



**REPORTABLE**

CASE NO: SA 77/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**METROPOLITAN BANK OF ZIMBABWE LTD**

**First Appellant**

**WORLD EAGLE PROPERTIES (PTY) LTD**

**Second Appellant**

and

**BANK OF NAMIBIA**

**Respondent**

**Coram:** MAINGA JA, SMUTS JA and HOFF JA

**Heard:** 9 October 2018

**Delivered:** 23 October 2018

**Summary:** This is an appeal against the granting of a final winding-up order in relation to the Small and Medium Enterprise Bank Limited granted by the High Court on 29 November 2017. Reasons were provided on 4 December 2017.

The appellants are two minority shareholders and opposed the winding-up application brought by the Bank of Namibia (BoN) on the basis of non-compliance

with section 351 of the Companies Act 2004 (the Act) and provisions of the Banking Institutions Act 2 of 1998 (BIA).

*Condonation and reinstatement of appeal* - Appellants applied for condonation and the reinstatement of the lapsed appeal as required by rule 17(1) of the Supreme Court Rule for the late filing of their heads of argument. In opposition to this application, respondent claimed that the record was also lodged out of time. Appellants lodged the record on 2 March 2018, more than 3 months after the order was handed down on 29 November 2017 but within the required period if calculated from the date when the reasons were provided, namely 4 December 2017. Rule 8(2)(b) requires a record to be filed within three months of the date of judgment or order appealed against.

In relation to the record, the court found that the matter of *Wirtz v Orford* relied on by respondent in arguing the three month period ran from the date of the order is distinguishable and the rules of court have since been amended to require appellants to specify grounds of appeal in a notice of appeal (which was not the case at the time of the *Wirtz* judgment). This court found that the judgment appealed against was provided on 4 December 2017 for purposes of rule 8(2)(b). There was thus no need for application for condonation and reinstatement for the filing of the record.

Appellants argued that the late filing of their heads of argument was due to an erroneous belief by their legal practitioner that the date of hearing of their appeal was 9 November 2018 and not the actual date of 9 October 2018; hence their application for condonation for non-compliance with the rule and for reinstatement of the appeal in terms of rule 17(2).

In applying *Rally for Democracy and Progress v Electoral Commission of Namibia*, the court found that this explanation is not unreasonable, but this explanation only satisfies one leg of the two pronged enquiry. The court held that appellants need to satisfy the court that there are reasonable prospects of success in the merits of the appeal for condonation and reinstatement to be granted.

On the merits, appellants' argument focussed on a constitutional argument and procedural points of non-compliance with statutory provisions.

*Constitutional argument* - in support of their argument, appellants cited articles 95(j) and 98 of the Constitution. Appellants contended that, by virtue of the SME Bank's objective to serve small and medium enterprises which are under served by the existing commercial banking sector and to uplift previously marginalised and disadvantaged communities, it is of necessity for the statutory provisions in the winding-up process of the SME Bank to be interpreted in light of Arts 95(j) and 98 of the Constitution. Appellants further argued that, even though these principles of State policy are not legally enforceable by virtue of Art 101, they should inform the statutory interpretation of the provisions raised in the procedural attacks upon the exercise of BoN's powers under the BIA and that a winding-up application should only have been a last resort and that BoN was obliged to exhaust less far reaching remedies before doing so in view of the principles of State policy which enjoined government to pursue policies which raise the standard of living and in pursuit of economic growth and prosperity, as striven for by SME Bank.

*Held;* the Constitution and the values enshrined in it form the starting point in interpreting statutory provisions. An interpretation of a provision consistent with advancing and giving effect to the values enshrined in the Constitution is to be preferred where a statute is reasonably capable of such interpretation.

*Held that;* although Art 101 provides that, regard is to be had to the principles of state policy as cited by the appellants in the interpretation of laws, the provisions contained in BIA and the Act are not based upon the principles expressed in Arts 95(j) or 98. Those provisions accordingly do not apply.

*It is held that;* the BIA vests extensive supervisory and regulatory powers in BoN, including a wide range of powers directed at remedial action as well as the power to apply for the winding-up of any banking institution; and the Act provides for the incorporation, management and liquidation of companies.

*It is further held that;* BoN has a statutory duty to perform its supervisory functions and exercise its wide ranging powers in respect of banks in order to fulfil its important objective of maintaining a sound monetary, credit and financial system in Namibia and sustain the liquidity, solvency and functioning of that system. It does so in order to further another of its statutory objectives, namely the maintenance of monetary stability. A foundational principle of the Constitution embodied in Art 1(1) is that the Namibian State is founded upon the rule of law. This requires that BoN performs the statutory duties vested in it.

*Abuse of proceedings* – appellants maintained that the winding-up of the SME Bank should have been the measure of last resort after other remedial measures open to BoN had been exhausted and there was short service.

*The court held that;* this argument might have carried some weight if appellants had made out a case that the winding-up application constituted an abuse. Respondent, on its papers showed it was preceded by a series of steps, spanning several months. At each step appellants failed to provide satisfactory responses which led to BoN's winding-up application.

*The court further held that,* although the short service and notice of the application upon appellants would at first blush seem oppressive, the court was mindful of the fact that BoN was concerned about a run on SME Bank by depositors who were already calling up their deposits. Hence the matter being brought in the court *a quo* as an urgent application.

*It further held that;* the court *a quo* was correct to find that the SME Bank was insolvent and that it was just and equitable for it to be wound-up. The BoN's winding-up application did not constitute abuse of process.

*Non-compliance with Section 351(4) of the Act* – appellants argued that s 351(4), a peremptory provision of the Act requiring lodging of an application of winding-up first with the Master of the High Court before it is presented to the court, had not been complied with – which according to appellants results in the application being a nullity and invalid; and that the provisional order should have been discharged

even when a Master's certificate was issued on 4 July 2017 stating that the application was lodged. Reference to Wallis JA in *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* where it was found that 'that the requirements of lodging a copy of the application (and providing security) are peremptory'.

The issue to be determined in this instance was whether a less than perfect compliance results in the invalidity of the application (as is the case in this instance)?

*It is held that;* the consequence of strict non-compliance would need to be determined with reference to the scope and object of the provision in question – *Torbitt v International University of Management*.

*Held that;* the purpose of section 351(4) is to alert the Master to the application and provide that office with the opportunity to file a report to court upon it. Respondent had fulfilled this underlying purpose.

*It is held that;* the court a quo cannot be faulted for finding substantial compliance with section 351(4) and confirming the rule because a copy of a signed notice of motion and founding affidavit had been lodged when the application was presented to court. The annexures and every affidavit confirming facts stated in the founding affidavit were not lodged but were served a day later and a day before the application was first called in court. The Master was satisfied that this amounted to lodging the application for the purpose of s 351(4) and certified this and made a report to the court on the strength of the incomplete papers.

*It is further held that;* if the court a quo was dissatisfied with respondent's compliance with section 351(4), the consequence would be to postpone or refuse the application until compliance had occurred had the Master complained that the annexures and confirmatory affidavits had not been lodged.

*Non-compliance with section 58(5) of BIA – it is held that;* any concerns the appellants have with appointment of provisional liquidators is not relevant in determining whether or not a final order of winding-up should have been granted.

The court a quo was correct in finding that if the appellants were aggrieved with those appointments, it was open to them to take the appointments on review.

*The court thus holds that;* there is no merit in these grounds of appeal. Appellants' appeal enjoys no prospects of success and that condonation and reinstatement should not be granted.

*It is further held that;* because no issues of substance concerning the basis for winding-up were raised by appellants, and that their procedural points were without merit and merely served to delay the winding-up process of the SME Bank, costs in this court should likewise be borne by the appellants.

Condonation and reinstatement refused and the matter is struck from the roll with costs.

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### **APPEAL JUDGMENT (19 October 2018)**

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SMUTS JA (MAINGA JA and HOFF JA concurring):

[1] This appeal arises from a final winding-up order in relation to the Small and Medium Enterprise Bank Limited (SME Bank) granted by the High Court on 29 November 2017.

[2] The winding-up application was brought by the Bank of Namibia (BoN), Namibia's central bank as provided for in Art 128 of the Constitution and established under the Bank of Namibia Act, 8 of 1990 read with Act 15 of 1997. It is the respondent in this appeal.

[3] The first and second appellants are two minority shareholders in SME Bank, holding 30 and 5 percent of the shares respectively. They opposed the

winding-up application. The majority shareholder with 65 percent of the shares is the Government of Namibia which holds those shares through an entity, Namibia Financing Trust (Pty) Ltd. It did not oppose the winding-up application.

[4] The application was brought under s 351 of the Companies Act, 28 of 2004 (the Act) on the grounds, that:

- (a) SME Bank was insolvent as contemplated by s 1 of the Act read with s 58 of the Banking Institutions Act, 2 of 1998 (BIA) in that its liabilities exceeded its assets;
- (b) SME was in any event commercially insolvent in that it was unable to pay its debts as they fall due, as contemplated by s 350 (1)(c) and (2) of the Act read with s 349 (f); and
- (c) it is just and equitable that SME Bank be wound up as contemplated by s 349 (h) of the Act.

[5] The High Court granted a provisional winding-up order on 11 July 2017. The return date of 15 September 2017 was extended to 18 October 2017 after the appellants had filed further affidavits out of sequence. The final order was given on 29 November 2017, with reasons for the order provided on 5 December 2017.

[6] In those reasons, Prinsloo, J found that SME Bank was commercially and factually insolvent and unable to honour its commitments to its investors and creditors. The High Court also found that it was just and equitable for SME Bank to be wound-up. The court also found that the opposition to the application on constitutional grounds was unfounded and also dismissed opposition based upon non-compliance with s 351 of the Act and provisions in the BIA.

[7] The appellants' heads of arguments were filed out of time. This results in an appeal lapsing under rule 17(2) of the rules of this Court. The appellants have applied for condonation and for the reinstatement of the appeal. In opposition to that application, the point is taken by the respondent that the record was also lodged out of time. This was because the record was lodged on 2 March 2018, more than 3 months after the order was handed down on 29 November 2017 but within the required period if calculated from the date when the reasons were provided, namely 4 December 2017. Rule 8(2)(b) requires a record to be filed within three months of the date of judgment or order appealed against.

[8] Mr Corbett, who with Mr Obbes, appeared for the respondent argued that the three month period operates from the date of the order on the strength of the *obiter dictum* in *Wirtz v Orford* 2005 NR 175 (SC) at 194. But the facts in that matter are distinguishable and the rules have since been amended to require appellants to specify grounds of appeal in notice of appeal (which was not the case when the *Wirtz* judgment was given).

[9] The judgment appealed against was provided in this matter on 4 December 2017 for the purpose of this rule. (It would be a different matter if a party seeks to appeal against an order where no reasons are given.)

[10] There is thus no need for an application for condonation and reinstatement concerning the filing of the record.



### Condonation and reinstatement

[11] The appellants apply for condonation for the late filing of heads of argument and reinstatement of the appeal. The appellants' legal practitioner was under the mistaken belief that the date of hearing of their appeal was 9 November 2018 and not the actual date of 9 October 2018. Although there is an unfortunate lapse in the wording of rule 17(1) of the rules of this Court – by providing that heads of argument are to be filed 'not more than 21 days before the hearing' instead of 'not later than 21 days', the intention of the rule giver is clearly the latter meaning in the context of the wording of rule 17(1) construed as a whole and in view of the wording of the former rule 11 of the repealed rules of this Court. This is also how the rule is understood by practitioners and applied by this Court, namely that heads of argument of an appellant must be filed no later than 21 days before the date of hearing and that a respondent's heads are to be filed no later than 10 days before the hearing.

[12] The appellants thus correctly applied for condonation for the non-compliance with the rule as applied and for reinstatement of the appeal in view of the provisions of rule 17(2). A detailed explanation is provided for the mistaken belief. The respondent does not take issue that there was such an erroneous belief.

[13] Applying *Rally for Democracy and Progress v Electoral Commission of Namibia*,<sup>1</sup> this explanation is not unreasonable. But that only satisfies one leg of the two pronged enquiry. The appellants would also need to satisfy the court that there are reasonable prospects of success in the appeal for condonation and

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<sup>1</sup> 2013(3) NR 664 (SC) at paras 35 and 37.

reinstatement to be granted. The court accordingly heard full argument on the merits of the appeal.

### Factual background

[14] The respondent (BoN) is the regulator of the banking sector. It exercises wide powers of control and supervision over banks in order to fulfil its statutory objectives to maintain and promote a sound monetary credit and financial system in Namibia and to sustain the liquidity, solvency and functioning of that system.<sup>2</sup> Its statutory purposes also include the promotion and maintenance of monetary stability and conditions conducive to orderly, balanced and sustained economic development of Namibia.<sup>3</sup>

[15] Included in its wide powers under the BIA is requiring a banking institution (such as SME Bank) to acquire further capital funds as specified by BoN when there is a risk of existing capital funds of that bank being impaired.<sup>4</sup> BoN is also empowered to conduct examination(s) of the affairs of a bank to determine whether it is in a sound financial condition and whether the BIA and other statutes are being complied with.

[16] BoN is expressly authorised to apply for the winding-up of a bank.<sup>5</sup>

[17] The winding-up application arose in the following way. As its name would suggest, the SME Bank was set up as a banking institution with the laudable aim of serving small and medium enterprises, especially in rural or outlying areas

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<sup>2</sup> Section 3 of the Bank of Namibia Act, 1997.

<sup>3</sup> Section 3 of the Bank of Namibia Act, 1997.

<sup>4</sup> Section 28(4) of BIA.

<sup>5</sup> Section 58(4) of BIA.

where businesses of that kind were underserved by the existing commercial banking sector.

[18] Its shareholders comprised the Government with its 65 percent stake and the appellants which are both Zimbabwean corporate entities.

[19] During August 2016, SME Bank's external auditors had concerns about investments totalling N\$196 million by SME Bank with a South African entity called Mamepe Capital (Pty) Ltd (Mamepe) and drew these concerns to the attention of BoN's Banking Supervision Department. BoN's Director of Banking Supervision sought and obtained documentation from SME Bank relating to these investments. Indications were initially that these investments were placed by Mamepe with VBS Mutual Bank Limited (VBS), also in South Africa. The investment not only exceeded the approval limit of SME Bank's Chief Executive Officer (and required board approval which had not been given), but the explanations by SME Bank's management of the further placement to VBS Mutual Bank were unsatisfactory.

[20] Further investigations by BoN officials revealed liquidity challenges at SME Bank and a targeted inspection was conducted commencing 26 September 2016. By mid-December 2016, no proper confirmation could be established from SME Bank of the investments made with Mamepe and VBS. BoN calculated that if the investments were lost, SME Bank was insolvent or at least likely to become insolvent on the strength of capital adequacy returns filed by SME Bank.

[21] The management and board of SME Bank were entirely unable to provide satisfactory answers to BoN for the predicament SME Bank found itself in. BoN

ultimately assumed control of SME Bank from 1 March 2017 under s 56 of BIA. After assuming control of SME Bank, enquiries continued concerning the investments which showed that earlier information provided by SME Bank's management had been contradictory and questionable. Further enquiries revealed that of the allegedly invested funds in South Africa totalling N\$199,7 million, only an amount of N\$32.7 million was with Mamepe and that N\$167 million was paid into accounts of other beneficiaries and not placed with VBS, contrary to earlier statements by SME Bank's management. Despite demand for payment after maturation dates of investments exceeding N\$88 million, no amounts were returned by Mamepe until the provisional winding-up application was lodged in July 2017. Thereafter no sums were received by the provisional liquidators until the return date of 18 October 2017, despite a further maturity date arising in the interim.

[22] Prior to applying for the winding-up of SME Bank, BoN on 17 May 2017 required SME Bank's shareholders to acquire further capital to restore its solvency. This was because BoN found that the investments in Mamepe and VBS were unsound and held the view that SME Bank was insolvent.

[23] The majority shareholder, being the Namibian Government declined to recapitalise the SME Bank and informed BoN to that effect. The appellants, although expressing a willingness to do so, did not properly address what steps they would take on this issue either prior to the winding-up application or in their lengthy opposing affidavit after the provisional order was granted.

Proceedings before the High Court

[24] The appellants were provided with very short notice of the winding-up application and were only able to raise procedural points in opposition. These were dismissed and the provisional order was granted and the appellants thereafter filed their opposing affidavit.

[25] Although they denied that the investments with Mamepe and VBS were unsound, little contrary factual material was provided concerning these investments. Nor was factual material placed before the court displacing BoN's concerns about the commercial solvency of SME Bank and its lack of liquidity and in opposition to the grounds for the winding-up.

[26] On the extended return date the thrust of the appellants' opposition centred on a constitutional argument and procedural points of non-compliance with statutory provisions.

[27] The High Court found that the SME Bank was commercially and factually insolvent and unable to honour its commitments to its investors. The court also found that the substratum of the bank had disappeared and that it was also just and equitable that it be wound-up.

[28] These key findings would not appear to be placed in issue by the appellants in this appeal. This was confirmed in oral argument by Mr Bishop who, together with Mr Namandje, appeared for the appellants. Mr Bishop said that the appellants were not in a position to dispute the insolvency of the SME Bank as they did not have the information at their disposal to do so as BoN had taken over control of SME Bank in March 2017. They instead persisted with the constitutional and

procedural points and argued that the High Court was precluded by these points from granting an order winding-up SME Bank and should have discharged the provisional order.

### Constitutional argument

[29] Mr Bishop correctly characterised the appellant's opposition to the winding-up as procedural. The appellants in their answering affidavit and in argument before the High Court and in written argument in this court relied upon Arts 95(j) and 98 of the Constitution in support of their opposition to the winding-up of SME Bank. Mr Bishop explained that the appellants were not seeking to invoke a fundamental right protected by the Constitution but, as I understood the argument, asserted that the statutory provisions are to be interpreted in the light of those provisions of the Constitution. This was because SME Bank had as its objective serving small and medium enterprises which were underserved and particularly those in outlying rural areas and thus concerned with the upliftment of previously marginalised and disadvantaged communities.

[30] Article 95(j) enjoins the State to promote the welfare of people by, amongst others, raising the standard of living of the Namibian people whilst Art 98 defines Namibia's economic order as having the objective of securing economic growth, prosperity and a life of human dignity for all Namibians. Even though these principles of State policy are not legally enforceable by virtue of Art 101, Mr Bishop argued that they should inform the statutory interpretation of the provisions raised in the procedural attacks upon the exercise of BoN's powers under the BIA and that a winding-up application should only have been a last resort and that BoN was obliged to exhaust less far reaching remedies before doing so in view of the

principles of State policy which enjoined government to pursue policies which raise the standard of living and in pursuit of economic growth and prosperity, as striven for by SME Bank.

[31] The Constitution and the values enshrined in it form the starting point in interpreting statutory provisions. An interpretation consistent with advancing and giving effect to the values enshrined in the Constitution is to be preferred where a statute is reasonably capable of such interpretation.<sup>6</sup>

[32] The principles of State policy are however not legally enforceable as is spelt out in Art 101 which provides:

**'Application of the Principles contained in this Chapter**

The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.'

[33] Recourse to these principles may arise in the interpretation of laws based upon those principles. The BIA and the Act are however not based upon Arts 95(j) or 98. The BIA is enacted to empower BoN to control, supervise and regulate banking institutions to protect the interests of persons making deposits with those institutions, as is spelt out in its long title. The BIA vests extensive supervisory and regulatory powers in BoN, including a wide range of powers directed at remedial action as well as the power to apply for the winding-up of any banking institution. The Act provides for the incorporation, management and liquidation of companies. It follows that the principles of State policy do not arise in the interpretation of the

<sup>6</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004(4) SA (CC) 490 at para 72.

BIA and the Act given that they are not based upon those principles. Quite apart from not applying, the principles relied upon would in any event find greater application in ensuring bank supervision under BIA to safeguard hard earned savings of people and enterprises.

[34] BoN has a statutory duty to perform its supervisory functions and exercise its wide ranging powers in respect of banks in order to fulfil its important objective of maintaining a sound monetary, credit and financial system in Namibia and sustain the liquidity, solvency and functioning of that system. It does so in order to further another of its statutory objectives, namely the maintenance of monetary stability. A foundational principle of the Constitution embodied in Art 1(1) is that the Namibian State is founded upon the rule of law. This would require that BoN performs the statutory duties vested in it.

#### Abuse of proceedings?

[35] Mr Bishop argued that the winding-up of a bank by BoN should be the measure of last resort after exhausting other remedial measures open to BoN. This argument may carry some weight if a case were made out that the winding-up application constituted an abuse. In my view this was not remotely established. It was preceded by a series of steps, spanning several months, starting with formally seeking explanations for the investments. When those were unsatisfactory, the enquiries were escalated to the board, eliciting a further unsatisfactory response. Examinations were conducted and BoN thereafter took control of the SME Bank through its appointees. When the situation deteriorated further as depositors sought repayment of investments, BoN called upon the shareholders to



recapitalise SME Bank. When the Government declined to do so and the appellants were unable to do so, the winding-up application was brought.

[36] The very short service and notice of the application upon the appellants would at first blush seem oppressive but BoN was concerned about a run on SME Bank by depositors which were already starting to call up their deposits. BoN thus decided to approach the High Court as a matter of urgency.

[37] The grounds for winding-up are not in essence disputed. The High Court correctly found that SME Bank was insolvent and also that it was just and equitable for it to be wound up, particularly given the extent public funds invested in SME Bank. Those findings cannot be faulted. Not only was it not established that the winding-up application in any way constituted an abuse, it would seem to me that BoN acted properly in exercising its statutory powers in bringing the application, particularly after the majority shareholder, the Government understandably declined to recapitalise the Bank, in view of what amounts to at the very least serious mismanagement and possibly worse and a comprehensive failure of corporate governance on the part of SME Bank.

[38] I turn to the specific complaints of statutory non-compliance raised by the appellants.

#### Section 351(4) of the Act

[39] Mr Bishop argued that s 351(4) had not been complied with, resulting in the application being a nullity and that the provisional order should have been discharged for this reason. Section 351(4) provides:

‘Before an application for the winding-up of a company is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein must be lodged with the Master.’

[40] When the winding-up application was first called on 6 July 2017, the point was taken by the appellants that this provision had not been complied with. This notwithstanding the fact that the Master had prior to the hearing and on 4 July 2017 not only filed a certificate to the effect that sufficient security had been given as required by s 351(3), but in that certificate further stated:

‘A copy of the application has been lodged with me. I have nothing further to report to this Honourable Court.’

[41] The point was taken on behalf of the respondents that the return of service indicated that the winding-up application was served on the Master on 5 July 2017 whilst her certificate in terms of s 351(3) and (4) was dated 4 July 2017. The appellants argued that s 351(4) is peremptory and that non-compliance is visited with invalidity of the application.

[42] The court observed that the application had been filed with the Registrar at 10h32 on 4 July 2017 but that it was not clear at what time the application was lodged with the Master. As the Master had filed her certificate on 4 July 2017 certifying lodgement, the court inferred that the application had been lodged with the Master by that date and that it would be speculative to consider where the application was first filed in the absence of contrary factual matter. After referring to authority, the High Court held that in the absence of times specified for the respective filings, it would be speculative to find that there had been non-

compliance with s 351(4) and in any event found that there had been substantial compliance with the subsection, given the terms of the Master's certificate dated 4 July stating that the application had been lodged.

[43] The court dismissed the point and, after subsequently hearing further argument, granted a provisional winding-up order.

[44] This point, having been determined, was not raised in the answering affidavit deposed to on 22 August 2017.

[45] BoN's replying affidavit was subsequently deposed to on 11 September 2017. On the return date and entirely out of sequence, the appellants however sought to file a further affidavit on this issue on 15 September 2017. In this affidavit, a legal practitioner acting for the appellants stated that he attended upon the Master's office on that date to examine the timing of the lodging of the application on the Master on 4 or 5 July with a view to raising this point yet again. Understandably the official in the Master's office could not remember the exact time the application had been lodged but recalled being approached early on the morning of 4 July 2017 for a certificate to be issued under s 351(3) and said the application was at that stage unsigned and that a duly signed application was formally served on 5 July 2017.

[46] These affidavits were inexplicably not accompanied by an application to receive them. Nor was there any explanation provided as to why affidavits to this effect could not have been provided earlier on.

[47] The return date was extended to enable the respondent to deal with the belated allegations made about the sequence of lodging the application upon the Master. A further affidavit by BoN's legal practitioner revealed that an unsigned copy of the application was lodged with the Master on 3 July already. This was done for the purpose of alerting the Master to the application as a forerunner to providing security. On the following morning at 08h00 a duly signed notice of motion and founding affidavit were lodged, but without annexures and confirmatory affidavits as the latter had not been deposed to as yet. BoN's bond of security was lodged at about 08h30 on 4 July 2017 and the Master's certificate confirming this was provided later that day which included her statement to the effect that a copy of the application had been lodged and that there was nothing further to report. The full application was served by the Deputy Sheriff on the Master on 5 July 2017.

[48] Although there was no application for the receiving of the further affidavits and despite having dealt with this point prior to granting the provisional order, Prinsloo, J was prepared to take the further affidavits into account and proceeded to find no reason to reverse her earlier decision, having heard argument on the question that, because the confirmatory affidavits and annexures to the founding affidavit were not lodged when the application was lodged with the Master on 4 July 2017, s 351(4) had not been complied with and the rule should be discharged for that reason.

[49] Prinsloo, J pointed out that although not all annexures and none of the confirmatory affidavits were attached, the Master had accepted that the application had been lodged and issued her certificate. This served as prima facie proof of

compliance with s 351(4). The court further found that the objectives of the Act had been met and found that any shortcomings did not invalidate the application.

[50] The appellants appeal against this finding and argue that there was non-compliance with s 351(4) and that the entire application is a nullity as a consequence.

#### Principles of interpretation statutes and text

[51] The approach applicable to the construction of text was recently summarised by this court<sup>7</sup> with reference to an earlier decision of this court which had in turn followed recent trends in both England and South Africa:

‘39. This court in *Total Namibia v OBM Engineering and Petroleum Distributors*<sup>8</sup> recently referred to the approach to be followed in the construction of text and cited the lucid articulation by Wallis JA of the approach to interpretation in South Africa in *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>9</sup>.

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be

<sup>7</sup> In *Namibia Association of Medical Aid Funds and Others v Namibia Competition Commission and another* 2017 (3) NR 853 (SC) at paras 39-41. See also *Claude Bosch Architects v Auas Business Enterprises Number 123 (Pty) Ltd* 2018 (1) NR 155 (SC).

<sup>8</sup> 2015 (3) NR 733 (SC) at paras 17-20.

<sup>9</sup> 2012 (4) SA 593 (SCA) at para 18.

weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.”

40. In the *Total* matter, this court also referred to the approach in England<sup>10</sup> and concluded:<sup>11</sup>

“What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.”

41. To paraphrase what was stated by this court in *Total*, the approach to interpretation would entail assessing the meaning of the words used within their statutory context, as well against the broader purpose of the Act.’<sup>12</sup>

[52] As in both the *Claud Bosch* as well as the *Medical Aid Funds* matters, the context in this matter is the legislation in question and its purpose, and in particular Chapter 14 of the Act which deals with winding-up of companies and the purpose of lodging the application with the Master prior to the matter proceeding to court.

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<sup>10</sup> As set out by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 – 913.

<sup>11</sup> *Total* para 19.

<sup>12</sup> At para 42.

[53] Section 351 sets out requirements and the procedure to be followed in applications to wind-up companies. Subsection (1) essentially addresses who has the standing to bring such applications. Subsection (2) expands upon the requirements for the standing of a member. Subsection (3) requires that an application must be accompanied by a certificate by the Master to the effect that sufficient security has been given for the costs of the application and administering the company until a provisional liquidator has been appointed. Subsection (4) requires that a copy of the application must be lodged with the Master before an application is presented to court. Finally s 351(5) authorises and empowers the Master to report to the court:

‘any facts ascertained by him or her which appear to him or her to justify the court in postponing the hearing or dismissing the application and must transmit a copy of that report to the applicant or the agent of the applicant and to the company.’

[54] The purpose of the requirement of lodging the application upon the Master prior to its presentation to court is plainly to afford the Master adequate opportunity to make a report as contemplated in s 351(5), given the centrality of the Master’s office in the winding-up process. In discussing the rationale behind the equivalent provision in South Africa, Wallis, JA in *E B Steam Company (Pty) Ltd v Eskom Holding Soc Ltd*<sup>13</sup> of the Supreme Court of Appeal (SCA) said:

‘As the Master is the person who will have to oversee the winding-up there are obvious reasons for ascertaining in advance whether the Master is aware of reasons why a winding-up order should not be granted.’<sup>14</sup>

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<sup>13</sup> 2015 (3) SA 526 (SCA).

<sup>14</sup> At para 24.

One such reason, referred to by Mr Bishop, is that a company may have already been placed under a provisional winding-up order.

[55] This is the overall context in considering the effect of not strictly complying with the requirement in s 351(4).

[56] The *E B Steam* matter concerned the effect of the failure to comply with a different provision [s 346(4A)(a)] of the South African Companies Act<sup>15</sup> which requires that applications for winding-up are to be furnished to employees of the company whose winding-up is sought.

[57] Although the remarks in the judgment are thus *obiter*, the careful analysis of s 346 of that Act – the equivalent of s 351 of the Act – is instructive.

[58] The court in *E B Steam* referred to the legislative history and the purpose of introducing the requirement of service of a winding-up application on employees - being for the protection of the interests of those employees. The court held that the provision is to be construed in the light of that purpose – and not as providing a technical defence to their employer to invoke to delay or postpone a winding-up order.<sup>16</sup>

[59] In the course of his analysis, Wallis, JA referred to the requirement of lodging the application with the Master in similarly worded provision in s 346. He firstly referred to authority that ‘presenting’ to the court meant when the application is lodged with the Registrar. I accept that this also reflects the position in Namibia.

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<sup>15</sup> Act 18 of 1973.

<sup>16</sup> At para 7 – 8.



It would accord with the statutory purpose of providing an adequate opportunity to the Master to report on any matter to the court.

[60] Wallis, JA further expresses the view that lodging the application with the Master is peremptory, as is the provision of security.<sup>17</sup>

[61] In dealing with the timing of furnishing the application upon employees (and the other named persons in that subsection), Wallis, JA stressed:

‘The court should in general satisfy itself that the persons who are entitled to be furnished with the papers, have had adequate opportunity to consider the application and decide whether to intervene.’<sup>18</sup>

[62] That is after all the purpose of lodging and furnishing the application upon the parties designated in the section.

[63] In the *EB Steam* applications, the employees of the companies were cited as a ‘third party’ without the founding affidavit giving any indication of the number of employees and whether any were employed at the registered address or where they were employed. The sheriff purported to serve the applications on these employees – so cited – by affixing a copy of the application to the front door of the registered office. The employees of the different companies within the *EB Steam* group sought to be wound-up were employed in a number of different locations around South Africa. The SCA held that the court below should not have been satisfied that there had been compliance with the requirement of s 346 that a copy of the application be furnished upon employees. The SCA proceeded to set aside

<sup>17</sup> Paras 9 and 10.

<sup>18</sup> Para 12.

the final order of winding-up and replaced it with a provisional order returnable eight weeks later with directions as to the furnishing of the application and provisional order upon employees. The *obiter* remarks by Wallis JA are to be viewed in the overall context of that matter, including its outcome. The SCA did not find that the application was a nullity but merely required compliance with the provision in question.

[64] Whilst I agree with Wallis, JA that the requirements of lodging a copy of the application (and providing security) are peremptory, the question arises as to whether a less than perfect compliance (as occurred in the instant matter) results in the invalidity of an application. It is certainly peremptory in the sense (as intended by Wallis, JA) that a court would be entitled to (and should) direct compliance with s 351(4) if an application were not lodged with the Master (and refuse it until this were done) or postpone it to enable this to occur – so as to enable the Master to report to the court, thus linking the question of compliance to the purpose of the provision.<sup>19</sup>

[65] The approach to ascertaining the consequences of non-compliance of provisions expressed in peremptory terms was recently addressed by this court in *Torbitt v International University of Management*<sup>20</sup> where it was stated:

[30] The approach that a peremptory enactment must be obeyed exactly and that it is sufficient if a directory enactment is obeyed or fulfilled substantially

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<sup>19</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, SA Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 30.

<sup>20</sup> 2017 (2) NR 233 (SC).

has been described as rigid and inflexible<sup>21</sup> and “that the modern approach manifests a tendency to incline towards flexibility”<sup>22</sup>.

[66] After a thorough survey of authorities, this court concluded that the consequences of strict non-compliance would need to be determined with reference to the scope and object of the provision in question. In that matter the question arose as to whether delivery of an award by arbitrator outside a 30 day period prescribed by statute<sup>23</sup> would result in the late award being a nullity. This court concluded that the statutory injunction to deliver awards within 30 days is aimed at addressing delays in issuing awards and that non-compliance would not result in an award being a nullity<sup>24</sup> as that would undermine the statutory purpose. That approach also served to give the provision a sensible meaning taking into account the statutory purpose.

[67] In this instance, a copy of a signed notice of motion and founding affidavit had been lodged when the application was presented to court. The annexures and every affidavit confirming facts stated in the founding affidavit were not lodged but were served a day later and a day before the application was first called in court. The Master was satisfied that this amounted to lodging the application for the purpose of s 351(4) and certified this and made a report to the court on the strength of the incomplete papers.

[68] The founding affidavit of some 30 pages refers to the nature and import of the several annexures and states what fact(s) or conclusion(s) are relied upon with

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<sup>21</sup> *George Simataa v The Public Service Commission & another* (2013) NAHCMD 306 High Court judgment delivered on 30 October 2013; *Rally for Democracy (supra)*.

<sup>22</sup> *DTA of Namibia (supra)*; *Rally for Democracy (supra)*.

<sup>23</sup> Section 86(18) of the Labour Act, 11 of 2007.

<sup>24</sup> At para 55.

reference to those annexures. It was certainly open to the Master to require that the annexures and confirmatory affidavits should be lodged before certifying that the application had been lodged and before making her report or to draw it to the attention of the court that the papers were incomplete. But those annexures and confirmatory affidavits were in any event served on the Master the following day and a day before the application was set down.

[69] The High Court was in my view entirely justified in brushing aside the preliminary point at the initial hearing in view of the Master's certification that lodging had occurred in these circumstances. Did the position change after further affidavits showed a less than perfect compliance with s 351(4) because annexures and confirmatory affidavits had not been lodged at that time? In my view not.

[70] Mr Bishop's contention that the High Court's approach deprived the Master of the opportunity to exercise a discretion to accept or refuse lodgement is based upon a contrived interpretation to s 351(4) and s 351(5) in view of the purpose of lodgement being to provide the Master with an adequate opportunity to provide the report contemplated by s 351(5), given the centrality of that office to the process of liquidations. The two stage involvement of the Master contended for by Mr Bishop does not accord with a sensible purposive approach to the provisions. Lodging with the Master does not in my view entail the exercise of a discretion on the part of the Master. The act of lodging is after all one of delivering or depositing the application with the Master in accordance with the ordinary meaning of the term 'lodge',<sup>25</sup> buttressed in this instance by the purpose of lodging – so as to make a report to the court as contemplated by s 351(5). In the case of a winding-up order

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<sup>25</sup> The New Shorter Oxford English Dictionary (Clarendon Press, Oxford, 1993).

already obtained in respect of a respondent company – the justification for Mr Bishop’s interpretation – could then be pointed out by the Master in her report prior to the hearing and not require the contrived construction pressed by Mr Bishop. An applicant would in all likelihood be apprised of such an eventuality of a prior winding-up application and order at the stage of providing security.

[71] The purpose of the s 351(4) is to alert the Master to the application and provide that office with the opportunity to file a report to court upon it. This underlying purpose to the section was fulfilled. The Master was afforded an adequate opportunity to report to the court on the winding-up application and did so.

[72] The High Court found that there was in any event substantial compliance with s 351(4) and confirmed the rule in granting the final order. The court’s approach in this regard (and in all of the other findings made) cannot be faulted.

[73] As in the *Torbitt* matter, the failure in this matter to strictly comply with the peremptory provision of s 351(4) does not result in a nullity. The consequence of strict non-compliance with s 351(4) could have resulted in postponement or refusal of the application had the Master complained that the annexures and confirmatory affidavits had not been lodged. But the Master did not do so and was able to report in this instance without them and in any event was in receipt of them prior to the set down. It would serve absolutely no purpose at all for the rule to be extended for the annexures and confirmatory affidavits to be lodged because these were served the following day and in advance of the first set down. This demonstrates the contrived nature of this point.

[74] A similar issue arose in a matter very properly referred to us by appellants' counsel, *Thaw Trading and Investments 005 CC v Aobakwe Louw Properties (Pty) Ltd*<sup>26</sup> where a failure to comply with this obligation was not visited with a nullity as the Master had in that matter an opportunity to report to the court. It was found that it would be pointless to visit that non-compliance with a nullity. I agreed with that approach. It accords a sensible meaning to the provision, taking into account its statutory purpose.

[75] It follows that there is no merit in this ground of appeal.

#### Section 58 of BIA

[76] After the provisional order was granted, provisional liquidators were appointed on 11 July 2017. After the original return date and prior extended return date, the appellants filed an affidavit (on 9 October 2017) in which points were taken concerning their appointments, contending that s 58 of BIA was not complied with in certain respects. For instance, the point is taken that the Master had not prior to their appointment submitted their particulars and qualifications to BoN even though BoN had in fact recommended their appointment and that there had been prior discussions between the Governor of BoN and the Master when qualifications and experience of potential liquidators were discussed. Following those discussions, the Master had made recommendations to BoN on 3 July and the provisional liquidators were then proposed and appointed by the Master on 11 July 2017.

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<sup>26</sup> NW High Court Case No 1667/2012, 23 January 2014.

[77] The High Court correctly found that there had been compliance with s 58(5) of BIA. The High Court also correctly found that if the appellants were aggrieved with those appointments, it was open to them to take the appointments on review. I entirely agree with that approach. Any procedural non-compliance with s 58 (which has not been established) would in any event not be relevant in determining whether or not to grant a final order of winding-up.

[78] Upon enquiry, Mr Bishop correctly conceded that any defects with the appointment of provisional liquidators would not of its own be relevant in determining whether or not to grant a final order. He argued that the cumulative effect of statutory non-compliances with s 351(4) of the Act, the failure to exhaust other remedies together with non-compliance with s 58 of BIA - amounted to an abuse of liquidation proceedings and result in the rule being discharged.

[79] The difficulty with this argument is that its individual components demonstrably do not stand up to scrutiny and are baseless. No cumulative effect can or does arise.

#### Section 362(1)(b)

[80] In the appellant's written argument the point is also taken that s 362(1)(b) of the Act was not complied with. This provision requires the Registrar to immediately send a copy of the provisional winding up order to the sheriff, the registrar or office charged with the maintenance of a register of company assets and messengers of magistrates' court where company property is under attachment. The Registrar gave a notice in accordance with this section on 28 September 2017. The appellants submit that this section was not complied with, given the fact that the

provisional order was granted on 10 July already. The appellants also point out that there had until 6 October 2017 not been publication of the provisional order. These points were raised in affidavit before the High Court but are not raised in the appellant's notice of appeal. It is not open to the appellants to raise them on appeal. But I understood the appellant's argument that they are also raised as part of the cumulative effect of abuse of the liquidation process.

[81] As I have already demonstrated, the other components of this argument are without substance. The further difficulty for this argument is that non-compliance would not result in the invalidity of the application but merely a further extension of the rule which would be pointless. These procedural imperfections identified by the appellants, not giving rise to any identified prejudice, thus do not establish any abuse on the part of BoN of the kind contended for.

### Conclusion

[82] It follows that the appeal enjoys no prospects of success and that condonation and reinstatement should not be granted.

### Costs

[83] Mr Bishop argued that the appellants' opposition to the winding-up was *bona fide* and that, in the event of not succeeding with the appeal, the costs should be costs in the liquidation.



[84] In considering the question of costs, the High Court cited *Blackman*<sup>27</sup> in referring to the discretion to be exercised concerning costs of opposition to a successful application where the learned author stated the following:

'The court may direct that the cost of opposition to a successful application for winding-up order be included in the costs of liquidation. However, the court will not make such a direction unless special circumstances exist and the opposition was bona fide and reasonable. The test to be applied is whether or not it can be said that when the applications were launched (or when the final order were sought) it could fairly be said that there were no reasonable prospects of opposition proving successful.'

[85] I am satisfied that this approach also reflects the position in Namibia.

[86] In applying this test, the High Court held that the appellants merely raised technical points (which were without substance) and that the opposition was thus not *bona fide*. The High Court clearly duly exercised its discretion properly in directing the appellants to pay the costs of opposition. That approach cannot be faulted.

[87] As for the costs in this Court, the same procedural point taking was persisted with. No issues of substance concerning the basis for winding-up were raised. The appellants' procedural point taking was without merit and merely served to delay the inevitable. They enjoyed no prospects of success and do not amount to *bona fide* opposition to the winding-up.

[88] The costs in this court should likewise be borne by the appellants. Both sides were represented by two counsel. The cost order will reflect that.

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<sup>27</sup> MS Blackman Commentary on the Companies Act Vol 3, 14-186-2 (Updated Service 2009).

Order

[89] The following order is made:

- (a) The application for condonation and reinstatement is dismissed with costs;
- (b) The matter is thus struck from the roll, with costs;
- (c) The costs include those occasioned by the engagement of one instructing and two instructed counsel.

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**SMUTS JA**

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**MAINGA JA**

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**HOFF JA**

APPEARANCES

APPELLANTS:

A Bishop, with S Namandje

Instructed by Sisa Namandje & Co

RESPONDENTS:

A W Corbett, with D Obbes

Instructed by ENS Africa