HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

10 - 07 - 2020 .....
Date

.....
Judge P.A. Meyer

Case no: 10652/2020

In the matter between:

PAN AFRICAN SHOPFITTERS (PTY) LIMITED Applicant

and

EDCON LIMITED First Respondent
PIERS MARSDEN N.O. Second Respondent
LANCE SHAPIRO N.O. Third Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Fourth Respondent

***Case Summary*: Company – Business Rescue – Liquidation proceedings – Whether adoption of a resolution to institute liquidation application was 'initiation' of liquidation proceedings – Companies Act 71 of 2008, s 129(2)*(a)*.**

JUDGMENT

MEYER J

[1] This matter concerns the controversy surrounding the meaning of the word 'initiated' used in s 129(2)*(a)* of the Companies Act 71 of 2008 (the 2008 Act). Section 129(1) provides that '[s]ubject to subsection (2)*(a)*, the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision if the board has reasonable grounds to believe that- *(a)* the company is financially distressed; and *(b)* there appears to be a reasonable

prospect of rescuing the company'; and s 129(2) provides that '[a] resolution contemplated in subsection (1)- *(a)* may not be adopted if liquidation proceedings have been *initiated* by or against the company; and *(b)* has no force or effect until it has been filed.

[2] In *Mouton v Park 2000 Development 11 (Pty) Ltd and others* 2019 (6) SA 105 (WCC) para 81, it was held 'that when referring to the "initiation" of liquidation proceedings in s 129(2)*(a)* the legislature intended to refer to the preceding causative act or conduct whereby the legal process in relation to such proceedings was set in motion. What that act or conduct may be will depend on the facts and circumstances of each matter. In most instances where corporate entities, trusts or voluntary associations are involved it will surely be constituted by the adoption of the necessary resolution in order to launch such proceedings'. On the other hand, in *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and others* 2019 (6) SA 185 (GJ) para 22, it was decided that '[t]he liquidation proceedings contemplated in s 192(2) of the 2008 Act must be served on the company, not merely issued, to meet the requirements of the section'. The *Tjeka* judgment was delivered on 21 June 2019 and *Mouton* on 23 July 2019.

[3] The background to the present controversy is briefly as follows. The applicant, Pan African Shopfitters (Pty) Limited (Pan African), has for many years rendered bespoke retail shopfitting services to the first respondent, Edcon Limited (Edcon), in respect of numerous retail stores operated by Edcon. On 26 March 2020, Edcon's chief executive officer, Mr Grant Pattinson, held a conference call with Edcon's suppliers, including Pan African, and advised them that Edcon only has sufficient liquidity to pay salaries, which Edcon deems a priority, and is unable to honour any other accounts payable (that also included amounts then due, owing and payable to Pan African). He informed them that Edcon was commercially insolvent.

[4] Pan African sought advice from its attorney on that same day. The advice given was that it should launch an application for the liquidation of Edcon, that it was not possible to do so during the then looming lockdown period, but that the liquidation application should be prepared and be ready for launching the moment it became possible to do so. The nationwide lockdown commenced at midnight on 26 March 2020. On 27 March 2020, and pursuant to the advice received from its attorney, Pan

African's board adopted a resolution that it 'will as soon as practically possible' apply to liquidate Edcon.

[5] On 28 April 2020, the board of Edcon resolved, in accordance with s 129(1), that Edcon voluntarily begin business rescue proceedings and place the company under supervision. The resolution to place Edcon under supervision was duly filed with the fourth respondent, the Companies and Intellectual Property Commission (CIPC) on 29 April 2020. The second respondent, Mr Piers Marsden, and the third respondent, Mr Lance Shapiro, were appointed as the joint business rescue practitioners of Edcon (the business rescue practitioners).

[6] The liquidation application was prepared by Pan African's attorney during the phase 5 lockdown period, which persisted until the phase 4 lockdown period came into operation at midnight on 1 May 2020. On Monday, 4 May 2020, Pan African's liquidation application, which is founded on Edcon's inability to pay its debts and commercial insolvency, was issued in the high court and served on Edcon (the liquidation application).

[7] On 18 May 2020, Pan African launched an urgent applicant, seeking an order declaring that the resolution adopted by the board of Edcon on 28 April 2020 to voluntarily commence business rescue proceedings is invalid and consequently that such resolution and the proceedings that followed, including the appointment of the business rescue practitioners, be set aside, and for the discharge of Edcon from business rescue proceedings (the urgent application). In support of the urgent relief it claims, Pan African contends that it had already initiated liquidation proceedings against Edcon on 27 March 2020 within the meaning of s 129(2)*(a)* when its board adopted the resolution to make application for the winding-up of Edcon, which was prior to the adoption of the resolution by the board of Edcon on 28 April 2020 to voluntarily commence business rescue proceedings.

[8] The liquidation application and the urgent application were heard by me as an urgent matter on 18 June 2020. Counsel were *ad idem* that if the urgent application should succeed, the provisional liquidation of Edcon should follow. In other words, both applications should either fail or succeed. Unsurprisingly, Pan African argued that I should follow *Mouton*, and Edcon, on the other hand, that *Tjeka* should be followed. Due to its urgency I made an order after I had fully considered the matter on

25 June 2020, dismissing each application with costs, including those of two counsel. These are my reasons.

[9] The established approach to statutory interpretation set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 and approved by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) para 29 was recently thus concisely stated by Wallis JA in *C:SARS v United Manganese of Kalahari (Pty) Ltd* (264/2019) ZASCA 16 (25 March 2020) para 8:

'It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The approach is as applicable to taxing statutes as to any other statute [*Commissioner for the South African Revenue Services v Bosch and Another* [2014] ZASCA 171; 2015 (2) SA 174 (SCA) para 9]. The inevitable point of departure is the language used in the provision under consideration.'

[10] Before turning to the *Mouton* and *Tjeka* judgments, it is necessary to refer to *FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD) and *Standard Bank of South Africa v A-Team Trading CC* 2016 (1) SA 503 (KZP). Apart from the resolution of a board of a company to begin business rescue proceedings in terms of s 129(1), an affected person may, in terms of s 131(1), apply to a court for an order placing a company under supervision and commencing business rescue proceedings. In such event s 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'.

[11] In *Imperial Crown* a bank sought an order for the provisional liquidation of a company on the ground that it was unable to pay its debts. At the hearing before Swain J, the company sought a postponement of the matter in order to investigate the advisability of launching an application for business rescue and for the court not to grant a provisional order of liquidation since that, so it was submitted, would preclude an application for business rescue. The bank tendered an extended return date in respect of the provisional order of liquidation to afford the company sufficient time to

investigate and, if necessary, launch any application for business rescue of the respondent.

[12] In granting a provisional order of liquidation with an extended return date to enable an application for business rescue to be brought by any 'affected person', if so advised, Swain J *inter alia* said the following:

'[16] It is clear, however, that Act 71 of 2008 draws a distinction between the inter-relationship of business rescue proceedings and liquidation proceedings, depending upon whether the source of business rescue proceedings lies in the resolution of the board of a company to begin such proceedings in terms of s 129(1), or whether the source of such proceedings lies in an application brought by an 'affected person' in terms of s 131(1), for an order placing the company under supervision and commencing business rescue proceedings.

[17] In the former case, as pointed out, in terms of s 129(2)*(a)* such a resolution may not be adopted "if liquidation proceedings have been initiated by or against the company". The reference to liquidation proceedings "by or against the company", is clearly a reference to a voluntary winding-up of a company in terms of s 352 of Act 61 of 1973, as well as a reference to a winding-up of a company by the court in terms of s 348 of Act 61 of 1973. In this regard, the authors of the work Davis et al *Companies and other Business Structures in South Africa* 2 ed at 229 express the view that it is unfortunate that it is unclear whether the word "initiated" (which is not defined) is intended to have the same meaning as the word "commenced" contained in the aforesaid sections of Act 61 of 1973, and which is clearly defined in Act 61 of 1973. In this regard it should be noted that s 131(6) of Act 71 of 2008 refers to liquidation proceedings having "been commenced by or against the company" at the time application is made for an order placing the company under supervision and commencing business rescue proceedings in terms of s 131(1) of Act 71 of 2008. It would be anomalous if what was meant by liquidation proceedings being "initiated" by or against the company for the purposes of s 129(2)*(a)* differed from what was meant by liquidation proceedings being "commenced" by or against the company for the purposes of s 131(6). In my view, due regard being had to the fact that these provisions of Act 61 of 1973 expressly continue to be applicable to the winding-up of companies, the word "initiated" must be intended to have the same meaning as the word "commenced" in the applicable sections. To conclude otherwise would be to introduce uncertainty where none is justified, by virtue of the clear definition of the "commencement" of proceedings in ss 348 and 352 of Act 61 of 1973.'

[13] In *Standard Bank of South Africa v A-Team Trading CC* 2016 (1) SA 503 (KZP) paras 8-10, Ploos van Amstel J pointed out that '[w]hether the launching of the liquidation application itself precluded the adoption of a resolution by the board to

begin business rescue proceedings was neither argued nor decided [in *Imperial Crown*]. The decision must be read in the context of the facts of the case.' He further did not consider *Imperial Crown* to be 'authority for the proposition that the expression "liquidation proceedings" in s 131(6) does not include an application for a liquidation order'. He added that he does not believe 'it is helpful in determining when liquidation proceedings commence, for the purposes of s 131(6), to have regard to s 348 [a winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up] and s 352 of the 1973 Act [a voluntary winding-up of a company shall commence at the time of the registration in terms of s 200 of the special resolution authorising the winding-up]' since '[t]hese sections deal with the commencement of the winding-up, in other words, the time from when the company is, or is deemed to be, in liquidation. A distinction must be made between the proceedings which lead to a winding-up order, and the winding-up process during which the liquidator performs his duties in terms of the Act'.

[14] Ploos van Amstel J continued by saying (para 12) -

'. . . that liquidation proceedings are commenced by the launching of an application, and that ss (6) refers to liquidation proceedings "by or against" the company. If a liquidation application is dismissed the proceedings come to an end. That does not mean that the application did not constitute liquidation proceedings. If a liquidation order is granted the company is, in terms of s 348 of the Companies Act of 1973, deemed to have been placed in liquidation when the application was launched. And the liquidation proceedings continue until the order is discharged or the company is deregistered on completion of the liquidation process. . . . . It is not the liquidation proceedings which are deemed to have commenced when the application was presented – it is the winding-up of the company. . . . By way of analogy, eviction proceedings in everyday practice commence with an application for an eviction order and include the process of serving the eviction order and ejecting the unlawful occupant. I do not see why it should be different in the case of liquidation proceedings.'

And (para 19):

'. . . Legal proceedings are commenced by the launching of an application or the institution of an action. Liquidation proceedings are invariably brought by way of an application. In my view the application itself forms part of the liquidation proceedings, just as an application for the eviction of an unlawful occupier forms part of the eviction proceedings. The label merely tells one what the nature of the proceedings is. This approach seems to me to be fortified by the wording of ss (6), which refers to liquidation proceedings which have already been commenced *'by or against'* the company. The winding-up process which follows a liquidation

order also forms part of the liquidation proceedings, in the same way that the issue of a warrant of eviction forms part of the eviction proceedings.'

[15] In *Mouton*, Sher J considered the use of the word 'commenced' in the context of the winding-up of companies provisions of the 1973 Act, the use of the word 'begin' in the context of the winding-up of solvent companies and the words 'begin', 'initiated' and 'commenced' in the context of the business rescue proceedings provisions of the 2008 Act, particularly ss 352 and 348 of the 1973 Act, which provisions stipulate when the winding-up of a company 'commenced' (paras 60-62); ss 79, 80(6) and 81(4) of the 2008 Act, which provisions stipulate when the winding up of a solvent company 'begins' (paras 63-65); ss 129 and 132(1) of the 2008 Act, which provisions stipulate when business rescue proceedings, voluntary and on application to court, 'begin' (paras 66-69); s 131(6) of the 2008 Act where the word 'commenced' is used and ss 79(1)*(a)* and 129(2)*(a)*, where the word 'initiated' is used (paras 70-77).

[16] In interpreting s 131(6) of the 2008 Act (para 71), Sher J said that:

'. . . if one applies a similar meaning to the word "commenced" in the context of this subsection as that which applies in the case of the use of the word in the relevant winding-up provisions of the previous Act, as was done in [*Imperial Crown*] (ie that it means that either a company has voluntarily resolved to place itself under liquidation and has filed a resolution to that effect, or application has been made for its compulsory winding-up), it will not be inconsistent with the purpose of the subsection and will give effect to it, as the subsection aims to suspend liquidation proceedings only where these have publicly and formally "commenced", ie where these have begun by means of the filing of the necessary resolution with the CIPC or the filing of court papers with the Registrar of the High Court. The same holds true if we are to apply the meaning which is attributed to the word "commenced" in the relevant provisions of the current Act, in terms of which, in addition to the two possibilities referred to in [*Imperial Crown*], we must add as a third possibility the time or moment when a court makes an order granting a liquidation.'

[17] And in interpreting s 129(2)*(a)*, Sher J said (para 73) that 'it cannot be a linguistic accident that the legislature chose to use the word "initiated" rather than either the word "commenced" or the word "begin"', and:

'[74] In this regard I note that the only other place where the word "initiated" is used in the current Act in relation either to winding-up or business rescue proceedings, is s 79(1)*(a)*, which provides that a solvent company may be dissolved either voluntarily by means of a winding-up which is "initiated by the company as contemplated in s 80", ie by the adoption of a special

resolution to such effect, or compulsorily by way of a winding-up and liquidation order [in terms of s 81].

[75] The ordinary, grammatical meaning of the verb "initiate" is to cause a process or action to begin [*Concise Oxford English Dictionary* 10 ed]. As such, in the context in which the word is used in s 79(1)*(a)*, it is intended to refer to some act which precedes the publicly formal beginning or "commencement" of the legal process referred to therein (liquidation proceedings), ie it refers to a preceding act or conduct which sets the process into motion. Such an interpretation is supported, in the context of s 79(1)*(a)*, by the phrase in which it appears, which qualifies what that preceding act or conduct is to be and how it is to be effected, ie the adoption of the necessary resolution. It provides in essence that the legal process of voluntarily winding-up a company is put into motion by means of the adoption of a resolution to such effect. However, as we have seen from the preceding discussion, the formal "commencement" of the liquidation process, as a matter of law, only occurs at the moment when the resolution is filed.

[76] Thus, whereas, in the case of the use of the word "commence", the word "begin", when viewed in the context of the various provisions of the previous and the current Acts which I have referred to, may either be a synonymous legal term which is used to denote the formal commencement, as a matter of law, of the proceedings in question (or simply the start, in a factual sense, thereof), the word "initiate" is used to denote the factual, causative action by means of which the legal process which gives rise to the proceedings concerned is put into motion.

[77] The word "initiated" in s 129(2)*(a)* is therefore intended to refer to a preceding act or conduct by which liquidation proceedings are set in motion and is not intended to signify the moment in time when the proceedings are deemed to have formally "commenced". In my view, therefore, the word "initiated" does not bear the same meaning as the word "commenced" in s 348 and 352 of the previous Act, and it was never intended that it should have the same meaning.'

[18] Sher J accordingly concluded that the liquidation proceedings in *Mouton* were not 'initiated' when the liquidation application by a creditor company was filed with the court, but when the resolution of that creditor company to launch the liquidation proceedings was taken, which resolution was taken before the board adopted the resolution that the company voluntarily begun business rescue proceedings in terms of s 129(1).

[19] In *Tjeka* a creditor caused the issue of a liquidation application in the high court. Some time later the directors of the company, unaware of the liquidation application,

filed a resolution to begin business rescue proceedings. The creditor then caused the liquidation application to be served. The question for decision was whether the issue of the liquidation application was the 'initiation' of liquidation proceedings as intended in s 129(2)*(a)*.

[20] In reaching the conclusion that '[t]he liquidation proceedings contemplated in s 129(2) of the 2008 Act must be served on the company, not merely issued, to meet the requirements of the section', Sutherland J accepted (paras 6-7) that, taking literally, the dictionary meaning of the word 'initiated' (' cause a process or action to begin' (*Oxford English Dictionary*)) may mean 'the "first move" in any process', but he pointed out that:

'. . . [t]he difficulty which is encountered with such textual treatment is that most words can be turned to fit meanings that can be attributed to them. What cannot be stressed enough is that a word can never be interpreted on its own, because it exists only as part of a greater whole, whether a phrase, a sentence or an entire section, not to mention a whole statute. Moreover the duty to interpret language purposively compels a court to cast a wider net over what must be explored. Accordingly, it is the work that the phrase or sentence performs in the context of the whole that must be examined.'

(Footnote omitted.)

[21] Sutherland J continued by saying that (para 8):

'The text of s 129(2)*(a)* must be read as a whole. Whatever 'initiated' means, it must be understood to be 'by or against the company'. To omit this aspect is not to do justice to this part of the sentence. It is plain that the liquidation proceedings which are initiated, must be cognisable by reference to its effect upon the company, otherwise the notion of being 'by' or 'against' the company is mere verbiage. Thus, it can be asked: if a deed (ie the issue of an application) which is juridically cognisable occurs, but without the company being in the least aware of its existence, can that deed be said to be an example of a deed initiated *against* the company? At the levels of both grammar and logic this seems to be doubtful.'

[22] Sutherland J referred to *Crown Trading* and *A-Team* (paras 9-13) and concluded that the 'reasoning, by Ploos van Amstel J, demonstrates that the function of s 348 [of the 1973 Act] is different to the function of s 129(2) [of the 2008 Act]' and thus 'the eliding of "commenced" with "initiated" is shown to be inappropriate'.

[23] He also referred to *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D, where it was held that '[a]lthough an action is commenced when

the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him', to *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) paras 16-20, where it was held that a court order that review proceedings 'shall be initiated by no later than' a stated date meant 'that notice of the application be given to the registrar and the application served on the affected parties by' the stated date, and to *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780D, where it was held that the purpose of a summons or notice of motion is to implicate or involve a respondent into a lawsuit, and concluded thus:

'[20] The conceptualisation of the critical juridical act in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A), cited in the decision, regarding the purpose of a summons or notice of motion being '[o]m respondent by 'n geding te betrek' [[t]his phrase would in English be rendered as 'to implicate or involve a respondent'; literally to be 'drawn in'] and that, only when served is a respondent thus 'betrek', is, in my view, an expression of the inherent policy choice that a litigant remains unaffected in law until made formally aware of the steps being taken against the litigant. Those exceptional cases where it is legitimate to take an order against an unsuspecting party *ex parte* do not constitute an exception to this principle because of the contingency of a reversal at the instance of the party adversely affected once made aware of the order.

[21] What *Finishing Touch* is authority for must not be exaggerated. It does not address s 129(2), nor per se dispose of that controversy. What it does do is emphasise that context is critical and the *purpose* for which terminology is selected must be unearthed in order to attribute the appropriate meaning to the text.'

[24] I subscribe to the conclusion reached in *Tjeka* that the liquidation proceedings contemplated in s 129(2)*(a)* must be issued and served on the company to meet the requirements of the section for the reasons set out in the judgment and for those that follow. The interpretation of s 129(2)*(a)* in *Mouton* does not seem to me to be a sensible one, nor is it supported by the wording of that section.

[25] I agree with Ploos van Amstel J in *A-Team* that a distinction needs to be made between the proceedings leading up to a winding-up order and the winding-up process itself that follows once a winding-up order is granted. The same holds true for the winding-up process of a company that follows upon a the adoption and filing of a resolution authorizing the winding-up or the business rescue process that follows upon

the adoption and filing of a board resolution to begin business rescue proceedings or a court order in an application to court for an order placing the company under supervision and commencing business rescue proceedings. It is also not helpful in determining when 'liquidation proceedings have been initiated by or against a company' as contemplated in s 129(2)*(a)*, to have regard to the various provisions of the 1973 and 2008 Acts dealing with the commencement or beginning of the winding-up and business rescue processes.

[26] I do not believe that the context in which the word 'initiated' is used in s 79(1)*(a)* supports the interpretation that it is intended to refer 'to a preceding act or conduct which sets the process in motion' or the interpretation that the word 'initiated' in s 129(2)*(a)* means the factual putting into motion of liquidation proceedings by the adoption of an appropriate resolution, and not their formal 'commencement' by the lodging of the application with the court as was held in *Mouton*. Section 79(1) defines the meaning of the word 'initiated' for the purpose of that section: 'A solvent company may be dissolved by . . . voluntary winding-up *initiated* by the company *as contemplated in section 80*' (own emphasis) and s 80 provides *inter alia* for the adoption of a special resolution to do so, the filing of the resolution with the CIPC and that the voluntary winding-up 'begins' when the resolution of the company has been filed. The context in which the word 'initiated' is used in s 79(1) is rather a reference to the adoption and filing by a company of a resolution to be wound up voluntarily, which corresponds to the meaning of the words 'commenced' and 'begins' used elsewhere in the 2008 Act in stipulating when the voluntary winding-up process or the voluntary business rescue process begins.

[27] Furthermore, the word 'initiated' is also used in s 141(2)*(b)*(i), which section provides that '[i]f at any time during business rescue proceedings, the practitioner concludes that . . . there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must inform the court, the company, and all affected persons in the prescribed manner, and- (i) if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings; or (ii) otherwise, file a notice of termination of the business rescue proceedings'. Here too, the context in which the words 'if a business rescue process was . . . initiated by an application to the court in terms of section 131' are used, cannot

be said to be reference 'to some act which precedes the publicly formal beginning or "commencement" of the legal process referred to therein' (an application to the court for an order placing the company under supervision and commencing business rescue proceedings).

[28] I therefore respectfully disagree with the textual treatment of the meaning of the word 'initiated' in the 2008 Act in *Mouton*. As was accepted in *Tjeka*, taking literally the dictionary meaning of the word 'initiated' may mean 'the "first move" in any process', but, as was pointed out by Sutherland J, the 'difficulty which is encountered with such textual treatment is that most words can be turned to fit meanings that can be attributed to them'.

[29] Section 129(2)*(a)* forms part of Chapter 6 of the 2008 Act, which *inter alia* regulates business rescue proceedings of companies. In *Panamo Properties (Pty) Ltd and another v Nel and others NNO* 2015 (5) SA 63 (SCA) para 8, Wallis JA said business rescue is a process aimed at avoiding the liquidation of a company if it is feasible to do so. The source of business rescue proceedings lies in the resolution of the board of a company to begin such proceedings in terms of s 129(1) or in an application brought by an 'affected person' in terms of s 131(1) for an order placing the company under supervision and commencing business rescue proceedings.

[30] The text of s 129(2)*(a)* must be read as a whole. As Sutherland J said in *Tjeka*, whatever 'initiated' means, it must be understood to be '*by* or *against* the company'. Furthermore, 'initiated' must also be understood within the context of the prohibition contained in s 129(2)*(a)*. The section prohibits the board of a company from adopting a resolution that the company voluntarily begin business rescue proceedings 'if liquidation proceedings have been initiated by or against the company'. The legislature ordained that in such event a resolution by the board of a company to begin business rescue proceedings *'may not be adopted'*. The section does not merely render such a resolution without force or effect. In such event only an 'affected person' may bring an application to a court in terms of s 131(1) for an order placing the company under supervision and commencing business rescue proceedings

[31] I agree with Sutherland J in *Tjeka* that 'at the levels of both grammar and logic' it seems to be doubtful that 'if a deed (ie the issue of an application) which is juridically cognisable occurs, but without the company being in the least aware of its existence',

it can be said 'to be an example of a deed initiated *against* the company'. A litigant remains unaffected in law until made formally aware of the steps being taken against the litigant. Furthermore, the interpretation that the word 'initiate' in s 129(2)*(a)* 'is used to denote the factual, causative action by means of which the legal process which gives rise to the proceedings concerned is put into motion', such as a company resolution to institute a liquidation application, results in the absurdity that the board of a company is prohibited from adopting a resolution that the company begin business rescue proceedings if a creditor had adopted a resolution to institute a liquidation application against the company of which resolution the board of the company may well be unaware. Such meaning militates against logic, leads to an insensible or unbusinesslike result, and undermines the purpose of the section. (*Endumeni* para 18.) The apparent purpose to which 129(2)*(a)* is directed is to prohibit the board of a company from adopting a resolution that the company voluntarily begin business rescue proceedings if liquidation proceedings have been initiated by the company itself or if someone else has implicated or involved the company in liquidation proceedings against it.

[32] In *A-Team* para 21, it was held that a business rescue application suspends a pending application for the liquidation of a company in terms of s 131(6), which section provides for such suspension '[i]f liquidation proceedings have already been commenced by or against the company'. As was said by Sher J in *Mouton*, 'the subsection aims to suspend liquidation proceedings only where these have publicly and formally "commenced", ie where these have begun by means of the filing of the necessary resolution with the CIPC or the filing of court papers with the Registrar of the High Court.' It would indeed, as Swain J said in *Imperial Crown*, 'be anomalous if what was meant by liquidation proceedings being 'initiated' by or against the company for the purposes of s 129(2)*(a)* differed from what was meant by liquidation proceedings being "commenced" by or against the company for the purposes of s 131(6)'. The application of a similar meaning to the word 'initiated' in s 129*(a)* will give effect to the clear purpose to which the section is directed.

P.A. MEYER
JUDGE OF THE HIGH COURT

Heard:	18 June 2020
Judgment:	10 July 2020
Counsel for the applicant:	Adv JL Kaplan
Instructed by:	Ian Levitt Attorneys, Sandton, Johannesburg
Counsel for the 1st, 2nd and 3rd respondents:	Adv AE Bham SC (assisted by Adv JE Smit)
Instructed by:	ENS Africa Inc., Sandton, Johannesburg