a return of non-service of the application in respect of employees. The Court granted a provisional order of winding up, substituting a final order granted by the court *a quo*, despite the absence of an affidavit deposed to by the sheriff in question and despite finding that there had been no compliance with section 346(4A) of the Act. In *Intello Capital*, Adams J found it appropriate to decline to uphold the technical point of failure to comply with section 346(4A) where the applicant lacked *bona fides* in the application. In the circumstances, counsel for Investec submitted that the *point in limine* should be rejected.

[9] In opposing the proposal, counsel for Culverwell referred to a plethora of authorities dealing with the requirements relevant for service of the application. With regard to service on employees and any trade unions representing them, reliance was placed on *EB Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd*[3] where the Court stated:

> "…. The requirement that the application papers be furnished to the persons specified in section 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

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[1] *Aqua Transport and Plant Hire (Pty) Ltd v TST Broker (Pty) Ltd* ("*Aqua Transport*") 2023 JDR 0191 (GJ).
[2] *Intello Capital CC v Sigge Managed Solutions (Pty) Limited* ("*Intello Capital*") 2023 JDR 0644 (GJ).
[3] [2013] ZASCA 167; [2014] 1 All SA 294 (SCA) at para 23.

section 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."

[10] In *Pilot Freight v Von Landsberg Trading (Pty) Ltd*,[4] the following was stated in respect of service on employees:

"... [O]nly the person who physically furnished the application on the relevant parties, such as a messenger, courier or, if service by sheriff was used, then the sheriff or deputy sheriff who carried out service, is a person who can depose to the affidavit setting out precisely what occurred and how the application was furnished to the relevant parties.

....

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).

It appears that too often the requirements of s 346(4A)(b) are overlooked by applicants for the winding-up of companies. However, as set out above, they are peremptory and

[4] 2015 (2) SA 550 (GJ) at paras 28 and 32-3.

can in appropriate circumstances therefore be fatal to an application for the winding-up of a company."

[11] In *Cassim N.O. v Ramagale Holdings (Pty) Ltd and Others*,[5] in an application for the provisional liquidation of a company, Moorcroft AJ examined the effect of non-compliance with the requirements for serving a copy of the application on employees, registered trade unions, SARS, and the company itself. The Court held:

"The failure to furnish a copy to the company itself may be dispensed with where the Court is satisfied that it would be in the interest of the company or creditors to do so. Condonation is not provided for in respect of the employees or SARS and the legislature made a clear distinction in this regard.

The deponent to the service and compliance affidavit did not see to service personally but relies entirely on the returns of service issued by the Sheriff and the acknowledgement by SARS.

In our law service is usually proved by a return of service issued by the Sheriff but section 346(4A) of the Companies Act of 2008 as well as in section 9(4A)(a) of the Insolvency Act 24 of 1936 contain specific provisions introduced in 2002 relating to service. The legislative background is dealt with in *EB Steam Co (Pty) Ltd v Eskom Holdings Society Ltd.* The provisions of the Superior Courts Act relating to service are general provisions and do not apply when there are specific legislative provisions such as those found in the Companies Act or the Insolvency Act in respect of service. It is therefore to section 346(4A) of the Companies Act of 1973 that one must turn, and not section 43 of the Superior Courts Act.

...

The deponents are quite simply not persons "who furnished a copy of the application" accordance with section 346(4A)(b). The Sheriff furnished the application to the employees, but the Sheriff's affidavit is not before court.

In a number of decided cases it was held that section 346(4A)(b) and section 9(4A) are peremptory: *Standard Bank of SA Ltd v Sewpersadh*; *Hannover Reinsurance Group Africa (Pty) Ltd v Gungudoo*; *Corporate Money Managers (Pty) Ltd v Panamo*

[5] ("*Cassim*") [2020] ZAGPJHC 149 at paras 7-18.

Properties 49 (Pty), Sphandile Trading Enterprise (Pty) Ltd v Hwibidu Security Services; *EB Steam Co (Pty) Ltd v Eskom Holdings Soc Ltd*, *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd*. These cases require an affidavit by the person who furnished the application.

The decision in *Corporate Money Managers (Pty) Ltd v Panamo Properties 49 (Pty) Ltd* was overruled by the Supreme Court of Appeal but only in respect of the question as to when the application papers must be furnished to the specified persons and not in respect of section 346(4A)(b).

However, *EB Steam Co (Pty) Ltd v Eskom Holdings Soc Ltd*, is also authority that the court may by reasons of urgency or logistical problems grant a provisional order even when the application papers have not yet been furnished to employees. Wallis JA said:

> '[12] ... It is also unnecessary to spell out the circumstances in which a court should be prepared at the stage when a provisional winding-up order is sought to grant an order notwithstanding the fact that the application papers have not yet been furnished to employees. Ordinarily this should be done before a provisional order is granted but reasons of urgency or logistical problems in furnishing them with the application papers may provide grounds for a court to allow them to be furnished after the grant of a provisional order.'

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 non-compliance 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.

Reading the judgement as a whole makes it clear however that the statement quoted above relates to the question whether the steps taken were sufficient and not with the question whether the court may condone non-compliance with section 346(4A)(b).

...

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).

I conclude that the affidavit by Ms. Cassim does not comply with section 346(4A)(b) as she is not the person who furnished the affidavit, that the bulk sms's did not cure the defect as it did not contain a copy of the application as required and as no case is made out for deviating from the provisions of section 346(4A)(a)(ii)(aa) and (bb), and that non-compliance can not be condoned."

Discussion on the point in limine

[12] The affidavit filed by Investec to address compliance with the peremptory provisions, and specifically the requirements of section 346(4A) of the Companies Act, is that of the Sheriff. With regard to service on employees and trade unions representing them, the "Return of Service" on which Investec relies— which is, in fact, a return of non-service in respect of the employees and trade unions— makes the following allegations:

" ... [O]n 25 November 2022 at 13h20, the notice of Motion could not be served as no employees of the Defendant [sic] could be located as the address is a private residence".

[13] It is clear that the application was not served on the employees or on any trade union representing them.

[14] The furnishing of the application to the employees and trade union is peremptory in terms of section 346(4A) of the Companies Act. While a court may condone failure to serve on the employees and trade union for purposes of a provisional sequestration application, such condonation is granted only in exceptional circumstances and where there is extreme urgency. Even in such

a case, an affidavit must be deposed to, explaining why the court should grant such an indulgence. That is not the case in the present application. Investec wrongfully maintains that service has been effected on the employees. The difficulty for Investec is that no attempts have been made to find alternative methods of service on the employees and trade union since the return of non-service on 25 November 2022 to the date of the application.

[15] Considering the prevailing authorities on the service of an application for provisional or final liquidation, with which I align myself, it is clear that service on employees and trade unions, as well as the manner in which it is to be effected, is peremptory. In the present application, the compliance affidavit does not assist Investec in satisfying this Court that it has complied with section 346(4A) of the Companies Act.

[16] The point *in limine* must accordingly be upheld.

[17] Culverwell submitted that the application should be dismissed and that Investec should be ordered to pay costs on an attorney-and-client scale.

[18] Investec is hindered by its failure to diligently comply with the requirements of section 346(4A) of the Companies Act.

[19] In *Cassim*, Moorcroft AJ, having found that the applicant failed to comply with section 346(4A)(b) regarding SARS and the employees, made an order removing the matter from the roll.

[20] In my view, an order similar to that in *Cassim*, with the necessary changes to suit the peculiar circumstances of this application, may be made.

Order

In the result, the following order is made:

1. The application is removed from the roll;

2. The applicant shall pay the costs of opposing the point *in limine* regarding non-compliance with section 346(4A) of the Companies Act 61 of 1973 on scale "A".

MB MAHALELO
Judge of the High Court
Gauteng Division, Johannesburg

DISCLAIMER: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 17 March 2025*

Date of Hearing:	23 August 2024
Date of Judgement:	17 March 2025

Appearances

Counsel for applicant:	Adv. M De Oliveira
Instructed by:	Shaie Zindel Attorneys
Respondent's Counsel:	Adv. AG Sawma SC
Instructed by:	Geniv Wulz Attorneys Inc