Reportable:	~~YES~~ / **NO**
Circulate to Judges:	~~YES~~ / **NO**
Circulate to Magistrates:	~~YES~~ / **NO**
Circulate to Regional Magistrates:	~~YES~~ / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: UM252/2020

In the matter between:

BEES WINKEL (PTY) LTD **APPLICANT**

(Registration Number: 2017/030149/07)

and

MKHULU TSHUKUDU HOLDINGS (PTY) LTD **RESPONDENT**

(Registration Number: 2018/060481/07)

DATE OF HEARING	**:**	18 FEBRUARY 2021
DATE OF JUDGMENT	**:**	04 MARCH 2021
FOR THE APPLICANT	**:**	ADV. PRINSLOO
FOR THE RESPONDENT	**:**	ADV. MAY

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time of the handing down of judgment is deemed to be 14h00p.m. on 04 March 2021.

ORDER

(i) The application is removed from the roll;

(ii) The applicant is directed to file an affidavit or affidavits in compliance with section 346A(4) (b) of the Companies Act 61 of 1973 before re-enrolling the matter on the Opposed Roll;

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

JUDGMENT

PETERSEN AJ:

Introduction

[1] This in an opposed application for the urgent provisional winding-up of the respondent in the hands of the Master of the High Court.

The relief sought by the applicant

[2] The applicant seeks the following relief:

1. That this application be adjudicated as an urgent application as envisaged in uniform rule 6 (12) of the uniform rules of court and that non-compliance with service and the time periods provided for in the uniform rules of court be condoned.

2. That the estate of the MKHULU TSHUKUDU HOLDINGS (PTY) LTD (Registration Number: 2018/060481/07), be placed under provisional liquidation in the hands of the Master of the High Court, North West division Mahikeng;

3. That a provisional order is issued calling upon the respondent and any other interested party shall cause, if any, to the honourable Court, four weeks pursuant to the granting of the provisional order, why a final order of liquidation should not be granted against the respondent;

4. This order, together with a copy of the notice of motion in annexures thereto must be served on the respondent;

5. A copy of this order must further be served on:

5.1 any registered trade union that as far as the sheriff can reasonably ascertain represent any of the employees of the respondent;

5.2 respondent's employees, if any, by affixing a copy of the order and the application to any noticeboard which the employees have access inside the respondent's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which, the front door of the premises from which the respondent converts any business; and

5.3 the South African Revenue Service.

6. The sheriff must ascertain whether the employees of the respondent represented by a trade union and whether there is a noticeboard in the premises which employees of access.

7. The cost of this application, an attorney and client scale, to be costing the administration of the insolvent estate of the respondent.

8. Further and/or alternative relief."

Points *in limine* raised by the respondent

[3] The respondent raised a number of points *in limine*, the most significant being premised on the requirements for the furnishing of the application as provided in section 346(4A) of the Companies Act 61 of 1973("the Companies Act"). 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) 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 any noticeboard which the applicant and the employees access inside the premises of the company; or

(bb) 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 in a business at the time of the application;

(ii) the South African revenue service; and

(iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy if the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(b) the applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with."

[4] The respondent takes issue with the requirements in regard to proof of service of the application in respect of employees, a trade union and the South African Revenue Service. The confirmatory affidavit of Gert Andries Botha Agenbag ("Agenbag"), an attorney in the employ of the applicant's instructing attorney *Strydom & Bredenkamp* which purports to deal with compliance with the requirements of section 346(4A) of the Companies Act, in particular, is assailed.

[5] In respect of service of the application on SARS, Agenbag, makes the allegation that the application was served on SARS on 27 November 2020. It is not in dispute that Agenbag, who is based in Pretoria was not the person who attended to service on SARS in Mahikeng. A date stamp from SARS appears on the notice of motion as the application was allegedly served on SARS by the correspondent attorneys in Mahikeng. No confirmatory affidavit has been filed of the person who attended to service at SARS in Mahikeng.

[6] In respect of service of the application on employees and any trade unions of employees of the respondent, Agenbag, makes the allegation that the application was served on the respondent's employees and their trade

unions by the Sheriff of the High Court, Potchefstroom, by affixing to the main entrance gate of the respondent's registered address at 117 Kock Street, Potchefstroom, North West. Agenbag in fact alleges that the Sheriff certified in his return of service that no employees and trade unions of the employees were found at the said address. The returns of the Sheriff in respect of employees and trade unions was endorsed as returns of non-service and returned to the applicant's attorneys of record.

[7] *Adv May* for the respondent referred to a plethora of authority dealing with the requirements relevant to service of the application. In respect of service on SARS, reliance is placed on *Pilot Freight v Von Landsberg Trading* 2015 (2) SA 550 (GJ) at paragraph [29], where it was said:

"[29] The furnishing to SARS is usually uncontroversial and an affidavit from the person who delivered the application to SARS, together with the stamp from SARS on the notice of motion acknowledging receipt thereof, would constitute sufficient proof that the application was furnished on SARS.'

Sphandile Trading Enterprise (Pty) Ltd and Another v Hwibidu Security Services CC and Others 2014 (3) SA 231 (GJ) at paragraph [18], where the Court held:

"[18] I accordingly hold that, whilst the furnishing of a copy of the application to SARS, and proof of such furnishing by way of affidavit, are peremptory, s346(4A)(a)(ii) does not require the furnishing of the copy to SARS to occur at any particular time. The purpose of the section is met if such furnishing takes place within a reasonable period of time prior to the hearing of the application, and the affidavit is filed before or during the hearing.

[8] In respect of service on employees and any trade unions of employees, reliance is placed on *EB Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd* [2014] All SA 294 (SCA) at paragraph [9] where the Court said:

"…The requirement that the application papers be furnished to the person specified in s346(4A) is peremptory, when furnishing them to the respondent's employees, that this be done in any of the ways specified in s346(4A)(a)(ii). If those modes of service are impossible or ineffectual another mode of service 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."

In *Pilot Freight v Von Landsberg Trading supra*, the following was stated in respect of service on employees:

"[28] … only 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.

[32] 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).

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

[9] In *Cassim N.O. v Ramagale Holdings (Pty) Ltd and Others* [2020] JOL 47600 (GJ) in an application for provisional liquidation of a company, Moorcroft AJ examined the effect of non-compliance with the requirements relevant to the service of a copy of the application on employees and registered trade unions, SARS and the company itself. The following paragraphs of the judgment are apposite:

[7] 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.

[8] 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.

[9] 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.

[11] 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.

[12] 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 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.

[13] 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).

[14] 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.

[15] 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.

[16] 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)…

[17] 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).

[18] 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 cannot be condoned."

Discussion on the point *in limine*

[10] The only affidavit filed by the applicant to address compliance with the peremptory provisions and specifically the requirements of section 346(4A) of the Companies Act, is the affidavit of Agenbag.

[11] In respect of service of the application on SARS, Agenbag makes the following allegation at paragraph 3 of the compliance affidavit:

"On 27 November 2020, c copy of the notice of motion, founding affidavit and annexure thereto (hereinafter "***the application***") was served onto the SOUTH AFRICAN REVENUE SERVICES (SARS), at SARS's address being 2493 Batlaping St, Mmabatho Unit 4, Mmabatho. In confirmation hereof I refer the Honourable Court's attention towards paginated page 5 of the notice of motion, whereby receipt by SARS is acknowledged by way of date stamp."

[12] Agenbag fails to identify in his affidavit who served the application on SARS on 27 November 2020. The submission from the bar by *Adv Prinsloo* for the applicant that it was attended to by the correspondent of his instructing attorney does not suffice. The prevailing authority is clear

that the person who attended to such service must file an affidavit to report on what he or she did in effecting service on SARS. This requirement is couched in peremptory terms and there is no room for deviation.

[13] In respect of service on employees and trade unions of employees, Agenbag makes the following allegation at paragraph 5 of the compliance affidavit:

> "On 27 November 2020 at 13:40, the Sheriff of the High Court, Potchefstroom, served a copy of the application on the Respondent's Employees and their Trade Unions, by serving a copy thereof by Affixing it to the main entrance gate of the Respondent's registered address situated at 117 Kock Str, Potchefstroom North West. The sheriff certified in his Return of Service attached hereto as Annexure "**GA2**" and "**GA3**" that no Employees or Trade Unions of the Employees were found at the Respondent's Registered address."

[14] Agenbag relies solely on the "Returns of Service" of the Sheriff to allege that service of the application was effected on the employees and trade union/s. I align myself with the authorities that in the context of the present application, only the Sheriff can depose to an affidavit setting out the prevailing circumstances at the time he attended to or attempted service of the application on employees and trade union/s, if any. I re-iterate that the only compliance affidavit on record is that of Agenbag.

[15] The "Returns of Service" which the applicant relies on, which are in fact returns of non-service, in respect of the employees and trade union/s, "**GA2**" and "**GA3**", identifying the parties as the applicant and the

respondent and THE EMPLOYEES and THE TRADE UNIONS respectively reads as follows:

Annexure "**GA2**"

"**REASON FOR NON-SERVICE/EXECUTION**:

I certify that on 27th day of November 2020, at 13:40, at 117 KOCK STR, POTCHEFSTROOM, **I attempted service** of the NOTICE OF MOTION together with founding affidavit and annexures on the employees of the RESPONDENT. I further certify that no employee of the RESPONDENT was employed or found at the given address.

Note: Given address is the physical address of Villa Shalom Complex.

Process not served and returned herewith."

Annexure "**GA3**"

"REASON FOR NON-SERVICE/EXECUTION:

I certify that on 27th day of November 2020, at 13:40, at 117 KOCK STR, POTCHEFSTROOM, **I attempted service** of the NOTICE OF MOTION together with founding affidavit and annexures on the trade unions. I further certify that no trade unions on behalf of the employees was employed or found at the given address.

Note: Given address is the physical address of Villa Shalom Complex.

Process not served and returned herewith."

[16] Even in the absence of an affidavit from the Sheriff of the High Court, Potchefstroom, it is clear that the application was not served on the employees or a trade union. Paragraph 5 of Agenbag's compliance affidavit is factually incorrect and purports to rely on Annexure "**GA1**", the

return of service on the respondent which was served by affixing the application to the main entrance gate at the registered address of the respondent. Service on the respondent cannot be equated as service on the employees or trade union.

[17] The furnishing of the application to the employees and trade union is peremptory in terms of section 346(4A) of the Companies Act. Whilst a Court may condone failure to serve on the employees and trade union for purposes of a provisional sequestration application, it is only to be granted in exceptional circumstances and where there is extreme urgency. Even in that 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. The applicant wrongfully maintains that service has been effected on the employees and trade union. The difficulty for the applicant is that there have been no attempts at finding alternative methods of service on the employees and trade union since the return of non-service of 27 November 2020 to date of the application on 18 February 2021.

[18] On a consideration of the prevailing authorities on service of an application for provisional liquidation, it is clear that service on SARS and employees and trade unions and how same is to attended to, is peremptory. In the present application, the compliance affidavit of Agenbag does not assist the applicant in satisfying this Court of compliance with the provisions of section 346(4A) of the Companies Act.

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

The way forward

[20] The respondent submits that the application should be dismissed and the applicant be ordered to pay costs on an attorney/client scale.

[21] The applicant is hamstrung by its failure to diligently comply with the requirements of section 346(4A) of the Companies Act.

[22] In *Cassim N.O. v Ramagale Holdings (Pty) Ltd and Others* Cassim at paragraph 17 Moorcroft AJ makes the observation that "…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)." Moorcroft AJ further held at paragraphs 18 and 19 as follows:

"[18] 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 cannot be condoned.

[19] Section 346 (4A) (b) must be complied with in respect of SARS and the employees. Affidavits by the Sheriff and the person who furnished a copy to the SARS should suffice."

[23] The following order was consequently given in *Cassim N.O. v Ramagale Holdings (Pty) Ltd and Others* at paragraph [20]:

"[20] The following order is made:

1. The second and third respondents are granted leave to intervene in the application;

2. The matter is removed from the roll;

3. The applicant is directed to file an affidavit or affidavits in compliance with section 346A (4) (b) of the Companies Act 61 of 1973 before re-enrolling the matter in the Urgent Court;

4. The costs shall be costs in the application."

[24] In the present matter, the applicant unlike the applicant in the *Cassim N.O. v Ramagale Holdings (Pty) Ltd and Others* matter, had close on two and a half months to remedy its non-compliance with the peremptory provisions of section 346(4A) of the Companies Act. In my view, an order similar to that in *Cassim N.O. v Ramagale Holdings (Pty) Ltd and Others*, with the necessary changes, as applicable to the peculiar circumstances of this application may be made.

Order

[25] The following order is accordingly made:

(i) The application is removed from the roll;

(ii) The applicant is directed to file an affidavit or affidavits in compliance with section 346A (4) (b) of the Companies Act 61 of 1973 before re-enrolling the matter on the Opposed Roll;

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

_____

AH PETERSEN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG