**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 651/2018

In the matter between:

**AFRISAM (SOUTH AFRICA) PROPRIETARY LIMITED** **APPELLANT**

and

**MALETH INVESTMENT FUND PROPRIETARY LIMITED** **RESPONDENT**

**Neutral citation:** *Afrisam (SA) (Pty) Ltd v Maleth Investment Fund (Pty) Ltd* (651/2018) [2019] ZASCA 139 (01 October 2019)

**Coram:** Navsa, Wallis, Dambuza, Molemela and Mbatha JJA

**Heard:** 16 August 2019

**Delivered:** 01 October 2019

**Summary:** Company Law – principles relating to court applications for winding-up of a company restated – intervening voluntary winding-up does not extinguish a pending application for compulsory winding-up – where compulsory winding-up supersedes the pending voluntary winding-up provisions of s 340(2)*(a)* of the Companies Act 71 of 1973 apply – compulsory winding-up shall be deemed to have been effective from date of registration of the special resolution for the voluntary winding-up of a company.

## ORDER

**On appeal from**: Gauteng Division of the High Court, Johannesburg (Makume J sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include the costs of two counsel.
2 The order of the high court is set aside and replaced by the following:
'a) Leave is granted to the appellant to intervene in case no 40865/13.
b) The order of Windell J dated 04 December 2015 is varied by the deletion of the words "with effect from 31 October 2013" in paragraph 1 thereof.
c) The costs of this application are to be paid by the respondent including the costs consequent upon the employment of two counsel.'

## JUDGMENT

**Dambuza JA (Navsa, Wallis, Molemela and Mbatha JJA concurring):**

[1] At the heart of this appeal, is an unusual sequence of events in regard to the winding-up of a company unable to pay its debts. Briefly summarised, an application for compulsory winding-up was brought but, before any order was granted, the company was placed in voluntary winding-up. That continued for some eighteen months after which the company was compulsorily wound-up in terms of the original application. The liquidators have pursued an action to set aside certain dispositions made by the company prior to its winding-up. They do this in terms of certain provisions of the Insolvency Act 24 of 1936 (the Insolvency Act) one of which is more onerous as regards the onus of proof for the recipient of the disposition, while the other is, from the same perspective, more onerous for the liquidators. Determining which date applies determines under which statutory provisions the dispositions can be attacked.

[2] On 4 December 2015 the Gauteng Division of the High Court, Johannesburg (the high court) (Windell J) granted a court order that a company, Cemlock Cement (Pty) Ltd (Cemlock), be finally wound up 'with effect from 31 October 2013'. The order was granted at the instance of one of Cemlock's creditors, Maleth Investment Fund (Pty) Ltd (Maleth). At the time, Cemlock had been in voluntary liquidation for just over 18 months. Subsequent to the grant of the December 2015 court order, the appellant, Afrisam South Africa (Pty) Ltd (Afrisam), also a creditor of Cemlock, launched an application in the same court seeking to intervene in the winding-up application and that the December 2015 order be rescinded. The high court (Makume J) dismissed the application. Afrisam now appeals, with leave of the high court, against the dismissal of its application.

**Background**

[3] The events around Cemlock's winding-up started on 31 October 2013 when Maleth presented an application before the high court, seeking an order that Cemlock be wound up as it was unable to pay its debts.[1] On 15 November 2013 Cemlock filed its notice of intention to oppose the winding-up application. It also delivered a notice of application for security for costs.

[4] The opposition to the winding-up application prompted Maleth to invoke 'step-in-rights' that it had under a 'cession and pledge agreement' which it had concluded in 2011 with Cemlock's director, Stuart Paget. The cession and pledge agreement provided for a loan of (moneys) by Maleth to Cemlock's sole shareholder, Scarab Investment Holdings (Pty) Ltd (Scarab). Also, under that agreement, all rights, title and interest to shares in Scarab were ceded to Maleth as security for the loans.

[5] Breaches under the cession and pledge agreement, and an application by the Standard Bank of South Africa Limited for the winding-up of Cemlock, paved the way for Maleth to invoke its step-in-rights and acquire all the shares in Scarab and the shares held by Scarab in Cemlock. On 14 November 2013 Maleth exercised the newly acquired voting

[1] As contemplated in s 344F and 345 of the Companies Act 61 of 1973. It was not in dispute that although at the time of the events under consideration, the Companies Act 71 of 1973 (the Act) had been repealed and replaced by the Companies Act 71 of 2008, the dispute was to be determined in terms of the 1973 Act. This is because despite the repeal of the 1973 Act, the winding-up of insolvent companies remained regulated under Chapter XIV of that Act.

rights in Scarab and Cemlock to appoint two new directors, Brendan Harmse and Rishendrie Thanthony, to Scarab's and Cemlock's boards. On 25 November 2013 the newly appointed directors voted to remove Paget as Scarab's and Cemlock's director. On 17 January 2014, under the newly installed directors, Cemlock withdrew its opposition to its compulsory winding-up. It also withdrew its application for security of costs.

[6] On 23 January 2014 another creditor of Cemlock, Carlbank Mining Contracts (Pty) Ltd (CMC), brought an application in the high court for Cemlock's compulsory winding-up. However, on 12 March 2014, the eve of the hearing of that application, an agreement was reached between CMC and Scarab, which led to the postponement of CMC's application. On the same day Scarab passed a special resolution that Cemlock be placed under 'a creditors' voluntary winding-up' in terms of s 349, read with s 351(1), of the Companies Act 61 of 1973 (the Act). The resolution was registered with the Companies and Intellectual Property Commission (CIPC) on the same day, thus placing Cemlock under voluntary winding-up in terms of s 349 of the Act.[2]

[7] About a year later, on 18 March 2015, Maleth filed what it termed a 'conversion application' in which it sought to have the voluntary winding-up converted to a compulsory winding-up which would be effective from 31 October 2013, the date on which it had presented its original winding-up application. Essentially, this unusual conversion application sought to rekindle the original winding-up application launched by Maleth, and, at the same time, convert the voluntary winding-up into a revived compulsory winding-up. Although in the conversion affidavit Maleth asserted that the pending voluntary winding-up should be set aside, no order to that effect was sought in the conversion notice of motion. It is this conversion application that led to the December 2015 order by Windell J.

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[2] Section 351 stipulates the following in relation to creditors' voluntary winding-up:
'(1) A voluntary winding-up of a company shall be a creditors' voluntary winding-up if the resolution contemplated in section 349 so states, but such a resolution shall be of no force and effect unless it has been registered in terms of section 200.' And in terms of s 352 of the Act a voluntary winding-up of a company shall commence at the time of the registration in terms of section 200 of the special resolution authorising the winding-up.'
A members' voluntary winding-up in terms of s 350(1) of the Act is one where either the company has no debts or security has been provided for their payment.

[8] Three liquidators were appointed pursuant to the December 2015 court order. Subsequent to their appointment they instituted proceedings against Afrisam, seeking to recover as impeachable dispositions, moneys paid to it by Cemlock prior to 31 October 2013. There were two sets of payments – first, those made by Cemlock between 1 May 2013 to 31 October 2013, amounting to R62 297 826,77, which allegedly constituted voidable preferences to Afrisam in terms of s 29 of the Insolvency Act 24 of 1936, and secondly, amounts totalling R191 352 419,41 paid by Cemlock to Afrisam during the period 1 November 2012 to 31 October 2013, which were alleged to constitute undue preferences in terms of s 30(1) of the Insolvency Act. It was subsequent to the institution of the action by the liquidators of Cemlock that Afrisam launched the application in the high court seeking to set aside the winding-up order of December 2015.

[9] In its application for rescission, Afrisam bemoaned the granting of the winding-up order on the back of the 2013 application. It contended that the December 2015 order should never have been granted because the 2013 application was either tacitly withdrawn or abandoned, or Maleth had waived its rights in relation thereto when the voluntary winding-up was effected in March 2013. There was, therefore, no winding-up application to revive, and the conversion application was, in fact, a new application for compulsory winding-up. Afrisam then took issue with the fact that it was never given notice of that new (conversion) application despite being a known interested party as one of Cemlock's creditors. For this reason it contended that the 2015 winding-up order fell to be rescinded as it was erroneously sought and erroneously, granted without it being given due notice. Alternatively, the order was liable to be set aside on the basis of either *iustus error*, exceeding the court's jurisdiction, or grounds sufficient to justify *restitutio in integrum*.

[10] It was not in dispute however, that the payments the liquidators seek to recover had, indeed, been made to Afrisam. It was also not in dispute that the first set of payments were made at a time when Cemlock's liabilities exceeded its assets and that it was proper that it be wound up. For this reason Afrisam had not opposed the original application when it was launched in October 2013. In the end, the nub of Afrisam's discontent with the December 2015 court order was that it disregarded the intervening voluntary winding-up when determining the commencement date for the compulsory winding-up.

[11] On the other hand, Maleth insisted that it had always intended to pursue its original application and to preserve 31 October 2013 as the effective winding-up date. The voluntary winding-up was merely a strategy to avoid 24 January 2014, on which CMC presented its application for Cemlock's winding-up, being the commencement date for the winding-up. The intention was to later convert the voluntary winding-up to a compulsory winding-up such that it would be effective from 31 October 2013.

[12] In dismissing Afrisam's application the high court determined the issue as one grounded in waiver. It reasoned that in facilitating Cemlock's voluntary winding-up in March 2014 Maleth had not waived its rights under the original application. The court found that the evidence supported Maleth's stated intention to preserve 31 October 2013 as the effective date for the winding-up. Such evidence, according to the court, lay in the active role played by Maleth in frustrating Cemlock's opposition to its compulsory winding-up, discouraging CMC from proceeding with its application, re-instating its own application and facilitating the interrogatories under s 417 of the Act.

**Commencement of winding-up**

[13] It is desirable to say something about the commencement of a winding-up even though, at the end of the day, that is not the decisive issue in this case. In the case of a compulsory winding-up, the winding-up would be deemed to commence on 31 October 2013, the date of presentation of the application for its winding-up. Section 348 of the Act provides that the winding-up of a company by the court shall be deemed to commence at the time of presentation of the application for the winding-up. Had nothing else intervened, when the winding-up order in this case was granted on 15 December 2015, the winding-up would have been deemed to have commenced on 31 October 2013. That was in accordance with the order of Windell J.

[14] The position is different in the case of a company that is being wound up in consequence of a voluntary winding-up. There is then no application to the high court for a winding-up order. However, it is still necessary for a variety of purposes, not least the date of commencement of the *concursus creditorum*, to know when the winding-up commenced.

Accordingly s 352(1) of the Act provides that the winding-up will commence on the date on which the special resolution for its winding-up is registered by the CIPC.[3]

[15] This case was largely argued on the basis that we had to choose between one of these two dates as the date of commencement of the winding-up. That was, however, incorrect. The reason is that the section that governs the determination of the relevant date for the purposes of setting aside dispositions made before the winding-up commences contains a special provision for determining the relevant date. That date is not the date of commencement of the winding-up, save as a matter of coincidence. In the peculiar factual circumstances of this case it may be that the date of commencement of the winding-up will have changed between the period of its voluntary winding-up and it subsequent compulsory winding-up, but it is unnecessary for us to consider that possibility or to pronounce upon it. We are only concerned with proceedings to set aside impeachable dispositions in terms of the Insolvency Act. The relevant date for these purposes is not the date of commencement of the winding-up of the company. Accordingly this judgment does not deal with the difficult question of when for the purposes of the winding-up of Cemlock the winding-up commenced.

**Impeachable transactions**

[16] Section 339 of the Act provides that in the winding-up of a company that is unable to pay its debts, the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specifically provided for by the Act. Against this background s 340 of the Act regulates the impeachment of dispositions made by a company prior to its winding-up. The section provides that:

'(1) Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.

(2) For the purpose of this section the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be-

(a) in the case of a winding-up by the Court, the presentation of the application, *unless that*

[3] The section refers to the Registrar of Companies but that function is now fulfilled by the CIPC in terms of s 187(4)*(b)* of the Companies Act 71 of 2008.

*winding-up has superseded a voluntary winding-up, when it shall be the registration in terms of section 200 of the special resolution to wind up the company*;

(b) in the case of a voluntary winding-up, the registration in terms of section 200 of the special resolution to wind up the company;

(c) . . .' (Emphasis supplied)

[17] The need to have a special deeming provision in regard to the date corresponding with the date of sequestration of an insolvent, arises from the terms of the statutory provisions in the Insolvency Act dealing with voidable and undue dispositions. The law of insolvency applicable to impeachment of dispositions as specified under s 340(1) and 340(2)*(a)* is set out in ss 29 and 30 of the Insolvency Act. Section 29 of that Act regulates voidable preferences as follows:

'Every disposition of his property made by a debtor *not more than six months before the sequestration of his estate* or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.' (Emphasis added.)

[18] Section 30 of the Insolvency Act regulates the setting aside of undue preferences. It provides that:

'If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition.'

[19] The difference between these two sections is clear. Under s 29 the onus rests upon the recipient of the disposition to prove that it was made in the ordinary course of business and was not intended to prefer one creditor (usually the recipient) above another. Under s 30 the liquidator or other person seeking to set the disposition aside must prove that it was made with the intention to prefer the recipient or some other creditor.[4]

[4] For example a payment to one creditor may release, and thereby prefer, another creditor under a deed of suretyship.

[20] Once this distinction is appreciated the real dispute between the parties in this case becomes apparent. The earlier the 'date of sequestration' of Cemlock the more of the admitted dispositions to it fall within s 29, where the onus rests upon it to show that they were made in the ordinary course of business and without intending to prefer one creditor over another. The later the date, the fewer dispositions fall within s 29 and can only be recovered if the liquidators prove that they were made with the intention of preferring one creditor over another. Maleth's purpose in asking for a winding-up order 'with effect from 31 October 2013' was to entrench that date as the applicable date for the purpose of the attack on the dispositions to Afrisam.

**The date of sequestration**

[21] As is evident from s 340(2)*(a)*,[5] the Act envisages replacement of a voluntary winding-up with a compulsory winding-up. That section then provides, in terms, that where a compulsory winding-up order replaces a voluntary winding-up, the deemed date of commencement shall be the date of registration of the special resolution for the winding-up as provided in s 200 of the Act, rather than the date of presentation of the application for compulsory winding-up. This means that the six month period for impeachable transactions will be determined with reference to the date of registration of the special resolution to wind up the company, rather than the date of presentation of the winding-up application.

[22] Other sections in the Act that envisage the replacement of a voluntary winding-up by a compulsory winding-up court order include s 346(1)*(e)* of the Act, which expressly provides as follows in regulating who may apply to court for a winding-up order:

'(1) An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made-

(a) by the company;

(b) …

(e) *In the case of any company being wound up voluntarily*, by the Master or any creditor or member of that company…' (Emphasis supplied).

[23] Also, in terms of s 347(4)*(a)* of the Act:

'Where the application is presented to the Court by –

[5] See para 15 above.

(a) any applicant under section 346 (1) (e), the Court may in the winding-up order or by any subsequent order confirm all or any of the proceedings in the voluntary winding-up.'

[24] The facts in this case fit squarely within the provisions of the Act referred to above, particularly s 340(2)*(a)*. The December 2015 winding-up order superseded the voluntary winding-up that had commenced in March 2014. It follows, therefore, that in terms of s 340(2)*(a)* the effective date of Cemlock's winding-up was the date of registration of the special resolution, i.e 12 March 2014 and not 31 October 2013.

[25] While this disposes of the appeal, it is appropriate to deal with a submission by the appellant that a compulsory winding-up order cannot be obtained unless the voluntary winding-up has been set aside. In *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd; King Pie Holdings (Pty) Ltd v King Pie Durban (Pty) Ltd*[6] the court was confronted with similar issues, except that, unlike in this case, a provisional winding-up order had been granted in the compulsory winding-up proceedings. The applicant had launched court proceedings for the winding-up of each of the two respondents and had obtained a provisional winding-up order in respect of each of them. Each of the respondents subsequently passed a special resolution for its voluntary winding-up. On the return date, the court had to decide: (i) whether section 359(1)*(a)* of the Act had the effect of suspending the applications for compulsory winding-up of the respondents from the date of commencement of the voluntary winding-up; (ii) whether it was necessary before proceeding with the applications for compulsory winding-up, to stay or set aside the voluntary winding-up; (iii) whether a compulsory winding-up order ought to replace the voluntary winding-up; and (iv) what order for costs would be appropriate in the circumstances.

[26] Although the provisions of s 354 are not central to the issues in this appeal, certain findings made by the court in *King Pie* are relevant. Section 354 of the Act provides that:

'(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside

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[6] *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd; King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd* [1998] 4 All SA 179D; 1998 (4) SA 1240 (D).

the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.
(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.'

[27] In *King Pie*, the Court held that a voluntary winding-up of a company was no bar to the launching of an application for its compulsory winding-up. That application for winding-up did not constitute 'civil proceedings' as envisaged in s 354, and therefore no stay of the voluntary winding-up process was consequential therefrom. The court also held that it had a wide discretion to set aside the pending voluntary winding-up process; but it was not necessary to have the voluntary winding-up set aside before an application for compulsory winding-up could be launched. However, on the facts before it, the Court found that it was in the interests of the creditors that the voluntary winding-up of each company be set aside and that the provisional winding-up order be confirmed.

[28] The decision of the court in *King Pie* is consistent with the provisions of the Act, which allude to the granting of a winding-up court order in the context of a pending voluntary winding-up. The wide discretion which the court has when considering that application was described in *Ward & another v Smit & others: In re Gurr v Zambia Airways Corporation Ltd*[7] as follows:
'The language of the section is wide enough to afford the Court a discretion to set aside a winding-up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events.'
As shown above, the wide discretion of a court when considering an application for winding-up is specifically given under s 347(4)*(a)*, that the court '*may* in the winding-up order or by a subsequent order confirm all or any of the proceedings in the voluntary winding-up.' (Emphasis supplied)

[29] Were it necessary for the voluntary winding-up to be set aside before granting an order of compulsory winding-up, confirmation of the proceedings under the voluntary winding-up would be an anomaly. The setting aside of Cemlock's voluntary winding-up was

[7] *Ward & another v Smit & others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 180G-181D.

therefore not necessary. Those proceedings could be set aside if the court, in the exercise of its discretion, found that it was necessary to do so.

[30] Further, there is no indication in the Act that the voluntary winding-up process extinguishes pending compulsory winding-up proceedings, such as the court applications that were pending against Cemlock in March 2014. There can be no basis for an applicant, who opts not to proceed for the time being with their application for compulsory winding-up pending a parallel winding-up process, to be divested of its application of their rights under that application. That is why, when a provisional winding-up order has been granted by the court, a creditor who believes that the provisional winding-up order may not be confirmed, may on the return day, seek leave to intervene in the winding-up proceedings. Also, if the applicant seeks to discharge the provisional winding-up order, an intervening creditor may be granted an extension of the rule to enable them to bring his own winding-up application.

[31] However, once it is accepted that the determination of the date that for the purposes of setting aside dispositions is equivalent to the date of sequestration under is resolved in terms of s 340(2)*(a)* of the Act, the contention by Afrisam that Maleth withdrew, abandoned or waived its rights under the original application becomes irrelevant. Afrisam correctly did not persist with this submission. Even if the conversion application were to be considered to be a new application for winding-up as Afrisam insisted, in terms of s 340(2)*(a)*, the commencement date for the winding-up remained the date of registration of the voluntary winding-up resolution.

**Failure to give service**

[32] The complaint regarding the failure to give notice of the application does not take the matter further. Given the concession by Afrisam that, as far back as October 2013, Cemlock was unable to pay its debts and the attempt by CMC to have Cemlock wound up there was ample evidence of the hopelessness of Cemlock's circumstances. As Meskin puts it:

'Where a creditor seeks the winding-up and his application is not opposed by other creditors, the Court's discretion is very narrow; for an unpaid creditor who cannot obtain payment and who brings his claim within the Act is, as against the company, entitled *ex debito justitiae* to a winding-up order; he is not bound to give the company time …'

In this instance a case for the winding-up of Cemlock had been properly made out on the papers.

[33] In any event, in terms of s 346A of the Act, service of a winding-up order, including a provisional winding-up order is required only in respect of trade unions, employees of the company, the South African Revenue Service; and the company itself, unless the application was made by the company.

[34] In the result the following order is made:

1 The appeal is upheld with costs, such costs to include the costs of two counsel.

2 The order of the high court is set aside and replaced by the following:

‘a) Leave is granted to the appellant to intervene in case no 40865/13.

b) The order of Windell J dated 04 December 2015 is varied by the deletion of the words “with effect from 31 October 2013” in paragraph 1 thereof.

c) The costs of this application are to be paid by the respondent including the costs consequent upon the employment of two counsel.’

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N Dambuza

Judge of Appeal

APPEARANCES

| | |
|---|---|
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