REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No. HC-MD-CIV-MOT-GEN-2021/00128

In the matter between:

JOAHNNES ERASMUS VAN WYK	**APPLICANT**

and

WINDHOEK RENOVATIONS	**1ST RESPONDENT**
L H EQUIPMENT SALES CC	**2ND RESPONDENT**
ROBERT DOUGLAS WIRTZ	**3RD RESPONDENT**

Neutral Citation: *Van Wyk v Windhoek Renovations* (HC-MD-CIV-MOT-GEN-2021/00128 [2021] NAHCMD 545 (23 November 2021).

CORAM: **MASUKU J**

Heard: 1 November 2021

Delivered: 23 November 2021

Flynote: Legislation – Close Corporations Act 26 of 1988 – Section 66 – non-compliance with section 346 of the Companies Act – security to be furnished not for the benefit of the respondent – Payment of security ensures the reimbursement of funds used by the Master if sequestration application is unsuccessful - failure to file a

Master's certificate not fatal – Master's certificate may be filed after hearing but before judgment has been passed.

Summary: The applicant before court seeks an order for the winding up of the 1st respondent. The respondents raised a point *in limine* which relates to the non-compliance of section 66 of the Close Corporations Act. Section 66 renders various provisions under the Companies Act applicable in the winding up of a Close Corporation. The respondents allege that the applicant failed to comply with section 346 of the Companies Act in that he failed,10 days before the hearing, to file a certificate by the Master of the High Court to the effect that sufficient security had been given for all fees and charges for the prosecution of the winding-up proceedings. Furthermore, it was alleged that the applicant failed to lodge the accompanying affidavits with Master before the application was presented at court. The court having considered various case law found as follows:

Held: that the security required in s 346 of the Companies Act is not for the benefit of a respondent in liquidation proceedings. These costs are used to cover the costs incurred by officials in the prosecution of the winding –up proceedings, especially where the winding-up order is not granted.

Held that: a creditor who commences with sequestration proceedings does so at his or her own costs up until a time a trustee is appointed and the security so furnished ensures that the trustee's costs are secured in the event that the application for sequestration is unsuccessful.

Held further that: courts have adopted a liberal approach if section 9(3) of the Insolvency Act (the equivalent of s 346 of the Companies Act) has not been complied with. This is so because the courts would allow the compliance with the filing of the Masters certificate at a later stage, for example, after the hearing but before judgement is delivered.

Held: that the applicant, by filing the Master's certificate on the morning of the hearing, complied with the interpretation given by the court to the application of s 346

of the Act. Furthermore, there was no prejudice suffered by the respondents in any manner, shape or form, as a result of the late filing of the certificate.

Held that: the court is still entitled to hear the matter while the Master's certificate is yet to be filed. What the court may not do is to issue a provisional order for sequestration without the certificate having been filed.

The court accordingly dismissed the point of law *in limine* raised by the respondent.

ORDER

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1. The Respondents' point of law in *limine,* regarding the non-compliance with Section 66 of the Close Corporations Act No.26 of 1988, is dismissed.
2. The Respondents are ordered to pay the costs of the application, jointly and severally, the one paying and the other being absolved and such costs being consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is postponed to 25 November 2021 at 08:30 for the allocation of a hearing date.

RULING

MASUKU J:

Introduction

[1] The sole question that has to be answered with a measure of immediacy, is the following: what are the consequences of a party not complying with the provisions of s 66 of the Close Corporations Act, No. 26 of 1988, ('the Act'), regarding the hearing of an application for a provisional winding up of a close corporation?

[2] The setting in which this question arises, will become apparent as the ruling unfolds.

Background

[3] The facts giving rise to the question placed for determination are largely common cause. They are the following: the applicant, Mr. Joahnnes Erasmus Van Wyk, brought proceedings before this court on motion, essentially seeking an order in terms of which this court would order the winding up of the 1st respondent, Windhoek Renovations CC into the hands of the Master of the High Court.

[4] This application, needless to say, is strongly opposed by the respondents, especially by the third respondent, Mr. Robert Douglas Wirtz. In this connection, a full set of papers had been filed and the matter was ready for hearing when on the morning of 1 November 2021, the date of hearing, the respondents raised a point of law *in limine,* the nub of which has been hazarded in the opening paragraph of this ruling.

[5] Without in any way seeking to delve into the merits of the matter, it is clear that the applicant and the 3rd respondent, who are members of the 1st respondent, appear to have reached a deadlock and the relationship between them, in the running of the 1st respondent, appears to have seriously diminished to the point of non-existence. This is apparent from reading the papers.

[6] Whether the applicant is entitled to order it seeks, is of course another matter altogether and which will have decided on the merits and once the question presently serving before court has been answered. The question for determination is certainly not an issue that can be said to dispositive of the entire matter, should the court find for the respondents regarding the non-compliance alleged.

Section 66 of the Act

[7] Section 66(1) of the Act, provides the following:

'The provisions of the Companies Act which relate to the winding-up of a company, including the regulations made thereunder, (except sections 337, 338, 344, 345, 346(2), 347(3), 349, 364, 365(2), 367 to 370, inclusive 377, 387, 389, 390, 395, to 399, inclusive, 400(1)(b), 401, 402, 417, 418, 419(4), 421, 423, and 424), shall apply *mutatis mutandis* and in so far as they can be applied to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.'

[8] Shorn of all the frills, it appears plain that the intention of the above provision, is to render certain named provisions of the Companies Act, 1973, relating to the winding-up of companies, applicable with necessary modifications and adaptations to close corporations. This will be so in cases where the Act does not make provision for the matter relating to liquidation of the close corporation.

[9] One of the provisions, which are named in the above quotation, is section 346. Subsections (3) and (4) of the Companies Act thereof, read as follows:

'(3) Every application to the Court referred to in subsection (1), except an application by the Master in terms of paragraph (e) of that subsection, shall be accompanied by a certificate by the Master, issued not more than 10 days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding-up.

(4) (a) Before an application for the winding-up of a company is presented to the court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged with the Master, or, if there is no Master at the seat of the Court, with an officer in the public service designated for that purpose by the Master by notice in the Gazette.

(b) The Master or any such officer may report to the Court any facts ascertained by him which appear to him to justify the court postponing the hearing or dismissing the application and shall transmit a copy of that report to the applicant.'

[10] It is the respondents' contention that the applicant did not comply with the above provisions. It seems plain that both provisions are couched in peremptory

terms. Subsection (3) requires, in mandatory terms, that every application for a winding-up order filed in court, to be accompanied by a certificate from the Master confirming that sufficient security has been posted for the payment of all fees and charges necessary for the prosecution of the winding-up proceedings.

[11] On the other hand, subsection (4)(a) of the same section, provides, also in mandatory terms that before an application for the winding-up a company is presented to court, a copy of the application and every affidavit filed and confirming the facts relied on for the winding-up order, shall be filed with the Master. In terms of s346(4)(b), the Master, upon receipt and perusal, it would seem of the application, together with the affidavits filed, may report to the court any facts which appear to the Master, to justify the postponement, dismissal or the granting of the application, as the case may well be. A copy of the report is to be transmitted to the applicant or his agent and to the company sought to be liquidated.

[12] It appears to be common cause that the applicant did not comply with these mandatory provisions. In this regard, there was no certificate issued by the Master issued more than 10 days before the date of the hearing of the application certifying that sufficient security had been posted. Furthermore, the application, together with the accompanying affidavits, it would seem, was not lodged with the Master before it was presented to court.

[13] The Master, only filed a certificate, which is envisaged by s 346(4)(b) on 1 November, 2021, which was the date of the hearing of the application. It is also plain that when the application was filed by the applicant, there had not been compliance with subsection (3) in that there is no evidence that the application, when filed in court, was accompanied by a certificate issued by the Master 10 days before the filing of the application to court.

[14] In view of the non-compliance in both respects, the question for the court to determine, is what the effect of the non-compliance is. This issue must be viewed from the prism that the provisions not complied with, are mandatory.

<u>Arguments</u>

[15] I must mention that the protagonists both chose to instruct counsel by the name Barnard to represent them. Mr. P Barnard represented the applicant, whereas Mr. T. A. Barnard, represented the respondents. Mr. Barnard for the respondents submitted that in view of the non-compliance, the application must either be dismissed or postponed, presumably to allow the applicant an opportunity to comply with the mandatory provisions. In making these submissions, Mr. Barnard for the respondents relied on case law, which will be considered below.

[16] A lot of store was, in this regard, laid by Mr. Barnard for the respondents, on *Arnawil Investment (Pty) Ltd v Stamelman and Another*[1]. The court was also referred to the Supreme Court judgment of *Baard & Another v Serengetti Tourism (Pty) Ltd t/a Etosha Mountain Lodge*[2]. Some of these judgments will be considered shortly, in mapping a way forward in this matter, in the light of the non-compliance.

[17] Mr. Barnard, for the applicant, for his part relied firstly, on *Court v Standard Bank of SA Ltd; Court v Bester **NO** And Others*[3] and *Sphandile Trading v Hwibidu Security*[4]. These cases, it would seem, all deal with the non-compliance with the provisions in question. It must be noted, in this connection, that most of the cases relied on, emanate from South Africa. There is one local authority, relatively fresh from the oven, so to speak, namely, the *Baard* case, decided by our Supreme Court.

Consideration of the cases

[18] I will now proceed to deal with the cases cited above. I will not do so in any order. I must, however, mention, that at the end of the day, the judgment of our Supreme Court, is the one that is binding on this court, regard had to the provisions of Art 81 of the Constitution. The South African cases referred to by the parties, may only be of persuasive value in dealing with the question under consideration.

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[1] *Arnawil Investment (Pty) Ltd v Stamelman and Another* 972 (2) SA 13 (W) at p14B.

[2] *Baard & Another v Serengetti Tourism (Pty) Ltd t/a Etosha Mountain Lodge* 2021 (1) NR 17 (SC).

[3]*Court v Standard Bank of SA Ltd; Court v Bester **NO** And Others Court v Standard Bank of SA Ltd; Court v Bester **NO** And Others*

[4] *Sphandile Trading v Hwibidu Security* 2014 (3) SA 231 (GJ).

[19] In the *Court* case, the Appellate Division of South Africa, dealt with the question whether s 9(3)(*b*) of the Insolvency Act No.24 of 1936 requires an application for insolvency, to be accompanied by the certificate from the Master and that the certificate must have been issued not less than 10 days before the hearing of the matter. The court was seized with the question whether it is necessary that the certificate should accompany the application.

[20] It would appear that the point taken before that court was to the effect that because there was no compliance with the provisions of the said section, the application before court was thus fatally defective and that the application could therefor not be granted on the papers.

[21] The court engaged in a wide survey of cases from that jurisdiction, which decided on the question of the effect of not complying with the said provisions. Vivier JA, writing for the majority of the court, after a survey had been done, concluded the applicable law on this issue as follows:[5]

> 'I am accordingly of the view that s 9(3)(*b)* of the Act does not require the security certificate to accompany the application either when it is filed with the Registrar or when it is served on the respondent and that the practice in the Court *a quo,* followed in the present case does not conflict with the provisions of the subsection. The point taken by the appellant that the application was fatally defective for want of compliance with the subsection cannot therefore succeed.'

[22] In the *Sphandile* case, Andre Gautschi AJ dealt with the provisions of s 346 of the Companies Act of South Africa. That provision touches on the very provisions up for interpretation in this judgment. It would appear that when the application for winding-up served before the learned judge, there was no security bond filed as required by the Act. The bond, the judgment reveals, was only filed after the hearing and shortly before the delivery of the judgment was due.

[23] The learned judge, in dealing with this question, summed up the position in the following language, namely, 'It is now established that security must be given before

[5] *Court ibid,* at p 131D-E.

a winding-up order is granted. The failure to have obtained a security bond before the hearing is therefore not fatally defective.' The learned judge appears to have relied on the *Court* judgment in order to reach his conclusion on the question. I should mention that Mr. Barnard for the applicant relied heavily on this judgment in his submissions.

[24] I now turn to the *Baard* case of our Supreme Court. In that case, a sequestration order had been granted by this court. The appellants, who were husband and wife, appealed to the Supreme Court on a number of grounds. One of these was that this court lacked jurisdiction to grant the sequestration order against them because the application was not accompanied by a security of costs certificate issued under the hand of the Master. The latter is ground that was raised belatedly, it appears.

[25] Mokgoro AJA, writing for the majority of the court dealt with the question in the following manner:[6]

> '[27] The requirement of the certificate has generally been accepted as peremptory or imperative and the rule nisi has been set aside despite that a certificate had been belatedly filed. Whereas I agree that a sequestration application should not be heard without the certificate of the master relating to security being at hand as this is what s 9(3) clearly requires, the question that arises is what are the consequences of an order granted contrary to s 9(3). The traditional answer is that such an order is a nullity and should be set aside as the requirement relating to security prior to the bringing of a sequestration order is imperative.
>
> [28] The first consideration to note is that s 9(3) is not for the benefit of the respondent in sequestration proceedings. As pointed out by Leon J. "there is nothing in the subsection which provides that the security must in any way relate to the costs of the respondent: the costs of opposition are not the costs referred to in the subsection". It is to cover the costs necessarily incurred by the officials to start the sequestration process once an application is launched for a provisional sequestration order and such order is granted but becomes wasted if the order is not confirmed. A creditor who commences sequestration proceedings does so at his or her own costs until a trustee is appointed and the security

[6] *Baard, ibid* para 27.

required in terms of s 9(3) ensures the mentioned officials' costs are secured if the sequestration application is unsuccessful.

[29] As the objective of s 9(3) of the Act is to ensure the public purse is reimbursed for its expenses should the sequestration application not proceed, why should the failure to comply with s 9(3) timeously necessarily lead to a nullity of the proceedings where such proceedings have proceeded to the granting of the provisional order or further, and where a certificate in terms of s 9(3) had in the meantime been furnished and the mischief against which s 9(3) is aimed at has been addressed?

[30] It is clear from the wording of s 9(3) that it should be complied with and that a sequestration order should not be granted without the master's certificate provided for in this section. A failure to produce the certificate at this stage should either lead to a postponement or the refusal of the application for provisional sequestration. This would, of course, allow an applicant to obtain the certificate and launch the application afresh without much prejudice or costs. There is simply no reason for not insisting on compliance with s 9(3) at this stage'.

[26] The court proceeded to address the question of what happens in cases where a provisional sequestration order and perhaps a final sequestration order was issued without complying with the provisions of s 9(3). The question was answered in the following manner by the court at paragraph 32:

'I am not satisfied that the Act intends that all the steps taken to finalise the sequestration application must in such circumstances be considered nullities. This is so because the non-compliance with s 9(3) is not illegal, there is no direct statement in the Act that such non-compliance will void all subsequent actions taken, the security is now indeed in place and to allow a respondent to raise the issue that such non-compliance may lead to injustice. Considering the scope and object of the provision this also militates against an automatic nullity in all cases. The appellants were not prejudiced at all by the non-compliance with s 9(3). As pointed out above the subsection is not for their benefit. They further fully partook in the proceedings so their version was fully placed before the court *a quo* and their case on the merits was fully argue.'

[27] Is there any judicial convergence, judging from the cases considered above? It would appear to me that the cases quoted above, all come to the same conclusion, and this includes the *Baard* judgment from our Supreme Court. There appears to be

judicial unanimity about the provision is question, together with its objective and interpretation. I will accordingly summarise what I consider to be the main conclusions.

[28] Before I do so, it is imperative that it is mentioned that the fact that the cases above refer to the Insolvency Act should not in any manner, shape or form, detract from the position that the interpretation accorded thereto applies to the Close Corporations Act and the Companies' Act, by extension. This is so because the effect of the provisions in all the above legislative enactments is the same.

[29] Reverting to the judicial unanimity spoken of earlier, it is plain that in all the cases, it is concluded that the provision in question is couched in peremptory terms, meaning that ordinarily, parties should comply with the requirements set out therein.

[30] Second, it appears that courts have adopted a liberal interpretation of the provision such that even if it is not complied with timeously, the courts would allow the compliance with the filing of the Master's certificate even at a later stage. As pointed out earlier, in the *Sphandile* case, the certificate was accepted after the hearing but before judgment was rendered.

[31] As such, the weight of judicial opinion seems to be that the failure to comply strictly with the provisions of the Act does not ordinarily result in subsequent steps taken being considered a nullity. This is because not to comply therewith is not necessarily illegal. It would appear, and this is plain from *Baard* and the cases referred to therein, that the main consideration, at the end of the day, revolves around the objective of the provisions. The courts have held that the provision is not designed to benefit the respondent and has nothing to do with the respondent's costs of opposing the application for sequestration or liquidation of a company, for that matter.

[32] The courts have held that the provision is designed for the benefit of the fiscus, in the sense that the staff of the Master should be indemnified and reimbursed for whatever expenses are incurred in dealing with an unsuccessful application for sequestration or liquidation. The court in *Baard* held that in those cases where the

matter proceeds, the objects of the Insolvency Act would still be met if the matter is been heard but the certificate is filed before a provisional order is issued. The court further considered the issue of prejudice and held that the appellants had not been prejudiced in any manner by the non-compliance in that matter.

[33] More importantly, the court in *Baard,* held at paragraph [30], quoted above, that the Act should be complied with 'and that a sequestration order should not be granted without the master's certificate provided for in this section.' The court held that a failure to produce the certificate 'at this stage', namely of the granting of a provisional sequestration order, should 'either lead to a postponement or the refusal of the application for provisional sequestration.'

[34] I am accordingly of the considered view that although the certificate was not filed in time in this matter, considering the objects of its filing, as discussed above, the filing, which took place on the morning of the hearing, was well within the reasoning of the *Baard* matter as at that stage, the court had not been called upon to grant a provisional winding-up order. The matter was still to be heard and there is no prejudice that was in any manner suffered by the respondents as they were able to file all the papers they wished to.

[35] It is accordingly my understanding of the *Baard* judgment that even if the certificate is not filed, the court may still hear the matter because the non-filing of the certificate does not impinge in any manner, on the rights of the respondents. What the court may, however, not do, is, having heard the application for sequestration, issue a provisional order, without the certificate having been filed. This is because a possibility exists that the court may refuse to issue the provisional sequestration or liquidation, as the case may be and in which event, the fiscus may be prejudiced, as no security would have been filed at that stage.

[36] It would accordingly appear to me that it is for that reason that the court would, as I understand the *Baard* judgment, at that stage, having heard the argument, but before pronouncing itself on the granting or refusal of the provisional order, postpone the matter or indeed refuse to grant the provisional order. That this is the case is clear from the judgment as it states that the matter either having been postponed or

the granting of the provisional order refused, the applicant would obtain the certificate in the interregnum and if the application is refused, the applicant could then launch the application afresh, without incurring further costs or prejudice.[7]

[37] It is unnecessary, in my view, for this court deal with the other scenarios that featured in the *Baard* case, namely, instances where the final order is issued in the absence of the certificate. I decline to do so because that questions falls beyond the remit of the issues this court is called upon to determine in the instant matter.

[38] I should be quick to mention that no confusion should result from the fact that the cases referred to above, relate to s 9(3) of the Insolvency Act. It must be pointed out that the provisions implicated in this judgment, namely, s 346 of the Companies Act, are *in pari material*. As such, the interpretation accorded to s 9(3) of the Insolvency Act, applies *mutatis mutandis* to this case.

Conclusion

[39] In the premises, and after consideration of the above judgments, it appears to me that the respondents' point of law *in limine* is bad. This is because it is clear from *Baard* that the court may hear the matter in the absence of the certificate but refuse to issue a provisional order for winding-up or sequestration as the case may well be or postpone the matter pending the filing of the certificate. The court would, in this instance, allow the applicant time to file the certificate and later re-enrol the matter.

[40] The other alternative, would be for the court to postpone the matter to enable the applicant to file the certificate in question before proceeding to issue an order either granting or dismissing the application as may to the court seem meet.

[41] I am of the considered view in this matter that the postponement of the matter would not have been a necessary step in the present circumstances. I say so for the reason that when the matter was eventually called for hearing, on 1 November, 2021, the certificate was already before court and the respondents would not, in any manner, shape or form, have been prejudiced with the matter proceeding on

[7] Para 30 of the *Baard* judgment.

schedule, regard being had to the objects of the certificate and for whose benefit it is designed, as discussed above.

[42] If the respondents had been correct in their submissions such that the court had the right in the circumstances, to either postpone the matter or to refuse the application for the granting of a provisional order, I would have been inclined to grant the former option, namely, to postpone the matter as this would, in my considered opinion be consistent with the overriding objectives of judicial case management, as encapsulated in rule 1(3).

[43] I would, at this juncture, wish to deal with one submission made on behalf of the respondent, namely, that where the certificate is not before court, 'as in the present matter, the application cannot be granted and must either be dismissed or postponed.'[8] I am of the considered view that the statement above is incorrect when regard is had to the portions quoted from *Baard* at paragraph 30.

[44] The court was clear that where the certificate is not before the court, it may either postpone the matter or refuse to grant the provisional sequestration order. The refusal, does not, in my view, amount to a dismissal of the application. That this is the case can be gleaned from what the learned judge proceeded to say in *Baard*, namely to 'allow the applicant to obtain the certificate and launch the application afresh without much prejudice or costs.'

[45] A refusal would accordingly not have final consequences on the case but would allow the applicant to obtain the certificate and then re-launch the application. A dismissal, on the other hand, would possibly have the opposite effect, namely, finality of the proceedings and bringing in its wake the application of legal principles such as *res judicata* and *functus officio*.

<u>Costs</u>

[46] The rule applicable to costs, generally speaking, is that costs follow the event. I am of the considered view that in the instant case, the applicant has been successful

[8] Paragraph 12, page 5 of the respondents' heads of argument.

in warding off the respondents' point of law *in limine*. I can mention in this regard that the point was raised on the morning of the hearing, giving the applicant precious little time to deal with it comprehensively. The applicant is accordingly entitled to his costs in this regard.

<u>Order</u>

[47] Having full consideration for the issues that have been canvassed above, and the conclusions attendant thereto, I am of the considered view that the following order would present itself as condign:

1. The Respondents' point of law in *limine,* regarding the non-compliance with Section 66 of the Close Corporations Act No.26 of 1988, is dismissed.
2. The Respondents are ordered to pay the costs of the application, jointly and severally, the one paying and the other being absolved and such costs consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is postponed to 25 November 2021 at 08:30 for the allocation of a hearing date.

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T. S. Masuku

Judge

APPEARANCES:

APPLICANT:	P. Barnard
Instructed:	PD Theron & Associates
RESPONDENTS:	T. A. Barnard
Instructed by:	Dr. Weder, Kauta & Hoveka Inc.