CASE NO: A 310/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

EQUITY AVIATION SERVICES (PTY) LTD
(IN LIQUIDATION) **APPLICANT**

And

EQUITY AVIATION NAMIBIA (PTY) LTD **RESPONDENT**

BELETE WORKU **JUDGMENT CREDITOR**

CORAM: UEITELE, AJ.

Heard on: 2012 03.06

Delivered: 2012.03.09

UEITELE A, J

Introduction

[1] On 01 December 2011 the applicant lodged an urgent application on an *ex parte* basis for the provisional liquidation of the respondent. On that date this

court, per Swanepoel J, granted the provisional order with the returned date set for 20 January 2012.

[2] On 16 January 2012 Mr. Belete Worku (in this judgment referred to as the judgment creditor) brought an application also on an urgent basis claiming *inter alia* the setting aside of the provisional liquidation order granted on 01 December 2011.

[3] I was informed by Mr. Strydom who appeared for the applicant that the judgment creditor's application of 16 January 2012 was, on 18 January 2012, dismissed with costs. I could not locate that order on the court file. On 20 January 2012 the judgment creditor launched yet another urgent application again claiming the setting aside of the provisional liquidation and other alternative reliefs.

[4] On that day (i.e. 20 January 2012) this court, per van Niekerk J, after hearing submissions from the judgment creditor and counsel for applicant extended the return date of the *rule nisi* to 02 March 2012 and gave a written judgment on 03 February 2012.

[5] van Niekerk J *inter alia* found that the *locus standi* of the judgment creditor needs to be clarified she said "…*it seems to me advisable that the matter of the intervening creditor's locus standi is clarified. It seems to me that if there is indeed a settlement agreement which has been adhered to, this may explain why he is not considered by the applicant and the respondent to be a creditor. If there is indeed a settlement on the basis mentioned above, this fact should be brought to the*

attention of the Court in the proper way, namely by way of affidavit. The intervening creditor may then respond by way of a replying affidavit, where after the matter may be properly considered on the papers…" she accordingly ordered that:

"2 The corrected order of this Court as made by Swanepoel, J on 1 December 2011 shall be served at the respondent's registered address and shall be published in one edition each of *"Die Republikein"* newspaper and of the *Government Gazette*.

3 The applicant shall file any answering affidavit to the application of the intervening creditor by Monday, 20 February 2012.

4 The intervening creditor shall file any replying affidavit by Tuesday, 28 February 2012."

[6] The applicant provided prove that the corrected Court order was served at the respondent's registered address and published in one edition each of *"Die Republikein"* newspaper and of the *Government Gazette.* On 22 February 2012 Mr. Lebogang Michael Moloto the appointed liquidator of the applicant filed an answering affidavit to the application of the intervening creditor. In the answering affidavit Mr. Moloto amongst others states that:

- He has no knowledge of the settlement agreement and that he was not party to it; and
- He has no knowledge of the day to day affairs of the respondent.

[7] The intervening creditor did not file a replying affidavit to the applicant's answering affidavit. I consider it appropriate to, at this juncture, pause here and consider the position of the intervening judgment creditor.

The position of the intervening judgment creditor

[8] The headnote in the matter of ***Fullard v Fullard*** *1979* (1) SA 368 (T) reads as follows:

> "There is a well established practice with regard to intervention of third parties in insolvency applications. The position can be briefly summed up as follows: (1) A creditor can intervene at any stage (a) to have a provisional sequestration order set aside or (b), where the applicant does not proceed with the case, or drags his feet, to obtain a fresh sequestration order in his own right and name. (2) Where the applicant does not proceed the existing sequestration order cannot be confirmed at the instance of any intervening creditor. It must be set aside and a fresh order can be issued with the creditor as applicant and not as a co-applicant. He alone thus becomes the *dominus litis* and the original applicant drops out altogether thereafter. (3) The intervening creditor must make out a case for sequestration, furnish security, etc as though he had originally been the applicant, but he can rely on facts which appear from the record in the existing proceedings. (4) The Court "takes a practical view of these matters and also bears in mind the interests of the general body of creditors.
>
> It is clear that this practice is a unique one which differs altogether from conventional intervention. It is neither a pure intervention nor substitution of applicants and is really *sui generis* seen from a procedural point of view. It is rather an independent application which, naturally different from the usual one, is introduced because the creditor only arrives in Court with his own evidence, usually on the return day. Because he is the creditor he has *locus standi* to be heard in a *concursus creditorum* which already exists and the so-called leave to intervene is actually a formality…"

[9] I accept the position as elucidated by Coetzee J in ***Fullard (supra)*** that in insolvency applications a practice which is unique and to a certain extent differs from conventional intervention has developed. It is often said that the court hearing an intervention application has discretion to allow or refuse it, which discretion obviously has to be exercised on judicial grounds.

[10] In the instant matter the intervention application is brought by the intervening judgment creditor in his capacity as a judgment creditor of the

respondent. In this capacity he clearly has a legal interest in the subject-matter of the application, which could be prejudicially affected by the judgment of the court. In my view, the intervention application is made seriously and *bona fide*. In these circumstances, I allow the judgment creditor to intervene in the winding-up proceedings.

Requirements for the confirmation of a provisional liquidation order

[11] As I have indicated above this is an extended return date of a provisional liquidation order. It is an established principle in our law that in an application for the sequestration of a respondent the applicant must prove on a balance of probabilities that:

(a) the respondent is insolvent.

(b) the respondent has committed an act of insolvency; and

(c) the sequestration of the respondent will be to the advantage of creditors.

See the case ***Barotti Furniture (Pty) Ltd v Moodley*** 1996 NR 295 (HC)

[12] Also see section 12 (1) of the Insolvency Act, 1936 (Act 24 of 1936) which provides that:

"12 **Final sequestration or dismissal of petition for sequestration**

(1) If at the hearing pursuant to the aforesaid *rule nisi* the court is satisfied that-

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may sequestrate the estate of the debtor."

[13] Section 9(1) of the Insolvency Act, 1936 reads as follows

"(9) **Petition for sequestration of estate**

> (1) A creditor (or his agent) who has a liquidated claim for not less than one hundred Namibia Dollars or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than two hundred Namibia Dollars against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor."

[14] It follows that the issues that I have to consider on the extended return date are those set out in paragraphs 11 and 12 above namely; whether the applicant has a claim for more than One Hundred Namibia Dollars against the respondent, and whether the respondent has committed an act of insolvency or is insolvent; and whether there is reason to believe that it will be to the advantage of creditors of the respondent if his estate is sequestrated.

[15] There is the intervening judgment creditor who wants the provisional liquidation order set aside. For him to succeed he will thus need to establish that the respondent is not indebted to the applicant or the respondent is not insolvent or has not committed an act of insolvency or that it is not in the interest of the body creditors for the respondent's estate to be liquidated. ***Barotti Furniture (Pty) Ltd (supra).***

Has applicant satisfied the requirements?

[16] On the extended return date (i.e. 02 March 2012) the *rule nisi* was further extended to 06 March 2012 to allow the parties to file heads of arguments. When the matter was called on 06 March 2012 the judgment creditor initially objected to the late filling of the heads of arguments by the applicant, but when I indicted to the judgment creditor that the heads of arguments were only late by thirty minutes and that if he so wishes I would further extend the *rule nisi* to allow the applicant to bring a substantive application for the condonation of the late filing

of the heads of arguments, the judgment creditor withdrew his objection and asked for the matter to be argued.

[17] I proceeded to hear arguments from the judgment creditor and Mr. Strydom who appeared on behalf of the applicant. The crux of the judgment creditor's arguments was that:

- He had ten years (starting from 2001) legal battles for unfair dismissal with the respondent company and he obtained numerous judgments against the respondents and that those judgments were unsatisfied;
- He obtained a warrant of execution issued out of the District Labour Court for the District of Windhoek against the respondent;
- On 29 November 2011 the respondent brought an application for the setting aside of the warrants of execution and the following day the applicant represented by the legal representatives who formerly represented the judgment creditor brought a provisional liquidation application.
- He was not 'even' listed as one of the creditors of the respondent company.

[18] The judgment creditor thus insinuated that the provisional liquidation was brought simply to frustrate his claim against the respondent and to avoid paying him. He accordingly prayed (and I will quote him verbatim);

"13.1 for the making of the provisional liquidation as null and void and/or set aside so that the messenger of the Court will continue to execute according to the Supreme Court judgment of 7 July 2009, and his Lordship Chief Justice Peter Shivute's concretizing letter of 26 September 2011 would be fulfilled (sic!); alternatively.

13.2. if I allow the provisional liquidation to be final to accord me "***super and de facto absolutely priority secured claimant***" payment for my overdue judgment awards since 4 February 2002, 09 August 2002, 03 December 2004 and 7 July 2009 at the District Labour Court at Windhoek and the Supreme Court respectively.

13.3. or if the above two alternates are not accepted this Honourable Court is prayed to remit same and take it back to the Supreme Court for same super prior payments from all other creditors.

13.4 If the argument of all above three alternates does satisfy the Honourable Court, asking the Hounarable Court to respond to me whether the appeal and the judgment of the Supreme Court so much overdue to must have been paid to me by now since 07 July 2009can be superseded by this Court if so my appeal to be granted for the same to the Supreme Court."

[18] Mr. Strydom who appeared for the applicant argued that '*most if not all of the relief sought by the intervening creditor is bad in law and/or excipiable, finding no basis in law for its award…*" and also that *"…the intervening creditor nowhere in his affidavit contests that the respondent is indebted to trade creditors in the amount of N$2 733 404-00 and intercompany creditors in the amount of N$17 768 309-00. At best for him is the fact that his alleged debt only adds up to the respondent's miseries and precarious financial position which only further confirms its bankruptcy.*"

[19] The facts placed before the court can be discerned from the affidavit of Mr. Lebogang Michael Moloto the appointed liquidator of the applicant who made the following allegations in the affidavit supporting the provisional liquidation of the respondent:

(a) The applicant is a creditor of the respondent as envisaged by section 351(1)(b) of the Namibia Companies Act by virtue of the fact that the Applicant had advanced funds to the Respondent from time to time . As at 31 July 2011 the respondent was indebted to the applicant for an amount of N$ 2 054 396-00.

(b) The respondent has ceased trading since 30 September 2011;

(c) As at 30 September 2011 the respondent is indebted to trade creditors in the amount of N$2 733 404-00 and intercompany creditors in the amount of N$17 768 309-00.

(d) The respondent owns assets valued at approximately N$2 868 946-00

[17] I must confess that I had difficulties in making sense of judgment creditor's affidavit but what I could gather from the documentation is the fact that there was a default judgment in favour of the judgment creditor for an amount of N$ 240 295-52, a cost order from the Supreme Court, a notice of attachment in execution under DLC case No. 351/2003 **(*i.e. Belete Worku v Equity Aviation)*** for an amount of N$ 985 292-00.

[18] In view of the above allegations I am convinced that the applicant has established on a balance of probabilities that the respondent is in fact insolvent and that it is in the interest of the body creditors for the respondent's estate to be liquidated.

[19] In the result I would make the following order:

(a) the provisional liquidation order granted on 01 December 2011 is confirmed;

(b) the intervening creditor's application to set aside the liquidation order granted on 01 December 2011 and the alternative reliefs are dismissed;

(c) cost to be cost in the liquidation.

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UEITELE, AJ

ON BEHALF OF THE APPLICANT:	**J A N STRYDOM**
INSTRUCTED BY:	**GF KÖPPLINGER LEGAL PRACTITIONER**
ON BEHALF OF THE RESPONDENT :	**NO APPEARANCE**
ON BEHALF OF THE INTERVENING JUDGMENT CREDITOR	**IN PERSON**