

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:2023-101248

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

Date: 27 February 2024 E van der
Schvff

In the matter between:

IPP MINING AND MATERIALS HANDLING (PTY) LTD APPLICANT

and

KEATON MINING (PTY) LTD RESPONDENT

JUDGMENT

Van der Schyff J

[1] The applicant instituted a liquidation application and approached the unopposed motion court for the granting of a provisional liquidation order, through which affected and interested parties were called to provide reasons why the order should not be made final on the designated return date.

- [2] The applicant (IPP) is a creditor of the respondent, Keaton Mining, for R 22 634 239.43. IPP caused a notice in terms of s 345 of the Companies Act 61 of 1973 be delivered to Keaton Mining's registered address. When the liquidation application was issued, more than 21 days had elapsed since the notice was delivered, and Keaton Mining failed to pay IPP.
- [3] Because Keaton Mining is ostensibly unable to meet demands to pay its debts as they fall due, IPP avers that it is necessary that the *concursum creditorum* be established to ensure that all creditors enjoy equal treatment from the respondent on a valid and legitimate title.
- [4] The liquidation application was issued on 5 October 2023. The Sheriff served the liquidation application on the respondent, the respondent's employees, and the relevant trade union. The application was served by email to the Companies and Intellectual Property Commission and the South African Revenue Services. It was served by hand on the Master of the High Court. The required security bond was issued, and a certificate of tendered security was obtained. On 26 October 2023, Keaton Mining filed a notice of intention to oppose. No answering affidavit was, however, filed.
- [5] Just before the unopposed motion court commenced, and approximately at 9:11;40 an urgent business rescue application was uploaded to the CaseLine's file. The application was issued from the Local Division. The first applicant is Keaton Energy Holdings Ltd (Keaton Energy). Keaton Energy is the sole shareholder of the second applicant Keaton Mining (Pty) Ltd, who is also the respondent in the liquidation application.
- [6] The founding affidavit to the urgent business rescue application is deposed to by Keaton Mining's attorney of record. The court was informed that subsequent to the filing of its notice to oppose the liquidation application, Keaton Mining engaged IPP

and other creditors in an attempt to settle its exposure and regarding the prospects of concluding a compromise in terms of section 155 of the Companies Act, 71 of 2008. Keaton Mining provided the involved parties with a draft compromise proposal contemplating a full recovery of IPP's proven indebtedness if the compromise was successfully approved, sanctioned, and implemented. IPP, however, proceeded to enroll the liquidation application on the unopposed motion court roll without providing any feedback on why it is of the view that a liquidation is better than a compromise.

- [7] Keaton Mining was left with no alternative but to seek alternative relief to the benefit of all affected persons. It subsequently issued an urgent business rescue application. This application, was, however, issued from the Gauteng Local Division, Johannesburg, and not the Gauteng division, Pretoria, as stated in the affidavit filed. Because the application was issued over the weekend, it was served without a case number and by email to, amongst others, IPP. The respondent avers that the business rescue application suspended the liquidation proceedings and seeks the postponement of the liquidation application.
- [8] The Supreme Court of Appeal in *Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others*,¹ dealt conclusively with the interpretation of section 131(6) of the Companies Act 71 of 2008 (the 2008-CA) and the meaning of when a business rescue application 'is made'. The court held that the business rescue application must be issued and served on the company and the CIPC, and each affected person must be notified of the application in the prescribed manner to meet in order to trigger the suspension of the liquidation proceedings provided for in section 131(6).
- [9] Keaton Mining, the respondent in the liquidation application, is cited as the second applicant in the business rescue application. Section 129(2)(a) of the 2008-CA provides that the board of a company may not commence business rescue

¹ 2022 (4) SA 529 (SCA).

proceedings by adopting a resolution that the company voluntarily begin business rescue proceedings if liquidation proceedings have been initiated by or against the company. In this context, the failure of serving the business rescue application on the company is, in light of the Supreme Court of Appeal's view as set out in *Lutchman*, fatal to suspending the liquidation proceedings at this point in time. In addition, it is evident that the respondent scrambled frantically at the eleventh hour in an attempt to ward off a liquidation application. Emailing an unissued application whilst withholding definitive proof substantiating that the application was sent to all affected persons and without identifying the 'affected persons', does not meet the requirements of section 131. Once the issued business rescue application is served properly the liquidation proceedings will be suspended.

ORDER

In the result, the following order is granted:

- 1. The draft order marked 'X' dated and signed by me is made an order of court.**

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:	Adv. D.D. Swart
Instructed by:	J W Botes Incorporated
For the first respondent:	Adv. L Phaladi
Instructed by:	Shandu Attorneys Inc.
Date of the hearing:	26 February 2024
Date of judgment:	27 February 2024

