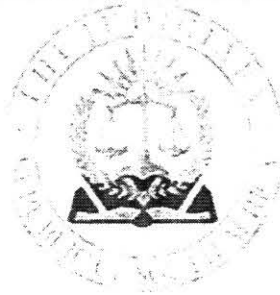


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 38630/2019

| | |
|-------------------|---------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED. |
| 28 JANUARY 2019 | |
| JUDGE E. MATOJANE | |

In the matter between:

CHAVONNES BADENHORST ST CLAIR COOPER N.O

First Applicant

THEA CHRISTINA LOURENS N.O.

Second Applicant

In their capacities as the joint liquidators of Westdawn
Investments (Pty) Limited (In liquidation)

And

KURT ROBERT KNOOP N.O

First Respondent

JOHAN LOUIS KLOPPER N.O

Second Respondent

JUANITO MARTIN DAMONS N.O

Third Respondent

KGASHANE CHRISTOPHER MONYELA N.O

Fourth Respondent

**KOORNFONTEIN MINES (PTY) LIMITED (IN BUSINESS
RESCUE)**

Fifth Respondent

BLACK ROYALTY MINERALS (PTY) LIMITED

Sixth Respondent

| | |
|--|--------------------|
| THE ORCHARD CONSORTIUM | Seventh Respondent |
| ESKOM HOLDINGS SOC LIMITED | Eighth Respondent |
| LURCO GROUP SOUTH AFRICA (PTY) LIMITED | Ninth Respondent |
| ALL AFFECTED PARTIES TO KOORNFONTEIN MINES (PTY) LIMITED (IN BUSINESS RESCUE) AS PER ANNEXURE A TO THE NOTICE OF MOTION | Tenth Respondent |

J U D G M E N T

MATOJANE J

[1] The liquidators of Westdown Investment (Pty) Ltd (in liquidation) (Westdown) have brought an application in which it sought, amongst others, a final winding up order of Koornfontein Mines (Pty) Ltd (In business rescue) ("Koornfontein"). Alternatively, a declaration that the eighth respondent ("Eskom") had no voting interest in relation to its business rescue plan; that the adoption of the business rescue plan on 18 October 2019 was invalid and is set aside; and that the expungement of Westdown's claim from the plan was unlawful.

[2] Oakbay Investments (Pty) Ltd ("Oakbay") sought and was granted leave to intervene in Westdown's application. In the event that the winding up order is not granted against Koornfontein as sought by Westdown, Oakbay sought in order declaring that Eskom had no voting interest in relation to its business rescue plan and that the adoption of the plan on 18 October 2019 was invalid and is set aside, it also sought an order removing and replacing the 1st to 4th respondents as the business rescue practitioner's ("the BRP"s) of Koornfontein.

[3] Charles King SA ("Charles King") applied for leave to intervene in Westdown's application and sought an order postponing Westdown's application pending the outcome of its appeal against an arbitration award dated 27 November 2018.

[4] Lurgo Group South Africa (Pty) Ltd seek an interim relief to interdict the implementation of the business rescue plan for Koornfontein Mines pending further

proceedings for final relief: declaring that the amendment to the plan by way of the additional provisions is unlawful and should be set aside. I

[5] K2015211368 (South Africa) (pty) Ltd t/a Exca Mining applied for leave to intervene in Westdawn's application and sought an order for the provisional winding up of Koornfontein alternatively declaring that Eskom had no voting interest in relation to its business rescue plan and that the adoption of the plan on 18 October 2019 was invalid and is set aside.

[6] In each of the applications of Westdawn and Lurco and the intervention applications of Oakbay, Exca, and Charles King, the Sixth respondent BRM has raised a point in limine based on non-joinder of the affected persons in respect of Koornfontein. BRM alleges that all the affected persons of Koornfontein have a direct and substantial interest in this application and that their non-joinder will be prejudicial to the current and future affairs of the affected persons of Koornfontein.

[7] In terms of section 128 of the Companies Act, an affected person is defined to mean:

- (i) a shareholder or creditor of the company;
- (ii) any registered trade union representing employees of the company; and
- (iii) if any of the employees of the company are not represented by a 10 registered trade union, each of those employees or their respective representatives;

[8] The case made out by BRM is that Westdawn in its Notice of Motion has cited 10 respondents. The first 9 respondents were properly served with the application, while the 10th respondents is cited as **"ALL OTHER AFFECTED PERSONS IN RESPECT OF KOORNFONTEIN MINES (PTY) LIMITED (IN BUSINESS RESCUE)"**. The affected persons comprising the 10th respondents are not identifiable from the notice of motion or the founding affidavits. Notification was sent to the unidentified affected persons by emails.

[9] The business rescue plan was adopted by the creditors at the meeting in terms of section 151 in 152 of the Companies Act, 71 of 2008 ("the Act") on 18 October 2019.

The plan identifies the rights afforded to all affected persons under the plan who are bound to its obligations

[10] Section 152 (4) and (5) of the Companies Act provides ;

A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person-

(a) was present at the meeting;

(b) voted in favour of adoption of the plan; or

(c) in the case of creditors, had proven their claims against the company.

(5) The company, under the direction of the practitioner, must take all necessary steps to—

(a) attempt to satisfy any conditions on which the business rescue plan is contingent; and

(b) implement the plan as adopted.

[11] It is clear that If a business rescue plan has been adopted, notice of an application in terms of section 130(3) of the Act to all creditors will not be sufficient. These creditors will need to be joined as parties in order to allow them to make an informed decision as to whether to oppose the application or not.

[12] As explained by the Supreme Court of Appeal in **ABSA Bank Ltd v Naude NO & Others**¹

"If the creditors are not joined their position would be prejudicially affected: A business rescue plan that they had voted for would be set aside; money that they had anticipated they would receive for the following ten years to extinguish debts owing to them, would not be paid; the money that they had received, for a period of thirty months, would have to be repaid; and according to the adopted business rescue plan the benefit that concurrent creditors would have received namely a proposed dividend of 100 per cent of the debts owing to them, might be slashed to a 5,5 per cent dividend if the company is liquidated".

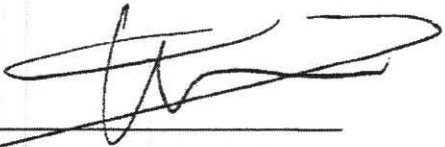
[13] The effect of the relief sought by Westdawn, Oakbay, Exca Louca and Charles King would undo a plan to which all the creditors and affected persons are bound and

¹ 2016 (6) SA 540 SCA at para 10. See also Golden Dividend 339 (Pty)Ltd & Another v Absa Bank limited [2016] ZASCA 78. Kayamandi Town Committee v Mkhwaso & Others 1991(2) SA 630 (C)

creditors who have been paid in terms of the plan would be required to repay such amount to Koornfontein. Every affected person has a direct and substantial interest in the relief sought and ought to have been joined. The non-joinder is fatal.

ORDER

[14] Consequently all applications are dismissed with costs including the costs consequent upon the employ of two counsel.



**JUSTICE E MATOJANE
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**