



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2017/00227

In the matter between:

**BANK OF NAMIBIA**

**APPLICANT**

and

<b>SMALL &amp; MEDIUM ENTERPRISES BANK LIMITED</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>NAMIBIA FINANCING TRUST (PROPRIETARY) LIMITED</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>METROPOLITAN BANK OF ZIMBABWE LIMITED</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>WORLD EAGLE PROPERTIES (PROPRIETARY) LIMITED</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>THE MINISTER OF INDUSTRIALIZATION, TRADE AND SME DEVELOPMENT</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>THE MINISTER OF FINANCE</b>	<b>7<sup>TH</sup> RESPONDENT</b>

**Neutral Citation:** *Bank of Namibia v Small & Medium Enterprises Bank Limited & 6 others HC-MD-CIV-MOT-GEN-2017/00227 [2017] NAHCMD 191 (10 July 2017)*

**Coram:** Prinsloo, J  
**Heard:** 10 JULY 2017  
**Delivered:** 11 JULY 2017

**Flynote:** Applications and motions –Urgent Application – Rule 73 – Application brought on an urgent basis for the winding up of a company in terms of section 351 of the Companies Act, 28 of 2004 – The applicant in this matter seeks an order placing the first respondent under a provisional order of winding-up into the hands of the Master of the High Court of Namibia.

**Summary:** The applicant, Bank of Namibia in this matter seeks an order placing the first respondent, Small and Medium Enterprises Bank Limited under a provisional order of winding-up into the hands of the Master of the High Court of Namibia. The 4<sup>th</sup> and 5<sup>th</sup> Respondent argued against the winding-up of the company on the basis that such a decision would not be just and equitable, even if the SME Bank appears to be insolvent.

*Court held:* In the instance of compulsory winding up of a banking institute, is regulated by both the Banking Institutions Act, 2 of 1998 and the Companies Act, 28 of 2004.

*Held further:* From the cash flow and liquidity assessment and a solvency assessment, it is quite evident that the bank's liabilities exceed its assets. There is no doubt in this court's mind that SME Bank is commercially insolvent and will be unable to honour its commitments with investors.

*Held further:* The requirements of "just and equitable" confers upon the court a wide discretionary power which must, of course be exercised judicially, taking into account all the relevant circumstances, regard being had to the competing interests of all concerned

*Held further:* Due to SME Bank's state of factual and commercial insolvency it is unable to conduct banking business as a banking institution as set out in section 1 of the Banking Institutions Act.

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Held further: Placing the first respondent under a provisional order of winding-up into the hands of the Master of the High Court of Namibia would ensure an orderly and controlled realization and distribution of the company's assets and property. Court is accordingly satisfied that the applicant has made out a case for the relief sought in respect of all three grounds for winding-up the first respondent as set out in its papers

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## ORDER

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1. That the first respondent be and is hereby placed under a provisional order of winding-up into the hands of the Master of the High Court of Namibia.
  
2. A rule nisi hereby issues calling upon all interested persons (including the second to seventh respondents) to show cause, if any, on **15 September 2017** at **09:00**, why this Court should not make the following final order –
  - 2.1 that the first respondent be placed under a final order of winding-up; and
  - 2.2 that the costs of this application be costs in the winding-up of the first respondent.
  
3. That service of this order be effected as follows –
  - 3.1 by the Deputy-Sheriff for the District of Windhoek, by serving a copy of this order on the first respondent's registered address;
  - 3.2 by service, in any manner reasonably possible, on the addresses reflected in paragraphs 5, 6, 7 and 8 of the founding affidavit deposed to by Mr. Ipumbu Wendelinus Shiimi;

3.3 by publishing a copy of this order in one edition of The Namibian newspaper and the Government Gazette.

4. Further or alternative relief.

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## JUDGMENT

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Prinsloo, J

### Introduction

[1] The applicant in this matter seeks an order placing the first respondent under a provisional order of winding-up into the hands of the Master of the High Court of Namibia.

[2] A rule nisi is sought in this regard.

[3] The grounds for winding up are as follows<sup>1</sup>:

3.1 SME Bank is insolvent as contemplated by section 1 read with section 58 of the Banking Institutions Act 1998, (Act 2 of 1998), in that its liabilities exceeds its assets;

3.2 SME Bank is, in any event , commercially insolvent in that it is unable to pay its debts as they fall due, as contemplated by section 350(1)(c) and (2) of the Companies Act 2004, (Act 28 of 2004), read with section 349(f);

3.3 It is just and equitable that the SME Bank be wound-up as referred in section 349(h) of the Companies Act, 2004.

### Factual context of the application:

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<sup>1</sup> Notice of motion, prayers 2 and 3.

[4] The background of this application, the parties thereto has been traversed and discussed in my earlier rulings on the point in limine and the point of urgency and I will not dwell into it here. I will however briefly refer to the factual context that brought us to the ruling relevant to this application.

[5] It is now a common cause fact that certain investments in the approximate amount of NAD 196 000 were made by the SME Bank into Mamepe Capital ('Mamepe') seemingly a South African investment company.

[7] From 1 March 2017, the Bank of Namibia (BoN) assumed control of SME Bank under section 56 of the Banking Institutions Act, 1998 and took measures to investigate the aforementioned and other questionable investments made by SME Bank.

[8] It was subsequently established that an amount of NAD 32.7 million is seemingly with Mamepe while the amount of NAD 167 million was paid into various accounts belonging to other beneficiaries<sup>2</sup>.

[9] Despite demand, the funds so invested were not returned to SME Bank. In the founding affidavit the Governor of the BoN, Mr. Ipumbu Shiimi, expressed the view that an amount of at least NAD 174.4 million will not be recovered and is lost.<sup>3</sup>

[10] Subsequently it also came to the attention of BoN that NAD 175 million was invested in a consumable product (fertilizer). Said investment is held by Rawfert Offshore Sal, which is a Lebanese fertilizer company<sup>4</sup>.

[11] In January 2017, SME Bank was alerted to the fact that it was in contravention with the Determination of Minimum Local Assets Requirement, in terms of which it was required to maintain at all times a minimum local assets in Namibia of an aggregated value of not less than 100 percent of the amount of its liabilities payable in Namibian Dollars, excluding capital funds<sup>5</sup>.

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<sup>2</sup> Founding Affidavit para 36-38.

<sup>3</sup> Founding Affidavit para 41.

<sup>4</sup> Founding Affidavit para 41.3.

<sup>5</sup> Founding Affidavit para 41.4.

[12] Confirmation was then given by the then SME Board Chairman, Mr. Simataa that the amount of NAD 40 million that was in the form of South African investment would be recalled to rectify the breach, which did not happen.

[13] In an attempt to recover the funds invested in South Africa the acting CEO, Mr. Herunga formally demanded the return of said investments. However, that also came to naught.

[14] It would appear apart from the unsound investments that were made, SME Bank also incurred substantial losses from its lending activities and other operations which eroded the capital position of the banking institution even more.

[15] The result hereof was that as at 30 April 2017, the total shareholders' equity amounted to a negative NAD 177.6.

[16] The BoN engaged the shareholder of SME Bank to have a meeting and to discuss the position of the ailing bank, however the meeting did not realise<sup>6</sup>.

[17] On 31 May 2017 BoN requested the shareholders (in letter form) in terms of section 28(4) of the Banking Institutions Act, 2 of 1998 to inject capital funds into SME in the amount of NAD 359.1 million by 13 June 2017. The shareholders were informed in this communiqué that should they fail to comply, that the BoN would invoke sections 57 or 58 of the Banking Institutions Act, 2 of 1998<sup>7</sup>.

[18] The Governor of BoN was requested by the majority shareholder, Ministry of Industrialization, Trade and SME Development (sixth respondent) on 07 June 2017 for investigative report relating to the Mamepe Capital and VBS investments<sup>8</sup>.

[19] The said report was provided as requested, thereafter the sixth respondent sought an extension of the due date set in terms of section 28(4) request.

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<sup>6</sup> BON 38.

<sup>7</sup> Founding Affidavit para 49; BON 40.

<sup>8</sup> Founding Affidavit para 51; BON 42.

[20] On 21 June 2017, the sixth respondent informed BoN that “all avenues have been exhausted in terms of the SME Bank recapitalization from the majority shareholder perspective” and “that no resources are available to ensure timely recapitalization of SME Bank as per the Bank’s request”<sup>9</sup>.

[21] Up to date of the launching of this application, no funds were injected into SME Bank by the fourth and fifth respondents.

*Applicable legislation:*

[22] In the instance of compulsory winding up of a banking institute, is regulated by both the Banking Institutions Act, 2 of 1998 and the Companies Act, 28 of 2004.

*Factual insolvency:*

[23] Section 1 of the Banking Institutions Act provides that "insolvent", in relation to a banking institution, includes a banking institution –

- (a) of which the liabilities exceed its assets; or
- (b) which has committed an act of insolvency in terms of the Insolvency Act, 1936 (Act 24 of 1936).

[24] A report drafted by Mr. Nel, Director Banking Supervision, based on the financial information received from the SME Bank the balance sheet position of SME Bank as at 31 March 2017 was a negative NAD 162.065.000.<sup>10</sup>

[25] In a further report prepared by Mr. Nel dated 26 June 2017, under the title SME Bank Cash Flow, Liquidity and Solvency Scenario<sup>11</sup>.

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<sup>9</sup> Founding Affidavit para 53; BON 45.

<sup>10</sup> Founding Affidavit para 59; BON 49.

<sup>11</sup> BON 50.

[26] Mr. Nel considered the hypothetical impact if the funds invested with Mamepe in the amount of NAD 88 million, is returned to SME Bank. This is based on the assumption that the affidavit deposed to by Mr. Kotane, (Director of Mamepe) that the investment is safe and that the amount of approximately NAD 88 million has a maturity date of 30 June 2017.<sup>12</sup> To date the funds were not returned to SME Bank.

[27] Mr. Nel considered a cash flow and liquidity assessment and a solvency assessment and he concluded as follows:

‘It is clear from the two scenarios on the cash flow/liquidity and solvency assessment of SME Bank it is inevitable that both factual and commercial insolvency will befall the banking institution, even in the event that the investments are returned as reported, the high levels of losses will deplete the current inflows.’<sup>13</sup>

He proceeds:

‘Further the bank will continue to experience challenges with liquidity even with the expected inflows from maturing investments to NAD 188.2 million, since that amount will not (be) sufficient to meet the need for expected cash outflow needs between July 2017 and September 2017, which will amount to NAD 248.4 million. SME Bank will eventually find itself in a position where it is unable to honour its obligations as they fall due. The bank will be faced with both factual and commercial insolvency in the near future, which is inevitable.’

[28] From the said report it appears that the deposit maturities to be paid out by the bank between July 2017 and 30 September 2017 amounts to NAD 248,434,087.

[29] It is quite evident that the bank’s liabilities exceed its assets.

*Commercially insolvent:*

[30] In this regard the provisions of section 350(1)(c) and (2) of the Companies Act 2004, (Act 28 of 2004), read with section 349(f)<sup>14</sup> apply.

<sup>12</sup> Founding Affidavit para 41; BON 22.

<sup>13</sup> Founding Affidavit para 60; BON 50.

<sup>14</sup> (f) the company is unable to pay its debts as described in section 350.



[31] Section 350(1)(c) and (2) reads as follows;

'(1) A company or body corporate is deemed to be unable to pay its debts if-

(a) ...

(b) .....

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

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

[32] According to the liquidity report dated 30 June 2017<sup>15</sup> the liquid asset ratio of SME Bank as at 29 June 2017 stood at 5.0 percent which is below the regulatory minimum of 10 percent. The liquid asset holding stood at NAD 52.8 million and the bank reported a liquidity shortage of NAD 53 million.

[33] A further affidavit was filed deposed to by Mr. Nel indicating the position of the bank on 05 July 2017. The liquid asset hold amounted to NAD 38 million and the reported liquidity shortage was NAD 68.2 million. It appears that the minimum required regulatory level is NAD 106.2 million.

[34] As the position of the SME Bank was fluctuating from day to day, the court received a further affidavit, of Mr. Romeo Nel dated 10 July 2017 indicating the total liquidity available, at the time of hearing the merits of this application (10 July 2017), as NAD3,895,994.25.

[35] Attached to the said affidavit, the court also received correspondence from Ministry of Mines and Energy requesting urgent disinvestment of all National Energy Fund (NEF) investment with SME Bank to the tune of NAD 368,442,770.04. The investment in question has a maturity date of September 2017 onwards, however NAD 117,648,755.62 is a call account and therefore does not have a maturity date and can be called up at the date of choosing by the depositor.

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<sup>15</sup> Founding Affidavit para 65; BON 53.

[36] In addition hereto, GIPF informed SME Bank by correspondence dated 05 July 2017 that they intend to call up their investment of NAD 100 million on or before 10 July 2017 (date of the affidavit of Mr. Nel was deposed to).

[37] There is no doubt in this court's mind that SME Bank is commercially insolvent and will be unable to honour its commitments with investors.

[38] The liquidity problems already came to the fore when the bank was unable to pay Namibia Water Corporation Limited a deposit of NAD 150 million which was called up during September 2016 and the liquidity problems has now reached a critical point.

*Section 349(h): Principle of just and equitable:*

[39] This subsection, unlike the preceding subparagraphs of section 349, postulates not facts but only a broad conclusion of law, justice and equity as a ground for winding-up.

[40] In the matter of *Moosa NO v Mavjee Bhawan (Pty) Ltd and Another*<sup>2</sup> Trollip J while interpreting the 'just and equitable' ground said:

'The ground relied upon for a final winding-up order is that ... it is 'just and equitable' that the company should be wound up. That paragraph ... postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding up ... In its terms and effect, therefore, [it] confers upon the Court a very wide discretionary power, the only limitation originally being that it had to be exercised judicially with due regard to the justice and equity of the competing interests of all concerned...'

[41] The requirements of "just and equitable" confers upon the court a wide discretionary power which must, of course be exercised judicially, taking into account all the relevant circumstances, regard being had to the competing interests of all concerned<sup>16</sup>.

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<sup>16</sup> *Moosa NO* (supra).

[42] The courts have proposed five categories of circumstances in which it would *prima facie* be just and equitable to wind up a company under this provision<sup>17</sup>:

- (1) disappearance of its substratum;
- (2) illegality of its objects and if it has a fraudulent purpose;
- (3) fraud, misconduct and oppression;
- (4) deadlock in its administration; and
- (5) irretrievable breakdown of the relationship between the shareholders of a domestic company.

[43] Although five broad categories have been identified for winding up on just and equitable grounds, no *numerus clausus* exists.

[44] In the matter of *Barnard v Carl Greaves Brokers (Pty) Ltd And Others*<sup>18</sup> on p 676-677, Binns-Ward AJ discussed the five categories regarding just and equitable as follows:

'In the context of the reference to them in argument, it is necessary to point out that notwithstanding a tendency in some cases to have treated them as such, the five categories of just and equitable grounds cited in *Rand Air*, *supra*, are not juristic niches in any formal sense. They are merely the categorisation, in five groups, of examples of similar types of case in which a winding up has been granted under the just and equitable ground. Categorisation in this manner is helpful because it promotes greater predictability in the application of the relevant law; it does not connote, however, that establishing a case for relief under this head in a matter which on its facts falls outside the categorised examples requires a substantive development of the law. To the extent that some reported judgments might be read as suggesting otherwise<sup>19</sup>, I respectfully differ. The well established principle that an unrestricted breadth of considerations might, depending on the peculiar facts of a case, affect a finding as to what would be just and equitable in the given circumstances<sup>20</sup>

<sup>17</sup> *Laicatti Trading Capital Inc and Others v Greencoal (Namibia) (Pty) Ltd And Another* 2016 (2) NR p369 applied *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W).

<sup>18</sup> 2008 (3) SA 663 (C).

<sup>19</sup> Cf, for example, *Rand Air*, *supra*, at 350I-351B; *Wiseman v Ace Table Soccer (Pty) Ltd* 1991 (4) SA 171 (W) at 181fin-182H; and *Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd* [2001] 3 All SA 15 (T) at 48.

<sup>20</sup> Cf, for example, *Moosa NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at 136H; *Sweet v Finbain*, *supra* at 444H-445A; *Tjospomie Boerdery (Pty), Ltd v Drakensberg Botteliers (Pty)*

makes it inappropriate that the enquiry should in any way be confined by the influence of the established categories. Recognising this does not, however, mean that the just and equitable ground may properly be treated as an unprincipled 'catch all' for obtaining the liquidation of a company<sup>21</sup>.

[45] Mr. Namandje argued against the winding-up of the company on the basis that such a decision would not be just and equitable, even if the SME Bank appears to be insolvent.

[46] He submitted that there is a 'hybrid' relationship between the BoN and SME Bank, as on the one hand the BoN is the regulator and on the other hand the entity controlling the SME bank. As I understand the argument, this involves a blurring of the distinction between the respective rights of a regulator and an entity controlling the bank. He was of the opinion that it would serve BoN better if the application for winding-up is brought by a creditor.

[47] He further argued that there is no need for a winding-up of the SME Bank as BoN has already assumed control and such control would apply in terms of section 392(6)(f) of the Act on of the duties of the Liquidator is to manage and run the totality or part of business to be wound up<sup>22</sup>.

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Ltd and Another 1989 (4) SA 31 (T) at 45B and *Kyle and Others v Maritz & Pieterse Inc* [2002] 3 All SA 223 (T) in para 30.

<sup>21</sup> See Wunsh J's remarks in *Kia Intertrade*, supra, quoted in n16. And compare Lord Hoffmann's comments in part 5, sv 'Unfairly Prejudicial', of his speech in *O'Neill and Another v Phillips and Others* [1999] UKHL 24 ([1999] 1 WLR 1092 (HL); [1999] 2 All ER 961): 'Petitions under section 459 [of the English Companies Act, 1985—which is the equivalent of s 252 of the SA Act] are often lengthy and expensive. It is highly desirable that lawyers should be able to advise their clients whether or not a petition is likely to succeed. Lord Wilberforce, after the passage which I have quoted [the well-known passage often referred to in SA judgments, see eg *Hulett and Others v Hulett* 1992 (4) SA 291 (A) at 307H; *Sweet v Finbain*, supra at 445E], said that it would be impossible "and wholly undesirable" to define the circumstances in which the application of equitable principles might make it unjust, or inequitable (or unfair) for a party to insist on legal rights or to exercise them in a particular way. This of course is right. But that does not mean that there are no principles by which those circumstances may be identified. The way in which such equitable principles operate is tolerably well settled and in my view it would be wrong to abandon them in favour of some wholly indefinite notion of fairness.'

<sup>22</sup> Section 392(6)(f): (f) **to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up of the company**, but, if he or she considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he or she has obtained the leave of the Court or the authority referred to in subsection (5), but, is not, in that event, entitled, as between himself or herself and the creditors or contributories of the company, to include the cost of any goods purchased by him or her in the costs of the winding-up of the company unless those goods were necessary for the immediate purpose of carrying on the business of the company and there are funds available for payment of the cost of those goods after providing for the costs of winding-up;

[48] And lastly he took issue with non-compliance with section 28(4) of the Banking Institution Act.

[49] This court followed the argument advanced by Mr. Namandje however the BoN is not precluded from bringing this application *in casu* to court. Section 58(4) of the Banking Institution Act provides that:

‘(4) The Bank may, notwithstanding section 346<sup>23</sup> of the Companies Act, or notwithstanding having taken action under section 56 or 57 of this Act, make an application to the High Court for the winding-up of any banking institution.’

[50] Section 58(4) *supra* need to be read with section 56(10) of the same Act, which reads as follows:

‘(10) No order made under subsection (2) shall confer upon, or vest in, the Bank or any person appointed by the Bank, any title to, or any beneficial interest in, any property of the banking institution to which the order relates.’

[51] Assuming control over SME Bank by BoN was interim in nature pending application for winding-up of the company in terms of Section 349 of the Companies Act. This does not extent into the winding-up of the banking institution. The Master will appoint the liquidator who will perform the duties as set out in section 392 of the Act. Said liquidator will bear the responsibility to take such measures, subject to the applicable law to ensure the protection and better administration of SME Bank’s affairs and property.

[52] The argument advanced in respect of compliance with section 28(4) and jurisdictional issue raise with reference to the ‘hybrid’ relationship is found to be

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<sup>23</sup> Section 346:

(1) Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, is void.

(2) Every disposition of its property, including rights of action, by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, is void unless the Court otherwise orders.

unmeritorious for the reasons discussed *supra*. I am satisfied that BoN complied with section 28(4) when it demanded that the shareholders recapitalize the bank.

[53] Having considered all the relevant circumstances as discussed above and having with due regard to the justice and equity of the competing interests of all concerned, I conclude that winding-up would be just and equitable.

[54] It is also clear from the facts before me that the substratum of SME Bank has disappeared. The main object and purpose of the SME Bank is set out in its Memorandum and Articles of Association<sup>24</sup> as being:

‘TO OPERATE AND TRADE AS A BANKING INSTITUTION AND TO TRADE IN/OR INVEST IN FINANCIAL MARKET INSTRUMENTS, EQUITIES, DEPOSIT INVESTMENTS, PROVIDING MONEY MARKET SERVICES, CONSULT CORPORATE CLIENTS AND RELATED ACTIVITIES’

[55] Due to SME Bank’s state of factual and commercial insolvency it is unable to conduct banking business as a banking institution as set out in section 1 of the Banking Institutions Act.

[56] Placing the first respondent under a provisional order of winding-up into the hands of the Master of the High Court of Namibia would ensure an orderly and controlled realization and distribution of the company's assets and property.

[57] I am accordingly satisfied that the applicant has made out a case for the relief sought in respect of all three grounds for winding-up the first respondent as set out in its papers and my order is as follows:

1. That the first respondent be and is hereby placed under a provisional order of winding-up into the hands of the Master of the High Court of Namibia.
2. A rule nisi hereby issues calling upon all interested persons (including the second to seventh respondents) to show cause, if any, on **15 September 2017** at **09:00**, why this Court should not make the following final order –

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<sup>24</sup> BoN 54.

- 2.1 that the first respondent be placed under a final order of winding-up; and
- 2.2 that the costs of this application be costs in the winding-up of the first respondent.
3. That service of this order be effected as follows –
- 3.1 by the Deputy-Sheriff for the District of Windhoek, by serving a copy of this order on the first respondent's registered address;
- 3.2 by service, in any manner reasonably possible, on the addresses reflected in paragraphs 5, 6, 7 and 8 of the founding affidavit deposed to by Mr. Ipumbu Wendelinus Shiimi;
- 3.3 by publishing a copy of this order in one edition of The Namibian newspaper and the Government Gazette.
4. Further or alternative relief.

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JS PRINSLOO  
JUDGE

APPEARANCES:

THE APPLICANT: Adv. A Corbett SC (with him D. Obbes)  
Instructed by: ENSafrica Namibia (inc. as LorentzAngula Inc),  
Windhoek

4<sup>TH</sup> AND 5<sup>TH</sup> RESPONDENTS: Sisa Namandje (with him T. Iileka)  
Of: Sisa Namandje & Co Inc, Windhoek