REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00217

In the matter between:

BANK WINDHOEK LIMITED **APPLICANT**

and

FAIR VIEW PROPERTIES CC (REGISTRATION NO. 2002/1575) **RESPONDENT**

Case no: HC-MD-CIV-MOT-GEN-2022/00219

In the matter between:

BANK WINDHOEK LIMITED **APPLICANT**

and

REHOBOTH PROPERTIES CC (REGISTRATION NO. 2000/1028) **RESPONDENT**

Neutral citation: *Bank Windhoek Limited v Fair View Properties CC (Registration No. 2022/1575)* (HC-MD-CIV-MOT-GEN-2022/00217) *and Bank Windhoek Limited v Rehoboth*

Properties CC (Registration No. 2000/1028) (HC-MD-CIV-MOT-GEN-2022/00219) [2023] NAHCMD 7 (25 January 2023)

Coram: PARKER AJ
Heard: **8 November 2022**
Delivered: **25 January 2023**

Flynote: Close corporation – Winding up – In what cases – The respondent in each matter unable to pay debt – Debt was due and payable – Court concluded that on the facts and in the circumstances the applicant had made out a case for the winding up of both respondents.

Summary: Close corporation – Winding up – In what cases – The applicant (a commercial bank) brought winding-up applications to wind up two sister close corporations, namely, Fair View Properties CC and Rehoboth Properties CC – In case no. 2022/00217 Fair View Properties CC admitted under oath that the respondent had no defence to the applicant's claim for payment in a rescission application that has a direct bearing on, and relevant to, the instant winding-up application – Rehoboth Properties CC (the respondent in case no. 2022/00219) became indebted to the applicant in virtue of a series of loan agreements whereby the applicant loaned moneys to the respondent and an overdraft facility the applicant had extended to the respondent – Additionally, Rehoboth Properties CC concluded a written suretyship in favour of the applicant for the debts of Fair View Properties CC – Court found in each matter that the respondent failed to pay its debt when it became due and payable and when payment was demanded in terms of Act 26 of 1988 – Court found further that the respondents were deemed to be unable to pay their debts in terms of Act 26 of 1988, s 69(1) – Consequently, on the facts and in the circumstances of the case, the court concluded that the applicant had made out a case for the final winding-up of both respondents – For reasons appearing in the judgment the two matters, by agreement between the parties, were heard simultaneously.

Held, the use of the verb 'deemed' in the chapeu of s 69(1) of Act 26 of 1988 lays the intention of the Parliament which is this: If any of the circumstances contained in paras *(a)*, *(b)* and *(c)* of s 69(1) existed, it would be 'deemed', that is, considered,

that the corporation was unable to pay its debt; not that the corporation was in fact unable to pay its debt.

Held, further, Act 26 of 1988 does not require a nulla bona return to be filed with the court for the purposes of the winding up of a close corporation under the Act.

Held, further, the *ex debito justitiae* rule does not apply where the unpaid debt which is relied on is bona fide disputed by the respondent.

ORDER

---

1. The respondent in each matter is placed under a final order of liquidation in the hands of the Master.

2. The costs of both applications shall be the costs in the winding up of both respondents.

3. A copy of this order shall be served on the Labour Commissioner, the Minister of Finance, and the Receiver of Revenue.

4. The two matters are finalized and removed from the roll.

JUDGMENT

PARKER AJ:

[1] In the instant proceedings, the court is asked to determine two applications. Both concern the winding up of close corporations. The matters are Case No. HC-MD-CIV-MOT-GEN-2022/00217 and HC-MD-CIV-MOT-GEN-2022/00219. The parties in the first matter are Bank Windhoek Limited: Applicant and Fair View

Properties CC: Respondent. The parties in the second matter are Bank Windhoek Limited: Applicant and Rehoboth Properties CC: Respondent.

[2] Counsel urged the court to consider the two matters simultaneously. The reasons, which the court accepts, are these. In both cases the applicant is the same Bank Windhoek Limited. Ms Lardelli, counsel for the respondents in the two matters, described the two respondents as two sister Close Corporations. Indeed, significantly, on 11 October 2013 the Rehoboth Properties CC concluded a written surety in favour of the applicant for the debts of Fairview Properties CC.

[3] Above all, the facts in both matters converge in material respects. Furthermore, the same counsel, Mr Gibson, represents the applicant in both matters; and the same counsel, Ms Lardelli, represents the respondents in both matters. Moreover, the disputes will be disposed of fairly, justly, speedily, efficiently and cost effectively, if the matters are heard simultaneously. To do so conduces to the overriding objective of the rules of court as contemplated in rule 1(3) of the rules of court.

[4] For the sake of neatness in presentation, I shall consider Case No. HC-MD-CIV-MOT-GEN-2022/00217 under Part 1 and Case No. HC-MD-CIV-MOT-GEN-2022/00219 under Part 2. Under Part 3, I shall consider the order sought in respect of both matters.

PART 1: Case No. HC-MD-CIV-MOT-GEN-2022/00217

Introduction

[5] In this application the applicant seeks primarily an order that:

(1) the respondent be placed under an order of liquidation in the hands of the master; and

(2) costs of the application be the costs in the winding up of the respondent.

[6] The respondent has moved to reject the application. Mr Gibson represents the applicant, and Ms Lardelli represents the respondent. I am grateful for the helpful and comprehensive heads of argument of both counsel.

The merits of the case: Is the respondent unable to pay its debts, within the meaning of s 68*(c)*, read with s 69(1)*(c)*, of Act 26 of 1988.

[7] Naturally, the starting point in the determination of the present application is the interpretation and application of the relevant provisions of the Close Corporation Act 26 of 1988, in particular ss 66, 68 and 69 thereof. The applicant relies on the ground in s 68*(c)* of Act 26 of 1988. Section 68 provides:

> 'A corporation may be wound up by a Court, if -
>
> (c) the corporation is unable to pay its debts.'

[8] And for the avoidance of doubt, Act 26 of 1988 prescribes in s 69 in explicit terms the circumstances under which a corporation is deemed to be unable to pay its debt. The use of the verb 'deemed' is neither aleatory nor insignificant. The use of the verb 'deemed' in the chapeu of s 69(1) lays bear the intention of the Parliament which is this: If any of the circumstances contained in paras *(a)*, *(b)*, and *(c)* of s 69(1) existed, it would be 'deemed', that is, considered, that the corporation was unable to pay its debt; not that the corporation was in fact unable to pay its debt. This crucial connotation associated with the deeming clause in s 69(1) is often overlooked. I have discussed the deeming clause to reject any defence by the respondent that the applicant is required to set out facts which show that the respondent is *in facto* insolvent or 'actually insolvent', as Ms Lardelli put it.

[9] It follows as a matter of course that in the present proceeding, if I am satisfied that any of the circumstances referred to in s 69(1) has been proved to exist, then on the interpretation and application of s 69(1), read with s 68*(c)*, of Act 26 of 1988, the applicant shall have succeeded in its application to wound up the respondent; and would, accordingly, be entitled to judgment.

[10] On the papers and considering the ground relied on for relief by the applicant, the burden of the court is therefore to consider whether on the evidence the applicant has 'proved to the satisfaction of the court', as required by s 69 (1)*(c)*, that the respondent 'is unable to pay its debts'.

[11] The following relevant factual findings are undisputed. On the Fair View loan agreement, Roxanne Laurie Ju-Anne Plaatjie, the deponent to the respondent's answering affidavit, in a rescission application, which has a direct bearing on, and relevant to, the instant proceeding, stated clearly and unequivocally:

> 'I admit the non-payment of the bond instalments under Bank Windhoek account number ML7000238268 and therefore admit that Fair View has and had no defence to the respondent's (ie applicant in the instant proceeding) claim for payment.'

[12] Fair View Properties CC is the respondent in case no. 2022/00217. Put simply, the debt owed by the respondent to the applicant cannot, and has not, been disputed. In that regard, the respondent cannot be thankful of one of the exceptions to the *ex debito justitiae* rule. The *ex debito justitiae* rule is that an unpaid creditor is entitled *ex debito justitiae* to a winding-up order; and the exception apposite in this proceeding is that the rule does not apply where the unpaid debt which is relied on is bona fide disputed by the respondent.[1]

[13] Another such relevant factual finding is that the applicant did issue a statutory demand in terms of s 69(1)*(a)* of Act 28 of 1988, and despite the expiry of 21 days, the debt has remained unpaid. I accept Mr Gibson's submission that the respondent is commercially insolvent. And in terms of s 68*(c)*, read with s 69(1)*(a)* and *(c)*, of Act 26 of 1988, I am satisfied that the respondent is unable to pay its debts. In the result, the *ex debito justitiae* rule ought to apply.

Points *in limine*

[14] But that is not the end of the matter. In an attempt to postpone its funeral, as it were, the respondent has raised six points '*in limine*', which it hoped would assist it in postponing its funeral. It is to those points *in limine* that I now direct the enquiry.

---

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

Security bond and service on the Master of the High Court and Master's Certificate

[15] I find that the security bond has been filed with the Master. I accept Mr Gibson's submission that the security should be provided prior to the hearing and not prior to the launching of the application. The Master's Certificate may be filed even after hearing of the application but before judgment is delivered.[2] Consequently, the point *in limine* under this head is rejected.

Service of process: On the respondent and respondent's employees and their trade unions and on the Receiver of Revenue

[16] I find that the respondent has been duly served; and the application is properly before the court. I find further that the respondent has made no allegations as to the existence of any employees and whether they are unionised. It should be remembered, the requirement that such application be served on employees and trade unions is to protect any rights or benefits – whether preferential or not – that could enure in favour of employees upon the winding up of their employer. Service of process on the employees or trade unions is therefore not for the benefit of the employer respondent. The employees or their trade unions could do nothing in law – nothing at all – to stop the judicial winding up of the employer respondent.

[17] Considering the aforementioned purpose that service of process in such applications on employees or trade unions is to achieve, who better than the Labour Commissioner to receive such service, particularly when is in the instant matter, the respondent has made no allegations, as Mr Gibson submitted, as to the existence of any employees and whether they are unionised.

[18] The Labour Commissioner has the appropriate resources to enquire and determine whether the respondent has employees and whether they are unionised. And more important, the Labour Commissioner is well placed to advise any employees and trade unions free of charge as to their rights and benefits upon the winding up of the respondent. Besides, I find that the Receiver of Revenue and the Ministry of Finance have been served.

---

[2] *Van Wyk v Windhoek Renovations* [2021] NAHCMD 545 (23 November 2021).

[19] In that regard, I fail to see the reason for Ms Lardelli submission that although those public authorities have been served, they have not been cited. Such weak argument cannot take the respondent's case any further than where it is, namely, that the respondent has failed to resist the application on the merits. The applicant seeks no order against those public authorities; and what is more, an order to wind up the respondent will not be *brutum fulmen*, albeit the public authorities have not been cited but served with process. For completeness, the order granted in this proceeding shall be served on the served public authorities for their information. Accordingly, the points *in limine* under the present head is rejected.

Absence of nulla bona return in respect of disposable property

[20] Another attempt yet 'to avoid the inevitable', as Mr Gibson put it, is the respondent's frivolous averment that 'there is a complete absence of *nulla bona* return in the present application', as argued by Ms Lardelli. Ms Lardelli's argument can be rejected in these words of one syllable: Act 26 of 1988 does not require a *nulla bona* return to be filed with the court for the purposes of the winding up of a close corporation under Act 26 of 1988. Consequently, the point *in limine* under this head is rejected.

[21] Ms Lardelli accepts that this requirement is not peremptory in such application. But, according to counsel, it would assist the court in determining the application. As I have said previously, the ground on which the applicant relies for relief is s 68*(c)*, read with s 69(1)*(c)*, of Act 26 of 1988; and, as I have held previously they have made out a case for the relief sought.

[22] What is relevant and required is income sufficient to satisfy the debt owed by the respondent to the applicant. In its answering papers, the respondent makes out no case tendering to establish that there is any cash or viable cash flow available to satisfy the debt.

[23] I have found previously that the respondent is deemed unable to pay its debts. Despite respondent's allegations that it has been receiving rental on its property, none of those funds – if, indeed, they were received – were being paid to

the respondent to be used to satisfy the debt. Doubtless, as Mr Gibson submitted a liquidator will be in a better position to investigate to whom the funds have been paid or by whom they have been dissipated, and then recover those funds for the benefit of the creditors.[3]

Lis alibi pendens

[24] In her submission, Ms Lardelli lists a number of matters involving the parties, namely *Fair View Properties CC v Bank Windhoek Limited, Bank Windhoek Limited v Fair View Properties CC and Bank Windhoek Limited v Rehoboth Properties CC* that were withdrawn. Ms Lardelli laments – unjustifiably, if you asked me – that the matters were not prosecuted 'until their finality'.

[25] It does not lie in the province of the court to concern itself with Ms Lardelli's worry. If the applicant *qua* plaintiff withdrew matters without tendering costs that should not bother the court. The respondent *qua* defendant has an adequate remedy in terms of the rules of court. Consequently, the point *in limine* under the present head is rejected.

Disputed claim amount

[26] I fail to see how the point *in limine* under the present head can assist the respondent. As Mr Gibson submitted, all that the applicant is required to establish is a debt of not less that N$200. The debt proved to the satisfaction of the court is way higher than the prescribed minimum amount based on the loan agreement and the mortgage bond which are common cause between the parties. The respondent has not placed one iota of evidence before the court to dispute the debt which it owes to the applicant; neither does it allege that the debt is less than N$200. Moreover, it does not dispute that the debt is owed and payable. The evidence does not account for Ms Lardelli's submission that the amount claimed (Ms Lardelli calls it 'claim amount') is disputed: It is not about the debt being disputed simpliciter, as Ms Lardelli appeared to argue, but it is about the amount being disputed on bona fide and reasonable grounds for the court to take note of it and consider it.[4]

[3] See *Laicatti Trading Capital Inc and Others v Greencoal (Namibia) (Pty) Ltd* 2016 (2) NR 363 (HC) paras 31-32.
[4] *Klein v Caramed Pharmaceuticals (Pty) Ltd* footnote 1.

[27] The respondent has failed to show that the debt which it has acknowledged, as I have found, and upon which the applicant's claim is based, is disputed on bona fide and reasonable grounds. The fact that the exact amount is disputed does not affect the situation, unless there is proof that the indebtedness itself is disputed.[5] But the indebtedness is not disputed on bona fide or reasonable grounds or at all.

[28] With respect, I take no respectable look at the charge of unconstitutionality of the balance certificate. *Pace* Ms Lardelli, the certificate, as she herself acknowledged, is prima facie proof of indebtness.[6] Nobody says it is conclusive proof: It is not conclusive proof of indebtness. What Ms Lardelli fails to appreciate is that the respondent speaks with two voices. It makes bald denials of the amounts owed, and in the same breadth acknowledges its indebtedness to the applicant: See, for instance, the respondent's clear and unambiguous admission referred to in para 11 above. The respondent unjustifiably conflates the fact of indebtedness and the amount of indebtedness. And that cannot assist the respondent. The two are polar apart.

[29] As I say, the certificate of balance is prima facie proof of the amounts owed. But the respondent has only made bald denials of the amount owed. The bare denials cannot amount to bona fide and reasonable dispute of indebtedness. There is no sufficient and satisfactory proof of what in the respondent's view it owed the applicant. The prima facie proof has in that regard become conclusive. And there is nothing 'unconstitutional' about that.

[30] In any case, there are some 70 basic human rights protected by the Namibian Constitution. The respondent has failed to prove in what manner the balance certificate has violated all the 70 constitutional rights, or which one or which ones, in relation to it.[7] In other words, the respondent has failed to establish which constitutional right or rights – or is it all the 70 constitutional rights – it has approached the court to vindicate.

---

[5] *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others* 1976 (2) SA 856 (W) at 867F.
[6] See *Standard Bank of Namibia Ltd v Schameerah Court Number Seven CC and Others* [2018] NAHCMD 378 (27 November 2018) para 11.
[7] *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC).

[31] Without beating about the bush, I should say this. Such absurd, ill-conceived and self-serving constitutional attack should be condemned by the court. It is labour lost. It does not conduce to a development of our constitutional law which has served us well in promoting the vindication of constitutional rights of individuals. Such futile constitutional challenge is not permissible. And what Ms Lardelli overlooks is that the principle *pacta sunt servanda* is part of our law.[8] Indeed, what the respondent 'avers is not established; it becomes a mere irrelevance'.[9] In sum, the charge of unconstitutionality is unproven. It is roundly rejected.

Sabotage by the applicant

[32] The gravamen of the preliminary objection under this head is encapsulated in Ms Lardelli's submission thus: 'It is argued that the Applicant sabotaged the Respondent in that there had been wrongful, unauthorized and fraudulent or unlawful deductions on the respondent's accounts held with the applicant'.

[33] Doubtless, the allegations of fraudulent and unlawful conduct against a Bank are serious. The court, in fairness to both the respondent and the applicant, requires sufficient and satisfactory evidence from the accuser to prove what it alleges.

[34] The respondent defaulted in its payment obligations under a loan extended to it by the applicant under a loan agreement. On 3 May 2018 the applicant addressed a demand note to the respondent. Thereafter, on 1 April 2021 the applicant served a statutory demand on the respondent in terms s 69(10)*(c)* of Act 26 of 1988. Moreover, the respondent was presented with a certificate of balance indicating its indebtness to the applicant – at least to a prima facie degree. The court expected the respondent, if it was minded to act reasonably, to have dealt with those allegations at the relevant time, particularly before the expiry of the prescribed 21 days' time limit within which to pay the debt. There is no cogent evidence placed before the court tendering to show that it did. It waited until it has failed to pay the debt before slapping the applicant with such allegations.

---

[8] *Erongo Regional Council and Others v Wlotzkasbaken Home Owners Association and Another* 2009 (1) NR 252 (SC).
[9] *Klein v Caramed Pharmaceuticals (Pty) Ltd* footnote 1 para 13.

[35] On the evidence, I conclude that it is unsafe and unsatisfactory to put any currency on the unproved allegations. They are incapable of resisting the applicant's claim. Consequently, the preliminary objection raised under the present head is rejected.

[36] With all the points in limine rejected and the court having found that the applicant has made out a case for the winding up of the respondent, the next question to consider is whether final winding up of the respondent ought to be ordered.

PART 2: CASE NO. HC-MD-CIV-MOT-GEN-2022/00219

The Merits

[37] On the papers, I find that these relevant facts are undisputed; indeed, they are common cause between the parties. The respondent became indebted to the applicant in virtue of a series of loan agreements whereby the applicant loaned moneys to the respondent and an overdraft facility which the applicant extended to the respondent. The facility expired on 1 September 2017. The papers also indicate the total amount of the respondent's indebtedness to the applicant. The said amounts were confirmed by the certificate of balance dated 22 April 2022 issued to the respondent.

[38] Additionally, on 11 October 2013 the respondent concluded a written suretyship in favour of the applicant for the debts of Fair View Properties CC (the respondent in Case No. 2022/00217). And I have found in Part 1 above that Fair View Properties CC is indebted to the applicant in respect of the debts for which Rehoboth Properties CC stood surety in favour of the applicant. A statutory notice was served on the respondent. The 21 days' time limit within which to pay the debt have long passed, and no payment has been made.

[39] The debt owed by the respondent to the applicant cannot be disputed. On 14 March 2019 the respondent concluded a written settlement agreement in favour of the applicant. In the settlement agreement the respondent admitted that it was indebted to the applicant in the amount of N$21 516 511.28 as at 11 February 2019.

In terms of the settlement agreement, the respondent agreed to settle the debt by way of 12 equal monthly instalments of N$50 000 as from 27 May 2019, with the final payment on 7 May 2020; and the balance to be paid on or before 31 May 2020.

[40] On 1 April 2021 the applicant served a written demand on the respondent in terms of s 69(1)*(a)* of Act 26 of 1988. The statutory period of 21 days within which to make payment has long passed and the respondent failed to make payment.

[41] Having applied the principles and requirements under Act 26 of 1988 discussed in Part 1 above, I conclude that the respondent is deemed to be unable to pay its debts, within the meaning of s 68*(c)*, read with s 69(1)*(a)*, of Act 26 of 1988.

[42] The respondent bore the onus to establish that it was not insolvent. It has failed to so establish. The rental agreement relied on by the respondent cannot assist the respondent. The respondent has not shown that any funds derived from the rentals are being used to satisfy the debt. On the papers, the respondent has failed to establish sufficiently and satisfactorily details of other creditors of the respondent, the amounts owed to them and total arrears owed to them.

[43] What I said above about advantage to creditors under Part 1 applies with equal force to Part 2.[10] With regard to the present respondent, too, I hold that a liquidator is better placed to investigate relevant matters, in particular regarding where the funds from the rental are going and being misapplied.

Points *in limine*

[44] Under Part 2, too, the respondent raises the same points *in limine* as raised under Part 1. I discussed and rejected all of them. It serves no useful purpose to rehearse here the analysis and the conclusions thereanent. Those analysis and conclusions apply with equal force to the present Part.

[45] By a parity of reasoning, I find that the applicant has made out a case for the winding up of the respondent. Similarly, the next question to consider is whether a final winding up of the respondent under the present Part ought be ordered.

[10] See para 23.

PART 3: CASE NO. 2022/00217 and CASE NO. 2022/00219

Final or Provisional winding up of respondents

[46] Based on all these reasons, I conclude that the only impediment that could stand in the way of the applicant in both matters from obtaining a final winding-up order is if there had been no service on interested employees of respondent and their unions, if they were unionised. But, as I have demonstrated above, the applicant has surmounted that impediment by serving process on the Labour Commissioner. It follows that there is nothing preventing the court from granting a final winding-up order in both matters, as Mr Gibson argued. The applicant is entitled to such order.

[47] In the result, I order as follows in respect of Case No. 2022/00217 and Case No. 2022/00219:

1. The respondent in each matter is placed under a final order of liquidation in the hands of the Master.

2. The costs of both applications shall be the costs in the winding up of both respondents.

3. A copy of this order shall be served on the Labour Commissioner, the Minister of Finance, and the Receiver of Revenue for their information.

4. The two matters are finalized and removed from the roll.

_____

C PARKER

APPEARANCES:

APPLICANT:	C Gibson Instructed by Dr Weder, Kauta & Hoveka Inc, Windhoek
RESPONDENT:	L Lardelli Of Louis Karsten Legal Practitioner, Windhoek