REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2020/00415

In the matter between:

ARCHIE GRAHAM **1ST APPLICANT**

THUNDERSTRUCK INVESTMENTS 1 CC AND
FIFTY EIGHT OTHERS **2ND TO 59TH APPLICANTS**

and

THE MASTER OF THE HIGH COURT OF NAMIBIA **1ST RESPONDENT**
ALWYN PETRUS VAN STRATEN **2ND RESPONDENT**
WILLIAM DE VILLIERS SCHICKERLING **3RD RESPONDENT**
BANK WINDHOEK LIMITED **4TH RESPONDENT**
JEROME DAVIS
AND FURTHER RESPONDENTS **5TH TO 12TH RESPONDENTS**

Neutral Citation: *Graham v The Master of the High Court* (HC-MD-CIV-MOT-REV-2020/00415 [2021] 466 NAHCMD (7 October 2021).

CORAM: MASUKU J
Heard: **27 September 2021**
Delivered: **7 October 2021**

Flynote: Company Law – the Companies Act, Act 24 of 2004 ('the Act') – Appointment of a provisional liquidator – the appointment is two-fold: there should be an order of court to wind up the entity or a resolution for the voluntary winding up and the security bond must be furnished – correlation between security bond and total assets to be present – security should equal the total assets of the entity to be wound-up – the conduct of the Masters Office – qualities of provisional liquidator discussed - Ethics – requirement for Master's Office, as a public office, to timeously respond to queries, questions and demands by members of the public.

Summary: This application for review was brought on an urgent basis. The application was previously opposed but for the latter part, it proceeded unopposed. The applicant essentially sought to review a decision of the Master of the High Court whereby she allegedly appointed the 2nd and 3rd respondents as the provisional liquidators of the entities associated with the 1st applicant in terms of what she referred to as the 'first come, first served' principle. In this connection, the applicants claimed that the provisional liquidators were appointed before any winding up order had been issued or, in voluntary liquidations, the resolution in terms of s 208 of the Act, had not been duly registered with the Master. In addition to this, the applicants challenged the practice employed by the Master for the determination of securities payable by provisional liquidators.

The applicants' contention was that there appears to be no correlation between the amount of security posted by the liquidator and the value of the estate to be administered in the liquidation proceedings. The court found as follows:

Held: that if the Master appoints a provisional liquidator before the issuance by the court of a winding-up order, or appoints a provisional liquidator before the registration of a resolution for winding-up, she acts contrary to the provisions of the Act.

Held that: The appointment of provisional liquidators has far-reaching consequences, which demand a proper and judicious exercise of discretion by the Master.

Held further that: The appointment of a provisional liquidator may by no means be done without the granting of a court order directing the winding up of the entity or the registration of resolution for the voluntary winding up with the Master. In the absence of either of the above, the appointment should result in a nullity.

Held: The appointment is two-fold: not only must there be a court order for the winding up of the entity or a resolution for voluntary winding up, but this should be accompanied by a security bond. The security bond is used as a measure to indemnify the entity under liquidation, its creditors or contributories against any maladministration that may occur or carried out by the provisional liquidator.

Held that: The security must be equivalent to the total assets of the entity sought to be wound-up. The master has discretion to determine the nature of the security but has no discretion whatsoever, to accept security for a lesser amount than the value of the assets of the company under liquidation.

Held further that: The court's reasoning in the matter of *Ex Parte Finnemore*
NO 1948(2) SA 621 (TPD) at 625 constitutes good law and respresents the state of law within our jurisdiction. In this matter the court stated that the liquidator must give and the Master must require security for the due performance of the liquidator's duties and there is in the Act no express or implied provision that he can under any circumstances dispense with or require less than such security.

Held: that there must be a correlation between the security posted and the value of the assets of the company in liquidation. The security posted should be for the full amount of the assets to be administered.
Held that: the remit of a provisional liquidator is to promote consistency, fairness and transparency in dealing with the assets of a company, once appointed.

Held further: that a person is regarded as 'suitable' to be appointed as a provisional liquidator if he or she is independent and has no interest in the company under liquidation.

Held: that a clear, conscious and cognitive exercise must be undertaken by the Master to determine the security to be paid, thus the Masters ‘first come, first served’ practice is not just, fair or proper in the circumstances.

Held that: The ‘first come first served’ approach does not allow for the Master to take into account the experience of the provisional liquidator and the complexity of the estate to be administered. This is so because despite the expertise of the appointee, the only factor considered is the liquidator being first to make payment of security.

Held further that: the office of the Master is there to serve the public and it is important that the members of the public must receive prompt assistance, guidance and responses if so required. The failure of the Master’s office to do this often compels people to engage in the costly route of litigation and this should be decried.

The court found that ‘first come, first served’ practice was improper, unlawful and does not enable the Master to exercise any discretion and make an informed and suitable appointment. It was thus reviewed and set aside.

ORDER

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1. The First Respondent's decision to apply a practice to receive and to allow insolvency practitioners to lodge security bonds prior to a winding-up order having been made in terms of the Companies Act 28 of 2004 ("the Act") in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 208 of the Act, is hereby reviewed and declared null and void and set aside by reason of the First Respondent's decision being in conflict with the provisions of section 375 of the Act and thus unlawful.

2. The First Respondent's decision to apply a practice to determine securities or allow securities to be provided by provisional liquidators in respect of legal or

private persons in provisional or final winding-up or sequestrations in an amount unrelated to the full amount of the assets to be administered is hereby reviewed and declared null and void and set aside by reason of the First Respondent's decision being in conflict with the provisions of section 375 of the Act and thus unlawful.

3. The Applicants are to jointly and severally, the one paying and the other being absolved, pay the Second Respondent's costs up until 16 March 2021, consequent upon the employment of one instructing and two instructed counsel.

4. The First Respondent is to pay the Applicants' costs of this application, consequent upon the employment of one instructing and two instructed counsel, where so employed.

5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] What started off in tempestuous circumstances, as a thatched house on fire, on a dry and windy day has, with the benefit of the intervention of the clouds and rain of reason, hindsight and reflection, turned out to be a damp squib after all.

[2] The matter started off on a feisty note, with each party armed to the teeth, legally speaking, and parading two instructed counsel, who were ready to do a limb-severing battle at worst, and a life-extinguishing operation, at best.

[3] In this regard, except for the Master of this High Court, the appointed liquidators and Bank Windhoek (which was a party introduced to the proceedings

via the side door of joinder), have been at each other's throats, trading punches, designed to leave the one or other litigant lying prostrate on the court's canvass, shouting '*No mas' No mas',* which interpreted from Spanish, means 'No more, no more!'.

[4] Fortunately, matters did not reach that exasperating point because after the initial unpleasant exchanges that at times degenerated to personal attacks, and allegations of impropriety, the number of permissible sets of affidavits intervened and the attacks on paper ceased as they inevitably had to at some point.

[5] At that very point, it would seem, the light bulb of what the matter was really about, was switched on. All the sideshows expressly excluded, it became clear that after many emotive pages had been typed, carrying accusations and counter-accusations, on what are incidental or tangential issues, the application for the main relief, was one not fit to be opposed on any rational basis after all. This constituted a serious anti-climax if I may call it that.

The parties

[6] The 1st applicant is Mr. Archie Graham, a male Namibian adult who resides in Windhoek. He is a director of a company known as Green Property One Hundred and One (Pty) Ltd, which was known as Jimmey Construction (Pty) Ltd. He is also a creditor, trustee and shareholder of an entity known as Green Property. The 1st applicant is also the sole member of the entities which are cited as the 2nd to the 21st applicant, the 24th, 26th, 32nd, 33rd, and 37th to 51st applicant. I do not find it necessary to cite each of these entities in the body of the judgment.

[7] The 1st respondent is the Master of the High Court of Namibia, and is cited in her official capacity. She is an official appointed in terms of the provisions of s 2 of the Administration of Estates Act.[1] The 2nd respondent is Mr. Alwyn Petrus Van Straten, an adult male insolvency practitioner based in Windhoek. He works in association with the 3rd respondent, Mr. William De Villiers Schickerling. In point of fact, the 2nd respondent describes the 3rd respondent as his employee.

[1] Act No. 66 of 1965.

[8] As a result of an order issued by this court on 27 November 2020, further respondents were ordered to be cited and served. The first was Bank Windhoek, which is cited as the 4th respondent. It is a creditor to the applicants and for the most part, initiated liquidation proceedings against them. Bank Windhoek opposed parts of the application initially, but its opposition petered away with time and further material filed of record.

[9] Serving as the 5th to 12th respondents, are insolvency practitioners practising as such in this jurisdiction. They were cited and served with the application for the interest that they may have in the relief sought by the applicants. They did not file any papers in the matter.

Appearances

[10] The applicants were represented by Mr. Potgieter SC, on the instructions of Danielle Lubbe Attorneys. The 2nd and 3rd respondents were represented by Mr. Visser, of Koep & Partners. The 4th respondent was represented initially by Mr. R. Heathcote, assisted by Ms. Campbell, on the instructions of AngulaCo. The Master was represented by Ms. Tjahikika of the Office of the Government Attorney.

[11] As indicated in the opening paragraphs of this judgment, the relief sought was in the main, not opposed by any of the respondents. As such, Mr. Potgieter proceeded with the matter on an unopposed basis, with Mr. Visser, appearing only to ensure that the order sought and granted did not serve to prejudice his clients, the non-opposition notwithstanding. There was no appearance from the 4th respondent, which filed a notice to abide by the court's order.

[12] The 1st respondent did not appear either. There is no explanation that was proffered for the non-appearance. For this reason, the court is at large to consider this application as unopposed, as the 1st respondent, having initially filed an affidavit in opposition, did not file any heads of argument in the matter.

[13] I will refer to the parties as follows: the applicants will be referred to as such. Where it becomes necessary to refer to a particular applicant, that applicant will be particularised in the manner in which the applicants have been cited above. I will refer to the Master of the High Court, as 'the Master' or 'the 1st respondent'. Mr. Van Straten will be referred to as 'the 2nd respondent' and Mr. Schickerling will be referred to as the '3rd respondent'. Bank Windhoek, will be referred to as the '4th respondent'.

The relief claimed

[14] The applicants, by notice of motion dated 22 October 2020, approached this court on an urgent basis and sought relief in two parts. In Part A, they sought the enrolment of the matter on an urgent basis, in terms of rule 73. They further sought an interim order interdicting the Master from appointing the 2nd and 3rd respondents or any of their employees or associates as provisional liquidators in respect of the entities associated with the 1st applicant.

[15] The applicants further sought an order interdicting the Master from making any appointments of provisional liquidators or trustees in respect of the entities associated with the 1st applicant, on the basis of security bonds lodged with the Master prior to orders for winding up having been issued or resolutions for voluntary winding-up not having been registered, or sequestration orders having been issued.

[16] The applicants further sought an order preventing the 2nd and 3rd respondents, where they had already been appointed by the Master, from exercising any powers beyond the provisions of s 392(1)(a), (b), (c), (e) and ss (6)(f) of the Companies Act, No. 28 of 2004, ('the Act). Costs were sought from any party that would oppose the application.

[17] Part B, of the notice of motion essentially sought an order reviewing and declaring as null and void and setting aside the Master's decision to apply a practice to determine securities, or allow securities to be provided by provisional or final liquidators in respect of legal and private persons in provisional or final winding up or sequestrations, in an amount unrelated to the full amount of the assets to be

administered, by reason of the decision being in conflict with the provisions of s 375 of the Act and thus unlawful.

[18] The applicants further sought an order for the appointment of the 2nd and 3rd respondent as provisional liquidators in the winding up or sequestration of the applicant's estates, to be reviewed and set aside. They further sought an order for the appointment of a suitable person to be appointed as a provisional liquidator in compliance with s 375 of the Act and s 56 of the Insolvency Act.[2] Needless to mention, a costs order was sought against any party that opposed Part B of the application.

[19] The matter was heard on 30 October and 6 November 2020, respectively and the court upheld a plea of non-joinder of the 4th respondent and other liquidators in the jurisdiction. Ultimately, the applicants amended their notice of motion to read as follows:

'2.1 the first respondent is interdicted from making any appointments of provisional liquidators or trustees in respect of any of the entities or persons listed in annexure "FA4", on the bases of:

2.1.1 security bonds lodged with the first respondent prior to orders for winding–up having been issued or resolutions for voluntary winding-up have been registered or sequestration orders have been issued; and

2.1.2 security bonds being provided in amounts not equal to the aggregate assets to be administered by the liquidators or trustees lodged with the first respondent;

2.2 the decisions of the first respondent to appoint the second respondent as well as his appointments as provisional liquidator in the winding-up of the entities listed in annexure "A" hereto are stayed.

3. The first and second respondent, jointly and severally, are directed to pay the costs of the applicants, such costs to include the costs of one instructing and two instructed counsel, and in the case of the first respondent, on an attorney and client scale.'

[2] Insolvency Act No. 24 of 1936.

[20] Ultimately, the preliminary legal issues initially raised in relation to urgency, the issue of non-joinder having been addressed, were not pursued. No interim interdict was, in the circumstances issued by the court. As result, the matter was eventually set down for the determination of the relief sought in Part B of the notice of motion. It is that aspect that is the primary focus of this judgment and as stated above, it is not in effect, opposed by any of the respondents.

[21] On 27 September 2021, the date on which the matter had been set down for the hearing of the opposed motion for review, it transpired that only the applicants had filed their heads of argument and Part B was for all intents and purposes not opposed. I thus granted an order as follows:

‘1. The First Respondent’s decision to apply a practice to receive and to allow insolvency practitioners to lodge security bonds prior to a winding-up order having been made in terms of the Companies Act 28 of 2004 (‘the Act’), in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 208 of the Act, is hereby reviewed and declared null and void and set aside by reason of the First Respondent’s decision being in conflict with the provisions of section 375 of the Act and thus unlawful.

2. The First Respondent’s decision to apply a practice to determine securities or to allow securities to be provided by provisional liquidators in respect of legal or private persons in provisional or final winding-up or sequestrations in an amount unrelated to the full amount of the assets to be administered is hereby reviewed and declared null and void and set aside by reason of the First Respondent’s decision being in conflict with the provisions of section 375 of the Act and thus unlawful.

3. The Applicants are to pay the Second Respondent’s costs up to and including 16 March 2021, consequent upon the employment of one instructing and two instructed counsel.

4. The Master of the High Court is to pay the Applicants’ costs of this application, consequent upon the employment of one instructing and two instructed counsel, where so employed.

5. The matter is removed from the roll and is regarded as finalised.

6. The reasons for the order made above, will be delivered on 20 October 2021, at 10h00.'

Reasons for the order

[22] The issues in contention in this matter, relate to the practices employed by the Master in the sequestration of individuals' estates and in matters, particularly of liquidation of companies, whether pursuant to an order issued by the court, or in circumstances where a voluntary winding-up of a company has been registered.

[23] The applicants' case is that in or about September 2020, the 2nd or 3rd respondents lodged with the Master's office, some security bonds in respect of certain entities and persons. These entities and persons were all debtors of the 4th respondent and they were all associated with the 1st applicant's trusts or part of what the 1st applicant refers to as 'the Graham Group'. These entities, he deposed, are directly or indirectly associated with his business endeavours in property development.

[24] It is the applicants' case that at the time that the said security bonds were lodged with the Master's Office, there were no existing winding-up orders issued by this court, nor were there any resolutions registered with the Registrar of Companies for the voluntary winding-up of the said entities. The 1st applicant states that a security bond for his personal sequestration formed part of the security bonds that were lodged within the period in question.

[25] The applicants allege that the Master's Office employs a practice and principle known as the 'first come first served' in respect of the appointment of provisional liquidators. In pursuance of this impugned practice, an insolvency practitioner, who happens to be the first to lodge a bond of security in relation to an entity or individual liable to be sequestrated or wound-up, without further ado, *ipso facto* becomes the one appointed by the Master as the provisional liquidator.

[26] It is the applicants' case that other insolvency practitioners, who will not have been able to file the bond of security first, thus become excluded and accordingly lose the opportunity to be so appointed. This has nothing to do with their suitability of the latter liquidator, but all to do with the fact that he or she was not the first to lodge the bond of security with the Master's office.

[27] The second leg of the applicants' complaint, relates to the Master, in certain instances, accepting bonds of security prior to provisional liquidation orders having been issued or sequestration proceedings having commenced. In the case of voluntary winding-up of companies, the bonds would be issued without any resolutions to that effect having been taken in terms of s 375 of the Act and without those resolutions having been duly registered in terms of s 208 of the Act.

[28] It is the applicants' case that this practice results in insolvency practitioners lodging bonds of security in respect of matters on the basis of speculation that the said individuals or entities face either sequestration or liquidation. This speculation may or may not be correct, but where incorrect, it may have adverse consequences, reputational and otherwise for the subject.

[29] The applicant further contends that the practice gives rise to unjust and unfair results in that in these cases where no orders or resolutions have been filed, there is normally no correlation between the amount of security posted by the insolvency practitioner and the value of the estate to be administered in the sequestration or liquidation proceedings, as the case may be. This, may, in the long run, prejudice the creditors of the estate, so the applicants further contend.

[30] It is fair to mention that the applicants attach correspondence between themselves and the Master's office regarding these complaints.[3] Theirs is not just a case of bored busy bodies, meddling in affairs that have no connection to them. The applicants are creditors, shareholders and members of corporate entities facing the prospect of being led to the gallows of liquidation. They accordingly have a direct

[3] Letters to the Master from the applicants' legal practitioners, dated 15 September and 15 October 2020, respectively pp 70 and 81 of the pleadings' bundle.

and substantial interest in the manner in which the Master exercises her powers and discretion where appropriate, in terms of ss 375 and 389 of the Act. This is not gainsaid by any of the respondents, the Master, included.

[31] The Master responded to the applicants' complaint by letter addressed to the applicants' legal practitioners of record and stated the following, in part:[4]

'RE: OBJECTION TO THE APPOINTMENT OF LIQUIDATORS IN GREEN PROPERTY INVESTMENT ONE HUNDRED AND ONE (PROPRIETARY LIMITED – REF NR. W22/2020

1. Your letters dated 1 October 2020, 7 October 2020 and 9 October 2020 refers (*sic*).
2. Section 378 is not clear whether it includes the appointment of provisional liquidator. Please find however my reasons for the appointment of Mr. Alwyn van Straten as co-provisional liquidator.
3. Section 375 of the Companies Act, 2004, provides that: "As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up has been registered in terms of section 208, the Master may appoint any suitable person as provisional liquidator of the company concerned, who must give security to the satisfaction of the Master for the performance of his or her duties as provisional liquidator and who holds office until the appointment of a liquidator.'
4. At the time provisional liquidators were still appointed on the "first come first serve" basis, meaning that the person that submitted first a bond of security will be appointed as provisional liquidator. An email was sent out on a later date to include the submission of a court order due to an influx of bonds of security without any court application from the various Insolvency Practitioners on many other pending liquidations.'

[32] I must mention, for completeness' sake that the applicants objected to the 2nd respondent being appointed as provisional liquidator in the matters involving them. The Master, in response further admitted that there were many bonds of security, which were lodged in the absence of any court orders in respect of involuntary windings-up, hence the contents of paragraph 4 above.

[4] Letter from the Master dated 15 October 2020, p 83 of the pleadings' bundle.

[33] She further placed on record that the 4th respondent had nominated the 2nd respondent as a provisional liquidator in the matter under reference. She ended the letter by stating that, 'Mr. Van Straten will be appointed in various of these entities as provisional liquidator on the same basis that he was appointed in Green Property Investment One Hundred and One (Proprietary Limited.'

[34] The 2nd respondent, in his answering affidavit confessed that he is aware of the 'so-called "first come first served" policy employed by the Master in the appointment of provisional liquidators' but decided to leave the issue to be addressed by the Master, reserving his rights in due course, to deal with relief sought. He opined that there was no reason whatsoever for the main relief to succeed.'[5] I write this to merely underscore the 2nd respondent's initial attitude to the impugned practice. He, in any event, decided, as stated earlier, to abide by the judgment of the court regarding the main relief sought in Part B.

[35] In dealing with the impugned practice, the Master stated the following in her answering affidavit dated 4 November 2020:
(a) that her office was obliged by s 374 of the Act to appoint a provisional liquidator or liquidators and in this regard, creditors would lodge a notice of motion with the Master in terms of s 9(4) of the Insolvency Act, No. 24 of 1936, as amended;
(b) she would as soon as a winding-up order had been issued in relation to a company, appoint a provisional liquidator upon the provision of a bond of security to her satisfaction. In doing so, the following would be taken into account (i) the insolvency practitioner who lodged the bond of security first (ii) the complexity of the business involved; and (iii) the experience of the insolvency practitioner.

[36] It is accordingly clear that the Master accepts the existence of the practice and she gives a justification for its employment. The question to answer, and this is the next enquiry I move to, is whether the practice is sound, compliant with the law and thus not amenable to be reviewed and set aside as the applicants have prayed for.

Determination

[5] Para 2 of the 2nd respondent's answering affidavit, p 170 of the pleadings' bundle.

[37] The first port of call, is to deal with the applicable provisions and about which all the parties are agreed. These are the provisions of s 375 of the Act and they read as follows:

'375 Appointment of provisional liquidator

As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 208, the Master may appoint any suitable person as provisional liquidator of the company concerned, who must give security to the satisfaction of the Master for the proper performance of his or her duties as provisional liquidator and who holds office until the appointment of a liquidator.'

[38] Section 389, on the other hand, reads as follows:

'389 Cost and reduction of security by liquidator

If a liquidator has in the course of the winding-up accounted to the satisfaction of the Master for any property belonging to the company, the liquidator may in writing apply for the consent of the Master to a reduction of the security given by him or her and the Master, if satisfied that the reduced security will suffice to indemnify the company and the creditors and contributories against any maladministration on the part of the liquidator in respect of the remaining property belonging to the company, may consent wholly or in part to that reduction.'

[39] Section 375 deals with two scenarios. The first is where a company is sought to be wound-up as a result of an order issued by the court. The second relates to a voluntary liquidation in terms of which a special resolution for the winding up of the concern in question, has been registered with the Master in terms of s 208 of the Act. The first process relates to involuntary liquidation, whereas the second relates to a voluntary one.

[40] In either case, the provision states that once the winding-up order has been issued by the court, or a resolution for a voluntary winding-up has been lodged and registered with the Master, the Master may appoint any suitable person to serve in

the office of a provisional liquidator. It is important to mention in this regard that the word ‘once’ occurring in the provision, means that the event mentioned, must happen first, before the Master may appoint a suitably qualified person as provisional liquidator.

[41] In this regard, it is either the receipt of a court order for the winding-up of a company, or the registration of a resolution for the voluntary winding-up with the Master, that serves to trigger the Master’s power and discretion to appoint a suitable person as the provisional liquidator. It is accordingly clear that if the Master appoints a provisional liquidator either before the issuance by the court of a winding-up order, in the case of an involuntary winding-up, or appoints a provisional liquidator before the registration of a resolution for winding-up, in the case of a voluntary winding-up, the Master would in those circumstances, have acted contrary to the provisions of the Act. Her actions would thus be precipitate and thus liable to be declared invalid and unlawful and therefor fit to be set aside.

[42] Having regard to the allegations by the applicants in this matter, and the responses by the Master, it is plain that there is no denying the fact that the Master has, in some cases, appointed provisional liquidators in the absence of either a court order, in involuntary liquidations or a registered resolution in respect of voluntary liquidations. This practice is wrong and contrary to the letter and spirit of the law as conveyed by the Act. The appointment of provisional liquidators is a process that can have far-reaching consequences, which therefor demand a proper and judicious exercise of discretion. It should thus be beyond reproach.

[43] It is either the court order or the registration of the resolution for voluntary winding-up that trigger the Master’s powers, in part, exist to enable the appointment of a provisional liquidator. In other words, absent a court order, on the one hand, or the registration of the resolution in voluntary winding-up, on the other, then there cannot be a valid appointment of a provisional liquidator. The issuance of the order or the registration of the resolution, are the *sine qua non* for the proper appointment of a provisional liquidator.

[44] I have, in the immediately preceding paragraph, used the word 'in part'. This is to convey that the order or the registration of the resolution, are not the only factors or steps that render the appointment in consonance with the law. I will proceed below to deal with the role and necessity of the payment of a suitable bond of security before the appointment of a suitable provisional liquidator is made by the Master.

The security bond

[45] It is plain, from reading the provisions quoted above that the *raison d'etre* for the promulgation of the two provisions above related to the security bond is to indemnify the entity under liquidation, together with the creditors or contributories against any maladministration that may be perpetrated by the provisional liquidator in the course of liquidation.

[46] According to the learned authors Henochsberg, 'Since the security is for the proper performance of the liquidator's duties, which involve his taking custody and control of, and administering all the assets of the company, the security must be for the total value of such assets and the Master has no discretion to accept security for a lesser amount; he does however, have a discretion, as to the nature of the security'.[6]

[47] To illustrate the point, in *Ex Parte Finnemore N.O*.[7] Neser J dealt with the issue in the following terms:

> 'The liquidator must give and the Master must require security for the due performance of the liquidator's duties and there is in the Act no express or implied provision that he can under any circumstances dispense with or require less than such security.'

I am of the considered view that the above statement of the law constitutes good law and represents the correct state of the law in this jurisdiction as well.

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[6] Henochsberg on the Companies Act 61 of 1973, p801.

[7] *Ex Parte Finnemore NO* 1948 (2) SA 621 (TPD) at 625.

[48] What becomes plain from the writings of the learned author, is that while the Master retains the discretion to determine the form of security to be availed, he or she does not have the discretion to accept an amount or value, which is less than the total value of the assets of the company under liquidation. In this regard, any amount or value of the security which is less than the total value of the company's assets, cannot be regarded as suitable.

[49] It is for that reason that the provision requires the posting of a security bond that will be found to be suitable by the Master. Suitable, in this regard, must, in my considered view, be considered against the value of the assets to be administered during the winding-up of the company. In this regard, there must a correlation between the security posted and the value of the assets of the company in question. This is because the security posted or furnished must be for the full amount of the assets to be administered, as stated above.

[50] It thus becomes as clear as noonday that the Master's 'first come, first served' practice violates the law and renders the protection the law gives to the company, its creditors and contributories hollow, if not meaningless, should there be maladministration of the estate perpetrated by the provisional liquidator. In employing the impugned practice, there is no evidence that the bonds posted or furnished are equal to the value of the estate and the Master in those cases appears to consider the security put up suitable without any regard to the value of the estate.

[51] By way of example, the applicants allege, and this is not gainsaid by any of the respondents, that on 4 September 2021, the 2nd respondent lodged 64 security bonds in relation to companies or entities related to the 1st applicant. The security, which was posted, and apparently accepted by the Master, was in each of the said cases, N$ 100,000. This was without consideration or reference to the value of the assets to be administered in each of those entities.[8]

[52] I am of the considered view that the applicants' challenge of the practice employed by the Master is well- founded. The Master should be in a position to

[8] Para 84.2 of the Founding Affidavit, p. 32 of the pleadings' bundle.

determine the suitability of the security posted after being placed in possession of all relevant information related to the value of the assets of the company. The provisional liquidators should not have a free hand in subjectively determining the amount of security, with the Master accepting what is placed before her as 'suitable'.

[53] A clear, conscious and cognitive exercise must be undertaken by the Master, eschewing the mechanical determination of the security by the provisional liquidator, who would, for reasons known to him or herself, succumb to the temptation to pay as little security as possible, which may, in the event of maladministration, be to the prejudice of the company, the creditors and contributories.

[54] In the circumstances, I am of the view that the review of the Master's practice of 'first come, first served' is called for in the light of the fact that she does not exercise any oversight regarding the amount of security posted by provisional liquidators in certain cases. The applicant argued that in some of the cases, the amount of security was thumb-sucked and placed at N$ 100 000, when the value of the estate in question runs into millions, and in other cases, so he argued, billions of Namibian Dollars. The process appears to be very mechanical, automatic and devoid of the exercise of proper discretion and thus falls to be declared unlawful. It is accordingly set aside.

Suitability of the provisional liquidator

[55] The learned author, Henochsberg,[9] states that the words any suitable person, as employed in the Act, refers to an independent person who has no interest in the company.[10] The remit of the provisional liquidator is to promote consistency, fairness, and transparency in dealing with assets of the company once appointed. The Master stated in her affidavit, as quoted above, that she took into

[9] Henochsberg on the Companies Act, 4th ed, Vol Two, 1985, p651

[10] *In re: Reid & Acutt Wool Mart Ltd* 1916 NPD 331 at 332; *In re: Greatex Footwear (Pty) Ltd (II)* 1936 NPD 536 at 539.

account the experience of the provisional liquidator and the complexity of the estate to be administered in deciding who is suitable for appointment.

[56] When one considers the practicality of the impugned practice, it becomes plain that the criteria she spoke of in her answering affidavit is not consistent with what she does in practice, in merely appointing a liquidator, who has been the first to lodge a bond of security. It appears that the idiom, the earliest bird catches the worm, applies. In this particular connection, it becomes plain that the Master does not exercise any discretion in the appointment of provisional liquidators in terms of her chosen practice.

[57] In effect, the person who is first to lodge the bond is guaranteed of appointment and this it would seem, is so, regardless of the experience, the value and complexity of the estate in question. It is thus an inescapable conclusion that the Master is at the proverbial mercy of the one who lodges the bond early and she does not actually consider the suitability of that liquidator for the task and hardly considers possible areas of conflict. This does not bode well for the proper, fair and efficient winding-up of a company, by an independent and disinterested liquidator.

[58] The above conclusion also leads me to the inexorable finding in the circumstances that the impugned practice does not enable the Master to exercise any discretion and make an informed and thus suitable appointment of a provisional liquidator. This is contrary to the provisions of the law and must necessarily lead to the court declaring the said practice invalid therefor and liable to be reviewed and set aside.

[59] It is important to caution that the prescripts of the law as quoted above, must be followed to the letter, for they were put in place to ensure that all persons with vested interests are protected, including those companies facing the gallows of liquidation, and individuals, who have sequestration proceedings staring them in the face. Convenience and practice, no matter how long entrenched they may be, should never be allowed to hold sway in these matters and trump the manifest legislative solicitudes. This is especially the case because serious negative

consequences may eventuate as a result of not following the prescribed statutory route.

[60] It is accordingly manifest that from whichever prism the Master's practice can be viewed, it is roundly bad and constitutes a serious violation of the statutory prescripts. It poses an ever-present danger that the company, its creditors and contributors may be left with little or nothing in the event that the provisional liquidator succumbs to the temptation of mal-administering the assets of the company in the process of liquidation.

[61] This would, in turn, open the Master, to being dragged through the coals of a lawsuit for negligent performance of her statutory duties. The net result of that would be that the taxpayer might have to feel the pinch and pay the amount ordered in a judgment adverse to the Master.

Observation

[62] There is a recurring theme that is a cause for concern to the court in this matter. The applicants complain in their affidavits regarding enquiries, answers and reports or decisions that were required from the Master. On a number occasions, the applicants' enquiries were not responded to and in some cases notwithstanding a few letters demanding a response.[11]

[63] In particular, the applicants, who were aggrieved by the Master's decision, through their legal practitioners, required the Master to furnish them with reasons in terms of s 378(1) of the Act, regarding the appointment of the 2nd respondent as a provisional liquidator. The Master, to date, failed to provide the reasons and necessary documentation as requested and as prescribed in s 378(3) of the Act.[12]

[11] Page 70 and 72 of the record of pleadings and paragraph 84.1 of the founding affidavit, p32 of the pleadings bundle.
[12] Page 72 of the pleadings' bundle marked 'FA 11'.

[64] It must be recalled that the office of the Master is there to serve the public. And as fate would have it, it is an office that one must in law perforce deal with in cases of pain and misfortune – for most people, either death, sequestration or liquidation. It is accordingly important that members of the public served by the Master must receive prompt assistance, appropriate guidance and responses to any questions or queries they may have.

[65] It is unseemly and a matter of regret that persons in the applicants' position have to wait for answers from the Master, for weeks or months on end and in some cases, not receiving any answers at all. Some people are compelled to engage the costly route of litigation because an answer or decision they seek is not forthcoming from a public servant. The fact that we serve the public should not be lost to us at any point.

[66] The failure by public servants to respond to enquiries from members of the public has been decried by Sibeya AJ, as he then was, in *Mouse Properties 98 CC v Minister of Urban and Rural Development*[13] in the following language, although in a different context:

> 'When the Minister is confronted in this application with all the above unanswered letters addressed to his office, he responded that a letter of courtesy to reply and acknowledge the applicant's letters should have been done . . . The response of the Minister is very shallow, lacks detail for not responding to the damning letters and can therefore not be condoned. It is disheartening to even imagine that a public official entrusted with public power at such an elevated level would ignore letters calling upon him or her to take a decision, more so where there are allegations that the delay in making a decision prejudices another party.'

[67] It is my fervent hope that this will be the last time that such allegations will be levelled by a litigant against this important and exalted office. It smoothens everyone's path when the Master's office is able to deal with and respond accordingly to requests and queries in good time. Where correspondence is not

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[13] *Mouse Properties 98 CC v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2018/00173) [2020] NAHCMD 42 (6 February 2020), para 24.

responded to, it results in the matter stalling and the completion of necessary processes and procedures unnecessarily held in abeyance. That is unacceptable.

[68] It may be necessary and fitting that the courts, at some stage have to convey some retribution by imposing one sanction or the other on public guilty accused of unnecessary and unexplained or inexplicable delay as this results in persons' status being held on tenterhooks indefinitely.

Conclusion

[69] It will become plain from the reasons advanced above, that the Master's Office simply had no leg to stand on. The impugned practice, as is evident above, violates the applicable law and may open the Master to unnecessary and avoidable litigation. The 'first come first served' practice is accordingly declared to be unlawful and a violation of the Companies Act. It is thus proper to review it and set it aside, as I hereby do.

Costs

[70] The general rule is that costs follow the event. The Master has, in this case been unsuccessful. Her case has been made a less onerous by not opposing the main relief eventually. She must, in the premises be mulcted in costs on the ordinary scale. Similarly, the applicants tendered costs to the 2nd respondent and that tender shall be made an order of court.

Order

[71] It was for the above reasons that the court, on 27 September 2021, issued the order that follows below:

1. The First Respondent's decision to apply a practice to receive and to allow insolvency practitioners to lodge security bonds prior to a winding-up order having been made in terms of the Companies Act 28 of 2004 ("the Act") in relation to a company, or a special resolution for a voluntary winding-up of a

company has been registered in terms of section 208 of the Act, is hereby reviewed and declared null and void and set aside by reason of the First Respondent's decision being in conflict with the provisions of section 375 of the Act and thus unlawful.

2. The First Respondent's decision to apply a practice to determine securities or allow securities to be provided by provisional liquidators in respect of legal or private persons in provisional or final winding-up or sequestrations in an amount unrelated to the full amount of the assets to be administered is hereby reviewed and declared null and void and set aside by reason of the First Respondent's decision being in conflict with the provisions of section 375 of the Act and thus unlawful.
3. The Applicants are to jointly and severally, the one paying and the other being absolved, pay the Second Respondent's costs up until 16 March 2021, consequent upon the employment of one instructing and two instructed counsel.
4. The First Respondent is to pay the Applicants' costs of this application, consequent upon the employment of one instructing and two instructed counsel, where so employed.
5. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

APPLICANT:	MvR. Potgieter (SC)
Instructed by	Danielle Lubbe Attorneys
2nd RESPONDENT:	J. Visser
	Of Koep & Partners (Windhoek)