

SOUTH AFRICA / JUDGMENT

Roberts v Taylor of Buckingham CC and Others (2008/21864) [2008] ZAGPHC 435 (28 November 2008)

[2008] ZAGPHC 435

COURT

High Courts - Gauteng

BEFORE

P Blieden

CASE / FILE NUMBER

2008/21864

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND

LOCAL DIVISION)

CASE

NO: 2008/21864

DATE:

28/11/2008

In

the matter between:

PETER

WAYNE

ROBERTS.....Applicant

and

THE

TAYLOR OF BUCKINGHAM

CC.....First

Respondent

CHAD

JAMES

JOSEPH.....

.Second

Respondent

DARREN

ANTHONY

JOSEPH.....Third

Respondent

JUDGMENT

BLIEDEN. J:

[1] Section 346(4A) of the Companies Act, No. 61 of 1973 (the Companies Act) reads:

"(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;

(Hi) 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."

[2] The present application is one for the winding up of the first respondent close corporation. Section 346(4A) of the Companies Act is applicable to close corporations in terms of section 66 of the Close Corporations Act, No. 69 of 1984. It is not in issue that the first respondent has 27 employees.

[3] The winding up application of the first respondent was opposed and was fully argued. At the end of counsels' argument the applicant

handed up an affidavit which purported to comply with the requirements of section 346(4A)(b) of the Companies Act. The affidavit, which was made by a candidate attorney in the employ of the applicant's attorneys indicates that:

(a) no attempt has been made by the applicant to comply with the requirements of subsection 4A(a)(i);

(b) the only attempt to comply with subsection 4A(a)(ii) was on 18 November 2008 at 09h33, that is 27 minutes before the matter was due to be called in court, by the Sheriff attaching the application to a notice board in the first respondent's premises.

[4] As is plain from a reading of subsection 346(4A) of the Companies Act compliance thereof is peremptory. The relevant subsection became law in January 2003. Counsel was unable to refer me to any authority which deals with the consequences of the non-compliance with section 346(4A), nor have my researches in this regard produced any fruit.

[5] Save for the authors of *Meskin: Insolvency Law*, the various text writers on the Companies Act and the Insolvency Act although

referring to the relevant subsection have not dealt with the consequences of its non-compliance.

Blackman et al in *Commentary on the Companies Act* (Volume 3 at 14-170) makes the following comments on the subsection:

"It is not clear when a copy of the application must be furnished to the persons described in section 346(4A). The subsection says it must be done when an application is presented to the court'. As the intention, no doubt, of subsection 346(4A) is to give the persons to whom a copy of the application must be furnished, an opportunity, if necessary to be heard, it is submitted that the 'furnishing' must take place when the application papers are lodged with the registrar and not only at the time the matter is heard by the court. The latter would not give the persons involved sufficient notice.

The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application to the persons mentioned in subsection 346(4A), which sets out the manner in which the 'furnishing' required by subsection 346(4A) was complied with."

[6] Henochsberg on the Companies Act (Volume 1) at page 724(2) makes the point that non-compliance with the relevant subsection 4A(a)(i) to (iii) precludes the grant of a provisional order until there has been compliance.

[7] It seems therefore that the textbook writers referred to above are in general agreement that without compliance of the subsections

concerned a court cannot grant a provisional order. However, in neither of these text books do the writers deal with the situation

where the matter has been fully argued in the absence of compliance with the relevant subsection, as has occurred in the present case.

[8] The authors of *Meskin: Insolvency Law* referring to subsection 9(4A)(a) of the insolvency Act, No. 24 of 1936 which is in precisely the same terms as subsection 346(4A) of the Companies Act, at 2-38 comment that "... the intention is that the copy of the application is to be delivered immediately after the application papers are lodged with the court (i.e. filed with the registrar) and not the date upon which the application is heard. The latter

interpretation, so it is submitted would effectively deprive the debtor of any, or any adequate, notice of the application and of the opportunity to be heard prior to the grant of a provisional order".

In their further discussion of the subsection at page 2-40, the learned authors further comment

'While section 9(4A)(a)(iv) specifically provides for the circumstances in which the Court may dispense with the delivery of the application to the debtor, no such provision applies in relation to the delivery of the application to the persons mentioned in subsection (4A)(a)(i) to (Hi). The provisions of these subsections are ostensibly peremptory, but it is submitted that this notwithstanding, a failure in any respect to comply therewith is a formal defect, within the meaning of section 157(1)."

The subsection of the Insolvency Act referred to reads:

u 157(1) Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court."

[9] Neither the Companies Act nor the Close Corporations Act has a provision similar to section 157(1) of the Insolvency Act. However, that apart, I am in respectful disagreement with the learned authors in their classification of a non-compliance with the provisions of subsection 346(4A)(a)(i) and (ii) as a "formal defect" capable of remedy by the court. A failure by a party to comply with peremptory provisions regarding the service of papers on specified

parties in an application, in my opinion cannot be regarded as something merely formal. It is a substantial non-compliance of a

provision of an Act. The reliance by the learned authors on the decision of the full bench of the Natal Provincial decision in *Ex Parte Harmse* 2005

(1) SA 323 (N) for their comments, is in my view misplaced. That case concerned the premature publication of a notice of the surrender of an estate under section 4(1) of the Insolvency Act and its effect on the surrender application. The present case deals with a totally

different situation. Here there has been a failure to serve an application on parties designated by statute as being entitled to

receive it.

[10] In his founding affidavit the applicant, in paragraph 30, stated that the Sheriff would be asked to enquire from the employees whether they were represented by a trade union and he also undertook to serve a copy of the application papers on the employees by affixing it to a notice board in the first respondent's premises. In his answering affidavit, the second respondent acting on behalf of the first respondent, pointed out that at the time of his deposing to that affidavit no copy of the papers had been affixed to the corporation's notice board. In his replying affidavit the applicant stated that he would ensure that the employees

would be given proper notice of the application. This clearly was not done. It therefore seems plain that the applicant, and those acting on his behalf, has only himself to blame for not complying with the peremptory requirements of section 346(4A).

- [11] Counsel for the applicant, as he was constrained to do, was unable to submit that there was any way that a provisional order could be granted in his client's favour at this stage. He however submitted that the applicant should be given time to serve the papers on the relevant trade union/s and the first respondent's employees and the matter could then be dealt with.
- [12] On behalf of the first respondent it was submitted that subsection 346(4A)(a) is an extension of the audi alteram principle to recognize the interests of persons vitally affected by the pending proceedings, which in the nature of things will impact significantly on their ability to maintain themselves and their dependants.
- [13] In my view there is substance in this latter argument. The application for winding up, when it was lodged with the Registrar,

required that the applicant at that time complied with the requirements of subsection 346(4A). Had the court been aware that there had been no such compliance the matter would have been struck off the roll. The fact that the matter has now been fully argued does

not change the position. The application should not have been heard in the first place. It was not properly before the court.

[14] In the circumstances the following order is made:

14.1 The application is struck off the roll.

14.2 The applicant is ordered to pay the respondents' wasted costs, which costs are to include the costs of opposing the application in court.

P BLIEDEN

JUDGE OF THE HIGH COURT

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DATES OF HEARING 20-21 NOVEMBER 2008

DATE OF JUDGMENT 28 NOVEMBER 2008

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Prepared on 12 October 2026 · Esheria