REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 16/2016

In the matter between:

NOTTINGHAM INCORPORATED **APPLICANT**

and

ROCKVIEW INVESTMENT NUMBER SEVENTY ONE CC **RESPONDENT**

Case no: A 17/2016

In the matter between:

NOTTINGHAM INCORPORATED **APPLICANT**

and

VXK INVESTMENTS THIRTY (PTY) LTD **RESPONDENT**

Neutral citation: *Nottingham Incorporated v Rockview Investment Number Seventy (Pty) Ltd and VXK Investments Thirty (Pty) Ltd* (A 16/2016 and A 17/2016) [2018] NAHCMD 278 (28 August 2018)

Coram: ANGULA DJP

Heard: **26 April 2018**

Delivered: **28 August 2018**

Flynote: Law of Insolvency – Winding-up – Application for the winding-up of both the principal debtor and its surety. Inability to pay a sum of US$2.5 million – Based on an arbitral Award in favour of the applicant and made an order of this court. Surety raising a defence that the claim against the principal debtor has prescribed. The Award created a new cause of action in favour of the applicant.

Summary: The applicant, an American registered corporation under receivership, brought an application to wind up the respondents, based on their inability to pay a debt, the cause of action being an arbitral Award made an order of court in favour of the applicant. The principal debtor conceded that it is insolvent. The surety raised a number of technical defences inter alia lack of locus standi; absence of authorization by the deponent to the founding affidavit; that the founding affidavit has not been properly authenticated; and that its offer of settlement to pay off the debt was protected by the 'without prejudice' rule.

The surety also raised a defence on merits that the applicant's cause of action against the principal debtor had prescribed.

Court held: On the evidence before it, it was satisfied that, the deponent to the applicant's founding affidavit, was duly authorised to bring the proceedings.

Held further: The court will exercise jurisdiction over any *incola* who is either domiciled or resident within its jurisdiction and that the court will exercise this power no matter where the cause of action arose or whether the plaintiff or applicant is a *pregrinus*.

Held further: An admission of insolvency by a party should not be precluded from disclosure based on the 'without prejudice' rule. As a matter of public policy, an act of insolvency should not be afforded the same protection which is afforded to settlement negotiations. Therefore the offers of settlement made by the respondents to the applicant following receipt of letters of demand fall within the exceptions to the

'without privilege' rule. Accordingly, the offer made by the respondents to the applicant constitutes an admissible evidence of an act of insolvency.

Held further: The judgment obtained against a principal debtor covered by a suretyship agreement, constitutes a new cause of action and that the surety is liable. In other words, prescription against the surety commences running independently of the original debt, from the date of the judgment.

Held further: For the foregoing reasons, the applicant has made out a case that the respondents are unable to pay their debts and must therefore be wound-up into the hands of the Master of this Court.

ORDER

1. The respondents, VXK Investments Thirty (Pty) Ltd and Rockview Investment Seventy-One (Pty) Ltd are hereby placed under final liquidation order in the hands of the Master of this Court.

2. The Master shall exercise her necessary power to appointing the liquidators.

3. The costs of this application shall include the costs of one instructed counsel and one instructing counsel, such costs to be costs in the liquidation.

4. The matter is removed from the roll and is regarded finalised.

JUDGMENT

ANGULA DJP:

Introduction

[1] The applicant, Nottingham Incorporated, is a corporation, incorporated and registered in the State of Georgia in the United States of America. It was placed under Receivership in the United States of America. It's appointed Receiver instituted these proceedings on its behalf but under its name. Nottingham brought two separate applications for the winding-up of both respondents: VXK Investments Thirty (Pty) Limited (hereinafter referred to as 'VXK Investments') and Rockview Investments (hereinafter referred to as 'Rockview Investments') and collectively referred to as ('the respondents'). The respondents are registered and incorporated in this Republic. The respondents are, so to speak, sister companies. The two applications were, by agreement between the parties, consolidated into one case before this court. The reason for the consolidation was mainly that the parties are the same and the issues for determination in both applications are basically the same.

[2] The applicant alleges that the respondents are unable to pay their debts to the applicant and are therefore insolvent and for that reason they are liable to be liquidated. The respondents deny that they are unable to pay their debts and advance defences why they should not be wound up.

[3] The issue for determination in these proceedings is therefore whether the applicant has made out a case for the winding-up of the respondents.

Brief factual background to the applications

[4] On or about 14 February 2011, Nottingham and VXK Investments concluded a sale of shares and claims agreement. In terms of the agreement the Nottingham sold to VXK Investments its shares and claims including its trademarks for a total purchase price of US$4.5 million. It was agreed that a sum of US$2 million would be paid in cash and the balance of US$2.5 million would be paid in kind in the form of the delivery of granite stone by VXK Investments to Nottingham.

[5] It is common cause that VXK Investments paid the first instalment of US$1.5 million and the second instalment of US$62 500; that it also procured the delivery of

granite stone worth US$65 865 to Nottingham. It is further common that VXK Investments failed to pay the balance of US$437 500 despite demand.

[6] It is also not in dispute that VXK Investments failed to deliver the granite materials to the value of US$2 434 135. What is however in dispute is the reason why it could not deliver the granite.

[7] As a result of VXK Investments' default to comply with its obligations in terms of the agreement, Nottingham instituted arbitration proceedings against VXK Investments where Nottingham claimed that VXK Investment should perform its obligations in terms of the sale of shares agreement. The arbitration proceedings were held in the Republic of South Africa. At the end of the proceedings, the arbitrator made an award in favour of Nottingham. The Award was, on application by Nottingham, made an order of court by the Gauteng Local Division of the High Court of South Africa.

[8] Thereafter, Nottingham applied to this court for the Award to be made an order of this court. The Award was made an order of this court on 31 July 2015.

Grounds for winding-up

[9] As a ground for the winding-up, in respect of VXK Investments, Nottingham alleges that VXK Investments is unable to pay its debts and therefore it is insolvent. This allegation is based on draft annual financial statements and management accounts dated 30 June 2014 and 20 June 2015 respectively which VXK Investments submitted to Nottingham following a formal letter of demand addressed by Nottingham to VXK Investments, to settle the judgment debt, as mentioned earlier, being the arbitral Award which was made a judgment of this court. VXK Investments responded to the letter of demand with a settlement offer to pay off the debt in instalments. However, the offer was rejected by Nottingham. Nottingham further contends that the offer by VXK Investments constitutes an admission by VXK Investments of its inability to pay its debts.

[10] Nottingham sent a similar statutory demand to Rockview Investments as surety for the due payment of VXK Investments' debts towards Nottingham which

Rockview Investments assumed in terms of a written suretyship agreement entered into between it and Nottingham following the conclusion of the sale of shares agreement.

[11] In response to the statutory demand, Rockview Investments sent a settlement offer to Nottingham accompanied by draft annual financial statements for the period ended June 2014 as well as the management account for the period ended 30 June 2015. The offer was to settle VXK Investments' debts in instalments. Nottingham rejected the offer.

[12] The ground for winding-up of Rockview Investments is based on the fact that Rockview Investments bound itself as surety and co-principal debtor of VXK Investments for the due and payment of all VXK Investments' obligations but limited to the sum of US$2.5 million. Nottingham thus alleges that Rockview Investments is commercially insolvent, alternatively it must be deemed to be unable to pay its debts. Rockview is thus also liable for winding up. Nottingham further alleges that the offer constitutes an admission by Rockview Investments of its inability to pay its debts.

Opposition by the respondents

[13] Naturally the respondents opposed the applications for their winding-up. The opposing affidavits in both matters have been deposed to by Mr Weakly. In respect of VXK Investments, Mr Weakly deposed to the opposing affidavit in his capacity as director and in respect of Rockview Investments, he deposed to the opposing affidavit, in his capacity as managing director of Rockview Investments.

[14] VXK Investments raises a number of technical defences against the application for its winding. First, that Mr Smith, a partner of the law firm, Finley Colmer & Co, which was appointed by the court of the State of Georgia, as the Receiver for Nottingham, has not been properly authorised to bring the application for winding-up of VXK Investments. Second, Finley Colmer & Co does not have *locus standi* to initiate winding up proceedings of the VXK Investments because the court's order only authorised Mr Peter Colmer, a partner of Finley Colmer & Co, with the responsibility to administer 'the collaterals'. Third, the letter of demand delivered to VXK Investments did not comply with the provisions of section 350 of the

Companies Act, 2004 in that it failed to state the prescribed amount as required by the Act. Fourth, the supporting affidavit by Mr Smith has not been properly authenticated as required by rule 128 of the Rules of this court. Fifth, the sales of shares agreement attached to Mr Smith's affidavit has not been stamped as required by the Stamp Duties Act, 1993 and therefore the applicant is not entitled to produce it in evidence.

[15] As regards the merits, VXK Investments alleges that in terms of the sales of share agreement, it was agreed that it would pay the balance of the purchase price of US$2.5 million by delivering granite material to the applicant. However Nottingham was in turn obliged to place orders for the granite and to arrange with the shippers and pay for the shipment of the granite tendered for delivery by VXK Investments. Nottingham however failed to place orders for granite and to pay the shippers. As a result of Nottingham's breach of the term of the agreement, VXK Investments alleges that it was unable to comply with its obligations in terms of the agreement.

[16] Whilst VXK Investments admits that it made an offer to the applicant to settle the debts, it alleges that such offer is privileged from disclosure for the reason that it was made 'without prejudice' in a genuine attempt to settle the dispute. It therefore prays that the document containing the offer be struck from record as it constitute inadmissible evidence.

[17] Despite all the foregoing defences raised, in the end VXK Investments admits that it is insolvent. This admission leaves Rockview as a surety for VXK Investments to pay VXK Investments debts in terms of the suretyship agreement with Nottingham in terms of which Rockview Investments bound itself as surety and co-principal debtor to Nottingham for the due and punctual payment of the all the obligations of VXK Investments, but limited to the sum of US$2.5 million.

[18] Mr Smith, dealt with points *in limine* in his replying affidavit. I will consider the points *in limine* in conjunction with his response to each point *in limine* raised.

[19] Mr Kruger, from Pretoria Bar, South Africa, acts on behalf of the applicant. Mr Marais SC, assisted by Mr Obbes, act on behalf of the respondents. Counsel filed

comprehensive and helpful heads of argument for which the court wishes to express its appreciation.

Lack of authority to institute these proceedings

[20] The respondents point out in the answering affidavits that Mr Smith claims that he is duly authorised to depose to the affidavit, but fails to reflect his authority to launch this application either on behalf of Finely Colmer & Co, the appointed Receiver or on behalf of Nottingham, and therefore, there is no evidence that the application was properly authorised. In response to this point *in limine* Mr Smith attached to his replying affidavit a resolution of the partnership of Finely Colmer & Co authorising him:

'To instruct attorneys in the Republic of South Africa and the Republic of Namibia to institute proceedings against VXK Investments Thirty (Pty) Ltd for the recovery of the amounts owed in terms of the arbitration award granted in favour of Nottingham Incorporated, which award was made an order of court in South Africa and in the High Court of Namibia, Main Division, in Windhoek under case number A 180/2015, and in terms of the deed of suretyship signed by Rockview Investment Seventy One CC, alternatively Rockview Number Seventy One (Pty) Ltd and to take all further steps necessary to finalise the proceedings, including deposing to affidavits;

That all steps taken to date by Mark A Smith in the instituting proceedings and instruction attorneys in the Republic of South Africa and the Republic of Namibia be ratified.'

[21] On behalf of the respondents, it is submitted that in terms of the rules relating to motion proceedings an applicant is required to make out his case in the founding affidavit including his authority to institute proceedings. It is therefore impermissible, so the arguments goes, for Mr Smith to try to establish his authority in his replying affidavit. It is then submitted that the resolution should be struck from the record as it constitutes new matter to which the respondents have not been afforded an opportunity to respond thereto.

[22] In response to the above submission, Mr Kruger for the Nottingham submitted the submission of behalf of the respondents' amounts to a technical defence and the court is entitled to overlook any irregularity in the absence of any substantial

prejudice. Counsel referred to the *Gariseb v Bayer*[1] where it was held that a court has a discretion to condone less than perfect procedure, especially where the irregularity complained will not prejudice the other party. In that matter the respondent raised a point of irregular proceedings in terms of the old rule 30 giving notice that he would ask for the setting aside of the respondents affidavit on the basis that it had not been properly authenticated. The affidavit had been commissioned in the Federal Republic of Germany. The court reasoned that if it were to be accepted that the affidavit had not been properly authenticated there was no prejudice to the respondent if such irregularity is overlooked having regard to the fact that the respondent came to court to argue the merits of the application. The court accordingly dismissed the point.

[23] The applicable principles were set out in *National Union of Namibian Workrs v Naholo*[2]:

'[26.1] If a respondent offers no evidence at all to suggest that an applicant is not properly before court, a minimum of evidence will be required from the applicant to establish authority. This is the import of the frequently followed judgment of the Mall (Cape) matter supra. In my view, this principle should also apply if respondent avails himself of a mere non-admission or a tactical denial of authority without placing any evidence before court to suggest that the applicant is not properly authorised.

[26.2] In circumstances where a respondent substantially challenges the authority of the applicant – supported by sufficient evidence so as to create a genuine dispute of fact as to whether or not the applicant was properly authorised – the duty is cast on the applicant to refute that evidence. In this case the validity of the particular resolution or extract purporting to confer authority ('AVM1') was challenged on specific grounds. It went well beyond a mere non-admission. This challenge was supported by sufficient evidence. The applicant was called upon to properly respond thereto and to refute those allegations. In those circumstances the applicant could not merely be content by simply relying on the text of the resolution (and a bare allegation in the founding affidavit that the deponent of the applicant is duly authorised), without meeting these challenges. The duty was cast on the applicant to show that the relevant resolution has a valid underlying basis.

[26.3] In my view the authority of *Kurtz v Nampost Namibia (Pty) Ltd* is clearly distinguishable from this matter: In the *Kurtz* matter the (albeit belated) production of the

[1] 2003 NR 118 at 121.
[2] 2006 (2) NR 659 at par 25.1-26.3.

company resolution conferring authority on the deponent constituted sufficient proof of authority in circumstances where no facts whatsoever were placed before the Court by the other party contesting the validity of that resolution.'

[24] In the present application the respondents do not offer any evidence to suggest that the Mr Smith is not authorised. Mr Smith produced a resolution in compliance with the principle sent by the court in [26.3] of the *Naholo* judgment *supra*. The resolution ratifies the actions taken by Mr Smith. This court will follow the principle set in the *Naholo* matter *supra*. I therefore hold, based on the evidence before me, that that Mr Smith has convincingly demonstrated that he is duly authorised to bring these proceedings.

[25] In the result the technical point *in limine* thus fails.

Locus standi and Recognition of Foreign Receiver

[26] It is argued on behalf of the respondents that the court order which appointed the Finley Colmer & Co as the Receiver did not include authority to institute proceedings of this nature; that the order indicates that Mr Peter Colmer was appointed with the primary responsibility for administration of the 'Collateral'. Furthermore even if it is assumed that Mr Smith acts on behalf of the Receiver, then in that event Mr Smith is acting on behalf of a foreign Receiver; and there is no allegation in the founding papers that such foreign Receiver has been recognised in this court's jurisdiction. It is further submitted, that in order for the foreign Receiver to be able to institute winding-up proceedings against the respondents who are domiciled within the jurisdiction of this court, the Receiver's appointment as such must first be recognised by this court. Counsel relies for this submission on this court's judgment in *Miller N.O v Prosperity Africa Holdings (Pty) Ltd*[3].

[27] Mr Kruger for the applicant, points out in heads of argument that the defence raised above, was raised by VXK Investments at the arbitration proceedings and was rejected by the arbitrator. He refers to the passage in the Award where the arbitrator dealt with the point and held that Finley Colmer & Co as a court appointed Receiver, had the power to make decisions on behalf of the applicant subject to the courts directions.

[3] I 32182/2010) [2017] NAHCMD 62 (8 March 2017).

[28] It would appear to me that the system of receivership in the State of Georgia, in the United States of America, is similar to the system of judicial management in our jurisdiction. The judicial manager is an officer of the court and stands in a fiduciary relationship to the company (which has been place under judicial management by the court), its members and creditors. His or her duty is to manage the company's business under judicial management in order to restore the company to a sound business footing. The judicial manager must, subject to the orders of the court, conduct the management of the company as he may deem most economic and most promotive of the interests of the members and creditors of the company. A judicial manager does not derive his authority from the company but from the court's orders[4]. A judicial manager, with authority of the court, has the power to bring or defend in the name of the company any action or other legal proceedings.

[29] On proper reading of first court order of the State of Georgia, it is clear that it authorised the Receiver to engage legal counsel. The consequence of the company having been placed under receivership is that from the moment the court order was issued, Nottingham's board of directors, management and officers of Nottingham were divested of all powers and placed in the hands of the Receiver; and that henceforth the Receiver was vested with the power to make decisions on behalf of the Nottingham, subject to the provisions of the court's order and/or directions by the court.

[30] In my view paragraph (d) of the court order of the State of Georgia, beyond doubt, vests the Receiver, with the power to institute legal proceedings. Paragraph (d) of the order reads:

'The Receiver shall be authorised to enter into settlement agreements on behalf of the Borrowers to settle accounts receivable, to assert liens on behalf of the Borrowers as appropriate under applicable law, and to engage legal counsel <u>to bring on behalf of the Borrowers such lawsuits</u> as may be necessary to preserve the Collateral, including without limitation for collection of accounts receivable ,which legal counsel will be compensated out of the proceeds of the management and liquidation of the Collateral'. (Underling supplied for emphasis).

[4] LAWSA Vol 4 para 622 to 649.

[31] In my judgment, nothing more need be said about this aspect. The respondents' point *in limine* in this regard fails.

[32] As regards the argument that for a foreign Receiver to be able to institute winding-up proceedings against the respondents who are domiciled within the jurisdiction of this court, the Receiver's appointment as such must first be recognised by this court, I agree with the proposition as a general statement of the law. I am however of the view that the facts of this matter are slightly distinguishable from the facts in the *Miller N.O* matter upon which reliance for the submission is premised. In the *Miller* matter, the liquidators instituted the action in their nominal capacity as foreign appointed liquidators. In the present matter it is not the Receiver who instituted the proceedings but the company, Nottingham, which is the applicant in these proceedings. It follows therefore, in my view, that there was no need for the Receiver's appointment to have been recognised first before Nottingham could institute these proceedings because the Receiver is not a party to these proceedings before court. All what the Receiver did was to take a decision on behalf of the Nottingham, as authorised by the order of court of the State of Georgia, to institute the present legal proceedings in order to recover the debt owed to the company. The Receiver further appointed Mr Smith to represent the Receiver in these proceedings.

[33] In so far as it may need to be stated, this court will exercise jurisdiction over any *incola* who is either domiciled or resident within the borders of this Republic. The court will exercise this jurisdiction no matter where the cause of action arose or whether the plaintiff or applicant is a *pregrinus*. In the present matter the respondents are domiciled within the jurisdiction of this court whilst the applicant is a *pregrinus.* The applicant is a *pregrinus* for the reason that it is neither domiciled nor resident within the area of jurisdiction of this court[5].

[34] The facts of this matter are further distinguishable from the facts *in Miller N.O* matter in the following respect: In that case the foreign liquidators sought to deal with the assets of a company, in liquidation, which assets were situated in this court's jurisdiction on the strength of the their appointment as liquidators in South Africa. The court, correctly in my view, held (at para [20] and [21]) that in order for the foreign liquidators to deal with the assets of an insolvent company in a foreign

[5] Herbstein and Van Winsen: *The Civil Practice in Superior Court of South Africa*, 3rd Edition at page 33.

jurisdiction, they should first seek recognition from the court where the property is situated. The rationale behind the requirement for recognition is that without such recognition, the foreign liquidators would not be able to perform their functions without the active assistance of the local courts.

[35] In the present matter it is not the Receiver who seeks the order of the winding-up of the respondents' companies; neither are the respondents' companies already in liquidation. Furthermore, the applicant does not intend to deal with the assets of the respondents. As a matter of fact, the applicant is proposing in the notice of motion that local liquidators be appointed in the event the winding-up order is granted.

[35] It follows therefore, from the foregoing, that this point *in limine,* equally fails.

[36] The points relating to the incorrect reference to section 350 of the Companies Act, 2004 and the alleged non-compliance with the provisions of the Stamp Duties Act, were not persisted with at the hearing. They fell by the wayside, so to speak.

[37] I turn now to consider whether the applicant has made out a case for the relief sought.

Reliance on offer of settlement made without prejudice

[38] On behalf of the respondents, a defence is raised that the applicant is precluded from relying for its case for the winding of the respondents based on privileged information which was exchanged on a 'without prejudice' basis in a genuine attempt to settle the dispute; and therefore such information should not be relied upon and must be struck from the record. Counsel mentioned that there appears to be no Namibian case law on point.

[39] In attacking the defence of non-disclosure of privileged information ,counsel for the applicant referred the court to a judgment of the South African Supreme Court of Appeal in *Absa Bank v Hammerle Group (Pty) Ltd*[6] where the court held that the South African law recognises that there are exceptions to the 'without prejudice' rule.

[6] 2015 (5) SA 2015 SCA.

In that matter the debtor, *Hammerle*, in response to Absa Bank's letter of demand for settlement of the debt, stated in its letter that it would like to make a settlement proposal but that it was 'struggling to turn the business around' and was 'unable to make any meaningful profit in the business'. In an appeal against the dismissal of Absa Bank's application for the winding-up of *Hammerle*, the SCA held that the letter by *Hammerle* was both an indication of commercial insolvency and an acknowledgement of liability and rejected *Hammerle's* contention that the contents of the letter were inadmissible. The court expressed itself at para 13 in the following words:

'[13] It is true that, as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a 'without prejudice' basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings are a matter which by its very nature involves the public interest. A *concursus creditorum* is created and the trading public is protected from the risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged. This is explained in the words of *Van Schalkwyk J in Absa Bank Ltd v Chopdat*, when he said:

"(A)s a matter of public policy, an act of insolvency should not always be afforded the same protection which the common law privilege accords to settlement negotiations.

A creditor who undertakes the sequestration of a debtor's estate is not merely engaging in private litigation; he initiates a juridical process which can have extensive and indeed profound consequences for many other creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent. I would therefore be inclined to draw an analogy between the individual who seeks to protect from disclosure a criminal threat upon the basis of privilege and the debtor who objects to the disclosure of an act of insolvency on the same basis."

In the final analysis, the learned judge said at 1094F:

"In this case the respondent has admitted his insolvency. Public policy would require that such admission should not be precluded from these proceedings, even if made on a privileged occasion.

[14] Moreover, in this case the unequivocal admissions of liability by the respondent were not even made in the course of any negotiations, but in response to a letter of demand for payment of the arrear instalments due in terms of the loan agreement. The court a quo accordingly erred in granting the application to strike out reference to the respondent's admissions of liability." '

[40] This court is of the considered view that the moral convictions of Namibian public would accord with the same public policy consideration as in South Africa that would require that an admission of insolvency by a party should not be precluded from disclosure based on the 'without prejudice' rule. As a matter of public policy, an act of insolvency should not be afforded the same protection which is afforded to settlement negotiations[7]. It has been pointed out that one reason for not affording such protection is because settlement negotiations between an insolvent and a creditor may be an undesirable thing because it might give rise to voidable preference, whereas a speedy and unimpeded sequestration may prevent the insolvent from inflicting further damage to the body of creditors[8].

[41] A further policy consideration is that a creditor who has instituted sequestration proceedings against an insolvent estate is not only doing so for his own benefit or interest, he 'institutes a judicial process which can have extensive and indeed profound consequences for many creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade while insolvent'[9].

[42] On the basis of the authorities discussed above, I consider the law which I must apply to the facts of this matter, is that the offers of settlement made by the respondents to the applicant following receipt of letters of demand fall within the exceptions to the privilege from disclosure rule. The defence based on 'without prejudice' rule cannot succeed. Accordingly the offer constitutes an admissible evidence of an act of insolvency.

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[7] *Absa Bank v Chopdat* 2000 (2) SA 1088 (W).
[8] *Absa Bank v Chopdat* at 1094 C – F.
[9] Absa Bank v Chopdat at 1092 – 1093.

[43] In so far as the case against VXK Investments is concerned, on its own admission, VXK Investments is insolvent. I am satisfied that there is no *bona fide* defence against the application for its winding-up. The arbitration Award, which was made an order of this court stands. No application for the rescission of that judgment has been filed with this court, neither has an appeal been noted against that judgment.

[44] In the circumstances the applicant is entitled to a winding-up order of the VXK Investments *ex debito justitio*. The court is left with little discretion, if any at all, to refuse the winding-up order of VXK Investments[10].

The applicant's case against Rockview Investments on the merits

[45] It is common cause that Rockview Investments bound itself as surety and co-principal to the application for the due and punctual payment of all the obligations of VXK Investments, but limited to the sum of US$2.5 million; VXK Investments has failed to pay its indebtness; and that VXK Investments is insolvent. The application further alleges that from the annual financial statements and the management accounts furnished by Rockview Investments' attorney to the applicant it appears that Rockview Investments is commercially insolvent, alternatively it must be deemed to be unable to pay its debts.

Rockview's opposition

[46] Rockview Investments raises a number of defences including technical defences which I have already dealt with and found such defences to be meritless and accordingly dismissed them.

[47] Rockview Investments denies that it is commercially insolvent and/or that it is unable to pay its debts. In this connection, the respondent points out that the financial statement relied upon by the Nottingham for the allegations that it is commercially insolvent and unable to pay its debts are privileged and protected by the 'without prejudice' rule. It further asserts that it is solvent and is in position to pay its debts.

[10] *Knots v Nemangol (Pty) Ltd* (A 226/2005) [2008] HC 3 (27 May 2008).

[48] In support of foregoing allegations the Rockview Investments points out that: it is an industrial property owner; that the conservative estimate of the said property exceeds N$34 million; and that it's combined liabilities does not exceed N$28 million.

[49] Rockview Investments points out further that it does not conduct business or trade and that therefore the monthly rental income and the monthly expense in respect of the immovable properties, balance out. In other words the income regenerated covers the expenses. Mr Weakley for the Rockview Investments asserts that Rockview Investments has always managed to pay its debts and remains able to do so. In support of his allegations, Mr Weakley attached a confirmatory affidavit by the auditor of Rockview Investments.

Defences raised by Rockview Investments a surety of VXK Investments

Privileged information

[50] I have already dealt with the defence of privilege when I considered VXK Investment's defences and dismissed it. In so far it is necessary to state and for avoidance of doubt, the defence of privileged as far as it has been raised by Rockview Investments with regard to the financial statements and the offer it made following receipt of the letter of demand from Nottingham attorney, is not protected by the 'without prejudice rule'. I proceed to consider the remainder of the defences raised by Rockview Investments.

Prescription

[51] Rockview Investments' next defence is that the debt by VXK Investments towards Nottingham has in any event prescribed as against it, in terms of section 11 of the Prescription Act, 1969: In terms of the said statutory provision, a cause of action becomes prescribed after three years from the date the cause has arisen.

[52] On Nottingham's version, despite demand to VXK Investments during September 2011, VXK Investments failed to deliver the granite material to Nottingham. Accordingly, the debt became due at the latest, in September 2011. In this connection, Mr Weakley argues that because the obligation of the principal debt is kept alive by a judgment, the surety's accessory obligation in terms of common law continues to exist. However in the present matter the suretyship agreement expressly states that the respondent's obligation 'is limited to VXK Investments towards Nottingham virtue of clause 4.3 of the Agreement only'. It is to be remembered that clause 4.3 limits the Rockview Investments 'obligation towards Nottingham to US$2.5 million.

[53] This defence has been briefly be summarised by Mr Weakly in his affidavit as follows: The respondent (Rockview Investments) executed the suretyship in the knowledge that there was sufficient granite available to enable VXK Investments to comply with its obligation in terms of the agreement and that the respondent would only become liable if VXK Investments was unable to procure supply of the granite to the applicant. On the other hand, the applicant was obliged to place orders for granite and to engage shippers and pay shippers for the shipment of granite tendered by VXK Investments. In breach of the agreement, the applicant failed to order granite and to pay for the shipment. As a result, VXK Investments was unable to comply with its obligation in terms of clause of 4.3. Furthermore by reason of the applicant's said breach of its obligation or its prejudicial action in reckless disregard of the interest of the respondent, the suretyship is voidable or unenforceable.

[54] Mr Weakly then submitted that from the foregoing not only does it show that Rockview Investments has a *bona fide* defence, but that the Receiver has at all material times been aware of those defences.

[55] As regard the applicant's defence of prescription, Mr Smith points out that the arbitration Award was made an order of court in 2015 and therefore the liability of the respondent in terms of the court order started to run from that date.

[56] It would appear to me that the immediate issue for determination before considering other related issue is whether the applicant's claim against the respondents has prescribed as contended by the respondent.

[57] Nottingham contends that, its cause of action is based on the arbitration Award which was made an order of this court in 2015 and the claim has been instituted within the prescribed period of three years. In this connection Mr Smith's submitted that the Rockview Investment has already admitted its liability for its obligations when it made an offer of settlement to the applicant. Furthermore, that even if Rockview Investment was not a party to the arbitration proceedings, it had bound itself as a suretyship to the principal debtor of VXK Investments therefore it is bound by the fact that a court with competent jurisdiction has confirmed a judgment against VXK Investments.

[58] The respondent argues contra wise and contends that a surety debt became enforceable as soon as the principal debtor defaulted, that on the applicant's version the debt became due in September 2011; and that to date no proceedings have been instituted by the applicant; and that the period of three has already expired and therefore the applicant's claim against the respondent has become prescribed.

[59] It is to be noted that the Rockview Investments does not dispute the validity of the judgment. In law, the obligation between the creditor and the surety is contractual, a surety is entitled to rely on and plead any defence, in that is available to the principal debtor[11]. In *Bulsara v Jordan & Co. Ltd*[12] it was held that a judgment obtained against a principal debtor covered by a suretyship constitutes a new cause of action and that the surety is liable even if the original debt on which the judgment was obtained become prescribed. In other words prescription against the surety commences running independently of the original debt from the date of the judgment.

[60] Nottingham contends that its cause of action is based on the arbitration Award which was made an order of this court in 2015 and that it instituted its claim within the prescribed period of three years. The Rockview Investments argues contra wise and contends that a surety debt became enforceable as soon as the principal debtor defaulted, that on the applicant's version the debt became due in September 2011; that to date no proceedings have been instituted by the applicant; and that the period

[11] *Standard Bank of SA Ltd v Wilkinson* 1993 (4) All SA 506 (C).
[12] (406/92) [1995] ZASCA 106; 1996 (1) SA 805 (SCA); (21 September 1995).

of three years has already expired and therefore Nottingham's claim against the respondent has become prescribed.

[61] It is to be noted that the respondent does not dispute the validity of the judgment. In law, the obligation between the creditor and the surety is contractual, a surety is therefore entitled to rely on and plead any defence, in that is available to the contracting party[13].

[62] In *Bulsara v Jordan & Co. Ltd*[14] it was held that a judgment obtained against a principal debtor covered by a suretyship agreement constitutes a new cause of action and that the surety is liable even if the original debt on which the judgment was obtained become prescribed. In other words, prescription against the surety commences running independently of the original debt from the date of the judgment.

[63] On the basis of the *Bulsara* judgement, I hold that the Award made a court order in 2015 constitutes a new cause of action and therefore the applicant's claim has not prescribed. My conclusion in this regard is further re-enforced in what I deal with below.

Suretyship agreement

[64] It is Rockview Investments' case that the terms of the suretyship agreement must be read with the terms of the sale of shares agreement. In this connection it stresses out that in terms in terms of the suretyship agreement, its obligation is limited to US$2.5 million.

[65] In response to Rockview Investments, allegations that its industrial property value exceeds N$34 million and that its combined value of liabilities does not exceed N$28 million, Mr Smith points out that on this version, the respondent is only able to pay N$6 million in reducing its debt to the applicant, whereas its liability to the applicant calculated at a conservative exchange rate between the US Dollar and NAD means that the respondent owes the applicant N$35 million. In this connection, Mr Smith submits that if the respondent were in position to pay its liabilities, it should

[13] *Standard Bank of SA Ltd v Wilkinson* 1993 (4) All SA 506 (C).
[14] (406/92) [1995] ZASCA 106; 1996 (1) SA 805 (SCA); (21 September 1995).

have acted *bona fide* and with the intention to reduce its liability, however it failed to do so and continues to fail to do so.

Submissions on behalf of the respondents

[66] On behalf of Rockview Investments, Mr Marais, argues that whether a judgment constitutes a new cause of action or not depends on the interpretation of the express terms of the suretyship agreement. In other words whether the surety bound himself for any obligation which may then or later become due by the principal debtor or for any other cause of debt arising therefrom. In support of this submission, counsel referred the court to *Swadif (Pty) Ltd v Dyke NO*[15]. In that matter, a final judgment had been obtained on a mortgage bond registered against an immovable property of the insolvent respondent more than two years prior to his insolvency. One of the issues for decision by the court was the effect of the judgment as a form of novation of the obligation under the mortgage bond.

[67] The court held at page 944 that 'where the only purpose of taking judgment was to enable the judgment creditor to enforce his right to payment of the debt under the mortgage bond, by means of execution, it seemed realistic, and in accordance with the views of the Roman-Dutch writers, to regard the judgment not as novating the obligation under the bond, but rather as a strengthening or reinforcing the obligation'.

[68] Mr Marais further referred the court to *Metequity Ltd NO & Another v Heel*[16]. The issue for decision in that matter was whether the suretyship covered the judgment debt. The court held that the answer to that question depended on the construction and interpretation of the words of the suretyship agreement.

[69] The court had to consider the words: 'all sums of money which the debtor *owes* to the creditor from whatever cause arising', the words: 'punctual performance of all other *obligations* howsoever arising which the debtor may be bound to perform in favour of the creditor', and the words: 'all amounts *due and payable* to the creditor'; and what was comprised by a 'judgment debt'.

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[15] 1978 (1) SA 928 (AD) at 939 D-E.
[16] 1997(3) SA 432(WLD).

[70] The court reasoned that if the focus is placed on the concept of a debt connoted by the words ‘owe’ and ‘due and payable’, or on the concept of the legal relationship between the two parties connoted by the word ‘obligation’, the outcome of the inquiry whether a judgment debt was covered by any of these words, was to be determined by the nature of a judgment debt, that is whether or not such judgment debt created a new and independent debt or obligation.

[71] After considering the issues, the court found on the facts of that case, that the judgment obtained by the plaintiff against the company did not create a new debt. It found on the contrary that the plaintiff had to rely on the original principal debt, the bond, for their cause of action against the defendant and that the defendant was entitled to rely on the invalidity of the principal debt as a defence. The court felt reinforced in its conclusion by authorities to the effect that a creditor cannot preclude a surety from challenging the existence or enforceability of the principal debt by relying on a judgment he obtained against the principal debtor in an action to which the surety was not a party; and that such judgment would not operate as a defence of *res judicata* against the surety who was not a party to the action in which the judgment was obtained (at 440 B-C).

[72] In the light of those authorities, Mr. Marias urged upon this court to adopt the approach of the courts in South Africa and to determine the issue on the basis whether or not, as a matter of interpretation, the agreement of suretyship in this matter, evinces an intention of the parties to cover both the original cause of debt as well as the judgment debt.

[73] Counsel accordingly argued that on a properly interpretation of the suretyship agreement, the Rockview Investments’ liability is restricted to the obligation of the debtor in terms of clause 4.3 and that upon a proper construction of the suretyship there is no indication whatsoever of an intention by the parties for the suretyship to cover a judgment debt.

[74] Counsel finally submitted that winding-up order may not be resorted to in order to enforce a *bona fide* disputed debt. Counsel therefore submitted that the application should be dismissed with costs.

Submissions on behalf of the applicant

[75] Mr Kruger was in agreement with the legal position as advanced on behalf of the respondents that as surety, Rockview Investments can rely on any defence that is or would be available to the principal debtor provided that such a defence is one *in rem* and not one *in personam*. Counsel points out that there is no evidence produced by the respondent that it had attempted to oppose the application to make the Award an order of court whether in South Africa or in Namibia or to that it has brought an application to set aside the order or to appeal it. The order therefore stands.
[76] Mr Kruger thus submitted that the respondent is insolvent and is unable to pay its indebtness to the applicant. Accordingly it is liable to be wound-up.

[77] As regard the question whether the only purpose of a judgment is to enable the creditor to enforce his right to payment, in contrast to which was held in *Swadif matter (supra)* namely to regard the judgment as not novating the obligation, but rather as strengthening or reinforcing it, the SCA by Farlam JA in *MV 'Ivory Tirupati' & Another v Badan Urusan Logistik (aka Bulgo)* 2003 (A) 104 SCA, held that while acknowledging that it is a controversial question as to whether a judgment 'in all circumstances' creates a new and independent debt, the court stressed that: 'What is not controversial, however, is the proposition that a judgment furnishes the judgment creditor with a new cause of action on which he may sue in another court'. The court declined to consider the correctness of the interpretation of the *ratio decidendi* of the *Bulsara supra* decision by Collier JA in the *Metequity* matter (supra).

[78] There is no Namibian authority on this point, or at least I was not referred to such authority by counsel in their heads of argument. I could also not find such authority through my own research. I prefer the legal position as set out by Farlam JA in the *MV 'Ivory Tirupati'* matter (*supra*). I further considered it persuasive and I accordingly adopt it as good law to be applied in this jurisdiction. I say so for the reason that the question for decision before this court is whether the arbitral Award in favour of the applicant and made an order of this court, created Nottingham a new cause of action on which it is entitled to bring the present winding-up proceedings. In *MV Ivory Tirupati* the court approach the question of the basis of the facts the applicant had to prove in order to succeed.

[79] Adopting that courts approach in *MV Ivory Tirupati*, the facts which the Nottingham needs to prove in this matter in order to succeed are that:

79.1 A new judgment was made by a court of competent jurisdiction in its favour enforceable in another court;

79.2 The judgment is final and conclusive;

79.3 The judgment is not against public policy;

79.4 The judgment was not made in contravention of any public policy; and

79.5 The judgment is due.

[80] For those reasons this court is satisfied that the arbitral Award which was made an order of this court on 31 July 2015 gave rise to a new cause of action enforceable by the applicant against the respondent.

[81] I have therefore arrived at the conclusion that the arbitral Award was made a judgment on 31 July 2015 it created a new cause of action. The respondent's defences must thus fail.

[82] The remaining question for decision is whether on the evidence before court the applicant has made out a *prima facie* case for the grant of a winding-up order of the respondents, on the balance of probabilities[17].

[83] The legal position is that where the dispute is whether on the papers it appears that the applicant's claim is disputed by the respondent on reasonable grounds and *bona fide* grounds, in that event it is not sufficient that the applicant has made out a case on the balance of probabilities[18].

[84] In my judgment the applicant's claim in this matter is not disputed on reasonable grounds and or on *bona fide* grounds. I say this for the following reasons: In the light of my finding that the Award which was made a judgment of this court

[17] *Kalil v Decotex (Pty) Ltd* 1988 (1) A 943 Ad at 976-979.
[18] *Payslip Investments Holdings CC v TEC Ltd* 2001 (4) SA 781 (C).

constitutes a new cause of action, the grounds for defence advanced by the respondent are neither reasonable nor *bona fide*. I have further rejected Rockview Investments' further and alternative defences. Second, subsequent to the Award being made the judgment of this court and being communicated to the respondent in the form of a statutory demand, the respondent attempted to make an offer to settle the judgment debt in instalments. I have referred to authorities, earlier in this judgment to the effect that that such an offer constitutes an admission of liability. I have also found that the respondents' defence that the offer was protected by the 'without prejudice' rule is not sustainable based on good public policy to preclude such offer form disclosure. Furthermore, in view of my finding that the offer by both the Rockview Investments and VXK Investments constitute an admission of liability, it is my considered view, that all and any defence which would otherwise be available to VXK Investments and thus to Rockview Investments, under the circumstances of the present matter, would be in conflict with both VXK Investments and Rockview Investments, admission of liability by way of making an offer to pay-off the judgment debt in instalments. Had the offer been accepted by the applicant it might have amounted to undue preference of one creditor above the other creditors which would have amounted to an impeachable transaction.

[85] I further take into consideration that, if Rockview Investments was not insolvent and was in a position to pay the debt it would have done so by now. The applicant, correctly in my view, pointed out that the respondent assets, even it were to be liquidated into cash, would not be sufficient to pay off the judgment debt. Furthermore, on the respondent's own version, the income from the proceeds of rents of the immovable properties merely covers the expenses of maintaining such immovable property. In other words, there is no free residue produced by the rental of the immovable properties to cover the judgment debt owed to the applicant. The inevitable conclusion on the papers before me, is therefore that the respondent is unable to pay its debt.

[86] I have therefore arrived at the conclusion that the applicant has made out a case the respondents is unable to pay their debts and must therefore be wound-up into the hands of the Master of this Court.

[87] In the result I make the following order:

1. The respondents, VXK Investments Thirty (Pty) Ltd and Rockview Investment Seventy-One (Pty) Ltd are hereby placed under final liquidation order in the hands of the Master of this Court.

2. The Master shall exercise necessary statutory powers in appointing the liquidators.

3. The costs of this application shall include the costs of one instructed counsel and one instructing counsel, and such costs to be costs are in the liquidation.

4. The matter is removed from the roll and is regarded finalised.

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H Angula

Deputy-Judge President

APPEARANCES

APPLICANT:	T P Krüger instructed by Erasmus & Associates, Windhoek
RESPONDENTS:	J Marais (with him D Obbes) instructed by Fisher, Quarmby & Pfeifer, Windhoek