

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING

Case No: HC-MD-CIV-MOT-GEN-2023/00424

In the matter between:

**POWER PARTS CC**

**APPLICANT**

and

**THE MASTER OF THE HIGH COURT OF NAMIBIA**

**RESPONDENT**

**Neutral Citation:** *Power Parts CC v The Master of the High Court of Namibia* (HC-MD-CIV-MOT-GEN-2023/00424) NAHCMD 695 (2 November 2023)

**Coram:** MASUKU J

**Heard:** 13 October 2023

**Delivered:** 2 November 2023

**Flynote:** Civil Procedure - Applications for provisional liquidation orders - Whether Master of the High Court should be cited as a respondent in such applications.

**Summary:** The applicant filed an *ex parte* application for its provisional liquidation into the hands of the Master of the High Court. The members of the

applicant filed a resolution in terms of s 68(a) of the Close Corporations Act 26 of 1988, ('the Act'), for the provisional liquidation of the applicant. The matter served before court and it was removed from the roll on the basis that the Master of the High Court had not been cited as a respondent.

*Held:* That the provisions of the Companies Act 28 of 2004, apply with necessary modifications in cases of liquidation of close corporations in line with 66 of the Act.

*Held that:* Applications for provisional liquidation are moved *ex parte* and the Master is ordinarily not cited as a respondent in such matters. The office of the Master is, in terms of the Act, entitled to being served with the application for provisional liquidation and is expected to file a certificate confirming that sufficient security has been provided for the costs and charges of liquidation proceedings. Additionally, the Master may, in appropriate cases, file a report to the court for the postponement or dismissal of the application for a provisional order.

*Held further that:* Applications for liquidation normally provide for the issuance of a rule *nisi* to interested parties. The rule *nisi*, is issued after the provisional order has been granted. The Master in this connection, must be served with the application before the matter serves in court and is not an interested party in the conventional sense to be served with the rule *nisi* for the first time after its issue.

*Held:* The court is obliged to grant a provisional order of liquidation where it is satisfied that the applicant has made out a case, unless it occurs to the court that there is a suitable remedy available other than the liquidation order, or where it appears to the court that the applicant is acting unreasonably or frivolously in seeking the winding up order.

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**ORDER**

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1. The applicant is hereby placed under provisional liquidation into the hands of the Master of the High Court.

2. A rule *nisi*, do hereby issue, calling upon all interested parties to show cause on or before **Thursday 23 November 2023** at **08h30**, why an order in the following terms should not be made final:

2.1 That the applicant be placed under a final order of liquidation into the hands of the Master of the High Court.

2.2 That costs of this application be costs in the liquidation.

3. That service of this rule *nisi* must be effected upon the interested parties as follows:

3.1 By serving a copy of this order at the applicant's registered address; and

3.2 By publishing this order in one edition of the *Government Gazette* and the Namibian Newspaper.

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## RULING

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**MASUKU J:**

Introduction

[1] The instant matter served before me during the first motion court on 13 October 2023. I was particularly struck by the citation of the Master of the High Court, as a respondent in the matter and enquired from Mr Andima why that was the case.

[2] He submitted that his law firm had filed an application for the voluntary liquidation of the applicant due to a resolution of the members that the entity be wound up in terms of s 68(a) of the Close Corporations Act 26 of 1988, ('the Act'). That application had been brought *ex parte* and when the matter

served before court on 15 September 2023, the presiding Judge ordered that the Master of the High Court ('the Master'), be cited as a respondent. The matter was thus removed from the roll for that purpose.

[3] The question that needs to be determined in this ruling is whether it is proper to cite the Master as a respondent in an application for liquidation of a close corporation, or for that matter, a company.

[4] I requested Mr Andima, to file heads of argument to assist the court in determining this matter but he did not do so. He instead decided to file an affidavit explaining what led to the applicant citing the Master as a respondent. I accordingly take the bull by the horns and issue the ruling below.

#### The Act

[5] Section 68 of the Act, in terms of which this application was brought, provides the following:

'A corporation may be wound up by a Court, if –

- (a) members having more than one half of the total number of votes of members, have so resolved at a meeting of members called for the purpose of considering the winding-up of the corporation, and have signed a written resolution that the corporation be wound up by a Court;
- (b) the corporation has not commenced its business within a year from its registration or has suspended its business for a whole year;
- (c) the corporation is unable to pay its debts; or
- (d) it appears on application to the Court that it is just and equitable that the corporation be wound up.'

[6] It is clear, from reading the provisions of the Act, that the word 'Court', occurring in the said provision, relates to this court. That much is clear from reading s 1 of the Act, with s 7. The latter, states in part that this court 'shall

have jurisdiction to entertain any matter in respect of a corporation.’ This includes an application for the liquidation of a corporation, which the matter serving before this court is.

[7] It is apparent from the founding affidavit filed in this matter, that the members of the applicant, filed a resolution dated 4 August 2023, in which they acknowledged that the applicant is factually insolvent and is unable to pay its debts as they fall due in the ordinary course of business. They therefor resolved to approach this court in terms of s 68(a) of the Act.

[8] This makes it abundantly clear that the application to be moved before this court, the members having resolved to move in terms of s 68(a), ie a resolution to wind up the corporation, is of the members’ own motion, *or suo motu*, if you will. This ordinarily requires that the application be *ex parte*. There is thus, no need to cite the Master as a party to the proceedings, for the reason that at this early juncture, all that is required, is for the court to issue an order for a voluntary winding-up, if satisfied that the provisions of s 68 of the Act have been met.

[9] It is important to mention that s 66 of the Act, provides that the provisions of the Companies Act 28 of 2004, (‘the Companies Act’), which relate to the winding-up of a company, including the regulations made thereunder, shall *mutatis mutandis*, ie with necessary alterations and modifications, apply to the winding-up of a corporation in terms of the Act. Certain provisions, are however, specifically excluded from application of the Companies Act.

[10] Section 351 of the Companies Act, which deals with winding-up of companies, is not one of the provisions excluded from application to corporations under the Act. Sub section (3) and (4) of s 351, read as follows:

‘(3) Every application to the Court referred to in subsection (1), except an application made by the Master in terms of paragraph (f) of that subsection, must be accompanied by a certificate by the Master, issued not more than 10 days before the

date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and all costs of administering the company in liquidation until a provisional liquidator has been appointed, or if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding-up.

(4) Before an application for the winding-up of a company is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein must be lodged with the Master.'

[11] What is clear from the foregoing, is that the role of the Master in these proceedings, is administrative. The Master is entitled to be served with the application for a winding-up order. This service on the Master, if the provision is read closely, is for the Master to be aware of the application and to certify that sufficient security for the payment of fees and charges necessary for the prosecution of the winding-up proceedings, has been provided by the applicant.

[12] Subsection (5) of the provision allows the Master, upon service of the application, to issue a report to the Court on the facts presented to the court by the applicant for a winding-up order. In this regard, the Master may point out facts in the application, which justify the application either being postponed or dismissed. This report, must, in terms of this subsection, be transmitted by the Master to the applicant and to the company.

[13] I am of the considered view that the procedure mentioned above, shows indubitably that the Master is not a party to the proceedings. As previously stated, the Master carries out administrative functions and has a right to file a report, as opposed to an opposing affidavit, which is what parties to proceedings would be expected to file. In a sense, the Master acts as a 'friend of the court', regarding the application for winding-up that would have been filed. Ordinarily, the court takes the report filed by the Master quite seriously, with the applicant obviously being afforded an opportunity to deal

with whatever adverse aspects the report may contain in relation to the application.

[14] Having said this, it must also be pointed out that the Master is entitled in terms of the Companies Act, to also bring an application for the winding-up of a corporation. This is apparent from the provisions of s 351(1)(f), which provide the following:

‘An application to the Court for the winding-up of a company may, subject to this section, be made –

- (e) in the case of a company being wound-up voluntarily, by the Master or any creditor or member of that company;’

[15] It would accordingly stand to reason, in my considered view, that in the situation referred to immediately above, the Master would be a litigant and would thus move the application and file the necessary affidavit in support of the relief sought. It is doubtful that the Master may, in that scenario, also be entitled to file a report such as the one in cases where other parties have moved for the winding-up of a company or corporation.

[16] I now move on to deal with s 352(2) of the Companies Act, which provides for the orders the court may issue in granting an application for a winding-up order. The said provision reads as follows:

‘Where the Court grants an application made under section 351, the Court must unless there is good reason not to do so –

- (a) grant a rule nisi calling upon the company and all interested parties to show cause on the return day why the company should not be finally wound-up; and
- (b) direct that the rule nisi be published in the Gazette and if the Court deems it necessary, in a newspaper circulating in Namibia . . .’

[17] The learned authors, Herbstein & van Winsen,<sup>1</sup> state the following regarding *ex parte* applications ie without notice, and the issuance of a rule *nisi*:

‘In *ex parte* applications brought on notice to the registrar only, the court will order a *rule nisi* to issue where the rights of other person may be affected by an order sought, and also where the issue of such a rule is required by law.’

[18] In dealing directly with a rule *nisi*, the learned authors say the following at p 379:

‘As it has already been pointed out that where an application is brought *ex parte* but the rights of other persons may be affected by the order, the court will not make an outright order but will grant a rule *nisi*, sc an order directed to a particular person or persons calling upon them to appear in court on a certain date to show cause why the rule should not be made absolute; or in other words, why the court should not grant a final order’.

[19] In the instant case, the Companies Act does not directly prescribe for the application for winding-up to be brought *ex parte*. The issuance of a rule *nisi*, as prescribed by s 352(2), however, suggests inexorably that the application should be *ex parte*. The truth of the matter is that even in an application such as the present, where the members adopt a resolution to have the corporation wound-up, it is clear that there are rights of other persons, which stand to be affected by the winding up, especially the creditors of the corporation in question. In this regard, it must be pertinently observed that the issuance of the rule *nisi* as pointed out earlier, is prescribed by law.

[20] In this case, if the court is satisfied that the applicant has made a case in terms of the relevant provisions of the Act, what it can do, is to grant an order provisionally winding-up the corporation in the hands of the Master. This would be coupled with the issuance of a rule *nisi* in terms of s 352(2), calling upon interested persons to show cause, why the corporation should

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<sup>1</sup> Herbstein & van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4<sup>th</sup> ed, Juta & Co, p233.



not be finally wound-up. This order, as stated in the above provision, must be published in the Government Gazette, and if the court is satisfied, it can direct that such order be also published in a newspaper circulating in Namibia.

[21] Having regard to what has been stated above, I am of the considered view that the intention of the law maker, was for these applications to generally be *ex parte*, allowing the court, if so satisfied, to issue a rule *nisi*, calling upon interested parties to show cause why the provisional order of winding-up, should not be confirmed at a later date.

[22] In this regard, reference is further made to the learned authors Herbstein & van Winsen<sup>2</sup> where they say the following regarding *ex parte* applications:

‘An *ex parte* application is an application brought without notice to anyone, either because no relief of a final nature is sought against any person, or because notice might defeat the objects of the application, or the matter is one of extreme urgency.’

[23] It would appear to me, having regard to the excerpt above, that the instant case falls within the first category. This is because from the order sought, it is clear that the applicant does not seek the granting of an order of a final nature.

[24] For the foregoing reasons, I accordingly arrive at the conclusion that in these cases, the Master is strictly speaking, not a party to the proceedings and is thus not supposed to be cited as a respondent. What the Master is entitled to, is service of the application before it is launched and the mandatory requirement that the Master issues a certificate in terms of s 351(3), confirming that sufficient security has been furnished for the costs and fees for the prosecution of the proceedings by the applicant. There may be the added requirement, in appropriate cases, for the Master, to file a report to

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<sup>2</sup> Herbstein & van Winsen, *The Civil Practice of the High Courts of South Africa* 5<sup>th</sup> ed, Volume 1, p 421.

the court, served on the applicant and the company, regarding the need to postpone the matter or to dismiss the application.

[25] I must mention that Mr van der Merwe, the applicant's legal practitioner in this matter, deposed to an affidavit to the effect that after he had cited the Master in this matter as a respondent, the Deputy Master, Mrs Erasmus contacted him, protesting about the citation of the Master as aforesaid. This was because, she alleged, that had never been done before. Mr van der Merwe states further that he agreed with her but explained that he had followed an order of court dated 15 September 2023, to that effect.<sup>3</sup>

[26] In the instant case, I need to proceed to consider, despite the procedure that was eventually followed, whether the applicant has made out a case for the relief sought. I have perused the papers filed of record. I note that the applicant has made all the necessary allegations. First, it is stated that the applicant is unable to pay its debts. In this regard, it is stated on oath that the applicant has been operating at a loss of at least N\$12 154 098,62 for the period ended 30 April 2023. Furthermore, the applicant is indebted to the Receiver of Revenue in the amount of N\$16 964 290,19.

[27] In addition to the above stated facts, which are in appropriate cases accompanied by relevant documents, the members of the applicant have approached the court in terms of s 68(a) of the Act and have filed a resolution for the voluntary winding-up of the applicant.

[28] The Master has, as required by law, filed a certificate in terms of s 66 of the Act, confirming that the applicant has furnished sufficient security for the payment of all fees and charges necessary for the administration of the applicant until a provisional liquidator has been appointed and that all fees and charges for the discharge of the applicant from winding-up, have been secured. Furthermore, the Master, in her certificate, confirms that her office was served with the application issued by the applicant in the instant matter on 26 September 2023.

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<sup>3</sup> Paragraph 13 of the explanatory affidavit of Mr van der Merwe.

[29] Section 352(3)(a) of the Companies Act, which applies *mutatis mutandis*, in this matter, provides the following:

‘Where the application is presented –

- (a) by members of the company and it appears to the Court that the applicants are entitled to the relief, the Court must make a winding-up order, unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound-up instead of pursuing that other remedy’. (Emphasis added).

[30] Having regard to what is before me, as stated above, I am of the view that all the necessary allegations regarding the provisional winding-up of the applicant have been made in the affidavit supporting the order sought. I accordingly incline to the view that the applicant is entitled to the relief it seeks. There is nothing before me that suggests that there is any other suitable remedy available than winding-up the applicant in this case. Neither, I may add, is there any suggestion or indication on the papers before me that the applicant is acting unreasonably in seeking its winding-up in the circumstances, when there is another suitable remedy open to be pursued.

[31] I must point out that when proper regard is had to the above cited provision, it makes it mandatory for the court, where the court forms the view that the applicant has made out a good case so as to be entitled to the relief sought. The only exception, is where the court is convinced that there is some other suitable remedy available or that the applicant is acting unreasonably or frivolously, or is abusing the processes of the court<sup>4</sup> in seeking the winding-up order – in the presence of a viable alternative remedy available to the court.

### Conclusion

[32] In the premises, I am of the considered view that the applicant has made out a good case for the relief sought. I am accordingly bound to grant

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<sup>4</sup> Meskin, *Insolvency Law*, Butterworths, 2003, para 2.1.5.

the order sought. I say so for the reason that there is nothing before me that suggests a remedy suitable to be pursued in the circumstances, than the winding-up the applicant. I am also of the view that there is no suggestion or *inducium* that the applicant is acting unreasonably in seeking the relief of winding-up, as recorded in the notice of motion and the draft order.

### Order

[33] In the premises, the order that is appropriate, is the following:

1. The applicant is hereby placed under provisional liquidation into the hands of the Master of the High Court.
2. A rule *nisi*, do hereby issue, calling upon all interested parties to show cause on or before **Thursday 23 November 2023** at **08h30**, why an order in the following terms should not be made final:
  - 2.1 That the applicant be placed under a final order of liquidation into the hands of the Master of the High Court.
  - 2.2 That costs of this application be costs in the liquidation.
3. That service of this rule *nisi* must be effected upon the interested parties as follows:
  - 3.1 By serving a copy of this order at the applicant's registered address; and
  - 3.2 By publishing this order in one edition of the *Government Gazette* and the Namibian Newspaper.

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T S MASUKU

Judge

## APPEARANCES

APPLICANT: T. H Andima  
Van Der Merwe-Greeff-Andima Inc.  
Windhoek