



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2019/00105

In the matter between:

ENOCK KAMUSHINDA	1st APPLICANT/ 1st Respondent in reconvention
METROPOLITAN BANK OF ZIMBABWE LIMITED	2nd APPLICANT/ 2nd Respondent in reconvention
WORLDEAGLE INVESTMENTS (PRIVATE) LIMITED	3rd APPLICANT/ 3rd Respondent in reconvention

and

PRESIDENT OF THE REPUBLIC OF NAMIBIA	1ST RESPONDENT
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	2ND RESPONDENT
BANK OF NAMIBIA	3RD RESPONDENT
MINISTER OF INDUSTRIALIZATION, TRADE AND SME DEVELOPMENT	4TH RESPONDENT
MINISTER OF FINANCE	5TH RESPONDENT
THE LIQUIDATORS, (SMALL AND MEDIUM ENTERPRISES BANK LIMITED (S.M.E. BANK) (IN LIQUIDATION)	6th RESPONDENT/ Applicant in reconvention

Neutral citation: *Kamushinda v President of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2019/00105) [2020] NAHCMD 493 (29 October

2020)

Coram: PARKER AJ
Heard: 12 & 13 August 2020
Delivered: 29 October 2020

Flynote: Company – Shares – Register of members – Rectification of – Application for in terms of s 122 of the Companies Act 28 of 2004 – Rectification granted not as of right – Motion proceedings for rectification discouraged where issues complex – Held, rectification may be refused where rectification would work injustice to other members of the company.

Summary: Company – Shares – Register of members – Application in terms of s 122 of the Companies Act 28 of 2004 – Application instituted by liquidators appointed for the SME Bank (In liquidation) – Court finding that members of the company had agreed before liquidation that the share register needed to be rectified to reflect the correct shareholding structure – Liquidators/Counter-Applicants merely seeking an order to do that which had been agreed – Court finding that there was no evidence that rectification would work injustice to other members of the company.

Flynote: Company: Directors – Liability for debts of company – Companies Act 28 of 2004, s 430 – Reckless trading – Proof of recklessness – Remedy under s 430 punitive – Onus on party alleging recklessness to prove it – Onus to be discharged on balance of probabilities – Recklessness not lightly to be found – Proper approach – If company carries on business and incurs debts when in the opinion of reasonable business persons there is no prospect of creditors receiving payment then court entitled to draw inference that business carried on recklessly – Such approach based on evidential test, not statement of substantive law – In the words carrying on business recklessly – ‘Recklessly’ means to carry on business through acts which show lack of any genuine concern for company’s benefit or prosperity – In applying the recklessness test, court should have regard to such factors as the scope of operations of the company, its role, functions of director, who creditors are, and amount of debts.

Summary: Company – Directors – Liability for debts of company – Companies Act 28 of 2004, s 430 – Reckless trading – Court finding that moneys stolen from the SME Bank benefited first respondent in reconvention who is a director of the SME Bank – Moneys were stolen from SME Bank ostensibly to invest in South Africa – Moneys paid into accounts of companies in South Africa and returned to Namibia and into accounts of two companies whose shareholder and director is first applicant in convention/first respondent in reconvention – When Bank of Namibia asked questions about the so-called investments and when the SME Bank expected to receive repayment on the maturity of the investment no response was forthcoming – No investments had taken place and the moneys stolen from the SME Bank were for the benefit of first applicant in convention/first respondent in reconvention personally and not for the benefit or prosperity of the SME Bank – Many depositors including the poorest of the poor stood to lose their deposits.

ORDER

1. The members' register of the Small and Medium Enterprises Bank Limited (In liquidation) is hereby rectified as contemplated by s 122 of the Companies Act 28 of 2004 to reflect the members of the Small and Medium Enterprises Bank Limited (In liquidation), with effect from 21 July 2015 as follows:
 - (a) Namibia Financing Trust (Association incorporated not for gain) as holding 65% of the issued shares;
 - (b) Metropolitan Bank of Zimbabwe Limited as holding 30% of the issued shares; and
 - (c) Worldeagle Investments (Private) Limited as holding 5% of the issued shares.
2. The First Respondent in reconvention (Enock Kamushinda) is declared liable for the liabilities of the Small and Medium Enterprises Bank Limited (In liquidation), as envisaged in section 430 of the Companies Act 28 of 2004.
3. The Second and Third Respondents in reconvention (Metropolitan Bank of Zimbabwe Limited and Worldeagle Investments (Private) Limited) are declared liable

jointly and severally, the one to pay the other to be absolved, for the contracted debts of the Small and Medium Enterprises Bank Limited (In liquidation) since date of liquidation, being 11 July 2017.

4. Judgment is granted against the First, Second and Third Respondents in reconvention, being Enock Kamushinda, Metropolitan Bank of Zimbabwe Limited, and Worldeagle Investments (Private) Limited jointly and severally, the one paying the other to be absolved, for payment to be made to the Sixth Respondents in convention, being the Liquidators, (Small and Medium Enterprises Bank Limited (SME Bank) (In liquidation) for the following amounts:

(a) N\$1 028 286 906.13 (One Billion Twenty Eight Million Two Hundred and Eighty Six Thousand Nine Hundred and Six Namibia Dollars and Thirteen Cents); and

(b) Interest on the aforesaid amounts calculated at the rate of 20% per annum as from 12 July 2017 until date of full and final payment.

5. Judgment is granted in favour of the Sixth Respondents in convention, being the Liquidators, (Small and Medium Enterprises Bank Limited (SME Bank) (In liquidation) against the Second and Third Respondents in reconvention in respect of their outstanding payments for their shareholding as follows:

(a) Metropolitan Bank of Zimbabwe Limited: N\$121 463 077;

(b) Worldeagle Investments (Private) Limited: N\$20 243 846;

(c) Interest on the aforesaid amounts at the rate of 20% per annum from 1 April 2015 until date of full and final payment.

6. The Sixth Respondents in convention, being the liquidators, are ordered to issue share certificates to Metropolitan Bank of Zimbabwe Limited and Worldeagle Investments (Private) Limited, for the percentages as mentioned in paragraph 1 of this order.

7. The First, Second and Third Applicants in convention/First, Second and Third Respondents in reconvention, being Enock Kamushinda, Metropolitan Bank of

Zimbabwe Limited and Worldeagle Investments (Private) Limited, are ordered to pay costs of the Sixth Respondents in convention/Applicants in reconvention, being the Liquidators, (Small and Medium Enterprises Bank Limited (SME Bank) (In liquidation), in respect of the counter-application, jointly and severally, the one to pay the other to be absolved, which costs include:

- (a) the costs of one instructing counsel and two instructed counsel; and
- (b) the costs incurred by the Sixth Respondents in convention/Applicants in reconvention, being the Liquidators, to secure expert witness reports from: Undjii Kaihiva, Alida Vries, Gerard Ryan, Ashley Wilson and Jacobus Swart.

8. The matter is considered finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

Introduction

[1] Rip Van Winkle saw a bank in operation in Namibia. The bank was registered and incorporated on 23 March 2011. The banking license of the bank was issued on 30 November 2012. It was 16 July 2014, the date on which a shareholders meeting was held, and Metbank/Metbank of Zimbabwe/Metbank Zimbabwe Limited/Metbank Zimbabwe Ltd/Metropolitan Bank of Zimbabwe (Pty) Limited/Metropolitan Bank of Zimbabwe (Pty) Ltd/Metropolitan Bank of Zimbabwe Ltd (see, for instance the citation of the appellant in the Supreme Court appeal case *Metropolitan Bank of Zimbabwe Ltd and Another v Bank of Namibia* Case No. SA77/2017) and World Eagle Investments (Private) Limited/Worldeagle Investments (Private) Limited/World Eagle Investments (Pvt) Ltd/Worldeagle Investments (Pvt) Limited/ World Eagle Investments (Pty) Limited/Worldeagle Investments (Pty) Limited/World Eagle Investments/Worldeagle Investments/World Eagle (see para 11 below), were represented by Wilson T Manase, Chairman of Metbank Zimbabwe, and Ozias Bvute, Director on the Board of World Eagle, respectively. Thereafter, it was 21 July 2015, the date on which for the last time Bank of Namibia (BoN), the third

respondent in convention in the application approved Metbank as a shareholder of the bank.

[2] Thereafter, it was on 25 February 2016 when the Board of Directors of the bank resolved that Metbank be added to the share register, holding 30% shares in the bank. The directors of the bank signed the required resolution for those shares to be registered in Metbank's name.

[3] The next critical date is 1 March 2017 when, in terms of s 58 of the Banking Institutions Act 2 of 1998, Bank of Namibia took control of the bank. Thereafter, on 11 July 2017 the court granted a provisional liquidation order in respect of the bank. A final liquidation order was granted on 29 November 2017.

[4] Lest we forget, the bank was established to serve small and medium enterprises that are under served by the existing commercial banking sector in the country and in order to uplift previously marginalised and disadvantaged communities, as contended by the appellants in *Metropolitan Bank of Zimbabwe Ltd and Another v Bank of Namibia* Case No. SA77/2017, para 29. What a noble socio-economic idea! What a social justice project! All right thinking people thought so. The aforementioned appeal was against the aforesaid granting of a final order of liquidation by the High Court (the court) (See para 6 below)

[5] Rip Van Winkle had fallen asleep on the veld to the south of the city on 1 December 2011 after imbibing a local brew, *Tombo*, given to him by three mysterious urchins. This time Rip Van Winkle did not sleep for 20 years; he slept for derisory six years. He had not grown old and he had not grown a long white beard, having slept for a comparatively short time. Rip Van Winkle went to town. The bank was nowhere in sight. The bank, which was to be the hope and refuge of small and medium enterprises and previously marginalised and disadvantaged communities, the lumpen proletariat or 'the poorest of the poor' (as Mr Heathcote SC, counsel for sixth respondents in the application/counter-applicants in the counter-application, characterized those communities), had been wound up when he was asleep. Rip Van Winkle was so told by those who must know. Rip Van Winkle was sad about the short life of such a good-intentioned project. But he was not gravely bothered

because he did not hold a deposit account with the bank, albeit he was a small business person. He did not trust any new thing, particularly a new bank run almost exclusively by foreigners.

[6] The winding-up application was brought by Bank of Namibian on the basis of the bank's non-compliance with s 351 of the Companies Act 28 of 2004 and the relevant provisions of the Banking Institutions Act 2 of 1998. The winding-up order was appealed from the court to the Supreme Court. The Supreme Court struck the appeal from the roll after Rip Van Winkle had woken up from his *Tombo*-induced slumber. Liquidators had been appointed for it in July 2017.

[7] That in a nutshell is the threnodial story of the Small and Medium Enterprises Bank Ltd ('the SME Bank'), which in law has now acquired the appellation SME Bank (In liquidation). The SME Bank is the subject matter of the instant application and counter-application.

[8] As intimated previously, the compulsory judicial (High Court) liquidation of the SME Bank did not go down well with certain persons, including Metropolitan Bank of Zimbabwe Ltd, hence the aforementioned appeal to the Supreme Court. The Supreme Court struck the appeal from the roll on 23 October 2018, as I intimated previously.

[9] In the course of events, Mr Enock Kamushinda instituted the instant application in convention ('the application') by the amended notice of motion ('notice of motion') on his own behalf as the first applicant and on behalf of Metbank as second applicant, and also on behalf of World Eagle as third applicant. The Bank of Namibia is the third respondent in the application and the liquidators are the sixth respondents. There are four other respondents (hereinafter referred to as 'GRN respondents', because they belong to the Central Government). All respondents have opposed the application. The sixth respondents (the liquidators) have not only opposed the application in convention; they have also instituted an application in reconvention by the amended notice of counter-application ('the notice of counter-application'). Hereinafter, for the sake of clarity and to eschew any confusion or misunderstanding, where the context allows, the application in convention will be

referred to simply as the application; and the application in reconvention will be referred to simply as the counter-application.

[10] It is important to note at the outset that in the papers of applicants in the application, Kamushinda indicates that the third applicant should be Worldeagle Investments (Private) Limited, and not Worldeagle Properties (Pty) Ltd which had appeared in the citation on the cover of the notice of motion. This goes to support Mr Heathcote's submission as to what should be the correct citation of third applicant in the application/third respondent in the counter-application. Indeed, Kamushinda describes himself as a shareholder of third applicant and third applicant's 'Chairman'. Consequently, third applicant in the application/third respondent in the counter-application is cited as Worldeagle Investments (Private) Limited in this proceeding, about which there appears to be common ground between the parties, as I have found. In that regard, it is important to note the following crucial points.

[11] On the papers filed of record, I find the following disturbing feature. The second applicant in the application/second respondent in the counter-application is referred to variously as Metbank, Metbank of Zimbabwe, Metbank Zimbabwe Limited, Metropolitan Bank of Zimbabwe (Pty) Limited, Metropolitan Bank of Zimbabwe (Pty) Ltd, Metropolitan Bank of Zimbabwe Ltd, and Metropolitan Bank. See, for instance, a letter, under the hand of Manase, 'Metropolitan Bank Chairman', wherein the writer complained to the Government about certain matters concerning the SME Bank. That being the case, the decision of the court in the instant matter is this: All those respective appellations belong to the one and same entity; and so, the order of the court binds any one of them, irrespective of the appellation appearing in the citation on the cover sheet. Similarly, third applicant in the application/third respondent in the counter-application is referred to variously as World Eagle Investments (Private) Limited, Worldeagle Investments (Private) Limited, World Eagle Investments (Pty) Ltd, Worldeagle Investments (Pty) Ltd, World Eagle Investments (Pvt) Limited, Worldeagle Investments (Pvt) Ltd, World Eagle Investments, and World Eagle. That being the case also, it is the further decision of the court that in the instant matter, all those appellations belong to the one and same entity; and so, the order of the court binds any one of them, irrespective of the appellation appearing in the citation on the cover sheet. If the people in charge of

those entities, for reasons known only to them, succeeded in fooling other persons they dealt with in business operations by using different appellations for each of those entities, they should not be allowed to dupe the court.

[12] The aforementioned decisions regarding the various appellations of Metbank and Word Eagle are necessary and required. It is to prevent the judgment and orders of the court in the instant matter from being rendered *brutum fulsum*.

[13] For the sake of clarity and neatness and the context allowing, hereinafter, first applicant in the application/first respondent in the counter-application is referred to as Kamushinda; second applicant in the application/second respondent in the counter-application is referred to as Metbank; third applicant in the application/third respondent in the counter-application is referred to as Worldeagle or World Eagle; and sixth respondent in the application/applicant in the counter-application is referred to as liquidators, Liquidators, sixth respondent, or sixth respondents in the application, and as Liquidators, liquidators, counter-applicant, or counter-applicants in the counter-application.

[14] Mr Rukoro represents the applicants in the application/respondents in the counter-application; Mr Jones represents the GRN respondents in the application; Mr Marais SC (with him Mr Obbes) represents third respondent in the application. Mr Heathcote SC (with him Mr Schickerling) represents sixth respondents in the application/applicants in the counter-application.

[15] The purpose of the application is captured precisely in para 25 of Kamushinda's founding affidavit. Kamushinda stated *verbatim et literatim*:

'25. The purpose of this application is to have the actions taken by Third Respondent, with the support of the First and Second Respondents, since 1 March 2017 to date, declared invalid in so far as they violate the Applicants' fundamental rights and freedoms under Articles 16 and 18 of the Namibian Constitution. The applicants seek relief in terms of Article 25 (3) of the Constitution.'

[16] The application and counter-application were set down for hearing on 11 August 2020. For reasons connected with the Covid-19 governmental measures, the hearing took place on 12 and 13 August 2020.

Withdrawal of the application and consequences

[17] In the opening words of his submission, Mr Rukoro stated that the applicants in the application were withdrawing their application. No notice of withdrawal had been filed to that effect; and so, naturally there could not have been a written consent (that would have been in the notice) to pay costs, as r 97 (1) of the rules of court provides. Nevertheless, Mr Rukoro placed on record that the withdrawal is accompanied by consent to pay costs. Unsurprisingly, Mr Jones and Mr Marais did not decline to give their consent to the withdrawal. They rather applied for costs which I inclined to grant, and an order to that effect has already been made (on 19 August 2020).

The withdrawal of the application in relation to the counter-application

[18] Mr Heathcote declined – and wisely so – to consent to the withdrawal of the application in terms of r 97 (1) of the rules of court unless the withdrawal was subject to certain conditions which counsel spelt out in his submission and were filed of record. They are as follows:

- ‘1. The consent to the withdrawal of the First to Third Applicants’ application shall not, by and in itself;
 - 1.1 be regarded as a concession that the court loses jurisdiction over the First to Third applicants in respect of the Sixth Respondents’ counter-application against First to Third applicants; and
 - 1.2 be regarded as permitting the First to Third applicants to unilaterally revoke their submission to this Court’s jurisdiction over the First to Third applicants;
2. The First to Third applicants (in the application) shall pay, jointly and severally the one paying the other to be absolved, the sixth Respondents’ (the liquidators’) costs incurred in opposing the First to Third Applicants’ application, such costs to include the costs of one instructing counsel and two instructed counsel.

3. The Sixth Respondents (in the application) reserve the right to refer to the affidavits filed on behalf of the First to Third Applicants (in the application) as well as the other respondents (in the application) for purposes of adjudicating the Sixth Respondents' counter-application.

Dated and signed at Windhoek on the 13th day of August 2020.'

[19] It must be remembered, according to r 97 of the rules of court, applicants could withdraw their application by - (a) consent of the parties or (b) leave of the court. In my view, where the court is inclined to grant such leave but a party does not consent to the withdrawal, it is fair and conducive to due administration of justice for the court to take into account the position of such party. I have pored over the counter-applicants' conditions that should attach to consenting to the withdrawal. The conditions make sense in law and they are reasonable on the facts and in the circumstances of the case; and so, the court's leave to allow the withdrawal has taken into account the counter-applicants' conditions in the interest of justice. As I demonstrate, the position set out in the conditions makes sense in law and is reasonable on the facts and in the circumstances of the case.

Conditions 1.1 and 1.2

[20] As to Conditions 1.1 and 1.2; I should say this. What is presently before the court under Case No. HC-MD-CIV-MOT-GEN-2019/00105 is an application and a counter-application, as I have mentioned previously. And the practice is now in vogue since the introduction of e-justice by the rules of court that where a matter is concluded, the last order usually reads: The matter is considered finalized and is removed from the roll; or words to that effect. Such an order enables the e-justice system to remove the matter from the roll of the court. Thus, as far as the application is concerned, an order has been made to that effect on 19 August 2020. But that order has not disposed of Case No. HC-MD-CIV-MOT-GEN-2019/00105 in its entirety.

[21] It follows inevitably that this matter is still alive and it will exist on the roll of the court until the counter-application, too, is disposed of. *A priori*, as a matter of law, the

jurisdiction of the court over first, second, and third applicants in the application/respondents in the counter-application has not dematerialized even if a part of the matter under Case No. HC-MD-CIV-MOT-GEN- 20219/00105 has been withdrawn. Doubtless, the court is under a legal duty under art 80 (2) of the Namibian Constitution to adjudicate upon the disputes before it, and in the present instance, the disputes before the court are an application and a counter-application in the one and same matter. The submission of the applicants in the application/respondents in the counter-application, being Kamushinda, World Eagle and Metbank, to the jurisdiction of the court in respect of the instant matter remains firmly intact until Case No. HC-MD-CIV-MOT-GEN-2019/00105 is concluded, including execution of any orders arising from the judgment of the court. These conclusions, which arise from the interpretation and application of the relevant provisions of the rules of court, are so basic and fundamental that I do not need to cite any authority in support thereof.

[22] As we stand, Case No. HC-MD-CIV-MOT-GEN-2019/00105 has not been finalized; and so, the court's consent to the withdrawal of the application cannot have the effect of permitting Kamushinda, Metbank, and Worldeagle to unilaterally revoke their submission to the court's jurisdiction over them. That is the law. It is trite that the plaintiff who sues a defendant in the defendant's forum to which the plaintiff would ordinarily not be subject, impliedly consents to the defendant instituting a counterclaim against him or her; and *a fortiori*, a submission to jurisdiction once made cannot be revoked. (Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th ed (1997) at 54-55; and the cases there cited) It need hardly saying that this trite principle applies with equal force to applications and counter-applications.

[23] Based on these reasons, I hold that the submission of Kamushinda (first applicant in the application/first respondent in the counter-application), Metbank (second applicant in the application/second respondent in the counter-application), and Worldeagle (third applicant in the application/third respondent in the counter application) remains firmly intact and unaffected by their withdrawal of their application.

Condition 2

[24] As respects Condition 2; I should, as I did in favour of the other respondents in the application (see para 17 above), order that sixth respondents, too, should have their costs, and an order has been made to that effect.

Condition 3

[25] As to Condition 3; I did not hear Mr Rukoro to object to it. In any case, all the papers filed by the parties form part of the record of the proceeding under Case No. HC-MD-CIV-MOT-GEN-2019/00105, and I do not see any good reason, and none was placed before the court, why the papers filed in the application by Kamushinda, Metbank, Worldeagle, Bank of Namibia, and the GRN respondents cannot be referred to in the adjudication of the counter-application.

The counter-application

[26] I now proceed to consider the counter-applicants' counter-application. For the sake of clarity, I shall deal with each relief in turn under the paragraphs as they appear in the notice of counter-application, together or separately.

Para 1. That the members' register of the SME Bank be rectified as contemplated by s 122 of the Companies Act 28 of 2004 so as to reflect the members of the SME Bank, with effect from 21 July 2015 or any other relevant date as appears from the papers, as follows:

1.1 Namibia Financing Trust (Association incorporated not for gain (NTF)) as holding 65% of the issued shares;

*1.2 Metropolitan Bank of Zimbabwe Limited as holding 30% of the issued shares;
and*

1.3 Worldeagle Investments (Private) Limited as holding 5% of the issued shares.

[27] Rectification of the register of members of a company is governed by s122 of the Companies Act 28 of 2004. Lest I forget, I use the word 'members' as synonymous with 'shareholders'. (See MC Oliver *Company Law* 5th ed (1976) at 96.)

Similarly, members' register and share register are used interchangeably. Section 122 provides:

'122. Rectification of register of members

(1) If-

- (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
- (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,

the person concerned or the company or any member of the company, may apply to the Court for rectification of the register.

(2) The application referred to in subsection (1) must be made in accordance with the rules of Court or in any other manner which the Court may direct, and the Court may either refuse it or may order rectification of the register concerned and payment by the company, or by any director or officer of the company, of any damages sustained by any person concerned.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his or her name entered in or omitted from the register concerned, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for the rectification of the register.'

[28] The interpretation and application of the statutory provisions granting the power of courts to order the rectification of the share register ('the register' for short) has received much treatment in many cases without number in Namibia and in other jurisdictions where similar provisions existed; indeed, as long ago as 1887 in England (see para 29 below).

[29] Counsel referred the following cases to the court in their individual submission: *Trevor v Whitworth* (1887) 12 App Cas 409 (HL); *Jeffery v Pollak and Freemantle* 1938 AD 1; *Davis v Buffelsfontein Gold Mining Co and Another* 1967 (4)

SA 631 (A); *Waja v Orr, Orr NO and Dowjee Co Ltd* 1929 TPD 865; *Botha v Fick* 1995 (2) SA 750 (A); *Bauermeister v Bauermeister and Another* 1981 (1) SA 274 (W); *Denker v Ameib Rhino Sanctuary (Pty) Ltd and Others* 2017 (4) NR 1173 (SC) (which referred to *Bauermeister v Bauermeister and Another*; *Jeffrey v Pollak and Freemantle*; and *Waja v Orr, Orr NO and Dowjee Co Ltd*).

[30] The considerations that emerge clearly from the authorities concerning the interpretation and application of s 122 of Act 28 of 2004 (and similar provisions in the other jurisdictions) are principally these:

- (a) The applicant for rectification of the members' register must act promptly after becoming aware of the relevant facts.
- (b) The power of the court to rectify the register is rooted in equity.
- (c) The power of the court to rectify the register is discretionary.
- (d) The rectification remedy is discouraged where the issues to be decided are so complex that they lend themselves to resolution by way of action as opposed to motion proceedings.

[31] The counter applicants' counter-application is, therefore, considered against the foregoing considerations (in items (a) to (d) in para 30) to see if the court ought to exercise its discretion in favour of granting the order to rectify the members' register as prayed for, because 'the request to rectify the share register is not granted for the asking'. (*Denker v Ameib Rhino Sanctuary* (SC) para 31, per Damaseb DCJ)

Consideration (a). Has sixth respondent acted promptly in making the application for rectification of the members' register?

[32] The crucial points to make under this head at the threshold are these. Whether an applicant for rectification has instituted the application promptly depends on the facts and circumstances of the particular case. The facts and circumstances relate perforce to such critical factors as the persons involved as shareholders, eg

whether they are easily locatable, in particular, whether they are ordinarily subject to the jurisdiction of the court; and the volume of documentation the applicant for rectification must trawl through in order to prepare his or her case properly, as is the case in the instant proceeding.

[33] Furthermore, the enquiry into whether there has been a delay and so the applicant should be out of court must be pursued in two steps. First, the court should decide whether there has been a delay, and if there has been a delay, to continue the enquiry to see whether sufficient and satisfactory explanation has been put forth for the delay. It follows, as a matter of common sense and logic that if there has not been a delay, there would not be the need for the applicant to put forth sufficient and satisfactory explanation for that which does not exist.

[34] In the instant proceeding, it is Mr Rukoro's submission that no 'proper and credible explanation' was placed before the court for the delay in applying for rectification of the register. Based on what I have said in paras 32 and 33 above, I respectfully, but roundly, reject Mr Rukoro's submission. Counsel has assumed, without justification, that there has been a delay which calls for a 'proper and credible explanation'. That, I should decide, as I now do. Mr Heathcote argued contrariwise, and submitted that the application for rectification has been brought with promptitude.

[35] The liquidators (David John Bruni and Mr Ian Robert McLaren) were appointed on 11 July 2017 by the Master of the High Court. I have taken account of the many volumes of paper, containing technical information that have been filed of record which of course, cannot – according to common sense and human experience – be the only papers the liquidators would have had to read and consider in order to prepare their case properly. I have also taken into account the fact that it was only on 3 April 2019 that applicants in convention, being peregrini, submitted themselves to the jurisdiction of the court when their amended notice of motion was filed. And the counter-applicants filed the counter-application on 17 October 2019.

[36] Moreover, Metbank and World Eagle are foreign companies through and through, because they were incorporated in Zimbabwe, that is, otherwise in Namibia

(LCB Grower *Principles of Modern Company Law* 3rd ed (1969) at 668). They are foreign companies irrespective of whether they carry on business in Namibia. (Piet Delport *New Entrepreneurial Law* (2014) at 23) Doubtless, Zimbabwe is a 'foreign country' within the meaning of s 1 of the Companies Act 28 of 2004.

[37] In all this, I think, in virtue of what I have said previously, we should take a cue from Smuts J as respects what he said in *Petroneft Intl v Minister of Mines and Energy* [2011] NAHC 125 para 32 about the factors the court ought take into account when deciding whether there has been a delay in bringing an application, to be heard on urgent basis, and not to take a simplistic approach; particularly that '[A] party cannot be expected to act over hastily, particularly in complex cases.' I have no doubt in my mind that the matter presently at hand is very complex by all account and on any pan of legal scales.

[38] For the sake of completeness, I should say, with the greatest deference to respondents in the counter-application, that their lame attempt to rely on prescription cannot succeed. They bear the onus to allege and prove prescription. They have failed to discharge the onus cast on them. (*Botes v McLean & Others* 2019 (4) NR 1070 (HC)) At all events, a claim of rectification of the share register is not a debt for the purposes of the Prescription Act 68 of 1969. (John Saner SC, *Prescription in South African Law* (2015) at 3-44); *ABSA Bank Ltd v Keet* 2015 (4) 474 (SCA))

[39] For all these reasons, I find that the counter-application was instituted with speed and promptness. Therefore, the counter-application and, with it, the request for rectification of the members' register of the SME Bank is properly before the court. This conclusion disposes of Consideration (a) (see para 30 above) in favour of the counter-applicants. I pass to consider together Consideration (b) and Consideration (c) (see para 30 above).

Consideration (b). What equity has sixth respondent established for rectification to be ordered?

and

Consideration (c). The power of the court to rectify the register is discretionary

[40] In looking to see whether equity has been established, the court is bound to go into all the circumstances of the case. (*Bauermeister v CC Bauermeister (Pty) and Another* 1981 (1) SA 274 (W), referred to by the Supreme Court in *Denker v Ameib Rhino Sanctuary (SC)*) In the instant proceeding, I understand the word 'equity', this 'chameleon-hued word' (see Bryan A Garner *A Dictionary of Modern Legal Usage* 2nd ed (1995)), to mean what is fair and right in a given instance; something that is fair and right: it is a blend of what is fair and what is just (*In re Gloria Manufacturing Corp* 65 BR 341, 347 (Bankr. E.D Va. 1985)). In a given instance, the court ought to be satisfied that the order of rectification should not work injustice to other members of the company. (H R Hahlo et M J Trebilcock *Hahlo's Casebook on Company Law* 2nd ed (1977) at 232-233, relying on *Re Sussex Brick Co* [1904] 1 Ch 598 (CA))

[41] All that the counter-applicants pray the court to do in this proceeding is for the court to exercise its judicial power under s122 of the Companies Act to rectify the members' register for it to reflect the true situation as at and as from 21 July 2015. Mr Heathcote asked the court to substitute 21 July 2015 for 3 September 2012, appearing in the notice of counter-application. I grant counsel's entreaty. It is reasonable. In any case, in the chapeu of para 1 of the notice of counter-application, the counter-applicants state safely: '... 3 September 2012 or any other relevant date as appears from the papers'. The date 21 July 2015 appears in the papers filed of record. Indeed, in his founding affidavit in support of the application, Kamushinda stated pointedly and meaningfully, 'It is common cause that the Second and Third applicants (in convention) are minority shareholders in the SME Bank (In Liquidation). The Second Applicant holds 30% of the shareholding and the Third Applicant holds 5% of the shareholding.'

[42] As liquidators of the SME Bank, the counter-applicants have a statutory duty to the general body of creditors, including depositors, many of whom are the poorest of the poor of the society (see para 5 above) to approach the court for appropriate relief. Doubtless, sixth respondents' counter-application conduces to due administration of justice pursuant to the rule of law. 'A foundational principle of the Constitution embodied in art 1 (1)', said Smuts JA, 'is founded upon the rule of law.' (*Metropolitan Bank of Zimbabwe Ltd and Another v Bank of Namibia (SC)* para 34) That, in my view, in the instant matter, requires the liquidators to perform their

special duties imposed on them by law (see *LCB Gower, Principles of Modern Company Law*, *ibid* at 654). And in the performance of their special duties, the liquidators have approached the seat of judgment of the court, praying the court to implement that which has essentially always been the agreement between the members of the SME Bank, as appears very clearly on the papers.

[43] As I see it, the liquidators have not attempted to manufacture and contrive evidence to suit a self-serving interest. They rely on what I find to be unchallenged and unchallengeable evidence, found on the papers and from common cause facts. And I accept the non-common-cause-facts on the basis of the *Plascon-Evans* test (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634E-635C).

[44] In that regard, it is important to set out the following undisputed and/or indisputable facts which, as I have said, appear from the papers. I have mentioned some of them already. I shall not rehash them here.

[45] As at 23 March 2011, according to the financial statements and the SME Bank register, members who were granted permission by the Bank of Namibia to become shareholders of the SME Bank were: The Namibia Financing Trust (Association incorporated not for gain), Worldeagle Investments (Private) Ltd and Metbank, carrying the following shares:

- (a) Namibia Finance Trust (Association incorporated not for gain): 65%;
- (b) Worldeagle Investments (Private) Ltd: 5%; and
- (c) Metropolitan Bank of Zimbabwe Limited: 30%.

[46] I should put the factual findings I make regarding the shareholding structure in the proper perspective and context by reference to the chronology of events relevant to the present proceeding. On 15 June 2012 the Metropolitan Bank of Zimbabwe (Metbank) applied for approval for the acquisition of 30 per cent of the shares in the SME Bank. Metbank's application for approval to acquire 30 per cent of the shares in

the SME Bank was granted by the Bank of Namibia on 3 September 2012. Therefore, as at 3 September 2012, the shareholding of the SME Bank, as approved by the Bank of Namibia, was:

- (a) Namibia Financing Trust (association not for gain): 65 per cent;
- (b) Metbank of Zimbabwe: 30 per cent; and
- (c) Worldeagle Investments (Private) Ltd: 5 per cent.

[47] The SME Bank's banking license was approved on 30 November 2012, as mentioned previously, and on the basis of the proposed shareholding structure, the situation was: Namibia Financing Trust: 65 per cent; Metbank of Zimbabwe: 30 per cent, and Worldeagle: 5 per cent. It is important to note that when the Bank of Namibia called for capital to augment the declining capital levels at the SME Bank in September 2013, Metbank, on 9 October 2012, purported to resign as a shareholder. Such abortive action has no basis in our law. We note here that – as part of the *res gestae* – after the required approval of the banking licence, mentioned previously, on the basis of the above shareholding and notwithstanding that the approval was granted on the basis of that shareholding, Mr Kamushinda, in a letter (dated 4 March 2014) attempted to divert Metbank shareholding to his own companies. When that attempt failed, Manase, Chairman of Metbank on 14 March 2014 in writing, applied again for approval of Metbank as a 30 per cent shareholder. On 9 May 2014 the Bank of Namibia stated that it had no objection to Metbank taking up 30 percent shares.

[48] Thus, it is apparent that, as far as the shareholding was concerned, nothing had changed since 3 September 2012. On the basis of a letter under the hand of Mr Kapofi, at the relevant time Chairman of the SME bank, which requested that the initial shareholding structure be reinstated, Metbank, in writing, undertook on 4 June 2014 to play their shareholder role of participating in the injection of fresh capital. Thus, at the shareholders meeting, held on 16 July 2014, the shareholders of the SME Bank took a number of resolutions, including that which stated that the share structure initially approved be reinstated. The result is clearly that Metbank has been

and has remained a shareholder of the SME Bank since 3 September 2012; or at the latest, 21 July 2015. The date on which, for the last time, as mentioned previously, Bank of Namibia approved the Metbank as a shareholder of the SME Bank.

[49] What have Kamushinda, Metbank and World Eagle, respondents in the counter-application, put forth in their attempt to demolish the overwhelming evidence relied on by the counter-applicants? Only this: Only these bare denials by Kamushinda, couched in Delphic terms. For instance, Kamushinda says that 'the content thereof is denied to the extent that it is at variance with what I have stated in the affidavit'. Unlike Kamushinda's bare, naked statements, the evidence placed before the court by the counter-applicants is detailed materially and substantially, supported by unchallenged documentary proof and expert analysis of the relevant documents and conclusions thereon; and, therefore, sufficient and cogent, as far as the court is concerned.

[50] Indeed, Kamushinda does not even reject the overwhelming evidence supporting the liquidators' call on the court to rectify the members' register. Kamushinda rather complains that he sees no reason why the failure to rectify the 'register and to issue share certificates must be attributed primarily to me while there was a board of directors and I was not even the Chairperson at the relevant time'. The counter-applicants are not placing any blame at Kamushinda's door. That, as I see it, is not the purpose of the evidence placed before the court by the counter-applicants.

[51] It is as clear as day that Mr Kamushinda does not object to the third respondent's counter-application to rectify the register. How could he reasonably and honestly do that? Kamushinda had as long ago as 10 July 2014, on behalf of Metbank and World Eagle, written a letter to the SME Bank in which he urged that 'the shareholding must be rectified, which rectification, by its nature, being a correction of a past error, is retrospective'. As I see it, now, he is only interested in telling the court that it was not his fault that the Board of Directors did not do that which the liquidators now pray the court to do. Be that as it may, the fact remains true that the members' register was not rectified in accordance with the agreement between the parties. The liquidators now pray the court to rectify the register in the interest of the general body of creditors, as aforesaid.

[52] There can be no doubt that the facts, considered justly and fairly, constitute the equity the counter-applicants have to move the court for the court's interposition. (*Halsbury's Laws of England*, 4th ed vol 7 para 146; approved in *Bauermeister v CC Bauermeister (Pty) Ltd and Another* 1981 (1) SA 274 (W) at 278) That, I should say, is the equity that the counter-applicants have established for the counter-applicants to be granted the remedy of rectification, to borrow the language of the Supreme Court, per Damaseb DCJ, in *Denker v Ameib Rhino Sanctuary (Pty) Ltd and Others* (SC), para 31. Indeed, as I have indicated previously, there is no evidence before the court tending to establish that rectification of the register will work injustice to other members. See H R Hahlo et M J Trebilcock *Hahlo's Casebook on Company Law* ibid at 232-233, relying on *Re Sussex Brick Co*, referred to in para 40 above.

[53] Based on these reasons, in my judgment, the counter-applicants have established the equity for the remedy of rectification to be granted. I am satisfied that the justice of the case impels me to exercise my discretion in favour of granting an order to rectify the members' register as the counter-applicants pray for in the counter-application. This conclusion disposes of not only Consideration (b) but also Consideration (c). I now proceed to treat Consideration (d). (See para 30 above.)

Consideration (d). Are the issues to consider in the rectification remedy so complex that they lend themselves to resolution by way of action as opposed to motion proceedings?

[54] I decided to set out the chronology of events and the facts in paras 45-48, above, for a reason. It is to demonstrate that there existed no intricate, difficult and complex questions of title to the shares which could not properly be decided on the affidavits. I have considered the large volume of documents, including financial statements and Resolutions of the Board of Directors of the SME Bank which amount to uncontroversial, unchallenged and unchallengeable proof of the material facts concerning this head of the relief sought by the counter-applicants. Having done that, I find that it is, with respect, sheer idle boast for the respondents in the counter-application to suggest that there are disputes of fact which call for a referral to oral evidence or dismissal of the application.

[55] I accept Mr Heathcote's submission that, whether there is or is not an absence of a real dispute between the parties on any material question of fact is considered with reference to the relief sought in the case at hand. On the facts of this case and as respects the remedy of rectification of the share register, as considered above, it is with firm confidence that I respectfully reject the suggestion by the respondents in the counter-application. I hold that there is 'an absence of a real dispute between the parties on any material question of fact' as respects this head of relief, and the other heads. (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)) at 1162)

[56] Consequently, I hold that the rectification remedy is amenable to the instant motion proceedings; and so, it is appropriately considered and adjudicated on (see *Denker v Ameib Rhino Sanctuary* (SC), para 31). The point is signaled that, with respect, Mr Rukoro did not respond with any substantial argument against the counter-applicant's request. Counsel's submission under this head and under the other heads dwelt principally and mostly on the issues of dispute of fact, delay in bringing the rectification application, and the defence of prescription. The argument based on those grounds have been considered and rejected. Indeed, Mr Rukoro argued that on the basis of 'case law relating to disputes of fact, it is submitted that the counter-application must be dismissed with costs, alternatively referred for oral evidence'. This, I should say, is the talisman on which Kamushinda, Metbank and Worldeagle hang their case. Like all talismans, this talisman, too, has been shown above to be illusory.

[57] Based on these reasons, I conclude that the counter-applicants have made out a case for the relief sought. It, therefore, behoves me to see to it that equity and justice be done by granting the order for rectification in order to make the register reflect the state of affairs which the counter-applicants *qua* liquidators are entitled to claim that it ought to reflect. (*Botta v Fick* 1995 (2) SA 750 (A))

[58] One last crucial point to make in virtue of the relief sought in para 3 of the notice of counter-application is this. It is trite that when the rectification of the members' register is effected, such rectification operates *ex tunc*, not *ex nunc*; and so, the court ought to order that rectification operate retrospectively where such

order will not work injustice to others. In the instant proceeding, no injustice is alleged by Kamushinda or Metbank or World Eagle. In any case, on the facts and in the circumstances, I do not see that there could be such injustice. Indeed, as I have mentioned previously, as long ago as 10 July 2014, Kamushinda on behalf of Metbank and World Eagle had written a letter to the SME Bank in which he urged that 'the shareholding must be rectified, which rectification, by its nature, being a correction of a past error, *is retrospective*'. (Italicised for emphasis) Naturally, no injustice can, therefore, be alleged reasonably and honestly by Kamushinda, Metbank or World Eagle, as aforesaid.

[59] Doubtless, the order granting rectification of the members' register under the present head should perforce, as mentioned previously, have a direct and material bearing on the relief sought in paras 3, 4, 5, and 6 of the notice of counter-application. Keeping this conclusion in my mental spectacle, I think it stands to reason to consider paras 6 and 5 of the notice of counter-application in that order; and so, I proceed to consider para 6 now.

Para 6. That the sixth respondents in convention be ordered to issue share certificates to Metropolitan Bank of Zimbabwe Limited and World Eagle Investments (Pty) Ltd against payment of the amounts mentioned in paragraph 5 of the notice of counter-application and for the percentages mentioned in paragraph 1 of the notice of counter-application.

[60] I have considered at great length previously what the true share structure of the SME Bank should be at the relevant time; and decided that the members' register ought to be rectified to reflect the correct situation at the relevant time. It follows reasonably that it is important to give effect retrospectively to the rectification order. For that reason and in the interest of due administration of justice, I should grant the relief sought in para 6 of the notice of counter-application; as I do. And I order that the order operates retrospectively. I now pass to consider the relief sought in para 5 of the notice of counter-application.

Para 5. That judgment be granted in favour of the sixth respondents in convention against the second and third respondents in reconvention in respect of their outstanding payments for their shareholding as follows:

- 5.1 *Metropolitan Bank of Zimbabwe Limited: N\$121 463 077;*
- 5.2 *World Eagle Investments (Pty) Ltd: N\$20 243 846;*
- 5.3 *Interest on the aforesaid amounts at the rate of 20% per annum from 1 March 2015 until date of full and final payment.*

[63] I have decided previously that the order granted in respect of the relief sought in para 6 flowed reasonably and inevitably from the order granted in respect of the relief sought in para 1 for rectification of the register. By a parity of reasoning, the order sought under the present head, that is, para 5 of the notice of counter-application, should in turn flow reasonably and inevitably from the order granted in respect of the relief sought in para 6. The only qualification is this. The remaining burden of the court under para 5 of the notice of counter-application should, therefore, only be a consideration of the evidence placed before the court to establish the amount of money that each of the entities, namely, Metbank (second applicant in the application/second respondent in the counter-application) and Worldeagle (third applicant in the application/third respondent in the counter-application) should pay for their individual shares.

[64] It is not disputed by Metbank or Worldeagle that they firmly promised and resolutely undertook to make the required contributions for their shareholding in the SME Bank, as I have found previously. In that regard, their outstanding contributions, which are undisputed, stand at:

- (a) Metbank: N\$121 463 077; and
- (b) Worldeagle: N\$20 243 846

[65] The fact that the outstanding contributions are outstanding and undisputed is borne out by the detailed and adequate explanation put forth by the former auditor of the SME Bank, Ms Magda Nel of BDO. There is also no dispute about the numerous demands by the Bank of Namibia for injection of capital and the inflow of the promised contributions by the members of the SME Bank. The allegations thereanent by the liquidators and Ms Tania Pearson, the legal advisor of the SME Bank (In liquidation), supported by relevant documentary proof, stand unchallenged by Metbank or World Eagle.

[66] It is worth noting that Kamushinda does not, as I have said more than once, dispute these irrefragable facts, namely, that Metbank and Worldeagle are members of the SME Bank; that those entities are liable to make their required contributions to the SME Bank; and the degree of their individual liability involved is as calculated by Magda Nel. Kamushinda's answers to the clear and documents-backed allegations are, with the greatest deference to Kamushinda, at best irrelevant and unrelated to the allegations, and at worst meaningless statements; see, for instance, the statement that he had to find a good deal that best served the interests of those he represented; the denial that Proffex Investment (Pty) Ltd is a Kamushinda company; and, furthermore, the statement, 'I deny that I chose not to inform my shares in the companies referred to' Kamushinda denies that he was the chairman of the SME Bank at all relevant times. But the liquidators did not put forth such contention. But tellingly and meaningfully, Kamushinda stated, 'In the end the parties (ie the members) agreed the structure and allocation of shares, and the Bank was established.' There is also Kamushinda's denial that he caused any delay in the issuing of the share certificates to Metbank and Worldeagle. I have held previously that that statement was uncalled for: It is irrelevant: it has no probative value. Yet again, Kamushinda states that 'an agreement that each party's contribution had to be paid before the Bank (the SME Bank) commence business operations'. On the heels of such important admission, Kamushinda gives flak that the Bank of Namibia allowed commencement of operations by the SME Bank before that condition was met.

[67] All these statements of Kamushinda do not whittle away the unchallenged, cogent and overwhelming evidence about the shareholding of the members and the fact that: (a) Metbank and Worldeagle are members of the SME Bank; (b) Metbank and Worldeagle undertook to pay their contributions in respect of their shares; and (c) their contributions are outstanding. As Mr Heathcote submitted, the personal feelings of Mr Kamushinda simply do not engage the said liability to make the capital contributions and the promise to do so, and the fact that payment is due, owing and payable by Metbank and Worldeagle.

[68] The following pieces of evidence are equally relevant to parry Kamushinda's extremely weak attempt to resist the granting of the order prayed for in para 5 of the notice of counter-application. On 1 March 2011 'the technical partner' (ie Metbank) indicated that their proposed capital contribution of N\$100 000 000 was still available. I hasten to note that the subterfuge that Metbank was a 'technical partner' not a shareholder was unabashedly abandoned by the tricksters themselves. In a letter dated 9 October 2013 from Metbank, the impression (rather the subterfuge) was created that Metbank was only a technical partner not a shareholder. That shameful stratagem was abandoned, as I say. The contrived misimpression was corrected in Metbank's letter dated 10 July 2014 in which Metbank pledged to 'play their *shareholder role* in the injection of fresh capital' into the SME Bank. (Italicised for emphasis) Consequently, as I said previously, Kamushinda wrote that 'the shareholding must be rectified which certification, by its nature, being a correction of a past error is retrospective'. I find that the further contributions by GRN (through (NFT) were never marched by World Eagle and Metbank with their contributions. Therefore, Kamushinda's statement of flak mentioned in para 66 above is unfounded and self-serving. As I have demonstrated, at the relevant time Metbank, too, had made a firm undertaking to make its 'shareholder' contribution to the SME Bank as a shareholder.

[69] Kamushinda's attempt to rely on prescription to resist the granting of the order under this head (that is, para 5 of the notice of counter-application) is as futile as his attempt to rely on prescription to resist the granting of the order under para 1 of the notice of counter-application, which has been rejected.

[70] Kamushinda raises the defence of prescription under the present head in the following terms:

'... any claim against second and third applicants (in the application) are prescribed as more than three years passed before this application was brought.'

[71] Kamushinda, Metbank, and World Eagle have several obstacles in their way as respects the raising of the defence of prescription. A party who raises prescription must allege and prove the date of inception of the period of prescription (*Gericke v Sack* 1978 (1) SA 821 (A); see also para 36-38 above). In that regard, that party

must allege and prove the date on which the creditor acquired knowledge of the debtor's identity and knowledge of the facts from which the debt arose. In the instant matter, I hold that the version of Kamushinda, Metbank, and World Eagle assuredly lack the factual averments to sustain the defence of prescription. Furthermore, s 13 (1) of the Prescription Act 69 of 1969 enacts that –

'If –

...

(a) The debtor is outside the Republic (including the territory of South West Africa (ie Namibia);

...

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)'.
'

And paragraph (i) of subsec (1) of s 13 of Act 69 of 1969 provides:

'the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist.'

[72] It follows that in terms of s 13 (1) (b) of the Prescription Act, prescription cannot commence to run for as long as the debtor is outside Namibia. I have found previously that Metbank and World Eagle are foreign companies; and the counter-applicants' uncontested version, which I accept, is that since the inception of the SME Bank they have remained outside Namibia. The applicants in the application have not placed any version before the court to counterpose the liquidators' version. Therefore, I have no good reason not to accept the liquidators' version as the truth. Thus, the liquidator's right to claim the amounts only arose, at the earliest, upon liquidation; and the counter-application was instituted long before three years would have elapsed since the date of liquidation. Even then, and more important, as I have said, the debtors have remained outside Namibia.

[73] Based on these reasons, I am satisfied that a case has been made out for the grant of the relief sought in para 5 of the notice of counter-application. I proceed to

consider the next relief. Because of the direct relationship and close affinity between the relief sought in para 2 and para 3, and between para 3 and para 4, of the notice of the counter-application, I shall consider these paragraphs together.

Para 2. That the First Respondent in reconvention (Enock Kamushinda) be declared liable for the liabilities of the Small and Medium Enterprises Bank Limited, as envisaged in s 430 of the Companies Act 28 of 2004

Para 3. That the Second and Third Respondents in reconvention (Metropolitan Bank of Zimbabwe Limited and World Eagle Investments (Private) Limited be declared liable for the contracted debts of the Small and Medium Enterprises Bank Limited as at date of liquidation of the Small and Medium Enterprises Bank Limited, being 11 July 2017

Para 4. That judgment be granted against the First, Second, and Third Respondents in reconvention, jointly, alternatively jointly and severally, for payment to be made to the Sixth Respondents in convention (the Liquidators of the Small and Medium Enterprises Bank Limited) of the following amounts:

d.1 N\$1 028 286 906.13 (One Billion Twenty Eight Million Two Hundred and Eighty Six Thousand Nine Hundred and Six Namibia Dollars and Thirteen Cents);

d.2 N\$60 000 000 (Sixty Million Namibia Dollars);

d.3 Interest on the aforesaid amounts calculated at the rate of 20% per annum as from 12 July 2017 until date of final payment.

[74] As an important prelude to the treatment of paras 2, 3 and 4 of the notice of counter-application, I note the following crucial points relating to the evidence. The facts relied on by the counter-applicants are mostly common cause facts. If there is seemingly any dispute of facts, as alleged by the applicants in the application/respondents in the counter-application, I hold that they are not bona fide disputes on material questions of fact. (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)) Be that as it may, the well-established approach to disputed facts in motion proceedings is to be followed. (See *Swartbooi and Another v Mbengela NO and Others* 2016 (1) NR 158 (SC).)

[75] In that regard, I find that the papers filed by the liquidators to support their case contain cogent and sufficient proof of the allegations they make. They do not contain generalities and hesitant and unsure statements. The evidence are backed in no small measure, in the main, by undisputed or indisputable documentary proof put forth through meticulously and professionally collated information and calculation of figures, gathered from unimpeachable sources, eg financial statements and bank records gotten from the SME Bank and personal computers or laptops, and ran through credible forensic examination by the liquidators' expert witnesses, namely, Undjii Kaihiva, Alida Vries, Gerard Ryan, Ashley Wilson and Jacobus Swart (a computer expert). As Mr Heathcote put it felicitously, the proof of the relevant matters is established in sufficient and cogent detail, by 'chapter and verse'. In any case most of the evidence stands on common ground between the parties, as I have said previously.

[76] Keeping what I have said in para 43 and paras 74 and 75 in my mind's eye as respects the consideration of evidence in motion proceedings, I proceed to consider para 2 of the notice of counter-application.

Para 2. That the First Respondent in reconvention (Enock Kamushinda) be declared liable for the liabilities of the Small and Medium Enterprises Bank Limited, as envisaged in s 430 of the Companies Act 28 of 2004

[77] The legal basis of the counter-applicants' claim in para 2 of the notice of counter-application is, therefore, s 430 of the Companies Act 28 of 2004. It is important to note that s 430 of Act 28 of 2004 Act was s 424 of the repealed Companies Act 61 of 1973. Section 430 provides:

'430 Liability of directors and others for fraudulent conduct of business

(1) If it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the

Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in that manner, is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

(2) Where the Court makes the declaration contemplated in subsection (1), it may give any further directions for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to him or her, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or her or any company or person on his or her behalf or any person claiming as assignee from or through the person liable or any company or person acting on his or her behalf, and may from time to time make any further orders which may be necessary for the purpose of enforcing any charge imposed under this subsection.

(3) For the purposes of subsection (2), the word "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(4) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with the intent or for the purpose mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in that manner commits an offence and is liable to a fine which does not exceed N\$8 000 or to be imprisoned for a period which does not exceed two years or to both the fine and imprisonment.

(5) This section has effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made.'

[78] The treatment of the relief sought in para 2 of the notice of counter-application should commence naturally with the interpretation of the s 430 (1) of Act 28 of 2004, paying particular attention to the key and the ruling elements of the provisions, and thereafter consider their application to the facts of the case.

[79] I shall start the enquiry by giving meaning to the words 'If it appears that' in s 430 (1). The need to give meaning to this clause 'If it appears that' is crucial in the application of the provisions of s 430 (1) in the Companies Act. The verb 'appear', as used in those provisions, means 'seem'. (*Concise Oxford English Dictionary*, 12th ed) And considered syntactically with the provisions in s 430 (1), the provisions say that if it seems to the persons mentioned in s 430 (1) that any of the prohibited conduct existed, they may make application to the court in terms of s 430.

[80] As I see it, going by the legislative intent, the words 'If it appears that' denote prima facie proof as the degree of proof required to establish liability for any of the prohibited conduct in s 430 (1) (see *Strut Ahead Natal (Pty) Ltd v Burns* 2007 (4) SA 600 (D) at 609D –E) and such proof is on a balance of probabilities. Keeping that in my mental spectacle, I proceed to interpret and apply the rest of the provisions to the facts of the instant case. The other key elements in s 430(1) are:

- (a) knowingly a party to the carrying on of the business in the manner prohibited by s 430 (1); and
- (b) any business of the company being carried on recklessly or with intent to defraud or for any fraudulent purpose.

[81] In the interpretation and application of these two elements, I cannot do any better than to rely on a passage in *Triptomania Twee (Pty) Ltd and Others v Conolly and Another* 2003 (3) SA 558 (C) at 562B-G where Davis J is interpreting s 424 of South Africa's Companies Act 61 of 1973 which applied to Namibia until Namibia's Companies Act 28 of 2004 repealed Act 61 of 1973 and which are repeated in s 430 (1) of Act 28 of 2004. There, Davis J stated:

'The onus is upon the party alleging recklessness to so prove, and being civil proceedings, to establish the necessary facts on a balance of probabilities. (*Howard v Herrigel and Another* NNO 1991 (2) SA 660 (A) at 672E; *Philotex (Pty) Ltd and Others v Snyman and Others*; *Braitex (Pty) Ltd v Snyman and Others* 1998 (2) SA 138 (SCA) at 142I - J.

The two phrases which are required to do the work if s 424 (1) is to be applied are "knowingly a party to the carrying on of the business in the manner aforesaid" and "carried

on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose”.

In *Philotex* (supra at 143B - C) Howie JA said of the phrase: “knowingly a party”:

“Knowingly” means having knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was or has been carried on recklessly; it does not entail knowledge of the legal consequences of those facts. . . . It follows that knowingly does not necessarily mean consciousness or recklessness.

Being a party to the conduct of the company's business does not have to involve the taking of positive steps in the carrying on of the business; it may be enough to support or concur in the conduct of the business.'

[82] Furthermore, in *Strut Ahead Natal (Pty) Ltd v Burns* 2007 (4) SA 600 (D), Swain J re-affirmed the onus cast on an s 430 applicant. Swain J stated at 609E-F that recklessness is not lightly to be found; but where facts are within the exclusive knowledge of one party, his or her failure to give explanation of evidence may weigh very heavily against him or her.

[83] Additionally, in *Tsung and Another v Industrial Development Corporation of South Africa Ltd and Another* 2013 (3) SA 468 (SCA), the Supreme Court of Appeal, paras 31 and 64, per Lewis JA (Cachalia JA, Theron JA, Schoeman AJA and Van der Merwe AJA concurring), stated:

[31] It is clear, then, that if the IDC can show (and of course it bears the burden of proof) on the probabilities that the Tsungs acted recklessly or fraudulently in conducting the business of Textiles, and the Textiles was unable to pay its debts, they would be liable to it under s 424. *Henochsberg on the Companies Act* states that the carrying on of the business of a company recklessly means ‘carrying it on by conduct which evinces a lack of any genuine concern for its prosperity’. A fortiori if one deliberately depletes the company's assets, or misuses its corporate form for one's own purposes, then that conduct will fall within the ambit of s 424. *Henochsberg* states also:

“Ordinarily, if a company while carrying on its business incurs debts at a time when to the knowledge of its directors there is no reasonable prospect of the creditors' ever receiving payment, there is a carrying on of its business with intent to defraud those creditors”.'

...

[64] If one has regard to these facts it is plain that the payments made to Lio Ho, to the Bank of Taiwan and in respect of the Tsungs' personal expenses, were for their personal gain and not for the benefit of Textiles or its creditors. They deliberately eviscerated the company. They used the corporate shell not for its prosperity but to recover their personal investment.'

[84] Moreover, it has been held, 'knowledge (for the purposes of s 430 (1)) does not mean detailed knowledge but at least a knowledge that something fishy is being perpetrated and the refusal or wilful neglect to make enquiries. (*Fourie v Braude and Others* 1996 (1) SA 610 (T) at 614 G-J) Thus, 'prima facie proof (on a preponderance of probabilities) of the fact that the defendant (respondent) was a director during the relevant period, that the acts were reckless (or fraudulent) and that he (or she) had knowledge thereof would be adequate to require from him (or her) an appropriate explanation as to the extent of his (or her) participation therein and occurrence therewith.' (*Fourie v Braude and Others* 1996 (1) SA 610 (T) at 615C-D)

[85] Here, too, drawing on what I said in paras 74-75 above, and proceeding on the basis that the degree of proof required to establish liability for any of the prohibited conduct in s 430 (1) is prima facie proof on a preponderance of probabilities, I make the following factual findings with regard to the relief sought under para 2 of the notice of counter-application; findings borne out of the affidavits of the counter-applicants and based on meticulously gathered and particularized information that is collected from credible sources, consisting of financial records and bank statements and personal laptops. They are, therefore, not some general and tenuous statements, unsupported by documentary proof, made at the whims and caprices of the deponents of the affidavits. The following, though not representing all the evidence about all the moneys that were stolen from the SME Bank, is an example of the thorough and unimpeachable work that was done by Pearson and the aforementioned computer and financial forensic experts as appears clearly and unchallenged in the papers filed of record by the liquidators, and referred to above.

[86] It is set out in great detail in the liquidators' papers the complicity of Kamushinda and Crown Finance Corporation, being his company, in the fraud and theft of the SME Bank's stolen funds. No other adjective other than 'stolen' can sufficiently and affirmatively describe the act perpetrated against the funds of the SME Bank. Amongst others, the following happenings are signaled by the liquidators in their papers. Mr Kamushinda and his family member Ozias Bvute were the only constant board members of the SME Bank's board of Directors since 23 March 2011 until the Bank of Namibia took control of the SME Bank during March 2017. It is also worth noting that Bvute is also a board member of Metbank. During that period an amount of N\$247 000 000 was stolen by Mr Kamushinda through his companies, Crown Finance and Heritage Investments, which received the stolen funds. The liquidators allege pertinently that a George Markides had numerous phone calls with Mr Kamushinda; and Mr Markides on one occasion handed N\$64 000 to Kamushinda in South Africa at the Maslow Hotel, Sandton. Furthermore, Kalandra Viljoen of Asset Movement and Financial Services CC/AMFS Solutions (Pty) Ltd ('AMFS') transferred large sums of money from AMFS, which had first received the direct stolen funds from the SME Bank, to Kamushinda's company, Crown Finance Corporation.

[87] In keeping with the adducing of cogent and satisfactory evidence, the liquidators rely on documentary proof to establish that moneys, like those set out below, were stolen from the SME Bank, and paid into AMFS's bank account in South Africa. The modus operandi used by the perpetrators of the fraud is described in great detail in the counter-applicants' papers; for example, from the selfsame account, Kamushinda's Crown Finance Corporation (Pty) Ltd is paid, through the mechanism of Electronic Funds Transfer (EFT), the following amounts:

- (a) N\$40 000 on 1 April 2015;
- (b) N\$150 000 on 5 June 2015;
- (c) N\$100 000 on 2 July 2015;
- (d) N\$50 000 on 8 July 2015;
- (e) N\$300 000 on 4 August 2015;
- (f) N\$20 000 on 12 August 2015;
- (g) N\$100 000 on 28 August 2015;

- (h) N\$180 000 on 3 September 2015;
- (i) N\$50 000 on 23 September 2015;
- (j) N\$115 000 on 7 October 2015;
- (k) N\$80 000 on 15 December 2015;
- (l) N\$130 000 on 17 December 2015;
- (m) N\$500 000 on 3 March 2016;
- (n) N\$60 000 on 13 April 2016;
- (o) N\$200 000 on 29 April 2016;
- (p) N\$200 000 on 2 June 2016; N\$100 000 on 15 August 2016; and
- (q) N\$100 000 on 24 August 2016.

[88] The proof of the aforementioned EFT payments were annexed appropriately to the liquidators' papers (of Tania Pearson). These annexures prove that the amounts mentioned above were paid directly into Crown Finance's bank accounts in Namibia. They are further supported by the written instructions issued by Zogby (an assistant of Markides) to Kalandra Viljoen on each occasion that funds were transferred from the SME Bank to AMFS. The movement of these funds are confirmed sufficiently by the confirmatory affidavits of Undjii Kaihiva of Standard Bank of Namibia Limited, Alida Vries of First National Bank of Namibia Limited and Ashley Wilson of First Rand Bank Limited (of South Africa). The deponents confirm the transferring of the amounts of money from the SME Bank, listed in the liquidators' papers (of Tania Pearson), to AMFS, making up the total amount of N\$247 535 004.71, paid to AMFS as stated in annexure 'TP 2.1 to Tania Pearson's affidavit', as well as the transferring of moneys from the SME Bank to AMFS and the receipt of such amounts by Crown Finance Corporation (Pty) Ltd.

[89] The irrefragable conclusion to make from the evidence is that most of the SME Bank's moneys which were misappropriated from the SME Bank and transferred to AMFS, were retransferred back to Namibia, and directly into the fraudulent corporate entities of Mr Kamushinda; and it was not for the benefit of the SME Bank. That is clear from the papers filed of record by the counter-applicants.

[90] In that regard, it is important to expose Kamushinda's lie in the answering affidavit Kamushinda filed in Kamushinda's application in Namibia for an interim

interdict pending his review of the decisions of the Master of the High Court ('the Master') taken on 18 January 2018 and 8 May 2018, extending the powers of the liquidators. The application was dismissed on 21 February 2019. Significantly, Kamushinda alleged in his replying affidavit in that application that Crown Finance was sold in 2012 and that he was not the Director of Crown Finance Corporation. He stated further that it might be possible that the directorship of Crown Finance had not been amended, but 'I unequivocally deny any involvement with Crown Finance since I sold the business'. It is equally important to note that this statement too, is false. A copy of the bank statement of Crown Finance Corporation, account number 62161140232, held at First National Bank of Namibia at its Maerua Mall branch, confirmed that: On 6 December 2013 an amount of N\$296 000 described as 'various invoices' is transferred from SME Bank into the same account of Crown Finance. Then, on 17 December 2013 and 27 December 2013, two separate amounts of N\$20 000 and N\$10 000, respectively are paid to Kamushinda's Credit Card account. Thereafter, on 7 January 2014 an amount of N\$58 125 is transferred from the SME Bank's account to the account of Crown Finance. An amount of N\$10 000 is, the very same day, paid over by Crown Finance to Kamushinda's Credit Card account.

[91] Thereafter on 31 December 2016 an amount of N\$10 000 is received into the account of Crown Finance. An amount of N\$10 000 is transferred the same day from the account of Crown Finance Corporation to Kamushinda's Credit Card account. Then on 13 December 2016, an amount of N\$10 000, described as 'directors fees' is paid into the same account of Crown Finance; and the very same date, an amount of N\$10 000 is paid over to Kamushinda's Credit Card account. The pattern continued from 2013 until January 2017, when the Bank of Namibia took over the management of the SME Bank.

[92] It is equally important to note that on 8 June 2016 Kamushinda's wife, Caroline, addressed an email to Chiedza Goromonzi (see paras 100-101 about Goromonzi's relationship with Kamushinda), a Zimbabwean, an Administrator in the Finance Department of the SME Bank, stating that Kamushinda asked her to transfer an amount of N\$50 000 to his Credit Card; and specifically from Crown Finance to Kamushinda's Credit Card account. The bank statement dated 6 July 2016 of Crown

Finance confirms that on 8 June 2016 Crown Finance transferred an amount of N\$50 000 to Kamushinda's Credit Card account. I have set out these facts to expose Kamushinda's chicanery that since 2012 he had had nothing to do with Crown Finance.

[93] It has been said previously that another company of which Kamushinda is a director is Heritage Investments (Pty) Ltd, with FNB Account number 62245517175. By the same way of acting not above board, Kamushinda received by EFT payments from AMFS, after the moneys were spirited away and misappropriated from the SME Bank and transferred directly into the account of AMFS and from the AMFS's account directly into Heritage Investments (Pty) Ltd. The amounts and dates involved are:

- (a) N\$200 000 on 8 April 2015;
- (b) N\$100 000 on 31 July 2015;
- (c) N\$49 000 on 16 October 2015;
- (d) N\$51 000 on 16 October 2015;
- (e) N\$52 000 on 16 October 2015;
- (f) N\$100 000 on 20 October 2015;
- (g) N\$200 000 on 6 November 2015;
- (h) N\$230 000 on 7 January 2016;
- (i) N\$200 000 on 25 January 2016;
- (j) N\$100 000 on 7 March 2016;
- (k) N\$49 000 on 30 March 2016;
- (l) N\$51 000 on 31 March 2016;
- (m) N\$100 000 on 11 April 2016;
- (n) N\$100 000 on 3 May 2016;
- (o) N\$40 000 on 3 May 2016;
- (p) N\$100 000 on 2 June 2016; and
- (q) N\$140 000 on 24 August 2016.

[94] The convincing and unimpeachable documentary proof of the EFT payments are annexed to the affidavits of Tania Pearson (marked TP 14.1 to TP 14.17). The evidence is confirmed by the confirmatory affidavits of Undjii Kaihiva of Standard

Bank of Namibia Limited, Alida Vries of First National Bank of Namibia Limited, and Ashley Wilson of First Rand Bank Limited (of South Africa). They confirm the payment by SME Bank of each amount listed in annexure 'TP 2.2' to AMFS's making up the total amount paid to AMFS as stated in annexure 'TP 2.1', as well as payment by AMFS to Kamushinda's Heritage Investments (Pty) Ltd and the receipt of such amounts by Heritage Investments (Pty) Ltd. Significantly, Kamushinda has not denied the fact that he knew the moneys came from AMFS, and they were paid into his companies' accounts; neither has he vouchsafed an explanation as to the extent of his participation in the transferring of moneys from the SME Bank to AMFS's account in South Africa and the return of the moneys to Namibia and their being paid into the accounts of his companies. (See *Faurie v Braude and Others*.)

[95] Furthermore, on his own account, Kamushinda says meaningfully and significantly that he knew that the Board of the SME Bank had failed in their fiduciary duties. He says also that he had been aware of a number of persons who allegedly received monies from the SME Bank in an illicit manner. It is noted that Kamushinda at the relevant time was the Chairman of the Credit Committee and a member of the Audit Committee of the SME Bank. Furthermore in the period 30 April 2015 to 1 September 2015, he was the Chairman of the Board of Directors. And he was a director since the Bank's inception on 23 March 2011 until its winding-up on 11 July 2017, and Deputy Chairperson of the Board from 11 October 2012. The conclusion is therefore inescapable that not only did Kamushinda participate in the looting of the SME Bank, in the ways described by Tania Pearson in her affidavits, and accepted by the court, Kamushinda concurred in the reckless and fraudulent conduct perpetuated against the SME Bank, and he has no explanation for the reckless and fraudulent acts.

[96] Against this overwhelming body of what I have described as convincing and sufficient evidence, Kamushinda has this to say in his answering affidavit to the counter-application: 'If ever money was paid into the account of entities in which I may have shares, I respectfully submit that such entities are legal personas in their own right and until and unless the corporate veil has been pierced cannot be held liable'. He stated further, 'I insist that the applicants in reconvention have a duty to pierce the corporate veil, a duty they have thus far dismally failed at'; and further,

'the contents hereof (are) is denied'; and 'the contents thereof (are) is contemptuously denied'; and 'all transfers to my account were legitimate and the insinuation made are simply wrong'.

[97] It needs hardly saying that the bare denials of Kamushinda cannot assist him. On the papers, I find that he acted with the knowledge of the fraud perpetrated on the SME Bank, while the SME Bank was carrying on business recklessly and fraudulently. It is not the case of the liquidators that they wish to pierce the veil of incorporation of Crown Finance or Heritage Investments. They simply use the evidence to prove that Kamushinda had full knowledge of the theft and fraud, through which the SME Bank's business was carried on. It must be remembered that a director does not act with impunity in terms of s 430 of the Companies Act, simply because he received the moneys so stolen, and of which he has knowledge, merely because he happened to have diverted the stolen moneys into one of his companies, as is sufficiently established in the instant proceeding. That that is what Kamushinda did.

[98] Put simply, it is no defence in the application of s 430 for Kamushinda, a director, to say that he received the moneys stolen, which he had knowledge of, merely because he happened to have diverted the stolen moneys to his companies. At all events, it must be remembered that the liability of a director for fraudulent or reckless conduct in which he participated arises without it being necessary or being required to establish a causal link between the fraudulent or reckless conduct relied on and the company's losses or debts. All that the party need to establish is that the director has taken part or concurred in the carrying on of the business of the company recklessly or fraudulently within the meaning of s 430 (1) of the Companies Act (*Fourie v Firstrand Bank Ltd and Another NO 2013 (1) SA 204 (SCA)*, which is on the interpretation and application s 424 of the Companies Act 61 of 1973, whose provisions are equivalent to s 430 of the Act 28 of 2004). And it should be remembered; the remedy is a punitive one, as a director can be held personally liable for the liabilities of the company, without proof of any causal link between his fraudulent or reckless conduct or knowledge of such prohibited conduct and the company's losses or debts. (*Strut Ahead Natal (Pty) Ltd v Burns 2007 (4) SA 600 (D) at 609F*)

[99] In that regard, it is important to note this important piece of evidence. The fraud tainted conduit through which moneys stolen from the SME Bank was spirited away – literally so – was the Finance Department of the SME Bank, manned exclusively by Zimbabweans, all of whom have family and/or business association with Kamushinda. The greater part of the moneys were in the main spirited away on the pretext that they were to be invested in investment companies in South Africa. However, for instance, in *Metropolitan Bank of Zimbabwe Ltd and Another v Bank of Namibia*, the Supreme Court found that in August 2016, the SME Bank's external auditors had concerns about investments totalling N\$196 000 000 by the SME Bank with a South Africa entity called Mamepe Capital (Pty) Ltd ('Mamepe'). Indications were initially that these investments were placed by Mamepe with VBS Mutual Bank Limited (VBS), also in South Africa. The investment not only exceeded the approval limit of SME Bank's Chief Executive Officer (and required board approval which had not been given), but the explanations by the SME Bank's management of the further placement to VBS Mutual Bank were unsatisfactory to the Bank of Namibia. Further enquiries revealed that out of the allegedly invested funds in South Africa totalling N\$199 700 000, only an amount of N\$32 700 000 was with Mamepe and that N\$167 000 000 was paid into accounts of other beneficiaries and not placed with VBS, contrary to earlier statements by the SME Bank's management. Despite demand for payment after maturity dates of the so-called investments exceeding N\$88 000 000, no amounts were returned by Mamepe up to the date on which the winding-up application was lodged in July 2017. Some of the moneys were also spirited away on the pretext that they were payments for goods purchased for the SME Bank, especially computer related equipment. No such computer related equipment had been purchased for such large sums of money.

[100] The papers indicate that almost all payment instructions involving the misappropriation of the SME Bank's moneys emanated directly from the Finance Department or the Office of the Chief Executive Officer (CEO). A Zimbabwean, Tawanda Mumvuma, with close business association with Kamushinda, was the CEO at the relevant time. Takura Dzvatva was at the relevant time the Finance Manager who held the post of Audit Manager but carried out the duties of Finance Manager, to be replaced by another Zimbabwean Joseph Banda. There was also

Chiedza Goromonzi who doubled as Administrative Officer in the Finance Department of the SME Bank and Kamushinda's personal assistant. In the latter capacity, Goromonzi run the aforementioned Kamushinda's companies, Crown Finance Corporation (Pty) Ltd and Heritage (Pty) Ltd. Goromonzi, together with Kamushinda and others, remains an authorized signatory of the bank account of Crown Finance Corporation (Pty) Ltd held at First National Bank, Windhoek.

[101] In her affidavit which I have referred to more than once, Ms Tania Pearson states that an inspection of Goromonzi's laptop, left at the SME Bank by her when she left Namibia, revealed that Goromonzi (apart from running Kamushinda's private affairs) clearly acted as go-between with individuals in South Africa to whom so called investments of the SME Bank' monies were transferred, as aforesaid. In addition to her SME Bank e-mail address, cgromonzi@smebank.com.na, Goromonzi had a second e-mail address on her laptop; crownfin@crowdffincorp.com.na. It is from this e-mail address that Goromonzi (as go-between) regularly sent proof of payments of the so-called investments to various external parties, who received the misappropriated funds. Amongst others, the involvement of one Ovid Chitsiku and one George Markides are exposed by these e-mails which are on Goromonzi's laptop. 'Downloads' on Goromonzi's SME Bank laptop, revealed, amongst others, three excel spreadsheets keeping track of what appears to be distribution of funds to various parties and institutions. Names such as 'Ovid', 'Gavton' 'Daryl', 'Technical Assignments' 'EK' (Kamushinda, from the papers, was referred to popularly as EK), 'FBL Transport' (being a South African company of which one Lyndon Gaidzanwa is the director and sole shareholder), "Chiedza (Goromonzi)" and "rustic" appear thereon.) Gaidzanwa is also a close business associate of Kamushinda. Copies of the documents recovered by the experts, Forensic Intelligence Data solutions ("the FIDS Experts"), from her laptop are annexed to Tania Pearson's affidavits. FBL is another recipient of at least the following stolen moneys of the SME Bank that came into its account from AMFS:

N\$500 000 on 20 May 2015 (see Annexure TP25.2);

N\$300 000 on 2 June 2015 (see Annexure TP 25.3);

N\$101 571.67 on 13 August 2015 (see Annexure TP 25.4);

N\$70 000 on 10 May 2016 (see Annexure TP 25.5).

[102] On the facts I have found to exist, I come to the unshakable and well-grounded conclusion that the counter-applicants have established satisfactorily that which they must prove, namely that Kamushinda has taken part, or concurred, in the carrying on of the business of the SME Bank recklessly or fraudulently. Kamushinda has no acceptable and satisfactory answer to what I have found previously to be credible and overwhelming evidence placed before the court by the counter-applicants. If the truth be told, it is plain that the moneys stolen from the SME Bank were for Kamushinda's personal gain not for the benefit or prosperity of the SME Bank. The conduct of Kamushinda evinces a lack of any genuine concern for the SME Bank's prosperity (see *Tsung and Another* loc cit.) In my judgement, therefore, on the law of s 430 of the Companies Act 28 of 2004 and on the facts and in the circumstances of the present case, the liquidators are entitled to pursue Kamushinda from among other directors of the SME Bank for all or any of the debts or other liabilities of the SME Bank .

[103] The liquidators have, in terms of s 430 (1) of the Act 28 of 2004, sought a declaration against Kamushinda as a person who was knowingly a party to the carrying on of the by the business SME Bank in the prohibited manner and is, therefore, personally liable without any limitation of liability for all or any of the debts or other liabilities of the SME Bank. Based on the enquiry under the present head, I am satisfied that Kamushinda has incurred liability because he was knowingly a party to the carrying on of the business of the SME Bank recklessly or with intent to defraud or for a fraudulent purpose within the meaning of s 430 (1) of Act 28 of 2004 or he later acquiesced in it. (MC Oliver *Company Law* loc cit, p 231)

[104] One last point under the present head: The discussion and the conclusion thereanent concerning the defence of prescription in paras 71-72 above apply with equal force to the present head. Kamushinda cannot claim prescription when he has remained outside jurisdiction since March 2017 (*Grinaker Mechanicals (Pty) Ltd v Societe Francoise Industriale et D' equipment* 1976 (4) SA (CPD) 98); and what is more, Kamushinda does not tell the court the date of inception of prescription. In words of one syllable, Kamushinda cannot be thankful of the defence of prescription.

[105] For the foregoing reasons, I am impelled to grant the relief prayed for in para 2 of the notice of counter-application for the foregoing reasons. I proceed to consider the relief sought in para 3 of the notice of counter-application.

Para 3. That the Second and Third Respondents in reconvention (Metropolitan Bank of Zimbabwe Limited and World Eagle Investments (Private) Limited) be declared liable for the contracted debts of the Small and Medium Enterprises Bank Limited as at date of liquidation of the Small and Medium Enterprises Bank Limited, being 11 July 2017.

[106] The important point to make at the threshold is that in treating the relief under the present head, I fall back on what I said in paras 43 and 74 above about the weighing of the evidence.

[107] The legal basis of the relief sought in para 3 is s 37, read with s 72, of the Companies Act 28 of 2004. Section 37 of Act 28 of 2004 Act was s 32 of the repealed Companies Act 61 of 1973, and s 72 of Act 28 of 2004 Act was s 66 of the repealed Act 61 of 1973.

[108] The Companies Act 28 of 2004 provides:

'37. Mode of forming company

Any seven or more persons, where the company to be formed is a public company, or any two or more persons, where the company to be formed is a private company, or any one person, where the company to be formed is a private company with a single member, may, for any lawful purpose, form a company having a share capital or a company limited by guarantee and secure its incorporation by complying with the requirements of this Act in respect of the registration of the memorandum and articles.'

...

'72 Liability of members where membership reduced below minimum

If any public company other than a wholly owned subsidiary carries on business for more than six months while it has less than seven members, every person who is a member of the company during the time that it so carries on business after those six months and is

cognisant of the fact that it is so carrying on business, is liable for the payment of the whole of the debts of the company contracted during that time and may be sued for the same without any other member being joined in the action.'

[109] In terms of s 37 of Act 28 of 2004 (previously s 32 of Act 61 of 1973) a public company like the SME Bank must at all relevant times have at least seven members. And s 72 (previously s 66 of Act 61 of 1973) does not apply to a public company which is a wholly owned subsidiary, but as I have intimated earlier, the SME Bank is not such company. Mr Heathcote submitted that the historically crucial principle that a public company should not have less than seven members enjoys fierce protection by the Legislature. (See the interpretation and application of the previous s 66 of the repealed Act 61 of 1973 in L De Koker *et JJ Henning* 'Some Aspects of the Statutory Control over Minimum Number of Members of a Company', In 1990 *THRHR* 375 (Trans) at 379-380.)

[110] In my view, the legislative intent with regard to s 72 of Act 28 of 2004 is that the statutory dictate in s 72 is peremptory and that its infraction draws a liability. This is clearly borne out by the use of the categorical and unambiguous clause 'is liable'; not may be liable or shall be liable, but 'is liable', without any qualifying allowance.

[111] It has been said that members of the company, in terms of the previous 103 of the repealed Act 61 of 1973 (presently s 110 of Act 28 of 2004) are deemed to be all persons who signed the Deed of Creation, persons who undertook to become a member of the company and whose name is entered in the members register; and persons whose names are *nomine officii* entered in the members register; and that the entry in the members register is, however, not conclusive to determine membership: If an enforceable agreement was concluded and the necessary entry is lacking, the members register can be rectified in terms of s 115 of Act 61 of 1973, presently s 122 of Act 28 of 2004. (L De Koker *et J J Henning*, 'Some Aspects of the Statutory Control over the Minimum Number of Members of a Company', *loc cit*) And in these proceedings, the liquidators have seen it fit pursuant to the carrying out of their official statutory duties to request the court to rectify the members' register; and I have decided to grant their request.

[112] As regards the persons referred to in s 103 of the previous Act of 1973, De Koker and Henning state:

'The executors of a deceased member's estate do not automatically become members of the company (*Re: Bowling & Welby's Contract* [1885] 1 Ch 663). The name of an executor, administrator, guardian, liquidator or curator of a member who become deceased, sequestrated or under disability may, however, be entered by the company in the members register if such person delivers proof of his appointment.'

[113] I accept that this represents the correct interpretation and application of the law because it is in line with the abstract system of transfer in Namibian and Southern African law (See *Lema Enterprises CC v Urban Investments Three Seven Five (Pty) Ltd* (I 1085/2012) [2014] NAHCMD 324 (10 September 2014).) Indeed, *Henochsberg on the Companies Act* agrees with this statement of the law. In dealing with s 103 of Act 61 of 1973 (the equivalent of s 115 of the Companies Act 28 of 2004), the learned authors write:

'Upon incorporation, and without more, the subscribers of the memorandum are members of the company (*In re Land and Public works Co; Nicol's Case etc* (1885) 29 Ch 421 (CA) at 445-446; *Moosa v Lallo* 1975 (4) SA 207 (D) at 210) Any other person who agrees to become a member becomes such when his name is entered into the register of members ... But, entry of his name in the register is not a prerequisite to his holding shares in the company (*Moosa case supra* at 221-222, nor is his acquitting ownership of such shares (*Watt v Sea Plant Products* 1999 (4) SA 443 (C) at 453, confirmed on appeal: see 2000 (4) SA 711 (SCA).'

[114] The ambit of s 72 of Act 28 of 2004 covers sufficiently the facts and circumstances of the instant matter, although the extent of the application of the sanction provision in that section is limited. In that regard, the following are worthy of note. Every person who is a member during the time that the company so carries on business after these six months and is cognisant of the fact that the company is operating with fewer than the requisite number of seven is liable. Liability is furthermore limited to the debts which were incurred during the period of their membership. (L De Koker et J J Henning, *Some 'Aspects of the Statutory Control over the Minimum Number of Members of a Company'*, loc cit)

[115] In the instant proceeding, Worldeagle subscribed to the SME Bank's Memorandum and became a member upon its incorporation on 23 March 2011. It is common cause between the parties that Bank of Namibia approved the membership of Metbank on 3 September 2012. SME Bank's banking license was approved on 30 November 2012, when it commenced business. Thus, since inception of the SME Bank, both the Metbank and Worldeagle have been members of the SME Bank. It follows as a matter of course that all contractual debts for which Metbank and Worldeagle should be held liable are those that arose during the required period they were members; and a *fortiori*, it is trite that rectification of the members' register, once effected, operates *ex tunc* not *ex nunc*; and so, the court may order rectification to be retrospective where such course will not work injustice to others. No such injustice is alleged, let alone proved, by Metbank or Worldeagle. And on the facts of the case, I see that there can hardly be any such injustice, as I have found previously.

[116] But that is not the end of the matter. Section 72 of Act 28 of 2004 enacts that every person who is a member during that time the company carries on business after those six months and is cognisant of the fact that the company is operating with fewer than the requisite seven members is liable for the whole debts contracted during the relevant time. It follows that such members are liable only if they have knowledge of the facts and only in respect of debts contracted after the expiration of the six months. Furthermore, s 72 talks about 'debts of the company contracted.' (LCB Gower, *The Principles of Company Law*, *ibid* at 191) Bringing the discussion home, the company in question being a bank, such debts include debts owed to depositors (J Milnes Holden, *The Law and Practice of Banking: Banker and Customer* (1982) at 31-33)

[117] On the papers, the undisputed evidence is that both Metbank and Worldeagle Investments are cognisant of the fact that a public company should have seven members, and as respects the SME Bank, they were so cognisant as at least 9 May 2012. On 9 May 2012 Mr Romeo Nel, Director: Banking Supervision of the Bank of Namibia advised that s 61 (2) and 65 (2) of the Companies Act required that Memorandum and Articles must be signed by at least seven subscribers. As I have

said above, it is not the defence of Metbank or Worldeagle, as Mr Heathcote submitted, that they did not know about the seven-member requirement or that they were not cognisant of the fact the SME Bank was operating with fewer than the requisite number at the relevant time. Consequently, I find that Metbank and Worldeagle are liable for the payment of the whole of the debts of the SME Bank contracted during the relevant time as claimed by the counter-applicants.

[118] Kamushinda characterized such relief as 'selective justice', that is, the fact that a member, NFT (which represented the Government), has not been joined as a respondent in the counter-application. The answer to that charge, as Mr Heathcote correctly submitted, is this. The liquidators did not join NFT because they did not consider NFT as a necessary party in the instant proceeding. In any case – and this is crucial – the law of s 72 of Act 28 of 2004 permitted the liquidators to be selective. Section 72 says what it means. It says this. If members of the company in question are fewer than seven members and the company carries on business for more than six months while the member is so reduced, every person who is a member during the time that it so carries on business after those six months and is cognisant of the fact that it is so operating with fewer than the requisite number is liable for the payment of the whole of the debts of the company contracted during that time and may be sued for the same *without any other member being joined in the action*. (Italicized for emphasis)

[119] The fact, as Mr Heathcote informed the court, that a liquidation application is pending against such other member under Case No. HC-MD-CIV-MOT-GEN-2020/00168 matters tuppence. It cannot take away the statutory entitlement under s 72 that the counter-applicants have in this proceeding, as I have explained.

[120] For these reasons, I am satisfied that the counter-applicants have made out a case for the granting of the relief they seek in para 3 of the notice of counter-application. I pass to consider para 4 of the notice of counter-application.

Para 4. That judgment be granted against the First, Second, and Third Respondents in reconvention, jointly, alternatively jointly and severally, for payment

to be made to the Sixth Respondents in convention (the Liquidators of the Small and Medium Enterprises Bank Limited) of the following amounts:

4.1 N\$1 028 286 906.13 (One Billion Twenty Eight Million Two Hundred and Eighty Six Thousand Nine Hundred and Six Namibia Dollars and Thirteen Cents);

4.2 N\$60 000 000 (Sixty Million Namibia Dollars);

4.3 Interest on the aforesaid amounts calculated at the rate of 20% per annum as from 12 July 2017 until date of final payment.

[121] I have said previously that the order sought in para 4 is closely related to the order sought in para 3 in the sense that, as Mr Heathcote explained, para 4 contains the actual quantification in monetary terms of the relief sought in para 3. Since I have decided to grant the order prayed for in para 3, the only burden of the court now is to determine the quantum of liability, that is, the amount claimable against Kamushinda, Metbank, and Worldeagle.

[122] Here, too, I fall back on what I said in paras 43 and 74, above, in the weighing of the evidence. Having done that, I find that the counter-applicants have placed before the court cogent, sufficient and satisfactory evidence of ‘ [T]he whole of the debts’ of the SME Bank contracted during the relevant time in terms of s 72 of Act 28 of 2004, supported by clearly laid out and sufficiently explained analysis and irrefutable conclusions thereanent. Neither Metbank nor Worldeagle has challenged the verifiable amount. And Mr Rukoro did not challenge the figures in his submission. How could he? There is no evidence of substance forthcoming from Metbank or Worldeagle upon which counsel could have built his submission, remembering that counsel’s submission is not evidence. And I have no good reason to reject the figures.

[123] The counter-applicants’ papers (per Tania Pearson in her affidavits) explain clearly and satisfactorily how the amount of N\$1 028 286 906.13 was calculated and established – based on extracts from deposit account balances as at the relevant time. In that regard, it must be remembered that subsec (2) of s 59 of the Banking Institutions Act 2 of 1998, entitled ‘Proof and repayment of claims’, enacts that an entry in the books, accounts or records of the banking institution relating to a

depositor of the banking institution, is prima facie proof of a claim of the depositor. In the instant proceeding Metbank or Worldeagle has not placed any satisfactory and sufficient evidence before the court to prevent the prima facie proof becoming conclusive proof.

[124] Additionally, the Master of the High Court stated in her affidavit that at the stage of the first meeting of creditors of the SME Bank (In liquidation), held on 4 December 2019, the claim of the depositors was N\$952 373 313.59; but the liquidators' claim in the counter-application is for N\$1 028 286 906.13 She stated that that amount had been calculated as at the date of liquidation with reference to the books, accounts and records of the SME Bank. She explained further that the discrepancy between N\$1 028 286 906.13 and N\$952 373 313.59 was as the result of the fact that the liquidators were authorized and they made payment to some depositors whose accounts indicated small balances. And that was done in terms of reg 6 of Government Notice 158 of 15 June 2017 (Government *Gazette* 6332). I am satisfied with the explanation.

[125] In order to put the minds of Kamushinda, Metbank and Worldeagle at ease regarding the whimper they made about the non-joinder of the Master of the High Court, I should say this. No order is sought against the Master; and an order the court makes on the basis of the relief sought will not be *brutum fulsum* in relation to the Master. Besides, the Master has stated in her affidavit that she would abide by the decision of the court. For these reasons, I hold that the non-joinder of the Master cannot by all account stand in the way of the court in granting the order sought under the present head.

[126] Mr Heathcote informed the court that the counter-applicants do not wish to persist in the claim under para 4.2 of the notice of counter-applicant. Basically, the reason is that the counter-applicants think the document available to sustain the claim in para 4.2 may be a fraudulent note, cooked up – to use a pedestrian language – to make it smell as if the SME Bank owed the amount to a company in South Africa, as it came to light after the filing of the counter-applicants' papers. In the circumstances, the counter-applicants do not think it is proper in law to claim the amount of N\$60 000 000 as part of the debts of the SME Bank at the relevant time.

[127] Based on these reasons, I incline to grant the order sought in only paras 4.1 and 4.3 under para 4 of the notice of counter-application.

Conclusion

[128] I am satisfied that the counter-applicants' expert witnesses, namely, Undjii Kaihiva, Alida Vries, Gerald Ryan, Ashley Wilson and Jakobus Swart qualify as experts; and so, the counter applicants must have their costs, including costs occasioned by employing those experts and for filing individual expert reports.

[129] Based on all these reasons, in the result, I order as follows:

1. The members' register of the Small and Medium Enterprises Bank Limited (In liquidation) is hereby rectified as contemplated by s 122 of the Companies Act 28 of 2004 to reflect the members of the Small and Medium Enterprises Bank Limited (In liquidation), with effect from 21 July 2015 as follows:

- (a) Namibia Financing Trust (Association incorporated not for gain) as holding 65% of the issued shares;
- (b) Metropolitan Bank of Zimbabwe Limited as holding 30% of the issued shares; and
- (c) Worldeagle Investments (Private) Limited as holding 5% of the issued shares.

2. The First Respondent in reconvention (Enock Kamushinda) is declared liable for the liabilities of the Small and Medium Enterprises Bank Limited (In liquidation), as envisaged in section 430 of the Companies Act 28 of 2004.

3. The Second and Third Respondents in reconvention (Metropolitan Bank of Zimbabwe Limited and Worldeagle Investments (Private) Limited) are declared liable jointly and severally, the one to pay the other to be absolved, for the contracted debts of the Small and Medium Enterprises Bank Limited (in liquidation) since date of liquidation, being 11 July 2017.

4. Judgment is granted against the First, Second and Third Respondents in reconvention, being Enock Kamushinda, Metropolitan Bank of Zimbabwe Limited,

and Worldeagle Investments (Private) Limited jointly and severally, the one paying the other to be absolved, for payment to be made to the Sixth Respondents in convention being the Liquidators, (Small and Medium Enterprises Bank Limited (SME Bank) (In liquidation) for the following amounts:

- (a) N\$1 028 286 906.13 (One Billion Twenty Eight Million Two Hundred and Eighty Six Thousand Nine Hundred and Six Namibia Dollars and Thirteen Cents); and
- (b) Interest on the aforesaid amounts calculated at the rate of 20% per annum as from 12 July 2017 until date of full and final payment.

5. Judgment is granted in favour of the Sixth Respondents in convention, being the liquidators, (Small and Medium Enterprises Bank Limited (SME Bank) (In liquidation) against the Second and Third Respondents in reconvention in respect of their outstanding payments for their shareholding as follows:

- (a) Metropolitan Bank of Zimbabwe Limited: N\$121 463 077;
- (b) Worldeagle Investments (Private) Limited: N\$20 243 846;
- (c) Interest on the aforesaid amounts at the rate of 20% per annum from 1 April 2015 until date of full and final payment.

6. The Sixth Respondents in convention, being the liquidators, are ordered to issue share certificates to Metropolitan Bank of Zimbabwe Limited and Worldeagle Investments (Private) Ltd, for the percentages as mentioned in paragraph 1 of this order.

7. The First, Second and Third Applicants in convention/First, Second and Third Respondents in reconvention, being Enock Kamushinda, Metropolitan Bank of Zimbabwe Limited and Worldeagle Investments (Private) Limited, are ordered to pay costs of the Sixth Respondents in convention/Applicants in reconvention, being the Liquidators, (Small and Medium Enterprises Bank Limited (SME Bank) (In liquidation) in respect of the counter-application, jointly and severally, the one to pay the other to be absolved, which costs include:

(a) the costs of one instructing counsel and two instructed counsel; and

(b) the costs incurred by the Sixth Respondents in convention/Applicants in reconvention to secure expert witness reports from: Undjii Kaihiva, Alida Vries, Gerard Ryan, Ashley Wilson and Jacobus Swart.

8. The matter is considered finalized and is removed from the roll.

C PARKER
Acting Judge

APPEARANCES:

APPLICANTS/RESPONDENTS IN RECONVENTIONS: S Rukoro
Instructed by Francois Bangamwambo FB Law Chambers,
Windhoek

1st, 2nd, 4th, 5th & 7th RESPONDENTS IN CONVENTION: JP Jones
Instructed by Office of the Government Attorney, Windhoek

3rd RESPONDENT IN CONVENTION: J Marais SC (with him D Obbes)
Instructed by LorentzAngula Inc., Windhoek

6th RESPONDENT IN CONVENTION/APPLICANT IN RECONVENTION:

R Heathcote SC (with him J Schickerling)
Instructed by Francois Erasmus & Partners, Windhoek