

SUPREME COURT OF SEYCHELLES

Reportable
[2024] SCSC
MC 36/2023

In the matter between:

**THE INTERNATIONAL BUSINESS ACT, 2016
(AS AMENDED)
AND IN THE MATTER OF AAX LIMITED**

ATOM HOLDINGS (In Provisional Liquidation) Petitioner
Having its registered office at Ogier Global (Cayman) Limited
(*rep. by*)

and

AAX LIMITED (a subsidiary of Atom Holdings) Respondent
hereinafter referred to as AAX Seychelles of
Trident Trust Company (Seychelles) Ltd
(*rep. by*)

Neutral Citation: *Atom Holdings v AAX Limited* (MC 36/2023) [2024] SCSC (17th April 2024)

Before: Burhan J

Summary: Winding up application

Delivered: 17 April 2024

ORDER

BURHAN J

[1] This is a winding up application filed by Atom Holdings, a company incorporated under the laws of the Cayman Islands on 28 August 2018 (hereafter “the Petitioner”) against AAX Limited (hereafter “the Respondent”), a subsidiary company of the Petitioner incorporated under the International Business Companies Act (the “IBC Act”) on 6 May 2019.

[2] Pursuant to a filing for bankruptcy on the 11th November 2022, the Grand Court of the Cayman Islands on 8 March 2023 had granted a provisional liquidation (or PL Order) against the Petitioner, appointing two joint provisional liquidators, Mr. George Kimberley Leck and Ms. Angela Barkhouse. The PL Order empowered the former to commence winding up proceedings of the Respondent before this Court.

[3] Accordingly, the present petition was accompanied by the affidavit of Mr. Leck, who contended that Atom Holdings is a creditor, or contingent creditor of the Respondent, and that, by virtue of section 309 of the IBC Act has *locus standi* to seek the winding up of the Respondent. Mr Leck averred that the Court is empowered by section 310 of the IBC Act to wind up the Respondent on the premise that:

- i) the company is ***insolvent*** in so far as it is unable to pay its debts as they fall due and that its liabilities exceed its assets;
- ii) it is ***just and equitable*** that the company be wound up for the lack of visibility over the true financial position of the Atom Group, and that at present, there was no information on whether or not the assets invested by the users have been dissipated and having the potential to impact the value of the users' investments on the AAX Platform.

[4] Mr. Leck averred that there is a real need for liquidators to be appointed by the Court to: seek the Court's guidance, direction, and assistance in relation to the above issues; allow a substantive and independent investigation into the Respondent's business and affairs to determine its true financial position and solvency; and, to allow actions to be taken and proceedings to be brought to recover assets which have been misappropriated, should these be deemed necessary.

[5] The law as contained in the IBC Act pertinent to this petition for winding up of the Respondent, starting with Section 309(1) reads as follows:

*“309(1) If any of the circumstances specified in section 310 apply to a company, an application may be made to the Court, by the company, by any director, **member, creditor** or liquidator thereof or by any other **interested party**, for the compulsory winding up of the company.”* [Emphasis added]

[6] Section 310 declares:

*“A company may be wound up by the Court if —...(e) the company is **insolvent** within the meaning given in **section 299**; ...; or (g) the Court is of the opinion that it is **just and equitable** that the company should be wound up.”* [Emphasis added]

[7] Section 299 states, in so far as it is relevant for present purposes provides:

*“For the purposes of this Sub-Part and Sub-Part IV (Compulsory Winding Up by Court), a company is insolvent if — (a) the value of its liabilities exceeds, or will exceed, its assets; or (b) **it is, or will be, unable to pay its debts as they fall due.**”* [Emphasis added]

[8] From the above provisions, it is clear that in order to secure a winding up order against the Respondent, the Petitioner must establish the following:

- (a) that it is a “creditor” or as Mr Leck puts it, a “contingent creditor” of the Respondent within the meaning of section 309 of the IBC Act; and
- (b) either that:
 - (i) the Respondent is insolvent within the meaning given in section 299 as per section 310(e) of the IBC Act; or
 - (ii) it is just and equitable to wind up the Respondent, per section 310(g) of the IBC Act.

[9] Mr. Leck in his affidavit justifies the Petitioner moving against the Respondent on the basis that the Petitioner is a creditor of the Respondent and was named as such in the bankruptcy proceedings. Likewise, that as the holding company of the Respondent, the Petitioner has shareholding interest in the Respondent company, effectively being endowed with power to move the application as member/shareholder as well. Further justification may be derived from the Petitioner’s “interest” in the matter in so far as section 309 declares.

[10] This Court is convinced that the Petitioner has satisfied the requirements necessary for the application in that the Petitioner has established his interest as a creditor and member in the Respondent company, thus fulfilling the legal standing requirement.

[11] In addition in terms of section 311 of the IBC as a precautionary measure, notice was issued on the Financial Services Authority. Section 311 of the IBC which reads as follows:

*“(1) An application for an order for the compulsory winding up of a company referred to in subsection (2) shall not be heard unless a copy of the application is served on the **Authority** not less than 7 days (or such other period as the Court may, in its absolute discretion, direct) before the day of the hearing of the application.”* [Emphasis added]

[12] The said notice was issued on the Financial Services Authority (“the Authority”) as per the above directive and the Authority was asked to make representations before this Court on the matter. Acting on the instruction of Mr. Hoareau who appeared for the Authority, Mr. Vel informed the Court that the “*FSA has no say in the matter*” nor would the Authority act on the matter. This Court expressed that in light of the Authority’s position, it would proceed with the said matter.

[13] This Court is satisfied that there is no necessity to give further notice to the Authority on this matter. The Applicant may proceed with the application to wind up the Respondent company. The case is fixed for hearing, all steps for winding up to be taken by Applicant prior to the said date.

Signed, dated and delivered at Ile du Port on 17 April 2024.

M Burhan J