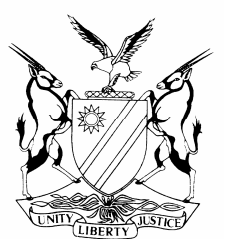

"REPORTABLE"

CASE NO.: A 226/2005

SUMMARY

ERIC KNOUWDS N.O. versus **NAMANGOL INVESTMENTS (PTY) LTD**

DAMASEB, JP

27/05/2008

COMPANY LAW – COMPANIES ACT 61 OF 1973:

- Winding up of a Company on the ground of its inability to pay its debts (S.344 (f) read with s345 and on the ground that it is just and equitable (s. 344(h).
- Application to strike out new matter in replying papers: Principles applicable

CASE NO.: A 226/2005

IN THE HIGH COURT OF COURT OF NAMIBIA

In the matter between:

ERIC KNOUWDS N.O. **APPLICANT**
(In his capacity as provisional liquidator
of Avid Investment Corporation (Pty) Limited)

and

NAMANGOL INVESTMENTS (PTY) LTD **RESPONDENT**

CORAM: DAMASEB, JP

Heard: 02 – 06/03/06; 19/05/06 & 22/05/06
Delivered: 2008.05.27

JUDGMENT

DAMASEB, JP: [1] On the return date of a *rule nisi* which placed the respondent in provisional liquidation, the applicant seeks a final order which is opposed by the respondent. The *rule nisi* was granted *ex parte* on 27 07 2005 following an urgent application.

[2] The applicant is the only remaining liquidator of Avid Investment Corporation (Pty) Ltd (Avid), his two joint provisional liquidators (Ian McLaren and David Bruni) having resigned after the interim order was granted. The late Lazarus Kandara was the Chief Executive Officer of Avid at the time the events took place which give rise to the present application. The respondent is Namangol Investments (PTY) Ltd who's Managing Director and alter ego at all material times relevant to the present matter was Nicolaas Josea. Josea deposed to the opposing papers in this case on behalf of the respondent. The respondent's winding up is sought on two grounds, to wit, that it is unable to pay a debt owed to Avid as contemplated by s344 (f) read with s345[1] of the Companies Act, No. 61 of 1973 and that, in any event, its winding-up is just and equitable in that the reckless conduct of the respondent's directors and or office bearers had the effect of driving the respondent into insolvency as contemplated by s344 (h) of the Companies Act aforesaid.

[3] The applicant obtained an order for the provisional liquidation of the respondent with the return date of 29 08 2005. That order required the applicant to effect service of the *rule nisi* on the respondent as follows:

---

[1] "S345:
(1) A company or body corporate shall be deemed to be unable to pay its debts if –
...
(c) It is proved to the satisfaction of the Court that the company is unable to pay its debts."

"(i) by service of a copy of the rule by the deputy sheriff on the respondent's registered address; and

(ii) by publishing same in one edition of each of the government gazette and the Namibian newspaper."

[4] In paragraph 4.3 of his answering affidavit deposed to on 9 09 2005, Nicolaas Josea alleges that the applicant failed to serve the provisional order on the respondent and adds that:

> "… it is only because of the media coverage that I came to know thereof. As such my and Namangol's attorneys of record through their own endeavours procured copies of the application and the provisional order."

[5] After the applicant filed of record his replying papers, the respondent brought a formal application to file a fourth set of papers (which he refers to as "the duplicating affidavit") and the applicants consented thereto. In the exercise of my discretion I allowed the so-called duplicating affidavit to be received, especially in view of the parties' agreement on the issue. The evidence on behalf of the respondent referred to in the body of this judgment is therefore derived either from the first set of answering papers or from the second set of answering papers.

[6] In paragraphs 24.1 and 24.3 of his replying affidavit dated 12 10 2005, Eric Knouwds states that the provisional order was not served on the respondent as directed by the Court, but that a copy of the papers and the order were handed to the respondent's legal representatives on

or about 27 07 2005. He then adds that he would proceed to have the order formally served on the respondent.

[7] In a supplementary affidavit deposed to by the applicants' legal practitioner of record, Mr Rodgers Kauta, the latter annexes a return of service by the deputy sheriff dated 27 07 2005 confirming that the provisional liquidation order was served on the respondent at its registered address on that date. Why Knouwds testified that it was not served is not clear and it is probably an error. The return of service corroborates Mr Kauta and clearly the Court order was complied with in that the order was served on the respondent's registered address as directed.

[8] In a judgment in a related case of *Eric Knouwds N.O. v Nicolaas Josea and Another* Case No. (P) A 227/2005 delivered on 11 12 2005, I made observations about an applicant who proceeds *ex parte* and obtains an order to only serve the *rule nisi* without also serving the founding papers. I said then, and I repeat, that such a practice is inherently unfair. In that case I discharged the *rule nisi* because in addition to the failure to serve the entire application, it was admitted that even the bare minimum service required by the Court order had not been complied with. Additionally, service was sought, and erroneously granted, to be effected on a "registered address" of a natural person – a legal impossibility. The

present case is distinguishable from the *Josea* case in that the service ordered by the Court, although deficient in the sense that it did not include the founding papers, was complied with. It is important to bear in mind that the proceedings in the *Josea* case related to the sequestration of an individual and *audi alterem partem* in my view assumes an even greater role when the status of a person is involved. [See paras 23 and 24 of the *Josea* judgment.] The point *in limine* that the applicant failed to comply with the Court's order as to service must therefore fail.

[9] The present case is concerned with the inability or otherwise of the respondent to repay a substantial part of the N$29.5m transferred to it by Avid on 28 01 2005 for the purpose of investment. The applicant maintains that all told, Namangol is indebted to Avid in excess of N$9m. It will soon become apparent that the indebtedness is not disputed by the respondent. The applicant therefore has *locus standi* as a creditor. The real issue in this case is whether the respondent defaulted on its obligation to Avid and whether it is not in position to repay the debt owed to Avid.

[10] The following facts are common cause. On 28 01 2005, Avid transferred the amount of N$29.5m into Namangol's investment account following an agreement between Josea and Kandara. That amount was

part of the N$30m paid over by the Social Security Commission (SSC) to Avid on 26 01 2005 in terms of an onward- investment mandate granted to Avid by the SSC. The money was to be invested so as to earn interest and to be repaid with such interest. Of the N$29.5m paid over to it by Avid, Namangol transferred N$20m to Alan Rosenberg Investment Bank of South Africa on 29 01 2005 ostensibly for the purpose of investment. In or about March 2005 Namangol brought an urgent application in the Cape High Court against Allan Rosenberg Investment Bank for the return of the N$20m. A settlement was reached between the parties following that suit resulting in N$15m being paid into the trust account of attorneys Orchard Greyling then acting on behalf of Namangol. Once the N$15m was received by attorneys Orchard Greyling, Josea instructed them to transfer it into his personal account. Excepting an amount withheld as fees by the said attorneys, the balance from the N$15m (in excess of 14m) was paid into the personal account of Josea as per his instructions. Following that transaction Josea made several large payments from his personal account to the extent that on 19 07 2005 only N$ 46.401.00 remained on his personal account.

[11] On behalf of Namangol Josea disputes the allegation that Namangol is unable to pay its debt to Avid and he maintains that the close to N$15m of Namangol's funds paid into his account represents a loan against him in the books of Namangol. Josea then makes reference to

the settlement agreement concluded with Rosenberg in the wake of the Court action in the Cape High Court from which Namangol reportedly stood to make a huge profit on the money invested with Allan Rosenberg. Josea deals with this in paragraphs 13, 14, 15 and 16 of his answering affidavit as follows:

> "13. I have to state that the aforementioned settlement was negotiated over three days in the offices of Mr Rosenberg's attorneys, who also attended to the drafting of the said settlement agreement. During the course of these three days Mr Rosenberg produced numerous documents which ultimately satisfied me that the investment capital was safely engaged in the envisaged trade. On that basis and premised upon a fifty percent share of the investment trade of US$35 800 000.00 (detailed in the settlement agreement), being more than just an ordinary return on capital, being given to Namangol, I settled the matter with Mr Rosenberg. The aforesaid investment trade is due to mature during the first week of March 2006, when Namangol stands to be paid US$17 900 000.00 (being half of the trade) less any monies that it would have received by then against same. To this end I refer to Annexure "S1", being a copy of the trade agreement relating to the aforesaid trade wherein the Social Security Commission's monies had been invested, as furnished to me by Mr Rosenberg.
>
> 14. Against the maturity value of the trade Namangol should already have received the further N$15 000 000.00 (in three equal payments), which had not taken place as envisaged in the Order read with the settlement agreement. Namangol has also been handed two promissory notes by Mr Rosenberg in the total value of US$6 000.000.00 which I have caused to be presented and which have been dishonoured (this amount should also have been set off against Namangol's half share of the maturity value of the trade. In the latter regard I annex hereto as Annexure "T" copies of the promissory notes and as Annexure "U" the notice of dishonour received by facsimile relating to the promissory notes. Before my attorneys of record could institute appropriate legal proceedings, which I

had already instructed them to do, against Mr Rosenberg for his compliance with the aforementioned Order (compelling payment of N$15 000 000.00) and for payment of the US$6 000 000.00, the Section 417 proceedings commenced and these proceedings were launched, effectively cutting my hands off to pursue same.

15. From documents that have surfaced shortly before the commencement of the Section 417 proceedings it appears clear that Avid and/or Mr Kandara and/or Ms Inez /Gases and/or the Social Security Commission has usurped the contract between Namangol and Mr Rosenberg, arising from the settlement agreement. I annex a copy of such documents hereto in a bundle marked Annexure "V". This situation has caused a total break down in communication between Mr Rosenberg and myself on behalf of Namangol, and has clearly spurred Mr. Rosenberg into taking a chance to seek to evade the consequences of the settlement agreement and the aforementioned Order. What is clear from the aforementioned documentation between Mr Rosenberg and the various usurping parties is that US$6 000 000.00 is being promised at least as payment of returns, an amount which Mr Rosenberg has also in writing acknowledged to Avid in terms of Annexure "W" hereto. The paramount issue arising from the aforementioned is that the actions of Avid and/or Social Security Commission has effectively resulted therein that they have caused a situation making performance of Namangol in terms of the investment agreement impossible, should same persist.

16. I offered Mr Kandara on behalf of Avid a cession of the US$6 000 000.00 promissory notes alternatively to cancel Namangol's agreement with Mr Rosenberg arising from his breach of the agreements (as I then perceived the matter to be before I came to know of all the usurping communications aforesaid) and to pay the proceeds arising there from to Avid. Mr Kandara never made an election in this regard, which makes sense given the aforementioned. I also repeated the tender in the Section 417 proceedings and hereby repeat my tender – this however being subject thereto that the Applicants and/or Social Security Commission ceasing to interfere with Namangol's contractual relationship with Mr Rosenberg, thereby making Namangol's performance impossible in due course on or before the maturity date. Under the usurped circumstances

> Namangol does not have control over the investment, and as such the Applicants cannot lay claim thereto that such investment funds (N$20 000 000.00) be held to the account of Namangol." (My underlining)

[12] It is clear from the above that Josea suggests, amongst others, that the fact that Namangol was unable to repay the debt owed to Avid is due to the fact that the Social Security Commission, Kandara and Avid interfered with the transaction he concluded with Rosenberg in the wake of the Cape High Court application. Namangol is clearly unable to repay the debt owing to Avid.

[13] In addition to the N$29.5m transferred to Allan Rosenberg, a further amount of N$6.3m was transferred from Namangol's account to that of Dean Africa CC. Josea also transferred N$1200 000 into his private bank accounts from the Namangol investment account and a further N$615 000, 00 from Namangol's investment account to Namangol's cheque account from which payments were made for purposes unrelated to investment. Josea also transferred altogether N$2.6m from Namangol's investment account to the account of a business called Fask Trading, a Congolese diamond dealing company based in South Africa. The upshot of all these transfers was that on 04 07 2005 only N$70 669. 21.00 was left on Namangol's investment account; and N$19 816.00 on Namangol's current account as at 19 07 2005. The applicant avers that this

amounts to a dissipation of the respondent's funds which resulted in the respondent being unable to repay Avid.

[14] The applicant further avers that the amount of N$1200 000 that Josea paid into his personal accounts was spent by him towards his personal ends unrelated to either the business of Namangol or for investment purposes as mandated by Avid. Knouwds also avers that instead of paying into Namangol's investment account the amount of N$14,899,750.00 received from Alan Rosenberg following the Court case in Cape Town, Josea transferred that amount to his personal account and used all of it for his own purposes. Knouwds relies on Josea's and Namangol's pattern of spending to support the allegation that the matter is urgent as there is a public interest in the matter being pursued expeditiously through the winding up of the respondent to see if any of the funds could be recovered.

[15] I agree. A proper case was made out for urgency and proceeding *ex parte*; in the latter respect as there existed the real likelihood of documents being destroyed or fabricated to justify receipt of moneys; and to make it possible for the money trail being identified as quickly as possible.

[16] Relying on the answering affidavit and the fourth set of affidavits on behalf of the respondent, I will now proceed to set out how the respondent meets the case put up by the applicant. In the first place, Josea confirms all the payments made from Namangol's and his accounts after the funds were received from Avid. He deposes that he had "initial" contact with one Lazarus Kandara (since deceased) in September/October 2004. He says that Kandara introduced himself as the Chief Executive Officer of Avid and was very "secretive" and wished to place an investment with Namangol and in fact did so. That transaction, which is unrelated to the N$30m which is the subject of this case, was conducted with Allan Rosenberg who was then known to Josea and related to funds from Navachab.

[17] Josea further deposes that he was again approached by Kandara at the beginning of January 2005 with the news that Kandara was expecting to receive N$30m soon in the name of Avid which he wished to place with Namangol for onward investment. According to Josea, after he had met Kandara and the two of them started to do business, Kandara took several loans from him on the strength of the N$30m he was expecting. (This could only have been after September/October 2004.)

[18] Josea gives details of the alleged loans. The manner that he sets out these alleged loans makes it clear that the amounts stated as loans were advanced on various dates in January 2005 (not earlier) as separate loan advances. Some of the alleged loans were allegedly advanced by Josea personally, while others were advanced on behalf of Namangol. In some cases dates on which the loans were allegedly advanced are given, while in others there are only bald statements that a loan was given.

[19] I must state at this point that it is Josea's case that at the time Kandara stated that he expected to receive N$30m (and even at the time that the N$30m was paid over to Namangol) he was not aware *that* money belonged to the SSC. This is an important background to evaluating the truthfulness of Josea's assertions about his dealings with Kandara and the reasons why he disbursed funds that were entrusted to Namangol. Not only that - these allegations are critical in the assessment of Josea's credibility generally and in coming to a decision whether or not the applicant discharged the *burden of proof* on a balance of probabilities as the final winding up is opposed (See *Wackrill v Sandton International Removals (Pty) Ltd,* 1984(1) SA 282 (W), at 286 A-B.)

[20] I now set out the loans as described by Josea:

A. ALLEGED LOANS TO KANDARA BY JOSEA PERSONALLY

DATE	SOURCE	AMOUNT	PROOF OF RECEIPT OF LOAN
Early January	Cash in Josea's safe	N$500 000	Not provided
14 January	Cash cheque drawn on Josea's personal account	N$30 000	Not provided
21 January	Cash cheque drawn on Josea's personal account	N$20 000	Not provided
January	Cash on hand	N$70 000	Not provided
January	Cash on hand	N$11 000	Not provided
January	Cash on hand	N$80 000	Doubtful
TOTAL		N$ 711 000	

B. LOANS ALLEGEDLY ADVANCED BY NAMANGOL TO KANDARA

DATE	SOURCE	AMOUNT	PROOF OF RECEIPT OF LOAN
22 January	Cash cheque drawn on Namangol account	N$310 000	Marked: 'to Kandara and group'
31 January	Namangol's cheque	N$250 000	Cheque to Stannic for the order of Kandara
31 January	Namangol's cash cheque	N$250 000	No proof provided. Allegedly to Kandara's wife
TOTAL		N$ 585 000	

C. ALLEGED TOTAL LOANS TO KANDARA BY NAMANGOL & JOSEA

Josea	N$ 711 000
Namangol	N$ 585 000
TOTAL	N$ 1, 296, 000

[21] Of the staggering amount of N$1 296 000 allegedly paid to Kandara by Josea (either personally or on behalf of Namangol) the only proof of acknowledgement of indebtedness by Kandara furnished by Josea in the papers, is a letter dated 31 01 2005, evidencing a debt of N$60 000 as one single payment, and an additional amount of N$45 000.

[22] Of the payments allegedly made to Kandara on 31 01 2005 (i.e. N$25 000 to Stannic and N$80 000) Josea says the following in paragraph 11.3.6.3 of his answering affidavit:

> *"As proof of <u>this entire transaction</u>, I annex hereto as Annexure 'E'*[2]*, a letter signed by Mr Kandara confirming receipt of the entire amount of N$105 000 on the said date. In this regard I have to state that I initially received a request from Mr Kandara to advance him N$60 000, but when he arrived at my office, he asked me to advance him a greater amount. As such we made the manuscript amendments to this annexure to reflect the <u>entire amount</u>.' (emphasis supplied)*

[23] Annexure 'E' records only N$105 000 and it is therein specifically recorded *that* amount is to be repaid. The loan is recorded on a letterhead of Namangol. It is nowhere explained why while Namangol advanced in total N$585 000 to Kandara during the month of January 2005, Annexure 'E' records that the amount reflected thereon as a loan (i.e. N$105 000) is to be paid back. Were the other loans not to be paid

[2] Annexure 'E'dated 31 January 2005.

back? Why are the larger loans not specifically acknowledged by Kandara when a much smaller one is? On Josea's own version, the total loan advanced to Kandara on 31 01 2005 is N$150 000; yet Annexure 'E' only records N$105 000. How could that letter possibly be the record of the ''entire transaction" of 31 01 2005?

[24] On Josea's own version the amount of N$80 000 was a loan to Kandara by Josea personally, yet Annexure 'E' is a Namangol letterhead. Consequently, how could Annexure 'E' be proof of any of the payments shown in table B of paragraph 20 *supra*? There exists no independent and verifiable proof of these loans allegedly advanced to Kandara totaling N$ 711 000. Apart from the amount of N$105 000 there is also no independent proof of any kind that Namangol advanced loans to Kandara. What is the Court to make of all this?

[25] The SSC transferred N$30m to Avid on 26 01 2005. Josea's version is that he was not aware of the source of the N$30m and that the initial contact between Kandara and him was only in September/October 2004. All the alleged loans to Kandara by Josea and Namangol were made in January 2005. On the assumption that the loans were in fact given, I find it most improbable that Josea would have advanced a staggering amount of N$ 1 296 000 (either personally or from Namangol) to Kandara

over such a short period of time without some assurance that the N$30m which Kandara claimed he would receive, would indeed be available.

[26] I am therefore satisfied that the applicant has proved on a *balance of probabilities* that Josea knew that the N$30m Kandara informed him about was money coming from the Social Security Commission for investment purposes.

[27] A payment made at Josea's prompting by Namangol on 22 01 2005 in the amount of N$310 000 was to *''Kandara and group''*. Josea offers no explanation whatsoever who 'the group' are, yet in the way his papers have been prepared he holds Kandara responsible for the entire amount of N$310 000 and sought to offset the alleged loans from moneys he allegedly held on behalf of Kandara without shedding any light on how the 'group' fits into the overall scheme of things. This, in my view, strengthens the conclusion that Josea was given the assurance by a 'group' which included Kandara that N$30m would in fact be forthcoming – such assurance being in a form which assured him and on the strength of which he could advance 'the group' the amount of N$310 000. I find it to be more probable than not that Josea knew that Kandara and a group of people acting via Avid would receive N$30m from the SSC for investment and considered it safe to advance a large amount of money to them.

[28] Josea also details further payments he allegedly made to Kandara after Namangol received the amount of N$29.5m from Avid. Most of these payments are referred to as monies paid to Kandara "at his special instance and request" or on "his instructions" from the amount of N$1 615 000 that Kandara had allegedly asked Josea to withhold from the amount of N$29.5m. The payments made during February to June 2005 amount to N$ 1 674 000 – which is more than the amount of N$1 615 000. Josea explains the discrepancy by saying that the amount in excess (N$ 76 000) was a personal loan he advanced to Kandara. He then states in paragraph 11.3.16 of the answering affidavit:

> *"The aforesaid total of monies lent and advanced and/or drawn by Mr Kandara from the initial N$29 500 000.00 received in respect of this transaction thus totals N$ 3 276 000.00, of which Mr. Kandara, and therefore now his estate, still owes me N$ 76 000.00 (leaving aside the smaller loans made to him from time to time as aforesaid).*

[29] The payments made between February and June do not come close to the amount of N$3 276 000, 00. Not only that, Josea then proceeds to state in paragraph 11.4:

> *"I annex hereto, as Annexure "R", a copy of the receipt signed by Mr Kandara's wife for the monies referred to in paragraphs 11.3.1 to 11.3.5 above. In this regard I mention the following:*
>
> *11.4.1 I am <u>not certain</u> that the date of the aforementioned Annexure is correct as a discrepancy arose in this regard during the course of the Section 417*

proceedings. It <u>may be</u> that the said document was <u>incorrectly</u> dated.

…"

I now reproduce Annexure "R" which is on a Namangol letterhead:

"January 22, 2004

Mr. L. A. Kandara
Avid Investment Corporation (PTY) Ltd
34 Pasteur Street
Windhoek West
Windhoek
Namibia

Dear Sir

<u>RE: Funds from Namangol Investments (PTY) Ltd.</u>

Herein by this letter, we as the above company want to notify you that the amount of money that was handed over to you were the following.

1. The amount of N$ 500,000.00 (Five Thousand Namibian Dollars) was deposit into Avid Investment Corporation Account 62066555750 at FNB.
2. The other amounts of N$ 431,000.00 (Four Hundred Thirty One Thousand Namibian Dollars) in cash. The N$ 431,000.00 were made up of N$ 300,000.00, N$ 70, 000.00, N$ 30,000.00, N$ 20,000.00 and N$ 11,000.00.

All these amounts has to be paid back to Namangol Investments (PTY) Ltd.

_____ _____

N.C. JOSEA L.A. KANDARA

Thank you

_____"

N.C. Josea
Asset Manager)

[30] That Josea can allege that Annexure 'R' which is dated 22 01 2004, long before he says he had the initial contact with Kandara, "may" have been ''incorrectly dated", is implausible. Either it was incorrectly dated or it was not. Is the Court expected to speculate which it is? These explanations are not plausible and are a clear attempt in my view

to mislead the Court and to obfuscate the issues. I am satisfied that the version attested to by Josea about the true nature of the transactions which he engaged in following the receipt by Namangol from Avid of the SSC investment funds is a total fabrication and stands to be rejected.

[31] In respect of the N$15m received from Allan Rosenberg in the wake of the Cape High Court urgent application, Josea admits Namangol received the amount from Allan Rosenberg as "a contractual amount of damages" which was then paid into the trust account of his and Namangol's attorneys of record – Orchard Greyling. This amount, he says, "will constitute a debit against my loan amount in Namangol [which] … is not payable at this stage". Again, no details are given about this loan: its size and when it is payable! What is clear even from the explanation he gives is that Josea converted to his own use the close to N$ 15m belonging to Namangol who held such funds on behalf of Avid. I have carefully considered the explanations he offers and regrettably they do not in any credible way negate the applicant's case *that* money belonged to Namangol who held it in trust for Avid who in turn held it in trust for the SSC – with the full knowledge of Josea. Yet, instead of paying over the moneys to Namangol he paid it into his personal account and used the funds for his personal ends and that of family and friends, or other than for legitimate investment in terms of the mandate of the SSC to Avid which, I find, he (it is more probable than not) was aware of.

[32] In the face of the applicant's allegation of frenzied spending by Josea after Avid paid over N$29.5m to Namangol, Josea not only confirms the payments made by him from the Namangol accounts after the money was received, but also fails to provide a satisfactory business rationale for the payments. For example: he admits to advancing N$70 000 to one Bonzaaier "to settle certain legal fees"; paying N$87 000 to Kalahari Sands Hotel and Casino; N$183 000 to Bonzaaier, and advancing N$4 150 000 to his brother (of which N$1 600 000 was allegedly a loan to the brother from him personally) although the funds emanate from Namangol; buying shares at N$2.5m in a mine which, he admits, was for his own benefit although the funds came from Namangol. And then in paragraph 49.2, Josea states as follows:

> *"My brother converted some N$ 2 400 000.00 into United States Dollars for me, and he handed me US$ 400 000.00 therefore. This was used to assist needy church brethren of mine in Angola. This act of compassion does not amount to a squandering of my money as same is consistent with my religious convictions."*

Josea here admits to using public funds to fund what he describes as charitable activities in a foreign country. No business rationale is proffered for spending such a large sum of money as admitted by Josea.

[33] Josea admits to (and does not provide a reasonable or satisfactory explanation for) the following transactions from his personal account after the close to N$15m of Namangol's funds were paid into his personal account by Orchard Greyling Attorneys:

(i) N$ 4, 150, 000 to his brother which he says was partially a loan to the brother and partially a refund of debts he owed to his brother;

(ii) N$ 2, 500 000 to Real Time Investments which he admits was to buy shares for himself;

(iii) N$ 500 000 to one Heinrich Helm which he says was a settlement payment for the resignation from Namangol of that person;

(iv) N$ 100 000 which he says was a loan to John Smith since partially repaid (N$ 70 000 still unpaid); and

(v) N$ 123 000 to Jowells Toyota to purchase a vehicle for himself.

This spending shows that Josea used Namangol's money to enrich himself and friends leaving, of the close to N$15m, only N$ 46, 401.00 on his personal account as at 19 07 2005.

[34] Excepting the N$20m which Namangol paid to Allan Rosenberg Investment Bank, of the balance of the money left over from the N$29.5m, there was only a paltry sum of N$70, 669.21 left on

Namangol's Investment Account as at 4 07 2005. So robust was Josea's spending after the money was received! Josea offers no credible business rationale for the payments he made to various persons and for various purposes which can negate the very strong inference that he was bent on dissipating public funds which he knew emanated from the SSC. The applicant therefore clearly made out a case that the respondent and Josea misappropriated public funds entrusted to the former for the purpose of investment and that the respondent is unable to meet its indebtedness to Avid because of this dissipation of funds. Applicant also maintains that Josea's conduct as managing director of Namangol was so reckless as to place it in real danger of insolvency.

[35] Josea avers that Allan Rosenberg had failed, in breach of contract, to provide him "with the necessary documentation relating to" the N$20m which Namangol placed with Allan Rosenberg. That such a large sum of money could have been placed without the "necessary documentation" in the first place, speaks volumes about Josea's lack of acumen and judgment. This failure of Rosenberg, on Josea's own version, is what had led to the urgent application as a result of which the N$15m was paid by Rosenberg. It defies logic that Josea then alleges in the same vein that during "negotiations" in the wake of the urgent application, Rosenberg produced "numerous documents which ultimately satisfied" him "that the investment capital was safely engaged in the envisaged trade". What

then was the need for a settlement agreement if, as he says, the investment capital was safely engaged? The assertion by Josea that Allan Rosenberg would have delivered the balance of the money, with fantastic returns, had the SSC and others not intervened to place pressure on Rosenberg which led him to renege on his undertakings, is so farfetched that it must be rejected on the papers. Faced with a clear failure by Rosenberg to perform and the promise of a fairytale transaction which did not make business sense, how those parties could be faulted for trying to make every effort to recover public funds in respect of which they had a fiduciary duty, is beyond me. The allegation of "usurpation" of the agreement between Josea and Rosenberg is nothing but a red herring intended to explain the failure by Namangol to return to Avid the moneys entrusted to the former.

[36] Arguments in this matter were concluded before me in April 2006. Josea stated that the due date of the 'trades' engaged in by Rosenberg was the 1st week of March 2006 and he vehemently maintains that the debt owed to Avid by the respondent was only due at the end of March 2006. It is common cause that by the time the matter was argued, the money had not been paid to Avid. In the circumstances the applicant has a right to a winding up *ex debito justitiae* and thus not leaving me much by way of discretion to refuse a winding up. To echo the words of

Dowling J in *Service Trade Supplies Ltd v Dasco & Sons Ltd* ,1962 (3) SA 424 at 428 B-G:

> "The cases show that the discretion of the Court where unpaid creditors seek a winding up order against a company unable to pay its debts is in reality a very narrow one, just as its discretion to refuse a sequestration order of an application of an unpaid creditor in an insolvent estate is very narrow… generally speaking an unpaid creditor has a right ex debito justitiae to a winding- up order against a company unable to pay its debts."

And in the words of Lord Cranworth in *Bowes v Hope Life Insurance,* 11 H.L.C. 389:

> "It is not a discretionary matter with the Court, when a debt is established and not satisfied, to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it, but ordinarily speaking, it is the duty of the Court to direct a winding up." (For the persuasive authority that English decisions have in the area of company law, see LAWSA, vol. 4, para 4.)

(See also *Samuel and Others v. President Brand G.M. Co. Ltd*, 1969 (3) (A) 629 at 662 E-F)

[37] I come to the conclusion that the applicant has demonstrated on a balance of probabilities and to the satisfaction of the Court that the respondent is unable to pay the debt owed to Avid. There is no realistic prospect that Namangol will ever yield the kind of returns Josea says were expected from Rosenberg on his phantom investments - phantom if

one has regard to the unfulfilled promises he made and the dishonored promissory notes.

[38] Having come to that conclusion it becomes strictly unnecessary to decide whether it is just and equitable for the respondent to be wound up on account of the reckless conduct of its office bearers which led the respondent into insolvency. However, in the event that my conclusion is wrong that the respondent is unable to pay its debt to Avid, I find overwhelming evidence on the record that the conduct of the office bearers of Namangol (chiefly Josea) was so reckless as not only to have the potential but in fact resulted in Namangol's substratum being all but eroded by the spending that occurred after Avid transferred the N$20m to Namangol for investment- to the extent that as at 4 07 2005 only N$70, 669.2 remained on Namangol's investment account and only N$ 19,816.00 on its current account as at 19 07 2005; with no realistic prospect of the over N$14m misappropriated by Josea ever being returned to Namangol in liquid form. In *Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd* [1999] 2 ALL SA 268 (W) at 279 (i)-280(a) diverting the company's funds which should have been used to pay its debts on grounds which were not satisfactorily explained was a relevant consideration in the winding up of the company on the just and equitable ground. In the case before me, there is no satisfactory explanation by Josea on behalf of the respondent of the prolific spending

of the funds received by the respondent from Avid over such a short period of time and towards the private ends of Josea, his family and friends - without any supporting documentation and any effort being made to obtain proof of indebtedness from those to whom the funds of Namangol were paid in order to protect Namangol's interests if the debt were later disputed. The applicant has therefore also established on a balance of probabilities that it is just and equitable for the respondent to be wound up.

The application to strike material in the applicant's replying affidavit as being scandalous irrelevant or vexatious

[39] The respondent seeks to have struck from Knouwds' replying affidavit the assertion that one Freda Van Wyk who is an employee of Nedbank Namibia where NCJ Mechanical Maintenance CC (who's sole member was Josea) held an account, witnessed the wife of Josea attempt to withdraw moneys from that account, an act which would amount to a dissipation of SSC funds. I dealt with an identical application in the related case of *Eric Knouwds v NJC Mechanical Maintenance CC and 2 others* Case No. A 261/05. In a judgment delivered on 15 01 2008 I dismissed the application to strike that paragraph because the applicant in the founding papers foreshadowed the evidence of van Wyk and laid an appropriate basis for it. For the same reasons that I gave in the *NCJ Mechanical* case *supra* I dismiss the application to strike paragraph

11.3.3 of the applicant's replying affidavit in the present matter. Paragraph 11.4 alleges that Mrs. Josea's attempt to withdraw funds as aforesaid was intended to dissipate funds belonging to the SSC. The evidence more than amply supports that conclusion and I see no reason why that allegation should be excluded. Paragraphs 13.2.1, 13.2.2 repeat matter which is common cause between the parties and I do not see any prejudice the respondent suffers from its inclusion. Paragraphs 13.2.6 and 13.2.7 relate to allegations made under oath in a s152 enquiry in South Africa by an employee of a bank where Allan Rosenberg held an account wherein was deposited moneys which Namangol paid to Rosenberg after Avid transferred the funds to Namangol. That employee related that his bank formed the view that Rosenberg was a fraudster and that the bank reported him to the money laundering authorities. That evidence is demonstrably relevant because the applicant's case (corroborated by Josea) is that Rosenberg is a man that could not be trusted and I cannot agree that it should be excluded on the basis alleged. Paragraphs 13.3, 15, 42.2, 43, 44, 52.2, 52.3 and 56.2 draw the conclusion of dissipation of investment funds based on transactions that are admitted by Josea. I do find that those transactions were not legitimate and therefore the applicant is entitled to the conclusion and inferences he seeks to draw from them. Paragraph 22 alleges that the "trades" referred to by Josea that would rake in huge profits to enable Namangol meet its debts to Avid are bogus. I did find that the alleged

trades are farfetched and therefore see no basis for excluding the allegation. Paragraphs 29.2, 29.3 and 30.2 to 30.5, 33.1, 33.4, 33.5, 34.4 either question the *bona fides* of the loans allegedly given to Kandara or highlight the fact that Rosenberg and Josea devised a scheme to misappropriate investment funds. Both those conclusions are more than amply supported by the evidence and must stand. I have considered the objection against paragraphs 31.3 and 31.4 and frankly am not able to make sense of them. They stand to be rejected. The objection to paragraph 32.1 is rejected on the same ground as the objection to 30.2 - 30.5. Paragraphs 32.2 and 32.3 relate to matter stated by Rosenberg under oath in a s152 inquiry. It is highly relevant in view of the central thrust of applicant's case that there was a scheme devised to misappropriate investment funds.

The application to strike allegedly new matter

[40] The actions of Josea's wife in relation to NJC Mechanical's account at Nedbank are certainly not new matter for the reasons I gave earlier. The objection to strike paragraphs 11.3.5 and 11.4 on that basis is misconceived. The Navachab investment with Namangol is referred to in paragraph 10 of the answering affidavit by Josea and it is there implied that some of the funds on Namangol's investment account were sourced from there. The applicant is entitled to meet that case. Besides, the matter relates to the actions of Rosenberg after he received the funds

from Namangol and that evidence is highly relevant. Paragraphs 13.2.1, 12.2.2, 13.2.4, 13.2.6 and 13.2.7 which seek to place those transactions in context cannot for that reason be excluded as new matter. Paragraphs 22, 30.2 - 30.5, 31.4, 32.1, 32.2, 33.1, 33.3 and 33.4 challenge the *bona fides* of the transactions between Josea and Rosenberg and the alleged trades that Josea says Rosenberg engaged in which would have yielded unusually high returns. The applicant is entitled to challenge that version. The paragraphs must therefore stand.

[41] In an unreported judgment in *Telecom Namibia Ltd v Lutchmanan Ivan Ganes & Another*, Case No. 6266/01 (CPD), Oosthuizen AJ correctly summarized the law on new matter in a replying affidavit in connection with liquidation proceedings as follows:

> "An application for a provisional order is frequently placed before the Court as a matter of urgency in the interest of the applicant, the respondent's creditors and the public generally. Often the applicant will have incomplete information at his disposal when launching the proceedings. It would be inappropriate and impractical to require of an applicant in sequestration proceedings to include, in the founding papers, all allegations and information pertaining to the financial position of the respondent and to preclude the applicant from supplementing such information in the replying papers.
>
> Even if my aforementioned view is incorrect, and it were to be accepted that the allegations which the Respondents seek to raise do constitute new matter, a Court has a discretion to permit new matter in the replying papers. Such discretion is exercised the more readily where the facts sought to be adduced were not known to the Applicant when the founding papers were drawn ...In exercising a discretion to permit new material the court will obviously seek to

> achieve fairness and will, where appropriate, give the respondent the opportunity to deal with such new matter in a second set of answering affidavits…" (Case references omitted). (See also *Djama v Government of the Republic of Namibia and Others*, 1993 (1) SA 387(NmHC), at 391 E-F.)

[42] In *casu* the respondent specifically requested (and with the applicant's consent) was allowed to introduce a second set of answering affidavits (the so-called duplicating affidavit) wherein he deals fully and at length with the alleged new matter. I must also mention that the applicant made clear in the replying papers that a great deal of information was not known to him about the relevant financial transactions when he first launched the application for a provisional order. In the light of these considerations, the new matter introduced in the replying affidavit was justified; in any event I in my discretion allow it as no prejudice has been occasioned to the respondent on account of the opportunity he had to deal with the impugned matter. Besides, the respondent in the answering affidavit made a lot of factual averments and denied many of the allegations of the applicant. The applicant was therefore entitled to raise allegations in reply (Compare *Lane & Another NNO Magistrate, Wynberg*, 1997 (2) SA 869 (CPD) at 886 G-H.)

[43] The entire application to strike is misconceived and is accordingly dismissed.

[44] The assertion that on account of her marriage in community of property to Josea Mrs. Josea ought to have been cited in these proceedings is not sound in law as this application relates to the

liquidation of a body corporate with a separate legal identity from Josea's.

[45] The parties also debated before me the apportionment of the wasted costs occasioned by the postponement when the matter was first set down for argument. I have considered the matter and take the view, in the exercise of my discretion, that costs should be in the cause and be costs in the liquidation.

[46] In the result I make the following orders:

(i) The points in limine are dismissed.

(ii) The respondent's application to strike in terms of Rule 6(15) is dismissed in its entirety.

(iii) The respondent is placed under final liquidation into the hands of the Master of the High Court.

(iv) The applicant is awarded the costs of the application which shall be costs in the liquidation.

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DAMASEB, JP

ON BEHALF OF THE APPLICANT: **Mr. A W Corbett**

Instructed By: Dr Weder, Kauta & Hoveka Inc.

ON BEHALF OF THE RESPONDENT: **Mr Van Rooyen**

Instructed By: André Louw & Company