

SOUTH AFRICA / JUDGMENT

**Botes and Others v Tariomix (Pty) Ltd t/a
Forever
Diamonds and Gold and Others (UM29/2023)
[2024] ZANWHC 106; [2024] 2 All SA 830
(NWM);
2024 (6) SA 203 (NWM) (12 April 2024)
[2024] ZANWHC 106**

COURT

North West High Court, Mafikeng

BEFORE

Morgan

CASE / FILE NUMBER

UM29/2023

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Source record

FLYNOTES:

COMPANY – Winding up – Withdrawal
of proceedings –
After
provisional liquidation order and before possible discharge –
Person instituting proceedings wants to withdraw
must tender to
pay costs – Notice does not contain such an embodiment –
Notice filed after case was set down
– Necessary for
liquidating creditors to get consent of other parties – No
consent – No application for
leave to withdraw –
Notice of withdrawal is defective and dismissed.
IN
THE HIGH COURT OF SOUTH AFRICA
NORTHWEST
DIVISION, MAHIKENG
CASE
NO: UM29/2023

Reportable:

YES
/ NO
Circulate

to Judges: YES
/ NO
Circulate

to Magistrates: YES / NO
Circulate

to Regional Magistrates: YES / NO

DATE: 12/04/2024
SIGNATURE
In

the matter between: RUAN
BOTES
FIRST APPLICANT
JEANDRE
VILJOEN
SECOND APPLICANT
ELSABE SNYMAN &
10
OTHERS[1]
THIRD TO THIRTEENTH
APPLICANTS
and
TARIOMIX (PTY)
LTD
FIRST RESPONDENT
T/A FOREVER DIAMONDS
AND GOLD
(REGISTRATION NUMBER:
2011/119689/07)
(In liquidation)
FINANCIAL SECTOR
CONDUCT AUTHORITY
SECOND RESPONDENT
HERMANUS J V VICTOR
N.O.
THIRD RESPONDENT
JOHANNA N MAHANYELE
N.O.
FOURTH RESPONDENT
CAROLINE MMAKGOKOLO
N.O.
FIFTH RESPONDENT
(In
their capacities as the duly appointed joint provisional liquidators
of Tariomix (Pty) Ltd (in liquidation))
SOUTH AFRICAN REVENUE
SERVICES
SIXTH RESPONDENT
MASTER OF THE HIGH
COURT,

MMABATHO
SEVENTH RESPONDENT
Neutral
Citation: Ruan
Botes and 12 Others v Tariomix (Pty) Ltd and 6 Others
ZANWHC (12 April 2024)

Heard: 15 September 2023; and 13 November 2023

Delivered: 12 April 2024

Summary: Liquidation application brought by
liquidating creditors against company – Opposed Motion -
Provisional liquidation order
granted against company– On Rule

Nisi (second leg of
liquidation proceedings): determination whether the company in liquidation and / or any other
interested persons made out a case to discharge of the provisional
liquidation order granted against the company – consideration
of novel points of law and legal effect on status of company
placed
under provisional liquidation pursuant to the filing of a notice of
withdrawal of proceedings by the Original Applicants
post the
granting of a provisional liquidation order and prior to the possible
discharge thereof – consideration of applications
for
intervention by intervening Applicants / creditors –
Consideration and discussion of inter
alia the sui
generis nature of
liquidation proceedings – Just and equitable remedy –
Unopposed application to file an affidavit to correct
the curator
bonis report averring additional adverse information against the
company in liquidation.
This
judgment was handed down in virtual court and copies thereof
circulated electronically to the parties' representatives
by
email. The date and time of hand-down are deemed to be 15h00 on
Friday, 12 April 2024.

JUDGMENT

MORGAN AJ

INTRODUCTION

- [1] This application is a sequel to the application brought jointly by the First and Second Applicants, Mr Ruan Botes and Mr Jeandre Viljoen (Original Applicants / liquidating creditors)[2] against the First Respondent, Tariomix (Pty) Ltd t/a Forever Diamond and Gold (“Tariomix”) for its liquidation and winding up.
- [2] The crystalised issue for me to determine is whether Tariomix and/or other interested parties, have made out a case militating against the provisional liquidation order granted by Djaje DJP on 23 February 2023 against Tariomix, from being made final. In other words, this Court is called to decide whether Tariomix and/or other interested parties have made out a case in favour of the discharge of the provisional liquidation order made against Tariomix.
- [3] The issues involved in this matter were, in my view, simple, notwithstanding some of the novel issues raised that required proper consideration.
- [4] At the outset, I must categorically state that the voluminous papers filed in this matter, more so, pursuant to the granting of the provisional liquidation order, span over 20,836 (twenty thousand eight hundred and thirty-six) pages, comprising of approximately 15 large arch lever files and no less than 20 volumes of bound pages, which made trawling through the copious amount of paper a tedious and abnormally lengthy exercise.
- [5] Nevertheless, albeit most of the affidavits filed by Tariomix and other interested persons (after the provisional order was granted and in opposition to the provisional liquidation order being made final) were substantially repetitive, I still had to consider the content of each of them prudently to prepare a well-considered and concise judgment.
- [6] As such, this judgment will not be burdened by unnecessary facts. I will only set out the relevant facts necessary for determining the issues before me. Other facts may be engaged where the application of the legal principles so requires. This is not a consequence of judicial parsimony or judicial reluctance, but it is to ensure that this judgment is concise and limits unwarranted academic musings on issues that are not relevant to this matter.
- [7] The crisp issues for determination before me are three-fold, namely:
- a. What is the nature of liquidation proceedings?
 - b. Can a notice of withdrawal by the Applicants, delivered after a company has been placed under provisional liquidation, end or terminate the liquidation proceedings without more?
 - c. What is the status of intervention proceedings by other affected creditors in such a case?

ESSENTIAL BACKGROUND

FACTS

- [8] Tariomix has been provisionally liquidated, on the strength of the application brought by the Original Applicants, who allege that its business model was a Ponzi scheme which involved investors buying into diamond parcels, Tariomix promised to resell at high profits. Regrettably the scheme ultimately led to them losing large sums of money and resulted in Tariomix being indebted to the Applicants and unable to pay its indebtedness to them and as such committed acts of insolvency. They further allege that Tariomix collected approximately four billion rands from its investors / creditors from whom some are the liquidating creditors in this application.

The pertinent facts in detail

- [9] The initial urgent application for the liquidation of Tariomix served before Djaje DJP on 23 February 2023, and pursuant to hearing all the parties, she granted an order that:

“1. The First Respondent [Tariomix] be placed under provisional liquidation returnable on the 14th day of September 2023;

2. The First Respondent [Tariomix], and all other interested parties, are called upon to show cause on or before the return date hereof, why this order should not be made final;
 3. The interim order be served upon the First Respondent [Tariomix], at its registered address by way of sheriff;
 4. This order be served upon the Master of the High Court and the South African Revenue Service by way of filing notice, by hand;
 5. This order be served upon the Second Respondent [FINANCIAL SECTOR CONDUCT AUTHORITY] by way of filing notice, by hand;
 6. This provisional order be served upon the employees of the First Respondent [Tariomix], if any, by affixing a copy of this order against the principal door or gate of the premises of the First Respondent [Tariomix], at the First Respondent's [Tariomix], registered address, by way of the sheriff;
 7. This order be published once in the Beeld Newspaper and once in the Government Gazette, before the return date;
 8. The costs of this application be costs in the liquidation.”
- [10] The first order granted placed Tariomix under provisional liquidation and directed that certain procedures be wrought (effected) prior to the return date, and that Tariomix and any other interested party show cause on or before the return date why the interim liquidation order should not be made final.

- [11] On 24 March 2023, another application served before Djaje DJP, wherein Tariomix brought an anticipation application. In those proceedings, the South African Revenue Service (SARS) brought an application to intervene in the main proceedings of the liquidation application. On the day of the hearing of Tariomix's anticipation application, Djaje DJP granted an order permitting SARS to intervene and be joined in the main application and postponed the hearing of the merits of the anticipation application to be heard on 12 April 2023.
- [12] On 12 April 2023, Djaje DJP heard Tariomix's anticipation application. During the hearing of the anticipation application, SARS sporadically brought an application to rescind the provisional liquidation order of Djaje DJP, which was postponed for hearing on another date.
- [13] In the anticipation application, Djaje DJP found that Tariomix failed to make out a case for the discharge of the provisional liquidation order of 23 February 2023 and as such, the anticipation application was dismissed.
- [14] In SARS rescission application, she found that there was no merit in the application and that it fell to be dismissed. She further found that the main liquidation application should not be finalised in those proceedings. In addition, she directed that Mr Zaheer Cassim, the curator bonis from Cassim Trust (Pty) Ltd appointed for Tariomix, pending before the Gauteng Division of the High Court of South Africa in the matter of Commissioner for the South African Revenue Services vs Louis Petrus Liebenberg & Others Case no. 32092/2021 file an affidavit or report on the status of Tariomix. In her order she further extended the rule nisi; reserved costs; and directed that the order be served on Mr Zaheer Cassim.
- [15] The provisional liquidation order was properly served on all the cited and interested parties and was further published in the newspapers and government gazette per the order of Djaje DJP. This fact was not disputed before me and nothing in this matter turns on to this.
- [16] On 13 November 2023, the matter came before me. However, before I could hear the parties on their main submissions to the intervention applications before me and the main issues to be canvassed on the return date, the parties indicated that they were not ready to proceed as all the papers were not in order, and there were still some affidavits which the parties wished to file.
- [17] Further in the hearing, SARS indicated an intention to bring another application to correct certain portions in the report filed by the curator bonis. In this regard, SARS further submitted that the application was not intended to have the curators report reviewed and set aside either in terms of common law or Rule 53 of the Uniform, Rules of Court, but merely to correct typing errors and figures to ensure that the correct amount owing to it by Tariomix in unpaid taxes was properly recorded. In brief the submissions proffered by SARS was that Tariomix owed it more than 33 (thirty-three) million rands in unpaid taxes which it wanted to ensure that this fact is

brought to the Court's attention. This submission, in my view, does not aid or make Tariomix's case any better in support of a discharge of the provisional order but instead paints a worse picture and extends Tariomix's total liability to its creditors, including SARS, a statutory preferent or preferred creditor.

[18] On 23 September 2023, on the return date, the parties requested a postponement to allow SARS to bring a further application and to ensure that the court files are in order. I then placed the matter under judicial case management and made the following order: Pursuant to hearing the parties and having taken into account that all the necessary papers which ought to have been filed were not filed on the date set down. I then proceeded to issue a comprehensive directive and order placing the matter under judicial case management, prescribing specific timelines in which additional pleadings, notices and submissions each party was to file ahead of the hearing of the merits of the liquidation application and ancillary applications on the new return date. The directive and order I granted read as follows:

1. The rule nisi is extended to Monday, 13 November 2023 at 10:00. The estimation of the hearing of the arguments to be conducted over a period of two days, i.e. Monday, 13 November 2023 and Tuesday, 14 November 2023, in physical court or on a virtual platform subject to the discretion of the presiding Judge. Directives regarding the mode of the hearing will be communicated to the parties in due course.
2. Tariomix and SARS are directed to file and deliver their opposing affidavits, if any, in the applications for leave to intervene initiated by the Applicants/Intervening Parties on or before 14:00 on Tuesday, 26 September 2023.
3. The Applicants/Intervening Parties are directed to file and deliver their replying affidavits, if any, in response to the opposing affidavits referred to in paragraph 2 supra, on or before 14:00 on Tuesday, 3 October 2023.
4. It is recorded that SARS initiated an application to file a further affidavit, which application was already served on the joint provisional liquidators, in which specific timelines are set out within which opposing affidavits, if any, and replying affidavits, if any, should be filed and delivered:

4.1.1. This application will be heard simultaneously with all the other applications on the dates referred to in paragraph 1 supra; and

4.1.2. SARS will index and paginate this application separately on the understanding that this application also forms part of the case management before the presiding Judge. In the event that any unforeseen delay comes about in the time periods envisaged in the notice of motion, leave is granted to SARS to bring it to the presiding Judge's attention for further directives.

5. The Applicants/Intervening Parties are directed to prepare a consolidated index and to paginate the papers (the bundles) (save for what is provided for in paragraph 4 supra) comprehensively in accordance with this Court's practice directives, on or before 16:00 on Friday, 6 October 2023.
6. The Applicants/Intervening Parties are directed to file and deliver their practice notes, heads of arguments, concise chronologies and lists of authorities on or before 16:00 on Monday, 16 October 2023.
7. The Respondents and all other interested parties are directed to file their practice notes, heads of arguments, concise chronologies and lists of authorities on or before 16:00, on Monday 23 October 2023.
8. The Applicants/Intervening Parties are responsible to deliver the prepared bundles, envisaged in paragraph 5 supra, at the office of the Registrar of the presiding Judge, on or before 14:00 on Monday, 30 October 2023.
9. The extension (postea) of the rule nisi, referred to in paragraph 1 supra, must be published by the Applicants/Intervening Parties, at their costs (notwithstanding the practice or convention that the Original Applicants are responsible to comply with the provisions of Section 346(4A) of the Act), in the Government Gazette, the Rapport newspaper and the Sunday Times newspaper by no later than Sunday 1 October 2023, and should furthermore be delivered to the offices of the Ninth Respondent (the Master of this Court).
10. In argument, each party will be afforded an opportunity to argue the matter in its entirety and dealing with the following aspects:
 - 10.1 The withdrawal of the application by the First and Second Applicants and the effect thereof;
 - 10.2 The applications for leave to intervene initiated by the Applicants/Intervening Parties;
 - 10.3 The ultimate relief which ought to be granted in the application, be it a discharge of the provisional order dated 23 February 2023, the replacement of the provisional order with a new provisional and/or final liquidation order and/or any other order;
 - 10.4 Any other matter properly canvassed in their Heads of Argument and Practice Notes.
11. The order in which the parties will present their arguments is as follows:
 - 11.1.1. The First and Second Applicants (Original Applicants);
 - 11.1.2. Tariomix;
 - 11.1.3. The Applicants/Intervening Parties;
 - 11.1.4. SARS;
 - 11.1.5. The joint liquidators;

11.1.6. Whereafter the Applicants/Intervening Parties will be afforded an opportunity to reply.

12. The time periods provided for and envisaged herein supra will be strictly enforced and in the event that any party deviates therefrom, such party must initiate a substantive application for condonation, failing which, and at the discretion of this Court, a punitive cost order may be granted.

13. The parties are directed to file and deliver a comprehensive joint practice note at the office of the Registrar of the presiding Judge on or before 14:00 on Friday, 27 October 2023, in which provision must be made for the manner in which the matter should be dealt with or ventilated, with specific reference to any points in limine, whether or not leave should be granted to the Applicants/Intervening Parties after the First and Second Applicants have withdrawn their application, regard being had to the effect thereof.

14. The Registrar is directed to submit a copy of the transcribed record of the proceedings of 14 and 15 September 2023 to the presiding Judge promptly.

15. The costs occasioned by the appearances on Thursday, 14 September 2023 and Friday, 15 September 2023, are costs in the application, including the costs consequent upon the employment of two counsel, where so employed.”

[19] On the return date 13 November 2023, prior to hearing the application on the merits and on the point in limine raised by Tariomix, namely that the matter was not ripe for hearing as they contended that some of the parties had not complied with the Court’s directive, I ruled that the matter was ripe for hearing as all the pleadings, notices and documents had been exchanged amongst the parties and filed in Court and thus there was substantial compliance with my directive. This ruling came pursuant to counsel for Tariomix, having taken issue in limine on the ripeness of the matter to be heard in an attempt to have the matter postponed again, mainly citing non-compliance by certain parties to my directive above as a reason for the postponement.

[20] As already stated above, I refused Tariomix’s request for a postponement, as I was of the view that all parties had complied with my directive and the matter was ripe for hearing. Further, this matter had already been unduly delayed and postponed multiple times owing to spontaneous meritless applications being launched at the hearing, which, if they were intended to be a Stalingrad tactic, were indeed prejudicial to the creditors and all who would have been adversely affected by the unreasonable delay of the finalisation of this matter. Moreover, the postponement application brought was launched from the bar on the day of the hearing and was nowhere to be found on paper.

[21] Noteworthy is that, also during the proceedings, SARS abandoned its application to have portions of the curator’s report struck out. Instead, it opted to proffer the information it sought to correct or add to the curator’s report in its affidavit filed in response to the court’s directive to show cause why the interim liquidation order should not be made final.

[22] I will now turn to address the intervention applications, followed by the parties' submissions on the legal effect of the Original Applicants' purported withdrawal from the proceedings pursuant to the granting of the provisional order; and lastly, examine the merits of Tariomix's submissions and that of interested persons, in response to the Court's directive to show cause, as to why the provisional liquidation order should not be made final.

INTERVENTION APPLICATIONS

- [23] Noteworthy, is that pursuant to the publication of the provisional order, more interested persons, all whom are investors and creditors of Tariomix launched intervention applications to be joined into the proceedings as further Applicants. The other parties who sought to be joined were appointed as the joint liquidators of Tariomix pursuant to the grant of the provisional liquidation order, as aforementioned. The Master of the High Court and the Financial Sector Regulator filed notices to abide.
- [24] Common amongst most of the intervening parties is that they were creditors of Tariomix who had invested their monies in the company's business scheme. Tariomix did not dispute this contention, namely that they were investors in the company and had a direct and substantial interest in the outcome of the application. Further, all the intervening persons save for SARS sought a final order for the liquidation of Tariomix as was prayed for by the Original Applicants in their notice of motion.
- [25] I find that all creditors (irrespective of status, whether secured, preferent, or concurrent) of a company in which they hold shares or securities (irrespective of class) have a direct and substantial interest in the outcome of a lis (application) brought against a company, especially if it pertains to the liquidation of such a company. This is because their investment forms a basis for the company's continued business operations and existence, whose primary object is to ensure a return on their investment through the profits made and dividends declared.
- [26] Moreover, a final liquidation and winding up order would, without a doubt, has an adverse effect on the interests invested in the company and the dividend yield on their investment. For these reasons, I admit and join all the intervening Applicants, who made submissions before me and identify them as the third to thirteenth Applicants as stipulated in the cover page of this judgment.
- [27] Before I turn to address the legal framework for the novel substantive issues for determination before me, the Original Applicants contended that Tariomix is possibly operating an unlawful business in the form of a pyramid scheme. Alas, these issues are not before me for determination, and even if they were, they are not fully canvassed and ventilated in the papers before me. In any event, I am of the view that those alleged facts are not relevant to determining the crucial issues before me in this liquidation application.

[28] Further, it is my view that this Court is not called upon to decide on the nature of and legality of the business conducted by Tariomix. My understanding is that the Original Applicants merely raise these allegations to add atmosphere in aggravation to Tariomix to support its liquidation. Nothing on the issues for determination before me turn on this Court considering the nature of, and legality of the business conducted by Tariomix. Therefore, I will not accommodate an argument based on speculation and conjecture, moreso one that is not relevant to determine the pertinent issues on the subject matter before me.

LEGAL FRAMEWORK

- [29] Liquidation is a statutory process in which a company is wound up in the hands of the Master of the High Court. Winding-up refers to the process and procedure of selling the assets of a company, paying its debts and using the residue money to pay the shareholders of such a company in accordance with their rights and shares.[3] It goes without saying that both solvent and insolvent companies can be wound up in certain circumstances.[4]
- [30] Liquidators are appointed by the Master of the High Court to investigate the company's financial position, financial viability, collect debts owing to the company, sell the company's assets and pay its creditors in the prescribed order and process set out under the Insolvency Act[5].
- [31] The liquidation of insolvent companies is still regulated by Chapter 14 of the Companies Act, 61 of 1973. These provisions are kept alive by the new statute, the Companies Act, 71 of 2008. A company can be wound up in several ways. First, it can be wound up voluntarily through a resolution of the board of directors and shareholders of the company, either as a members' voluntary winding-up or a creditors' voluntary winding-up, or by order of a court. A court may liquidate a company in a number of circumstances, such as when a company is deemed unable to pay its debts because it has failed to respond to a statutory demand in terms of section 345 of the 1973 Companies Act, the company has resolved by special resolution to be wound up by the court, or where the court finds it just and equitable to wind up the company.
- [32] The grounds for the winding-up of a company are enunciated in section 344 (for insolvent companies) and section 81(1) (for solvent companies) of the 2008 Companies Act. Whether a company may be wound up as a solvent or insolvent company turns on the commercial solvency of the company[6] In short, the test for commercial solvency requires a court to establish whether the company's liquid assets are available to meet its ongoing and expected obligations currently and in the immediate future.[7]
- [33] LAWSA states the following on commercial insolvency:

“A company is unable to pay its debts when it is unable to meet current demands on it, or its day-to-day liabilities in the ordinary course of business, in other words, when it is “commercially insolvent”. The test is therefore not whether the company’s

liabilities exceed its assets, for a company can be at the same time commercially insolvent and factually solvent, even wealthy. The primary question is whether the company has liquid assets or readily realisable assets available to meet its liabilities as they fall due, and to be met in the ordinary course of business and thereafter whether the company will be in a position to carry on normal trading, in other words whether the company can meet the demands on it and remain buoyant.”[8]

- [34] However, before me, the case is not about whether Tariomix should be liquidated. It was placed under provisional liquidation on 23 February 2023, and a return date was set. The issues that transpired are that the Original Applicants, the liquidating creditors, have elected to withdraw their application, and there are now applications to intervene as Applicants by other creditors who seek to be the future liquidating creditors. A return date was provided in which Tariomix, and other interested parties are invited to show cause as to why the provisional liquidation order must not be made final.
- [35] Tariomix argues that because of the withdrawal by the liquidating creditors, the provisional order must fall as there is no application in law or in fact. Thus, the intervening future liquidating creditors cannot successfully intervene as there is no application or case to intervene in.
- [36] There is no legislation that gives an express answer to this situation, and it appears to me that this is a novel issue. I will answer this by considering several issues. First, I look at the nature of liquidation proceedings, and then I will look at remedies a court can craft. Lastly, after looking at these issues, I turn to the question of whether a withdrawal application can collapse liquidation proceedings after a provisional order of placing the company under liquidation has been made and after this, I will address the question of whether Tariomix or any other interested party has shown cause why the provisional order should not be made final.
- [37] I must emphasise that this judgment is concerned with a withdrawal application after the provisional order for liquidation has been granted. It is limited to those facts and nothing more.
- [38] This argument requires a proper analysis of the contents of the notice filed and consideration of the facts and legal effects of the Original Applicants' alleged withdrawal after the provisional liquidation order was granted.
- [39] It is trite that a provisional liquidation or sequestration order immediately alters the legal status of the person against whom it is granted on the day that a competent court makes the order.

- [40] Further, irrespective of whether it is a natural or juristic person as in casu, the status of the person (natural or juristic) is altered, and their estate is immediately placed and vested in the hands of the Master, who will, in turn, appoint provisional trustees or liquidators to administer the estate or affairs of the liquidated entity until such time that the order is made final or is discharged on the return date.
- [41] During this period the person sequestrated, or directors of the liquidated company are barred from conducting business or making financial decisions in their own affairs or the company's and such decision-making functions and powers are vested in provisional trustees or liquidators appointed by the Master.
- [42] If, on the return date, the provisional order is discharged, the person or company's estate reverts to him/her or the director(s) who thereafter are restored the powers to make financial decisions relating to their estate or company's business affairs. In the case of a company, the directors of the company will continue to manage and conduct the day-to-day business affairs of the company.
- [43] On the contrary if on the return date the provisional order is made final. The Master will appoint liquidators who will be tasked amongst others, with winding up and deregistering the company, whilst ensuring that all the companies' liabilities towards its creditors per their class are settled in full and final.
- [44] What this means is that from 23 February 2023 when Tariomix was placed under provisional liquidation to the date of the final determination of this matter before me, the directors of Tariomix ceased or were barred from running the day-to-day affairs of the company until the application was finally determined on the return date and subject to this Court not making the provisional liquidation order final.
- [45] By analogy, unlike a company placed under business rescue which is allowed to trade at the hands of the business rescue practitioners appointed by the Companies and Intellectual Property Commission (CIPC), a company placed under provisional liquidation ceases to trade and conduct its ordinary day to day business.
- [46] This is because a company's affairs under business rescue is placed under the supervision of the CIPC and the business rescue practitioners (the proverbial medical staff in an intensive care unit of a hospital ward) to rescue a financially distressed company which is believed to be likely to get back on its feet and continue to trade normally with a healthy balance sheet (after implementing the turn around business strategy formulated by the business rescue practitioners and conducting the solvency and liquidity test) after the statutory prescribed period of 3 (three) months that the company is placed under business rescue.
- [47] On the reverse, in the case of a liquidation, the company is proverbially considered dead with no chances or likelihood of being revived through a business rescue process, thus it is no longer permitted to trade and the company's estate and its business affairs are placed in the hands of the Master and appointed liquidators (the proverbial funeral undertaker and its

palldbearers) to collect and preserve the assets of the company, including collecting monies owed to the company from its debtors pending the winding up and deregistration of the company, after the winding up procedures have been completed and approved by the Master to ensure that all debts owed by the company to its creditors are paid in full and final (to ensure a proper and dignified send-off is given to the company) prior to its deregistration.

THE STATUS AND IMPACT OF PROVISIONAL LIQUIDATION

- [48] Some general, broad observations are necessary to set the scene for my findings here. The initiation of liquidation proceedings represents a significant juncture in the life of a company, marking a departure from its ordinary course of business and signalling a shift in its legal status. This transformation is particularly pronounced with the issuance of a provisional order of liquidation, which carries with it a host of legal consequences that set it apart from other types of court orders.
- [49] First and foremost, it is crucial to recognise that liquidation proceedings are *sui generis* in nature, meaning they possess unique characteristics and operate within a distinct legal framework. Unlike other forms of legal action, which may seek to resolve specific disputes or enforce contractual obligations, liquidation proceedings are concerned with the winding up of a company's affairs in a manner that is orderly and equitable for all stakeholders involved.
- [50] The granting of a provisional order of liquidation represents a pivotal moment in this process, as it signifies the court's recognition of the company's inability to continue trading in its current state. By placing the company under provisional liquidation, the court effectively suspends its ordinary powers of management and places its affairs under the supervision of a liquidator. This not only alters the internal governance structure of the company but also affects its external relationships with creditors, shareholders, and other interested parties.
- [51] Moreover, the issuance of a provisional liquidation order triggers a series of statutory provisions and legal mechanisms that are unique to insolvency proceedings. For example, upon the granting of such an order, a moratorium may be imposed on legal proceedings against the company, providing it with temporary relief from creditor actions while the liquidation process unfolds. Additionally, the appointment of a liquidator empowers them to take control of the company's assets, investigate its financial affairs, and distribute proceeds to creditors in accordance with the priorities established by law.
- [52] The provisional order of liquidation serves as a watershed moment that marks the beginning of the end for the company in its current form. It not only changes the legal status of the company but also initiates a comprehensive restructuring of its affairs under the auspices of the court. As such, it is clear that liquidation proceedings are *sui generis* in nature, carrying with them a unique set of rights, obligations, and consequences that distinguish them from other forms of legal action.

- [53] A court may grant or dismiss any application for winding-up, or adjourn the hearing of the application, conditionally or unconditionally or make an interim order or any order that it regards as just.[9]
- [54] However, in most cases, a court will make a provisional order in which the liquidating Applicant, provided that the liquidating Applicant has made out a prima facie case.[10] In those cases, a court will issue a rule nisi calling upon all interested parties to show cause on the return date why the court should not make an order placing the company under final liquidation.[11] This is something that the court has discretion over. It is not required by statute to make such an order. It may, if it deems it just and appropriate, make an order placing the company under liquidation immediately.[12]
- [55] However, the court is central to this process. Once a court makes a provisional order, followed by a rule nisi, it is for the court to set aside that order. It is the obligation of the court to determine whether there is cause (or the lack thereof) for granting an order placing the company under liquidation. The mere withdrawal of the application by the liquidating Applicant(s) cannot render this redundant and nugatory.
- [56] Taking into consideration this example. Section 254 of the 1973 Companies Act refers to when a court may stay or set aside the winding up of a company. It reads:
- “(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 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.”
- [57] It is evident that in this situation, a court is pivotal to the setting aside or staying of the winding-up process. Even though that section does not speak to the consequences of withdrawing an application that commenced the proceedings, it seems to buttress the important obligation of the court to satisfy itself that there are grounds or a cause for setting aside or suspending the winding-up process.
- [58] It seems to me analogous that the Court must satisfy itself that there is cause shown by the company or any interested parties that the company should not be liquidated. This is something that the spirit and object of the legislative framework requires.

[59] I must emphasise this. In such a situation, the Court is not forcing the liquidating creditors or parties to remain in the liquidation litigation as an active participant. That is not so. Instead, the company and any interested party would be required to show cause. This is something they would have had to do regardless, even if the liquidating parties remained in the proceedings. So, it does not fundamentally cause any injustice to the parties in the proceedings but merely reinforces the centrality of the Court and its obligations.

HAS TARIOMIX OR ANY OTHER INTERESTED PARTY HAS SHOWN CAUSE WHY THE PROVISIONAL ORDER SHOULD NOT BE MADE FINAL?

[60] In my view, on the return date, the essential question to prove is whether the company placed under provisional liquidation [Tariomix in this case] and/or any other interested party has shown cause why the provisional order should not be made final.

[61] The mere fact that a provisional order was granted, in my view, indicated that the Judge who considered the liquidation application at the inception stage was satisfied that on the facts pleaded and proved, the Applicant had made a prima facie case to justify the company being provisionally placed in the hands of the Master and provisional liquidators pending further submissions on the return date by the company or any other interested person against making the interim order final. In my view, a failure to make out a convincing case on a balance of probabilities or refusal to make submissions to the court's invite or directive will render the interim order made or confirmed to be final.

[62] Further, I am of the view that on the return date it is not for the Applicants or any other person to make out a case why the order should be made final save for the court to hear the company placed under provisional liquidation and any other interested person on why the provisional order should not be made final. The elements that ought to have been proven by the Applicants during the first stage of the liquidation application to obtain a provisional order should not be restated in further affidavits on the return date, save to address any new issues or averments that the company or any other person would have made in response to the court's invite or directive to make submissions on why the interim order should not be made final.

[63] Therefore, this judgment will focus in the majority on the submissions made by Tariomix and others on the return date on why I ought not to make the provisional liquidation order granted by Djaje DJP final.

[64] As stated above, before me served a substantially voluminous copies of court processes that were filed after the provisional liquidation order was made in response to the invitation made to show cause why the provisional order ought not be made final.

[65] Further, it is my view that a company seeking to be placed under liquidation is given two opportunities in the same proceedings to make out a case rebutting the Applicant's case or persuade against granting an adverse order. The first opportunity is to make out a convincing case in the answering affidavit, to the founding affidavit delivered by the

Applicant initially when the application is brought for a provisional order, and if not successful at that stage and the provisional order is granted, and the second opportunity is when the court issues a directive in its order for the company to make further submissions or to show cause why the interim provisional order granted should not be confirmed or made final.

REMEDIES AVAILABLE TO THE COURT

[66] Section 172(1)(b) of the Constitution, 1996 provides that a court may make any order that is just and equitable. In *Electoral Commission v Mhlope*[13], Mogoeng CJ states:

“Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresolvable situations. And the operative words in this section are “an order that is just and equitable”. This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b).”[14]

[67] In the same judgment, Malunga J for the minority writes:

“The outer limits of a remedy are bounded only by considerations of justice and equity. That indeed is very wide. It may come in

different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The

odd instance may require a singularly creative remedy. In that case, the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it as it is empowered to.”[15]

[68] In this case, there are clearly constitutional issues. The first one is the rule of law. I say that it is the rule of law because if a withdrawal has the effect of collapsing a provisional order of liquidation, then it denudes the Court of its obligation to be satisfied that there are grounds to set aside a provisional liquidation order. Courts are a constitutional strut for accountability and ensure that the law is complied with. If a unilateral withdrawal by the applicant(s), in liquidation proceedings after a provisional order is granted, would undoubtedly remove a crucial constitutional strut.

[69] My previous finding buttresses that liquidation proceedings are *sui generis* in that once a party is placed under provisional liquidation, then only a Court can set that provisional liquidation aside. Nothing short of the Court being satisfied that there are grounds, such a setting aside would suffice.

[70] It is also trite that the rule of law is part of our constitutional dispensation and is a constitutional value.[16]

- [71] Of import, there may be an abuse of court processes. It is plausible that an aggrieved creditor may approach a court to launch liquidation proceedings before a Court. After the granting of such a provisional liquidation order, the creditor may receive a payment from the company, which incentivises the creditor to withdraw their application as their debt is now paid. In other words, if this Court were to find that a unilateral withdrawal from the proceedings can collapse liquidation proceedings after they have progressed passed the provisional liquidation stage, it may encourage unscrupulous directors to take advantage of this by making payments to the claimant / liquidating creditors to encourage them to withdraw their cases. The consequences are too grave.
- [72] Second, there are implications to access to court. Once a provisional order has been granted all the creditors are affected by this and have a vested interest in the conclusion of this case. It is not just the claimant creditors that has a stake but it is other creditors, preferred, secured and unsecured. They have a vested interest in this Court discharging its duty and being satisfied that there is a basis for setting aside the provisional order placing a company under liquidation.
- [73] In order to safeguard these constitutional imperatives and rights, it is important for the Court to forge new tools[17] and provide appropriate relief to ensure that the spirit and object of the law are not undermined. Coupled with the remedial powers vested in this Court in terms of section 172(1)(b) of the Constitution, I find that once a provisional liquidation order is granted, as in this case, the withdrawal by the Original Applicants does not result in the automatic collapse of the provisional liquidation order or withdrawal of the application proceedings before this Court.
- [74] Both counsel for Tariomix and SARS could not point me to any authority that would contradict this position and conclusion, and therefore, considering the fundamental tenets of justice and equity, I am convinced that the provisional order must stand.
- [75] I must reiterate this. In considering the intricate web of constitutional implications woven into the fabric of this case, it becomes evident that the principles of justice and equity must be upheld with unwavering diligence. The foundation upon which the rule of law rests is not merely a theoretical construct but a tangible cornerstone of our democracy. As such, any action or interpretation that risks eroding this foundation must be scrutinised with utmost care.
- [76] The concerns raised regarding potential abuse of court processes strike at the heart of the judiciary's role in maintaining the integrity of legal proceedings. The scenario painted, wherein unscrupulous actors may exploit loopholes to circumvent the law, is a stark reminder of the delicate balance that must be struck between facilitating access to justice and preventing its perversion. A system that allows for the manipulation of legal mechanisms for personal gain undermines the very essence of justice and equality before the law.

- [77] Furthermore, the implications for access to court extend beyond the immediate parties involved in this case. The ripple effects of a decision to allow unilateral withdrawal to collapse liquidation proceedings reverberate throughout the broader legal landscape, impacting not only creditors directly involved but also the integrity of the judicial process itself. Ensuring that all stakeholders have a fair and equitable opportunity to have their grievances heard and adjudicated is essential in upholding the principles of justice and fairness upon which our legal system is built.
- [78] Therefore, to safeguard the fundamental tenets of our legal framework, it is imperative that this Court exercises its remedial powers judiciously. By forging new tools and crafting appropriate relief, the court can ensure that the spirit and objectives of the law remain intact, even in the face of novel challenges. In this context, the expansive remedial powers vested in the Court by Section 172(1)(b) of the Constitution serve as a vital instrument in navigating the complexities of modern legal disputes.
- [79] Guided by the imperatives of justice and equity, it is incumbent upon this Court to make final the provisional liquidation order in order to prevent the erosion of fundamental constitutional principles and protect the integrity of the legal system. In doing so, I reaffirm this Court's commitment to ensure that the rule of law remains an unwavering beacon of justice for all who seek recourse within its hallowed halls.

EFFECT OF THE WITHDRAWAL OF APPLICATION

- [80] It is trite that a court cannot force a party to pursue a case it has lost interest in. Thus, parties can generally withdraw their application. Uniform Rule 41 provides:

“(1)

- (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.”
- [81] In this case, the original liquidating creditors sought to withdraw from the proceedings and filed a notice of withdrawal. This is what caused the other creditors to file applications to intervene.
- [82] From a reading of the facts, it is evident that if a person instituting any proceedings wants to withdraw, they must tender to pay costs. In this case, the notice does not contain such an embodiment. This is the first problem.
- [83] The second problem is that since the notice was filed after the case was set down, it is necessary for the liquidating creditors to get the consent of the other parties, and if it fails to do that, it would be required to obtain leave of the court to withdraw. The other parties have not filed a notice of consent to the withdrawal and merely made arguments about the effects

of the withdrawal. I disagree with their arguments, and barring this, there is no consent before me. There has also not been an application brought before me asking this Court for leave to withdraw.

[84] In any event, the two sections immediately preceding this discussion set forward my findings as to why the withdrawal notice does not affect the liquidation proceedings after a court has made a provisional order placing the company under liquidation.

[85] In the circumstances I make the following order:

1. The intervention applications by the intervening Applicants Elsabe Snyman and ten others as cited above is granted.
2. The notice of withdrawal filed by the First and Second Applicants is defective and accordingly dismissed.
3. The unopposed application by the South African Revenue Services to file a supplementary affidavit is granted.
4. The provisional order placing Tariomix (Pty) Ltd with Registration number 2011/119689/07 (in liquidation) on 23 February 2023 is made final.
5. Tariomix (Pty) Ltd be and is hereby placed under final winding-up.
6. The date of commencement of the winding-up of Tariomix (Pty) Ltd by the Court in terms of section 348 of the Companies Act, 61 of 1973, shall be deemed to be as from 20 February 2023.
7. The costs of the application will be costs in the liquidation and may be recovered on attorney and client scale.
8. Tariomix (Pty) Ltd's costs occasioned with the opposition of the application is disallowed and will not be the costs in the liquidation.

LM MORGAN

Acting Judge of the High Court of South Africa,

North West Division

PARTIES REPRESENTATIVES

FOR THE FIRST AND SECOND APPLICANTS FOR THE FIRST RESPONDENT Adv. N Du Toit instructed by Adv. RA Solomon SC with Adv. J Van Vuuren Hansen Inc. Attorneys C/O Kgomo Attorneys instructed by WN Attorneys Inc., C/O Maree & Maree Attorneys FOR THE THIRD TO THE EIGHTH APPLICANTS FOR THE SECOND RESPONDENT Adv. ASL van Wyk with Adv. D Broodryk instructed by No appearance: Notice to abide filed. Rabie Botha & Associates Inc., C/O Smit Neethling Inc. FOR THE THIRD TO FIFTH RESPONDENTS FOR THE NINTH TO THE TWELFTH APPLICANTS Adv. J Hershensohn with Adv. De Leeuw instructed by Adv. FW Botes SC

with Adv. J Stroebel instructed by Strydom Rabie Inc. C/O Smit Neethling Inc. Barnard & Patel Inc., C/O Smit Neethling Inc. FOR THE SIXTH RESPONDENT FOR THE THIRTEENTH APPLICANT Adv. M Meyer with Adv M Molea instructed by Mathopo Moshimane Mulangaphuma Inc. C/O Mokhetle Attorneys Adv. M. Louw instructed by FOR THE SEVENTH RESPONDENT Mathys Krog Attorneys C/O Smit Neethling Inc. No appearance.

[1] For purposes of brevity of the judgment header, I shall name the third to eleven intervening applicants herein: Rheenen Brayshaw

(Fourth Applicant); Renier Bloem (Fifth Applicant); Daniel van der Vyfer (Sixth Applicant); Hendrik Mynhardt (Seventh Applicant); Natasha Rack (Eighth Applicant); Karin de Bruin (Nineth Applicant); Jan Lubbe (Tenth Applicant); Dean Mynhardt (Eleventh Applicant) Hercules de Lange (Twelfth Applicant); Anita Du Plessis (Thirteenth Applicant).

[2] In this judgment, extensive reference is made to Mr Ruan Botes and Mr Jeandre Viljoen, the First and Second Applicants collectively

as the ‘Original Applicants’. Where I intend to address each singularly, I will do so in singular and unless otherwise

specified, reference to them will be made collectively as the ‘Original Applicants’.

[3] Alastair Smith, Kathleen van der Linde and Juanitta Calitz, Hockly’s Law of Insolvency: Winding-up and Business Rescue (10th ed) 280.

[4] Ibid.

[5] 24 of 1936.

[6] See *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014

(2) SA 518 (SCA) 525.

[7] See *Murray NO & Others v African Global Holdings (Pty) Ltd and others* 2020

(2) SA 93 SCA at 103-104.

[8] LAWSA Vol 4(3), (2 ed, 2014), para 74.

[9] Section 347(1) of the 1973 Companies Act.

[10] Alastair Smith, Kathleen van der Linde and Juanitta Calitz, Hockly’s Law of Insolvency: Winding-up and Business Rescue (10th ed) 292.

[11] Ibid.

[12] See *Johnson v Hirotec (Pty) Ltd* [2000] ZASCA 131; 2000

(4) SA 930 SCA.

[13] [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC).

[14] Ibid at para 132.

[15] Ibid at para 83.

[16] Section 1(c) of the Constitution reads: “1. The Republic of South Africa is one, sovereign, democratic state founded on the following values: (c) Supremacy of the constitution and the rule of law.” See *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening ; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 at para 19; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1998 12 BCLR 1458 (CC); 1999 1 SA 374 (CC) at para 58-59; *Chief Lesapo v North West Agricultural Bank* 1999 12 BCLR 1420 (CC); 2000 1 SA 409 (CC) at paras 1, 11, 16-17, and 19; *Zondi v MEC for Traditional and Local Government Affairs* 2005 4 BCLR 347 (CC); 2005 3 SA 589 (CC) at para 82 and *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at paras 39 and 43.

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See *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening ; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 at para 19; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1998 12 BCLR 1458 (CC); 1999 1 SA 374 (CC) at para 58-59; *Chief Lesapo v North West Agricultural Bank* 1999 12 BCLR 1420 (CC); 2000 1 SA 409 (CC) at paras 1, 11, 16-17, and 19; *Zondi v MEC for Traditional and Local Government Affairs* 2005 4 BCLR 347 (CC); 2005 3 SA 589 (CC) at para 82 and *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at paras 39 and 43.

[17] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 at para 69.

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