

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No.: HC-MD-CIV-MOT-GEN-2019/00193

In the matter between:

BANK WINDHOEK

APPLICANT

and

NAMIBIA STAR CC

RESPONDENT

Case No.: HC-MD-CIV-MOT-GEN-2019/00194

In the matter between:

BANK WINDHOEK

APPLICANT

and

PANORAMA BUTCHERY CC

RESPONDENT

Case No.: HC-MD-CIV-MOT-GEN-2019/00195

In the matter between:

BANK WINDHOEK

APPLICANT

and

MGM PROPERTIES (PTY) LTD

RESPONDENT

Case No.: HC-MD-CIV-MOT-GEN-2019/00196

In the matter between:

BANK WINDHOEK

APPLICANT

and

PANORAMA FOOD CENTRE CC

RESPONDENT

Neutral citation: *Bank Windhoek limited v Namibia Star CC and Others* (HC-MD-CIV-MOT-GEN-2019/00193; 2019/00194; 2019/00195 & 2019/00196) [2023] NAHCMD 63 (17 February 2023)

Coram: SIBEYA J

Heard: 24 November 2022

Delivered: 17 February 2023

Flynote: Legislation – Close Corporations Act 26 of 1988 and Companies Act No. 28 of 2004 discussed - the jurisdictional facts that must be proven 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 notice, the debtor has neither paid the amount claimed nor secured or compounded it to the reasonable satisfaction of the creditor. Authority to institute proceedings - The fact that a resolution has been adduced, which is attached to the founding affidavit duly authorising the deponent to institute proceedings is sufficient for the court to accept that the proceedings have been properly authorized.

Summary: The Bank launched four applications where it seeks the provisional liquidation of the respondents on the grounds that they are unable to pay their debts and relies on s 68 (c) and (d) as well as s 69(1) of the Close Corporation Act 26 of 1988 and s 349 and s 350(1)(a) Companies Act 28 of 2004. The root of the application stems from several bank facilities advanced to the respondents. The respondents allegedly breached the payment obligations to the Bank.

The respondents opposed the application by raising three points, which are the failure by the deponent to the founding affidavits of the Bank to allege authority to institute the proceedings; the failure to serve a statutory notice at the registered office of the respondents and further that the application raises contentious factual disputes.

Held that, the deponent to the founding affidavit was duly authorised to institute these proceedings as per the resolutions of the Bank annexed to the founding affidavit, read together with the resolution annexed to the replying affidavit filed on behalf of the Bank. The Bank further, in replying papers, ratified the steps and action taken including instituting the proceedings to wind up the respondents.

Held further that, the Bank relies on the fact that the respondents are unable to pay their debts as per s 68(c) and (d) of the Close Corporations Act and s 350(1)(c) as well as 349(f) of the Companies Act and on this premise the deeming provisions

provided for in s 69(1)(a) of the Close Corporations Act and s 350(1)(a)(i) of the Companies Act does not find application. The Bank further, however, as a separate ground, relies on the deeming provision of being unable to pay their debts as provided for in s 69(1)(a) of the Close Corporations Act and s 350(1)(a)(i) of the Companies Act.

Held further that, that although the test is to establish a prima facie case, the Bank established on a balance of probabilities that the respondents are unable to pay their debts (service the loans) and further that it will be just and equitable that they are liquidated, therefore, the deeming provisions of s 69(1)(a) of the Close Corporations Act and s 350(1)(a)(i) of the Companies Act are not applied.

In light of the above, the application of the Bank succeeds and the respondents are placed under provisional order of liquidation in the hands of the Master of the High Court.

ORDER

1. The respondents are 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 respondents and all persons interested to show cause, if any, on 20 April 2023, why the respondents must not be placed under a final order of liquidation in case numbers: HC-MD-CIV-MOT-GEN-2019/000193; HC-MD-CIV-MOT-GEN-2019/000194; HC-MD-CIV-MOT-GEN-2019/000195 and HC-MD-CIV-MOT-GEN-2019/000196.
3. Service of this order must be effected by:

- (a) the deputy sheriff at the registered office of the respondents

 - (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

SIBEYA J:

Introduction

[1] The legislature has recognised that the liquidation of companies and close corporations occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is, therefore, in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible.¹

[2] The devastating effect of liquidations on a nation's economy has been recognised by the courts. It follows that the remedy of liquidation appears to have been relegated to a 'last resort' that ought not to be granted if an alternative remedy is available to the applicant, notwithstanding that such remedy might not take the form of business rescue.

[3] Many a times, however, a company or close corporation is in dire financial distress that any form of rescue can be equated to flogging a dead horse. Nevertheless it must be established whether there are other less drastic or alternative remedies available to the applicant. Liquidation has an effect of balancing the rights and interests of all relevant stakeholders.

[4] With that said, this is a judgment that stems from the hearing of four separate liquidation applications for the final, alternatively provisional, winding up of each of the respondents, with costs to be costs in the winding up.

[5] Counsel, who argued the four matters as one, urged the court to consider the said matters simultaneously. The applications, in my view, are closely related in both nature and purpose. The applications are further interlinked and although they are not formally consolidated, they should, in the interests of justice, be disposed of in a consolidated hearing. This will save time and costs, and not result in potentially different judgments on the same facts. It is on this basis that I acceded to the request and I shall address the said applications together in this judgment.

Parties and representation

¹ *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 14.

[6] The applicant in all four liquidation application is Bank Windhoek Limited, a public company incorporated and duly registered as a commercial bank in terms of the laws of Namibia. The applicant shall be referred to as 'the Bank'.

[7] The Respondents in all four liquidations, in chronological order, are:

(a) Namibia Star CC (Registration number: CC/2007/0829), a close corporation incorporated with limited liability according to the laws of the Republic of Namibia (the Republic), with its chosen *domicilium citandi et executandi* being Erf No. 4830, Khomasdal, Extension 1, Windhoek.

(b) Panorama Butchery CC (Registration number: CC/2013/01592), a close corporation incorporated with limited liability according to the laws of the Republic, with its registered offices at 1st Floor, Moth Centre Building, Centaurus Road, Windhoek.

(c) MGM Properties (Pty) Ltd (Registration number: 2015/0671), a company incorporated with limited liability according to the laws of the Republic, with its registered offices at 1st Floor, Moth Centre Building, Muller Road, Windhoek.

(d) Panorama Food Centre CC (Registration number: CC/2007/0828), a close corporation incorporated with limited liability according to the laws of the Republic of Namibia, with its registered offices at 1st Floor, Moth Centre Building, Centaurus Road, Windhoek.

[8] The respondents shall collectively be referred to as 'the respondents'. Where necessary to be referred to individually, the respondents will be referred to as 'Namibia Star', 'Panorama Butchery', 'MGM' and 'Panorama Food'.

[9] The same counsel, Mr Stais SC, represents the Bank in all four liquidation applications, and Mr Diedericks, represents the respondents.

Purpose of the application

[10] Before court, are four separate opposed liquidation applications where the Bank relies on s 69 (1) (a) of the Close Corporations Act 26 of 1988 (the Close Corporations Act) and s 350(1)(c) of the Companies Act 28 of 2004 (the Companies Act) to seek the provisional liquidation of the respondents. The Bank alleges that the respondents are unable to pay their debts.

[11] The Bank launched the applications against the respondents where it seeks the following orders:

- (a) That the respondents be wound up, alternatively be provisionally wound up in the hands of the Master of the High Court.
- (b) That the costs of this applications be costs in the winding up.
- (c) That further and/or alternative relief be granted to the applicant.

Background

[12] The Bank carries on business as a commercial bank and lends monies to its customers on a commercial basis.

Namibia Star

[13] On 28 July 2017, the Bank and Namibia Star entered into an agreement in terms of which the Bank lent an amount of N\$9,285 million to Namibia Star.

[14] As security for the amount lent, the Bank registered three mortgage bonds over the following erven belonging to Namibia Star:

- a) Mortgage bond B4405/2012, Erf 4830, Khomasdal, Extension 1, Windhoek for the amount of N\$3 446 000;
- b) Mortgage bond B7182/2012, Erf 4830, Khomasdal, Extension 1, Windhoek for the amount of N\$5 319 000; and
- c) Mortgage bond B4424/2012, Erf 4262, Khomasdal, Extension 1, Windhoek for the amount of N\$520 000.

[15] Namibia Star is in breach of its payments in terms of clause 3 of the mortgage loan agreement. In terms of the said clause, Namibia Star agreed to repay the loan which it failed to do.

[16] Despite several demands, Namibia Star failed to comply with its obligations in terms of the agreement and no payment whatsoever was effected by Namibia Star.

[17] Namibia Star is indebted to the Bank as at 12 March 2019 in the amount of N\$9 718 660.75 plus interest at the mortgage lending rate (currently 11.5%) per annum, capitalised monthly.

Panorama Butchery

[18] On 28 January 2014, the Bank and Panorama Butchery entered into an agreement in terms of which the Bank lent an amount of N\$3 890 000 to Panorama Butchery against security of registration of a mortgage bond over Erf 3897, Khomasdal, (Extension 1), Windhoek.

[19] On 28 May 2018, Panorama Butchery owed the Bank an amount of N\$3 672 716.19 plus interest at mortgage lending rate (currently 11.5%) per annum capitalised monthly.

[20] Despite various demands, Panorama Butchery failed to comply with its obligations in terms of the agreement and no payment whatsoever was effected by Panorama Butchery.

MGM

[21] The Bank has two claims against MGM and the total outstanding amount in respect of both these claims as at 28 May 2018 was N\$32 380 320.16 excluding interest.

First claim

[22] The Bank entered into a mortgage loan agreement with MGM on 23 February 2017 in the amount of N\$27 425 000 (plus interest and costs), repayable by MGM on 10 December 2017, which amount was later by agreement between the parties increased to N\$29 500 000. The payment date for the principal debt was agreed to be to 25 July 2018 and thereafter to 15 August 2018.

[23] The Bank registered as security for the payment of the amount lent to MGM, a mortgage bond over Erf 1448, Khomasdal (Extension 15), Windhoek and Erf 6656 (a portion of Erf 1448), Khomasdal, (Extension 15), Windhoek.

[24] Despite several demands, MGM failed to comply with its obligations in terms of the agreement (and addendums) and no payment whatsoever was effected by MGM to the Bank.

Second claim

[25] On 3 March 2017, the Bank and MGM entered into an agreement in terms of which the Bank offered to MGM overdraft facilities in the amount of N\$32 350 000 on MGM's cheque account number CHK 8000594069.

[26] MGM failed to comply with all the payment deadlines agreed to with the Bank (of which the first was a payment of N\$17 862 000 due on 14 April 2017). On 30 November 2017 the Bank and MGM, by agreement, extended the overdraft facilities to 26 January 2018 when payment of the total amount outstanding would become due and payable.

[27] MGM failed to comply with any of its obligations in respect of the overdraft facilities.

[28] The Bank effected payment of N\$24 million on behalf of MGM to the City of Windhoek enabling MGM to purchase the vacant erven ERF 6656, Khomasdal and Erf 1448, Khomasdal, in terms of which the mortgage loan and cheque overdraft facilities were effected to MGM. MGM has failed to repay anything to the Bank in regard to its indebtedness.

Panorama Food

[29] On 28 July 2017, the Bank and Panorama Food entered into an agreement in terms of which the Bank lent an amount of N\$5 831 000 to Panorama Food against the security of the registration of three mortgage bonds over the erf belonging to Panorama Food being:

- (a) Mortgage bond B4406/2012 registered over Erf 4379, Khomasdal, (Extension 1), Windhoek for the amount of N\$1 700 000;
- (b) Mortgage bond B7181/2012 registered over Erf 4379, Khomasdal, (Extension 1), Windhoek for the amount of N\$7 555 000; and
- (c) Mortgage bond B6181/2016 registered over Erf 4379. Khomasdal, (Extension 1), Windhoek for the amount of N\$3 376 000.

[30] On 28 May 2018 Panorama Food owed the Bank the amount of N\$6,239,616.79 plus interest at mortgage lending rates (11.5%) per annum capitalized monthly.

[31] Despite various demands, Panorama Food failed to comply with its obligations in terms of the agreement and no payment was effected by Panorama Food to the Bank.

All applications

[32] All four applications for liquidation were launched by the Bank on 6 June 2019. The respondents have not paid their debts to the Bank when such debts became due. As a matter of fact, the respondents have not paid their debt to the Bank at all.

[33] Letters alleged to constitute demand as per s 69 of the Close Corporations Act and s 350 of the Companies Act were sent by registered post to Namibia Star, Panorama Butchery, MGM, and Panorama Food. None of the respondents reacted to the letters of demand and were thus deemed to be unable to pay their debts.

[34] Namibia Star, Panorama Butchery, MGM and Panorama Food admit their inability to pay the debts of the Bank.

[35] In compliance with s 351(4) of the Companies Act, copies of all the applications were delivered to the Master of the High Court.

[36] In further compliance with s 351(3) of the Companies Act, the Master of the High Court has issued certificates in respect of all four applications for liquidation. The Master confirmed that sufficient security for the payment for all fees and charges for the prosecution of all the winding up proceedings and all costs of administering the companies in liquidation until a liquidator is appointed, were complied with.

Discussion

First Point in limine - Authority

[37] The respondents raised a point *in limine* that the Bank does not state in the founding papers that it has the authority to institute the proceedings.

[38] Over the years, authority to depose to an affidavit and authority to institute legal proceedings has always been a highly contentious issue in our courts.

[39] Where the issue of lack of authority to institute proceedings is raised, admissible evidence must be properly placed before court to enable it to determine whether or not the proceedings were properly authorised.

[40] In light of the above, this court is called upon to first decide the issue of authority before anything else. I, therefore, address the issue of authority first.

[41] Mr Diedericks argued boldly and confidently, that none of the Bank's applications, in their founding papers, contain a statement as to any authority to institute proceedings. He argued that authority to depose to an affidavit is meaningless without alleging the authority to institute the proceedings. He relied on the Supreme Court judgment of *Ganes and Another v Telecom Namibia Ltd*.²

[42] Mr Diedericks further argued that the production of a resolution in reply that demonstrates ratification does not cure the fundamental defect of failure to state in the founding papers that the institution of the application was duly authorised. This must be made out in the founding papers, so he argued.

[43] Mr Diedericks concluded by arguing that it is in the founding papers that the statement of authority must appear as a bare minimum and the failure to allege such in the founding papers is fatal.

[44] Mr Stais on the other hand, did not approach the argument of lack of authority hands down. He argued with all force and might at his command that the issue of authority was ratified. In this connection, he relied on the case of *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority*,³ where the Supreme Court held that a deponent's lack of authority may be ratified at any time before judgment because the matter is still *re integra et tempore congruo* as a result that the suit is still pending and uncertain.

[45] The founding affidavits filed on behalf of the Bank in all applications were deposed to by Mr Anton Smit, the Chief Executive Officer: Credit. He stated that he is authorised to depose to the founding affidavits by virtue of the resolution attached to such affidavits. The same resolution is annexed to all the founding affidavits. The resolution authorises the Managing Director and any Designated Executive jointly as agents of the Bank to exercise the powers set out therein. It provides as follows regarding the authority to institute court proceedings:

'C: SIGNATORY POWERS

² *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA).

³ *Christian t/a Hope Financial Services v Namibia Financial Supervisory Authority* 2019 (4) NR 1109 (SC).

3. The signatory powers herewith conferred are: ...

3.18 To sign all documents necessary to give effect to all the matters listed below, including the making of affidavits and declarations and the granting of powers of attorney in any jurisdiction to: ...

3.18.4 Apply for, commence with, institute, defend, join in, or object against, or sign any pleading, notice or process document, required in respect of any action proceeding, motion proceeding, appeal proceeding, inter-locutory (*sic*) proceeding, third party intervention, summary judgment, or provisional sentence, in or before any competent court, tribunal, panel, statutory board, official or functionary'

[46] The respondents, in the answering affidavits, attacked the authority to institute proceedings based on the resolution as Mr Smit did not act jointly with the Managing Director when he deposed to the founding affidavits. The respondents further argued that the authority to institute these proceedings was not alleged in the founding affidavits.

[47] Although the resolution by the Bank authorised joint signing by the Managing Director and the Executive, it is common knowledge that an affidavit cannot be signed by two people. This renders the first resolution operationally problematic.

[48] In the Bank's replying affidavits filed by Mr Anton de Wit, the head of the Legal Collections Branch, he, however, denies the allegation that Mr Smit was not authorised to institute the applications for liquidation of the respondents. Mr de Wit attached a resolution by the Bank dated 24 March 2022. The said resolution by the Credit Committee of the Bank provides, *inter alia*, that:

'1. Bank Windhoek Limited ("the bank") confirms the mandate and authority of the Executive Officer: Credit, namely the late Mr. Anton Smit, (the Executive Officer: Credit) to lodge liquidation proceedings against the following entities... Namibia Star... panorama Butchery... M G M... Panorama Food...

2. The Bank further confirms that although the General Secretary's Powers approved by the Bank's Board of Directors on 15 June 2016 attached to Mr Smit's founding affidavit(s), specifically paragraph 3.18.4 thereof, jointly authorized Mr Smit and Mrs. Baronice Hans to apply for, commence with, institute, defend, join in, or object against, or sign any pleading, notice or process document, required in respect of any action proceeding, motion proceeding, appeal proceeding, interlocutory proceeding, third party intervention, summary judgment, or provisional sentence, in or before any competent court, tribunal, panel, statutory board, official or functionary, and it being true that Mr Smit has solely signed the founding affidavit(s) initiating and instituting the afore mentioned proceedings; the Bank herewith ratifies anything done or not done by either Mrs. Baronice Hans or Mr Anton Smit pertaining to the launching and prosecution of the applications mentioned in 1 above.'

[49] The bone of contention is that there is no statement of authority to institute proceedings in the founding papers. No argument was advanced by the Bank or Mr Stais in respect of the Bank's failure to allege authority to institute proceedings in the founding affidavits. The Bank was as silent as a church mouse in this respect. The effect of this statement must, however, be analysed in the context of what is to follow.

[50] In *Ganes and Another v Telecom Namibia Ltd*,⁴ Streicher JA said: 'The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.'

[51] The Supreme Court of Appeal of South Africa in *Masako v Masako and Another*⁵ was faced with the same question of alleged lack of authority to institute a

⁴ *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624G-H. See also: *Gonschorek and Others v Asmus and Another* 2008 (1) NR 262 (SC) para [35].

⁵ *Masako v Masako and Another* (724/2020) [2021] ZASCA 168; 2022 (3) SA 403 (SCA) (3 December 2021).

rescission application. Mabindla-Boqwana JA writing for the court in a unanimous judgment and while relying on the *Ganes* decision found that 'it stands to reason that a deponent to an affidavit is a witness who states under oath facts that lie within her personal knowledge. She swears or affirms to the truthfulness of such statements. She is no different from a witness who testifies orally, on oath or affirmation, regarding events within her knowledge. Thus, when Ms Moduka deposed to the founding affidavit, she needed no authorisation from her client.'

[52] I find that the *Masako* dictum is to apply *in casu* and by virtue of its application, it is fair to conclude that common sense and the law has now aligned. A witness needs no authorisation to depose to an affidavit. It is the authorisation to institute, oppose or defend legal proceeding that is required.

[53] Patel J in *Eleventh v Minister of Home Affairs and Another*⁶ discussed the approach to be followed when the authority to act for another person is challenged and remarked as follows:

'It is trite law and practice that where one person ... is authorized by another, then the person so authorizing is required to confirm that authority when challenged.'

[54] Damaseb JP, in his work entitled '*Court-Managed Civil Procedure of the High Court of Namibia*,⁷ referred *Wotzkasbaken Homeowners Association v Erongo Regional Council*,⁸ where it was held that if authority to institute proceedings is disputed, a resolution may be attached in reply or the bringing of the application may be ratified and proved in reply. The court further said that where authority is challenged, it is not introducing new evidence for a party to annex the resolution to the replying affidavit.

[55] The fact that, *in casu*, a resolution has been produced, which is attached to the Bank's replying affidavit duly authorising the deponent to institute and/or oppose

⁶ *Eleventh v Minister of Home Affairs and Another* 2004 (11) BCLR 1223 (T) at 1227C.

⁷ Petrus T Damaseb, *Court – Managed Civil Procedure of the High Court of Namibia*, Juta & Co, 2021 p.151 at 6-005.

⁸ *Wotzkasbaken Homeowners Association v Erongo Regional Council* 2007 (2) NR 799 (HC) para [11] – [13].

proceedings is sufficient for the court to accept that the proceedings have been properly authorised. I, therefore, find that the institution of the applications before court were duly authorised. In any event, the Bank, in the resolution, attached to the replying affidavits and further ratified the actions of Mr Smit, inclusive of instituting these proceedings.

[56] This court cannot be held hostage with overly formalistic requirements to the extent that one is invited to ignore the obvious. I, therefore, find that the point *in limine* of lack of authority raised by the respondents lacks merit and falls to be dismissed. I accordingly, dismiss it.

Second Point in limine - Statutory demand

[57] On this point, Mr Diedericks argued that the statutory letters of demand were all sent by registered mail to the respondents. Service of the statutory demand letters was therefore not effected by leaving such letters at the registered offices of the respondents. The service by registered mail was not denied by the Bank.

[58] Mr Diedericks further argued that service of a statutory notice by means other than at the registered office of the respondents' amount to no service / non-compliance with peremptory requirement. He laid great store on the decision of *TiAuto Wholesalers (Pty) Ltd v Van Rensburg Holdings CC*,⁹ where it was held that service of a demand required in section 345(1)(a)(i) of the Companies Act,¹⁰ which is worded similar to s 350(1)(a) of the Companies Act and s 69(1)(a) of the Close Corporations Act¹¹, is strictly service of the demand by delivery at the registered office of the respondent. The court further remarked that the service of the demand goes to the heart of the deeming provision and not the effectiveness of the service of the demand.

[59] Mr Diedericks wrapped his arguments on this subject by stating that the respondents' deemed inability to pay the debts in terms of s 69 of the Close

⁹ *TiAuto Wholesalers (Pty) Ltd v Van Rensburg Holdings CC* (HC-MD-CIV-MOT-GEN-2021/00135) [2022] NAHCMD 328 (1 July 2022) paras [87] – [88].

¹⁰ Companies Act 61 of 1973 (the South African company legislation that was also applicable to Namibia at the time).

¹¹ Close Corporations Act 69 of 1984.

Corporation Act and s 350 of the Companies Act does not come into operation if the demand is not delivered at the respondents registered office.

[60] The Bank does not only rely on the deeming provision that the respondents are deemed to be unable to pay their debts. The Bank's case against the respondents is that as a matter of fact they are unable to pay their debts as per s 68(c) and (d) of the Close Corporations Act and s 350(1)(c) and s 349(f) of the Companies Act. The Bank further argues that the respondents are also deemed to be unable to pay their debts as provided for in s 69(1)(a) of the Close Corporations Act and s 350(1)(a)(i) of the Companies Act.

[61] The Bank, therefore, launched a two-pronged position in its applications for liquidation. One being on the basis that the respondents are unable to pay their debts and therefore it is just and equitable that the respondents be wound up as provided for in s 68(c) and (d) of the Close Corporations Act and s 350(1)(c) and s 349(f) of the Companies Act. The other being based on the deeming provisions referred to above.

[62] If I find that the Bank managed to prove that the respondents are as a matter of fact unable to pay their debts, then it becomes unnecessary to consider the deeming provisions of s 69(1)(c) of the Close Corporations Act and s 350(1)(c) of the Companies Act.

[63] The Bank, in my view established that it is a creditor of each of the respondents. It loaned money to the respondents, which the respondents failed to pay back when such loans became due. Despite various demands, the respondents failed to service the loans. The respondents admitted to their inability to pay their debts to the Bank.

[64] In the result, I find the second point *in limine* raised to be unnecessary for purposes of deciding this matter.

[65] Enticing as the arguments on the deeming provisions appear, it is unnecessary to traverse same in this matter given my finding that as a matter of fact the respondents are unable to pay their debts with the Bank.

[66] I cannot help but make an observation without deciding the issue that, it is a salutary principle in our court that the purpose of service is to notify the person to be served of the nature and contents of a process.¹²

[67] The respondents in their answering affidavits unequivocally admit to have received the statutory demand. In argument, Mr Diedericks, also noted that the respondents were served with the letters of demand. In his own words, Mr Diedericks submitted that it is admitted that there was service of the demand on the respondents but not as contemplated in the Close Corporations Act and the Companies Act.

[68] In *Nathaniel & Elthymakis Properties v Hartebeestspruit Landgoed CC*¹³ the court dealing with s 69(1)(a) of the Close Corporations Act considered the issue of substantial compliance during service of the demand. The court distinguished the matter before it from the matter of *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd*¹⁴, on the basis that the *Phase* matter was decided on the Companies Act and not the Close Corporation Act. The court opined that strict compliance was not required provided that the close corporation received the demand. This was based on the reasoning that to hold otherwise would elevate form over substance. That would mean that a demand delivered at the registered office, not received by the management of the close corporation is effective but a demand received by the management but not delivered at the registered office is ineffective. This appears to be absurd. As a result, the court held that the requirement that the demand must be served on the corporation is peremptory but that the requirement that it be done at the registered office is not and that substantial compliance will in that respect suffice.

¹² *Standard Bank Namibia Ltd and Others v Maletsky and Others* 2015 (3) NR 753 (SC) para 21.

¹³ *Nathaniel & Elthymakis Properties v Hartebeestspruit Landgoed CC* [1996] 2 All SA 317 (T).

¹⁴ *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W) at 917 C- D.

[69] One could consider the aforesaid *dicta* as appropriate in these circumstances and conclude that, on the deeming provision, there was substantial compliance with the Close Corporation Act and Companies Act.¹⁵

Merits

Bank's case and argument

[70] The Bank's liquidation applications are based on:

- (a) The fact that Namibia Star, Panorama Butchery, MGM Panorama Food are *de facto* insolvent and their liabilities exceed their assets and they are unable to pay their debts as envisaged in s 61(c) & (d) of the Close Corporation Act and s 350(1)(c) of the Companies Act;
- (b) An act of insolvency was committed by Namibia Star, Panorama Butchery, MGM and Panorama Food in that a period of 15 days and/or 21 days has lapsed from the date of receipt of statutory letters of demand addressed by the Bank to Namibia Star, Panorama Butchery, MGM and Panorama Food without payment being effected by any of them.

[71] Mr Stais relied on the case of *Kalil v Decotex (Pty) Ltd and Another*,¹⁶ where the South Africa Supreme Court of Appeal held that an applicant in an application for a provisional winding up order, must make a *prima facie* case for winding up.

[72] *In casu*, I hold the view that the Bank managed to establish on a balance of probabilities, on account of what I stated hereinabove, that the respondents are unable to pay their debts.

[73] Mr Stais referred the court to a passage from the *Kalil* matter where it was remarked as follows:¹⁷

¹⁵ Answering Affidavit, paragraph 13.1, page 26.

¹⁶ *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 961I-962A.

¹⁷ *Kalil (supra)* at p. 954A.

'The *bona fide* dispute on reasonable grounds is, in law, not to be regarded as a bar to the appellant's success in his application. There is no decision in the Appellate Division on the issue and the line of cases favouring the automatic bar should be overruled as wrongly decided. There is no provision in the Companies Act or in the Insolvency Act for such a bar based on a *bona fide* dispute on reasonable grounds. Such a bar would be inconsistent with the following: (a) that the application may succeed on a *prima facie* case; and (b) the procedural law in South Africa, because interim orders are granted if the applicant makes out a *prima facie* case, even if it be open to some doubt; and a *bona fide* dispute on reasonable grounds does not operate as a bar to the success of an application.'

[74] In summation, Mr Stais concluded by submitting that the facts overwhelmingly justify that Namibia Star, Panorama Butchery, MGM and Panorama Food should immediately be placed in final liquidation.

Respondent's case and arguments

[75] The respondents are adamant that the Bank is before court with unclean hands. From the papers filed of record, the gravamen of the respondents' case is that the Bank breached the terms of the mortgage loan agreement with MGM and thereby caused the respondents' insolvency.

[76] In this connection the respondents submit that on 20 June 2022, MGM instituted a damages claim against the Bank under case number HC-MD-CIV-ACT-CON-2020/01839. In the suit, MGM claims loss of profits and business income in the amount of N\$42,445,233 and N\$19,398,422 as a result of the Bank's alleged breach of a N\$70 million mortgage loan agreement entered into between the parties on 23 February 2019.

[77] Mr Diedricks submits that the respondents raise contentious factual disputes and the Bank must do more than just prove a *prima facie* case.

[78] Naturally, the starting point in the determination of the four liquidation applications is the interpretation and application of the relevant provisions of the Close Corporation Act and the Companies Act. The applicants relies on the ground

in s 68(c) of the Close Corporation Act and s 349(f) of the Companies Act, which provides for the winding up of a corporation or company that is unable to pay its debts.

[79] On the papers and considering the ground relied on for the relief by the Bank, the burden of the court is therefor to consider whether on the evidence the Bank has 'proved to the satisfaction of the court' as required by s 68 and s 349, that the respondents 'is unable to pay its debts'.

[80] The respondents admitted that they are unable to pay the Bank's debts. They sought financial assistance from other entities, but were unsuccessful. The respondents seem to be in financial ruin to the extent that they are unable to pay their employees (318 in total) and unable to further proceed with their business activities.¹⁸

[81] The debt owed by the respondents to the Bank is also not disputed. In essence, what is relevant and required of the respondents is income sufficient to satisfy the debt owed to the Bank. In the answering papers, the respondents make out no case to establish that there is any money or viable funds available to satisfy the debt.

[82] In *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*,¹⁹ Caney J held that:

'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.'

[83] However, Caney J also held that a creditor who cannot obtain payment of his debt is entitled as between himself and the company *ex debito justitiae* to an order if he brings his case within the confines of the relevant Act.

¹⁸ Answering Affidavit, paragraph 5.51 – 5.52, page 18.

¹⁹ *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597

[84] In *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others*,²⁰ the court stated at 440F to 441A that: 'It matters not that the company's assets, fairly valued, far exceed its liabilities: Once the court finds that it cannot [meet current demands on it and remain buoyant], it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of section 345(1)(c) as read with section 344(f) of [the 1973 Act] and is accordingly liable to be wound-up.'

[85] *In casu*, I find that the *ex debito justitiae* rule applies. The *ex debito justitiae* rule is that an unpaid creditor is entitled to *ex debito justitiae* to a winding up order and the exception apposite in this proceeding is that the rule does not apply where the unpaid debt which is relied on is *bona fide* disputed by the respondent.²¹

[86] I further find that it is common cause that the respondents have not repaid their debt to the Bank; neither have they tendered to do so. It seems clear that the respondents' failure to repay the amounts, is due to their inability to pay. The conclusion is, therefore, inevitable that the respondents are commercially insolvent. Namibia Star, Panorama Butchery, MGM and Panorama Food admitted that they are factually insolvent.

[87] Further, in respect of the respondents' defence that the Bank breached the terms of the mortgage loan agreement and thereby caused the respective respondents' insolvency and as such are entitled to damages, constitutes a dispute that must be resolved in an action. The said dispute cannot appropriately be resolved in liquidation proceedings. This court simply does not have all the necessary facts at hand to make a determination on the veracity of such case.

Conclusion

[88] There is no dispute that the respondents are insolvent and the substratum of each has disappeared.

²⁰ *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C), the court stated at 440F to 441A.

²¹ *Klein v Caremed Pharmaceuticals (Pty) Ltd* 2015 (4) NR 1016 (HC) para 10.

(a) the deputy sheriff at the registered offices of the respondents;

(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.

OS SIBEYA

Judge

APPEARANCES

ALL APPLICANTS:

P Stais SC

Assisted by H Garbers - Kirsten

Instructed by Dr Weder, Kauta & Hoveka

Inc,

Windhoek

ALL RESPONDENTS:

J Diedericks

Instructed by Afrika Jantjies and Associates,

Windhoek