

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2021/30511

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
_____	_____
DATE	SIGNATURE

In the matter between:

TRUVAL MANUFACTURERS

Intervener

ENYUKA PROP HOLDINGS (PTY) LTD

Applicant

AND

UNITED MERCHANTS CC (in liquidation)

First Respondent

KOBUS VAN DER WESTHUIZEN N.O.

Second Respondent

TALHA MOOIN MAYET N.O.

Third Respondent

MASTER OF THE HIGH COURT GAUTENG DIVISION,
JOHANNESBURG

Fourth Respondent

COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION Fifth Respondent

In re:

ENYUKA PROP HOLDINGS (PTY) LTD

Applicant

and

UNITED MERCHANTS CC

Respondent

JUDGMENT

W G LA GRANGE, AJ

[1] This is an application by Truval Manufacturers CC (to whom I shall refer as Truval) to intervene in an application brought by the applicant (to whom, for ease of reference, I shall refer as Enyuka) in terms of section 354(1) of the Companies Act,¹ (the Act) to set aside the voluntary liquidation of the first respondent (to whom I shall refer United Merchants).² Truval refers to the application in terms of section 354(1) as the conversion application and Enyuka refers to it as an interlocutory application; I shall adopt the same terminology herein as that used by Truval, although it is not strictly an accurate description of Enyuka's application (nor for that matter is it interlocutory in nature).

[2] Section 354(1) of the Act provides as follows:

"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 the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit."

¹ 61 of 1973.

² Despite the Act having been repealed and replaced by the Companies Act 71 of 2008, the winding-up of insolvent companies remained regulated under Chapter XIV of the Act.

[3] The conversion application seeks to set aside the special resolution passed by United Merchants on 6 December 2021 for its voluntary winding-up and, pursuant thereto, seeks an order to set aside the voluntary winding-up together with the appointment of the second and third respondents as joint provisional liquidators. Whilst Enyuka seeks an order placing United Merchants in compulsory liquidation, pursuant to an earlier liquidation application launched by it under the same case number (and in that sense the application may be described as a conversion application), it is of significance for present purposes that Enyuka seeks to do so in consequence of the setting aside of all the steps that pertain to the voluntary winding-up. Importantly, Enyuka seeks an order declaring the compulsory winding-up of United Merchants to have commenced on 25 June 2021 (and not on 2 February 2022 when the special resolution was registered with the CIPC). There is no need in law to set aside an earlier voluntary winding-up in terms of section 354(1) of the Act before proceeding with the application for the compulsory winding-up of a corporation (even where launched prior to the voluntary winding-up).³ The reason for doing so, and the significance of proceeding with the extended relief in the conversion application, is to avoid the provisions of section 340(2)(a) of the Act. But before these issues are traversed in greater detail, it is necessary to set out some background to the present application.

[4] Enyuka is the property owner of several retail shopping centres. Enyuka entered into several lease agreements with United Merchants, a retailer of clothing and accessories, in respect of retail space in several of its shopping centres. United Merchants defaulted on its leases over a period, causing Enyuka to serve on United Merchants six section 345 notices in the course of February 2021. The six notices were in respect of six separate lease agreements and called on United Merchants to make payment in the

³ See by way of example *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd; King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd* 1998 (4) SA 1240 (D) where 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. The court also held that it had a wide discretion to set aside the pending voluntary winding-up process. On the facts of that case, however, 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 (compulsory) winding-up order be confirmed. See also the confirmation of the findings in *King Pie* by the Supreme Court of Appeal in *Afrisam (SA) (Pty) Ltd v Maleth Investment Fund (Pty) Ltd* (651/2018) [2019] ZASCA 139 (01 October 2019) at paras [25] to [28].

aggregate amount of R1 211 196.90. United Merchants failed to do so and was deemed unable to pay its debts. The outstanding debt continued to escalate and, subsequently, Enyuka also came to hear of owners from other shopping centres that United Merchants was unable to meet its rental obligations to the landlords at those premises. This much is not in dispute in the application to intervene.

[5] Truval has the same members as United Merchants and was a supplier to United Merchants of merchandise for sale in United Merchants' stores. Truval contends in its intervention application that, as at 31 March 2021, United Merchants was indebted to it in the sum of R56 559 975.45 in respect of clothing and accessories sold and delivered to United Merchants. On 15 March 2021 United Merchants executed a general notarial covering bond in favour of Truval over United Merchant's movables and on 28 April 2021 a court order granted Truval leave to perfect the notarial bond. The existence of the notarial bond is also not in dispute between the parties.

[6] On 25 June 2021 Enyuka brought liquidation proceedings against United Merchants, seeking the final winding-up of United Merchants on the basis that it was deemed to be unable to pay its debts (as contemplated in section 344(f) read with section 345(1)(a)(i) of the Act), and that it was also, as a matter of fact, commercially insolvent and unable to pay its debts (as contemplated in section 344(f) read with section 345(1)(c) of the Act). United Merchants opposed that liquidation application and filed an answering affidavit on 11 August 2021; thereafter Enyuka filed its replying affidavit on 21 September 2021.

[7] Prior to the opposed liquidation application being heard, on 6 December 2021, United Merchants passed a special resolution for its voluntary winding-up. The special resolution was registered with the fifth respondent (the CIPC) on 2 February 2022. There is no dispute between the parties that, had the voluntary winding-up not occurred, and had the application for compulsory winding-up brought by Enyuka been successful, the date of liquidation of United Merchants would have been deemed to be 25 June 2021 (the date on

which the application was launched).⁴ In the circumstances, however, the date of winding-up was 2 February 2022, that being the date on which the special resolution was registered.⁵

[8] The significance of the date of liquidation relates to whether a transaction by United Merchants is classified as a voidable preference under section 29 of the Insolvency Act,⁶ or an undue preference under section 30 of that Act. In the case of the former, the onus rests on the recipient of the disposition to prove that it was made in the ordinary course of business and was not intended to prefer a creditor (typically the recipient) above another. In the case of the latter, the onus is on the liquidator to prove that the disposition was made with the intention to prefer the recipient (or some other creditor). It is in consequence of this distinction and the related benefits arising from an earlier date of winding-up, that Enyuka brought its conversion application. In it, Enyuka refers to several dispositions by United Merchants to Truval that it contends were made during the earlier part of 2021, at a time that United Merchants was insolvent and with the clear intention of preferring Truval (who had the same members as United Merchants). Notably, the earlier date of liquidation would also have a material impact on the general notarial covering bond executed by United Merchants in favour of Truval over United Merchant's movables in March 2021.

[9] It is necessary to say something about the date of liquidation in relation to impeachable transactions at this juncture. Section 340 of the Act regulates the impeachment of dispositions made by a company prior to its winding-up and provides as follows:

“(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

⁴ 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.

⁵ Section 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 (the function of the Registrar of Companies now being fulfilled by the CIPC in terms of s 187(4)(b) of the Companies Act 71 of 2008).

⁶ 24 of 1936.

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 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 added]*

[10] The import of section 340(2)(a) is that, even were a compulsory winding-up order granted sometime in the future, this would follow after the voluntary winding-up already effected on 2 February 2022 and, for purposes of setting aside impeachable transactions, the date of liquidation will remain 2 February 2022 (despite the earlier application date for compulsory winding-up of 25 June 2021). The Supreme Court of Appeal confirmed that this is the import of section 340(2)(a) in its decision in *Afrisam*:⁷

“[21] As is evident from s 340(2)(a), 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.

...

⁷ *Afrisam (SA) (Pty) Ltd v Maleth Investment Fund (Pty) Ltd* ZASCA 139 (supra) at para [21]

[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.*"

[11] In the *Afrisam* matter, the court also pointed out (albeit *obiter*) that it was not necessary for the voluntary winding-up to be set aside before granting an order of compulsory winding-up; those proceedings could be set aside if the court, in the exercise of its discretion, found that it was necessary to do so.⁸ There is no indication in the Act that the voluntary winding-up process extinguishes pending compulsory winding-up proceedings; and 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 rights under that earlier application.⁹ The court concluded as follows on this issue:¹⁰

"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,[sic] 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."

[12] It is against the above legal and factual backdrop that Enyuka brings its conversion application and Truval seeks to intervene. In the ordinary course, little purpose would be served by Truval intervening were it that Enyuka's

⁸ *Afrisam (SA) (Pty) Ltd v Maleth Investment Fund (Pty) Ltd* (supra) at para [29]; see also *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd*; *King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd* (supra) at 1250C-E

⁹ *Afrisam (SA) (Pty) Ltd v Maleth Investment Fund (Pty) Ltd* (supra) at para [30]

¹⁰ *Afrisam (SA) (Pty) Ltd v Maleth Investment Fund (Pty) Ltd* (supra) at para [31]

application served only the purpose of ‘converting’ a voluntary liquidation into a compulsory one. The date of liquidation would not be altered thereby (as per section 340(2)(a) of the Act) and Truval’s rights as creditor would be unaffected. Moreover, as indicated by the Supreme Court of Appeal in *Afrisam*, the position would not be altered even if the application were brought as a conversion application in terms of section 354(1) of the Act.

[13] It appears to me, however, that both Enyuka and Truval accept that the conversion application brought by Enyuka extends beyond the mere ‘conversion’ of a voluntary winding-up into a compulsory one. As indicated above, Enyuka expressly seeks to have the special resolution passed by United Merchants (and which triggered its voluntary liquidation) set aside. Enyuka contends, amongst other allegations, that the statement of affairs that forms an integral part of, and foundation for the special resolution and the consequent voluntary winding-up, was fatally defective by virtue of its non-compliance with section 363 of the Act. Enyuka also contends that, in consequence thereof, the special resolution passed on 6 December 2021 and registered on 2 February 2022 was void *ab initio*. Pursuant hereto, not only does Enyuka seek to set aside the voluntary winding-up of United Merchants and have it replaced with a compulsory winding-up (before newly appointed liquidators), but it seeks an express order “*declaring that the winding-up ordered [pursuant to the compulsory liquidation of United Merchants] commenced on 25 June 2021 in terms of section 348 of the Act*”. Enyuka seeks thereby to avoid the ordinary consequences of section 340(2)(a) of the Act. Whilst the court hearing the conversion application may grant such an order (as indicated in both the *King Pie*¹¹ and *Afrisam*¹² decisions), it does not follow as a matter of course from a conversion application (as indicated by the court in *Afrisam*¹³).

[14] It is in this context that Truval seeks to intervene. It is trite that Truval needs to show that it has a direct and substantial interest in the right that is the

¹¹ *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd; King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd* (supra) at 1250C-E

¹² *Afrisam (SA) (Pty) Ltd v Maleth Investment Fund (Pty) Ltd* (supra) at para [29]

¹³ *Afrisam (SA) (Pty) Ltd v Maleth Investment Fund (Pty) Ltd* (supra) at para [31]

subject matter of the application; specifically, Truval needs to show that it could be prejudiced by the judgment of the court in the conversion application.¹⁴ Provided Truval is able to show that it “*has some right which is affected by the order issued, permission to intervene must be granted*”.¹⁵ Truval argued that it had “*some right*” by dint of the provisions of section 354(2) of the Act, which provides that 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*”. Whilst Enyuka disputes that Truval is a creditor, I am prepared to accept for present purposes that it is. As a creditor, so contends Truval, it has a right to intervene to have its wishes heard. A second argument advanced by Truval is that, in consequence of its perfected notarial bond, it has a real right that is impacted by the conversion application; in this regard Truval referred me to the decision in *Standard Bank of South Africa Ltd v Swartland Municipality and Others*.¹⁶ At issue in that matter was whether the bank, which held two mortgage bonds on a property, ought to have been joined in an application for demolition brought by the municipality. The court held that, as the holder of a real right in property, the bank had more than a mere financial interest in the outcome of proceedings.

[15] I consider these points below, but first I need to say something about the case pressed in oral argument before me by Enyuka. It contended that, beyond a bald denial, Truval had not answered the allegations around the nullity of the special resolution in its application to intervene. Moreover, so contended Enyuka, the issue regarding the voidness of the resolution and statement of affairs is to be determined as between Enyuka and United Merchants (and its liquidators). Enyuka contends that Truval has no legal interest in the outcome or in the determination of this issue; Truval was not party to the taking of the purported special resolution or the statement of affairs.

¹⁴ *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC) at para [11] and *Peermont Global (KZN) (Pty) Ltd v Afrisun KZN (Pty) Ltd t/a Sibaya Casino and Entertainment Kingdom* [2020] 4 All SA 226 (KZP) at para [18].

¹⁵ *SA Riding for the Disabled Association v Regional Land Claims Commissioner* (supra) at para [10]

¹⁶ 2011 (5) SA 257 (SCA)

[16] Turning first to the points advanced by Truval. I find little merit in the argument made with reference to section 354(2) of the Act. The proposition is advanced at a general level without any detail about how or why the conversion application would adversely affect Truval's rights as creditor. Not only does the section require specificity regarding the "wishes of the creditors", but as I have already indicated, no purpose would be served by a creditor intervening in a conversion application; the date of liquidation would not ordinarily be altered thereby (as per section 340(2)(a) of the Act) and the creditors rights would be unaffected thereby. That having been said, Truval's point that its security (in the form of a notarial bond) would be adversely impacted by this particular conversion application holds more sway. So too, for that matter, would an allegation that other transactions between Truval and United Merchants would be adversely affected by the conversion application. The reason is because this conversion application seeks relief beyond merely the 'conversion' of a voluntary winding-up to a compulsory winding-up; it also seeks relief that alters the provisions of section 340(2)(a) of the Act. Whilst I consider that such relief is capable of being sought, as is apparent from the *King Pie* decision, the import thereof is that Truval has a right to be heard in relation thereto because its property rights may be affected thereby.

[17] Whilst I agree with the point advanced by Enyuka's counsel to the effect that Truval has not put up a defence to the allegations around the nullity of the special resolution (and the allegations of voidness that follow thereon) beyond a bald denial, it is conceivable that Truval may yet advance some arguments as to why a court ought to not to alter the date of liquidation from 2 February 2022 to 25 June 2021. Accordingly, whilst Truval has not indicated the details of its defence or opposition to the conversion application, it has indicated the extent of its rights that would be adversely affected by the conversion application and there exists the possibility that Truval may yet make submissions in relation to the relief sought by Enyuka (without any reference to the nullity of the special resolution).

[18] Accordingly, despite the unsatisfactory nature of the intervention application and the failure of Truval to indicate therein the basis upon which it intends to

oppose the conversion application, I nonetheless consider that I ought to exercise my discretion to grant Truval the right to intervene. Given Truval's failure to indicate on what basis it intends to oppose the conversion application, however, I do not consider that it is entitled to the costs of the intervention application at this juncture. Those costs are to be held over for the court hearing the conversion application, that being the point at which Truval will have disclosed the basis for its opposition to the relief sought by Enyuka.

[19] I grant the following order:

1. Truval Manufacturers CC is granted leave to intervene in the conversion application brought by the applicant and is joined therein as a party (to be called the intervener).
2. Truval Manufacturers CC shall file its answering affidavit within 15 court days of the granting of this order.
3. The costs of the application are reserved.

W G LA GRANGE
ACTING JUDGE OF THE HIGH
COURT, JOHANNESBURG

Date of Hearing: 2 October 2023
Date of Judgment: 31 October 2023

APPEARANCES:

Intervener's s Counsel: Adv M D Silver
Intervener's Attorneys: Moss Cohen and Partners

Applicant's representative: Adv J Both SC
Defendant's Attorneys: Kokinis Inc