REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-2021/00135

In the matter between:

TIAUTO WHOLESALERS (PTY) LTD **APPLICANT**

and

VAN RENSBURG HOLDINGS CC **RESPONDENT**

Neutral citation: *TiAuto Wholesalers (Pty) Ltd v Van Rensburg Holdings CC* (HC-MD-CIV-MOT-GEN-2021/00135) [2022] NAHCMD 328 (1 July 2022)

Coram: PRINSLOO J
Heard: **2 March 2022**
Delivered: **01 July 2022**

Flynote: Motion proceedings - provisional liquidation of CC - Applicant relies on section 68(1)*(c)* of the Close Corporations Act 26 of 1988 - respondent unable to pay its debts - applicant failed to show indebtedness - that respondent unable to pay debts - Section 68 of Close Corporations Act - alleged failure to comply with section 69(1)*(a)* of the Close Corporations Act - provisional winding-up order is dismissed.

Summary: The applicant launched an application whereby it seeks the provisional liquidation of the respondent on the grounds that the respondent is unable to pay its debts and relies on s 68(1)*(c)* of the Close Corporation Act, 26 of 1988. The root of the application stems from a credit facility, whereby the applicant sold wheels and tyres to the respondent. The respondent allegedly breached the payment obligation to the applicant.

The respondent opposed the application and in doing so raised three points, being firstly that the applicant failed to show that the respondents is indebted to it, secondly, that the respondent is unable to pay its debts as contemplated under s 68 of the Close Corporations Act and finally that the applicant failed to comply with s 69(1)*(a)* of the Close Corporations Act.

Held that: the provisions of s 69(1)(*a)* of the Act were peremptory in requiring service of the demand by delivering it at the registered office of the corporation and had the legislature intended to sanction other forms of service it would have made provision for them.

Held that: strict compliance regarding service was a prerequisite for deeming the corporation to be unable to pay its debts.

Held that: upon reading and considering the affidavits and annexures thereto, and submissions by both parties with reference to relevant case law, I am not satisfied that the applicant has made out a prima facie case for the granting of a provisional order of winding-up of the respondent on the ground that the respondent is unable to pay its debt

The applicant's application for a provisional winding-up order is dismissed with costs.

ORDER

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1. The applicant's application for a provisional winding-up order is dismissed with costs.
2. Such costs to include the costs of one instructed and one instructing counsel.
3. The matter is finalized and removed from the roll.

JUDGMENT

PRINSLOO J:

The parties

[1] The applicant is TiAuto Tyre Wholesalers (Pty) Ltd, a registered private company duly incorporated in accordance with the applicable company laws of Namibia.

[2] The respondent is Van Rensburg Holdings CC, a registered close corporation duly incorporated in accordance with Namibia's applicable close corporation laws.

Purpose of the application

[3] Before me, is an application where the applicant, TiAuto Tyre Wholesalers (Pty) Ltd, relies on s 68(1)*(c)* of the Close Corporations Act, 26 of 1988[1] (the Act), to provisionally liquidate the respondent, Van Rensburg Holdings CC by alleging that the respondent is unable to pay its debts.

[4] The applicant launched the application seeking the following orders:

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[1] '**Liquidation by Court 68.**
A corporation may be wound up by a Court, if –
(a) ……;
(b) ……;
(c) the corporation is unable to pay its debts; or
(d) …….'

‘1. That the respondent be provisionally liquidated;

2. That the *rule nisi* be issued calling upon all persons concerned to appear and show cause (if any) on a date and time to be determined by the Registrar of the above Honourable Court, why:

2.1 the respondent should not be placed in final liquidation; and

2.2 the applicant’s costs should not be costs in the liquidation.

3. Directing that service of this order be effected by the Deputy Sheriff for the District of Windhoek, serving a copy of this order on the respondent personally;

4. Such further and/or alternative relief as the court may deem fit.’

Background

[5] The applicant is a wholly-owned subsidiary of TiAuto Investments (Pty) Ltd (TiAuto Investments), a company registered and incorporated in the Republic of South Africa. TiAuto conducts business of, inter alia, the Tiger Wheel & Tyre brand franchisor.

[6] The applicant's application is essentially based on the fact that the applicant sold wheels and tyres to the respondent, which were purchased in terms of a credit facility and in terms of which the respondent has allegedly breached its payment obligation to the applicant.

[7] The applicant further alleges that the respondent is indebted to it in the amount of N$ 2 100 587, 21.

Opposition

[8] The respondent’s opposition to the application is three-fold, ie: That the applicant failed to demonstrate:

a) that the respondent is indebted to it;

b) that the respondent is unable to pay its debts as contemplated in s 68 of the Close Corporations Act, and

c) that the applicant failed to comply with s 69(1)(a) of the Act.

The founding affidavit

[9] The affidavit was deposed to by Mr Drury, the Chief Financial Officer of the applicant.

[10] Mr Drury states that on 10 January 2017, TiAuto entered into a written franchise agreement[2] with the respondent, in terms of which the respondent was authorised to trade under the name 'Tiger Wheel & Tyre' from a certain agreed premises in Windhoek. The duration of the franchise agreement was five years unless it was terminated earlier by either of the parties under the franchise agreement[3].

[11] In terms of the credit agreement, upon purchasing wheels and tyres from the applicant, the respondent had 30 days to discharge its liability in respect of such purchase. According to Mr Drury, the detailed terms of payment are recorded in the credit application dated 22 September 2017[4].

[12] Mr Drury alleges that the respondent is indebted to the applicant in the amount of N$ 2 100 578.21, which despite demand, remains outstanding. He further states that the respondent previously alleged that the applicant is indebted to it in the amount of N$ 524 000 in respect of an oral lease agreement concluded between the parties. This amount must be set against the capital claim amount, resulting in a balance of N$ 1 576 587.21, which he refers to as the admitted liability.

[13] According to Mr Drury, the applicant agreed to accept payment of the admitted liability and that this liability had to be discharged by no later than 10 December 2020. As the respondent failed to honour the agreement, the full amount of N$2 100 587.21 has become due and payable, which is set out in the statement of account supported by

[2] Annexure 'CD2' to the founding affidavit.
[3] The franchise agreement was terminated with the respondent.
[4] Annexure ‘CD3’ to the founding affidavit.

invoices[5]. In support of the claim of indebtedness made on behalf of the applicant Mr Drury also refers to a chain of communication exchanged between different parties, evidencing the respondent's liability[6].

[14] On 19 February 2021 the applicant caused a letter in terms of s 69(1)(a) of the Close Corporations Act, 26 of 1988 (as amended) to be issued and delivered to the respondent's registered address. In terms of the said correspondence, the respondent was advised that the amount of N$2 100 587.21 was due and payable in respect of goods sold and delivered and such remains outstanding. The respondent was further informed that should the outstanding amount not be settled within 21 days from the date of demand, the respondent will be deemed unable to pay its debts, and the applicant will commence legal proceedings against it.

[15] As the respondent did not settle the outstanding amount, it was resolved by the applicant's Board of Directors to institute the current application.

[16] The applicant is of the view that the respondent is commercially insolvent and unable to pay its debts, warranting an application for the winding up of the respondent.

[17] The applicant filed the relevant security with the Master of the High Court for all fees and charges necessary for the prosecution of the winding-up proceedings and the cost of administering the respondent in liquidation until a provisional liquidator has been appointed.

[18] It should be noted that although a copy of the application was served on the Office of the Master on 9 April 2021, the certificate in terms of s 9(3) of the Insolvency Act 24 of 1936, was only issued on 4 March 2022 (two days after the hearing of the matter).

The answering affidavit

[5] Annexure ‘CD4’ to the founding affidavit.
[6] Annexure ‘CD5’ to the founding affidavit.

[19] In its answering papers, deposed to by Mr Ewald van Rensburg, the respondent raised two pertinent points *in limine*, i.e.

a) Irregular delivery of the s 69(1)*(a)* letter; and
b) No cause of action.

Section 69(1)(a) letter

[20] The respondent submits that the demand therein is essentially a 'communication' as contemplated in s 25(1)[7] of the Act and takes issue with the fact that s 25 does not permit service of process or a document, by affixing the document or process to a door at the registered office or the close corporation. In terms of the Close Corporation Act, communication and/or notice is only deemed to be served once it has been delivered at the corporation's registered office or sent by certified or registered post to the corporation's registered office or postal address.

[21] Mr Van Rensburg submits that on a proper construction of s 25 of the Act, it requires process to be delivered (handed over) to the responsible employee of the close corporation to the local officer, place of business or the registered office of the close corporation.

[22] In the instant matter, the s 69(1)(*a)* letter was served in terms of rule 8(3)*(a)* of the Rules of the High Court by affixing a copy of the letter of demand at the main gate of the registered address of Van Rensburg Holdings CC.

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[7] 'Postal address and registered office 25.
(1) Every corporation shall have in Namibia a postal address and an office to which, subject to subsection (2), all communications and notices to the corporation may be addressed.
(2) Any - (a) notice, order, communication or other document which is in terms of this Act required or permitted to be served upon any corporation or member thereof, shall be deemed to have been served if it has been delivered at the registered office, or has been sent by certified or registered post to the registered office or postal address, of the corporation; and
(b) process which is required to be served upon any corporation or member thereof shall, subject to applicable provisions in respect of such service in any law, be served by so delivering or sending it.'

[23] Mr van Rensburg states that the applicant is aware that the respondent does not trade at the address mentioned above, and nothing prohibited the applicant from delivering the document to the respondent's normal place of business.

[24] Mr van Rensburg denies that the respondent was given notice or that the process relied upon came to the attention of either the deponent or any of the members of the close corporation.

No cause of action

[25] Mr van Rensburg contends that the applicant failed to adhere to the general rule in motion proceedings because it has not successfully set out its cause of action and supporting evidence in the founding affidavit.

[26] Mr van Rensburg states that the founding affidavit and supporting evidence are vague and embarrassing. In this regard, the following was submitted:

(a) The applicant relies on an agreement allegedly concluded between the applicant and the respondent to demonstrate the circumstances in which the respondent would be in mora with its obligations, however the said agreement annexed to the founding affidavit as ‘CD3’ is illegible.
(b) The applicant relies on tax invoices to show the respondent's indebtedness, but the said tax invoices are not attached to the founding affidavit.
(c) The transaction statement filed (CD4) is partially illegible, and there is no clear reference on the statement that any transactions took place between the applicant and the respondent.
(d) The correspondence between the parties relied upon by the applicant is a chain of communication consisting of some 80 odd pages, most illegible and others blank. The documents are in no particular order, and it is unclear to what extent the applicant is relying on the documents.

(e) The applicant expects the court and the respondent to wade through the documents to ascertain how the respondent's alleged indebtedness arose from these pages.

[27] Mr van Rensburg contends that the court should strike out these annexures.

[28] Mr van Rensburg states that amongst the correspondence filed by the applicant (C5), there is an email dated 10 December 2020, wherein Mr Pradesh Pillay claims that the respondent's indebtedness is to TiAuto Investments, which is the applicant's holding company and not the applicant itself. Mr van Rensburg states that TiAuto Tyre Wholesaler is a separate and distinct entity from the holding company, TiAuto Investments.

[29] Mr van Rensburg states that this email from Mr Pillay refers to a compromise between TiAuto Investments (the holding company) and the respondent. Mr van Rensburg submitted that the applicant appears to be relying on this email, but it does not support the applicant's claim that the respondent is indebted to it.

[30] Mr van Rensburg submitted that there are several documents exchanged between Ms Christa de Wet and Mr Gavin Brett (the legal practitioners), which indicates a bona fide factual dispute regarding the amounts claimed by the applicant and, most importantly, that the respondent disputes liability. Then, a compromise is reached between the holding company and the respondent. As a result, the respondent would be indebted to the holding company, TiAuto Investment, if indebted at all.

[31] Mr van Rensburg further points out that neither the applicant nor TiAuto Investments reserved their rights to rely on a cause of action, predated by the 10 December 2020 compromise.

[32] The respondent pleads that in the circumstance of the compromise between TiAuto Investments and the respondent, the applicant does not have the standing to launch the application before court.

[33] Mr van Rensburg pleads that the respondent previously, but before the compromise that was reached between the respondent and TiAuto Investment, disputed its indebtedness to the applicant and the grounds of the dispute were related to the applicant via an email sent by Ms Christa de Wet on 13 August 2019. He states that the respondent denied that the amounts claimed by the applicant were correct and accurate and has on several occasions requested an accounting and debatement of the amounts, which the applicant refused.

[34] Mr van Rensburg states that the only indebtedness the applicant can refer to is the compromise reached with the holding company. He denies that there can be any question about admitted liability other than the compromise, as there is no evidence of a settlement reached between the applicant and respondent at any given time.

[35] In conclusion, Mr van Rensburg pleads that the applicant failed to demonstrate on its founding affidavit that any grounds exist for it to rely on s 68(1)*(c)* of the Act.

Replying affidavit

[36] In response to the respondent's answering affidavit, Mr Drury states that there was substantial compliance with the provisions of the Act and that the respondent cannot deny receipt of the letter in terms of s 69(1)*(a)* of the Act. The respondent did not deny the validity of the registered address, and s 69(1)(*a)* of the Act makes clear provision for delivery at the registered office and not the trading address.

[37] Mr Drury states that the s 69(1)*(a)* letter was delivered twice more because of specific errors in the said correspondence pursuant to the first delivery. The first time the letter of demand was delivered on 12 November 2020 at the respondent's trading

address, c/o 75 Jan Jonker Road. The second time the letter of demand was delivered on 20 January 2021 at the respondent's trading address and received by Mr van Rensburg. The third time the letter of demand was served by the Assistant Deputy Sherriff on 19 February 2021 by affixing the process to the main gate at the registered address of the respondent.

[38] To alleviate the complaints raised by the respondent regarding the quality of documents filed, the applicant uploaded a new set of enhanced documents. Mr Drury submits that the respondent was given the opportunity to file a supplementary answering affidavit after receiving the legible copies but elects not to do so.

[39] Mr Drury also proceeded to clarify transactions, which he states are evident from the statement of account.

[40] Concerning the email correspondence of 10 December 2020, the applicant denies that any compromise was reached between any of the parties since no payment was effected by the respondent to either TiAuto Investments or TiAuto Tyre Wholesalers for such compromise to become effective. Mr Drury states that the franchise agreement was terminated with the respondent and Mr Pradesh Pillay communicated with the respondent to recoup the debt to reinstate the franchise agreement. He submits that it is clear that as per the discussions with Mr Pillay, the respondent admitted liability for N$ 1 576 587.21, which was not disputed until the appointment of the respondent's current legal practitioners.

[41] Mr Drury states that if one has regard to the chain of communications as per CD5, it is clear how the claim amount is arrived at.

[42] On the issue taken by the respondent that it is liable to the holding company, TiAuto Investments and not the applicant Mr Drury submitted that from the correspondence between the parties, it is clear that the respondent is liable towards TiAuto Investments' nominated supplier under the franchise agreement, being TiAuto

Tyre Wholesalers (Pty) Ltd and Mr Pradesh Pillay communicated with the respondent as an agent of the applicant and that a distinction must be drawn between the capacities under which Mr Pillay addressed the correspondence dated 10 December 2020.

Arguments advanced

On behalf of the applicant

[43] Mr Boesak submitted that it is common cause that the applicant is a wholly-owned subsidiary of TiAuto Investments (Pty) Ltd and that the applicant's holding company conducts the business of inter alia franchisor of the 'Tiger Wheel & Tyre' brand. It is further common cause that the applicant sold wheels and tyres to the respondent.

[44] Mr Boesak submitted that the respondent is not required to set out a defence but to give a bona fide version wherein it denies the indebtedness. However, instead of doing that, the respondent attacks every issue it can, and as a result, some points *in limine* were raised.

[45] Mr Boesak addressed the points raised *in limine* as follows:

Letter in terms of s 69(1)(a) of the Act:

a) The respondent does not deny having received the letter in terms of s 69(1)(a), nor does it deny having become aware of it.
b) Sufficient legal authority exists in terms of which a demand/communication in terms of s 69(1)*(a)* of the Act is delivered at the registered office irrespective of the manner in which the delivery occurred.
c) The respondent does not deny the validity of the registered address in question.

d) Section 69(1)*(a)* of the Act makes provision for delivery at the registered office and not the trading address or any other address.
e) Due to the errors in the initial letter of demand, further letters of demand were delivered on two different occasions to the trading address of the respondent and served once at the registered address.
f) The applicant's legal practitioners took the necessary steps to ensure compliance with s 69(1)*(a)* of the Act.

[46] Mr Boesak responded to the respondent's reliance on the *Hiskia and Another v Body Corporate of Urban Space and Others* matter[8]. He argued that it is misplaced as the court's discussion was with reference to the authors, Jones and Buckles' interpretation of what delivery means. However, delivery in the context of the *Hiskia* matter is regarding the Magistrate's Court Rules, which are distinguishable from the High Court Rules.

[47] Mr Boesak referred to *Nathaniel & Elthymakis Properties v Hartebeestspruit Landgoed CC*[9] wherein the court held that substantial compliance with s 69(1)*(a)* of the Act was sufficient. Mr Boesak contended that there was sufficient service to satisfy the section's requirement. The letter of demand was delivered at the registered address irrespective of the manner in which the delivery occurred.

[48] Mr Boesak pointed out that the deemed inability to pay its debts in terms of s 69(1)*(a)* of the Act does not come into operation if the demand is not delivered at the corporation's registered office. Mr Boesak further submits that the deemed inability is a conclusion in law, which is rebuttable.

Indebtedness

[49] On indebtedness Mr Boesak submitted as follows:

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[8] *Hiskia and Another v Body Corporate of Urban Space and Others* (HC-MD-CIV-MOT-GEN 143 of 2017) [2018] NAHCMD 279 (31 August 2018).
[9] *Nathaniel & Elthymakis Properties v Hartebeestspruit Landgoed CC*[7] [1996] 2 All SA 317 (T).

a) The respondent does not deny that it applied for a credit facility as set out in the credit application documents attached to the founding affidavit.
b) Annexure ‘CD3’ is the credit application in terms of which the respondent had to discharge its liability within 30 days of issuance of a tax invoice.
c) Respondent started defaulting on payment of stock during September 2019, and then between 30 June 2020 and 31 July 2020, stock was received by the respondent but never paid for.
d) Correspondence was exchanged, and statements sent contained in annexure ‘CD 5’ to the founding affidavit. From the documents annexed to the founding affidavit, it is clear that there cannot be any uncertainty regarding the respondent's indebtedness to the applicant.

[50] Mr Boesak conceded that the initial annexures to the founding affidavit were of poor quality and clearer copies had to be uploaded. Issues were raised in the replying papers but it was not new matter. Mr Boesak submitted this was done to point out to the respondent that invoices were rendered to Tiger Wheel & Tyre which were paid by the respondent clearly illustrating that the respondent was dealing with the applicant and not the holding company.

[51] In addition, the statement of account deals with invoices that the applicant refers to in its papers, which clearly shows the respondent’s indebtedness to the applicant.

[52] Mr Boesak submitted that if the respondent believed that a compromise was reached with the holding company, one would have expected the respondent to raise the lack of locus standi by the applicant to bring this application. This, however, did not happen.

[53] Mr Boesak submitted that much of the correspondence that forms part of annexure ‘CD5’ was filed to illustrate the history of the matter and not because the

applicant relies on it for purposes of the current application. Mr Boesak is thus of the view that each does not require confirmatory affidavits of the authors of the correspondence in the current context.

On behalf of the respondent

[54] Mr Jones argued that the applicant's case must be considered on the strength of the papers and the papers deal with the alleged indebtedness set out and substantiated by the various emails and correspondence attached to the founding affidavit as well as the s 69(1)*(a)* letter issued and delivered. However, when the applicant was alerted to the deficiencies in its case, the applicant attempted to rectify the shortcomings in reply, which is impermissible.

[55] Mr Jones submitted that the respondent is prejudiced by this approach followed by the applicant as the respondent, for obvious reasons, did not have the opportunity to deal with the 'new matter' and under the circumstances the status of the respondent is in jeopardy.

[56] In his heads of argument, Mr Jones raised a further point *in limine*, specifically the non-compliance with s 9 of the Insolvency Act, however, this point fell away with the filing of the Master of the High Court's certificate, and I will not dwell on it.

[57] On the point in limine raised in respect of s 69(1)(*a)* letter, Mr Jones argued the return of service by the Deputy Sherriff dated 22 February 2021 speaks for itself as it indicates that the letter was served by affixing it at the respondent's registered address, and that was the total of the compliance by the applicant with s 69 of the Close Corporations Act.

[58] Mr Jones argued that the provision of s 69(1)*(a)* of the Act is peremptory and what can be extracted from the specific section, is the following:

a) The indebtedness must not be less than N$200.
b) The demand must be served.
c) By delivering it (the demand) at the corporation's registered office.
d) The sum due must remain unpaid for 21 days thereafter.

[59] In addition the applicant must allege that the indebtedness is a liquid or liquidated claim.

[60] Mr Jones argued that the purpose of service is to notify the person to be served of the nature and contents of the court process and to prove to the court that there has been such notice[10].

[61] Mr Jones referred the court to *Hiskia and Another v Body Corporate of Urban Space and Others*[11], wherein the court dealt with s 25 of the Act and the meaning of the word 'deliver' as used in that section. Mr Jones pointed out that in the *Hiskia* matter, the court held that s 25 of the Act does not permit service of process or a document by affixing the approach to the door of the registered office of the close corporation[12]. Therefore, Counsel argued, in terms of the ratio of *Hiskia*, the letter was never delivered.

[62] Mr Jones argued that the applicant in its replying affidavit attempted to remedy the shortcoming in respect of the delivery of the said letter by setting out the steps taken between 12 November 2020 and 19 February 2021, seemingly to suggest that there was compliance with the provisions of s 69(1)*(a).*

[63] Mr Jones criticized the applicant for yet again only acting upon the issues raised in the respondent's answering affidavit, where the information was available to it when the application was launched and should have been included in the allegations in the

[10] *Standard Bank Namibia Ltd and Others v Maletsky and Others* 2015 (3) NR 753 (SC) para 21.
[11] *Hiskia and Another v Body Corporate of Urban Space and Others* 2018 (4) NR 1067 (HC).
[12] *Hiskia and Another v Body Corporate of Urban Space and Others* 2018 (4) NR 1067 (HC) para 43.

founding affidavit. Still, the respondent had no opportunity to deal with the allegation, which remains prejudicial to the respondent.

[64] In respect of the chain of communication that the applicant relies on to show the respondent's liability, Mr Jones argues that these documents contain correspondence involving several people, and there are no confirmatory affidavits filed in respect of them. As a result, the evidence relied on constitutes hearsay.

[65] Mr Jones submitted that the issue regarding annexure ‘CD5’ goes further in that the annexures are attached to the founding affidavit but not adequately identified in the founding papers, nor are references made to what particular aspect it refers to.

[66] Mr Jones contended that the applicant could not justify its case by relying on facts that emerge from annexures to the founding affidavit that the applicant has not referred to in its founding affidavit and to which the respondent's attention has not been specifically directed.

[67] On the issue of the compromise, Mr Jones submitted that the respondent’s defence to the merits is simple as it contends that it is not indebted to the applicant and alleges that a compromise was reached between the respondent and the applicant’s holding company, TiAuto Investments (Pty) Ltd. Mr Jones argued that Mr Drury, in his founding affidavit, conceded that the applicant is a wholly-owned subsidiary of TiAuto Investments (Pty) Ltd.

[68] Mr Jones referred the court to the email correspondence in which Mr Pillay acted on behalf of TiAuto Investments. Mr Jones argued that Mr Pillay accepted the respondent’s proposal on behalf of the holding company, TiAuto Investments and that the funds had to be cleared into the account of TiAuto Investments. Counsel submitted that there is a clear compromise between TiAuto Investments and the respondent and not between the applicant and the respondent. Therefore, the applicant failed to show that the respondent is indebted to it. Tied to this compromise is the proposed

reinstatement of the franchise agreement, an agreement between the respondent and TiAuto Investments.

[69] The compromise, counsel argued, extinguished any cause of action that previously existed between the parties unless the right to rely thereon was reserved[13], which was not done by either the applicant or TiAuto Investments.

[70] Mr Jones contended that there was no compliance with s 69(1)(*a)* of the Act as the applicant did not show that the respondent is indebted to TiAuto Tyre Wholesalers (Pty) Ltd as opposed to TiAuto Investments (Pty) Ltd. This fact, considered with the other irregularities in the applicant's application, is sufficient for this court to dismiss the application with costs.

Applicable legal principles

[71] The application before the court is premised on s 68(1)(*c)* read with s 69 of the Close Corporations Act and s 345(1)*(a)*(i) of the Company Act 61 of 1973 as s 69(1)*(a)* of the Close Corporations Act and s 345(1)*(a)(*i) are similar in terms.

[72] As indicated earlier s 68(1)*(c)* of the Act deals with a situation where a close corporation can be wound up if, inter alia, it cannot pay its debts. To make any findings in terms of s 68(1)*(c)*, the court must be satisfied that there was compliance with s 69 and, more specifically, s 69(1)(*a)* of the Act that reads as follows:

'69. (1) For the purposes of section 68(c) a corporation shall be deemed to be unable to pay its debts, if –

(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for twenty-one days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

[13] *Mbambus v Motor Vehicle Accident Fund* 2013 (2) NR 458 (HC) para 7.

(b) …; or

(c) …..

(2) In determining for the purposes of subsection (1) whether a corporation is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the corporation.'

Onus

[73] The applicant bears the onus to prove on a balance of probabilities that the respondent cannot pay its debts and is actually and commercially insolvent. An applicant for a provisional order of liquidation need only make out a prima facie case. Whether the evidence adduced by the applicant constitutes a prima facie case is generally determined according to the principle set out by Corbett JA in *Kalil v Decotex (Pty) Ltd*[14] as follows:

'Where the application for a provisional order of winding-up is not opposed or where, though it is opposed, no factual disputes are raised in the opposing affidavits, the concept of the applicant, upon whom the *onus* lies, having to establish a *prima facie* case for the liquidation of the company seems wholly appropriate; but not so where the application is opposed and real and fundamental factual issues arise on the affidavits, for it can hardly be suggested that in such a case the Court should decide whether or not to grant an order without reference to respondent's rebutting evidence.'

Service of the s 69 letter of demand

[74] It is common cause that the letter of demand was delivered, not once but three times. The first two letters were delivered at the trading address of the respondent and were received by an employee firstly and secondly by Mr van Rensburg, a member of the respondent**.**

[14] *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 961I-962A.

[75] When realizing that the delivery of the demand was not in compliance with s 69(1)*(a)* of the Act, the legal practitioner acting on behalf of the applicant decided to serve the letter of demand at the registered address of the respondent. From the papers, it appears that there are no employees at this address, as it is not the trading address of the respondent and the Assistant Deputy Sherriff then had to serve in terms of r 8(3)*(a)* of the Rules of the High Court by affixing the process to the main gate at the registered address of the respondent.

[76] The applicant's position is that the Act does not provide for the manner in which delivery should take place, as long as it is delivered. Mr Boesak pointed out that s 25 of the Act provides for delivery via registered post, and therefore affixing the process to the registered address is substantial compliance with the act.

[77] Section 25 of the Act reads as follows:

> ‘(2) Any –
>
> (a) notice, order, communication or other document which is in terms of this Act required or permitted to be served upon any corporation or member thereof, shall be deemed to have been served if it has been delivered at the registered office, or has been sent by certified or registered post to the registered office or postal address, of the corporation; and
>
> (b) process which is required to be served upon any corporation or member thereof shall, subject to applicable provisions in respect of such service in any law, be served by so delivering or sending it.’ (my underlining).

[78] The respondent relies on the *Hiskia*[15] matter as authority for the point that the letter of demand was not properly delivered in terms of the Close Corporations Act. In the *Hiskia* matter, the court held that service of the summons, commencing action in the Magistrates’ Court, was invalid because neither rule 9(3)*(e)* nor s 25 of the Close Corporations Act,1988 permits service of a process or document by affixing the document or process to a door at the registered office of the close corporation.

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[15] *Hiskia and Another v Body Corporate of Urban Space and Others* (HC-MD-CIV-MOT-GEN 143 of 2017) [2018] NAHCMD 279 (31 August 2018).

[79] In the *Hiskia* matter, Ueitele J interpreted service of the summons, commencing action in the Magistrates' Court was invalid because neither r 9(3)(*e)* nor s 25 of the Close Corporations Act,1988 permits service of a process or document by affixing the document or process to a door at the registered office of the close corporation. Ueitele J found that r 9 of the Magistrates' Court Rules do not provide for the affixing of process.

[80] The current matter is distinguishable from the *Hiskia* matter as the High Court Rules provide for affixing of process on a close corporation as opposed to the Magistrates' Court Rules. The High Court Rule provided that service on a close corporation of any process may be effected –

'(a) on a company or other body corporate, by handing a copy of the process to a responsible employee of the company or body at its registered offices or its principal place of business in Namibia or if no such employee is willing to accept service, by affixing a copy to the main gate or door of such office or place of business or in any other manner provided by any law or these rules;'

[81] As in the *Hiskia* matter, r 8(3)*(a)* of the court rules also provide service in any other manner prescribed in any law or the rules. The Close Corporation Act provides for the delivery of process to the registered office of the close corporation.

[82] According to *Henochsberg* on the Companies Act[16] points out that the authorities are not harmonious on the issue of strict compliance on s 345(1)*(a)* of the Companies Act 61 of 1973 (South African), which necessitates proof of strict compliance with its requirements, which is similar to the Close Corporation Act. Section 345(1)*(a)* provides as follows:

'(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 not less than one hundred rand then due-

[16] Service Issue 31 June 2010 Vol at p 708.

(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) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or' (my underlining)

[83] In *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd*[17], the court held that:

'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 strictly 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.' In my view, no scope at all is left for the application of sec. 57 (1) or sec. 223. These two sections would have assisted applicant if sec. 112 (a) had merely required a demand to pay the sum due as a prerequisite for liquidation without describing a particular mode of service thereof. However, the deeming provision is phrased in such a way that until it is shown that service in this specified manner has taken place, it does not operate at all.'

[84] *Henochsberg* proceeds to refer to the matter of *BP & JP Investments (Pty) Ltd v Hardroad (Pty) Ltd*[18], wherein the court decided that s 345(1)*(a)*(i) requires strict compliance with its provisions and that it must be shown that there was service of the demand upon the respondent 'by leaving the same at its registered offices'. On appeal, the Appeal Court upheld the decision of the court a quo but left the question of whether substantial compliance with the provisions of s 345(1)*(a)*(i) open.

[85] In *Nathaniel & Elthymakis Properties v Hartebeestspruit Landgoed CC*[19] the court dealing with s 69(1)*(a)* of the Act considered the issue of substantial compliance

[17] *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W) at 917 C- D.
[18] *BP & JP Investments (Pty) Ltd v Hardroad (Pty) Ltd* 1977 (3) SA 753 (W)
[19] *Nathaniel & Elthymakis Properties v Hartebeestspruit Landgoed CC* [1996] 2 All SA 317 (T)

and, after distinguishing the matter before it from the *Phase* matter on the basis that the *Phase* matter was decided on the Companies Act and not the Close Corporation Act. The court decided that strict compliance was not required provided that the close corporation had received demand on the basis that to hold otherwise would elevate form above substance, and that would mean that 'a demand delivered at the registered office, not received by the management of the close corporation is effective but a demand received by the management but not delivered at the registered office is ineffective would be absurd. As a result, the court held that the requirement that the demand must be served on the corporation is peremptory but that the requirement that it be done at the registered office is not and that substantial compliance will in that respect suffice[20]. The *Nathaniel & Elthymakis Properties*[21] matter stands directly opposed to the matter of *Afric Oil (Pty) Ltd v Ramadaan Investments CC*[22], wherein the court held that the provisions of s 69(1)*(a)* of the Act were peremptory in requiring service of the demand by delivering it at the registered office of the corporation and had the legislature intended to sanction other forms of service it would have made provision for them. The court further held that strict compliance regarding service was a prerequisite for deeming the corporation to be unable to pay its debts[23].

[86] *Henochsberg*[24] commented that 'the question is not whether the demand is ineffective if not delivered to the company's registered address, but that the intention of the Legislature is that, provided that it is shown that the relevant demand, a company will be deemed to be unable to pay its debts as contemplated in s 345(1*)(a*)(i) of the Companies Act, without proof that the company has actually received such demand. The learned authors continued to say that on that basis a demand not left at the registered office is not a demand for purposes of s 345(1)*(a)(*i), conversely, a demand left at the registered office is a demand for purposes of s 345(1)*(a)(*i), even if it does not come to the attention of the company.'

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[20] Henochsberg Service Issue 31 June 2010 Vol at p 708.
[21] *Nathaniel & Elthymakis Properties v Hartebeestspruit Landgoed CC* [1996] 2 All SA 317 (T).
[22] *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N).
[23] *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) at 44A/B - B/C.
[24] Henochsberg Service Issue 31 June 2010 Vol at p 708.

[87] In both *Phase Electric*[25] and *Afric Oil*[26], above, the issue on the point related to the service of a demand contemplated in section 345(1)*(a)(*i) of the Companies Act[27] and section 69(1)*(a)* of the Close Corporations Act[28], respectively. These provisions were basically and substantially similar. In both cases, the court found that the provisions were peremptory in that strict compliance therewith was essential and a prerequisite for an applicant to rely on the deeming provisions that the company or the close corporation, as the case might be, was unable to pay its debts.

[88] In my view, it is clear that the service of the letter of demand goes to the heart of the deeming provision and not the effectiveness of the service of the letter of demand. I agree with the matters of *Phase Electric*[29] and *Afric Oil*[30] that the provisions of section 69(1)*(a)* of the Close Corporations Act are peremptory, requiring service of the demand by delivering at the registered office of the respondent. I have considered *Nathaniel & Elthymakis Properties*[31] matter, but elect not to follow the dicta of the said case.

[89] Further to that, I agree with Ueitele J in the *Hiskia* matter because if the legislature intended other forms of service, it would have been provided for. Therefore, strict compliance with the provisions regarding service is a prerequisite for deeming the respondent as being unable to pay its debts.

[90] I, therefore, find that the applicant failed to comply with the provisions of s 69(1) *(a)* of the Act on the aspect of service.

Indebtedness of the respondent

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[25] *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W)
[26] *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N).
[27] Companies Act Act 61 of 1973.
[28] Close Corporations Act Act 69 of 1984.
[29] *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W)
[30] *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N).
[31] *Nathaniel & Elthymakis Properties v Hartebeestspruit Landgoed CC* [1996] 2 All SA 317 (T)

[91] The second ground upon which the applicant relies is that the respondent is unable to pay its debts in terms of s 68*(c)* of the Act. The respondent raised the defence that the respondent is not liable to the applicant in respect of any debt due to the following:

a) the compromise reached between the respondent and TiAuto Investment; and
b) the applicant did not make any case out of indebtedness in its papers.

Compromise

[92] Van Niekerk J discussed compromise or transaction in the matter of *Mbambus v Motor Vehicle Accident Fund*[32] :

'[7] Another case on which counsel placed reliance is *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZSC) in which the following overview was given (at 138I-140D):
''Compromise, or *transactio*, is the settlement by agreement of disputed obligations, or of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something - either diminishing his claim or increasing his liability. See *Cachalia v Harberer & Co* 1905 TS 457 at 462 *in fine*; *Tauber v Von Abo* 1984 (4) SA 482 (E) at 485G - I; *Karson v Minister of Public Works* 1996 (1) SA 887 (E) at 893F - G. The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. See *Nagar v Nagar* 1982 (2) SA 263 (ZH) at 268E - H. As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to raise defences to the original cause of action. See *Hamilton v Van Zyl* 1983 (4) SA 379 (E) at 383H. But a compromise induced by fraud, duress, *justus error*, misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order

[32] *Mbambus v Motor Vehicle Accidents Fund* 2013 (2) NR 458.

of court. See *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A) at 922H. Unlike novation, a compromise is binding on the parties even though the original contract was invalid or even illegal. See *Hamilton v van Zyl* (*supra* at 383D - E); *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SE) at 288E - F.''

[93] When considering the facts of the application in context as presented to court, the following is clear:

a) TiAuto Investment (Pty) Ltd is the holding company which wholly owns TiAuto Tyre Wholesaler (Pty) Ltd.

b) Mr Pillay is authorized to act on behalf of TiAuto Investments (Pty) Ltd, which is clear from the contents of the e-mail of 10 December 2020. In the e-mail, Mr Pillay refers to a settlement amount due to TiAuto Investments and then proceeds to state:

    i. 'After due consideration of your proposal, and in the interest of all concerned, we will accept the proposal on the following basis and noting the anomalies as stated above. The acceptance is without prejudice of rights.

    ii. The amount of N$ 1 576 387.21 be transferred into TiAuto Investments by close of business on 10 December 2020 and the funds are cleared in the account of TiAuto Investments by no later than 11 December 2020.

    iii. The franchise agreement is reinstated and that the parties agree to moving forward on a "clean slate" and agree to meet during January 2021 to jointly determine the strategic directions of the Windhoek store.'

c) There is no mention of the applicant in the e-mail conversation, and the outstanding amount is payable to the holding company.

d) The compromise was tried in proposed reinstatement of the franchise agreement.

[94] Mr Jones argued that there is no basis for the court not to accept the factual matrix set out above in favour of the respondent, which would then mean that there is no debt owed to the applicant and the applicant did not comply with the further requirements of s 69(1)(a) of the Act.

[95] Having considered the e-mail in question, I agree with Mr Jones. There was an acceptance of the offer made by the TiAuto Investments, and the parties agreed to regulate their intention in a particular way.

[96] The applicant contended that there was no dispute regarding the debt; however, from the correspondence between the legal practitioners, it was clear that the respondent disputed the applicant's calculations. Therefore up to 10 December 2020, there was a factual dispute regarding the outstanding debt. After that, a compromise was reached between the respondent and the holding company, TiAuto Investments.

[97] Notwithstanding the clear dispute between the parties the applicant failed to make substantial allegations in its founding papers.

The motion proceedings

[98] It is trite that the evidence in motion proceedings is contained in the affidavits filed by the parties. In *Nelumbu and Others v Hikumwah and Others*[33] Damaseb DCJ stated as follows:

> '[40] In motion proceedings the affidavits constitute both the pleadings and the evidence and the applicant cannot make out a particular cause of action in the founding papers and then abandon that claim and substitute a fresh and different claim based on a different cause of action in the replying papers: *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A). It has been held that:

[33] *Nelumbu and Othersv Hikumwah and Others* 2017 (2) NR 433 (SC).

"[A cause of action ordinarily means] every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court."[34]

[41] Since affidavits constitute both the pleadings and the evidence in motion proceedings, a party must make sure that all the evidence necessary to support its case is included in the affidavit: *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC) at 634G – H. In other words, the affidavits must contain all the averments necessary to sustain a cause of action or a defence. As was stated in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*[35]:

"It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits."
As the adage goes, in motion proceedings you stand or fall by your papers.'

[99] In the instant matter, the founding affidavit is a mere eight pages long and references made to documents run into 80 odd pages. The applicant refers in the founding affidavit to the documents as a whole. For example the statement of account is annexed as 'CD3', and the correspondence is annexed as 'CD5'. However, as Mr Jones correctly pointed out, nowhere in the founding affidavit is the applicant's case developed with reference to specific documents and how it would be applicable to the application.

[100] In para 42 and onwards of the *Nelumbo* matter[36], Damaseb DCJ deemed it necessary to remark on the instance where a number of documents are attached to the founding affidavit without specific reference to the relevant documents or the significance thereof. Damaseb DCJ stated as follows:

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[34] *McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 at 23 and Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 838E – G.
[35] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F – G.
[36] *Nelumbu and Othersv Hikumwah and Others* 2017 (2) NR 433 (SC).

'[42] When reliance is placed on material contained in annexures, the affidavits must clearly state what portions in the accompanying annexures the deponent relies on. It is not sufficient merely to attach supporting documents and to expect the opponent and the court to draw conclusions from them. In that regard, practitioners will do their clients a great service by heeding the following warning by Cloete JA in *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*[37]:

"It H is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest — the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. . . . A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush is not permitted."[38]

[43] O'Regan AJA stated in *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC) at 771B – C para 43 that it is not sufficient for a litigant to attach an annexure without identifying in the founding affidavit the key facts in the annexure upon which the litigant relies.

[44] It is not open to a litigant merely to annex to an affidavit documentation and to invite the court to have regard to it in support of the relief sought or the defence raised: what is required is the identification of the portions in the annexures on which reliance is placed and an indication of the case which is sought to be made out on the strength of those portions.' (my underlining)

[101] What the Honorable DCJ cautioned against is precisely what happened in the current matter. The correspondence alone is 80 odd pages. When the fact was raised that it is not clear as to the relevance and the applicability of the correspondence to the facts, Mr Boesak argued that all the correspondence was filed to show the historical background of the matter. I take no issue with the applicant setting out the background of a matter but is that feat accomplished by filing a mishmash of documents without directing the court's attention to documents relevant to the applicant? The applicant filed all the correspondence between the parties, but not identifying the important documents

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[37] *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) ([2007] ZASCA 153).

[38] *Nelumbu and Othersv Hikumwah and Others* 2017 (2) NR 433 (SC) at 200C – E.

leaves the court and the respondent in the position of not knowing what to consider and what to discard.

[102] The documents initially annexed to the founding affidavit were of extremely poor quality, and the respondent's complaint in this regard was meritorious. However, when clearer copies were filed, the applicant proceeded to elaborate on the documentation, not so much in reply to the answering affidavit, but apparently to clarify the respondent's indebtedness.

[103] With the greatest respect to the respondent, that is neither the time nor the way to go about it. The founding affidavit only painted the case of the applicant in broad strokes. However, in reply, it wanted to give the details of its claim that were sorely lacking in the founding affidavit.

[104] I fully agree with Mr Jones that this kind of approach placed the respondent at a disadvantage as the respondent cannot respond to the issues raised in reply. Mr Boesak argued that it is merely a response to the answering affidavit, but I beg to differ. In its reply, the applicant attempted to deal with several issues that constitute a new matter, which was not dealt with in the founding affidavit.

Conclusion

[105] Upon reading and considering the affidavits and annexures thereto, and submissions by both parties with reference to relevant case law, I am not satisfied that the applicant has out made a prima facie case that the granting of a provisional order of winding-up of the respondent on the ground that the respondent is unable to pay its debt.

Cost

[106] Cost to follow the event.

Order

1. The applicant's application for a provisional winding-up order is dismissed with costs.
2. Such costs to include the costs of one instructed and one instructing counsel.
3. The matter is finalized and removed from the roll.

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J S PRINSLOO

Judge

APPEARANCES

APPLICANT:	A Boesak Instructed by ENS Africa, Windhoek.
RESPONDENT:	J P Jones Instructed by Evert Gous Legal Practitioners, Windhoek.