

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: PRAELEX PROPERTY & INVESTMENT CONSULTANTS CC T/A BRIDGE PRO FINANCIAL SOLUTIONS and URBAN FARMING CC	APPLICANT RESPONDENT	Case No: HC-MD-CIV-MOT-GEN-2021/00351 Division of Court: Main Division Heard on: 15 August 2023
Heard before: Honourable Lady Justice Rakow	Reasons delivered on: 8 December 2023	
Neutral citation: <i>Praelex Property & Investment Consultants CC t/a Bridge Pro Financial Solutions v Urban Farming CC</i> (HC-MD-CIV-MOT-GEN-2021/00351) [2023] NAHCMD 811 (8 December 2023)		
Order: <ol style="list-style-type: none">1. The rule nisi is confirmed and the respondent to be finally wound up.2. The cost of opposition to a successful winding up application be included in the liquidation costs.3. The matter is finalised and removed from the roll.		
Reasons for order:		

RAKOW J :

Introduction

[1] The applicant is Praelix Property & Investment Consultants CC t/a Bridge Pro Financial Solutions, a closed corporation duly registered and incorporated in accordance with the Close Corporations Act 69 of 1984 of the Republic of South Africa. The applicant conducts business as a bridging financing corporation. The respondent is Urban Farming CC a closed corporation formed on conversion of Urban Farming (Pty) Ltd, duly registered in terms of the laws of Namibia. The respondent's primary business involves speculation in renewable energy solutions, manufacturing of pellets, farming, guest farming operations, trophy hunting and property investments.

[2] The applicant seeks an order that the respondent be finally liquidated and that the costs of the application, on a scale as between attorney and client, be costs in the respondent's liquidation. The respondent was provisionally wound up on 11 February 2022 on which date the Court also issued the rule nisi, calling on the respondent, inter alia, to give reasons, or show cause, if any, on 22 April 2022 why the respondent should not be finally liquidated. Pursuant to the 11 February 2022 court order, and for purposes of the return date, the respondent delivered its answering affidavit on 21 April 2022. The applicant's replying affidavit for the return date was delivered on 6 May 2022.

[3] The rule nisi was extended and the matter was postponed to 15 August 2023 for hearing after the rule nisi was reinstated on 3 March 2023, after the matter was previously struck from the motion court roll on 22 April 2022. On the 3rd of March 2023, the court order was duly served by the deputy sheriff on the respondent and the Master and it was further duly published in both the Namibian and Republikein newspapers on 10 March 2023 and in the Government Gazette on 17 March 2023.

The purpose of the application

[4] This is a winding-up application of the respondents on the basis that it is unable to pay its debts as contemplated in terms of section 350(1)(c) of the Companies Act 28 of 2004 (the Act). The applicant is a creditor of the respondent and thus has the required locus standi to institute these proceedings in terms of section 351(1)(b) the Act.

Background

[5] During 2016 at Welgemoed (Belville) in the Republic of South Africa and Windhoek respectively the applicant and the respondent duly represented, entered into a bridging loan agreement of a capital amount of R6 000 000.00 against the passing of a covering mortgage bond in favour of the applicant over Farm Ehuuro no 120 and farm Ohere no 106.

[6] The amount of R6 000 000.00 was paid by the applicant to the respondent as follows:

- a) R300 000.00 was paid on or about 14 September 2016 (clause 4.2.1 of the agreement).
- b) R250 000.00 upon signature date of the loan agreement (clause 4.2.2 of the agreement).
- c) R300 000.00 in respect of 50% raising fee, plus R15 000.00 in respect of legal costs which was paid on or before 31 October 2016 (clause 4.2.3 of the agreement).
- d) R4 200 000.00 which was paid to the conveyancing attorneys for the respondent on or before 31 October 2016 which funds would be earmarked for payment due to First National Bank of Namibia (clause 4.2.4 of the agreement).
- e) The legal fees and conveyancing costs pertaining to the registration of the mortgage bond for the properties was paid within 5 days of being called upon to do so by the conveyancing attorneys (clause 4.2.5 of the agreement).
- f) The balance of the capital amount on the date of registration of the mortgage bond (clause 4.2.6 of the agreement).

[7] The respondent agreed to repay the capital amount plus interest no later than 15 January 2017 (clause 5.1 of the agreement). The respondent also agreed to pay interest on the capital

amount at a rate of 20% per annum, which would be calculated and capitalized monthly in advance (clause 5.2 of the agreement).

[8] In the event that the respondent failed to pay the capital amount and interest to the applicant on or before 15 January 2017, the respondent agreed to pay a penalty raising fee equal to R4 512.33 per day until the date of repayment of the capital amount plus interest (clause 7.2 of the agreement).

[9] It was further agreed that the respondent would pass a mortgage bond in favour of the applicant over the properties of the respondent in the amount of N\$10 000 000 to cover its obligations in terms of the loan agreement (clause 6.1 of the agreement).

[10] In breach of the express terms of the agreement, the respondent has failed to make any payments. The applicant claims that the respondent is indebted to it in the amount of R22 769 313.77 which amount comprises out of arrear capital payments, interest on the arrears and the penalty raising fee. A certain Mr Ben-Tovim who used to be a member of the respondent but apparently resigned during this time as member, made various promises of payment of the outstanding debt but nothing materialized and it is the case of the applicant that the respondent is unable to pay its debts and is commercially insolvent.

[11] It is further the case of the applicant that the Namibia Procurement Fund also obtained a default judgment against the defendant for outstanding loans secured to the respondent. The Namibia Procurement Fund holds a second covering mortgage bond over the properties for the amount of N\$3 510 000.

[12] The matter then proceeded to court and became opposed. The answering affidavit of the respondent was, however, filed out of time which necessitated the bringing of a condonation application. This application was, however not successful and my brother Masuku J refused the application for condonation of the late filing of the answering affidavit.

[13] On 11 February 2022, the court made the following order:

- '1. The Respondent be provisionally wound up in the hands of the Master of the High Court Namibia.
2. That a rule nisi is issued, calling upon Respondent and all interested parties to give reasons, or show cause, if any, on 22 April 2022 at 10h00 as to why:
- 2.1. The Respondent should not be finally liquidated; and
 - 2.2. The costs of this application on a scale as between attorney and client, should not be costs in the liquidation of the Respondent.
3. Service of the provisional winding-up order shall be effected as follows:
- 3.1. By service by the Deputy Sheriff on:
 - 3.1.1 the registered office and principal place of business of the Respondent at 12th Floor, Sanlam Centre, 145-157, Independence Avenue, Windhoek, Namibia; and
 - 3.1.2. the Master of the High Court of Namibia at the High Court Building, Lüderitz Street,
 - 3.2. By 1 (one) publication in each of The Namibian and Republikein newspapers, and
 - 3.3. By 1 (one) publication in the Government Gazette.'

[14] It is the version of the respondent that there was an agreement between Mr Ben-Tovim and the applicant that, repayment of the loan will only be done when the respondent has secured project financing and that the matter should have been referred for arbitration. This version however, was put forward in a second answering affidavit after the first answering affidavit was filed out of time and such late filing was not condoned by the court.

Various points raised by the respondent

Failure to allege authority

[15] The deponent to the application does not allege, as a minimum, that he is authorized by the applicant to institute the application on its behalf. Alleging authority to depose to an affidavit is meaningless. It is the institution of proceedings which must be authorised.

[16] Annexure "PP2" to the founding papers contemplate an urgent application against the respondent. It authorises the deponent to sign documents and affidavits required for the winding

up application. It does not resolve to authorise the institution of proceedings. Authority is not assumed; it must be stated as a bare minimum.

Jurisdiction of the court

[17] The applicant can only seek the liquidation of the respondent on the basis of section 350(1)(c) of the Companies Act 28 of 2004 in circumstances where the Close Corporations Act 26 of 1988 itself does not provide such basis (section 66(1) of the Close Corporations Act 26 of 1988).

[18] Accordingly, the court may not permissibly grant a final order of liquidation against the respondent on the basis of inapplicable legislation.

Absence of jurisdictional facts

[19] The applicant must prove the existence of the indebtedness, and the respondent's corresponding inability to pay as contemplated in section 68(1)(c), read with section 69(1)(c) of the Close Corporations Act 26 of 1988.

[20] On the applicant's version (Annexure PP5) the amount of indebtedness alleged comprise invalid penalties, impermissible interest, and a combination of monies due to the deponent of the applicant and the applicant itself. On these facts, the indebtedness is not clearly established.

Arbitration

[21] The parties agreed that, on whatever legal basis, any claim arising out of the agreement shall be settled by way of arbitration (clause 10.1). The respondent specifically pleaded this fact.

[22] The applicant seeks enforcement of a disputed claim by circumventing the agreed dispute resolution provisions. This explains why no statutory demand for payment was made. The issue is not that an arbitrator cannot grant liquidation relief. The applicant seeks enforcement of the

loan obligations by employing liquidation proceedings as a debt collection mechanism in circumstances where they agreed that disputes arising out of the agreement shall be referred to arbitration. The Honourable Court should decline to exercise its jurisdiction and hold the parties to their agreement.

Penalty raising fee impermissible

[23] The applicant's deponent produced extracts of email correspondence intending to demonstrate the respondent's false promises. Conveniently, it omitted its own replies thereto. Same were produced by the respondent in answer.

[24] The respondent, with reference to these very same emails, demonstrate applicant's acceptance of delayed performance for numerous years. The applicant is disentitled to the penalty in the amount of N\$7 621 325.37 by virtue of section 2(2) of the Conventional Penalties Act 15 of 1962.

Common law in duplum rule

[25] Annexure "PP5" demonstrates that the capital loan amount (excluding the deponent's commission payments) was N\$5 700 000. The commission is N\$300 000. Together with interests thereon it amounts to N\$15 147 988.40. Thus the interest is an amount of almost N\$10 000 000. The total amount of arrear and unpaid interest by far exceeds the outstanding capital sum of N\$5 700 000. Plainly the respondent is not indebted to the applicant for amounts offensive to the rule. In any event, the interest amount is levied even on amounts due to the applicant's deponent, personally.

The application

[26] The applicant, conducting business as a bridging finance corporation, is a creditor of the respondent and has locus standi in terms of section 351(1)(b) of the Companies Act 28 of 2004 ("the Act"), which section provides that an application to the Court for the winding up of a

company may be made by one of its creditors. The applicant's locus standi is not in dispute. It is further not in dispute that the Court has jurisdiction as the respondent's registered address is situated within its area of jurisdiction.

[27] The basis of the winding up application is that the respondent is unable to pay its debts as contemplated in terms of section 350(1)(c) of the Act and that the respondent is commercially insolvent. Section 350(1)(c) of the Act provides that a company or body corporate is deemed to be unable to pay its debts if it is so proved to the satisfaction of the Court. In terms of section 350(2) of the Act, contingent and prospective liabilities of the company must also be taken into account for purposes of section 350(1).

[28] The above is the only hurdle that must be overcome by the applicant to show to this court that the respondent is unable to pay its debts. In this instance, the respondent has never indicated how it intends to pay its debts. It has an issue with the calculation of the debt but it must be accepted that the principle debt and the interest on the principle debt stands. It is true that the in duplem rule stands in our law but in this matter it will result in the interest being curbed at N\$6 000 000 which takes the outstanding amount to N\$12 000 000. It was further a term of the agreement that the penalty raising fee was to run as from 15 January 2017 in the amount of R4 512.33 per day until the date of repayment of the capital amount plus interest.

[29] Clause 13 of the loan agreement, in express and unambiguous terms provides that:

'13.1 This Agreement constitutes the sole record of the agreement between the Parties with regard to the subject matter thereof. No Party shall be bound by any express or implied terms, representation, warranty, promise or the like not recorded herein.

13.2 No addition to, variation of, or agreed cancellation of this Agreement, including this clause 13.2, shall be of any force or effect unless in writing and signed by or on behalf of the Parties.

13.3 No relaxation or indulgence which any Party may grant to any other shall constitute a waiver of the rights of that party and shall not preclude that party from exercising any rights which may have arisen in the past or which might arise in future.'

[30] This court has held in *Von Weidts v Goussard and Another*¹:

'The rule is that when a contract has once been reduced to writing no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence.'

and

When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.'

[31] The respondent's reliance on the arbitration clause is of no moment as it does not amount to a defence. An arbitration clause cannot oust the jurisdiction of this Court. In *International Underwater Sampling Ltd and Another v MEP Systems (Pty) Ltd*² this Court stated that this proposition is so elementary that there is no need to cite any authority in support thereof. It was stated in *MEP Systems (Pty) Ltd* that it will take something more than just an arbitration clause to oust this Court's jurisdiction. In an appropriate case, the Court must be satisfied that, in the circumstances of the particular case, justice demands that the dispute be referred to arbitration first. The respondent did not point to any such circumstances. The respondent must put up a defence for the failure to service its debt, which was not done and no indication was given as to how arbitration would assist such a defence. The relief sought by the plaintiff can in any case not be achieved through arbitration.

[32] The court is also satisfied that Mr Loots indeed had the permission of the plaintiff to institute the proceedings. He had permission to draft the papers and sign the said papers with the purpose to institute these proceedings.

[33] In the result, I make the following order:

1. The rule nisi is confirmed and the respondent to be finally wound up.
2. The cost of opposition to a successful winding up application be included in the liquidation costs.

¹ *Von Weidts v Goussard and Another* 2016 (1) NR 169 (HC) para 3.

² *International Underwater Sampling Ltd and Another v MEP Systems (Pty) Ltd* 2010 (2) NR 468 (HC) para 15.

3. The matter is finalised and removed from the roll.	
Judge's signature	Note to the parties:
RAKOW J Judge	Not applicable
Counsel:	
APPLICANT:	RESPONDENT :
B De Jager Of Francois Erasmus & Partners, Windhoek	J Diedricks Instructed by Conradie & Damaseb Legal Practitioners, Windhoek