REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 273/2014

In the matter between:

LAICATTI TRADING CAPITAL INC	**FIRST APPLICANT**
CHRISTOPHER PETER VAN ZYL N.O	**SECOND APPLICANT**
RYNO ENGELBRECHT N.O	**THIRD APPLICANT**
EUGENE JANUARIE N.O	**FOURTH APPLICANT**

(The second to fourth applicants in their respective capacities as joint liquidators of Greencoal Holdings Proprietary Limited (in liquidation), registration number: 2013/120207/07) ("Greencoal Holdings")

And

GREENCOAL (NAMIBIA) (PTY) LTD (REGISTRATION NUMBER: 2010/0314)	**FIRST RESPONDENT**
GERSHON BEN-TOVIM	**SECOND RESPONDENT**

Neutral citation: *Laicatti Trading Capital Inc v Greencoal (Namibia) (Pty) Ltd (Registration Number: 2010/0314)* (A 273/2014) [2016] NAHCMD 31 (22 February 2016)

Coram: PARKER AJ

Heard: **2 – 3 November 2015**

Delivered: **22 February 2016**

Flynote: Company – Winding up – Applications for – Grounds – On the basis of the 'just and equitable' provision – Ambit of ground – Company, in instant case, in substance a partnership – Circumstances justifying dissolution of partnership also justifying winding up of company – Court satisfied applicant has established specific grounds sufficient for the granting of a provisional winding up order – Principles in, eg, *Ebrahim v Westbourne Gallaries Ltd and Others* [1972] 2 All ER (House of Lords) applied – Companies Act 28 of 2004.

Summary: Company – Winding up – Application for – Grounds – On the basis of the 'just and equitable' provision – Ambit of ground – Company, in instant case, in substance a partnership – Circumstances justifying dissolution of partnership also justifying winding up of company – Court satisfied applicant has established specific grounds sufficient for the granting of a provisional winding up order – On the papers it is sufficiently established that the relationship of mutual trust and confidence and friendly cooperation between the equal shareholders in company has broken down irretrievably – Furthermore, there has been breach of good faith parties owed to each other – Court accordingly held that first applicant has made out a case for provisional winding up order – Companies Act 28 of 2004.

Flynote: Company – Winding up – Application for – Grounds – On the basis of the 'unable to pay its debts' provision – Company unable to pay its debts when it is unable to meet current demands placed on it in its day-to-day activities in the ordinary course of business – Court will make an order for compulsory winding up of company where on the totality of the evidence interested parties would be protected only by a fully independent investigation of the company's affairs in compulsory winding up – Where on the papers there is prima facie case (ie a balance of probabilities) in favour of applicant, provisional order of winding up should normally be granted – *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 945 (A) applied – Companies Act 28 of 2004.

Summary: Company – Winding up – Application for – Grounds – On the basis of the 'unable to pay its debts' provision – Company unable to pay its debts when it is unable to meet current demands placed on it in its day-to-day activities in the

ordinary course of business – Court will make an order for compulsory winding up of company where on the totality of the evidence interested parties would be protected only by a fully independent investigation of the company's affairs in compulsory winding up – Where on the papers there is prima facie case (ie a balance of probabilities) in favour of applicant, provisional order of winding up should normally be granted – In instant case purpose of the rule *nisi* sought is to give interested parties interim protection and for them to be heard – Second, third and fourth applicants ('these applicants') are liquidators of insolvent holding company – Second respondent is a 50 percent shareholder of insolvent holding company and director thereof at the material time – Liquidators' investigations revealed an unexplained shortfall on holding company's books in the amount of N$4,7 million – Court found that assets of insolvent holding company diverted by second respondent by way of questionable and unauthorized transactions to the company (first respondent) through intervention of second respondent – Some of these payments to company constituted disposition without value in terms of s 26 of the Insolvency Act 24 of 1936, read with s 344 of the Companies Act 28 of 2004 – Court found further that company's failure to pay certain proved indebtedness is due to its inability to pay and therefore company is commercially insolvent – Court found no evidence that there has been any revenue flow into company or that funding has been sourced for company – Court found further that only when liquidators of company has investigated company that the full picture of questionable and unauthorized dealings in the company, including the role of the second respondent in them, would emerge – On the totality of the evidence court found there is a prima facie case (ie a balance of probabilities) in favour of applicant – Consequently court concluded applicants have made out a case for the grant of a provisional winding up order.

ORDER

Order dated 3 November 2015 granted *ex tempore*. (Paragraph 4 of this judgment).

JUDGMENT

PARKER AJ:

[1] The instant application revolves around a scientific project whereby biomass is converted to coal by a process called torrefaction. The initial application for the provisional winding up of the first respondent was brought by the first applicant on 10 October 2014. The second, third and fourth applicants ('the liquidators') were duly appointed as joint liquidators of Greencoal Holdings (Pty) Ltd, a company registered in South Africa ('the insolvent' or 'Greencoal Holdings') as a consequence of its winding up in terms of both a provisional order and final order of the High Court of South Africa. The liquidators received a certificate of appointment issued by the Master of the High Court of South Africa on 27 November 2014 pursuant to that order. The liquidators were, in terms of the recognition order granted by this Court on 13 March 2015 and made final on 10 April 2015, authorised to institute these proceedings for the winding up of the first respondent, and were granted further powers to recover movable property belonging to the insolvent and situated in Namibia.

[2] The liquidators brought an application to intervene in the pending winding up proceedings brought by the first applicant. The respondents moved to oppose this application, but shortly before it was due to be heard, withdrew their opposition. The intervention application was accordingly granted by agreement between the parties on 23 July 2015. Thereafter, the liquidators filed founding papers in the main winding up proceedings.

[3] The respondents have moved to reject the application. The first applicant's case is based on the ground contained in 349 (h) of the Companies Act No. 28 of 2004 ('the Companies Act'), namely, that it is 'just and equitable' that the first respondent be wound up. While they associate themselves with the just and equitable provision relied on by the first applicant, the second, third, and fourth

applicants rely on another provision. It is the 'unable to pay its debts' provisions in s 349*(f)*, read with s 350(1)*(c)*, of the Companies Act.

[4] After hearing counsel I issued the following order on 3 November 2015:

'1. The first respondent be provisionally wound up in the hands of the Master of the High Court.
2. Costs are reserved.

3. A rule *nisi* is issued calling on the respondents and all other interested persons to appear before the court on **6 April 2016** at **10h00** or so soon thereafter as the matter may be heard, to show cause, if any, why the following order should not be made:

(a) The first respondent is finally wound up in the hands of the Master of the High Court.

(b) The unopposed costs of the application of the respective applicants are costs in the winding up of the first respondent.

(c) The second respondent pays the respective applicants' costs of the application, save those mentioned in subpara (b), including the costs reserved earlier, and including costs of one instructing counsel and one instructed counsel of the respective applicants.

(d) This order shall be –

(i) published once in the Government Gazette and *The Namibian* newspaper;

(ii) served on the first respondent at its registered address, 12th Floor, Sanlam Centre, Independence Avenue, Windhoek; and

(iii) served on the second respondent at Farm Ehuiro, No. 120, Omaruru.

A. It is recorded that the reasons for the order are to be delivered to counsel on or before 24 March 2016.'

[5] It may be important to note that on the hearing of the application on the set down dates of 2 and 3 November 2015, while both counsel for the applicants appeared, Mr Möller, who had appeared as counsel for the respondents all along, including the hearing of the interlocutory matters, failed to appear without as much as the courtesy, which a court always expects from counsel, of an explanation from counsel for the failure to appear. That is all that I can say in the circumstances. This is a free country, and even legal practitioners are free to act as their consciences dictate. Mr Möller was absolutely aware of the set down dates; and in the circumstances I asked both counsel to prove the case of the applicants. The train of justice could not wait for Mr Möller to board at his whims and caprices.

[6] I now proceed to consider the first applicant's grounds and the grounds relied on by the second, third and fourth applicants.

'Just and equitable' provision

[7] Greencoal Holdings (the insolvent) is one company in a group of companies, sometimes referred to as 'the Greencoal Group'. The Greencoal Group includes the first respondent, a company registered in Namibia. Greencoal Holdings was provisionally wound-up on 21 August 2014 and a final winding up order was granted on 9 October 2014. The application there was initially opposed by Mr Gershon Ben-Tovim, the second respondent in the instant proceeding; but after the matter had been fully argued the second respondent abandoned his opposition to the relief sought. Greencoal Holdings has two shareholders, each owing 50 per cent of the issued share capital, namely, the second respondent (who was also a director of Greencoal Holdings) and the first applicant in the instant proceeding (Laicatti Trading Capital Inc). The winding up order in respect of Greencoal Holdings was granted by the High Court of South Africa at the instance of the first applicant.

[8] Furthermore, when investigating the affairs of Greencoal Holdings, the liquidators established that the assets of Greencoal Holdings are valued at just over N$10 million and the liabilities amount to just over N$15 million, leaving an apparent shortfall of about N$4,7 million. The Greencoal Group had as one of its main areas

of business the engagement in worldwide torrefaction, a process whereby biomass properties are changed to obtain a much more efficient fuel quality for combustion and gasification application. The first and second respondents were at the centre of this business plan. The second respondent was to provide expertise in plant management, whilst the first respondent owned a torrefaction plant in the country and had plans of constructing a new torrefaction plant on its farm near Omaruru.

[9] In promoting this enterprise the second respondent indicated that financing was required and expressed confidence that he could attract financing of a least 50 per cent of the total funds needed from a commercial bank. It was at that juncture that the first applicant came in as a funder. A Founders Agreement was entered into between the first applicant, the first respondent and the second respondent to regulate the collaboration between first applicant, as the funder, second respondent as the corporate head, and first respondent as owner of the plant. In terms of the agreement, the first applicant was to make funding available over a period of time in an amount of about N$35 million. The business did not take off. Despite the fact that first applicant provided funding to the tune of some EUR2,248,190, plus a further amount of EUR50,000 (about N$34,5 million), first respondent failed to generate any income and did not secure any firm orders for the torrefaction products.

[10] With these apparent intractable impediments in the way of the fist respondent, in the business sense, the relationship between the first applicant and the second respondent broke down and caused the first respondent to become dysfunctional: it gave rise to a situation where it is impossible for the first respondent to continue its business operations. The directors are embroiled in various disputes whose end is not in sight; just as the financial and management woes of the first respondent are not in sight. The directors accuse each other of breaches of the founders agreement, dishonesty and deceit. It is the applicant's contention that the second respondent has failed to conduct the business of the first respondent and Greencoal SA in accordance with what the parties' understanding was, and in accordance with the founders agreement, the financial plan, business plan and milestones. For this reason it is the applicant's position that it is no longer obliged to finance the first respondent and Greencoal SA any longer. And what is more; the second respondent

has been unable to secure financing from first respondent's bankers to fund the enterprise.

[11] Thus, on the papers, on any reasonable account, it is established that the relationship of mutual trust and confidence and friendly cooperation between the equal shareholders in first respondent, namely, the first applicant and the second respondent has broken down irretrievably. With this holding, the first sign post in the way to consider is this. Should the court exercise its discretion to grant the application on the basis of the just and equitable provision? That is the subject of the next level of the enquiry.

[12] I start with the interpretation and application of the just and equitable provision; and in that behalf, I set out here *in extenso* the speech of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (House of Lords) at 499g-500h, referred to me by Mr Steyn:

'It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles … To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him … But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of [the just and equitable provisions] is to enable the Court to relieve a party from his bargain in such cases.

…

'My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for

recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarilty submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations: considerations that is, of a personal character arising between one individual and another, which may make it unjust, inequitable, to insist on legal rights, or to exercise them in a particular way.

'It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The super imposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

'It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer as so many of the cases do, to 'quasi-partnerships' or 'in substance partnerships' may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable sum these up in the law of partnership itself.… A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.'

[13] It follows that the just and equitable provision is not confined to cases analogous to the unable to pay its debts provision. Nor can any fixed and immutable rule be laid down as to the nature of the circumstances that would justify the conclusion that it is just and equitable to wind up a company. See *Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc* 2008 (5) SA 615 (SCA at 623A-F. In this regard, as Mr Steyn submitted, the courts have proposed five categories of circumstances in which it would prima facie be just and equitable to wind up a company under this provision: (1) disappearance of its *substratum*; (2) illegality of its objects and if it has a fraudulent purpose; (3) fraud, misconduct and oppression; (4) deadlock in its administration; and (5) irretrievable breakdown of the relationship between the shareholders of a domestic company. This proposition is intended as guidelines to assist the courts and not as hard and fast rules to be applied regardless of factual context. In any case, *Ebrahimi* warns us that the tendency to create categories or headings under which cases must be brought if the provision is to apply is wrong; and the general words in the provision should remain general and not be reduced to the sum of particular instances.

[14] The three elements (elements (i), (ii) and (iii) proposed in *Ebrahimi*) mark the nature of the first respondent as a domestic company: The understanding of the parties to the founders agreement (concluded on 7 July 2013) was that, for example, the first applicant and the second respondent would be the only shareholders and members of the first respondent in equal shares. The business of the first respondent would be managed by a board of directors nominated by the first applicant and the first respondent in equal numbers, and comprising of any even number. The first applicant and the second respondent would, like partners in partnership relations, owe each other a duty of good faith. I, therefore, accept Mr Steyn's submission that upon the authorities (see, eg, *Re Yenidje Tobacco Co Ltd* [1916 – 1917] All ER 1050 (CA); [1916] 2 Ch 426 (Court of Appeal); *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others* 2014 (5) SA 1 (SCA), which approved and applied *Yenidje*) the first respondent is a 'domestic company' which may be liquidated on grounds similar to those on which a partnership may be dissolved, as respects the just and equitable provision.

[15] I accept the first applicant's averments that the fiduciary relationship of mutual trust and confidence and friendly cooperation between the first applicant and the second respondent as the only shareholders of the first respondent, which is necessary and required to continue its business as contemplated in the founders agreement cannot survive the disparaging allegations of fraud and dishonesty levelled at Stanislav Chebotar which the founding affidavit is replete with. Stanislav Chebotar was nominated by the applicant to be a member of the board of the first respondent. Added to this is what I have found established, namely, that the relationship of mutual trust and confidence and friendly cooperation between the equal shareholders in the first respondent, that is, the first applicant and second respondent, has broken down irretrievably.

[16] I am prepared to hold that in a case like the present where there are only two persons interested, where there are no shareholders other than the first applicant and the second respondent, where there are no means of overruling by the action of a general meeting of shareholders the trouble which is occasioned by the first respondent becoming dysfunctional and the quarrels in which the directors are embroiled, the first respondent ought to be wound up because there exists grounds as would be sufficient for the dissolution of a private partnership at the suit of one of the partners against the other, that is, it is just and equitable that the first respondent should be wound up. (*Re Yenidje Tobacco Co Ltd* [1916 – 1917] All ER, at 1053D-E; per Warrington LJ) And I do not find that the cause of the troubles of the first respondent can largely be put at the door of the applicant who now seeks to take advantage of it. (*Re Yenidje Tobacco Co Ltd* at 1051a)

[17] This court is satisfied that it is impossible for the first applicant and the second respondent (who, as I have said more than once, hold equal shares of 50 per cent of the first respondent) to place that confidence in each other which each has a right to expect, and such impossibility (as I have found previously) has not been caused by the applicant seeking to take advantage of it.

[18] Based on these reasons, in my judgement, the applicant made out a case for the grant of the application on the basis of the just and equitable provision, hence the granting of the order set out in para 4 of this judgement.

‘Unable to pay its debts’ provision

[19] As intimated previously, the liquidators (second, third and fourth applicants) seek a winding up order against first respondent on the basis that the first respondent is both factually and commercially insolvent and is, therefore, unable to pay its debts within the meaning of s 349*(f)*, read with s 350(1)*(c)*, of the Companies Act.

[20] I consider the application on the basis of the ‘unable to pay its debts’ provision in the light of the purpose of the order of provisional winding up which is to afford interested parties interim protection. The second, third and fourth applicants are such interested parties in these proceedings. These applicants need to preserve the movable assets of the first respondent, pending a proper investigation into the affairs of the first respondent with the purpose of recovering debts owed by the first respondent. The next level of the enquiry is therefore, to consider the facts which the liquidators rely on to establish the ‘unable to pay its debts’ provisions.

[21] The second respondent was at the material time a 50 per cent shareholder of Greencoal Holdings. He was also a director of the company at the relevant time. The liquidators’ investigations have revealed that there is a shortfall on Greencoal Holding’s books in the amount of about N$4,700,000. This state of affairs remains unexplained. Furthermore, the liquidators have established facts that the first respondent is indebted to Greencoal Holdings in the amount of N$635 340,81, together with interest. The indebtedness arose from wages paid by Greencoal Holdings (of which the second respondent was a director, as I have said previously) in May 2014 to July 2014. I find that the payments were made without cause and were not due by Greencoal Holdings to the first respondent’s workers. This, accordingly, constituted a disposition without value as contemplated by s 26 of the Insolvency Act 24 of 1936, read together with section 344 of the Companies Act. Indeed, it should be said in parentheses that the dispositions are liable to be set aside in terms of these provisions. It is worth noting that the respondents admit that the payment of such salaries constitutes disposition without value.

[22] In the answering papers, the respondents admit such payments but claim that the 'payments were made pursuant to the provisions of the Founders Agreement'. This cannot be true. The founders agreement, as mentioned previously, was entered into between first applicant, first respondent and second respondent. Greencoal Holdings is, therefore, not a party to the Founders Agreement; and so, it bore no obligations to make any such payments. And the respondents can get no succour from their contention that such debt is not due by first respondent to Greencoal Holdings because, according to the respondents, Greencoal Holdings was provided with funds by GI Development Forever Corporation and that such payments were paid to the employees concerned of first respondent pursuant to resolutions of first respondent and Greencoal Holdings. This transaction was based upon a partially performed loan agreement which is not subject to the terms of the Founders Agreement.

[23] Indeed, despite the allegations that the aforementioned funding was provided and resolutions were passed in this respect, no supporting documentation is furnished. The respondents also place reliance on an allegation that the payments were authorised by Roby Zomer, but no confirmatory affidavit is provided. Thus, although the respondents denied these allegations in the answering affidavit in the intervention application, and now in the answering affidavit in the present proceeding. I find that the denials are bald and devoid of any factual basis, apart from the ipse dixit of the deponent, Mr Ben-Tovim. I conclude therefore that no bona fide dispute of fact arises in these circumstances; and so, the denial is rejected, as untenable on the papers. (See *Plascon-Evan Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635c.) And *Elisenheim Property Development Company (Pty) Ltd v Guest Farm Elisenheim* 2013 (4) NR 1085 (HC), para 63, tells us that 'respondents cannot shield behind bald and unsubstantiated denials (or assertions where they raise them as a defence) or where denials are not genuine'. The conclusion is inescapable that such allegations by respondents are not proved; they become mere irrelevancies.

[24] It is my view that the liquidators have established this indebtedness on the part of the first respondent to Greencoal Holdings. The view rests on the authority of *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 945 A.

[25] Moreover, I find that there is no cogent or convincing response to the liquidator's averment that as a result of the aforementioned payments made less than six months prior to the date of Greencoal Holding's liquidation, Greencoal Holdings' liabilities exceeded the value of its assets. And it is common cause that the first respondent has not repaid this indebtedness to Greencoal Holdings; neither has it tendered to do so. It seems to me clear that first respondent's failure to repay the amount is due to its inability to pay, and so the conclusion is inevitable that first respondent is commercially insolvent.

[26] Furthermore, I find that the Founders Agreement relied upon by the respondents has not been properly implemented by first respondent inasmuch as there has been a failure of the first respondents' financial plan. On 7 July 2013 to 20 March 2014 first applicant provided second respondent with EUR2,303,446,35 to be applied by first respondent as managing director of first respondent to further its business objectives. But none of these objectives, including the upgrading of first respondent's production plant, the generation of EUR16,515,398 in revenue, nor a recording of a profit of EUR7,066,124, have been attained. And despite due demand, second respondent has failed to account to first applicant utilisation of the funds. In a period of two weeks, ending in September 2014, second respondent reduced the balance of first respondent's bank account from over N$1,000,000 to just over N$500,000. And the liquidators' investigations have revealed that second respondent caused Greencoal Holdings to make unauthorised payments to himself or third parties in an amount of at least N$4,076,498,85. It is reasonable to conclude that these payments could account for the aforementioned shortfall of N$4,7 million in the books of Greencoal Holdings.

[27] Additionally, either first or second respondent was in possession of two Pajero motor vehicles ('vehicles') for which Greencoal Holdings paid N$991,217,39. The vehicles were never returned to Greencoal Holdings. The respondents have provided no proper explanation for the vehicles and for appropriating proceeds from the sale, except making vague and unsubstantial allegations that the proceeds were used for disbursements and expenses. I accept Mr Corbett's submission that the dishonest nature of the respondents' dealings with the motor vehicles is evidence

from what is confirmed in the replying affidavit, namely that after the liquidators obtained an order in the Omaruru Magistrate's Court against the first and second respondents authorising the liquidators to seize the motor vehicles, the deputy sheriff served the order on the second respondent on 9 June 2015. In the return of service the deputy sheriff reported that Ben-Tovim, the second respondent, 'claims that he does not know anything about the said vehicles'. The sheriff's version contradicts Ben-Tovim's explanation that the 'vehicles became redundant upon the extraction of first applicant from the business'. This is relevant: The deputy sheriff records that 'the foreman and workers, they informed me that the said vehicles was on the Farm October 2014, both in accidents and was send to Windhoek but never returned to the Farm'.

[28] Apart from all else, the following excerpts from the minutes of the board of first respondent, dated 6 September 2013, are significant; and I accept Mr Corbett's submission that they are of major concern:

> '(a) Revenue flow in respect of first respondent would have started in February 2014;
>
> (b) Funding was to be secured by sourcing debt to the amount of N$10 million through "suspensive sale agreements", and
>
> (c) The total annual remuneration of the management team and directors amounted to N$4,068,050.'

[29] There is no evidence that there has been any revenue flow or that any funding has been sourced. There are rather only unexplained and apparently irregular payments made by the first respondent, including the seemingly overblown remuneration of the management team and directors; and what is more, there is no record of first respondent's income – budgeted or actual. There is no asset register or annual financial statements available despite the fact that first respondent was incorporated 2010. I reject the respondents' Delphic, generalised and irrelevant statements.

[30] It would be the burden of the respondent to prove what they assert, namely that the first respondent is commercially solvent, by, for instance, providing asset registers, financial statements and management reports showing that this is indeed the case. They have avoided dealing with these relevant issues. In my view, their inaction when challenged that no such financial records exist, leads to the inexorable conclusion that first respondent has no asset base, no finances and no ability to pay its debts as and when they become due. Doubtless, one such debt is the non-repayment of the aforementioned monies unlawfully disbursed from Greencoal Holdings to first respondent, as well as the vehicles bought for first respondent with Greencoal Holdings' funds.

[31] Doubtless, it is only when the liquidators of first respondent are able to take follow-up action, as a result of investigations into the affairs of the company after winding up, will the full picture be revealed. This would include examining carefully the role of the directors, including Ben-Tovim the second respondent, in the affairs of the first respondent.

[32] What the liquidators seek is reasonable and purposeful. As I have said previously, the purpose for seeking the rule *nisi* is to afford interested parties an opportunity to be heard. Thus, the purpose of an order of provisional winding up of the first respondent is to give such interested parties judicial interim protection. *Kalil v Decotex (Pty) Ltd and Another*, at 979B-C, tell us: 'Where on the affidavits there is prima facie case (ie a balance of probabilities) in favour of the applicant, then, … a provisional order of winding up should normally be granted …'. And it has been said -

'The Court will make an order for the compulsory winding up of the company where, on the evidence as a whole, the body of creditors would be protected only by a fully independent investigation of the company's affairs in compulsory winding up; for example, *where there are considerable suspicions about the real motive for the company seeking to avoid a compulsory winding up order, giving rise to understandable fears on the part of the creditors that the company's shareholders and directors have something to hide*.' (Italicized for emphasis)

(Ms Blackman, RD Jooste and GK Everingham, *Commentary on the Companies Act*, Vol. 3, at 14-145)

[33] The totality of the evidence and the respondents' failed persistent manoeuvres to set at naught the order of the court that the application should be heard as soon as possible and the respondents' abortive attempt to delay indefinitely the hearing of the present application (see judgment dated 8 October 2015) answer to the kind of situation the learned authors put forth as an example of a case where 'creditors would be protected only by a fully independent investigation of the company's affairs in compulsory winding up'.

[34] Having carefully considered the totality of the evidence and the grounds relied on by the second, third and fourth respondents, although disputed – weakly and unconvincingly disputed – I come to the inexorable conclusion that there is a prima facie case (ie a balance of probabilities) in favour of these applicants; and on that basis, in my judgement, the applicants have made out a case for the granting of a provisional order of winding up of the first respondent. It followed that the application succeeded on the 'unable to pay its debts' provision, too; hence the granting of the order appearing in para 4 of this judgment.

C Parker

Acting Judge

APPEARANCES

FIRST APPLICANT:	H Steyn Instructed by Ellis Shilengudwa Inc., Windhoek
SECOND, THIRD AND FOURTH APPLICANTS:	A W Corbett SC Instructed by Fisher, Quarmby & Pfeifer, Windhoek
FIRST RESPONDENTS:	A Möller Instructed by Du Plessis, De Wet & Co., Windhoek