REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case no: 33977/2020

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

9 November 2020 **.....**
MAIER-FRAWLEY J

In the matter between:

RUDI VAN DER MERWE **Applicant**
(ID Number: […])

And

JULIAN PETER EMPEDOCLES N.O. **First Respondent**
(In his capacity as Provisional Liquidator
of Bio Schnell (Pty) Ltd (Reg No: 1969/009053/07)

MALEBO RIAN ELIAS MOLOTO N.O. **Second Respondent**

(In his capacity as Provisional Liquidator
of Bio Schnell (Pty) Ltd (Reg No: 1969/009053/07)
MASTER OF THE HIGH COURT, JOHANNESBURG **Third Respondent**

JUDGMENT

MAIER-FRAWLEY J:

Introduction

[1] This matter came before me in the urgent court. Although the first and second respondents raised an objection in their answering affidavit to the matter being enrolled by way of urgency, the objection was not pursued at the hearing of the matter on 5 November 2020. One of the grounds of urgency was, *inter alia,* that the company sought to be compulsorily wound-up in these proceedings had disposed of its assets to another entity, Cotect Industrial Paints CC, ('Cotect'), both entities having been represented at the time by one, Mr De la Rey ('De La Rey') and that the applicant had obtained reliable information that Cotect (controlled by De La Rey) is presently taking active steps to sell of all its assets and that Mr De La Rey's intended emigration to Australia is likely imminent. I was satisfied that the matter was urgent and I enrolled it as such.

[2] On 2 July 2020, De La Rey, a director of Bio Schnell (Pty) Ltd ('the company'), passed a special resolution that the company 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 special resolution was duly registered on 8 July 2020.

[3] Pursuant thereto, on 6 August 2020, the first and second respondents were appointed as the joint provisional liquidators in the voluntary winding-up of the company.

[4] On 26 October 2020 the applicant, a creditor of the company, launched an urgent application in terms of s 246(1)(e) of the Act, seeking an order that (i) the company be compulsorily wound up on grounds that it was unable to pay its debts and was also both factually and commercially insolvent and (ii) that the special resolution previously placing the company into voluntary liquidation be set aside, including the appointment of the first and second respondents as provisional liquidators in the voluntary liquidation process, as envisaged in s 354 of the Act.

Background facts

[5] During September 2018, the applicant learnt that De La Rey had unlawfully attempted to dispose of the applicant's 10% shareholding in the company to a third party without the applicant's knowledge or consent. Upon learning of this, the applicant launched an application in this court against the company under case number 18/45358 for the production of company records, as envisaged in s 24(3)(b) of the Act, which relief was aimed at safeguarding his interests as a registered shareholder of the company. The application, which was opposed, became settled between the parties, *inter alia,* on the basis that the company pay the applicant's taxed costs on a scale as between party and party. A bill of fees and disbursements was taxed by the Taxing Master on 25 May 2020 in the amount of R107 272.66.

[6] The amount remained unpaid, prompting the applicant to have a warrant of execution issued for purposes of attaching the movable property of the company.

[7] On 23 June 2020, the Sheriff proceeded to execute the warrant by attending at the business premises of the company and demanding payment of the sum of R107 272.66. The Sheriff's return of service filed of record indicates that De La Rey informed the Sheriff that the company was unable to pay the debt, either in part or in full, however, certain movable assets of the company were attached having an estimated value in excess of the value of the company's indebtedness to the applicant. Pursuant to such attachment, Cotect (represented by De La Rey), laid claim to ownership of the attached assets on the basis that same had been purchased by it in March 2020 from the company (also represented by De La Rey) for the sum of R500 000.00. Interpleader proceedings were thereupon instituted by the Sherriff and affidavits were filed by the relevant parties. The proceedings were opposed. The interpleader action was heard on 20 August 2020 in this court. In the absence of appearance on behalf of Cotect or the company, the court dismissed Cotect's claim and ordered it to pay the applicant's costs. Interestingly, the self-same De La Rey was at all relevant and material times the sole member of Cotect and in control of its business. It is not in dispute that Cotect then conducted and still conducts the same business as that of the company (presently in voluntary liquidation). When the attorneys representing the company withdrew from representing it on 7 August 2020, they notified the applicant that the company had 'applied for liquidation'.

[8] The applicant thereupon instructed his attorneys of record to obtain confirmation of the status of the company. Various steps were taken by the attorneys, including, *inter alia*, addressing correspondence to the Master's office, which went unanswered during the national lockdown period. Eventually the applicant's attorney enlisted the help of a specific professional liquidator to make

enquires as to the status of the company through the latter's own professional contacts.

[9] Through the said liquidator's endeavours, on 2 October 2020, the applicant obtained confirmation from documentation obtained from the Master's office that the first and second respondents were appointed as provisional liquidators on 6 August 2020 in the voluntary winding-up of the company. On 19 October 2020, confirmation was obtained from the CIPC that a special resolution for the voluntary liquidation of the company had been registered on 8 July 2020. On 23 October 2020, the applicant obtained copies of the certificates of appointment of the first and second respondents, the CM 100 and the relevant resolution, from which it was noted that the company had been placed in voluntary liquidation by way of special resolution in terms of ss 349 and 151 of the Act, on 7 July 2020. The statement of affairs that was lodged by the company recorded unsecured creditors in a globular amount exceeding R2 million, preferent creditors in an undisclosed amount and that the company possessed no assets whatsoever.

[10] It is apparent from a reading of the papers that De La Rey had, during March 2020, sold assets belonging to the company to Cotect at a time when he well knew that the applicant had been pursuing his rights as shareholder of the company. He had also filed a special resolution to place the company in voluntary liquidation on 2 July 2020, at the time, well knowing that the applicant had an unpaid claim, as creditor, against the company in respect of the applicant's unpaid taxed bill of costs, yet De La Rey failed to include the applicant's claim in the statement of affairs that was lodged. It is clear from what is contained in the statement of affairs that the

company is indeed factually insolvent in that its liabilities (more than R2 Million) far exceed its assets (nil).

[11] The plot thickens, in that the applicant also managed to obtain copies of letters that had been sent by De La Rey to all previous customers of the company during February and March 2020. In one such letter, dated 28 February 2020, De La Rey informed company's clients that the company was 'closing due to insolvency', and that it had 'applied for liquidation'. In another letter, dated 7 March 2020, De La Rey informed clients of the company that 'all invoicing should in future be done through Cotect and that payments should in future be made to Cotect'. It is not in dispute on the papers that Cotect was selling products that had been manufactured by the company in the course of its business. The stage was being set[1] for a diversion of the company's business to Cotect, a disposition of the company's assets to Cotect and a voluntary winding-up of the company (which eventuated in July 2020). The inference is inescapable that all this was meticulously planned, possibly so, to frustrate the applicant's rights as shareholder.

[12] On 19 October 2020, the applicant discovered that De La Rey was engaging in negotiations for the sale of the business of Cotect, which, as irony would have it, happened to be pursued with the applicant's present employer, who not only informed the applicant thereof but also informed the applicant of the fact that De La Rey had expressed his intention to emigrate to Australia as soon as Cotect was sold.

[13] Lastly, it is not in dispute that the company no longer conducts business, and as such, has no employees. It also has no assets as indicated in the statement of affairs.

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[1] Meaning that conditions were being made right for something to happen.

Evaluation

[14] It is common cause between the parties on the papers that the company should indeed be placed in compulsory liquidation and that an application be made to the Master in due course for a section 417 and 418 enquiry be conducted, *inter alia*, to: (i) establish what led to the liquidation of the company; (ii) the actuality and extent of possible wrongdoing on the part of De La Rey in the management and conduct of the affairs of the company; and (iii) whether an impeachable disposition of assets has taken place.

[15] It is trite that section 417 does not apply in voluntary windings-up. See: *Michelin Tyre Company (South Africa) (Pty) Ltd v Janse Van Rensburg and others* (198/2001) [2002] ZASCA 55.

[16] The parties agreed that a compulsory winding-up order should be made in respect of the company being voluntarily wound up, as envisaged in section 346(1)(e) of the Companies Act, given the state of the demonstrated factual and/or commercial insolvency of the company. They are also of the same mind that the facts and circumstances pertaining to De La Rey's conduct, referred to earlier, warrant the conduct of a section 417 or 418 enquiry.

[17] The parties however differ as regards the ambit of the relief sought in terms of section 346(1)(e) of the Act and how the resultant compulsory liquidation process is to be managed. The dispute may be elucidated in reference to the opposing contentions advanced on behalf of the parties:

Applicant's case

[18] The applicant seeks an order in terms of s 354 of the Act for the setting aside of the voluntary winding-up of the company. It is the Applicant's wish for the compulsory winding-up process to start afresh, given that the voluntary winding-up proceedings have been tainted with the brush of deceit and duplicity of De La Rey, evidenced by his calculated conduct in failing to disclose the existence of applicant's claim in the voluntary liquidation process, including his failure to disclose the duplicitous sale of company assets to Cotect, or indeed his membership in Cotect, to the appointed liquidators and other stakeholders. Since the present liquidators were nominated by De La Rey (as well as by juristic entities that are either under his control or with which he is associated) for appointment as provisional liquidators in the voluntary liquidation process, they are thus perceived by the applicant to lack impartiality or to have been manipulated by De La Rey.

[19] The applicant's counsel submitted that in terms of section 368 of the Act, in the normal course, a provisional liquidator holds office until the appointment of a final liquidator. However, where the court is requested to exercise its discretion in making an order in terms of section 354 of the Act, if satisfied that the voluntary winding-up proceedings should be discontinued or terminated by way of an order setting same aside, then once such an order is given, the voluntary winding-up is terminated, resulting *ex eo* in the termination of the appointment of the liquidators. Reliance for such proposition was placed on what is stated in Henoschsberg,[2] namely, that '*once appointed, a provisional liquidator continues to hold office until a liquidator is appointed or the winding-up terminates*.' The applicant further submits that section 346(1)(*e*) of the Act, which makes provision for a creditor's winding-up by order of

[2] Extract from Lexisnexus online publication of Henochsberg on the Companies Act, 71 of 2008 authored by Proffessor Piet Delport, in the commentary on s 368 of the Companies Act, 61 of 1973, under Appendix 1, Part 1, 'Chapter XIV of the 1973 Act and Commentary'.

court, is to be read with s 344 of the Act, which section enumerates various grounds of insolvency, one or the other of which are required to be established in such an application.

[20] The applicant submits that the only provision contained in the Act for the discontinuance of voluntary winding-up proceedings is that contained in section 354 of the Act, which provides for the termination of winding-up proceedings by an order of court setting same aside. Thus, once an order is given in terms of section 354 of the Act, the voluntary winding-up terminates. If an order is thereafter given in terms of section 346(1)(*e*) of the Act, the company is placed under compulsory winding-up in which event, so the argument developed, section 368 of the Act should again be applied whereby the Master is tasked with appointing a suitable person as a provisional liquidator to hold office until the appointment of a liquidator. The applicant submits that there is no provision in the Act that expressly deals with a *conversion* of a voluntary winding-up into a compulsory winding-up by order of court, nor do any of the common law authorities, which make mention of such terminology, indicate how such a '*conversion'* is to take place or what process will apply to such conversion.

[21] The applicant's case is essentially centred on the need for an enquiry to be conducted in terms of ss 417 and 418 of the Act.

First and Second Respondents' case

[22] On behalf of the present liquidators, it was argued that the SCA and lower courts have recognised the concept of a conversion of a voluntary liquidation into a compulsory liquidation under the framework of section 346(1)(*e*) of the Act. The liquidators oppose their removal by means of a setting aside of their appointment, as sought by the Applicant, contending that the applicant has not relied on, nor has he

established any irregularity committed by them in the execution of their duties, nor any impropriety on their part on such as collusion between De La Rey and themselves. They do, however, support a conversion from a voluntary liquidation into a compulsory liquidation. The respondents submit that the date of the liquidation is, in terms of s 352 of the Act, the date on which the special resolution was registered. Reliance was placed on the provisions of section 388 of the Act[3] for the proposition that the court may determine any question arising in the voluntary winding-up of a company upon application to it by the liquidator or any member or creditor.

[23] The first and second respondents submit that it would be just and beneficial for the voluntary winding-up to be converted into a compulsory winding-up and to allow the liquidation process to continue thereafter without having to start the process afresh and, given that there are currently duly appointed provisional liquidators, if the voluntary winding-up is not set aside ie terminated by order of court, their appointment will continue. It was submitted during oral argument presented at the hearing that the second meeting of creditors has been advertised in the Government Gazette to be held on 11 November 2020 and at which meeting, the creditors of the company, including the applicant, whose claim the respondents will recognise, will all have the opportunity to nominate the Liquidator/s. In any event, so the argument developed, the applicant could avail himself of the right in terms of s 374 of the Act to approach the Master for appointment of a third liquidator, as nominated by the Applicant. It was further argued that the urgency of the matter

[3] Section 388 stipulates as follows:
"**Court may determine questions in voluntary winding-up.**-(1) Where a company is being wound up voluntarily, the liquidator or any member or creditor or contributory of the company may apply to the Court to determine any question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being wound up by the Court. (2) The Court may, if satisfied that the determination of any such question or the exercise of any such power will be just and beneficial, accede wholly or partly to the application on such terms and conditions as it may determine, or make such other order on the application as it thinks fit."

(urgency having been recognised by the court) and the need to conduct a section 417 enquiry, that is, before Mr De La Rey has the opportunity to leave the country, dictates that the whole process should advance without delays associated with having to start afresh.

[24] Ultimately, so it was contended, the compulsory liquidation can proceed without setting aside the voluntary liquidation or removing the current provisional liquidators from office. Upon conversion, the process of compulsory liquidation can commence at full tilt so that (final) liquidator/s may be appointed.

Relevant Jurisprudence

[25] Before evaluating the opposing contentions of the parties, it is apposite, at this juncture, to set out how courts have approached the debated issue of a conversion from voluntary liquidation to compulsory liquidation. It has regrettably not been possible, in the short time in which I have had to prepare this judgment, to conduct extensive research on the subject.

[26] In the *Michelin Tyre Company supra*, at par 4, the following was said:

> " There are at least two ways of procuring a s 417 enquiry even in a voluntary winding-up. The **first is to convert the winding-up into a winding-up by the court under s 346(1)(e)**; and the other is an application to court under s 388 for leave to convene an enquiry." (own emphasis)

[27] In *Corigrain Trading SA v Resora (Pty) Ltd* 2004 (2) SA 348 (W), the court recognised relief in the form of a conversion of a voluntary winding up into a winding-up by the court pursuant to s 346(1)(*e*) of the Act. In that case, the applicant had applied in a Local Division for a voluntary winding-up in terms of ss 349 and 351 of

the Companies Act 61 of 1973 to be converted into a winding-up by the Court pursuant to s 346(1)*(e)* of the Act. The founding affidavit stated that the respondent was indebted to the applicant for the sum of R18 755.02, being the taxed costs of an order obtained against the respondent in March 2002, and for a sum of money plus interest arising from a judgment awarded in favour of the applicant in the Cape Provincial Division in April 2003. It was alleged that the respondent was unable to pay the debts. On 13 March 2003 an attempted execution of the writ of execution issued pursuant to the costs order and taxed bill concerned was unsuccessful in effecting any payment at all. The address at which service of the writ occurred was the place of business of the respondent. In para 4 of the judgment, the following was said:

> "Much of the debate before me concerned whether the applicant was entitled to bring the present proceedings in terms of s 346(1)*(e)*, or whether it ought, in terms of s 388, to have applied to Court for a determination that the respondent is unable to pay its debts and may accordingly be dealt with in terms of such provisions as s 417. It seems to me that there was no reason why the applicant could not choose the present route rather than that contended for by the respondent."

[28] In *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) under the heading: 'The effect of s 354 of the Act', the following was said:

> "The section empowers the Court at any time after the commencement of a winding-up to stay or set aside the proceedings in relation to the winding-up. Such an order may be made on the application of a liquidator, creditor or member upon proof that such proceedings 'ought to be stayed or set aside'.
>
> Plainly the Court has a wide discretion to set aside winding-up proceedings. But, having held that the voluntary winding-up of a company is no bar to the launching of an application for its compulsory winding-up, I must in logic hold that it is not

> necessary to have the voluntary winding-up set aside before such an application can be launched. **Indeed, as I have already pointed out, s 346(1)*(e)* of the Act provides for the winding-up by the Court of a company 'being wound up voluntarily'. This factor demonstrates that the Legislature did not contemplate that the voluntary winding-up must first be set aside in terms of s 354 of the Act (for then, *ex hypothesi*, the company would no longer be in a state of 'being wound up voluntarily') before an application could be brought for its winding-up by the Court**." (own emphasis)

[29] Incidentally, what the applicant seeks in these proceedings, is *first* to set aside the voluntary winding-up under section 354 of the Act (by setting aside the special resolution - upon registration of which the voluntary winding-up had commenced - so that, on the authority of Henochsberg *supra*, the appointment of the present liquidators is thereby terminated, thus resulting in the very situation mentioned in *King* whereby *"ex hypothesi,* the company would no longer be in a state of 'being wound up voluntarily,' before the application for a winding-up order by the court could be brought" as envisaged in section 346(1)(*e*) of the Act.

[30] In the *King* case, a compulsory winding-up application had already been brought by a creditor *prior* to the company being placed in voluntary winding-up by registration of a special resolution, some 4 months after presentation to the court of the application for the winding- up of the company by the court. Thereafter, when the matter came before court, Mc Call J gave an order placing the company in provisional liquidation and issued a rule nisi, calling on all interested parties to show cause why the voluntary liquidation should not be set aside and why the rule should not be confirmed in respect of provisional order for liquidation of the company. The matter, which came before Magid J on the return date, was opposed by the appointed provisional liquidators. There were thus two parallel processes at play, which was not optimal. A decision had to be made to discontinue one or the other.

The court stated that, plainly, it had a wide discretion to set aside winding-up proceedings. In considering the matter, Magid J stated:

> "As I have already indicated, the voluntary winding-up of each company commenced on 1 June 1998. On the other hand, if a winding-up order is granted by the Court, the winding-up commences, in terms of s 348 of the Act, at the time of the presentation to the Court of the application for the winding-up - in this case on 19 February 1998.
>
> In his affidavits, the provisional liquidator said that his investigations had revealed no apparent impropriety in the administration of the affairs of the respondents. But, when it is borne in mind that his affidavits were dated barely a month after his appointment, I do not consider that great weight can be attached to his rather tentative statement ('it does not appear' etc). Moreover, the additional period applicable to the winding-up by the Court can only enure to the benefit of the creditors of the respondents if it is ascertained that anything untoward has occurred in the management of the respondents.
>
> For this reason I considered that it was in the interests of creditors that the creditors' voluntary winding-up of each company be set aside and that the provisional winding-up order granted by McCall J be confirmed."

[31] The *King* case was decided within a different factual context to that which applies in the present matter. There, the voluntary liquidation occurred *after* the application for the winding-up of the companies had been presented to the court. In the present matter, the voluntary winding-up occurred *before* the application for winding-up by the court was brought. The court in *King* exercised its discretion in favour of setting aside the voluntary winding-up, because it was considered to be in the interests of creditors, least of all, so that it could be ascertained if anything untoward had occurred in the management of the companies.

[32] King's case is not authority for the proposition advanced by the applicant, namely, that the proper approach is for this court to *first of all* set aside the voluntary winding-up in terms of section 354 (if of course it is satisfied that such a course is

warranted) and thereafter, in terms of section 346(1)(e), to order the winding-up of the company.

[33] In *Furniture Bargaining Council v AXZS Industries (Pty) Ltd Trading as Don Elly Enterprises* 2020 (2) SA 215 GJ, Levenberg AJ considered the differences between a creditors' voluntary winding-up and a winding-up by the court under the old Companies Act. There too, a voluntary winding-up had occurred *after* the applicant had brought an application for the winding up of the company by the court.

[34] At paras 36 & 37 of the judgment, the following was said:

> "There is a fundamental and important difference between the effect of a creditors voluntary winding-up and a winding-up by the Court. Liquidators and creditors cannot apply for the appointment of a Commissioner to conduct an enquiry under sections 417 or 418 of the Old Companies in the case of a voluntary creditors winding-up. In the case of a creditor's voluntary winding-up an enquiry can only be convened after making application to court under section 388 of the Old Companies Act or **converting** the winding-up into a winding-up by the court under section 346(1)(e)." [citing *Michelin Tyre* as authority]
>
> In the present case, where there is good reason to suspect wrongdoing, the inability of the liquidator or creditors to follow the streamlined enquiry procedure set out in sections 417 and 418 of the Companies Act is a matter of serious concern. The inference is inescapable that the shareholders chose to voluntarily wind the company up in order to avoid an enquiry. The timing of the voluntary winding-up and the background facts of this case suggest that there has been an abuse of process by the Respondent and its officers*."*

[35] The court reasoned as follows in paras 48 & 49, of which I quote only the relevant portions:

> "…if this Court grants a winding-up order at this stage, this winding-up will be deemed to have commenced when the winding-up application commenced, being 29 October 2018 This means that, if a liquidation order is granted by this Court in this application, the

> voluntary winding-up must be deemed to have commenced after the date of commencement of the compulsory winding-up proceeding. The effect of the granting of a winding-up order would therefore be to invalidate and void (albeit retrospectively) the voluntary winding-up." (own emphasis)

[36] The court went on to say, in par 51 of the judgment, that "if the legislature intended that a supervening voluntary winding-up would have the effect of superseding a pending compulsory liquidation proceeding, the legislature would have said so expressly."

[37] It should be noted that in the present matter, a supervening winding-by of the company by the court is being sought *after* a voluntary winding up has commenced. Guidance on what procedure may be employed in such a situation, may be found in *Afrisam (SA) (Pty) Ltd v Maleth Investment Fund (Pty) Ltd* (651/2018) [2019] ZASCA 139 (01 October 2019) (*Afrisam*) There, the SCA held that an intervening voluntary winding-up does not extinguish a pending application for compulsory winding-up and where compulsory winding-up supersedes[4] the pending voluntary winding-up, the provisions of s 340(2)*(a)* of the Companies Act 71 of 1973 apply.

[38] In *Afrisam*, 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. On 4 December 2015 the Gauteng Division of the High Court, Johannesburg (per Windell J) granted a court order that a company, Cemlock Cement (Pty) Ltd (Cemlock), be finally wound up 'with effect from 31 October 2013'. Cemlock's winding-up started on 31 October 2013 when Maleth, a creditor of Cemlock, presented an application before the High Court, seeking an

[4] i.e., succeeds or replaces or takes the place of.

order that Cemlock be wound up as it was unable to pay its debts. Cemlock opposed the winding-up application. In January 2014, Cemlock withdrew its opposition to its compulsory winding-up. Cemlock's sole shareholder was Scarab Investment Holdings (Pty) Ltd (Scarab). On 12 March 2014, 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 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.

[39] 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. The 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.

[40] As regards the replacement of a voluntary winding-up with a compulsory winding-up, Dambuza AJ, writing for a wholly concurring bench, stated as follows:

> " [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

[5] Section 340 of the Act regulates the impeachment of dispositions made by a company prior to its winding-up. The section provides 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 includes 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 –
>
> (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**.'

'(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 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)

[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] … 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* 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 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* 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 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. " [footnotes omitted] (own emphasis)

[41] Although the applicant's notice of motion does not expressly state that relief is being sought by him in terms of s 354 of the Act, it is clear from the founding affidavit that the applicant seeks the setting aside of the voluntary liquidation and the termination of all steps thus far taken thereunder, including the appointment of the first and second respondents as provisional liquidators. The applicant has demonstrated that a first meeting of creditors has not yet been held in the voluntary liquidation, but has been advertised to take place on the 11th November 2020. The relevant advertisement in the Government Gazette expressly stipulates that on that date, a first meeting of creditors will be held, *inter alia,* for purposes of proof of claims against the company and the nomination of liquidators for the purposes referred to in ss 364 or 461 of the Act. Nothing turns on the fact that a first meeting of creditors, previously advertised to take place on 28 October 2020, was postponed on that day.

[42] The applicant's suspicions concerning the potential lack of objectivity or impartiality on the part of the appointed provisional liquidators (first and second respondents), given that one or both of them were nominated for appointment by De la Rey himself (acting on behalf of the company or on behalf of different creditors) remain speculative in the absence of primary facts to justify the inference sought to

be drawn.[6] There is no evidence to suggest that the appointed liquidators were privy to manipulation by De La Rey or that they have unknowingly been influenced by him or that they will, in future, be biased in his favour.

[43] It is undisputed on the papers that the present provisional liquidators had no knowledge, prior to the launch of the present application, of the apparent underhanded conduct of De La Rey. Having now been alerted thereto, they expressed their support for an interrogation process to be conducted in terms of ss 417 and 418 of the Act, upon application to the Master for the institution of the relevant enquiries. Given that: (i) there is no evidence that the appointed provisional liquidators have committed any irregularity or impropriety in the conduct of their duties, save that the applicant holds the subjective opinion that they have been somewhat slow-paced in executing their duties, and (ii) the applicant, together with all other creditors of the company, will have the opportunity to vote on the appointment of a Liquidator/s at the scheduled meeting of creditors and (iii) the urgency inherent in the continuation of the liquidation process, including the urgent need for an enquiry to be held in terms of ss 417 and 418 of the Act, I am not satisfied that it is competent in law or necessary on the facts or law, for the voluntary

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[6] See: *Dros (Pty) Limited v Telefon Beverages CC* 1 All SA 164 (C), para [28], where the following was said:

"It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the court (See: Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others 1999 (2) SA 279 (W) at 323G) for the benefit of not only the court, but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may either be primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts (See: Willcox & Others v Commissioner of Inland Revenue 1960(4) SA 599 (A) at 602A; Reynolds N.O. v Mecklenberg (Pty) Ltd 1996(1) SA 75 (W) at 78I). **Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions** (See: Radebe v Eastern Transvaal Development Board 1988(2) SA 785 (A) at 793C-E) and accordingly do not constitute evidential material capable of supporting a cause of action." (emphasis supplied)

liquidation proceedings to first be set aside before granting a final winding-up order. The final liquidation order to be granted by this court will have the effect of replacing the voluntary liquidation of the company, and the process currently underway stands to be confirmed by the order which I propose making in the matter.

[44] I am satisfied that a case for the winding-up of the company has properly been made out on the papers. Although the first respondent faintly took the point in the answering affidavit that proper service of the application had not been effected on the second respondent, the point was not pursued at the hearing of the matter, given that the second respondent had indeed received notice of these proceedings and that both first and second respondents are being represented by the same attorneys in this matter. It stands to reason that the attorneys would have consulted with both the first and second respondents for purposes of filing the answering affidavit. I am also satisfied that the applicant has complied with the necessary statutory formalities set out in ss 346(3); 246(4A)a of the Act.[7]

[45] Both parties are in agreement that the date of the commencement of the winding-up of the company should be deemed to 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. That is indeed the correct date, as indicated in *Afrisam, supra.*

[46] Both parties submitted that it would be appropriate to grant an order that the costs of the application are to be costs in the winding-up of the company. I agree.

[47] In the result, the following order is granted:

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[7] The service affidavit filed of record records the steps taken by the applicant to comply with the relevant statutory requirements, including proof of compliance.

1. The matter is urgent.
2. Bio Schnell (Pty) Ltd (Registration No.:1969/009053/07) ('the company') is hereby placed under final winding-up in the hands of the Master of this court.
3. The proceedings thus far conducted in the voluntary winding-up of the company are hereby confirmed, including the appointment of the first and second respondents as joint liquidators.
4. The commencement date for the winding-up will be the date of registration of the voluntary winding-up resolution, namely, 8 July 2020.
5. The costs of the application are to be costs in the winding-up of the company.

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A MAIER-FRAWLEY
Judge of the High Court
Gauteng Division, Johannesburg

Date of hearing: 5 November 2020

Date of Judgment: 9 November 2020

For the Applicant:
Adv MA Kruger
Instructed by Scholtz Attorneys

For the First and Second Respondents:
Mr MJ Kapp
Instructed by Kapp Attorneys Inc