

Liquidation procedure: Can a solvent external company be wound up in SA?

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Is it possible for creditors to apply for the winding up of a South African branch of a foreign company (an external company), even if the foreign holding company remains solvent, since the two entities are legally one and the same entity?



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Although the registration of an external company in South Africa does not create a separate legal personality for the external company from the foreign incorporated company, this external company may be wound up in South Africa as an independent legal entity, even when the foreign company is not wound up.

Case law

The relevant case law with regard to the winding up of external companies in South Africa is *Sackstein NO v Proudfoot SA (Pty) Ltd [2003] (SCA)*. In this case, an industrial consultant, Proudfoot SA, applied for the winding up of Tsumeb Corporation, which was incorporated in Namibia and registered in South Africa as an external company under the same name.

Liquidation proceedings were instituted under Namibian law in respect of the Namibian-based company, as well as under South African law in respect of the external company. While the Namibian liquidation was withdrawn in respect of the Namibian-based company, the liquidation of the external company in South Africa continued. Hence, the Namibian-based company was not under winding-up proceedings but the South African-based external company was.

The Supreme Court of Appeal (SCA) and court a quo were mainly faced with issues under insolvency law and impeachable dispositions. However, the relevant pronouncements on the winding up of the external company were the following:

- despite the proposition that the registration of an external company in South Africa does not create a separate legal personality for the external company, an external company may be wound up in South Africa independently from its foreign counterpart, even where the foreign entity is not wound up; and
- given the general proposition above, and as set out in the court a quo case, the assets of the external company based in South Africa may be treated separately from that of the foreign company. In other words, the company may have two separate estates, one in each of the respective jurisdictions. It is nonetheless important to keep in mind that there is only one company, with one legal personality.

Hence, an external company may be wound up separately and independently to the foreign incorporated company, where the latter is not being wound up.



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Applicable legislation: Insolvent versus solvent companies

It is widely accepted that the winding up of insolvent companies is governed by the Companies Act 61 of 1973 (1973 Act), despite its predominant repeal, and the winding up of solvent companies is governed by the Companies Act 71 of 2008 (2008 Act). One of the criteria in determining whether a company is solvent or not is whether it is capable of paying its debts as and when they fall due for payment, failing which, the company is commercially insolvent.

Under the 1973 Act, only the Court can wind up an insolvent external company (sections 344(g) read with 349 of the 1973 Act). Specifically, section 349 provides that *"A company, not being an external company, may be wound up voluntarily if the company has by special resolution resolved that it be so wound up"*. Therefore, neither members nor creditors can voluntarily wind up an insolvent external company.

In terms of a solvent external company, there is no similar provision to section 349 of the 1973 Act in the 2008 Act. The difficulty lies in the lack of distinction in the 2008 Act between "companies" and "external companies" in the voluntary winding up provisions (section 80 of the 2008 Act), whereas this distinction is made in the 1973 Act.

Given the wide definition of "company" under the 2008 Act, as well as the distinction between the applicability of the 1973 and 2008 Acts to insolvent and solvent companies, respectively, it is our view that a solvent external company, especially a company that has no debts, may be voluntarily wound up and does not have to be wound up by the court. This is yet to be tested before the courts.

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