

SOUTH AFRICA / JUDGMENT

Outdoor Illumination (Pty) Ltd v Munwap Cafe (Pty) Ltd (2024-124949) [2025] ZAGPPHC 148 (18 February 2025)

[2025] ZAGPPHC 148

COURT

North Gauteng High Court, Pretoria

BEFORE

Swanepoel

CASE / FILE NUMBER

2024-124949

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case number:

2024-124949

Date of hearing: 7

February 2025

Date delivered: 18

February 2025

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

DATE: 18/2/25

SIGNATURE

In

the application of:

OUTDOOR

ILLUMINATION (PTY) LTD

Applicant

and

MUNWAP

CAFÉ (PTY) LTD

Respondent

JUDGMENT

SWANEPOEL J:

- [1] The applicant seeks the winding up of the respondent. The applicant's cause of action arises from services rendered by the applicant to the respondent to the value of R 166 750.
- [2] The applicant relies upon the provisions of section 344 (f) of the Companies Act 61 of 1973 ("the Act") which provides that a company may be wound up if it is unable to pay its debts as described in section 345 of the Act.
- [3] The applicant furthermore relies upon the deeming provisions in section 345 (1) (a) (i) to support its contention that the respondent is unable to pay its debts. The relevant provision reads as follows:

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

- (1) A company or body corporate shall be deemed to be unable to pay its debts if-
- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum of not less than one hundred rand then due-
- (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
- (ii)

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

- [4] I have highlighted the relevant passage in the above quote as it is on these words that this application turns. On 11 September 2024 the applicant caused a section 345 (1) (a) (i) demand to be dispatched to the respondent. Although the letter was addressed to the respondent's registered office, it was sent by registered mail.
- [5] The applicant's case is based entirely upon the deeming provision in section 345 (1) (a) (i). It did not seek to provide any other evidence regarding the respondent's inability to pay its debts. At the hearing of the matter in the unopposed motion court I sought counsel's submissions on whether the dispatch of the letter by registered mail satisfied the requirements set out in section 345 (1) (a) (i) of the Act, in that it was my prima facie view that a letter sent by registered mail did not constitute "leaving at the registered office". The applicant's counsel conveyed to me that his attorney was adamant that the demand had been properly served, which did nothing to assuage my concerns. I therefore invited counsel to submit heads of argument to me on this issue.

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

[7] In *Bank of Baroda v Annex Distribution (Pty) Ltd*[1] the applicant had attempted to serve the section 345 demand at the respondent's registered office. The premises were, however, found to be occupied by an unrelated third party who refused to accept the notice. The notice was also emailed to the respondent's

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

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

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

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

"The way in which this section is framed is significant. Only if the prerequisites enumerated in a conditional clause exist, does the Court have the power to order a winding up of the company on this ground. Hence each of the conditions contained in this sub-section

must be satisfied a priori. 'Service' on the company of a demand is required and the method of its service is exclusively described as 'by leaving the same at its registered office'."

- [10] In *BP and JP Investments (Pty) Ltd v Hardroad (Pty) Ltd*[5] the court, relying on *Phase Electric*, emphasized that for the deeming provision in section 345 (1) (a) (i) to apply, there had to be strict compliance with the requirement that the notice be left at the companies registered office. This approach was approved on appeal by a Full Court[6].
- [11] However, in consonance with the approach applied in *Nathaniel's case*, that form should not triumph over substance, the court held in *Wellington Board of Executors Ltd v Schutex Industries (Pty) Ltd*[7] that delivery of a notice in terms of section 112 of the Companies Act, 1926 by registered mail was sufficient compliance with the section, in circumstances where the respondent had received the notice and had acknowledged receipt of it.
- [12] From the above cases the following principles can be distilled. Generally, it is necessary for a section 345 (1) (a) (i) notice to be left at the registered office. It is advantageous to an applicant to arrange for the delivery to be made by the Sheriff, as it then gains the advantage of a presumption that the contents of the return of service are correct. However, it is not a requirement that service must be effected by the Sheriff, and if the applicant can prove delivery by someone else, that is sufficient to trigger the deeming provision.
- [13] The notice must be left at the registered office, but in cases where the applicant can prove that the respondent actually received the notice, even if delivery occurred at a place other than the registered office, (as in *Nathaniel* and *Wellington's cases*), such delivery may be sufficient compliance with section 345 (1) (a) (i).
- [14] That brings me to the facts of this matter. There is no evidence that the respondent actually received the notice. The applicant has not left the notice at the registered office, and it may well be that the notice is still at the Post Office. Therefore, the deeming provision in section 345 (1) (a) (i) has not been triggered. The entire substratum of the application has failed and the application must be dismissed.
- [15] I make an order in the following terms:

The application is dismissed.

SWANEPOEL J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

Counsel for the applicant: Adv. D Broodryk Instructed by: Serfontein Viljoen & SWart Date heard: 7 February 2025 Date of judgment: 18 February 2025

[1] Unreported Pretoria High Court case number 38591/2019 dated 14 May 2020; [2020] JOL 47332 (GP)

[2] [1996] 2 All SA 317 (T)

[3] 1973

(3) SA 914 (W)

[4] At 917 C

[5] 1977

(3) SA 753 (W)

[6] BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd 1978 (2) SA 481 (T)

[7] 1952

(3) SA 170 (C)

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Prepared on 13 October 2026 · Esheria