REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: **HC-MD-CIV-MOT-GEN-2021/00022**

In the matter between:

CHINA HARBOUR ENGINEERING COMPANY (PTY) LTD	**APPLICANT**

and

INDIGENUOS PEOPLE BUSINESS FORUM	**FIRST RESPONDENT**
REGISTRAR OF BUSINESS AND INDUSTRIAL PROPERTY	**SECOND RESPONDENT**
SILVANUS THIKAMENI KATHINDI N.O	**THIRD RESPONDENT**
RICHARD TRAUGOTT DIETHELM MUELLER N.O	**FOURTH RESPONDENT**
TROOPER INVESTMENTS (PTY) LTD	**FIFTH RESPONDENT**
REGISTRAR OF DEEDS, WINDHOEK	**SIXTH RESPONDENT**

Neutral citation: *China Harbour Engineering Company (Pty) Ltd v Indigenuos People Business Forum* (HC-MD-CIV-MOT-GEN-2021/00022) [2022] NAHCMD 544 (11 October 2022)

Coram: UEITELE J
Heard: **16 February 2022**
Delivered: **11 October 2022**

Flynote: Legislation – Companies Act No. 28 of 2004 – section 350(1)(*a)* – The jurisdictional facts that must be proven in order to rely on the section for liquidation, are that, the applicant must be a creditor of the respondent, the debt must be due and payable, and there must be proof that, despite the service of the s 350(1)(*a*)(*i*) notice, the debtor has neither paid the amount claimed nor secured or compounded it to the reasonable satisfaction of the creditor.

Summary: The applicant has brought an application seeking an order to wind up the respondent in terms of s 350(1)(*a*)(*i*) of the Companies Act No. 28 of 2004. The basis of the applicant's application is that the respondent is commercially insolvent and thus unable to pay its debts.

During 2016, the applicant and the first respondent were part of parties litigating against each other under case number HC–MD-CIV-MOT-GEN-2016/00212. The applicant alleges that on 14 March 2018, it and the first respondent concluded a settlement agreement, and which agreement was made an order of court. In terms of the settlement agreement the applicant, amongst other terms, agreed that the first respondent will do all that was necessary and sign all papers required for the deregistration of two mortgage bonds. The deregistration of the mortgage bonds was subject to the condition that the payment of the amounts secured by the mortgage bonds were, to be secured by way of a bank guarantee in favour of the applicant. In the alternative, the first respondent had to confirm that an amount of N$90 000 000 has been paid into the trust account of Chris Brandt Attorneys for the benefit of the applicant, and which amount will be paid over by the fifth respondent on behalf of the first respondent to the applicant on the date that the bonds are deregistered.

The applicant attached both the settlement agreement and the mortgage bonds to the affidavit in support of its claim.

It was the case of the first respondent, that the applicant based its claim on a loan agreement and that it failed to annex a loan agreement to its founding affidavit. The first respondent further denied that the debt is due and payable. The first respondent based its denial on the contention that the agreement concluded between the parties was a property development loan agreement which would only be repayable after the property was subdivided, the township establishment approved, gazetted, and the subdivided erven sold to cancel the bonds. The first respondent proceeded in argument that, the property has not even been subdivided and the development has not commenced and the debt is therefore not due and payable.

Held that, the jurisdictional facts that must be proven in order to rely on s 350(1)(*a*)(*i*) are that, the applicant must be a creditor of the respondent, the debt must be due and payable, and there must be proof that, despite the service of the s 350(1)(*a*)(*i*) notice, the debtor has neither paid the amount claimed nor secured or compounded it to the reasonable satisfaction of the creditor.

Held that, the parties, amongst other terms, agreed that the fifth respondent will on behalf the first respondent pay to the applicant the amount of N$90 000 00, as such, the applicant is a creditor of the first respondent, for not less than N$100 – in terms of the settlement agreement, and that demand in terms s 350(1)(*a*)(*i*) was served on the first respondent, and that despite this demand, the first respondent has not paid any amount nor secured or compounded any amount to the reasonable satisfaction of the applicant.

In light of the above, the application of the applicant succeeds and the first respondent is placed under provisional order of liquidation in the hands of the Master of the High Court.

ORDER

1. The first respondent is placed under a provisional order of liquidation in the hands of the Master of the High Court of Namibia.

2. A *rule nisi* is issued calling upon the first respondent and all persons interested to show cause, if any, on 6 December 2022, why the first respondent must not be placed under a final order of liquidation.

3. Service of this order must be effected by:

   (a) the deputy sheriff at the registered office of the first respondent, Auas Secretarial Services CC, Erf 5, Luther Street, Windhoek, Namibia;

   (b) one publication in each of The Namibian and Republikein newspapers; and

   (c) one publication in the *Government Gazette.*

4. The costs of this application will be costs in the liquidation, such costs to include the costs of one instructing and two instructed legal practitioners.

JUDGMENT

UEITELE J:

Introduction and Background

[1] The applicant, is China Harbour Engineering Company (Pty) Ltd, a company with limited liability incorporated in accordance with the company laws of Namibia. The applicant has cited six respondents, but is only seeking relief against the first respondent, the Indigenous People Business Forum, which is an incorporated association not for gain. The applicant is not seeking any relief against the remaining five respondents who are cited simply for the interest they may have in the outcome of this matter. Because no relief is sought against the other five respondents, I will say nothing in this judgment about them. I will, in this judgment, refer to the first respondent as the respondent.

[2] The applicant has brought an application seeking an order to wind up the respondent in terms of s 350(1)(*a*)(*i*) of the Companies Act of 2004,(in this judgment referred to as the "Companies Act").[1] The basis of the applicant's

[1] Companies Act 28 of 2004.

application is that the respondent is commercially insolvent and thus unable to pay its debts. The respondent is opposing the applicant's application.

[3] The brief background facts to this application are that, during 2016, the applicant and the respondent were part of parties litigating against each other under case number HC–MD-CIV-MOT-GEN-2016/00212. From the pleadings before me it appears that, the parties to that litigation during August 2017 and September 2017 settled the disputes between them and concluded a written settlement agreement. On 14 March 2018, the settlement agreement reached between the parties was made an order of court.

[4] In terms of the settlement agreement, the respondent amongst other terms, agreed that it will do all that was necessary and sign all papers required for the deregistration of mortgage bond No B 3857A/2015 and mortgage bond No. B 1896/2016 registered over;

(a) CERTAIN Remainder of Block VI Klein Windhoek (A Portion of Portion B of Klein Windhoek Town and Townlands No. 70),

SITUATED In the Municipality of Windhoek,

Registration Division “K”,
Khomas Region,

MEASURING 280 831 (Two Hundred and eighty Thousand Eight Hundred and Thirty One) square meters;

and

(b) **CERTAIN** Remainder of Erf 236, Klein Windhoek,

SITUATED In the Municipality of Windhoek,

Registration Division “K”,
Khomas Region,

MEASURING 126 174 (One Hundred and Twenty Six Thousand One Hundred and Seventy Four) square meters.

[5] The deregistration of the mortgage bonds was subject to the condition that the payment of the amounts secured by the mortgage bonds were, by not later than 15 September 2018, to be secured by way of a bank guarantee in favour of the applicant. In the alternative, the respondent had to confirm that an amount of N$90 000 000 has been paid into the trust account of Chris Brandt Attorneys, for the benefit of the applicant, and which amount will be paid over to the applicant on the date that the bonds are deregistered. It was a further term of the settlement agreement that, the contents and specimen of bank guarantee must satisfy the requirements of Standard Bank and be confirmed by the applicant, and that such payment was to be made by Trooper Investment, CC, the fifth respondent (I will in this judgment refer to it as Trooper Investment CC).

[6] It was furthermore a term of the settlement agreement that, if Trooper Investment CC fails to, on or before 15 September 2018, secure the bank guarantee or make the payment as stated in the preceding paragraph then and in that event,

the settlement agreement is deemed voidable at the applicant's instance. It was a further term of the agreement that the applicant had to, within three calendar days of Trooper Investment CC's non-performance, indicate in writing to the other parties to the settlement agreement, whether it intends to grant Trooper Investments CC an indulgence to perform its above-mentioned obligations, which indulgence shall not exceed a period of seven calendar days calculated from 15 September 2018, or whether it elects to cancel the settlement agreement, whereafter the matter shall be re-enrolled on the case management roll of the managing judge.

[7] The applicant alleges that Trooper Investments CC materially breached the settlement agreement in that, it failed to provide the bank guarantee or confirm that the payments contemplated in the settlement agreement were made. The applicant further alleges that due to breach of the settlement agreement, it, by way of a letter dated 7 July 2020, informed the parties to the settlement agreement that it has elected not to give Trooper Investments CC any indulgence and deemed the settlement agreement (including the court order) void.

[8] The applicant further alleges that as contemplated in clause 3*(a)* of Mortgage Bond No B 3857 A /2015 it, by letter dated 27 August 2020, which was served on the respondent during September 2020, demanded that the respondent repay the principal sum of N$90 000 000 plus all interest due on that amount not later than 15 days from the date that the letter of demand was served on the respondent. The applicant further alleges that despite the demand and the fact that the 15 days passed since the letter of demand was served on the respondent, the respondent did not pay the debt, but instead replied to the letter of demand requesting that it be provided with the loan agreement as the source document for the respondent's alleged indebtedness to the applicant.

[9] After receipt of the letter by the respondent requesting that it be provided with source document, the applicant relying on s 350 of the Companies Act, instituted these proceedings. The respondent opposed the application.

The applicant's basis of its application and the respondent's basis of opposing the application

[10] The applicant grounds its application in s 350(1)(*a)* of the Companies Act. Section 350(1*)(a)* provides as follows:

> '350. (1) A company or body corporate is deemed to be unable to pay its debts if –
>
> (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than the prescribed amount then due –
>
> (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
>
> (ii) in the case of any body corporate not incorporated under this Act, has served that demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of that body corporate or in some other manner as the Court may direct,
>
> and the company or body corporate has for 15 days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor . . .'

[11] The applicant contends that in terms of clause 18 of mortgage bond no. B 3857A/2015, a certificate signed by the applicant specifying the amount owing by the respondent to the applicant under that bond and further stating that such amount is due and payable by the respondent to the applicant, is sufficient proof that the amount is due, owing and payable for the purpose of obtaining provisional sentence or other judgment as well as execution under the bond. The applicant proceeded and contended that the applicant's deputy managing director, in terms of clause 18 of the mortgage bond no. B 3857A/2015, signed a certificate stating the amount due and that the amount is due and payable. The applicant attached a copy of the certificate to the affidavit in support of its application.

[12] The applicant further contends that it has, as contemplated under s 350(1)(*a*)(*i*) of the Companies Act, demanded payment from the respondent and that 15 days have passed since delivery of that said demand. The applicant continued and stated that despite the demand and the lapse of the 15 days, the respondent did not pay the debt and it (the applicant) therefore relying, on s 350(1)(*a*)(*i*), can conclude that the respondent is unable to pay its debts.

[13] On the other hand, the respondent assailed the reliance by the applicant for the respondent's alleged indebtedness to the applicant on the mortgage bond. The

essence of the respondent's contention was that the applicant's claim is based on a loan agreement, and in such a claim the party relying on the loan agreement must allege and prove the loan agreement, that money was advanced in terms of that agreement, and that the loan is repayable. The respondent continued and contended that the applicant has not annexed a loan agreement to its founding affidavit, nor has it stated whether the said monies were lent and advanced in terms of an oral or written agreement. The respondent continued and contended that the applicant is suing on a mortgage bond alone, without reference to an underlying loan agreement. The respondent thus contended that the applicant has failed to allege and prove the elements necessary to succeed in its claim and its claim must therefore fail.

Discussion

[14] Mr Heathcote who appeared on behalf the applicant argued that on 17 September 2020, the deputy sheriff served a demand in terms of s 350(1)(*a*)(*i*) of the Companies Act, requiring the respondent to pay the principal sum of N$90 000 000 and all interest due thereon, as set out in the certificate contemplated under clause 18 of mortgage bond no. B 3857A/2015, signed by the applicant's deputy managing director. He proceeded, and argued that the deputy sheriff served the demand on the respondent by leaving the certificate at the respondent's registered office as provided for under s 350(1)(*a*)(*i*). Mr Heathcote continued and argued that the respondent did not dispute any of those allegations, including the letter of demand dated 17 September 2020, as well as the certificate. The debt contained in the letter of demand is thus due and payable concluded Mr Heathcote.

[15] In addition to contending that the applicant based its claim on a loan agreement and that it failed to annex a loan agreement to its founding affidavit, the respondent's reply to Mr Heathcote's argument (that the debt contained in the letter of demand is thus due and payable) was to deny that the debt is due and payable. The respondent based its denial on the contention that the agreement concluded

between the parties was a property development loan agreement which would only be repayable after the property was subdivided, the township establishment approved, gazetted, and the subdivided erven sold to cancel the bonds. Mr Kamuhanga on behalf of the respondent thus argued that the property has not even been subdivided and the development has not commenced and the debt is therefore not due and payable.

[16] Mr Kamuhanga relied on a line of South African cases for his arguments namely *Standard Bank of South Africa Ltd v Gordon and other,*[2] *Klerck N.O. v van Zyl and Maritz,*[3] *Kilburn v Estate Kilburn,*[4] and on the judgment of this court in the matter *of Standard Bank Namibia v Apisay.*[5]

[17] Mr Kamuhanga's reliance on the judgments that I have referred to in the preceding paragraph demonstrates one of two things. It is either that counsel did not

---

[2] *Standard Bank of South Africa Ltd v Gordon and Others* [2011] ZAGPJHC 114; 2011/6477 (21 September 2011).

[3] *Klerck N.O. v van Zyl and Maritz* 1989 (4) SA 263.

[4] *Kilburn v Estate Kilburn* 1931 AD 501.

[5] *Standard Bank Namibia v Apisay* (HC-MD-CIV-ACT-CON 2017/02741) [2018] NAHCMD 273 (7 September 2018).

read those judgments to appreciate the facts of those cases and the reasons for the decisions in those judgments, or counsel does not understand the reasons for the decisions in those judgments. I say so for the following reasons: In the matter of *Standard Bank of South Africa Ltd v Gordon and other*, the applicant (*Standard Bank of South Africa Ltd)* brought an application against the respondents (Gordon and two others) for payment of the sum of R635 000, interest, costs and an order declaring certain immovable property executable, such property having been mortgaged by the respondents in favour of the applicant. In the founding affidavit the applicant alleges that the respondents entered into the mortgage bond which was duly registered and a copy of the bond was attached to the founding affidavit. The applicant, in its affidavit, then alleged that as it appears from the agreements, the respondents acknowledged their indebtedness to the applicant in the sum of R150 000 plus an additional amount of R37 500 which the respondents were to repay to the applicant by way of monthly instalments.

[18] The applicant (in the *Standard Bank of South Africa Ltd matter)* proceeded and alleged that it was a term of the said agreements, that:

(a) the respondents were to pay monthly instalments to the applicant on or before the first day of each month;

(b) the respondents were to pay interest as determined from time to time by the applicant calculated and capitalized monthly in arrears;

(c) that the monthly instalments were to be paid regularly month by month without deduction on demand,

(d) that the full balance outstanding at any particular time would forthwith become due, owing and payable in the event of the respondents failing to make any payment on due date, and

(e) that respondents would be obliged to pay costs on the scale as between attorney and client in the event of legal proceedings having been instituted.

[19] The court found that the terms, which I referred to in the preceding paragraph did not appear in the mortgage bond document which was annexed to the applicant's founding affidavit. The court found that those terms are terms that are typically found in an agreement of loan. The court further found that, because the applicant in its replying affidavit admitted to the existence of a loan agreement, the applicant had annexed an irrelevant document (the mortgage bond) to its particulars of claim. The court was thus left in no doubt that the applicant's cause of action was not based on the mortgage bond, but on a loan agreement which was not disclosed.

[20] Similarly in the *Standard Bank Namibia v Apisay* matter which was decided in this Court the plaintiff claimed the outstanding capital amount plus interest and costs in terms of a home loan granted to the defendant. The plaintiff in support of its claim did not attach a copy of the loan agreement but instead attached a copy of the mortgage bond securing the debt. The court found as a fact that the plaintiff's cause of action arouse from a loan agreement and not from the mortgage bond and thus refused to grant default judgment on the basis that the plaintiff did not attach the loan agreement as required under rule 45(7) of the rules of Court.

[21] In the matter of *Klerck N.O. v van Zyl and Maritz,* there were allegations that the signatures of the purchaser in the deed of sale and the mortgagor in the mortgage bond documents were forged. In the *Kilburn v Estate Kilburn,* a husband had, before his marriage, passed and registered a notarial bond for £500 as a second charge on all his property in favour of his wife. The court found as a fact that, although the bond purported to secure a sum of £500 which the husband had verbally promised to pay his wife, it was not a serious promise, and there was therefore no intention to pay that sum. The intention of the spouses, in agreeing to the notarial bond, was only to give a preferential claim on the sum if the husband were to be declared insolvent. The court held that the principal debt was invalid, and so, in turn, was the notarial bond. As, therefore, there was no legal obligation secured by the bond, the wife could not, on the insolvency of her husband, claim in a 'concursus creditorum' on the bond. The facts in the cases referred to above are thus distinguishable from the facts in the present matter.

[22] I have indicated earlier that, in the present matter the applicant alleges that on 14 March 2018, it and the respondent concluded a settlement agreement which was made an order of court. In terms of the settlement agreement the applicant, amongst other terms, agreed that it will do all that was necessary and sign all papers required for the deregistration of two mortgage bonds. The deregistration of the mortgage bonds was subject to the condition that the payment of the amounts secured by the mortgage bonds were, to be secured by way of a bank guarantee in favour of the applicant. In the alternative, the respondent had to confirm that an amount of N$90 000 000 has been paid into the trust account of Chris Brandt Attorneys for the benefit of the applicant, and which amount will be paid over by Trooper Investments CC on behalf of the respondent to the applicant on the date that the bonds are deregistered. The applicant attached both the settlement agreement and the mortgage bonds to the affidavit in support of its claim. I, therefore, fail to see how the applicant's cause of action is said to be based on a loan agreement. In my view the applicant's cause of action is based on the settlement agreement which was made an order of Court 14 March 2018.

[23] In this matter, the applicant's relief is premised on s 350(1)(*a*)(*i*). In *Lamprecht v Klipeiland (Pty) Ltd,*[6] the Supreme Court of Appeal while dealing with s 345(1)(*a*) of the Companies Act No. 61 of 1993,[7] which is the equivalent of our s 350 (1)(*a*)(*i*) stated that:

---

[6] *Lamprecht v Klipeiland (Pty) Ltd* (753/2013) [2014] ZASCA 125 (19 September 2014).

[7] Companies Act 61 of 1993.

'To meet the threshold laid down in s 345(1)(a) it is essential that an applicant prove three essential requirements. These are, first, that he or she is a creditor of the respondent for an amount not less than R100, secondly, which must be due and payable. In other words, the debt must be liquid. Third, there must be proof that, notwithstanding service of the s 345(1)(a) notice, the debtor has neither paid the amount claimed nor secured or compounded it to the reasonable satisfaction of the creditor.'

[24] I, accordingly, confirm that the jurisdictional facts that must be proven in order to rely on s 350(1)(*a*)(*i*) are that, the applicant must be a creditor of the respondent, the debt must be due and payable, and there must be proof that, despite the service of the s 350(1)(*a*)(*i*) notice, the debtor has neither paid the amount claimed nor secured or compounded it to the reasonable satisfaction of the creditor.

[25] In this matter, the parties (that is the applicant and the respondents) amongst other terms agreed that Trooper Investments CC will on behalf the respondent pay to the applicant the amount of N$90 000 000. This leads me to find that the applicant is a creditor of the respondent for a sum of not less than N$100. In terms of the settlement agreement, Trooper Investments CC, had to, for the benefit of the applicant, pay the amount of N$90 000 000 into Chris Brandt's Trust account by not later than 15 September 2018. There is no dispute that although the s 350(1)(*a*)(*i*) demand was served on the respondent, it has not paid any amount nor secured or compounded any amount to the reasonable satisfaction of the applicant.

[26] I am thus satisfied that, the jurisdictional requirements set out in s 350(1)(*a*)(*i*) of the Companies Act, have been met and the applicant is entitled to the relief it seeks. For the reasons set out in this judgment, I make the following order:

1. The first respondent is placed under a provisional order of liquidation in the hands of the Master of the High Court of Namibia.

2. A *rule nisi* is issued calling upon the first respondent and all persons interested to show cause, if any, on 6 December 2022, why the first respondent must not be placed under a final order of liquidation.

3. Service of this order must be effected by:

   a. the deputy sheriff at the registered office of the first respondent, Auas Secretarial Services CC, Erf 5, Luther Street, Windhoek, Namibia;

   b. one publication in each of The Namibian and Republikein newspapers; and

   c. one publication in the *Government Gazette.*

4. The costs of this application will be costs in the liquidation, such costs to include the costs of one instructing and two instructed legal practitioners.

_____

SFI UEITELE

Judge

APPEARANCES:

APPLICANT:	R Heathcote (with him by B De Jagger) Instructed by Sisa Namndje Inc, Windhoek
FIRST RESPONDENT:	K Kamuhanga
	Instructed by Government Attorneys, Windhoek