

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2020/10122

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

5 April 2023

DATE

SIGNATURE

In the matter between:

Selwyn Trackman N.O.

First Applicant

Mack Moses Baloyi N.O.

Second Applicant

and

**Bronx Mining and Investments
Proprietary Limited (In Liquidation)**

First Respondent

Corne Van Den Heveer N.O.

Second Respondent

Yunus Aboo Baker Ismail N.O.

Third Respondent

Louisa Selina Kgatle N.O.

Fourth Respondent

Companies and Intellectual Property Commission

Fifth Respondent

Rodel Financial Services Proprietary Limited

Sixth Respondent

Absa Bank Limited

Seventh Respondent

Thabo Gladstone Ntshiq

Eighth Respondent

In re

Bronx Mining and Investments Proprietary Limited	Applicant
and	
Khumbula Property Services Proprietary Limited	Second Respondent
Companies and Intellectual Property Commission	Third Respondent
Rodel Financial Services Proprietary Limited	First Affected Party
Thabo Gladstone Ntshiqqa	Second Affected Party
Absa Bank Limited	Third Affected Party

JUDGMENT

MUDAU, J:

Introduction

- [1] On 6 December 2022 this court granted, on urgent basis, an order that the operation of the order dismissing the business rescue application is not suspended pending the application(s) for leave to appeal in terms of Section 18(1) read with section 18(3) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). This court also ordered costs of the application to be costs in the winding-up of Khumbula Property Services Proprietary Limited (Khumbula). The reasons for the abovementioned order, which were requested on 26 January 2023, follow hereunder.
- [2] In terms of sections 18(1)(3) of the Superior Courts Act, the successful party may apply to court for a declaration that an order, which is the subject of an application for leave to appeal, is not suspended in terms of section 18(1).
- [3] The applicants are the duly appointed joint liquidators of Khumbula Services (Khumbula Liquidators) subsequent to their appointment on 23 June 2022. Khumbula was placed under final winding-up on 20 February 2020, by an order of this court (per Keightley J).

[4] The first respondent is Bronx Mining and Investments Proprietary Limited (in liquidation) (Bronx), a company duly incorporated in accordance with the company laws of South Africa. On 26 March 2020, and prior to its liquidation, Bronx instituted an application in terms of section 131(1) of the Companies Act 71 of 2008 (Companies Act) to place Khumbula under business rescue supervision. The institution of the Bronx's application had the effect of suspending Khumbula's winding-up in terms of section 131(6) of the Companies Act.

[5] Section 131(1) of the Companies Act provides that —

“(u)nless a company has adopted a resolution contemplated in s 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings”.

[6] Section 131(6) provides that —

“(i)f liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until —

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for”.

[7] Accordingly, the purpose to which section 131(6) of the Companies Act is directed is to suspend liquidation proceedings until the court has adjudicated upon the business rescue application or the proceedings end.¹

Background facts

[8] On 3 August 2017, Rodel and Bronx Silica concluded a loan agreement for the advance of R2.5 million. Khumbula is a guarantor for the indebtedness of Bronx Silica Mine Proprietary Limited (Bronx Silica). Khumbula owns the following properties —

¹ See *Lutchman No and Others V African Global Holdings and Others* 2022 (4) SA 529 (SCA) at para 29

- a. Erf 793 Lone Hill, situate at 43 Capricorn Road, Lone Hill (Erf 793), bonded in favour of ABSA, with an open market value of R2,350,000;
- b. Erf 794 Lone Hill, situate at 39 Capricorn Road, Lone Hill (Erf 794), bonded in favour of Rodel, with an open market value of R920,000; and
- c. Portion 3 of Erf 1291 Lone Hill Ext 39, situate at 3 Knox Hill Estate, Lone Hill (Portion 3), bonded in favour of Rodel, with an open market value of R2,580,000.

[9] According to the applicants' case, Rodel is owed R3 934 546.66 (plus costs) and the seventh respondent, ABSA is owed R9 288 624.15 by Khumbula, Bronx and the eighth respondent, Thabo Gladstone Ntshiqqa (Ntshiqqa), jointly and severally, with Ntshiqqa's liability limited to R2 916 000.00.

[10] On 26 August 2021, Bronx was placed under winding-up. The second to fourth respondents were subsequently appointed as its liquidators. On 21 February 2022, the business rescue application was dismissed with costs by Nel AJ. On 14 April 2022, Bronx instituted an application for leave to appeal against the dismissal of the business rescue application, which has since not been prosecuted. On 7 October 2022, Bronx purported to institute a second application for leave to appeal at the instance Ntshiqqa (being unauthorised), which has not been prosecuted, albeit using a different legal representative. On 25 November 2022, the present application was then launched.

[11] The suspension of the dismissal of the business rescue may have the effect that section 131(6) of the Companies Act remains in place, so it was argued, which effectually means that the applicants cannot sell Khumbula's properties.

[12] The deponent to the founding affidavit, Selwyn Trackman points out that, the applicants find themselves in a precarious predicament amounting, to exceptional circumstances as envisaged in section 18(1) of the Superior Courts Act for several reasons. Not only have the applications for leave to appeal not been prosecuted, but none of the attorneys purportedly acting for Bronx have managed to procure a power of attorney to act on behalf of Bronx's provisional liquidators. Also, the winding-up of Khumbula is therefore potentially stayed for

an indefinite and unknown period of time, while its assets depreciate, causing prejudice to Khumbula's general body of creditors.

[13] On the applicant's version, Bronx's various legal representatives have been advised that Mr Ntshiqqa no longer has the requisite authority to instruct attorneys on behalf of Bronx. They have also been advised that the liquidators of Bronx did not authorise either the first or second application for leave to appeal and that they do not, in any event, want to pursue an application for leave to appeal as per a supporting affidavit by Ms Corne Van Den Heever, a joint provisional liquidator of Bronx dated 25 November 2022.

[14] Mr Ntshiqqa who is opposed to this application deposed to an answering affidavit, which contain all the trappings of heads of argument with reference to case law. He does not allege that he has locus standi to oppose this application. Clearly, he conflates his right to appeal with that of Bronx as the applicants also point out. In para 56 of his answering affidavit, he is of the view that since he initiated business rescue proceedings, he is entitled to apply for leave to appeal as opposed to the liquidators. For reasons that follow, Mr Ntshiqqa is wrong.

[15] There is no denying that Mr Ntshiqqa, as Bronx's director, became functus officio upon Bronx's winding-up by operation of law.² In this case, it was Bronx, the legal entity, which initiated the business rescue proceedings as the applicants pointed out in their replying affidavit.

[16] As regards the merits, in order to succeed, the applicants must satisfy the following requirements. There must be exceptional circumstances; the applicant must prove on a balance of probabilities that the applicant will suffer irreparable harm if an order is not granted; and that the other party will not suffer irreparable harm if an order is granted.

[17] The applicants contend that; the circumstances are indeed exceptional in that

—

² See *Attorney-General v Blumenthal* 1961 (4) SA 313 (T). See also *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 439 - 440.

- a. The liquidators of Bronx do not have the statutory power to withdraw the application(s) for leave to appeal. On the contrary, in terms of section 359 of the 1973 Companies Act, the application(s) for leave to appeal are suspended pending the appointment of Bronx's final liquidators;
- b. Bronx, purportedly represented by Mr Ntshiqqa, has done nothing to prosecute the application(s) for leave to appeal; and
- c. there are zero prospects of success on appeal.

[18] The applicants further contend that, Khumbula, its liquidators and creditors stand to suffer irreparable harm in that rates, taxes and levies on Khumbula's properties have not been paid for a protracted period of time. Also, the secured creditors of Khumbula (i.e., Rodel and ABSA) have been waiting for years for their claims to be paid, while at the hands of Mr Ntshiqqa, Bronx has invoked business rescue proceedings no less than three times to delay Khumbula's winding-up; this is while Mr Ntshiqqa and his family resides on Khumbula's properties, free of charge and at the expense of Khumbula's secured creditors.

[19] As regards to the question of urgency, the applicants contend that, the application is urgent in that as Khumbula's liquidators, the applicants have received bids for properties. If the relief sought is not granted, the properties cannot be transferred.

[20] Bronx's purported applications at the instance of Ntshiqqa for leave to appeal has the effect of reviving the business rescue application for Khumbula's winding-up whereas proceedings remain suspended in terms of section 131(6) of the Companies Act. Consequently, Khumbula's liquidators cannot continue to wind-up Khumbula for the benefit of its general body of creditors, and in particular Rodel and ABSA, its secured creditors.

[21] However, the trite position is that the basic principle of company liquidation, namely that on winding up the board of directors becomes *functus officio* and its powers are assumed by the liquidator.³

³ See *Attorney-General V Blumenthal* 1961 (4) SA 313 (T); *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at para 10

[22] Consequently, Mr Ntshiqqa as a director was, following the grant of a final winding-up order, divested of his powers, had become *functus officio* and lacked the authority to oppose the application, which in this instance, is not opposed by the joint liquidators of Bronx, who legally, were in control of Bronx. With this finding, it appears to me that the application for leave to appeal has been improperly instituted by Ntshiqqa.

[23] There is another added consideration. The 7th respondent, ABSA bank, which is an affected person in the main application (the business rescue application) suggests that the improper applications for leave to appeal result in the status quo ante that order persisting i.e. a non-compliant section 131 application. In this case, Bronx never did notify all affected persons of its section 131(1) application for business rescue. Secondly, Bronx never did serve a copy of the principal application on either Khumbula or those persons in whose care Khumbula was subsequent to its provisional and final liquidation.

[24] The 7th respondent contend with which I agree that, in this matter there had thus not been proper service of the section 131(1) application on all affected parties. As Meyer AJA (as he then was) stated —

“[T]he business rescue application must be issued, served on the company and the Commission, and all reasonable steps must have been taken to identify affected persons and their addresses and to deliver the application to them, to meet the requirements of section 131(6) in order to trigger the suspension of the liquidation proceedings”.⁴

[25] There is another valuable consideration. Business rescue process, in any event is meant to be expeditious. In mandatory terms, section 132(3) provides that if the business rescue proceedings have not ended within three months after the start of the proceedings, or such longer time as the court on application by the practitioner may allow, the practitioner must prepare monthly reports and deliver them to each affected person and to the court (in the case of

⁴ See *Lutchman No and Others V African Global Holdings and Others* 2022 (4) SA 529 (SCA) at para 28.

compulsory business rescue) or to the CIPC (in the case of voluntary business rescue).⁵

[26] It accordingly follows as I find that, the institution of an application for leave to appeal against the dismissal of the business rescue application does not, have the effect of reviving the application or, by implication, the suspension of Khumbula's winding-up in terms of section 131(6) of the Companies Act in these circumstances. All the requirements for the relief sought have in my view, been met. No harm that is likely to befall the respondents, in particular, Mr Ntshinga other than an in convenience, has been established.

[27] With due regard to the consideration of costs, the applicants as liquidators established to the court's satisfaction that that the business rescue application and the application(s) for leave to appeal, which were never prosecuted were issued merely to stifle the liquidation proceedings. Added to this is the conflation of his rights vis-à-vis those of Bronx as a legal entity represented by liquidators. This constitutes abuse.

Order

[28] The order is confirmed.

T P MUDAU
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing:	6 December 2022
Reasons requested on:	
Date of judgment:	26 January 2023
For the Applicants:	5 April 2023
For the 8 th Respondent:	Adv. M De Oliveira instructed by Edward Nathan Sonnenberg Inc. In Person

⁵ See *Shiva Uranium (Pty) Ltd (In Business Rescue) and Another v Tayob and Others* 2022 (3) SA 432 (CC) at para 55.