

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

HC-MD-CIV-MOT-REV-2020/00415

In the matter between:

ARCHIE GRAHAM	1ST APPLICANT
THURDERSTRUCK INVESTMENT 1 CC	2ND APPLICANT
THURDERSTRUCK INVESTMENT 2 CC	3RD APPLICANT
THURDERSTRUCK INVESTMENT 3 CC	4TH APPLICANT
THURDERSTRUCK INVESTMENT 4 CC	5TH TO 52ND APPLICANTS

and

MASTER OF THE HIGH COURT	1ST RESPONDENT
ALWYN PETRUS VAN STRATEN	2ND RESPONDENT
WILLIAM DE VILLIERS SCHICKERLING	3RD RESPONDENT

Neutral Citation: *Graham v Master of the High Court* (HC-MD-CIV-MOT-REV-2020/00415) [2020] NAHCMD 547 (27 November 2020)

CORAM: **MASUKU J**

Heard: 30 October and 6 November 2020

Delivered: **27 November 2020**

Flynote: Civil Procedure – Urgent Application – Rule 73 – Administrative Law - setting aside decision by Master of the High Court on judicial review, regarding the appointment of provisional liquidators in respect of 67 bonds of

security registered and accepted by the Master – Legislation - Insolvency Act 24 of 1936 and Companies Act 28 of 2004 – Points of law *in limine* raised by respondents – Non-joinder and lack of urgency – Question of non-joinder dealt with anterior, to the question of urgency – Non-joinder raised by 2nd and 3rd respondent upheld.

Motion Procedure – Master of the High Court – Powers and functions – Participation of the Master's office in legal proceedings depends on the functions of the Master implicated in the matter. The Master exercises judicial; quasi-judicial; advisory; discretionary and administrative powers – Participation and extent thereof dependent on nature of decision challenged – Where decision administrative in nature, Master's office may fully participate – Where judicial or quasi-judicial, not appropriate – Likely to affect impartiality of the Master's office.

Summary: The applicants in this matter approached the court on urgent basis to firstly set-aside 67 security bonds registered with the Master of the High Court in respect of certain entities, all debtors of Bank Windhoek and subsequent appointment of provisional liquidators in respect thereof. The relief sought is in two parts, namely an interim interdict, being Part A, and a substantive application for the review of the above-mentioned decision, in Part B. At the core of the application is the applicants' contention that the said security bonds were all lodged at times when there had not been winding-up orders or resolutions for voluntary winding-up, registered with the Registrar of Companies in respect of the said entities. This resulted in the appointment of provisional liquidators in terms of an all-embracing practice and principle called 'first come first served', by the Master.

The Master raised points of law *in limine*, namely, that the matter is not urgent and the non-joinder of BIPA. The applicants challenged the participation of the Master's office in the said proceedings, stating that its participation should be limited to submitting an explanatory affidavit and no further. The second and third respondent also raised non-joinder *in limine* in respect of Bank Windhoek and all liquidators in Namibia. Court upholding points of non-joinder raised by the second and third respondent.

Held, where there has been a change in instructions or approach previously indicated to the court and placed on record, the court and the other parties are entitled to be informed and notified officially of the change and in good time.

Held further, the question of non-joinder, as alleged by both respondents, should be dealt with anterior, even before the question of urgency is entertained.

Held further, the Master's office would be expected to fully participate in litigation and the extent to which that would be necessary, should depend on the nature of the power the Master exercises in relation to issues giving rise to litigation in question.

Held further, where the issues in contention touch upon judicial and quasi-judicial issues, the Master's office should generally desist from grappling with the issues on the merits and thus uphold the independence and impartiality of the office in that particular scenario.

Held further, the current matter is not one of the cases where the Master should be precluded from fully participating in the proceedings as the matter touches on her administrative functions, which are subject to judicial review.

Held further, the Master's contention that BIPA has a direct and substantial interest in the proceedings cannot be upheld.

Held further, the point of non-joinder of Bank Windhoek Limited and other liquidators in Namibia, taken by the 2nd and 3rd respondents, is meritorious and is thus upheld.

ORDER

1. The point of law *in limine* raised by the Respondents regarding the non-joinder of Bank Windhoek Limited and other Liquidators in Namibia is upheld.
2. The applicants are ordered to pay the costs consequent upon the employment of one instructing and two instructed counsel.

PART A

- 2.1 The first respondent must furnish the applicants with a list of All Liquidators in Namibia (“such Liquidators”) on or before the 02nd of December 2020.
- 2.2 The applicants, with the assistance of the Registrar of the High Court, must attend on effecting the joinder of Bank Windhoek and such Liquidators herein on the E-Justice system on or before the 11th of December 2020.
- 2.3 The applicants must cause the papers herein, limited to all pleadings and court orders, to be served on Bank Windhoek and such Liquidators on or before the 15th of January 2021.
- 2.4 The applicants to be granted leave by the above Honourable Court to also serve the Notice of Motion and this Court Order by way of substituted service to be published in The Namibian and Republikein on or before the 02nd of December 2020, calling on All Liquidators that have not been joined as afore-stated, to deliver a Notice of Request to be Joined, if he/she/it wishes to consider whether or not to oppose the application, by hand to the offices of the applicants’ legal practitioners on or before 09th of December 2020. If a such a Notice has been received by the applicants’ legal practitioners, the applicant must cause the papers, as per 1.3 above, to be served on such further Liquidators and Banks in Namibia that have not been joined as afore-stated on or before the 15th of January 2021.
- 2.5 Bank Windhoek, such Liquidators and further Liquidators must file its/his/her Notice to oppose on or before the 20th of January 2021.

2.6 Bank Windhoek, such Liquidators and further Liquidators must file its/his/her Answering Affidavit on or before the 29th of January 2021.

2.7 Applicants must file their replying affidavit, if so advised, on or before the 17th of February 2021.

2.8 The respondents reserve their right to supplement their answering affidavit in so far as it is necessary to deal with any allegations raised by the parties joined in their answering affidavit(s).

PART B:

3. The first respondent has failed to furnish the record of proceedings as was required in the Notice of Motion.
4. The first respondent must bring a condonation application, subject to compliance with Rule 32(9) and (10), on or before the 14th of December 2020.
5. The matter is postponed **25 February 2021** at **8h30** for a status hearing.

RULING

MASUKU J:

Introduction

[1] Serving before court for determination is an application filed under a certificate of urgency. There are numerous applicants in the matter, 59, to be precise. As one reads the papers, the relief sought essentially, is in two parts, namely an interim interdict, being Part A, and a substantive application for the review of a decision made by the Master of the High Court, Part B.

The parties

[2] The 1st applicant, is Mr. Archie Graham, a businessman resident in Windhoek. The applicant describes himself as a director of an entity styled Green Property Investment Hundred and One (Pty) Ltd, which was previously known as Jimmey Construction (Pty) Ltd, which later changed its name to Green Property in November 2019. Mr. Graham also describes himself as a creditor of Green Property. He further deposes that he is a trustee of Green Property's sole shareholder, Samonabra Property Trust (Trust Number T150/2014).

[3] That is not all. Mr. Graham also states that he is a sole member of the 2nd to 21st applicants, the 24th, 26th, 29th, 30th, 32nd, 33rd and 37th to the 51st applicants and the sole shareholder of the 31st applicant. Cited as co-applicants, besides the entities mentioned immediately above, are a number of other close corporations. I find it unnecessary to cite all the applicants due to the sheer high number. Their interest in the application will become evident as the ruling unfolds.

[4] The 1st respondent, is the Master of the High Court of Namibia, who is duly appointed as such in terms of s. 2 of the Administration of Estates Act, No. 66 of 1965. She is cited in the proceedings in her official capacity. The 2nd respondent is Mr. Alwyn Petrus Van Straten, an adult male insolvency practitioner. The 3rd respondent is Mr. Willem De Villiers Schickerling, also an adult insolvency practitioner. Both the 2nd and 3rd respondents practice together under the style 'Van Straten and Schickerling' in Windhoek.

[5] I will, for ease of reference, refer to the applicants as such. Where reference is made to a particular applicant, the reference will be so made according to the citation of that applicant in the papers. I will refer to the Master of the High Court as 'the Master'. In the latest amended notice of motion,¹ it became apparent that the relief sought is against Mr. Van Straten. I will accordingly refer to him as 'the respondent', unless there is need to refer

¹ See para [11] of this ruling below.

to Mr. Schickerling, in which case I will refer to the latter as 'the 3rd respondent.'

Basis of relief

[6] The application is largely predicated on the founding affidavit of the 1st applicant, Mr. Graham. He deposes that on 13 August, 4 and 14 September 2020, either or both 2nd and 3rd respondents lodged at least 67 security bonds with the Master. It is alleged that the aforesaid bonds were in respect of certain entities and persons who are listed in annexure 'FA4' and who were all debtors of Bank Windhoek, a financial institution and associated with the 1st applicant's family trusts.

[7] It is the applicants' case that the said security bonds were all lodged at times when there had not been winding-up orders or resolutions for voluntary winding-up, registered with the Registrar of Companies in respect of the said entities. The applicants therefor seek to have reviewed and set aside the Master's decision to employ an all-embracing practice and principle called 'first come first served' in respect of the appointment of provisional liquidators.

[8] This practice came for trenchant criticism by the applicants. The applicants say that in reverence to this principle, the Master makes a mechanical appointment of a provisional liquidator, depending on which provisional liquidator first lodged the bond of security in respect of any company or close corporation to be placed in winding-up. It is the applicants' further case that this practice has consequences that are both illogical and inconsistent with the provisions of s. 375 of the Companies Act, 28 of 2004, ('the Act').

[9] The applicants further lament that the Master's decision results in that office accepting security bonds without reference to or without considering the value of the assets to be administered by the liquidators. Furthermore, so contend the applicants, the practice breeds a situation in which liquidators file security bonds with the Master as soon as they suspect or speculate that a winding-up, either voluntary or by the court at the instance of a party, is in the

offing. I do not find it necessary, at this juncture, to traverse all the bases of the attack on the practice launched by the applicants. That may be more appropriate if the matter proceeds to a hearing in relation to the substantive application for review in terms of Part B aforesaid.

Relief sought

[10] In view of what the applicants apprehend is the implementation by the Master of a practice that is not in keeping with the provisions of the Act, they approached the court, as stated, on an urgent basis, seeking the following relief in the first instance:

‘1. That this application be heard as one of urgency and that non-compliance with any rules or forms prescribed in the Rules of this Honourable Court, as far as they relate to forms, time periods and service, be dispensed with and condoned in terms of Rule 73(3).

2. Pending the determination of the review proceedings instituted herewith in terms of Part B below:

2.1 the first respondent be interdicted from appointing the second and third respondents or any of their employees or associates as provisional liquidators or trustees on any of the entities or persons listed in annexure “FA4” to this notice of motion.

2,2 the first respondent be interdicted from making any appointments of provisional liquidators or trustees in respect of any of the entities and persons listed in annexure “FA4”, on the basis of security bonds lodged with the first respondent prior to orders for winding-up having been issued or resolutions for voluntary winding-up have been registered or sequestration orders have been issued; and

2.3 the second and third respondents, in as far as they have already been appointed by the first respondent as provisional liquidators in respect of the entities listed in annexure “FA4”, be interdicted from exercising any powers beyond section 392 sub-section (1), (a), (b), (c), (e) and sub-section (6) (f) of the Companies Act, 28 of 2004 and that the first respondent be interdicted from extending the powers of the second and third respondents beyond the powers set out above.

3. The costs of this part of the application be paid by such of the respondents who oppose the application, jointly and severally.

4. Granting the applicants such further and/or alternative relief as the Court may deem fit.’

[11] In Part B of the notice of motion, the applicants seek the following relief:

1. Reviewing, declaring as null and void and setting aside the first respondent's decision to apply a practice to receive, and to allow insolvency practitioners to lodge security bonds prior to a winding-up order having been made in terms of the Companies Act 28 of 2004 ("the Act") in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 208 of the Act, by reason of this decision being in conflict with the provisions of section 375 of the Act and unlawful.

2. Reviewing, declaring as null and void and setting aside the first respondent's decision to apply a practice to receive, and to allow insolvency practitioners to lodge security bonds, as provided for in section 56 of Act 24 of 1936 ("the Insolvency Act") prior to the election of a trustee by reason of this decision being in conflict with the provisions of section 56 of the Insolvency Act and unlawful.

3. Reviewing, declaring as null and void and setting aside the first respondent's decision to apply a practice to determine securities, or allow securities, to be provided by provisional or final liquidators in respect of legal or private persons in provisional sequestrations, in an amount unrelated to the full amount of the assets to be administered, by reason of this decision being in conflict with the provisions of section 375 of the Act and unlawful.

4. That the appointment by the first respondent of the second and/or third respondent as provisional liquidator/s in the winding-up of the following entity be reviewed and set aside:

4.1 Green Property Investment One Hundred and One (Proprietary) Limited (Master's reference number W22/2020) ("Green Property").

5. Directing that the first respondent appoint a suitable person as provisional liquidator in compliance with the provisions of section 375 of the Act and section 56 of the Insolvency Act in respect of the entities listed in paragraph 4 above.

6. Directing that all the costs of this application be paid by any of the respondents who oppose this application, jointly and severally.'

[12] It will be noted that in para [9] above, I used the words 'in the first instance' at the end of the sentence. I did so deliberately, for the reason that the applicants during argument, applied to amend and thus executed a 'panel beating' exercise to their notice of motion in relation to Part A. According to my records, the last notice of motion filed by the applicants and on the basis of which they sought relief, save for prayer 1, which remains unchanged, reads as follows:

'2.1 the first respondent is interdicted from making any appointments of provisional liquidators or trustees in respect of any of the entities or persons listed in annexure "FA4", on the bases of:

2.1.1 security bonds lodged with the first respondent prior to orders for winding-up having been issued or resolutions for voluntary winding-up have been registered or sequestration orders have been issued; and

2.1.2 security bonds being provided in amounts not equal to the aggregate assets to be administered by the liquidators or trustees lodged with the first respondent;

2.2 the decisions of the first respondent to appoint the second respondent as well as his appointments as provisional liquidator in the winding-up of the entities listed in annexure "A" hereto are stayed.

3. The first and second respondent, jointly and severally, are directed to pay the costs of the applicants, such costs to include the costs of one instructing and two instructed counsel, and in the case of the first respondent, on an attorney and client scale.'

[13] It becomes immediately plain from reading the amended notice of motion that no relief is sought against the 2nd respondent save the costs of the application. This comes, it would seem, very late in the day, when the latter would have instructed counsel and got his hands dirty, so to speak, in opposing this application. He will, whatever the outcome, in all fairness, be entitled to his costs for having been drawn on the coals of this application from the blowing of the first whistle in these proceedings, when it later transpired that no relief, in the main, is sought against him.

The respondents' opposition

The 1st respondent's case

[14] I will, in this regard, start with the position of the Master. It is fair to say that the Master adopted a somewhat discordant approach to the matter. When the application was first called, Mr. Khupe appeared on behalf of the Master. He informed the court that his instructions were not to oppose the granting of the relief sought in Part A of the application. Mr. Khupe, further stated that his instructions were to only file an explanatory affidavit by the Master in respect of the relief sought in Part B of the notice of motion.

[15] When the matter was called for argument on 6 November 2020, having been postponed from 30 October, 2020, the Master debunked her first stance. Without leave from court or notifying the other parties, the Master filed an affidavit opposing the entire application, Part A included. This opposition included the Master taking points of law *in limine*, including one on urgency and non-joinder of certain parties.

[16] I am acutely aware that every litigant has a constitutionally enshrined right to oppose or defend legal proceedings instituted against him or her. This includes officials of the State, such as the Master. The court must and does, however, take exception when officials like the Master, through their chosen counsel, give the court one word and then they turn around to do something totally different without any qualms or explanation for that matter as to the change of view or approach to the matter.

[17] In fairness, Mr. Khupe did mention on the first date of hearing that his office had not had sufficient time to consult with the Master. That notwithstanding, he was however unequivocal in his address that the Master did not oppose the relief in Part A. This initial stance resulted in the applicant having to recalibrate its approach to the matter, so to speak, including the prayers sought. When there was the unexpected *volte-face* by the Master, both the court and the applicants, in particular, were taken aback by this

sudden change. The applicant, in terms of the court order of 6 November, 2020, was to answer to any issues raised by the 2nd and 3rd respondents only. This was so because the Master had, as stated above, advised the court through counsel in open court that she does not oppose the relief sought in Part A. This behaviour is clearly unacceptable.

[18] Where there has been a change in instructions or approach previously indicated to the court and placed on record, the court and the other parties are entitled to be informed and notified officially of the change and in good time. The Master's about-face and the manner she handled this aspect is unacceptable and must not be repeated. Courts and other litigants must not be given signals that end up conflicting with the actions adopted subsequently. Words and actions of litigants must be in sync.

[19] I now turn to deal head on with the Master's opposition. The Master, Ms. Elsie Sophia Carolina Beukes, deposed to the opposing affidavit. First, she alleged that the matter is not urgent as the applicants failed to make out a case for urgency in terms of rule 73. In particular, the Master denied that the illegality in the appointment of the liquidators, as alleged by the applicants, renders the matter urgent.

[20] Furthermore, the Master took issue with the applicants' compliance with the requirements of rule 73(4)(b). It was her case that the applicants are incorrect in stating that they do not have substantial redress at a hearing in due course. Furthermore, it was the Master's case that the applicants do have adequate redress provided by the provisions of s. 378 of the Act. It was the Master's further case that the applicants could and should have availed themselves of that relief and that their failure to do so should count against them in this regard. I will deal with the relevant provisions in due course.

[21] The second point of law raised by the Master, relates to the non-joinder of the Board of the Business Intellectual Property Authority (BIPA). It was her assertion that the said Board, in terms of the Act, has power to consider and to make a determination on the decision of the Master sought to be impugned by the applicants. To that end, the Master took the view that the

Board of BIPA has a direct and substantial interest in the proceedings and that failure to join it to the proceedings, was accordingly fatal.

[22] The Master then turned to deal with the practice complained of, namely the 'first come, first served principle'. She explained how the said principle is applied. I do not think it is appropriate, considering the limited nature of the relief sought in Part A, to deal with the validity of the practice at this stage. That issue should, in my considered view, take centre stage when the court gets around to deal head on with Part B.

[23] The Master also questioned the applicants' compliance with the requirements of an interim interdict. She took the position that the applicants had merely paid lip service to the legal requirements to be met before the court can grant an interim interdict, which is the main relief sought by the applicants in Part A. It was the Master's case that the applicants had failed to place facts before court that entitle the court to exercise the discretion in the applicants' favour.

[24] The Master proceeded to plead over on the merits, dealing with the allegations made by the applicants in the founding affidavit pound for pound. Because of the limited nature of the relief sought, I do not find it necessary to deal with the allegations and counter-allegations in any greater detail. The present enquiry will be limited to a determination of whether the applicants are, in terms of the law entitled to the relief sought in Part A, namely, an interim interdict on a provisional basis, whilst awaiting the determination of Part B of the notice of motion.

The 2nd respondent's case

[25] The 2nd respondent made common cause with the Master that the applicants had failed to show that the matter is urgent and deserving of being dealt with in terms of the provisions of rule 73. This respondent further took issue with the relief sought in the notice of motion. He reasoned that there is no case made by the applicants that he is unfit to be appointed by the Master.

It was the 2nd respondent's further case that the applicants' case lacks rationality.

[26] It was the 2nd respondent's further contention that as he had been appointed by the Master, the horses had already bolted from the proverbial stable and that an interdict is not appropriate remedy as the decision sought to be challenged had already taken place.

[27] The 2nd respondent further took issue with the relief sought in para 2.2 prohibiting the Master from making appointments of provisional liquidators or trustees relating to the entities mentioned in 'FA4'. The effect of the granting of the order, contended the 2nd respondent, would result in no Namibian liquidator being appointed. Furthermore, the 2nd respondent could not be appointed regardless of the fact that he may have complied with the Master's procedure and to the letter. The relief sought, contends the respondent, is an abuse of the court's processes.

[28] The 2nd respondent further attacked the application on the basis that Bank Windhoek Limited, which is the main creditor in the matters under consideration, has not been joined to the proceedings. Furthermore, contended the 2nd respondent, other liquidators in Namibia, who stand to be affected by the orders sought by the applicant, have similarly not been joined. This, the 2nd respondent claims, is improper and that the application should not proceed until these interested parties have been joined and they partake, if so advised, in the proceedings.

[29] The 2nd respondent also took issue with the main contentions in the founding affidavit but as mentioned in relation to the Master, it would be inappropriate to deal with these issues at the present moment when regard is had to the interim relief sought. These may well be meaty issues, fit to be considered when the court ultimately deals with the review proper, as contemplated in Part B.

[30] Having covered what I consider to be the material issues raised by the respondents and which have the potential to affect the relief sought in Part A,

I proceed to determine the issues raised by the respondents above. In this regard, I am of the considered view that the question of non-joinder, as alleged by both respondents, should be dealt with anterior, even before the question of urgency. This is because if upheld, it would entitle the parties who have not been joined, to be joined so that they are accorded an opportunity to deal with all the issues that arise. In this regard, the parties not joined but entitled to be joined as of a matter of law, would have a right to deal with the issues arising, urgency included.

The Master's approach to litigation

[31] Before dealing with the issue of non-joinder, I find it appropriate at this juncture to first deal with a submission made by the applicants' counsel regarding the manner in which the Master handled the matter. The applicants' counsel relied on a judgment of this court in *Esau v The Director-General: Anti Corruption Commission*.²

[32] In that judgment, the court decried the active involvement of magistrates in proceedings before this court where their decisions and orders were sought to be impugned. The point taken in *Esau*, amongst others, was that a magistrate, who had issued a warrant of search, had not been joined in the proceedings. The court emphatically rejected the correctness of that approach and stated in unequivocal terms that judicial officers should not ordinarily be cited in matters over which they presided.

[33] It is only in matters, the court further held, where untoward conduct is attributed to judicial officers that they should be able to file affidavits and deal only in a limited manner, with the pernicious allegations made against them. In all other cases, the court held, magistrates are cited for formal purposes only and need not file affidavits dealing with the legal issues that arise.

[34] Mr. Potgieter, argued that the same position should apply to the Master in this case. As I understood him, the Master could and should only have filed an explanatory affidavit, confined to assisting the court in dealing

² 2020 (1) NR 123 (HC) p132-133 para 30-33.

with the contentious issues. The Master should not have, for instance, partaken in the purely legal issues of urgency, non-joinder etc. Is this position correct in so far as it relates to the office of the Master?

[35] I am of the considered view that the position adopted by the applicants' legal team in this regard is incorrect. I say so for the reason that they appear to be comparing apples with oranges. They lift the Master and place her office on the same pedestal as a judicial officer. That cannot be correct.

[36] When one has proper regard to the *Esau* judgment, it is clear, as foreshadowed above, that the issue arose in relation to judicial officers partaking in proceedings against litigants whose cases may in future serve before them. The issue was approached from the viewpoint of the independence and impartiality that should always exude the conduct of judicial officers. They should thus avoid adopting a position of active protagonists as that may affect their standing as arbiters and thus harm their independence and objectivity in the eyes of the officious by-stander.

[37] The Master is not, for the most part, a judicial officer, subject to the same constraints and prohibitions that affect judicial officers. In the *Esau* case, the court commented that it was unseemly for the magistrates, cited for formal purposes only, to partake for instance in the procedural issues of urgency and non-joinder, regard had to their especial positions as arbiters. Their role and involvement in the proceedings should be limited to dealing with matters that question their judicial impartiality and decorum and not more.

[38] To illustrate the point further, a Full Bench of this court had occasion, in the matter of *Tjirare v Chairperson of the Electoral Commission of Namibia*,³ the court commented adversely on the conduct of the Electoral Commission in its approach to the dispute. The court reasoned thus:⁴

³ (EC 2/2020) [2020] NAHCMD 283 (13 July 2020).

⁴ *Ibid* para [127] and [129].

[127] We are of the view that it is not within the power nor is it the function of the Commission to solicit legal opinions on behalf of political parties. By doing so, as it happened in this matter, the Commission compromised its independence and impartiality. It adopted a position, which effectively amounts to it taking sides with a political party, against elected candidates of the said political party. . .

[129] We are of the considered opinion that in maintaining its impartiality and independence, the Commission is in no different position than a judicial officer when his or her decision is challenged on review. It is not advisable that a judicial officer should join issue with those who happen to be challenging his or her decision and file opposing papers to defend his or her decision. In such a situation, we are of the view that like a judicial officer, in order to maintain its impartiality and independence, the Commission should simply abide by the decision of the Court.'

[39] It is important to mention that the Commission referred to above, is, in terms of s. 4(1)(a) of the Electoral Act, 1992, commanded to perform its power and functions 'independently of any direction or interference by any authority or any person'. This, it would appear, is the same tone of language that applies to judicial officers in terms of Art 78 of the Constitution of the Republic of Namibia.

[40] The office of the Master, on the other hand, is placed in a different category. It is expected, in appropriate cases, to litigate, for instance, in cases where errant executors deserve to be removed. It may, in some cases have its decisions challenged and in which case, it should be allowed the latitude to oppose the relief sought and to file papers in opposition, including points of law, where appropriate.

[41] More importantly, according to the learned authors, *Wiechers et Vorster*,⁵ the Master performs a range of multifaceted functions. The first category is judicial, and quasi-judicial functions. These relate, for instance, to acceptance and registration of Wills, the interpretation of Wills, the sale of immovable property and sale of immovable assets from an estate. Secondly, the Master performs an advisory function for instance to legal practitioners,

⁵ *Wiechers et Vorster, Administration of Estates*, Butterworths, Service Issue 6, 2003, 1-8 and 1-9.

trust companies and other professional administrators of estates. That is not all.

[42] The learned authors further state that the Master also exercises discretionary functions to enable the office to exercise a measure of flexibility in the administration process of estates and to resolve potential conundrums in the administration of estates. Last, but by no means least, the Master also performs administrative functions, which enable the office to make final decisions in given cases.

[43] Although the learned authors write in relation to the South African Administration of Estates Act, I am of the view that the pockets of power and functions referred to by the authors which are exercised by the Master's office in South Africa, apply probably with perhaps minor some modifications in this jurisdiction. I would accordingly hold that the classes of powers reposed in the Master in South Africa, generally apply to the Master's office in Namibia as well.

[44] It would appear to me therefor, that whether the Master would be expected to fully participate in litigation and the extent to which that would be necessary, should depend on the nature of the power the Master exercises in relation to issue giving rise to the litigation in question. Where the Master exercises an administrative function, such as in the instant case, which is not a judicial or quasi-judicial function, I am of the view that the Master should not be deprived of the right to participate hook, line and sinker in the litigation. If on the other hand, the matter relates to the exercise of judicial and quasi-judicial functions, it might be inappropriate for the Master to fully participate in the proceedings and to take points of law in her favour as she has done in the instant case.

[45] I would therefor subscribe to the view that the Master should, where the issues in contention touch upon judicial and quasi-judicial issues, generally desist from grappling with the issues on the merits and thus uphold the independence and impartiality of the office in that particular scenario. In this case, it is clear that the decision impugned by the applicants is

administrative in nature and is thus subject to review in terms of Art 18 of the Namibian Constitution.

[46] It would thus be improper to silence or take away the Master's voice in such proceedings as she is bound to explain to the aggrieved parties and the court what she did and why. If there are tactical and technical points that are open to her as a litigant, she should be entitled, in my considered view, to explore those to the fullest, barring as I said, abusing the processes of the court under the guise of explaining what she did and why.

[47] In conclusion on this issue, I am of the considered view that the current matter is not one of the cases where the Master should be precluded from fully participating in the proceedings as the matter touches on her administrative functions, which are subject to judicial review. I accordingly do not agree with the applicants on this issue.

Non-joinder

[48] As will have been apparent in the previous paragraphs of this ruling, both the Master and the respondent raised the issue of non-joinder. The Master raised it in relation to the BIPA Board. It is to that issue that I now turn.

Non-joinder of the BIPA Board

[49] The Master argued that the proceedings should not be allowed to continue without the applicants having joined the Board of BIPA and affording it an opportunity to deal with the matter. The law applicable to joinder has been articulated and is well settled in this jurisdiction.

[50] One of the leading cases on the subject is *Ondonga Traditional Authority v Oukwanyama Traditional Authority*⁶ where Miller AJ propounded the applicable principles as follows:

⁶ 2017 (3) NR 709 (HC).

'It is trite that when a person has an interest of such a nature that he or she is likely to be prejudicially affected by any judgment given in the action, it is essential that such a person be joined as an applicant or respondent. The objection of non-joinder may be raised where the point is taken that a party who should be before court has not been joined or given notice of the proceedings. The test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned. This test was applied in *Kleinhans v The Chairperson of the Municipality of Walvis Bay and Others*, where Damaseb JP at para 32 said:

"The leading case on joinder in our jurisprudence is *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). It establishes that it is necessary to join a party to litigation any person who has a direct and substantial interest in any order, which the court might make in the litigation. If the order, which might be made, would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion. Clearly, the *ratio*, in *Amalgamated Engineering Union* is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court, has a direct and substantial interest in the matter and should be joined as a party.'

[51] It must be mentioned at this juncture, that the above excerpt, is the standard against which all the contentions relating to non-joinder, raised by the respondents will be gauged. In so saying, the court cannot turn a blind eye to the following dictum by the Supreme Court in *Southline Retail Centre CC v BP Namibia (Pty) Ltd*⁷ where the court said in part:

'The Court held that the subtenants did not need to be joined, reasoning that in order for joinder to be necessary, "what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by a judgment of the Court." This crisp encapsulation of the test for a necessary joinder recognises that for joinder to be required the party concerned must have a legal, not merely a financial interest, which will be prejudicially affected by the proceedings. The bar is

⁷ Case No. SA 9/2009.

thus set quite high as the facts of *United Watch* illustrate'. See also *Minister of Trade and Industry and Others v Matador (Pty) Ltd.*⁸

[52] Regarding the non-joinder of the BIPA Board, which I shall, for ease of reference call "BIPA" in this judgment, Ms. Tjahikika argued that BIPA has a direct and substantial interest in the proceedings and the order that the court may make because it is the body to which the applicants' complaint had to be referred in the first instance, in terms of s 378 of the Act. It was her contention that the order sought by the applicant before this court is one BIPA is able to grant in terms of the Act.

[53] Section 378(1) of the Act grants a person aggrieved by the Master's decision to appoint a liquidator or refusal to accept the nomination of a liquidator to, within seven days from the date of appointment or refusal, request reasons for the Master's decision, which the latter should submit in writing to BIPA. The Master is required by subsection (2) of the said provision, to submit to BIPA the reasons in writing, together with any relevant documentation, information or objections. BIPA is then empowered to consider the Master's reasons together with any written representations made by the aggrieved party. It may thus uphold, confirm or set aside the decision of refusal as the case may be.

[54] In fairness, and as correctly pointed out by the applicants, there are no facts alleged by the Master in her affidavit on the basis of which BIPA, was alleged to be a necessary party. What the Master's legal representative submitted in argument, was that because the applicants had not complied with the provisions of s. 378 of the Act, referring the matter to BIPA, which in terms of the law has a right to deal with dissatisfaction with the Master's decisions when it comes to the appointment of liquidators, BIPA was a necessary party.

[55] I am of the considered view that the Master's contention in this regard cannot be upheld. I say so for the reason that there is no basis for alleging that BIPA has a legal interest in this matter, save that it would have dealt with

⁸ 2020 (2) NR 362 (SC) para 27.

it if the Master had complied with her obligations under the said provision.

The applicants attached a letter written to the Master dated 7 October 2020, requesting her to furnish her reasons for the decision to BIPA. She did not furnish those reasons, and she does not provide those reasons or any response to the applicants' request in the papers before court.

[56] It cannot be correct for the Master, in the circumstances, to try to hide behind the provisions of s. 378 when her office is the one that did not comply with the obligations to file reasons in terms of s. 378(2). The Master cannot seek to benefit from a wrong that she committed by alleging non-compliance with s. 378 when it is her office that thwarted compliance therewith by the applicants. On a mature consideration of the matter, it does not appear to me that BIPA has any direct and substantial interest in the matter, especially once the question has been placed before this court for determination. This is particularly so in the aftermath of the Master not complying with her obligations in terms of s. 378(2).

[57] It must be recalled that the bar is quite high regarding those who may be said to have a direct and substantial interest. In this wise, a mere commercial or financial interest will not do. I am not convinced that the relief sought may not be granted without affecting BIPA's interests, which are not in any event disclosed both in the papers and in argument. This point of law must, in my considered view, necessarily fail.

Non-joinder of Bank Windhoek Limited

[58] Mr. Heathcote, for the 2nd and 3rd respondents, argued that Bank Windhoek is a major creditor in the matters serving before court and that if the relief sought by the applicant was to be granted, it stands to prejudice Bank Windhoek because the effect would be to stay the appointment of liquidators and to have the matters stall while the relief sought in Part B is being determined. It was Mr. Heathcote's argument, as I understood him that in the interregnum, there would be no mechanism in place to ensure that the assets of the applicants, who face liquidation, are preserved.

[59] I am of the considered view that the argument by Mr. Heathcote cannot be faulted. There is no dispute that if the orders sought were granted, Bank Windhoek's legal interests would be affected as the appointment of provisional liquidators ensures that they take charge of the assets and ensure that they are preserved, together with collecting those assets, which may be in the hands of third parties. The longer the process is stalled, the more likely that damage to Bank Windhoek's interests will eventuate. They should therefore be granted an opportunity, as a major creditor to have their say in the possible granting of the proposed orders, albeit on a temporary basis.

Non-joinder of other liquidators in Namibia

[60] Mr. Heathcote also argued that the prayers sought by the applicant have a decisive detrimental bearing on all liquidators in Namibia, including those who are not involved in this matter. For instance, in the revised prayer 2.1, the applicants pray that 'the first respondent is interdicted from making any appointments of provisional liquidators or trustees listed in annexure 'FA4' on the bases of:

2.1.1 security bonds lodged with the first respondent prior to orders for winding-up orders having been issued or resolutions for voluntary winding-up have been registered or sequestration orders have been issued; and

2.1.2 security bonds being provided in amounts not equal to the aggregate assets to be administered by the liquidators or trustees lodged with the first respondent'.

[61] It is abundantly clear that the relief sought, as quoted above, if granted, affects all individuals and firms involved in liquidations in this Republic. Whatever the legality of the practice adopted by the Master may be, it is clear that there are persons and entities involved in liquidations that stand to be affected by the order sought. They have every right, in the circumstances, to join in the fray and to have their say on the relief sought by the applicant.

[62] This is because, if granted, the relief sought will change the entire landscape in the appointment of liquidators in the jurisdiction. A radical

departure from what is happening is in the offing if the relief is granted.

Those involved in this particular trade should therefor be heard and granted an opportunity to place their respective positions before court. Their interest, in my assessment, falls neatly within the four corners of the standard set out in the *Ondonga Traditional Authority* case, together with the other cases referred to.

Conclusion

[63] In the premises, I am of the considered opinion that the point of non-joinder taken by the 2nd and 3rd respondents, is meritorious. The parties referred to do have a direct and substantial interest in the relief sought. To proceed and grant the relief unbeknown to them, would be tantamount to vising an injustice upon them and their interests that the court should not countenance.

Order

[64] In view of the conclusion reached above, I am of the considered view that the following order would be condign:

1. The point of law *in limine* raised by the Respondents regarding the non-joinder of Bank Windhoek Limited and other Liquidators in Namibia is upheld.
2. The applicants are ordered to pay the costs consequent upon the employment of one instructing and two instructed counsel.

PART A

2.1 The first respondent must furnish the applicants with a list of All Liquidators in Namibia ("such Liquidators") on or before the 02nd of December 2020.

2.2 The applicants, with the assistance of the Registrar of the High Court, must attend on effecting the joinder of Bank Windhoek and such

Liquidators herein on the E-Justice system on or before the 11th of December 2020.

2.3 The applicants must cause the papers herein, limited to all pleadings and court orders, to be served on Bank Windhoek and such Liquidators on or before the 15th of January 2021.

2.4 The applicants to be granted leave by the above Honourable Court to also serve the Notice of Motion and this Court Order by way of substituted service to be published in The Namibian and Republikein on or before the 02nd of December 2020, calling on All Liquidators that have not been joined as afore-stated, to deliver a Notice of Request to be Joined, if he/she/it wishes to consider whether or not to oppose the application, by hand to the offices of the applicants' legal practitioners on or before 09th of December 2020. If a such a Notice has been received by the applicants' legal practitioners, the applicant must cause the papers, as per 1.3 above, to be served on such further Liquidators and Banks in Namibia that have not been joined as afore-stated on or before the 15th of January 2021.

2.5 Bank Windhoek, such Liquidators and further Liquidators must file its/his/her Notice to oppose on or before the 20th of January 2021.

2.6 Bank Windhoek, such Liquidators and further Liquidators must file its/his/her Answering Affidavit on or before the 29th of January 2021.

2.7 Applicants must file their replying affidavit, if so advised, on or before the 17th of February 2021.

2.8 The respondents reserve their right to supplement their answering affidavit in so far as it is necessary to deal with any allegations raised by the parties joined in their answering affidavit(s).

PART B:

3. The first respondent has failed to furnish the record of proceedings as was required in the Notice of Motion.

4. The first respondent must bring a condonation application, subject to compliance with Rule 32(9) and (10), on or before the 14th of December 2020.
5. The matter is postponed **25 February 2021** at **8h30** for a status hearing.

T. S. Masuku
Judge

APPEARANCES:

APPLICANTS	MR. Potgieter SC
Instructed by:	Danielle Lubbe Attorneys, Windhoek
1 st RESPONDENT	N. Tjahikika Of Government Attorney
2 nd and 3 rd RESPONDENTS	R. Heathcote SC
Instructed by:	Koep & Partners, Windhoek