REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

HC-MD-CIV-MOT-GEN-2022/00121

In the matter between:

ALWYN PETRUS VAN STRATEN N.O **FIRST APPLICANT**
WILLIAM DE VILLIERS SCHICKERLING N.O **SECOND APPLICANT4**

and

OKAPUTA (PROPRIETARY) LIMITED **RESPONDENT**

Neutral Citation: *Van Straten N.O v Okaputa (Proprietary) Limited* (HC-MD-CIV-MOT-GEN-2022/00121) [2022] NAHCMD 312 (23 June 2022)

CORAM: UEITELE J

Heard: 31 March 2022; 05 – 07 April 2022; and 19 April 2022
Ruling: **24 May 2022**
Reasons Delivered: **23 June 2022**

Flynote: Common law – authority to institute proceedings on behalf of a juristic person - an applicant which is a legal person bears the onus to prove that the application which it has launched is authorised and that the individual who makes the application is duly authorised.

Motion proceedings – affidavits - it is now a well-established principle of our procedural law that in motion proceedings only three sets of papers are permissible: the applicant's founding affidavit, the respondent's answering affidavit and the applicant's replying affidavit.

Legislation – Companies Act, 2004 (Act 28 of 2004) – authority to institute legal proceedings - the Companies Act 2004, is self-contained and empowers persons in terms of s 351(1)(*c*) and (*d*) read with s 110(3) to launch liquidation proceedings represented by executors, administrators, trustees, curators, and guardians, against a company irrespective of the regime of authority as determined under the Insolvency Act, 1936 (Act 24 of 1936).

Summary: On 28 March 2022 the applicants, on an urgent basis, launched an application in terms of which they sought a number of orders, all turning on the provisional liquidation of the respondent into the hands of the Master of the High Court.

The applicants allege that a certain Jan Harmse Fourie, who was sequestrated on 08 December 2021, is in his personal capacity a 50 percent shareholder in Okaputa. The applicants further allege that the other 50 percent shareholder is a Trust known as the Raindrops Trust and that the insolvent and his former wife, Shani Fourie, are the only trustees of the Raindrops Trust. It is the case of the applicants that, the marriage between the insolvent and his former spouse was dissolved by this court after an acrimonious and protracted litigation and as such the relationship of trust that previously existed between the insolvent and his wife is completely destroyed.

The applicants further allege that on 24 March 2022 they applied to the master for authority to institute these proceedings and that on that same day the master granted them the authority to litigate.

The applicants set the matter down for urgent hearing on 31 March 2022 at 09h00. On 31 March 2022 Bank Windhoek launched an application to intervene under the same case number, averring that it has a direct and substantial interest in the matter

– in that, the respondent is an unlimited surety for Jan Harms Fourie to whom the Bank has provided secured loans. In addition, the Bank sought to raise a number of legal issues. The court postponed the matter to 05 April 2022 to hear the application to intervene. On 05 April 2022, after hearing the application - the court postponed the matter to 07 April 2022, to rule on the application to intervene. However, during the hearing of the 5th, the authority to institute legal proceedings, of the deponent on behalf of the Bank was questioned by the counsel for the applicants.

On 06 April 2022, Bank Windhoek filed an application to review and set aside the decision by the master to grant permission to the joint Trustees of the Insolvent Estate, to institute proceedings for the liquidation of the respondent, and also filed an application in terms of rule 61 for the setting aside of the applicants' notice to amend their notice of motion.

On 07 April 2022 Bank Windhoek filed yet another application and an affidavit in terms of which the chairperson of the Board of Directors of Bank Windhoek confirms that Husselmann was authorised to launch the proceedings which she did. The court withheld its ruling on the intervention application and postponed the matter to 19 April 2022, to hear all arising legal issues.

On 19 April 2022 the court heard arguments in respect of all the applications pending before it.

Held that, an applicant which is a legal person bears the *onus* to prove that the application which it has launched is authorised and that the individual who makes the application is so authorised.

Held that, it is now a well-established principle of our procedural law that in motion proceedings only three sets of papers are permissible.

Held that, despite the failure to explain why the documents evidencing Ms Husselmann's authority to launch the proceedings and to oppose the liquidation application were not filed earlier, the court found no indications that there is *mala fides* on behalf of Bank Windhoek in seeking to file the additional affidavit. The court

furthermore found, that the applicants will not suffer any prejudice which cannot be remedied by an order of costs in their favour.

Held that, it is accepted that this Court has a discretion to allow the intervention of a party on the grounds of convenience. The court was thus of the view that this is clearly a matter in which it may and so does exercise such a discretion in the intervening applicant's favour and allow it to join in the proceedings as the second respondent, despite the concerns raised by the applicants.

Held that, one cannot overlook the fact that the Companies Act 2004, is self-contained and does empower persons in the shoes of the applicants to launch liquidation proceedings. The court was furthermore satisfied that the applicants have demonstrated that some degree of urgency exists in this matter and secondly, that the interests of creditors in the estate of Okaputa will not be prejudiced by the institution of proceedings.

Held that, the question which needs to be answered is whether Okaputa has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can Okaputa meet the current demands on it and remain buoyant? The answer is in the court’s view in the negative. Okaputa’s sole asset, that is the Farm, can by no stretch of imagination be regarded as a liquid asset.

In light of all arising issues the court ordered that, Bank Windhoek be joined as respondent, the matter be heard as one of urgency and ultimately granted the provisional liquidation order.

ORDER

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1. The applicants' non-compliance with the forms and service provided for by the Rules of this Court is condoned and that this application is heard as one of urgency as provided for in rule 73(1) as read with rule 73(3) of the Rules of Court.

2. Bank Windhoek Limited is granted leave to intervene in these proceedings and is joined as the second respondent to these proceedings.

3. The first respondent, Okaputa (Proprietary) Limited is placed under provisional order of liquidation, into the hands of the Master of the High Court.

4. A *rule nisi* is issued calling upon the respondents and all or any interested parties to show cause (if any) on or before 26 July 2022, why:

4.1 the first respondent must not be placed under final order of liquidation;

4.2 the costs of this application must not be costs in the winding-up of the first respondent.

5 Service of this order must be effected:

5.1 upon the first respondent, by delivering a copy thereof at the first respondent's registered address being No. 61, Bismarck Street, Windhoek, Republic of Namibia; and

5.2 by publishing a copy of this order in one edition of each of the Government Gazette and the Namibian newspaper

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RULING

UEITELE J:

Introduction

[1] Before me are four applications, namely:

(a) an application by Bank Windhoek Limited to intervene in the application for the compulsory liquidation of Okaputa (Proprietary) Limited;

(b) an application by Bank Windhoek Limited to review and set aside the decision by the Master of the High Court of Namibia to grant permission to the joint Trustees of the Insolvent Estate: Jan Harmse Fourie to institute proceedings for the liquidation of Okaputa (Proprietary) Limited;

(c) an application by the joint Trustees of the Insolvent Estate: Jan Harmse Fourie to amend the Notice of Motion in the application for the compulsory liquidation of Okaputa (Proprietary) Limited; and

(d) an application by the joint Trustees of the Insolvent Estate: Jan Harmse Fourie for the compulsory liquidation of Okaputa (Proprietary) Limited.

The parties

[2] The first applicant is Alwyn Petrus Van Straten, in his nominal capacity as a provisional joint trustee in the insolvent estate of Jan Harmse Fourie, and the second applicant is William de Villiers Schickerling, also acting in his nominal capacity as provisional joint trustee in the insolvent estate of Jan Harmse Fourie.

[3] The respondent is Okaputa (Proprietary) Limited, a company with limited liability, duly registered in terms of the company laws of the Republic of Namibia with its registered address situated at Farm Okaputa, No. 334, District of Otjiwarongo, Namibia and principal place of Business C/O BDO (Namibia) (Pty) Ltd of No. 61 Bismarck Street, Windhoek.

[4] As I have indicated earlier Bank Windhoek Limited, is seeking leave of this Court to intervene in these proceedings and to be joined as the second respondent.

[5] I will, for ease of reference, refer to the joint Trustees of the Insolvent Estate: Jan Harmse Fourie as the applicants, Okaputa (Proprietary) Limited as '*Okaputa',*

Bank Windhoek Limited as Bank Windhoek, and to the Master of the High Court as 'the Master'.

Background

[6] On 28 March 2022 the applicants, on an urgent basis, launched an application in terms of which they sought the following orders:

'1. That the applicants' non-compliance with the forms and service provided for by the Rules of this Honourable Court be condoned and that this application be heard as one of urgency as provided for in rule 73(1) as read with rule 73(3) of the Rules of Court;

2. That the Respondent be placed under provisional order of liquidation, into the hands of the Master of the above Honourable Court;

3. That a *rule nisi* be issued calling upon the Respondent and all/any interested parties to show cause (if any) on/before a date and time to be allocated by the managing judge, why:

3.1 the Respondent should not be placed under final order of liquidation;

3.2 the costs of this application should not be costs in the winding-up of the Respondent.

4. Ordering and directing that service of this ordered be effected:

4.1 upon the Respondent, by delivering a copy thereof at the Respondent's registered address being No. 61, Bismarck Street, Windhoek, Republic of Namibia;

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

5 Such further and/or alternative relief as this Court may deem fit.'

[7] In the affidavit filed in support of their application the applicants allege that a certain Jan Harmse Fourie, whose estate was by order of this court finally sequestrated on 08 December 2021, is in his personal capacity a 50 percent shareholder in Okaputa. The applicants furthermore allege that the other 50 percent shareholder is a Trust known as the Raindrops Trust and that the Insolvent and his

former wife, a certain Shani Fourie (Born Taljaard and previously Bosch), are the only trustees of the Raindrops Trust.

[8] The applicants furthermore allege that the marriage between the insolvent and his former spouse was dissolved by this Court after an acrimonious and protracted litigation and as such the relationship of trust that previously existed between the insolvent and his wife is completely destroyed.

[9] The applicants furthermore allege that on 24 March 2022 they applied to the Master for authority to institute these proceedings and that on that same day the Master granted them the authority to litigate. The applicants in support of that allegation attached to their affidavit a copy of the authorisation by the Master.

[10] On 31 March 2022, Bank Windhoek launched an application to intervene under the same case number ('the Intervention Application'). In the affidavit in support of its application to intervene, the deponent on behalf of Bank Windhoek, a certain Ms Leatitia Phalydia Husselmann, alleged that she was authorised to launch the intervention application and that Okaputa owes Bank Windhoek an amount of N$ 11 577 667.87 for which amount Bank Windhoek obtained summary judgement against Okaputa. She further alleges that Okaputa has failed to satisfy the judgment.

[11] Ms Husselmann furthermore alleges that as a result of Okaputa failing to satisfy the judgment in favour of Bank Windhoek, the Bank arranged for a sale in execution of Okaputa's farm namely Farm Okaputa, No. 334, District of Otjiwarongo, Namibia, which sale in execution was scheduled for 08 April 2022.

[12] She continued and alleged that the urgent application for the liquidation of Okaputa is calculated to interfere with the rights and the material interest that Bank Windhoek has in the enforcement of the debt owing to it by Okaputa, more specifically in the sale in execution scheduled for 8 April 2022. She additionally alleges that the Bank wishes to address various issues in the proceedings launched by the applicants namely that:

(a) the Bank wishes to oppose the liquidation application on various grounds;

(b) the Bank specifically intends to oppose and impugn the allegation that the trustees are duly authorised in terms of the provisions of section 18(3) of the Insolvency Act, 24 of 1936 to have instituted the current proceedings; and

(c) the applicants launched what they referred to as *"an application to amend"* on 31 March 2022. The application comprises a notice of intention to amend, not compliant with the provisions of rule 52(1), accompanied by a purported supporting affidavit. The Bank wishes to apply, in terms of the provisions of rule 61, for the setting aside of this step as an irregular proceeding as contemplated by the rule.

[13] On 31 March 2022 the matter came before me and on that day I was alerted that Bank Windhoek intends to bring an application to intervene in the proceedings. I accordingly postponed the application for the liquidation of Okaputa to 05 April 2022 to enable Bank Windhoek (the intervening party) to file its papers with respect to its desire to intervene and to hear arguments with respect to its application. After I heard arguments, on 05 April 2022, relating to Bank Windhoek's intervention application I postponed the matter to 07 April 2022 for the purposes of making a ruling on Bank Windhoek's intervention application. During the hearing of arguments the applicants' counsel argued that from the affidavits and supporting documents filed by Ms Husselmann it was clear that the body which authorised Ms Husselmann to launch the intervention application did not have the authority to authorise her, to institute the proceedings which she instituted.

[14] Instead of waiting for the outcome or ruling on its intervention application, Bank Windhoek on 06 April 2022 filed an application to review and set aside the decision by the Master to grant permission to the joint Trustees of the Insolvent Estate: Jan Harmse Fourie to institute proceedings for the liquidation of Okaputa and also filed an application in terms of rule 61 (irregular proceedings) for the setting aside of the applicants' notice to amend their notice of motion.

[15] On 07 April 2022 Bank Windhoek, clearly in response to the arguments raised by counsel for the applicants that Ms Husselmann did not have the authority to launch the proceedings which she did, filed yet another application and an affidavit in terms of which the chairperson of the Board of Directors of Bank Windhoek confirms

that Ms Husselmann was authorised to launch the proceedings which she did. In view of these applications I withheld my ruling on Bank Windhoek's intervention application and postponed the matter to 19 April 2022. The order postponing the matter reads as follows:

'1 The sale in execution in respect of the immovable property, to wit: Farm Okaputa No. 334, Registration Division B, Otjozondjupa Region, measuring 6225, 4461 (six two two five come four four six one) hectares, and held under deed of transfer No. T 4364/1995, scheduled for 08 April 2022, is stayed pending the resolution of all arising legal issues in this matter.

2 The case is postponed to 19 April 2022 at 10h00 for Opposed Motion Hearing, of the following:

2.1 The application for leave to file a further affidavit;

2.2 The application for leave to amend;

2.3 The application to set aside the notice of intention to amend;

2.4 The application for leave to intervene; and

2.5 The liquidation application.

3 The parties are granted leave to file any other application(s) and process to set the matter to normalcy.

4. The parties are granted leave to file supplemented heads of argument addressing the main application and all other interlocutory applications, by not later than 15 April 2022 at 15h00.

5 The legal practitioners' attention is drawn to the matter of Bank Windhoek Limited v Benlin Investment CC (HC-MD-CIV-CON-2016/03020) [2017] NAHCMD 78 (15 March 2017).'

[15] On 19 April 2022 I heard arguments in respect of all the applications pending before me. Since Bank Windhoek was not cited as a respondent in these proceedings, it cannot take part in those proceedings nor can it launch the applications which it did unless it is granted leave by the Court to intervene as a creditor of Okaputa or to be joined in the proceedings as a respondent. I will accordingly commence to consider the intervention application.

Bank Windhoek's application to intervene

[16] As I have indicated earlier on in this ruling Bank Windhoek's intervention application was launched by Ms Husselmann. In her founding affidavit Ms Husselmann states that:

"I am an adult female person and manager (Legal Debt recovery) of the applicant and duly authorised to launch, institute and prosecute this application on behalf of Bank Windhoek Limited… Proof of my authority is attached hereto as annexure "LH1".'

[17] Annexure *LH1* appears at page 639 to 642 of the record of proceedings and the following is part of its text:

'EXTRACT FROM THE MINUTES OF A CREDIT COMMITTEE OF BANK WINDHOEK LIMITED MEETING HELD AT WINDHOEK ON THE 30TH DAY OF MARCH 2022.

RESOLVED THAT:

1. That **Bank Windhoek Limited** (the Bank) be and is hereby authorised to:

    1.1. oppose the urgent application launched by Alwyn Petrus Van Straten N.O and William De Villiers Schickerling N.O. against Okaputa (Proprietary) Limited under case number HC-MD-CIV-MOT-GEN-2022/00121.

    1.2. Launch an application to intervene in the proceedings as referred to in resolution 1.1 above.

2. **LEATITIA HUSSELMANN** in her capacity as Manager: Legal Debt Recovery of **LEGAL COLLECTIONS DEPARTMENT OF BANK WINDHOEK** be and is hereby nominated and appointed with the power to:

    2.1 appoint and authorise Tsuka Luvindao of Dr Weder Kauta and Hoveka Inc. with the power of substitution to act as legal practitioners for and on behalf of the Bank in the opposition of the urgent application, the application to intervene and any interlocutory proceedings which may arise from the said opposition or application provided for in resolution 1 above.

2.2 …'

[18] A document titled ***'BOARD CREDIT COMMITTEE AND BOARD LENDING COMMITTEE TERMS OF REFERENCE***' is also attached to the resolution, (that is, Annexure *LH1).* Paragraph 3 of that document that is, the **'**Board Credit Committee and Board Lending Committee Terms of Reference' provides for the authority and mandate of the two committees. It provides as follows:

'The committees are authorised by the board to:

1. Investigate, or cause to be investigated, any activity within their terms of reference;

2. Seek any information that they require from any employee of the company and require all employees to co-operate with any requests made by the committees;

3. Based on the mandate available to the committees in terms of the approved Authority Matrix, obtain at the company's expenses outside legal or independent professional advice and such advisors may at the invitation of the committees attend meetings as necessary, provided that suitable non-disclosure agreements are in place;

4. Meet for the dispatch of their business , adjourn and otherwise regulate their business as they see fit; and

5. Delegate any of their duties as is appropriate to such persons or committees they see fit.'

[18] Based on these documents Mr Heathcote, counsel for the applicants argued that the Credit Committee of Bank Windhoek had no authority or mandate to authorise Ms Husselmann to oppose the liquidation application or to launch the intervention application.

[19] Mr Barnard who appeared for Bank Windhoek complained that the argument raised by Mr Heathcote with respect to the authority of Ms Husselmann to institute the proceedings she did, was improperly raised because it was allegedly raised for the first time in arguments. He strenuously argued that the challenge to Ms

Husselmann's authority should have been raised in the applicants' answering affidavit to Bank Windhoek's affidavit in support of its intervention application.

[20] An applicant which is a legal person bears the onus to prove that the application which it has launched is authorised and that the individual who makes the application is duly authorised to depose to the relevant affidavits on behalf of the applicant[1]. When I indicated to Mr Barnard that the onus was on Bank Windhoek to prove what it alleges he moved an application to file a further affidavit in order to demonstrate that the Board of Directors of Bank Windhoek have ratified the decision of the Credit Committee to authorise Ms Husselmann to launch the intervention application and to oppose the liquidation application.

[21] It is now a well-established principle of our procedural law that in motion proceedings only three sets of papers are permissible: the applicant's founding affidavit, the respondent's answering affidavit and the applicant's replying affidavit. It is furthermore a settled principle of our law that a court may, in its discretion permit the filling of further affidavits. Silungwe J[2], after a review of authorities and quoting from the judgment of *James Brown & Hamer (Pty) Ltd (Previously Named Gilbert Hamer & Co Ltd) v Simmons, NO*[3] said:

> 'It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly observed: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted...'

[22] The learned Judge continued, quoting from the case of *Transvaal Racing Club v Jockey Club of South Africa*,[4] and said:

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1 *National Union of Namibian Workers v Naholo* 2006 (2) NR 659 (HC) para 23.

2 *Haindongo t/a Onawa Wholesalers v African Experience (Pty) Ltd t/a Fred Mac Energy Resources* (PA 104 of 2005) [2005] NAHC 26 (26 July 2005).

3 *James Brown & Hamer (Pty) Ltd (Previously Named Gilbert Hamer & Co Ltd) v Simmons, NO* 1963 (4) SA 656 (A) at p 660 E – G.

4 *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W) at 604 A-E.

'….I think that if there is an explanation which negatives *mala fides* or culpable remissness as the cause of the facts or information not being put before the Court at an earlier stage, the Court should incline towards allowing the affidavits to be filed. As in the analogous cases of the late amendment of pleadings or the leading of further evidence in a trial, the Court tends to that course which will allow a party to put his full case before the Court. But there must be a proper and satisfactory explanation as to why it was not done earlier, and, what is also important, the Court must be satisfied that no prejudice is caused to the opposite party which cannot be remedied by an appropriate order as to costs. …'

[23] In the present instance Ms Husselmann does not provide any explanation as to why the affidavits containing the facts demonstrating her authority to launch the intervention application and to oppose the liquidation application were not filed earlier. Despite the failure to explain why the documents evidencing Ms Husselmann's authority to launch the proceedings and to oppose the liquidation application were not filed earlier, I find no indications that there is *mala fides* on behalf of Bank Windhoek in seeking to file the additional affidavit. I furthermore do not find that the applicants will suffer any prejudice which cannot be remedied by an order of costs in their favour. I accordingly permit the filling of the additional affidavit and find that Ms Husselmann was duly authorised by the Bank Windhoek to launch the intervention application and to oppose the liquidation proceedings.

[24] Bank Windhoek sought to intervene in the liquidation application on the grounds that it has a direct and substantial interest in that application. The deponent to the affidavit in support of Bank Windhoek's intervention application contended that Bank Windhoek is a creditor of Okaputa, in that Okaputa is an unlimited surety for Jan Harms Fourie to whom Bank Windhoek has provided secured loans. The deponent further contended that Okaputa is indebted to Bank Windhoek, as a result of the said unlimited surety in respect of Jan Harms Fourie, in the sum of N$15 506 907.62 and that, on 09 December 2021, Bank Windhoek obtained summary judgment against Okaputa.

[25] In the circumstances Ms Husselmann stated that Bank Windhoek had a direct interest in the sequestration proceedings which it intended to protect by opposing these proceedings.

[26] Mr Van Straten who deposed to the affidavit in opposition to the intervention application contended that the sole reason why Bank Windhoek wishes to oppose the application for the winding up of Okaputa (Pty) Ltd, is to avoid the two year limitation on interest receivable in a winding-up. That is a purely financial interest which is not a direct and substantial interest. Mr Van Straten furthermore does not admit that Bank Windhoek is indeed a creditor of Okaputa. He says that fact must still be investigated.

[27] At common law, the court has a discretion to permit intervention in winding-up proceedings[5]. In order to succeed in the quest to intervene, Bank Windhoek must satisfy this court that it has a direct and substantial interests in the application to wind-up Okaputa, which could be prejudiced should the court issue an order winding-it up[6]. It must furthermore satisfy this court that the application is made seriously and is not frivolous, and that the allegations made by the applicant constitute a *prima facie* case or defence - it is not necessary for the applicant to satisfy the Court that it will succeed in its case or defence[7]. A *'direct and substantial interest'* means '... an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation'[8].

[28] It is accepted that this Court has a discretion to allow the intervention of a party on the grounds of convenience. I am thus of the view that this is clearly a matter in which I may and so do exercise such a discretion in the intervening applicant's favour and allow it to join in the proceedings as the second respondent, despite the concerns raised by the applicants.

Bank Windhoek's application to set aside the Master's decision to authorise the applicants to launch the liquidation proceedings.

[29] Bank Windhoek's application to set aside the Master's decision to authorise the applicants to launch the liquidation proceedings is premised on the contention that the Master acted *ultra vires* her powers when she authorised the trustees to launch the liquidation application.

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5 *Hetz v Empire Auctioneers & Estate Agents* 1962 (1) SA 558 (T).

6 *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 167; *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415–416.

7 *Mgobozi and Others v The Administrator of Natal* 1963 (3) SA 757 (D) at 760G.

8 *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

[30] Mr Barnard who appeared for Bank Windhoek argued that the Master had no jurisdiction to simply ignore the provisions of s 18(3) of the Insolvency Act, 1936 and that she had no jurisdiction to make an order concerning the authority of provisional trustees in terms of s 73 where the correct statutory provision governing such authority was s 18(3) of the Insolvency Act, 1936.

[31] Mr Heathcote who appeared for the applicants on the other hand argued that the Companies Act 28 of 2004 has a self-contained regime in respect of trustees. He argued that s 351(1)(*c*) and (*d*) read with s 110(3) of the Companies Act, 2004 gives powers to executors, administrators, trustees curators, and guardians to lodge liquidation applications against a company irrespective of the of the regime of authority as determined under the Insolvency Act. Mr Heathcote further argued it is competent for a provisional trustee to apply, simultaneously for authority in terms of s 18(3) to bring proceedings and for substantive relief. In support of this submission he referred me to the matter of *Van Zyl and Another NNO v Kaye NO and Others*[9] where it was held that:

'[46] It remains to determine the application by the applicants in terms of s 18(3) of the Insolvency Act for authorisation to have instituted these proceedings. The editors of *Meskin et al Insolvency Law (LexisNexis*) have ventured that; "*(i)n the case of motion proceedings . . . it is competent for the provisional trustee to seek simultaneously both authority to bring such proceedings and the substantive relief*". I have no quarrel with that postulate. The approach does, however, carry the risk that, should the application fail, the provisional trustees may be personally exposed to adverse costs consequences. No doubt in most cases a prudent provisional trustee would only take such a course after having obtained a suitable indemnity from one or more of the insolvent's creditors.

[47] It was held by Van Oosten J in *Warricker and Another NNO v Liberty Life Association of Africa Ltd* that "(a)n applicant seeking the authority of the Court in terms of the subsection must satisfy the Court, on good cause shown, that a departure from the normal course of events provided for in the Act is warranted. Where the institution of proceedings to enforce a claim is contemplated, to be entitled to an order the applicant must satisfy the Court, first, that some degree of urgency exists; secondly, that the cause of action which is to become the subject-matter of the proceedings is *prima facie* enforceable; and, thirdly, that

[9] *Van Zyl and Another NNO v Kaye NO and Others 2014* (4) SA 452 (WCC).

the interests of creditors in the insolvent estate will not be prejudiced by the earlier institution of proceedings." '

[32] In as much as Mr Barnard is correct that s 73 of the Insolvency Act does not empower the Master to authorise the provisional trustees to institute legal proceedings, one cannot overlook the fact that the Companies Act, is self-contained and does empower persons in the shoes of the applicants to launch liquidation proceedings. I therefore find that in those circumstances it is not necessary for the provisional trustees to seek this Court's permission to launch the liquidation proceedings. I am furthermore satisfied that the applicants have demonstrated that some degree of urgency exists in this matter and; secondly, that the interests of creditors in the estate of Okaputa will not be prejudiced by the institution of proceedings.

[33] In the light of the conclusion that I have come to in the preceding paragraph I find it unnecessary to deal with Bank Windhoek's Rule 61 application. I will now proceed to consider whether the applicants have made out a case for the relief that they are seeking.

The liquidation application.

[34] I have at the commencement of this ruling indicated that the applicants contend that apart from being a member of Okaputa the insolvent was also a creditor of Okaputa. I therefore have no doubt that the Companies Act allows or permits the applicants to launch the liquidation proceedings. The basis on which the trustees seek the winding up of Okaputa is that Okaputa is factually and commercially insolvent, in the alternative the applicants alleged that the relationship between the only shareholders of Okaputa has been destroyed completely to the extent that Okaputa has become ungovernable.

[35] Ms Husselmann who deposed to the affidavit on behalf of Bank Windhoek denies that Okaputa is factually insolvent. She further contends that, because the insolvent has now been replaced by the trustees it cannot seriously be argued that the relationship trust between the shareholders of Okaputa has been destroyed.

[36] In the matter of *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others*[10] it was held that:

'The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.'

[37] I am conscious of the fact that the *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* matter deals with the now repealed Companies 61 of 1973, but the Companies Act, 2004 at s 349, provides that:

'A company *may* be wound up by the court if –

(f) the company is unable to pay its debts as described in section 350; *or*

(g) …

(h) it appears to the Court that it is just and equitable that the company should be wound up.'

And s 350 provides:

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

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

[38] In the present matter Okaputa is the owner of a valuable farm, with its value put at anything between something short of N$10 Million and N$18 Million. The liabilities of Okaputa include a debt in favour Bank Windhoek in the amount of N$ 11 577 667.87. Repayment of this amount has been ordered by Court but judgment

[10] *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 440 F-H.

remains unsatisfied. There is a debt in favour of BDO in the amount of N$ 503 196.59 and loan account (which Bank Windhoek disputes) in the amount of N$ 13 469 368.

[39] It is common cause that Okaputa's assets consists solely of Farm Okaputa, No. 334, District of Otjiwarongo, Namibia. The question which needs to be answered is whether Okaputa has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading, in other words, can Okaputa meet current demands on it and remain buoyant? The answer is in my view in the negative. Okaputa's sole asset, that is the Farm, can by no stretch of imagination be regarded as a liquid asset.

[40] Despite the inability on the part of Okaputa to pay or to satisfy these very substantial debts, Mr Barnard argued that Okaputa is factually solvent because its assets allegedly exceed its liabilities. It simply goes above my conception how that is possible and I can therefore not uphold this contention. I am thus satisfied that Okaputa is unable to pay its debts within the meaning of s 349 as read with s 350 of the Companies Act, 2004.

Order

[41] In view of the conclusion reached above, I make the following Order:

1. The applicants' non-compliance with the forms and service provided for by the Rules of this Court is condoned and that this application is heard as one of urgency as provided for in rule 73(1) as read with rule 73(3) of the Rules of Court.

2. Bank Windhoek Limited is granted leave to intervene in these proceedings and is joined as the second respondents to these proceedings.

3. The first respondent, Okaputa (Proprietary) Limited is placed under provisional order of liquidation, into the hands of the Master of the High Court.

4. A *rule nisi* is issued calling upon the respondents and all/any interested parties to show cause (if any) on/before 26 July 2022, why:

4.1 the first respondent should not be placed under final order of liquidation;

4.2 the costs of this application must not be costs in the winding-up of the first respondent.

5 Service of this ordered must be effected:

5.1 upon the first respondent, by delivering a copy thereof at the first respondents registered address being No. 61, Bismarck Street, Windhoek, Republic of Namibia; and

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

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S F Ueitele

Judge

APPEARANCES:

APPLICANTS:	Raymond Heathcote SC (Assisted by Jesse Schickerling)
Instructed by:	Theunissen, Louw & Partners Windhoek
SECOND RESPONDENT:	Theo Barnard (Assisted by Hettie Garbers-Kirsten)
Instructed by:	Dr Weder, Kauta & Hoveka Inc. Windhoek