

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING ON POINT IN LIMINE**

CASE NO: HC-MD-CIV-MOT-GEN-2017/00227

In the matter between:

BANK OF NAMIBIA

APPLICANT

and

SMALL & MEDIUM ENTERPRISES BANK LIMITED

1ST RESPONDENT

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

2ND RESPONDENT

NAMIBIA FINANCING TRUST (PROPRIETARY) LIMITED

3RD RESPONDENT

METROPOLITAN BANK OF ZIMBABWE LIMITED

4TH RESPONDENT

WORLD EAGLE PROPERTIES (PROPRIETARY) LIMITED

5TH RESPONDENT

THE MINISTER OF INDUSTRIALIZATION, TRADE

AND SME DEVELOPMENT

6TH RESPONDENT

THE MINISTER OF FINANCE

7TH RESPONDENT

Neutral Citation: *Bank of Namibia v Small & Medium Enterprises Bank Limited & 6 others HC-MD-CIV-MOT-GEN-2017/00227 [2017] NAHCMD 184 (07 July 2017).*

Coram: Prinsloo, J
Heard: 06 JULY 2017
Delivered: 07 JULY 2017

Flynote: Applications and motions –Urgent Application – Rule 73 –Application brought on an urgent basis for the winding up of a company in terms of section 351 of the Companies Act, 28 of 2004 – The fourth and the fifth Respondents raised a *point in limine* that there was non-compliance with certain provisions of the Companies Act, 28 of 2004–*Point in limine* dismissed.

Summary: The applicant brought an urgent application against the first to seventh Respondent, that the first respondent be placed under a provisional order of winding-up into the hands of the Master of the High Court of Namibia by this Court. At the beginning of the proceedings Mr. Namandje, acting on behalf of the Fourth and the Fifth Respondents raised a *point in limine* that there was non-compliance with certain provisions of the Companies Act, 28 of 2004. Mr Namandje is of the view that, as there is no time reflected on the certificate issued by the Master of the High Court, the court cannot find that there was compliance with the provisions of Section 351(4) of the Companies Act.

Court held: It is indeed so that the time of filing of the application that will be accepted by this court as the time of filing on the offices of the Registrar, will be the time reflected on the E-Justice system when same was issued by the Registrar, which in this case was 10:32.

Held further: If one have regard to the certificate by the Master and the return of service of the Deputy Sherriff, it indeed appears to be contradictory. However, the certificate issued by the Master reflects the date of 04 July 2017 and the court must accept the document for what it purports to be and the court is thus satisfied that a copy of the application was indeed lodged at the office of the Master on the said date.

Held further: The provisions of section 351(4), the court may, in my view, determine whether the applicant has been in substantial compliance with each of these sections. In other words, it is for the court to determine whether the nature of the furnishing of the application, pursuant to the section, has been met.

Held further: This court will not speculate in this matter to say that there was non-compliance with section 351(4) as the certificate of the Master did not contain a time of lodging of the application, and I find that in the event of a time difference between filing with the Master and the Registrar, and in the event that the documentation was filed on the Registrar first, that there was still substantial compliance.

ORDER

1. The *point in limine* is therefore dismissed with cost of one instructing and one instructed counsel.

JUDGMENT

Prinsloo, J

Introduction

[1] The application before me is brought on an urgent basis for the first respondent to be placed under a provisional order of winding-up into the hands of the Master of the High Court of Namibia in terms of section 351 of the Companies Act, 28 of 2004. The application is set out in the Notice of Motion in the following prayers:

'1. That – in as far as this may be necessary – condoning the applicant's non-compliance with the forms and service provided for by the rules of this Court and hearing this application as one of urgency as contemplated by rule 73.

2. That the first respondent be and is hereby placed under a provisional order of winding-up into the hands of the Master of the High Court of Namibia.

3. A rule nisi hereby issued calling upon all interested persons (including the second to seventh respondents) to show cause, if any, on a date to be determined by this Court, why this Court should not make the following final order -

3.1 that the first respondent be placed under a final order of winding-up; and

3.2 that the costs of this application be costs in the winding-up of the first respondent.

4. That service of this order be effected as follows –

4.1 by the Deputy-Sheriff for the District of Windhoek, by serving a copy of this order on the first respondent's registered address;

4.2 by service, in any manner reasonably possible, on the addresses reflected in paragraphs 5, 6, 7 and 8 of the founding affidavit deposed to by Mr Ipumbu Wendelinus Shiimi;

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

5. Further or alternative relief.'

[2] At the commencement of the proceedings Mr. Namandje, acting on behalf of the Fourth and the Fifth Respondents raised a *point in limine* that there was non-compliance with certain provisions of the Companies Act, 28 of 2004 (hereinafter referred to as the 'Act').

[3] The circumstances that gave rise to the *point in limine* raised are as follows:

3.1 The urgent application was lodged with the Registrar of the High Court and issued by the Registrar on the E-justice system at 10:32 on the morning of 04 July 2017.

3.2 The copy of the application was filed on the Offices of the Master of the High Court on 04 July 2017, which can be deduced from the official date stamp affixed to the certificate issued by the Deputy Master.

3.3 The certificate does not indicate a time of receipt of the copy of the application.

3.4 The Acting Deputy Sherriff issued a return of service under the heading of 'CERTIFICATE OF URGENCY' which indicates that service was effected on:

'Address as specified:

MASTER OF THE HIGH COURT, 4TH FLOOR, FRANS INDONGO GARDENS WINDHOEK'

Stating the following:

"I the undersigned, MJ HENNES do hereby certify that I have on 5th of July at 10:50 in terms of Rule 8 3(e) duly served a CERTIFICATE OF URGENCY TOGETHER (sic) WITH APPLICATION: NOTICE OF MOTION, FOUNDING AFFIDAVIT OF IPUMBU WENDELINUS SHIIMI, ANNEXURE "BON1" –BON56" AND PARTICULARS OF LITIGANTS IN TERMS OF RULE 6 on MS H SHIPWATA (RECEPTIONIST) apparently over the age of 16 years and a responsible EMPLOYEE, apparently in charge at given address, the same time handing HER copy thereof, after exhibiting the original documents and explaining the nature and exigency of the process.

Dated at WINDHOEK on the 05TH day of JULY 2017." '

3.5 The certificate issued by the offices of the Master of the High Court only indicates 'A copy of the application has been lodged with me.', containing no specifics of what was the application contained that was filed with the offices of the Master.

[4] Mr. Namandje argued that the court must accept the time of filing the application with the office of the Registrar as the time reflected on the E-Justice system, being 10:32.

[5] He further argued that, as there is no time reflected on the certificate issued by the Master of the High Court, the court cannot find that there was compliance with the provisions of Section 351(4) of the Companies Act, and for completeness sake the court will refer to sub-section (3) and (4) of Section 351, that reads as follows:

'351 Application for winding-up of company

(3) Every application to the Court referred to in subsection (1), except an application 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 of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding-up.

(4) 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. (Emphasizes added).

[6] Mr. Namandje argued that the return of service is in contradiction of the certificate issued by the Master as the latter was dated 04 July 2017 whereas the former was dated 05 July 2017 and having regard to the date and time of filing of the

application at the offices of the Registrar the court cannot accept that there was compliance with Section 351(4) of the Act.

[7] On the issue of compliance, Mr. Namandje submitted that the requirements of section 351(4) is peremptory, as is indicated by the use of the word "must" together with a lack of any discretion conferred on the Court to depart from the requirements of these subsections and therefore neither the Master nor the court can condone the non-compliance. The court was also referred in this regard to the matter of *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd*¹ where Wallis JA stated in para 10 of the judgment that compliance with section 351(4) is peremptory.

[8] Contrary to the argument of Mr. Namandje, Adv. Corbett SC acting on behalf of the applicant in this matter, argued that the point raised in argument is a technicality and if the court strictly interpret the time periods set for e.g. Section 351(3) which provide for a 10 day time period before date of application then a matter of the one *in casu* would never be able to be brought in truncated manner.

[9] Adv. Corbett argued that the court is entitled to breach time periods and that the applicant only needed to lodge a copy with the Master and the certificate indeed certifies that same was done. The original certificate issued by the Master was handed from the Bar to illustrate the point.

[10] The court was referred to the matter of *Maharaj v Rampersand*² on the issue that there need not be exact compliance.

The issue to decide:

[11] The issues that the court must thus decide on are:

11.1. was there compliance with the provisions of section 351(4) of the Act;

¹ (979/2012) [2013] ZASCA 167 (27 November 2013).

²1964 SA 638 (A) on 646 C-D.

11.2. and, whether non-compliance with the provisions of section 351(4) of the Act fatal to the applicant's application .

Was there filing on the Registrar before filing on the Master?

[12] It is indeed so that the time of filing of the application that will be accepted by this court as the time of filing on the offices of the Registrar, will be the time reflected on the E-Justice system when same was issued by the Registrar, which in this case was 10:32.

[13] It is not clear what time the copy of the application was served on the Master as no time is indicated on the certificate issued.

[14] According to *Henochsberg on the Companies Act*, Vol 1,5thEdition, at page 740(1) and 740(2) -

'it is submitted that, whether the application is made *ex parte* or on notice....., due lodgment is the filing with the Registrar of the Court of the notice of motion and the affidavit or affidavits accompanying it together with proof of compliance with the provisions of section 346(4)³.'

[15] The learned author proceed to say -

'although there ought also to be filed the certificate of the Master envisaged by s 346(3), failure in this regard is not fatal due lodgment provided by the time the Court is asked to grant a winding-up order security has already been given and such certificate is before Court.'

[16] The issue *in casu* is not the security as provided for in section 351(3), it need not be considered.

³Section 346(4)(a) of Companies Act, 61 of 1973, is the direct equivalent to the Namibian Companies Act, section 351(4).

[17] If one have regard to the certificate by the Master and the return of service of the Deputy Sherriff, it indeed appears to be contradictory. However, the certificate issued by the Master reflects the date of 04 July 2017 and the court must accept the document for what it purports to be and the court is thus satisfied that a copy of the application was indeed lodged at the office of the Master on the said date.

[18] The court is in the quandary of having to find where the application was filed first and that calls for speculation.

Is non-compliance with the provisions of section 351(4) of the Act fatal to the applicant's application?

[19] If the court accepts for the moment that there might have been less than perfect compliance with section 351(4) would it lead to invalidity of the application before court?

[20] In the unreported matter of *Thaw Trading And Investments Oo5 Cc v Aobakwe Louw Properties (Pty) Ltd*⁴ and *Thaw Trading And Investments Oo5 Cc v Central Lake Trading 214 (Pty) Ltd*⁵ Landman J, discussed this non-compliance as follows:

[8] In **EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd** (979/2012) [2013] ZASCA 167 (27 November 2013) the Supreme Court of Appeal considered whether the applicant in that appeal had complied with section 346A (4A)(a) of the Companies Act of 1973. In doing so the SCA found it necessary to put this subsection in the context of the other applicable sections and said at para 10:

“Section 346(4)(a) provides that ‘[b]efore an application for the winding up of a company is presented to the Court’ a copy of the application shall be lodged with the Master or, in certain circumstances, with another officer in the public service designated for that purpose. There is a significant body of authority that holds that an application is presented to the court when it is lodged with the Registrar and there is no need for us to

⁴Case number 1667/2012 North West High Court

⁵Case numberr 1666/2012.

review it in this case. The effect then of s 346(4)(a) is that it is peremptory for the applicant to lodge the application with the Master before lodging the application with the Registrar. The Master then furnishes a report to the court before the hearing of the application.”

[9] It was not necessary for the court to deal with the situation where there was a less than perfect compliance with section 346(4)(a) as there is in this case. Here the applicant’s attorneys filed the application with the Master after lodging it with the Registrar. This is not compliance with the subsection. Mr Pistor SC submits that as the subsection is peremptory the provisional order should not have been granted.

[10] This raises the question whether the failure to comply with the subsection leads to invalidity. The Supreme Court of Appeal has held in **Unlawful Occupiers, School Site v City of Johannesburg** 2005 (4) SA 199 (SCA) at para 22 that:

“[I]t is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved”.

[11] This approach was affirmed again in **NokengTsaTaemane Local Municipality v Dinokeng Property Owners Association & Others** 2011 2 All SA 46 (SCA) at para 14 where it was stated:

“It is important to mention that the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality. . .”

[12] The Constitutional Court has adopted a similar approach. In construing municipal electoral legislation the court said in **African Christian Democratic Party v Electoral Commission and Others** 2006 (3) SA 307 (CC) at para 25 that: “[a] narrowly textual and legalistic approach is to be avoided”. And in **Liebenberg NO and Others v Bergrivier Municipality** 2013 (5) SA 246 (CC) at para 25 and 26 the same court said:

“Rather, the question is whether the steps taken by the local authority are effective when measured against the object of the Legislature, which is ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular.

Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.” ’

[21] L C Steyn: Die Uitleg van Wette (5de uitgawe) at 201, in dealing with the question of compliance, says the following:

‘Somtyds egter word ook in hierdie verband slegs sogenaamde "wesentliche" nakoming vereis, maar dit word oorwegend gegee dat die korrekte standpunt gestel is in Maharaj and Others v Rampersand1964(4) SA638(A) at 646 C-D, waar verklaar word:

The enquiry I suggest is not so much whether there has been exact, adequate or substantial compliance, but rather where there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that even though a position as it is not identical to what it ought to be the injunction has nevertheless been complied with. In deciding whether there has been compliance with the injunction, the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance.’

[23] I am respectfully in agreement Landman J and the learned author, LC Steyn in this regard. With regards to the provisions of section 351(4), the court may, in my view, determine whether the applicant has been in substantial compliance with this section. In other words, it is for the court to determine whether the nature of the furnishing of the application, pursuant to the section, has been met.

[24] This court will not speculate in this matter to say whether there was compliance with section 351(4) or not, as the certificate of the Master did not contain a time of lodgment of the application. I do however find that in the event of a time difference between filing with the Master and the Registrar, and in the event that the documentation was filed on the Registrar first, that there was still substantial compliance in this matter. I am thus of the opinion that if there was a failure to comply with the peremptory obligation set out in section 351(4), which court is unable to find, it should not be visited with nullity.

[25] The point in limine is therefore dismissed with cost of one instructing and one instructed counsel.

JS PRINSLOO
JUDGE

APPEARANCES:

THE APPLICANT: Adv. A Corbett SC (with him D. Obbes)
Instructed by: ENSafrica Namibia (inc. as LorentzAngula Inc), Windhoek

4TH AND 5TH RESPONDENTS: Sisa Namandje (with him T. Iileka)
Of: Sisa Namandje & Co Inc, Windhoek