



INSOLVENCY & BUSINESS RESCUE

When a withdrawal doesn't really withdraw: Provisional liquidation is not set aside by withdrawal

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Introduction

We were recently reprimanded by an opponent for having the temerity to insist on a final liquidation order on behalf of a client, after the applicant in the insolvency proceedings had already elected to withdraw. This brought to mind the recent decision of the Northwest Division of the High Court, which dealt with a similar issue: can a company under provisional liquidation, simply return to business as usual, once the original applicants withdraw their application and before the final order is granted?

The judgement in *Ruan Botes and 12 Others v Tariomix (Pty) Ltd and 6 Others* ZANWHC (12 April 2024) ("**Tariomix**") confirms that the answer is "no". Once a Court places a company under provisional liquidation, the process does not collapse due to the notice of withdrawal. Only the Court itself may discharge the order.

Background to the Dispute

Tariomix (Pty) Ltd was placed under provisional liquidation on 23 February 2023. The liquidation was initiated by creditors who alleged the company had been operating a Ponzi-type investment scheme. Following the granting of the provisional order, the original applicants sought to withdraw their application. This prompted additional creditors and interested parties to intervene and seek a final liquidation order.

The Court was required to consider three issues:

1. The nature of liquidation proceedings;
2. Whether a notice of withdrawal filed after a provisional order has been granted terminates liquidation proceedings; and
3. The standing of creditors who sought to intervene after such a withdrawal.

Nature of Liquidation Proceedings

Liquidation is a statutory process governed by the Companies Act No 61 of 1973 (as retained under the Companies Act No 71 of 2008). The process is designed to bring an orderly end to the life of a company, ensuring that its assets are collected and distributed according to a set ranking of creditor claims.

Liquidation proceedings operate within a distinct legal framework and are *sui generis* in nature. In contrast to other forms of legal action, where parties may seek to resolve disputes or enforce contractual provisions, liquidation proceedings are concerned with the winding up of a company's affairs in a just and equitable manner.

Once a provisional liquidation order is granted, the legal status of the company is fundamentally changed i.e.: its estate vests in the Master of the High Court, and provisional liquidators are appointed to take control of the company's assets and operations. From that moment, the directors are divested of any decision-making power, and the company cannot trade unless expressly authorised to do so. The company is effectively defunct for all commercial purposes, pending the outcome on the return date.

If the provisional order is discharged on the return date, control reverts to the directors. If the order is made final, the company enters final winding-up under the direction of the Master and the appointed liquidators. The process is therefore Court-supervised and no longer in the exclusive control of the party that initiated the liquidation proceedings.

The Intervention Applications

The Court noted that upon publication of the provisional liquidation order, numerous other investors and creditors sought to intervene. Many of these intervening parties had invested funds in the scheme and now sought final liquidation of the company.

The Court confirmed that all creditors, regardless of whether they are secured, preferent, or concurrent, have a direct and substantial interest in liquidation proceedings. This finding reinforced that liquidation is not merely a matter between the original applicant and the respondent company but implicates the rights of all stakeholders.

Procedural Significance of the Withdrawal

Rule 41 of the Uniform Rules of Court allows the instituting party to withdraw the matter at any time before it has been set down, and thereafter with the leave of the Court.

In *Tariomix*, the original applicants purported to withdraw their application after the provisional liquidation order had already been granted and the matter had been enrolled. Crucially, the notice of withdrawal was not accompanied by the consent of all the other parties, nor had the applicants sought the Court's leave to withdraw. The Court found that the withdrawal was procedurally defective.

Even if the original applicants had complied with the technical requirements of Rule 41, the Court stressed that it would not have nullified the provisional liquidation order, which is a judicial act and remains in force unless set aside by the Court itself.

This is what distinguishes liquidation proceedings from other disputes: a notice of withdrawal, even if properly filed, does not unravel the process once a provisional winding-up order has been granted. Unlike typical civil litigation where parties control the pace and progression of the matter, liquidation is court driven. It involves broader public interest and the rights of all creditors, not just the applicant.

Withdrawal Cannot Collapse the Proceedings

The Court was careful to clarify that its reasoning did not compel applicants to continue litigation they no longer wished to pursue. Rather, it affirmed the principle that once a provisional order is granted, the matter no longer turns on the continued participation of the original applicants. The Court’s directive for the respondent to “show cause” on the return date stands independently.

To allow a unilateral withdrawal to collapse the liquidation process would undermine the supervisory role of the Court and expose the process to abuse. The Court illustrated this by noting that a creditor could file for liquidation, obtain a provisional order, and then withdraw following a private settlement, potentially silencing the claims of other creditors and shielding the company from thorough scrutiny.

Such an outcome would not only erode confidence in the integrity of the liquidation process but would also offend the constitutional imperative of access to justice through the courts. Once the provisional order is granted, the rights of all affected parties, secured, preferent, and concurrent creditors alike, must be respected. The Court alone is tasked with determining whether there is cause for setting aside or confirming the order.

Conclusion

The decision in *Tariomix* affirms an important judicial safeguard: the Court’s oversight cannot be displaced by private acts or procedural shortcuts. Provisional liquidation is not a tactical tool to be employed or discarded at the whim of a single creditor. Once a company is placed under provisional liquidation, its status changes; its estate is placed under the authority of the Master, and it ceases to operate under the control of its directors.

Whether the original applicants remain active in the proceedings or not, the Court retains the obligation to assess, on the return date, whether there is cause to make the order final. The burden then shifts to the company or any opposing creditors to show why the company should not remain in liquidation.

This decision reinforces the unique nature of liquidation proceedings and the central role of the Court in supervising such processes in the interest of justice. It protects creditors from prejudicial manoeuvring, affirms the independence of the judiciary in insolvency matters, and ensures that liquidation proceedings are not short-circuited by procedural withdrawal alone.



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