REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Practice Directive 61

Case Title:		**Case No:**
		HC-MD-CIV-MOT-GEN-2023/00370
CLYDON NAMIBIA CC	APPLICANT	**Division of Court:**
		Main Division
and		**Heard:**
		31 February 2024
PROTECTION ENGINEERING NAMIBIA (PTY) LTD	1st RESPONDENT	
MASTER OF THE HIGH COURT OF NAMIBIA	2nd RESPONDENT	
Heard before:		**Delivered:**
Honourable Lady Justice Rakow		21 May 2024

Neutral citation: *Clydon Namibia CC v Protection Engineering Namibia (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2023/00370) [2024] NAHCMD 243 (21 May 2024)

Order:

1. That the first respondent be placed under provisional order of liquidation, into the hands of the Master of the above Honourable Court.

2. That a rule nisi be issued calling upon the first respondent and any interested party to show cause (if any) on or before 18 June 2024 why:

2.1 the first respondent should not be placed under final order of liquidation;

2.2 the costs of this application should not be costs in the winding-up of the first respondent.

Reasons for order:

RAKOW J:

Introduction

[1] The applicant is Clydon Namibia CC, a closed corporation incorporated and registered in Namibia under registration no 96/1074. The first respondent is Protection Engineering Namibia (Pty) Ltd, a company with limited liability incorporated and registered in Namibia under registration no 2021/0186 and the second respondent is the Master of the High Court of Namibia, duly appointed in terms of s 2(1) of the Administration of Estates Act 66 of 1965.

Background

[2] On 20 April 2022, upon request. the applicant provided to the first respondent a written quotation for the construction of an overhead line at Okatope PV plant. The quotation was accepted on the same day by Tobias Tsimandi, the director of the first respondent who signed the quotation and returned it to the applicant. This was the basis of a partly oral partly written agreement concluded between the applicant and the first respondent. The written quotation sets out the works that should be done with an estimated cost of N$1 130 000. The written quotation further required an upfront deposit of N$500 000. It also stated that the final payment had to be made within thirty days after completion of the work.

[3] On or about 20 or 21 April 2022 and at Okahandja alternatively Windhoek, the applicant represented by C de Wet Marias and the first respondent represented by its managing director Alastair Aspara concluded a supplementary written sub-contractor agreement. With that agreement the scope and value of the works increased. The works was completed and handed over to the first respondent on 23 May 2022 and the applicant also handed over its tax invoice to the first respondent. In the period thereafter, C de Wet Marias indicated that he followed up regarding payment with the first respondent's, Tobias Tsimandi and Alastair Aspara almost on a daily basis. He was eventually informed that they were suffering from cash-flow constrains and that was the reason for the delayed payment. They then proceeded and made payments of N$25 000 on 7 October 2022, N$25 000 on 31 December 2022, N$15 000 on 3 February 2023, N$10 000 on 17 March 2023 and another N$10 000 on 29 March 2023 and since then no further payments were made. The result is that the debt is at this stage outstanding for more than a year.

[4] The applicant caused its legal representative to write a letter of demand on 29 June 2023 to the first respondent in terms of s 349(1)(*f*) and 350(1)(a)(*i*) of the Companies Act 28 of 2004, demanding payment within 15 days of service of the letter of demand. This letter was served on 12 July 2023 on the registered address and place of business of the first respondent. No payment has still been made and the first respondent is indebted to the applicant in the amount of N$677 096.

[5] The first respondent opposes the application for liquidation on the basis that it has sufficient assets to cover the outstanding debt. It was explained on behalf of the first respondent that it is still awaiting a payment of N$904 549.80 payable to it from a project where it was a subcontractor who again subcontracted the applicant. The first respondent is further wholly Namibian owned with 11 full time employees and 10 part time employees. It has a wage bill of N$230 000 per month. It further owns assets to the value of N$1 293 137.13 and an inventory list was attached to the answering affidavit, listing the inventory belonging to the company, but without any valuations of these items. It further has 11 projects running which are to be completed between 30 November 2023 and 31 December 2024 and the value of these projects are to the tune of N$ 37 090 535.25.

The relief sought

[6] The relevant part of the notice of motion provides as follows:

1. That the first respondent be placed under provisional order of liquidation, into the hands of the Master of the above Honourable Court.
2. That a rule nisi be issued calling upon the first respondent and any interested party to show cause (if any) on/before a date and time allocated by the managing judge why:
    2.1 the first respondent should not be placed under final order of liquidation;
    2.2 the costs of this application should not be costs in the winding-up of the first respondent.

Condonation application

[7] On 24 November 2023, this honourable court gave an order directing the applicant to file its replying affidavit by no later than 1 December 2023. This was not done. Mr Jacobs explained that they in fact did file an unsigned replying affidavit on 1 December 2023, as their client was not

available to sign the said affidavit and filed a signed affidavit on the next court date which was 4 December 2023. There was however a notice of motion filed, indicating that a condonation application will be brought, but it was not accompanied by any affidavit and therefore not properly before court. There was further a request for directions for the judge to indicate whether it is necessary to file a condonation application, but this was filed on 15 December 2023 when the court was already on recess and the judge on leave and only came to my attention on 6 February 2024 when the respondent already indicated that it would be necessary for the applicant to file a condonation application.

[8] Rule 54(2) clearly states that where a court order-requires a party to do something within a specified time; or specifies the consequences of a failure to comply, the time for doing the act in question may not be extended by agreement between the parties.

[9] The applicant was still required to file its condonation application with court. As Masuku J stated in *Minister of Urban and Rural Development v Witbooi*[1] on rule 32(9) engagements between legal practitioners in condonation applications:

'(14) Accordingly, what the parties may do is to agree about the other party not opposing the application and advise the court accordingly. Having done so, the errant party should still file the application for condonation and which the court will decide, based on the merits. In this regard, although the view of the parties may be considered, ultimately it is the court that has to decide the matter, based on the papers before it. In the premises, it is strictly not necessary for parties to comply with rule 32(9) and (10) in applications for condonation.'

[10] The applicant therefore needed to seek condonation for the late filing of their replying affidavit as the one which was filed on 1 December 2023 was not signed and therefore not properly before court. The replying affidavit is therefore struck.

<u>The certificate of the Master</u>

[11] The respondent further raised the issue that no certificate in terms of s 351(3) of the Companies Act 28 of 2004 was filed. This section reads as follows:

'(3) Every application to the Court referred to in subsection (1), except an application by the Master in terms of paragraph (f) of that subsection, must be accompanied by a certificate by the Master, issued

[1] *Minister of Urban and Rural Development v Witbooi* (HC-MD-CIV-MOT-GEN-2019/00225 [2020].

not more than 10 days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding up.'

[12] This is however not the case. A certificate from the Master accompanied the application when it was initially set down on the first motion roll. The court finds that it is sufficient for the purpose of this application, as the matter did not proceed on the first motion court roll, but became opposed and was assigned to a managing judge.

The arguments by the legal practitioners

[13] It was argued for the applicant that the first respondent is deemed unable to pay its debts because it has not made payment to the applicant within 15 days of a written demand made under s 349(1)(*f)* read with s 350(1)(*a*)(*i*) of the Companies Act 2004 and that evidence shows that it is unable to pay its debts and should therefore be wound up. Further, that the defences put up by the first respondent is not defences at all. The acceptable business practice testified about when one waits for the main contractor to pay your debt before paying your subcontractors is in law no defence. It was also never the agreement between the parties.

[14] It was further submitted that the fact that the first respondent has other projects which payments are expected before 31 December 2024 indicates that these payments are not yet due. Also, the value of the equipment and tools are not supported by other evidence. The first respondent further did not disclose its annual audited financial statements to court, although this is usually done in liquidation applications to successfully avert being liquidated.

[15] For the first respondent, it was argued that the applicant in an impatient and vindictive manner, rushed to court and seeks an extreme and harsh remedy against the first respondent which is submitted stands to be dismissed in the interest of justice. The basis for non-payment is not that the first respondent has no money to pay the applicant or any other creditor for that matter, as a sound business principle, the applicant was informed to wait for the main contractor to settle both parties' invoices on the project.

The legal considerations and discussion

[16] In *Orion Cold Storage (Pty) Ltd v Deep Catch Trading (Pty) Ltd*[2] the court found that in opposition the first respondent would have to show that the applicant's claim is a bona fide dispute on reasonable grounds.

[17] In *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd*[3] the Supreme Court of South Africa referred to the *Badenhorst* rule after *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[4] and remarked as follows:

'(W)inding-up proceedings are not designed for the enforcement of a debt that the debtor-company disputes on bona fide and reasonable grounds'

[18] Brand J in *Payslip Investment Holdings CC v Y2K Tec Limited*[5] 2001 (4) SA 781 (C) at 783H-I formulated the test in determining indebtedness in these type of applications as follows:

'With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general.'

[19] The first respondent in the current matter has however not placed any factual dispute before court, it actually admitted owing the applicant the money so claimed. The first respondent however pointed to the fact that it was not yet paid by the main contractor. In the answering affidavit, it is alleged that there are various projects pending for the period November 2023 to December 2024,but there is no indication in what stage of completion these projects are and when payment for these projects can be expected. The first respondent further refers to a list of assets but does not include the financial statements of the business, neither any valuation for the items listed, in very general terms, providing the court with a factual basis for finding that it indeed is in a position to service its debts.

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[2] *Orion Cold Storage (Pty) Ltd v Deep Catch Trading (Pty)* Ltd (APPEAL 260 of 2013) [2014] NAHCMD 72 (5 March 2014).

[3] *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168 (24 November 2016).

[4] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T).

[5] *Payslip Investment Holdings CC v Y2K Tec Limited* 2001 (4) SA 781 (C) at 783H-I.

[20] The first respondent further alleged that it can pay all its debts and it is not just and equitable that it be wound up. It then also refers to the number of employees who are currently employed by the business as well as the fact that it is wholly owned by Namibians. In *Bank of Namibia v Small & Medium Enterprises Bank Ltd*[6] Prinsloo J referred to *Moosa NO v Mavjee Bhawan (Pty) Ltd and Another*[7] regarding the 'just and equitable' requirement:

'The ground relied upon for a final winding-up order is that . . . it is 'just and equitable' that the company should be wound up. That paragraph . . . postulates not facts but a broad conclusion of law, justice and equity, as a ground for winding up . . . . In its terms and effect, therefore, [it] confers upon the Court a very wide discretionary power, the only limitation originally being that it had to be exercised judicially with due regard to the justice and equity of the competing interests of all concerned.'

[21] In exercising my judicial discretion, I find that the first respondent can indeed not meet its obligations and that an order as prayed for is indeed merited. Although the first respondent had the opportunity to state its case, I am alive to the fact that other parties might have an interest in the matter such as the other parties the first respondent might have current contracts with and will therefore still issue a provisional order with a final return date as initially asked for in the notice of motion.

[22] In the result, I make the following order:

1. That the first respondent be placed under provisional order of liquidation, into the hands of the Master of the above Honourable Court.

2. That a rule nisi be issued calling upon the first respondent and any interested party to show cause (if any) on or before 18 June 2024 why:

2.1 the first respondent should not be placed under final order of liquidation;
2.2 the costs of this application should not be costs in the winding-up of the first respondent.

Judge's signature	**Note to the parties:**
E RAKOW	Not applicable

[6] *Bank of Namibia v Small & Medium Enterprises Bank Ltd.*2018 (1) NR 183 (HC).
[7] *Moosa NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at 136H.

Judge	
Counsel:	
Applicant(s):	**First Respondent(s)**:
SJ Jacobs (with him BJ Van Der Merwe (JNR)) Instructed by Van der Merwe-Greeff Andima Inc., Windhoek	N Halweendo Of Nafimane Halweendo Legal Practitioners, Windhoek