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

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: M 112/2023

M 113/2023

In the matter between:

JACOLIEN FRIEDA BARNARD N.O **First Applicant**

IGNATIUS ABRAHAM TEMANE N.O **Second Applicant**

and

DIKOPANE PROJECT MANAGEMENT CC **Respondent**

DATE OF HEARING : 08 MARCH 2024

DATE OF JUDGMENT : 25 MARCH 2024

FOR THE APPLICANTS : ADV. LEATHERN SC

FOR THE RESPONDENT : ADV. ACKER

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 14h00 on 25 March 2024.

ORDER

Consequently, the following order is made:

(i) The application in case number M112/2023 is removed from the roll.

(ii) The application in case number M113/2023 is postponed *sine die*.

(i) The wasted costs in both case numbers M112/2023 and M113/2023 shall be costs in the application.

JUDGMENT

HENDRICKS JP

Introduction

[1] In this matter, the applicants in their representative capacities as the appointed liquidators of the Dikopane Buses and Coaches (Pty) Limited (DBC or applicants), seek an order to place the

respondent, Dikopane, an alleged Close Corporation under **final winding-up**, based on a debt alleged to be due by DBC to a third party named F&I Services (Pty) Ltd (F&I), for which Dikopane is alleged to be liable to pay. This matter was heard together with case no M113/2023 in which the applicants seek an order declaring the respondents Dr. Lala and Mr. Pakade, personally liable for all and any of the debts or other liabilities of DBC and for payment of the amount of R12 302 044.04. Because the facts are inter-related and intertwined this Court acceded to the request by counsel, Adv. Leathern SC, that both matters (M112/2023 and M113/2023) be heard together on 08 March 2024, whereupon judgment was reserved.

[2] During argument, counsel for the respondent Adv. Acker, raised the point *in limine* that service of the furnishing of the application in case number M112/2023, was not proper and does not conform with the requirements of section 346 (4A) (a) and (b) of the Companies Act 61 of 1973, which provides:

> *"(4A) (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

(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 where 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.

[Sub-s. (4A) added by s. 7 of Act 69 of 2002.]."

[3] The respondent takes issue with the requirements in regard to service of the application in respect of employees, a trade union and the South African Revenue Service (SARS), which was effected by the Sheriff of the High Court (Sheriff). The respective returns of service of the Sheriff in respect of both the trade union and employees reads thus:

"On 22nd day of March 2023 at 14:33 I served this COMBINED SUMMONS AND 41A NOTICE upon the RESPONDENT as follows:

REGISTERED BUSINESS ADDRESS

By proper service of a copy of the COMBINED SUMMONS AND 41A NOTICE upon MRS LINDA KERSTEN (ADMIN) at the place of registered business address of the Defendant, a person at the above address apparently not less than 16 years of age and in charge of the premises at the time of service, after explaining the nature and contents thereof to the said person served."

[4] An "Affidavit of Service" deposed to by **Cassandra Papangeli** (Papangeli) was also filed. The contents of this affidavit is as follows:

"I, the undersigned,

CASSANDRA PAPANGELI
(ID 000825 0123 083)

Do hereby make an oath and state that:

1. *I am an adult female candidate legal practitioner, employed as such at Tintingers Incorporated at 242 Lange Street, Nieuw Muckleneuk, Pretoria, Gauteng.*

2. *The content of this affidavit falls within my personal knowledge, unless otherwise stated and are both true and correct.*

3. *I am duly authorised to depose to this affidavit, Tintingers Incorporated is the Attorney of record for the Applicant and I am dealing with the day-to-day administration of the file.*

4. *On 22 March 2023, the application was served on the Respondent by the office of the Sheriff Klerksdorp, at the respondent's registered address being 35B Yusuf Dadoo Street, Wilkoppies. The application was handed to a Mrs Linda Kirsten, a person apparently not less than 16 years of age and in charge of the premises at the time of service after explaining the nature and contents of it. The return of service is attached hereto as Annexure "A".*

5. *The application was furthermore served on the Employees and Trade unions on 22 March 2023 by affixing it to the principal door of the registered address being 35B Yusuf Dadoo Street, Wilkoppies. These returns are attached hereto as Annexure "Al" and "A2".*

6. *On 7 March 2023, the application was served on the South African Revenue Services by hand. A copy of the Notice of Motion containing receipt of this is attached as Annexure "B".*

7. *Also on 7 March 2023, the application was served on the Master of the High court, Mahikeng. I Refer to Annexure "B" again to show receipt of the application by the Master.*

8. *I, therefore, respectfully submit that all formalities as prescribed have been complied with and the application has duly been served."*

[5] Papangeli states in her aforementioned affidavit of service that the application (summons and Rule 41 A Notice) was served on the employees and any trade unions of employees of the respondent, Dikopane. It was served on Linda Kirsten (Admin) at the employers address at 35 B Dr. Yusuf Dadoo Street, Wilkoppies, by the Sheriff

of the High Court, North West. In respect of service of the application on SARS, Papangeli states that the application was served on 07 March 2023 **by hand**. The Notice of Motion bears the date stamp of SARS, Mmabatho to this effect, with the address stipulated as 2493 Batlaping Street, Unit 4, Mmabatho. No confirmatory affidavit has been filed of the person who attended to service by hand at SARS, Mmabatho. The Sheriff did not depose to an affidavit in respect of the service on the employees and trade unions of the employees.

[6] Adv. Acker refer this Court to a judgment of this division in the matter of **Bees Winkel (Pty) Ltd vs Mkhulu Tshukudu Holdings (Pty) Ltd** (UM 252/2020) [2021] ZANWHC 13 (4 March 2021), penned by **Petersen AJ** (as he then was). In this judgment **Petersen AJ** dealt extensively with the relevant applicable case law, in paragraphs [7] to [9]. I find it prudent for the sake of completeness to quote these paragraphs.

> *"[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, s 346 (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 s 346 (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."

See also: **EB Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd** [2014] All SA 294 (SCA) at paragraph [23] and [25].

"[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.[14] 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.

[24] That leaves one final question, namely whether the inability of the applicant, for whatever reason, to furnish the application papers to the employees before the hearing precludes the court from granting any relief. Certainly the failure to provide a security certificate in terms of s 346(3) or the failure to lodge

the papers with the Master in terms of s 346(4) is fatal to the grant of immediate relief. However, that is because of the nature and purpose of these requirements. To permit an application for winding-up to proceed without security having been furnished may result in costs being incurred, including by public officials, without any means of recouping them. As the Master is the person who will have to oversee the winding-up there are obvious reasons for ascertaining in advance whether the Master is aware of reasons why a winding-up order should not be granted. The position in regard to the notification provisions in s 346(4A) is different. Their purpose is to ensure that certain specified persons, who may have an interest in the winding-up, in order to protect their own interests, are, so far as reasonably possible, furnished with the application papers in order to assess their own position in the light of the case made by the applicant. They may well applaud and support the application as did some of the employees in Hendricks.

[25] The fact that the requirement that these persons be furnished with the application papers is peremptory means that it is not permissible for the court to grant a final winding-up order without that having occurred. Does that mean that it is equally impermissible for the court to grant a provisional winding-up order? In my view it does not. The position may well be that an overwhelming case is made on the papers for the grant of a winding-up order and that any delay will allow assets to be concealed or disposed of to the detriment of the general body of creditors and particularly the employees and SARS, who may have preferential claims. It would be absurd to hold that the court was disabled from granting a provisional order merely because it had not been feasible, possibly as a result of the conduct of the employer, to furnish a copy of the application papers to the employees or a representative trade

union or even SARS, although the latter is unlikely to be a practical problem."

[7] In **Rustenburg Crematorium (Pty) Ltd and Others vs Adriaan Jordaan N.O and Others** (CIV APP FB 01/2018 [2023] ZANWHC 49 (6 April 2023) a judgment of the Full Court of this division comprising of three (3) judges, and also penned by **Petersen J** (with **Reddy AJ** and **Mfenyana AJ** concurring), the following is stated:

1. *"[16] Counsel for the appellants has conceded that he was unaware of the EB Steam judgment of the SCA. Paragraph [25] of the said judgment makes it plain that there is no bar to granting a provisional winding-up order even if there has been non-compliance with section 346(4A)(a)(ii) of the Companies Act 61 of 1973. In my view, on a vigilant examination of the papers, the first respondent dismally failed to comply with the provisions of section 346(4A) in respect of the employees and the determination of the existence of any registered trade union. The letters which were served by the Sheriff prior to the Amended Notice of Motion being filed is not countenanced by the Companies Act. However, such non-compliance is not fatal to the grant of the provisional order as it is made clear in EB Steam. Whilst the facts of EB Steam in respect of not furnishing the employees with the application are distinguishable from the facts of the present matter, in that the employees were served with letters through the Sheriff of this Honourable Court, before the amendment of the notice of motion in which the respondents sought the liquidation of the Rustenburg Crematorium, the principle that a provisional liquidation may still be granted prevails. The papers in respect of service of the application on SARS is clear and nothing*

> *turns on this ground of appeal. I now turn to the ground of appeal which, in my view, is central to the appeal."*

It must be emphasized that the applicants in this matter seeks a **final winding-up** order, which makes it distinguishable from the **EB Steam** case of the SCA.

[8] Like in the **Bees Winkel** case, the only affidavit filed by the applicants to address compliance with the peremptory provisions and specifically the requirements of section 346(4A) of the Companies Act 61 of 1973, is the affidavit of Papangeli. In respect of service on the employees and trade unions of employees, Papangeli states:

> *"The application was furthermore served on the Employees and Trade unions on 22 March 2023 by affixing it to the principal door of the registered address being 35B Yusuf Dadoo Street, Wilkoppies. These returns are attached hereto as Annexure "Al" and "A2".*

Papangeli relies solely on the return of service of the Sheriff to allege that service of the application was effected on the employees and trade unions of the employees. I am in full agreement with the aforementioned caselaw that in the context of the present application, only the Sheriff can depose to an affidavit setting out the prevailing circumstances of the time she attended to service of the application on employees and trade unions of the employees. This was not done.

[9] Papangeli fails to identify in her affidavit who served the application on SARS **by hand** on 07 March 2023. Like it is stated in the **Bees Winkel** case, *supra*, 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 affecting service on SARS. This requirement is coached in peremptory terms and there is no room for deviation. So too, the service on the employees and trade unions of the employees. I am *ad idem* with what **Petersen AJ** stated in paragraph [17] and [18] of that case.

> *"[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."*

[10] In paragraph [22] the following is stated:

> *"[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."*

I am in full agreement with this *dictum.* There must be compliance with the dictates of section 346 (4A) (a) and (b). The application in this regard is defective, and it must be removed from the roll. With regard to costs, it should be in the application. As alluded to earlier on in this judgment, because this case is inter-related and intertwined with case number M113/2023, I deem it prudent not to pronounce on that matter at this stage. It should be postponed *sine die* and also with costs to be in the application. The court

dealing with these matters in the future should likewise deal with both matters simultaneously.

Order

[11] Consequently, the following order is made:

(ii) The application in case number M112/2023 is removed from the roll.

(iii) The application in case number M113/2023 is postponed *sine die.*

(iv) The wasted costs in both case numbers M112/2023 and M113/2023 shall be costs in the application.

_____

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG