

REPUBLIC OF NAMIBIA



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

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

Neutral Citation: *Bank of Namibia vs Small and Medium Enterprises Bank Ltd* (HC-MD-CIV-MOT-GEN-2017-00227) [2017] NAHCMD 350 (4 December 2017)

Coram: Prinsloo J

Heard: 18 October 2017 – 19 October 2017

Delivered: 29 November 2017

Reasons: 4 December 2017

Flynote: Insolvency Law – Banking Institution – Winding-up – Final Order of Winding-up – Factors to be considered by the Court in confirming the Provisional Order of Winding-up – Winding up of a Banking Institution – Key considerations to be made, one of them being whether the institution to be sequestrated made any improvements from the date of Provisional Order of winding-up being granted – Factors taken into account that would justify the granting of a Final Order of Winding-up.

Summary: On the return date after the provisional order of winding-up was granted on the 11th of July 2017, the parties were given the opportunity to adduce arguments why the SME Bank should not be placed under a final order of winding-up. On the return day of the *rule nisi*, the rule had to be extended until 18 October 2017 for further affidavits filed by the respondents to be considered.

At the granting of the provisional order, the court was well convinced at the time that SME Bank was factually and commercially insolvent and could as a result, not efficiently conduct business as a banking institution as set out in section 1 of the Banking Institutions Act. As a result of this finding, the Master of the High Court proceeded in terms of section 375, read with section 392 of the Companies Act to appoint provisional liquidators, Messrs. Bruni and McLaren.

In opposition to a Final winding-up order, the respondents raised various grounds relating to non-compliances, namely that:

1. The applicant had not filed any proof on the basis of which this Court would be satisfied that sections 361(1), 362(1) (a) and (b), and 3 of the Companies' Act were complied with after the provisional order was issued as required.
2. The appointment of Messrs. Bruni and McLaren not only as provisional liquidators but also as final liquidators was an approach inconsistent section 58(5)(c) of the Banking Institutions Act.¹
3. And furthermore a point of law for reconsideration raised which relates to the non-compliance with Section 351 of the Companies Act.²

¹ Act No. 2 of 1998

² Act 28 of 2004.

Held that in respect to sections 361(1), 362(1) (a) and (b), and 3 of the Companies' Act, the court remains satisfied that the objectives of the Act has been met and that the non-compliances referred to provide no substantial ground to cause the court to discharge the provisional order.

Held that the court was satisfied that there was substantive compliance with section 251 (4) of the Companies Act

Held that with respect to the provisions of section 58 of the Banking Institutions Act, if the respondents were aggrieved with the procedure followed by the Master in the appointment of the liquidators, the appropriate manner in which to address the grievances would have been the institution of review proceedings. Furthermore, no authority was presented to this court to say that there must be compliance with section 58(5)(c) before that the court can consider a final order.

Held further that the position of the SME Bank was still commercially and factually insolvent from date of provisional sequestration order granted to date of considerations for final order of sequestration and would be unable to honour its commitments with investors, therefore through principles of justice and equity of the competing interests of all concerned, the final order of winding-up which would be just and equitable in the circumstances.

ORDER

1. The *rule nisi* dated 11 July 2017 is hereby confirmed.
 2. The first respondent is hereby placed under a final winding-up order in the hands of the Master of the High Court of Namibia.
 3. Fourth and Fifth Respondents are ordered to pay the costs of opposition, including the costs of one instructing and two instructed counsel.
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JUDGMENT

Prinsloo, J

INTRODUCTION:

[1] The applicant, Bank of Namibia (hereinafter referred to as BoN or applicant) sought an order placing the first respondent, Small & Medium Enterprises Bank Limited (hereinafter referred to as SME Bank/the Bank) under a provisional order of winding-up into the hands of the Master of the High Court of Namibia. A rule nisi was also sought.³

[2] The relief was granted on 11th of July 2017 and consequently a final order of winding-up was sought on the return day.

[3] On the 15th of September 2017, which was the return day of the *rule nisi*, the court was requested to extend the *rule nisi* as further affidavits were filed on behalf of the Fourth and Fifth Respondents, which the Applicant wished to consider. The rule was therefore extended until 18 October 2017.

THE GROUNDS FOR THE WINDING-UP APPLICATION:

[4] The grounds that were advanced for winding up SME Bank were as follows: ⁴

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 Notice of motion, prayers 2 and 3, record 3.

⁴ Notice of motion, prayers 2 and 3.

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.

THE PROVISIONAL ORDER:

[5] Having considered the relevant facts and arguments advanced during the proceedings relevant to the provisional winding-up order, I found that:

1.1 On the issue of factual insolvency: the SME Bank's liabilities exceeded its assets.

1.2 On the issue of commercial insolvency: the SME Bank was commercially insolvent and would be unable to honour its commitments with the investors.

1.3 It would be just and equitable to wind-up the SME Bank.

1.4 The substratum of the SME Bank had disappeared.

1.5 The SME Bank was unable to conduct banking business as a banking institution as set out in section 1⁵ of the Banking Institutions Act, due to its state of factual and commercial insolvency.

THE FACTUAL CONTEXT OF THE APPLICATION:

[6] The factual context of this application and the facts thereto have been traversed and discussed in my three earlier rulings and I will not dwell on it. I will however briefly refer to certain issues to bring the current judgment into context.

[7] At the time of granting the provisional order on 10 July 2017, the total liquidity available to SME Bank was at NAD 3,895,994.25.

[8] Also at the time, correspondence received from the Ministry of Mines and Energy requesting urgent disinvestment of all National Energy Fund (NEF) investments with SME Bank to the tune of NAD 368,442,770.04, was handed into court and same now forms part of the record. The investment in question had 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.

⁵ "banking institution" means a public company authorised under this Act to conduct banking business, or deemed to be so authorized.

[9] In addition thereto, GIPF informed SME Bank by correspondence dated 05 July 2017 that they intend to call up their investment of NAD 100,000,000.00 on or before 10 July 2017 (date on which the affidavit of Mr. Nel was deposed to).

[10] Since the date of granting the provisional order for the winding-up of SME Bank, the provisional liquidators, Messrs. Bruni and McLaren, were appointed by the Master of the High Court of Namibia.

[11] A report was filed by the provisional liquidators indicating that to date of their correspondence, being 16th of October 2017, some 600 (out of potential 24 700) claims from depositors were received.

[12] The provisional liquidators further reported that they visited the offices of Mamepe Capital (Pty) Ltd (hereinafter referred to as Mamepe Capital) in Johannesburg on the 04th of October 2017 to have an audience with Mr. Kotane, Director of Mamepe Capital, but were unsuccessful in their efforts.

[13] The relevance of the visit to Mamepe Capital stems from the fact that certain investments in the approximate amount of NAD 196,000,00.00 were made by the SME Bank to Mamepe during 2014, of which NAD 175,000,000.00 was invested in a consumable product (fertilizer) during 2016. The said investment is held by Rawfert Offshore Sal, which is a Lebanese fertilizer company.⁶

[14] On the 5th of October 2017 the provisional liquidators visited the Financial Service Board in Pretoria and from the discussions it was determined that Mamepe Capital (Pty) Ltd was under investigation and the license of Mamepe was suspended.

⁶ Founding Affidavit para 41.3.

[15] It would appear from the replying affidavit filed by Mr. Ipumbu Wendelinus Shiimi, Governor of the Bank of Namibia, that to date no additional funding has been provided by the shareholders or any other party and that the position of the majority shareholder, the Government of Namibia through the third respondent, which holds a 65% shareholding, remains unchanged in that it has no interest in recapitalizing SME Bank.

[16] It would further appear that the total of investment made with Mamepe Capital, of which the maturity dates have passed, has not been repatriated to Namibia. According to the maturity analyses⁷ drafted by Mr Kotane, the following amounts were in SME Bank's Investment portfolio:

MATURITY DATE	INSTRUMENT	AMOUNT
30 JUNE 2017	MONEY MARKET	R28,201,413
30 JUNE 2017	Unlisted Investment	R59,999,928
31 AUGUST 2017	Unlisted Investment	R50,000,000
30 SEPTEMBER 2017	Unlisted Investment	R50, 000,000
TOTAL		R188,201,341

[17] The position regarding the investment with Mamepe Capital therefor remains unchanged and with that also the position of SME Bank as the expected return on the aforementioned investments did not materialize.

APPLICATION BY BoN:

[18] The applicant's prayer is that the rule be confirmed in finally winding-up the first respondent as sought, as SME Bank remains factually and commercially insolvent and it would therefore be just and equitable to grant a final order.

⁷ BoN 22.

[19] In support of its contentions the applicant filed a comprehensive head of arguments and also filed a replying affidavit by Mr. Ipumbu Shiimi.

OPPOSITION BY THE FOURTH AND FIFTH RESPONDENTS:

[20] It is important to note that the only respondents opposing a final order in this matter are the fourth and the fifth respondents. The first and third respondents did not oppose the application whereas the second, sixth and seventh respondents took up a neutral position and indicated that they will abide by the decision of this court.

[21] In opposing the application, an extensive opposing affidavit was filed, deposed to by Mr. Enock Kamushinda, on behalf of the fourth and the fifth respondents. Mr Kamushinda is a shareholder of the fourth respondent and the chairman of the fifth respondent.

[22] On the 14th of September 2017 the fourth and fifth Respondents (hereinafter referred to as the respondents) filed a notice to highlight and raise points of law in relation to non-compliances with certain mandatory provisions of the Companies Act, Act 28 of 2004.

[23] In addition thereto, the respondents filed arguments on a point of law for reconsideration which relates to the non-compliance with Section 351 of the Companies Act.⁸

[24] Lastly, the respondents filed heads of arguments on various legal issues which in essence incorporated all the aforementioned notices and arguments.

⁸ Act 28 of 2004.

[25] The respondents raised the following issues relating to non-compliances, to which I will refer in summary:

25.1 The applicant had not filed any proof on the basis of which this Court would be satisfied that sections 361(1), 362(1)(a) and (b), and 3 of the Companies' Act were complied with after the provisional order was issued as required. It was submitted that unless the Court is satisfied that the said provisions were complied with, it cannot proceed with the determination whether or not the provisional order should be made final.

25.2 With reference to the applicant's founding affidavit under paragraph 88 in which the applicant states:

"The Bank proposes the appointment of Messrs Ian Robert McLaren and David John Bruni (both being seasoned and well-experienced liquidators) as the provisional and final liquidators. These persons have been approached provisionally, and have signified their consent".

Respondents submitted that in the context of the aforementioned statement, the applicant at that time was proposing the appointment of Messrs. Bruni and McLaren not only provisional liquidators but also as final liquidators and that such an approach was inconsistent with section 58(5)(c) of the Banking Institutions Act.⁹

25.3 And lastly, on the issue of non-compliance, the respondents raised a point of law for reconsideration which relates to the non-compliance with Section 351 of the Companies Act.¹⁰

25.4 The respondents in their heads of argument also raise the issue of constitutionality of the final order and that the court should have regard to Article 95(j) and 98 of the Namibian Constitution.

[26] I will endeavor to deal with the alleged stated non-compliances hereunder:

NON-COMPLIANCE WITH SECTION 362(1)(b) OF THE COMPANIES ACT:

⁹ Act No. 2 of 1998.

¹⁰ Act 28 of 2004.

[27] The respondent did not advance argument in this regard any further and I will therefore not proceed to discuss same, except to say that the issue of compliance with section 362(1)(b) was sufficiently addressed in the affidavit of Mr. Visser and proof of service was filed.

NON-COMPLIANCE WITH SECTION 351 OF THE COMPANIES ACT:

[28] This court was invited to reconsider its findings made during the ruling on the point *in limine*¹¹ with specific reference to compliance in terms of section 351(4) of the Companies Act.

[29] On the latter issue raised, the respondents submitted that the court can revisit the reasoning and the ruling on the point *in limine* as it was interlocutory in nature and as such may be reconsidered.

[30] Compliance with the provision of section 351 was challenged at the initial hearing of the matter and in my judgment delivered on 07 July 2017, I made the following finding:

[24] This court will not speculate in this matter to say whether there was compliance with section 351(4) or not, as the certificate of the Master did not contain a time of lodgment of the application. I do however find that in the event of a time difference between filing with the Master and the Registrar, and in the event that the documentation was filed on the ground that if there was a failure to comply with the peremptory obligation set out in section 351(4), which court is unable to find, it should not be visited with nullity.'

[31] It is reasoned that in order for the court to have reached the determination of substantial compliance, the court had to take into account the provisions of section 351(4) in particular and the legislative scheme as a whole, i.e. the purpose or object of the particular provision.

¹¹ *Bank of Namibia v Small & Medium Enterprises Bank Limited & 6 others* HC-MD-CIV-MOT-GEN-2017/00227 [2017] NAHCMD 184 (07 July 2017).

[32] The purpose of the particular provision deals with the filling the application with the Master of the High Court as was set out in the matter of *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd*¹² at para 24:

‘As the Master is the person that will oversee the winding-up there are obvious reasons for ascertaining in advance whether the Master is aware of the reason why a winding-up order should not be granted’

[33] In support of their contention that the applicant did not comply with the provisions of section 351(4), the respondents obtained and filed further affidavits (without leave of court) dealing with the filing of the application at the office of the Master of the High Court of Namibia.

[34] The affidavits filed were deposed to by one Mr. Mhata, a legal practitioner practicing under name and style of Sisa Namandje & Co Inc. and Ms. Benade, a Senior Legal Officer at the Office of the Master of the High Court.

[35] Ms. Benade deposed to a confirmatory affidavit whereas Mr. Mhata related in his affidavit what he was told by Ms. Benade as to what occurred on the morning of the 4th of July 2017.

[36] The main issue in the point *in limine* was the time of lodging at the Master’s office and if same was effected before or after the lodging with the Registrar of the High Court and if before, the applicant was in non-compliance with section 351(4).

[37] It would appear from Mr. Mhata’s affidavit that during the morning of the 4th of July 2017, Ms. Benade received and retained the unsigned application and affidavits of the applicant herein. The bond of security had to be amended as the Master was cited as a respondent therein and same was returned to the Candidate Legal Practitioner, who attended the Master’s Office. The said Candidate Legal Practitioner took with her the bond of security and left.¹³ In the interim Ms. Benade proceeded to prepare the certificate in terms of section 351(3) of the Companies Act. The

¹² (979/2012) [2013] ZASCA 167 (27 November 2013).

¹³ Paragraphs 5 to 6 of the Affidavit.

corrected bond of security, the signed application, affidavits and annexures were hereafter served on 05th of July 2017. It was therefore maintained on behalf of the respondents that there was no lodgment prior to filing with the Registrar of the High Court.

[38] Mr. Charles Visser, a director of the applicant's legal practitioner also deposed to an affidavit wherein he stated that an unsigned copy of the notice of motion and an unsigned founding affidavit was served on the office of the Master on 03 July 2017 and Ms. Benade received same. The purpose of the unsigned copy of the application was to alert the Master of the impending application. At 08:00 on the morning of 04 July 2017, the initialed notice of motion and the founding affidavit of Mr. Shiimi (excluding the annexures) were filed. Whilst at the Master's offices, Ms. Jacobie, a Candidate Legal Practitioner, noticed that the Master was reflected as a party to the proceedings on the bond of security. Ms. Jacobie returned to the office with the said bond of security where she received a corrected bond of security in the parking lot of their offices from Ms. Morland. Ms. Jacobie immediately returned to the Master's office and arrived at about 08:30. Later the same day Ms. Jacobie received the certificate from Ms. Benade.¹⁴

[39] Ms. Jacobie, the Candidate Legal Practitioner in question, also referred to in the affidavit of Mr. Mhata, deposed to a confirmatory affidavit in this regard as well as Ms. Morland, also a Candidate Legal Practitioner who apparently brought the corrected bond of security to Ms. Jacobie.

[40] The affidavits filed by the applicant and respondents stand in clear contradiction with one another and recollections of Ms. Benade of the events as related to Mr. Mhata appears to be vague in certain aspects. The affidavit of Mr. Mhata does not deal specifically with the time that the application was received by Ms. Benade as it only referred to 'during the course of the morning'. This can mean anything from the time that the Master's offices opened until noon. On the other hand the affidavits filed on behalf of the applicant sets out time with specific particularity.

¹⁴ Paragraphs 9.5(a) to (d) of Affidavit.

[41] According to Mr. Visser the full application, excluding the confirmatory affidavits, was served on the Master's offices on 05 July 2017. He however maintains on behalf of the applicant that the lodgment was already effected on 04th of July 2017, apparently no later than 08:30, which was the time that Ms. Jacobie returned to the Master's offices with the corrected bond of security. Mr. Visser stated further in his affidavit, that when he confronted Ms. Benade with the 2 contradictory versions she indicated that she felt pressurized and rushed as the counsel who approached her at first was quite insistent. In the light of the contradictory versions of Ms. Benade presented to court, her recollection appears to be questionable and the affidavit presented is neither new evidence nor is it of assistance to this court. I find no reason to reverse my earlier decision in this regard.

[42] During arguments on the issue of non-compliance with section 351(4), the respondents raised yet another issue, i.e. that not all the affidavits were lodged with the Master's office as provided for in section 351(4). This is an argument that was not raised during the initial hearing of the matter.

[43] On behalf of the applicant it was however advanced that the full affidavit deposed to by Mr. Shiimi was lodged with the Master's office excluding the confirmatory affidavits that consists of some twelve pages. The said affidavit fully sets out the basis for the application and apprising the Master of the facts.

[44] The Master certified on the section 351(3) certificate and under its date stamp that the application was lodged on the 04th of July 2017.

[45] By issuing the section 351(3) certificate, the Deputy Master was evidently satisfied that sufficient security was given for payment of fees and charges and it was indicated that the Master has nothing to report on the matter.

[46] In spite of the fact that not all the annexures were filed on the date of lodgment, it is still apparent that the Master had the opportunity to exercise her discretion by accepting the lodgment of the application and by issuing the relevant certificate, which serves as *prima facie* proof of due compliance.

[47] I remain satisfied that the objectives of the Act have been met and any shortcomings to the affidavit of Mr. Shiimi, belatedly referred to, does not invalidate the application.

[48] I further remain firm in my earlier decision and again restate what was said in the matter of *Unlawful Occupiers, School Site v City of Johannesburg*¹⁵ by the Supreme Court of Appeal in South Africa at para 22 of the judgment that:

“[I]t is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved”.

[49] I can therefore not find that the non-compliance referred to should cause the court to discharge the provisional order.

NON-COMPLIANCE WITH SECTION 58 OF THE BANKING INSTITUTION ACT:

[50] On behalf of the respondents it was advanced that there was utter disregard for the provisions of section 58 of the Banking Institutions Act, on the following basis:

50.1 The Master failed to nominate any liquidators as required by section 58(5)(b), for consideration of the applicant and that the Master appointed provisional liquidators in terms of the Companies Act and not in terms of the Banking Institutions Act, as required.

50.2 Since none were nominated by the Master, the applicant failed to consider any nominations and failed to make a recommendation as contemplated in section 58(5)(a), for proper appointment by the Master.

50.3 That the applicant failed, at or about the time of the appointment of Messrs. Bruni and McLaren to designate a person with wide experience of, and who is knowledgeable about, the latest development in the banking industry.

[51] The certificate of appointment of Messrs. Bruni and McLaren have been made in terms of section 375, read with section 392 of the Companies Act. It is further

¹⁵ 2005 (4) SA 199 (SCA).

pointed out that if the Master was aware of the provisions of section 58(5) it is improbable that she would deliberately act contrary to those provisions, however, regardless the *mens rea* of the Master, the non-compliance with the statutory provision should be visited with nullity, save where substantial compliance has been demonstrated.

Nomination and election of provisional liquidators:

[52] The respondents submitted that the provisions of section 58(5) are clear and peremptory, which reads as follows:

“58 Winding-up or judicial management

...(5) Despite anything to the contrary in the Companies Act or any other law, the Master of the High Court-

- (a) may not appoint a person as provisional liquidator, provisional judicial manager, liquidator or judicial manager of a banking institution, other than a person recommended by the Bank under paragraph (b);
- (b) 30 days before appointing a person for any position referred to in paragraph (a), must submit the particulars and qualifications, and experience, if any, of such person and other relevant information to the Bank for its recommendation; and
- (c) the Master of the High Court must appoint a person designated by the Bank, who, in the opinion of the Bank, has wide experience of, and is knowledgeable about the latest developments in, the banking industry, to assist a provisional liquidator, provisional judicial manager, liquidator or judicial manager referred to in paragraph (a) in the performance of his or her functions in respect of the banking institution concerned.”

[Subsec (5) added by sec 34 of Act 14 of 2010.]

[53] It is further submitted that the purpose and the object of these provisions is for the applicant to have ample time (30 days) to consider the person nominated by the Master and even make its own enquiries concerning the person so nominated and then recommend to the Master.

[54] The purpose of appointing an expert banking advisor in terms of section 58(5) (c) is to assist the provisional liquidators and as the liquidators have not been nominated by the Master and then scrutinized for recommendation by the applicant but who have been appointed on 11 July 2017 to exercise the powers assigned to them under the Companies Act, without any expert banking guidance should cause their appointment to be a nullity.

[55] In reply it was argued on behalf of the applicant that the Master as well as the Governor of BoN was keenly aware of the provisions of section 58 and that there were prior discussions between the Master and the Governor where the names of the current provisional liquidators were also raised. The qualifications and experience of potential provisional liquidators were also discussed. The Master also provided the Governor of BoN's office with contact details of the current provisional liquidators. Following the said discussions, letters in this regard were authored and recommendations were made on 03 July 2017 and therefore the appointments of the liquidators were in compliance with section 58(5) of the Act.

[56] On the issue of the provisional appointment, the court in the matter of *Lipschitz v Watrus NO* pointed out that the Master has an unfettered and sole administrative discretion and it is within his/her enacted powers to give directions to his/her staff about such appointments.¹⁶

[57] In the matter of *Hartley NO v The Master*¹⁷ at 413 of the judgment of Maasdorp JA, the following was stated regarding the Master's powers and duties:

¹⁶ 1980 (1) 662 (TPD) at page 671.

¹⁷ 1921 AD 403.

“ I have said that the discretion of the Master is full and absolute and cannot be interfered with by this Court. But suppose this Court is of the opinion that the Master is wrong, which I do not suggest, should the Court- for his future guidance–point out where it thinks he erred? I do not think that the Court is called upon to do so, and by laying down any legal proposition for the future guidance of the Master would be indirectly interfere with his absolute discretion. And, even if the mode of instructing the Master is proper, it would in my opinion be utterly futile, considering the infinite variety of circumstances under which applications of this sort come before the Master.’

[58] In the matter of *Lipschitz* matter¹⁸ the court further stated that the exercise of such discretion can only be attacked in review proceedings on the basis that the Master failed to exercise her discretion at all, that she acted *mala fide*, or was motivated by improper considerations.

[59] If the respondents were therefor aggrieved with the procedure followed by the Master, the appropriate manner in which to address the grievance would have been through review proceedings.

[60] I can thus not find any merits in the argument.

Natural person:

[61] The respondents also took issue with the appointment of Logos Advisory Service, which was appointed in terms of section 58(5)(c) as the banking expert whereas such appointment ought to have been in respect of a natural person.

[62] This complaint does not appear to have any merit as section 1 of the Banking Institution Act defines "person" as a natural or juristic person, and includes a partnership. Logos Advisory Service would therefore be within the ambit of the definition.

¹⁸ *Supra* at page 672 C-D.

Effect of non-compliance with section 58(5)(c):

[63] No authority was presented to this court to indicate that there must be compliance with section 58(5)(c) before that the court can consider a final order. This is an administrative function vested in the Master and falls within the discretion of the Master.

[64] The nature of the Master's discretion was already discussed above.

CONSTITUTIONAL ISSUE RAISED:

[65] The court's attention was drawn to Article 95(j)¹⁹ of the Constitution which states that the State shall actively promote and maintain the welfare of the people, adopting *inter alia* policies aimed at consistent planning to raise and maintain an acceptable level of nutrition and standard of living and improve public health.

[66] In addition hereto, the court was requested to consider Article 98²⁰ of the Constitution which provides that the economic order of Namibia shall be based upon principles of a mixed economy with the objective to secure economic growth, prosperity and a life of human dignity for all Namibians.

[67] Respondents argued that the Bank of Namibia was established in terms of Article 128(1) of the Constitution and therefor the objectives of the Bank of Namibia, as set out in the Bank of Namibia Act²¹ must be read with Articles 95(j), 95(h) and 98 of the Constitution, as these articles raise the standard of living of the Namibian people through economic order with the aim of securing economic growth and prosperity for all Namibians.

[68] What the respondents in effect argued is that the applicant (BoN), as the financial advisor to the Government and as fiscal, and the Government of Namibia

¹⁹ Article 95(j): "The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following: ... (j) consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health."

²⁰ Article 98: " The economic order of Namibia shall be based on the principles of a mixed economy with the objectives of security economic growth, prosperity and a live of human dignity for all Namibians"

²¹ Act 15 of 1997.

failed the Namibian people. The SME Bank had to serve as a tool for the upliftment of the people of Namibia, yet the applicant and the Government allowed the liquidation and this constitutes improper conduct which would be unconstitutional. Respondent was of the opinion that applicant has measures of control at its disposal over SME Bank to address any irregularities but failed and to bring an application for the winding-up of SME Bank points to an abuse of process and the respondents questioned the bona fides of the applicant in the matter *in casu*.

[69] It was further submitted that the respondents stood for the rights of the 18 000 odd affected customers and investors of SME Bank.

[70] The court cannot fault the respondent's interpretation of Article 95 and 98 of the Constitution. The submissions regarding the obligations of the Bank of Namibia is also sound. However, the argument advanced by calling into question the *bona fides* of the applicant and then go as far as to say that the Government 'is sitting on its hands' and allowing the winding-up of SME Bank appears to be devoid of any merits.

[71] One cannot lose sight of the context within which the application before me was brought.

[72] To date the Government and Parastatals have invested hundreds of millions of Namibian Dollars into the SME Bank. The Namibian Government alone poured an approximate sum of NAD 900,000,000.00 into SME Bank. Money of the taxpayers, which is money that now appears to be lost due to various reasons, ranging from possible mismanagement to ill-advised investments and alike.

[73] On behalf of the applicant it was submitted that it was inconceivable to argue that it will benefit the Namibian economy if the provisional order is discharged. It was further submitted that failure of SME as a banking institution is the worst economic disaster since independence.

[74] The reality of the situation that SME Bank finds itself in is that if the Rule is discharged the little money left to pay out investors and clients will dissipate in an instant.

[75] I am fully in agreement with the argument of the respondents that within the constitutional context there is a duty on the applicant and the Government of Namibia to protect the people of Namibia and the economic growth and wellbeing of the country. From the papers before me it appears that that is exactly the aim and purpose of the application *in casu*.

[76] The application serve not only to prevent a further outflow of tax payers' money but also aims to protect the integrity of the Namibian banking institutions and the Namibian economy. This is the reason why the Ministry of Finance supported the winding-up of SME Bank and why the Government decided against recapitalizing the Bank.

[77] The efforts to resuscitate SME Bank was set out in details in the founding affidavit and further reports and affidavits following thereon. From the reading of papers before me, I cannot find any indication that the applicant acted *mala fides* in bringing the application for final winding-up of SME Bank nor can I find that such an application would be unconstitutional.

THE LEGAL THRESHOLD:

[78] When considering the winding-up of a banking institution, the provisions of the Companies Act which relates to winding-up or judicial management of companies apply *mutatis mutandis* and in so far as they are applicable in connection with any banking institution, even though any such provision may be inconsistent with any other law.

[79] In deciding if the court should grant a final order of winding up the following was set out by the learned author *Henochsberg on Companies Act*,²² para 347 at 728(1):

'Where a provisional order has been granted, or where application is made
for a final winding-up order without the prior grant of a provisional order, the

²² Delpont, P et al. 2010."Henochsberg on the Companies Act 71 of 2008". Vol 1 Service Issue June 2010.

applicant must satisfy the Court on a balance of probabilities that a final order is to be granted (see *Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) in which the Court (at 186) summarised the position as follows: “[T]he degree of proof required when an application is made for a final order is higher than that for the grant of a provisional order. In the former case a mere *prima facie* case need be established whereas the court, before it will grant a final order, must be satisfied on a balance of probabilities, that such a case has been made out by the applicant seeking confirmation of the provisional order”. Where there is opposition to the grant of a final winding-up order, the case for the grant of such order must be established on a balance of probabilities (*Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W) at 285–286; *Ter Beek v United Resources CC* 1997 (3) SA 315 (C) at 328; *SMM Holdings (Pty) Ltd v Southern Asbestos Sales (Pty) Ltd* [2005] 4 All SA 584 (W) at 593; *Cuninghame v First Ready Development 249 (Association incorporated in terms of section 21)* [2010] 1 All SA 473 (SCA) at para 1) and in the first instance the Court should determine whether on the evidence contained in the affidavits there is such a balance in favour of the applicant and, if there is, the Court then should consider whether oral evidence on any relevant issue of fact might disturb that balance, in which event it has a discretion to permit the adduction of such evidence (*Kalil* case supra at 979; and see *Atkinson v Rare Earth Extraction Co Ltd* 2002 (2) SA 547 (C) and cases cited therein). Where a final order is sought in circumstances where there are disputes in regard to the essential matters upon which the applicant is required to satisfy the Court, and the applicant does not seek an order referring such disputes for the hearing of oral evidence the test was summarised as follows in the Paarwater case (supra, at 187): “the following test enunciated by Corbett JA in the oft referred decision of *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* is of application, ie, ‘. . . where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted’ . . . It seems to me, however, that this formulation of the general rule particularly the second sentence thereof, requires some clarification, and perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order . . . In certain instances the denial by a respondent

of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact . . . Moreover there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers”.

[80] In the matter *in casu*, the final order was opposed in the strongest terms on technical issues that were raised and which were dealt with earlier in this judgment. This matter went as far as being challenged on a constitutional basis. However from the papers before me the factual position of SME Bank did not change since the granting of the provisional order.

[81] In the opposing affidavit filed on behalf of the respondents, Mr Kamushina²³ made the following statements:

81.1 That based on the affidavits made by Mamepe and VBS it is clear that the money (so invested) are not lost.²⁴

81.2 That the period for recapitalization of SME Bank was unduly truncated.²⁵

81.3 That the fourth and the fifth respondents are still willing to recapitalize SME with the appropriate contribution by NFT and that it would be the proper way to give effect to Article 95(j) and 98(1) of the Constitution of Namibia.²⁶

81.4 The respondents deny that SME Bank is insolvent from a liquidity point of view²⁷ and that the issue that was raised that the Bank failed to repay to Namibia Water Corporation Limited an investment in the amount of N\$ 140 Million, which had matured, was resolved.

81.5 That the respondents dispute that the winding-up of SME will be in anybody’s best interest.

81.6 That it would not be just and equitable to grant a final order and that they have no reason to belief that the Bank cannot be recapitalized through its shareholders and be run properly and successfully into the future.²⁸

²³ Shareholder of the Fourth Respondent and Chairman of the Fifth Respondent.

²⁴ Fourth and Fifth Respondent’s Opposing Affidavit at paragraph 148.

²⁵ Fourth and Fifth Respondent’s Opposing Affidavit at paragraph 169.

²⁶ Fourth and Fifth Respondent’s Opposing Affidavit at paragraph 176.

²⁷ Fourth and Fifth Respondent’s Opposing Affidavit at paragraph 183.

²⁸ Fourth and Fifth Respondent’s Opposing Affidavit at paragraph 186

[82] The respondents are paying lip service to how they imagine the SME Bank can be rescued from its dire straits but propose no plan of action to do so.

[83] No counter proposal or counter application is made as to how the Bank can be rescued and how the confidence of the Namibian public can be restored in the said bank.

[84] It is astounding the respondents deny that SME Bank is insolvent from a liquidity point of view, bearing in mind that on the date of the granting of the provisional order the liquidity rate of the bank dissipated to a meagre NAD 3,895,994.25 (as on 10 July 2017).

[85] The respondent also only paid lip service to the willingness to recapitalize SME but according to the Governor of BoN it has come to naught. There is no indication as to how and when this will occur and what their willingness entails.

[86] On that score one should not lose sight that the majority shareholder has indicated in no uncertain terms that no further monies will be invested into the failing SME Bank.

[87] Since April 2017 there was rapid decline in the solvency of SME Bank and I will just briefly summarize same (this has been discussed in detail in my previous judgment):

87.1 SME Bank incurred substantial losses from its lending activities and other unsound investments, which eroded the capital position of the banking institution.

87.2 As at 30 April 2017, the total shareholders' equity amounted to a negative N\$ 177.6.

87.3 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.²⁹

²⁹ BON 38.

87.4 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 N\$ 162,065,000.³⁰

87.5 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 359,100,000.00 by 13 June 2017, which was not done.

87.6 The expected cash outflow needs between July 2017 and September 2017 amounted to NAD 248,400,000.00 and in spite of the expected inflows from maturing investments to NAD 188,200,000.00 from Mamepe Capital, the amount will not be sufficient to meet the needs of the Bank.³¹

87.7 According to the liquidity report dated 30 June 2017³² the liquid asset ratio of SME Bank as at 29 June 2017 stood at 5.0 per cent which is below the regulatory minimum of 10 per cent. The liquid asset holding stood at NAD 52,800,000.00 and the bank reported a liquidity shortage of NAD 53,000,000.00.

87.8 The position of the bank on 05 July 2017 was that the liquid asset ratio was at 3.6 per cent, which was one third of the statutory minimum requirement of 10 per cent. SME Bank had a liquid asset holding amounted to NAD 38,000,000.00 and the reported liquidity shortage was NAD 68,200,000.00. It appears that the minimum required regulatory level is NAD 106,200,000.00.

87.9 On 10 July 2017 the liquidity available was N\$ 3,895,994.25.

87.10 Based on past data of SME Bank the EFT payments on average varied between NAD 5,000,000.00 and NAD 10,000,000.00 per day and therefor the remaining balance of NAD 3,895,994.25 will not be sufficient to cover subsequent EFT payments.

87.11 The National Energy Fund (NEF) investment with SME Bank to the tune of NAD 368,442,770.04 was called up.

87.12 GIPF informed SME Bank by correspondence dated 05 July 2017 that

³⁰ Founding Affidavit para 59; BON 49.

³¹ Founding Affidavit para 60; BON 50.

³² Founding Affidavit para 65; BON 53.

they intend to call up their investment of NAD 100,000,000.00 on or before 10 July 2017.

[88] If one has regard to the factual circumstances of the Bank, which did not change by much since the granting of the provisional order, then it is clear the bald statements and allegations made by the respondents are untenable. There does not appear to be an actual dispute of facts on the merits of the matter and the technical non-compliances raised indeed appear to be a game of smoke and mirrors, as it was eloquently put by the Governor of BoN in his replying affidavit.

[89] There is still no doubt in my mind that SME Bank is still commercially and factually insolvent and will be unable to honour its commitments with investors.

[90] It is also clear from the facts before me that the substratum of SME Bank has disappeared.

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

[92] I am satisfied on a balance of probabilities that a case has been made out to confirm the provisional order and that the first respondent should be placed under final winding-up into the hands of the Master of the High Court of Namibia to ensure an orderly and controlled realization and distribution of the company's assets and property.

COST:

[93] The court was referred to Blackman³³ as follows:

'The court may direct that the cost of opposition to a successful application for winding-up order be included in the costs of liquidation. However, the court will not make such a direction unless special circumstances exist and the opposition was bona fide and

³³MS Blackman Commentary on the Companies Act Vol 3, 14-185 (Original Service 2002)

reasonable. The test to be applied is whether or not it can be said that when the applications were launched (or when the final orders were sought) it could fairly be said that there were no reasonable prospects of opposition proving successful.'

[94] To date the respondents advanced very few substantive reasons, apart from the technical points raised, as to why the court should not grant a final order as sought by the applicant. I am not convinced of the bona fides of the respondents in opposing this application.

[95] There is little doubt in my mind that the action of the respondents contributed unnecessarily to the prolixity of the papers and the associated costs. In addition thereto the arguments to revisit a point *in limine*, which was fully argued and ruled on previously, took a significant portion of the time allocated for this matter.

[96] In the result I make the following order:

1. The *rule nisi* dated 11 July 2017 is hereby confirmed.
2. The first respondent is hereby placed under a final winding-up order in the hands of the Master of the High Court of Namibia.
3. Fourth and Fifth Respondents are ordered to pay the costs of opposition, including the costs of one instructing and two instructed counsel.

JS PRINSLOO
JUDGE

APPEARANCES:

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

4TH AND 5TH RESPONDENTS: Adv Bishop (with him S Namandje)
Of: Sisa Namandje & Co Inc, Windhoek