

SOUTH AFRICA / JUDGMENT

Dry v Guest Village Little Dreams CC and Another (M255/21;M256/21) [2023] ZANWHC 131 (7 August 2023) [2023] ZANWHC 131

COURT

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

M255/21;M256/21

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION -

MAHIKENG

CASE NO: M255/21

Reportable:	NO Circulate
to Judges:	NO Circulate
to Magistrates:	NO Circulate
to Regional Magistrates:	NO In

the matter between: MAGDALENA JOHANNA DRY
 APPLICANT
 And
 GUEST VILLAGE LITTLE
 DREAMS CC
 1ST RESPONDENT
 JAN ABRAHAM CHRISOFFEL
 DRY
 2ND RESPONDENT
 AND

APPLICATION NO: M256/21
 In the application

between: MAGDALENA
 JOHANNA DRY
 1ST APPLICANT
 ANTONIE
 CHRISTOPHEL VAN DYK
 2ND APPLICANT
 MARIA
 MAGDALENA VAN DYK
 3RD APPLICANT
 JUANDRY
 EIENDOMME CC
 1ST RESPONDENT
 JAN ABRAHAM
 CHRISTOFFEL DRY
 2ND RESPONDENT

JUDGMENT

REDDY AJ

Introduction

- [1] The crisp issue that falls for adjudication is whether nor not the insolvent respondent close corporations (Juandry Eiendomme CC and Guest Village Little Dreams CC) fall to be finally wound up because of a deadlock between the members thereof alternatively, whether a conditional counter application in terms of the provisions of section 36(1)(d) of the Close Corporations Act 69 of 1984 by one of the members of the latter, ought to be granted in lieu of a winding up order. There is an interlocutory application for the reinstatement of the rule nisi in the application under case number M256/2021.
- [2] The members of the close corporations are Mrs. Magdalena Johanna Dry (“Mrs. Dry”) and Mr. Jan Abraham Christoffel Dry (“Mr. Dry”). Mr. and Mrs. Dry are members of the Guest Village

Little Dreams CC and Juandry Eiendomme, each holding fifty per cent (50%) of the members interest therein. Mr. and Mrs. Dry are litigants in matters M255/21 and M256/21.

Litigation backdrop

- [3] Mr. and Mrs. Dry are involved in a rancorous divorce. Mrs. Dry and her applicants have been successful in securing provisional orders for the liquidation of both close corporations (Guest Village Little Dreams CC, M255/21, and Juandry Eiendomme M 256/21) and now apply for the winding up of the respective close corporations. In promoting the expeditious, efficient, and effective hearing of the main and counter application, it was agreed by counsel for both parties, that a pragmatic approach be adopted. Resultantly, both applications as well as the counter application are founded on fundamentally similar facts and may be disposed of, by the hearing of one application, incorporating the counter application. This was then the agreed litigious course endorsed by this Court.
- [4] Afore a consideration of a winding up order, or the conditional counter application, it is peremptory for it to be found that there had been due diligence in the compliance with peremptory service requirements as evinced by s346(A4) (a)(i) and (ii) and s346A(1)(a) and (b) of the Companies Act 61 of 1973.
- [5] On 22 October 2021 in Case Number M255/21, a provisional order was granted along the following terms by Petersen J:

1.THAT: The estate of GUEST VILLAGE LITTLE DREAMS CC(Registration number: 2003/104930/23(“ the First Respondent” be placed under provisional liquidation in the hands of the Master of the North West Division, Mahikeng returnable on 25th day of November 2021 to the unopposed roll,

2.THAT: A provisional order issued calling upon the First respondent and any other interested party to show cause, if any, to the Honourable Court, on the return date, why a final order of liquidation should not be granted against the First Respondent:

3. THAT: This order must further be served on:

3.1. The First Respondent at its registered address by the Sheriff.

3.2 any registered trade union as far as the Sheriff can reasonably ascertain represents any of the employees of the respondent.

3.3 the First Respondent’s employees, if any by affixing a copy of the application and provisional court order to any notice board to which the employees have access inside the First 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 , to the front door of the premises from which the First Respondent conducts any business

3.4 the South African Revenue Service, Mahikeng.

3.5. The Master of the High Court Mahikeng.

4. THAT: This order is to be published as follows:

4.1. by publication in 1 (ONE) edition of the Beeld Newspaper.

4.2. by 1(ONE) publication in the Government Gazette

5. THAT costs of this application, on a scale as between attorney -and-client shall be costs in the administration of the insolvent estate of the First Respondent

[6] On 22 October 2021 in motion matter Case Number 256/21 the following order was granted by Petersen J:

1. THAT: The estate of JUANDRY EIENDOMME CC(Registration number: 2006/039520/23("the First Respondent") be placed under provisional liquidation in the hands of the Master of the North West Division, Mahikeng returnable on 25th day of November 2012 unopposed motion roll.

2. THAT: A provisional order is issued calling upon the First Respondent and any other interested party to show cause, if any to the Honourable Court, on the return date, why a final order of liquidation should not be granted against the First Respondent

3. THAT: This order must be served on:

3.1 The first respondent as its registered address by the Sheriff.

3.2. any registered trade union that as far as the Sheriff can reasonably ascertain represents any of the employees of the Respondent.

3.3 the First respondent's employees, if any by affixing a copy of the application and provisional order to any notice board to which the employees have access inside the First 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, to the front door of the premises from which the First Respondent conducts any business.

3.4 the South African Revenue Service;

3.5 The Master of the High Court, Mahikeng

4. THAT: This order is to be published as follows:

4.1 By publication in 1(ONE) edition of the Beeld Newspaper;

4.2 by 1(ONE) publication in the Government Gazette.

5. THAT: The costs of this application on an attorney -and-client scale shall be costs in the administration of the insolvent estate of the First Respondent.

[7] In terms of these orders, it was peremptory that service of the liquidation and the provisional orders be served on the employees of the first respondent, as well as the trade unions representing such employees as evinced by s346(4A) (a)(i) and(ii) and s346A(1)(a) and

(b) of the Companies Act 61, of 1973. Notwithstanding the repeal of the 1973 Act, these provisions remain in force by virtue of the provisions of item 9 of Schedule 5 of the Companies Act 71 of 2008.

[8] Section 346(4A) of the Companies Act 1973 reads as follows:

“(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) 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 interest of the company or 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.”

[9] Mrs Dry has inundated the record with supplementary affidavits to pass the barometer of compliance with the service requirement. The first service requirement relates to case number: M255/21 which provides as follows.

1

1. I am an adult female businesswoman residing at 1[...] S[...] Street, Lichtenburg, North West.

2

I am the Applicant in the present application and the facts herein fall within my own personal knowledge and belief and unless otherwise indicated are to the best of my belief both true and correct.

3

Where I make allegations of a legal nature, I do so on the strength of the advice which I received from my legal practitioner.

4.

PURPOSE OF THE AFFIDAVIT

The purpose of this affidavit is to deal with the service of the provisional order in compliance with section 346A of the Companies Act 61 of 1973.

5.

I respectfully request this Honourable Court's leave to submit this affidavit in terms of Uniform Rule 6(5) in order to clarify any technical issues this Honourable Court may have with the service of the provisional order on the employees and the trade unions representing the employees of the respondents.

6.

I confirm that I am in charge of the business dealings and affairs of the Respondent including the payment of salaries to employees and I can confirm that the Respondent does not have any employees and consequently no trade unions representing them.

7.

The "Ms J Pretorius" referred to on paginated pages 178 and 179 of the bundle being the Sheriff's returns of service in respect of the service of the provisional order on the employees and the trade unions, is not an employee of the Respondent and I respectfully submit that the provisions of section 346A of the Companies Act have been complied with as well as the provisions of the provisional order in that the order was served on the Respondent at its registered address, which Respondent does not have any individuals in its employee and therefore service on employees and trade unions is required in terms of the Act could not have been effected.

8.

In an attempt to convey the Applicant's bona fide intention to this Honourable Court, my attorney has instructed the Sheriff to again attend the Respondent's registered address to have the provisional order served and accordingly furnish us with returns of service confirming that the respondent does not have employees and trade unions representing same.

[10] The second supplementary affidavit deposed to on the 2 March 2023 is dealing with case number M256/21. The salient portion provides as follows:

"I cannot confirm whether or not the First respondent has employees. The Second Respondent has been in charge of the business dealings and affairs of the First Respondent and I respectfully submit that it may very well be that Ms J Pretorius is an employee of the First Respondent, as recorded on Annexure "SLC5" to the compliance affidavit deposed to be Siobhan Loise Clancy on paginated page 201 of the bundle, being the Sheriff's return of service in respect of service of the provisional order on the employees.

- [11] Mr Dry deposed to an affidavit on 13 March 2023, contending that on the 11th hour delineating this to be 6 March 2023, a service affidavit relating to the service of the provisional order on the employees of the first respondent came to the attention of his attorney. This was on Friday, 10 March 2023.
- [12] Notably Mr Dry contends that Mrs Dry does have intimate knowledge of his various employees. To reinforce, the existence of the employees UIF Claim Forms for Covid TERS payments were annexed. Further thereto, Mrs Dry has explicit knowledge that the address in Hendrik Potgieter Street is not the address of the close corporation. As a result, service on Ms J Pretorius who is not employed by Jaundry CC, is insufficient.
- [13] Many of the employees of Juandry CC are employed on the farm Bokkraal, where they also reside. The other employees are working at a property described as 2[...] B[...] Street, Lichtenburg. Mr Dry overtly states that the sequestration and the provisional order was not served on any of the employees. Consequently, the employees are unaware of the liquidation application, inclusive of the provisional order.
- [14] Reacting to the affidavit of Mr Dry, a further compliance affidavit was deposed to by Ms. Hananja Jordaan in which the following averments are made:

Service at Bokkraal

“Copies of the liquidation application as well as the provisional order were served on the employees of the First Respondent at the farm Bokkraal on the 14 March 2023, as is evident from a copy of the tax invoice received from the Sheriff annexed hereto as “SA1” from which it is evident that the liquidation application and the provisional order were served on the employees of the First Respondent at the farm Bokkraal by the Sheriff Groot Marico by serving same upon Aubrey(employee) after the original document was displayed and the nature and contents thereof explained to him.”

Service on Trade Unions Representing Employees

“Copies of the liquidation application as well as the provisional order was served on any trade unions that may represent the employees of the First Respondent at the farm Bokkraal on 14th of March 2023, as is evident from a copy of a tax return invoice received from the Sheriff annexed hereto marked Annexure “SA2”, from which it is evident that the liquidation and the provisional order were served on the trade unions by the Sheriff Groot Marico by affixing same to the principal door of the premises....”

Service on the employees of the first respondent at 2[...] B[...] Street

“Copies of the liquidation application as well as the provisional order were served on the employees of the First Respondent at 2[...] B[...] Street, Lichtenburg on the 15th of March 2023, as is evident from a copy of a tax invoice received from the Sheriff annexed hereto marked Annexure “SA3” from which it is evident that the liquidation application and the provisional order were served on the employees at 2[...] B[...] Street, Lichtenburg by the Sheriff Lichtenburg by affixing same to the front door of the premises.....”

Service on the Trade Unions representing the employees of the first respondent at 2[...] B[...] Street.

“Copies of the liquidation application as well as the provisional order were served on the trade unions that may represent the employees of the First Respondent at 2[...] B[...] Street, Lichtenburg on the 15th of March 2023, as is evident from a copy of a tax invoice received from the Sheriff annexed hereto marked Annexure “SA4” from which it is evident that the liquidation application and provisional order was served on the trade unions by affixing same to the front door of the premises...”

[15] In respect of service in case number M255/21 on 2 March 2023 Mrs Dry deposes to an affidavit on an unknown date either at Lichtenburg or Rustenburg, given the amendment incorrectly done by the Commissioner of Oaths, wherein the following is stated:

6

“I confirm that I am in charge of the business dealings and affairs of the Respondent including the payment of salaries and I can confirm that the Respondent does not have any employees and consequently no trade unions representing them.”

[16] Further at paragraph 7, the following contention is made:

“The Ms J Pretorius referred to on paginated pages 178 and 179 of the bundle, being the Sheriff's returns of service in respect of the service of the provisional order on the employees and the trade unions, is not an employee of the Respondent and I respectfully

submit that the provisions of section 346A of the Companies Act have been complied with as well as the provisions of the provisional order in that the order was served on the Respondent at its registered address, which Respondent does not have any individuals in its employ and therefore service on the employees and trade unions as is required in terms of the Act could not have been effected.”

[17] Continuing at paragraph 8;

“In an attempt to convey the Applicant's bona fide intention to this Honourable Court, my attorney has instructed the Sheriff to again attend the Respondent's address to have the provisional order served and to accordingly furnish us with returns of service confirming that the Respondent does not have employees and trade unions representing same.”

The Law on Service

[18] In *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* (2014)

(1) All SA 294 (SCA) the following was stated as regards service:

[27] Turning to the present case, the application papers are silent about the existence of employees or their location. The

different companies operate in a number of different locations around South Africa. There is no indication in the sheriff's return of service that he made any enquiries as to the existence of employees of the companies or their place of work. In those circumstances the court below should not have been satisfied that there had been compliance with the requirements of s 346(4A) insofar as the employees were concerned. For that reason, it was inappropriate to grant final winding-up orders in relation to these companies. Whilst that is permissible in certain cases the well-established rule that, save in clear cases, a provisional winding-up order should be issued, should have been followed here and directions given for the employees to be identified and the application papers to be furnished to them. It is appropriate in this case to achieve that by directing the appellants to fulfil their obligations under the LRA. (In the light of the approach they have taken to this litigation I assume that they have not already done so. The directions embodied in the order set out below will not preclude the respondent from placing evidence before the court hearing the application on the issue of furnishing the application papers to employees of the companies."

(Footnotes omitted.)

[19] There is no underscoring the importance of a Sheriff's return to confirm the acquiescence with the orders of court. The original Sheriff's returns in respect of all services were not handed in, in respect of both Case numbers M255/2021 and M256/2021. Given the drastic relief sought, it would have been judicially irresponsible to have proceeded to grant winding up orders on this

basis. A concerning feature of all the returns of service was that Mrs Dry was purely complying with sequestration and provisional

liquidation orders of 22 October 2021, on 14 and 15 March 2023 belatedly and in a hazardous fashion.

[20] To make short shift of the point, the applicant was inept in ensuring competent and effective service. There certainly exists a synergy between the latter trite principles of service. To hastily serve, incompetently and ineffectively is equivalent to no service. This is more so, because Advocate Fourie conceded that the service of the sequestration and provisional liquidation orders were indeed problematic. This was a concession well made.

[21] In *Absa Bank v Mare and Others* A56/2019 2021(2) SA 151 (Gauteng Division, Pretoria), the full bench stated as follows regarding a Sheriff's return of service:

"[19] A return of service, it is trite, is regarded as prima facie evidence of its contents. Indeed, s 43(2) of the Superior Courts Act 10 of 2013 expressly provides that "[t]he return of the sheriff or a deputy sheriff of what has been done upon any process of a court, shall be prima facie evidence of the matters therein stated". It follows that such evidence may be challenged by adducing the clearest evidence. (See, for example, *Greeff v Firststrand Bank*

Ltd 2012

(3) SA 157 (NCK), para 10; Deputy Sheriff, Witwatersrand v Goldberg 1905 TS 680.)

[22] In case number M256/2021, copies of tax invoices and unsigned Sheriff's returns were presented to attest to compliance with the court order dated 22 October 2021. There is no compliance with the peremptory orders governing the service as provided for in s346(A) of the Companies Act. It is logical that non-compliance with the service of the provisional order undoubtedly will impede the granting of the final order unless there has been compliance.

[23] This Court does not have an inherent power to overlook the lack of strict compliance with the set-out provisions. In Hendricks NO & Others v Cape Kingdom (Pty) Ltd 2010(5) SA 274(WCC), it was stated that the inherent jurisdiction of the Court does not extend to allow it to condone non-compliance with the requirement that a copy of the application must be furnished on the parties which are specified in s346(4A)(a)(ii), and approved the views of Davis J in Moodliar NO & Others v Hendricks NO & Others [2009]JOL 24459(WCC), wherein it was categorically stated that a court is not enjoined with power to condone the non-compliance with provisions of s346(4A) but that the "answer may well lie, not so much in the inherent jurisdiction of the court to condone non-compliance, as in the nature of the concept of compliance itself."

[24] In Maharaj and Others v Rampersad 1964(4) SA 638(A) at 646C-D, the following was stated:

"the enquiryis not so much whether there has been exact, adequate, or substantial compliance, but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that even though a position...is not identical to what it ought to be the injunction has nevertheless been complied with. In deciding whether there has been compliance with injunction, the object sought to be achieved by the injunction and the question and, the question of whether this object has been achieved, are of importance."

[25] An approach to piecemeal litigation should be deprecated. It would have served no profound purpose for this Court to confine itself to the single issue of compliance with the provisions of section 346(A) of the Companies Act and open "the door to a factional disposal of proceedings and the piecemeal hearings of appeals on each part so disposed of." See Theron NO and Another v Loubser NO and Others: In Re: Theron NO and Another v Loubser and Others [2013] 2014 (3) SA 323 (SCA) at paragraph [19]. There is still the main and counter application that falls to be adjudicated on. To avert a fractional disposal and to address the substantive applications, the following orders were crafted with the assistance of both counsel. Regarding costs, the applicants are granted an indulgence, consequently there is no reason to deviate from the normal practice.

[26] The following order is made:

Case Number 255/21

It is ordered:

1. The applicant's attorney of record is directed to prepare and deliver a complete consolidated affidavit in terms of section 346(4A)(a) and section 346A of the Companies Act, 61 of 1973 relating to service of the application and any subsequent orders granted, together with proof of service, including the relevant original Sheriff's returns of service, where applicable, by no later than 23 August 2023.
2. Reasons for the order made in terms of paragraph 1 will be provided on 7 August 2023.
3. In relation to the order made in terms of paragraph 1 the applicant is to pay the costs.
4. The rule nisi is extended to 23 August 2023.

Case Number 256/21

5. That the rule nisi issued by the Honourable Mr. Justice Peterson on 22 October 2021, and thereafter extended by the Honourable Mr. Justice Hendricks on 25 November 2021, and again extended by Mr. Justice Hendricks on 11 March 2022 to 8 September 2022, is hereby revived.
6. The rule nisi so revived need not be served again.
7. The order granted by the Honourable Mr. Justice Hendricks on 25 November 2021, extending the rule nisi to 11 March 2022, is amended to reflect the registration number of the first respondent, Juandry Eiendomme BK, to read "2006/035920/23".
8. In relation to the orders made in terms of paragraphs 1, 2 and 3, no order is made as to costs.
9. The applicant's attorney of record is directed to prepare and deliver a complete consolidated affidavit in terms of section 346(4A) (a) and section 346A of the Companies Act, 61 of 1973 relating to service of the application and any subsequent

orders

granted, together with proof of service, including the relevant original Sheriff's returns of service, where applicable, by no later than 23 August 2023.

10. Reasons for the order made in terms of paragraph 5 will be provided on 7 August 2023.
11. In relation to the order made in terms of paragraph 5, the applicant is to pay the costs.
12. The rule nisi is extended to 23 August 2023.

A REDDY

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the Applicant: Adv H Fourie Attorneys for Applicant: Bosman & Bosman Attorneys C/O Labuschagne Attorneys 19 Constantia Drive Riviera Park Mahikeng For the Respondent: Adv J H F Pistor SC Attorneys for Respondent: Strydom & Bredekamp Attorneys C/O: Smit Stanton Inc 92 Warren Street Mahikeng Date of hearing: 17 March 2023 Date of judgment: 07 August 2023

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Prepared on 14 October 2026 · Esheria