IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN] **[REPORTABLE]**

Case nos. 1070/19; 8488/16; 2535/19

In the matter between:

JOHAN MOUTON	Applicant
and	
PARK 2000 DEVELOPMENT 11 (PTY) LTD	First Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent
SMOKEN CONSULTING (PTY) LTD	Third Respondent
KENNETH LOGAN STEWART N.O.	Fourth Respondent

and

In the matter between:

KENNETH LOGAN STEWART N.O.	Applicant
and	
JOHAN MOUTON	First Respondent
THE SHERIFF OF THE HIGH COURT, RIVERSDALE	Second Respondent
WH VAN SCHALKWYK VERVOER CC	Third Respondent
CHRISTIAN ERNST OLIVIER	Fourth Respondent
THE REGISTRAR OF DEEDS, CAPE TOWN	Fifth Respondent

and

In the matter between:

PETRUS JURGENS HANEKOM First Intervening Party

WILLEM ADRIAAN HANEKOM Second Intervening Party

In re: The Application of Stewart NO v Mouton & Ors (case no. 8488/19)

JUDGMENT DELIVERED ON 23 JULY 2019

SHER, J:

1. I have before me 3 related applications. In the main application (the 'Mouton' application), which precipitated the other two, an Order is principally sought[1] declaring that a resolution which was adopted on 11 December 2018 by the first respondent company ('Park 2000') to commence business rescue proceedings, is invalid, and consequently that such resolution and the proceedings which followed it, including the appointment of fourth respondent ('Stewart') as the business rescue practitioner, should be set aside. In the alternative an Order is sought declaring that the resolution was null and void from the outset.
2. In the remaining applications an interim interdict is sought by Stewart and certain intervening parties whereby the transfer of two immovable properties (which are registered in the name of Park 2000) to certain of the respondents, pursuant to an auction sale in execution at which they were purchased, is to be restrained pending the outcome of the main application.
3. The principal questions which arise for determination are whether or not the business rescue proceedings are defective because they were launched at a time when liquidation proceedings had already been 'initiated' against Park 2000, or whether the resolution by means of which the business rescue proceedings were launched is null and void because it was not taken by the requisite majority.

[1] In terms of s 130(1)(a)(iii) read together with s 130(5)(a)(i) and (ii) of the Companies Act 71 of 2008 ('the Act').

4. The first of these questions requires a careful interpretation of s 129(2)(a) and related provisions of the Companies Act 71 of 2008.

The facts and the issues

(i) The background

5. Park 2000 is a property development company. It was formerly the owner of two pieces of land, to wit Erf 541 in Riversdale and Erf 4513 in Stilbaai West, the latter being the remainder of portion 60 of the Plattebosch farm, on which certain developments were earmarked to take place. For the purpose of raising finance for the Stilbaai development from about 2006 onwards the company offered debentures which were linked to proposed erven. One of the subscribers for the debentures was the applicant, Mouton.

6. In terms of the debenture agreement the debentures were redeemable by a certain date from the net proceeds which were to be realized from the sales of erven, unless the requisite rezoning of the remainder of portion 60 had not occurred by 1 December 2009, in which event the directors could extend the redemption date. Such an extension was allegedly effected on a number of occasions, the last of which supposedly occurred in November 2017. Whether these extensions were validly effected is not clear.

7. In 2016 Mouton sought to redeem the debentures he held but was unable to do so. Consequently, he issued summons and in July 2016 he obtained default judgment against the company after it failed to file a plea.

8. Three months later the company made application for rescission of the judgment, which was acceded to in February 2017. However, it failed yet again to file a plea and as a result Mouton took default judgment against it for a second time on 11 October 2017, in an amount of R 400 000 (being in respect of 2 debenture certificates which he held of R 200 000 in value each), together with interest and costs.

9. As the company failed to satisfy the judgment on demand Mouton obtained a writ of execution against its movables in January 2018, which resulted in a *nulla bona* return. In this regard the Sheriff was informed by Renier Van Rooyen senior, who

together with his son is one of the two directors of the company, that it had no movable assets as these were owned by a Trust.

10. Consequently, in July 2018 Mouton obtained a writ of execution which authorised the attachment and sale of the company's immovable properties and in due course his attorneys advertised their intended disposal by way of public auction on 12 December 2018.

11. At about 15h44 on the afternoon of the day before the auction was to be held, Mouton's attorneys received notification by email from attorneys Lucas Dysel Crouse Inc that an entity known as Meiprops Twee en Twintig (Pty) Ltd ('Meiprops'), of which the Van Rooyens are also directors, had launched an application for the liquidation and winding-up of Park 2000, which application was enrolled for hearing on 14 December 2018. Lucas Dysel Crouse Inc currently represent not only Park 2000, but also the business rescue practitioner Stewart as well as the intervening parties. As far as all these entities are concerned there is therefore a commonality of interests.

12. About 15 mins after receiving notification of the intended liquidation of Park 2000 Mouton's attorneys received email correspondence from an entity known as Smoken Consulting (Pty) Ltd (through which Stewart offers consulting and 'business rescue' services), in which they were also informed that Park 2000 had made application that same day to be placed under business rescue, and two days later the Companies and Intellectual Property Commission (the 'CIPC') duly appointed Stewart as the business rescue practitioner. In the meantime, the liquidation application was withdrawn the day after it was launched.

13. Notwithstanding that Park 2000 had sought to place itself in business rescue on 11 December 2018 and despite a demand which was made by Stewart that the auction was to be cancelled as a result thereof, it went ahead on the instructions of Mouton's attorneys, as they were of the view that the business rescue proceedings were irregular and Park 2000 had not legitimately and validly been placed in business rescue, whereupon the two properties were sold at the auction: the Riversdale property was sold for R 135 000 and the Stilbaai property was sold for R 3.89 mil.

14. In both the liquidation application as well as the business rescue application Van Rooyen senior deposed to the motivating affidavits on 11 December 2018. In the liquidation application he deposed to the founding affidavit on behalf of the creditor Meiprops. In that affidavit he claimed that Park 2000 was indebted to Meiprops in an amount of R 2 359 642 in respect of monies which had been loaned and advanced to it in 2017 in order to finance the completion of the Stilbaai development, which monies had allegedly become repayable in September 2018.

15. Van Rooyen said that Park 2000 was unable to pay the amount owing to Meiprops because of the negative economic climate, which had resulted in slower sales of erven in the Stilbaai development than was expected and cash flow problems. As a result, Park 2000 was struggling to pay its creditors and due to the 'intimate knowledge' which he had of the company's affairs he said it had 'no hope of being able to do so in the foreseeable future'. According to him it was wholly unable to meet its monthly overheads and had no further 'funding' available to it, as it was unable to secure finance from any financial institution. And as was evident from its management accounts, which he enclosed, as at 31 October 2018 its liabilities exceeded its assets by an amount of R 5.8 mil. Consequently, he said the company was both commercially as well as factually insolvent and it was just and equitable that it be wound up for the benefit of its creditors.

16. In contrast to these averments, in the sworn affidavit which he filed with the CIPC in support of the business rescue application Van Rooyen alleged that Park 2000 was financially distressed to the extent that it was 'reasonably unlikely' that it would be able to pay its debts within the ensuing 6 months, but although it was 'reasonably likely' that it would 'become' insolvent within that period, based on 'current sales volumes, cash flows and costs structure' (sic) it could 'in all probability' trade profitably, provided it obtained the protection of the moratorium on legal proceedings which the Companies Act afforded a company in business rescue.[2]

[2] In terms of s 133.

17. It will be obvious that the averments which were made by Van Rooyen in the two affidavits were mutually contradictory and they clearly could not both be true. In one of them, at least, he was being mendacious. Either Park 2000 was hopelessly insolvent as at 11 December 2018 or it was not. And if it was, it could hardly then trade profitably, and it could clearly not be rescued, even with a moratorium in place.

18. What further demonstrates Van Rooyen's glib ability to be expedient with the truth is that in the sworn affidavit which he lodged as part of the business rescue application he declared not only that Park 2000 was at that time not involved in any (other) legal proceedings, but also that it was not in receipt of or aware of any application to liquidate it. That too was an obvious untruth, given that he deposed to the founding affidavit in the liquidation application which had been launched on behalf of Meiprops, earlier the same day.

19. One of the crucial questions which requires determination and which can be dispositive of the outcome of the main application is which of the business rescue and liquidation applications preceded the other.

20. This is both a factual issue ie a matter of when chronologically in time the applications commenced, as well as a legal issue ie when as a matter of law the applications are to be considered to have commenced. These are not necessarily one and the same moment in time. In this regard the provisions of both the previous and the current Companies Acts[3] refer variously to the 'commencement', 'beginning' and 'initiation' of liquidation and/or business rescue proceedings, and as I will attempt to illustrate in this judgment these terms have different meanings attached to them, depending on the context in which they are used.

21. It is important to note that the principal affidavits which were filed in the applications which are before me ie the answering affidavit in the Mouton application and the founding affidavit that was filed in the Stewart application, were deposed to by Stewart and not by Van Rooyen senior. This is a further factor which impacts on the cogency of the versions which were put up in the

[3] Acts 61 of 1973 and 71 of 2008.

various applications, as Stewart obviously had no first-hand knowledge of the events that transpired on 11 December 2018 and was clearly reliant on Van Rooyen's versions thereof. And, as I have already pointed out, there is a large question mark behind the veracity of Van Rooyen's affidavits, which must of necessity impact upon his credibility. In addition, as will become apparent later, there is a marked divergence between the version which was first put up by Stewart in his founding affidavit in the interdict application, which he deposed to on 7 February 2019, and that put up by him in his answering affidavit in the Mouton application, which was deposed to on 14 March 2019.

22. In the circumstances, when computing as chronologically accurate a timeline of events as possible I sought to arrive at factual findings on the basis of information which was objectively verifiable, without relying on the contents of the affidavits of either Stewart or Van Rooyen or which, if taken from their affidavits, was common cause and uncontested.

23. In the second place, it is important to point out that from the respondents' perspective the principal focus in the affidavits in the applications before me was directed at dealing with the launch of the business rescue proceedings and very little was said by the principal deponent Stewart about the liquidation application, or the launch thereof, and one has to sift through the papers in order to find the relevant information which is pertinent thereto.

24. The explanation for the approach which was adopted by Stewart is evidently that he was advised that for purposes of considering which application preceded the other the liquidation proceedings were to be considered as having been 'initiated' on the date and at the time when that application was issued out of the High Court. As I will attempt to explain below, this was based on the assumption that the provisions of ss 348 and 352 of the previous Companies Act,[4] which refer to the 'commencement' of liquidation proceedings, were applicable. In this regard the respondents seek to rely on the decision in *FirstRand Bank Ltd v Imperial Crown Trading (Pty) Ltd* [5] in which it was held that the word 'initiated' in

[4] Act 61 of 1973.
[5] 2012 (4) SA 266 (KZN).

subsection 129(2)(a) of the current Act, in relation to the launching of liquidation proceedings, must have been intended to have the same meaning as the word 'commenced' in ss 348 and 352 of the previous Act.

25. As a result, the explanations which were put forward by Stewart, particularly in the answering affidavit in the Mouton application, are directed at showing that the business rescue proceedings began by way of the adoption of the necessary resolution, before the liquidation proceedings 'commenced' ie before the issue of the papers in the liquidation application, and therefore cannot be set aside on the grounds of a failure to comply with the provisions of s 129(2)(a).

(ii) The liquidation application

26. As far as the liquidation application is concerned the Registrar's stamp on the first page of the notice of motion confirms that it was issued on 11 December 2018 and a time/date stamp on page 4 thereof indicates that a copy was received by the Master's office at 10h48 that morning. There is also a date stamp which indicates that it was served on SARS on the same day. This means that the application itself, as a whole, had to have been issued sometime before this on the morning of 11 December.

27. In the answering affidavit which he made in the Mouton application Stewart said that the papers in the liquidation application were drafted the day before they were issued (ie on 10 December 2018) and were then settled with Van Rooyen by 09h30 the following morning 11 December 2018,[6] who thereafter signed the founding affidavit and the resolution between 09h30 and 09h45 at the office of a commissioner of oaths close to the offices of his attorneys, in Durbanville.[7] However, at another point in his affidavit[8] Stewart averred that the founding affidavit was deposed to and signed between 09h15 and 09h30.

28. Thereafter, copies of the papers (for service and issue) were made at the offices of his attorneys before they proceeded to the High Court in Cape Town, which is a distance of approximately 30 kms away, for the application to be issued. According to Stewart issue occurred at 'around' 10h30 that day.

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[6] Para [141].
[7] Para [46] rtw para [20].
[8] Para [137].

29. Given the distance between Durbanville and the High Court in Cape Town, and the distance in turn from there to the Master's office, anyone who has any experience of working at the High Court in Cape Town and travelling between these various locations will realise that even on the best of days, when traffic conditions are optimal and office queues are non-existent (and 11 December is certainly not one of those days), and even were one to be conveyed from one location to the other (or even if one were travelling on a motorcycle), the chance of being able to have papers that were despatched from Durbanville at 09h45-10h00 at the earliest, issued by 10h30 at the High Court and stamped as received at the Master's office some 18 mins after that, is well-nigh impossible. On the best of days it is a 45 mins drive to Cape Town central from Durbanville, and in my view to allow even 30 mins for queueing, issuing and travelling time between the office of the Registrar of the High Court and that of the Master is wildly optimistic, and extremely unlikely.

30. In the circumstances I do not believe that one can set much store by the averments which are made by Stewart in the answering affidavit in the main application as far as times are concerned, save insofar as these are confirmed by objective evidence. And in this regard the only time which is confirmed by objective evidence is the time of receipt by the Master's office ie 10h48. Thus, at best, it could probably be said that the liquidation application could not have been issued out of the Registrar's office later than somewhere between 10h00 and 10h15 that morning in order for it to be stamped as having been received by the Master at 10h48. This means, of necessity, that it is highly unlikely that the founding affidavit was deposed to and signed in Durbanville by 09h30, or even 09h15, given that Van Rooyen had to return to his attorneys' offices in order that copies of the papers could be made for service and issue purposes before they could be despatched. Thus, once again, in all likelihood the settling, deposition, signature and copying of the papers in the application must have occurred earlier than was alleged.

31. And, given that Van Rooyen made reference in his founding affidavit in the liquidation application to the (prior) resolution that the directors of Meiprops had

taken in terms of which they had resolved that Park 2000 should be wound up, a copy of which was annexed to his affidavit, and a draft of the papers were prepared by his attorneys the day before ie on the 10th of December, that resolution had necessarily to have been taken before the founding affidavit was settled, deposed to and signed. This means that it probably had to have been taken before, or on, the 10th of December, even though it was only signed the following day. But, even if the Van Rooyens left it to the last minute, given the times referred to by Stewart the resolution most likely could not have been taken after 08h30-09h00 on the morning of 11 December 2018, in order for it to have been signed by 09h15. I note in this regard that in all of Stewart's affidavits there is only a reference to one of the Van Rooyens ie Van Rooyen senior, attending at the offices of his attorneys and the commissioner to sign the papers. Of necessity, this must mean that the signature of his son was appended to the resolution elsewhere before it was signed by Van Rooyen senior between 09h15 and 09h30 on 11 December 2018. This too supports the contention that the resolution must have been taken by the Van Rooyens before this.

(iii) The business rescue application

32. That then as far as the liquidation application is concerned. As far as the business rescue application is concerned, the following factual picture emerges.

33. Firstly, the document embodying the resolution which was taken in order to launch the business rescue proceedings proclaims that it was a 'director's' (singular) resolution which was taken at a 'directors' (no apostrophe) meeting which was held at 09h30 on 11 December 2018, whereby 'the director' (singular) resolved to begin business rescue proceedings and to place the company under supervision. And consonant with what it proclaimed ie that it was a resolution taken by only one of the directors of Park 2000, it was only signed by one of the Van Rooyens, and not by both. Thus, objectively, given the time recorded on the document, on the face of it the business rescue resolution had to have been taken *after* the liquidation resolution had already been adopted, and not before.

34. In the founding affidavit[9] which he deposed to on 7 February 2019 in his interdict application (which was a month or so before the answering affidavit which he deposed to in the Mouton application on 14 March 2019), Stewart simply said that the business rescue proceedings had been 'initiated' by the taking of the business rescue resolution 'in the early part of the morning' of 11 December 2018 whereafter, according to him, the 'authorised' director (ie Van Rooyen senior) who was under the misconception that he could launch both business rescue and liquidation proceedings simultaneously had proceeded to depose to his founding affidavit on behalf of Meiprops in the liquidation application. This assertion is not necessarily inconsistent with the objective facts as set out above in regard to the liquidation proceedings (ie that the resolution to commence such proceedings was taken before the founding affidavit was signed and deposed to ie before 09h15-09h30 on 11 December).

35. However, notwithstanding the initially vague assertion in his founding affidavit as to when the business rescue resolution was taken, in his replying affidavit Stewart pertinently alleged that it *preceded* the resolution which was taken to launch the liquidation proceedings.[10] As will immediately be evident, given the objective facts and the inferences which one can draw from them in relation to the times relevant to the liquidation application, as set out above, the resolution to launch the liquidation proceedings could not have been taken *after* 09h30 that morning. How the business rescue resolution could therefore possibly have been taken before that which was taken in the liquidation proceedings, in the light of the times and allegations set out above in regard to when the draft of the liquidation application was prepared and when it was settled, signed, copied, issued and then served is not evident, and seems to be impossible.

36. This is supported by the fact that contrary to this assertion, in a number of places in the replying affidavit[11] which he deposed to in the interdict application (about a week after the founding affidavit) Stewart repeatedly and expressly confirmed

[9] At paras [26]-[27].

[10] Paras [35], [70] and [72].

[11] Paras [20], [23], [38], [65], [70] and [72]. In para [65] he was particularly adamant: '*I must emphasize that the resolution for the business rescue proceedings was taken in the morning of 11 December 2018 at 09h30. This fact has been conveniently ignored by the respondents*.'

that the business rescue resolution was taken at 09h30 on 11 December, which he said was also evident from the face of the document which embodied the resolution, a copy of which he annexed to his founding affidavit. Thus, once again, this means that the business rescue resolution had to have been taken after that which was taken for the liquidation application.

37. I point out that Van Rooyen senior filed a confirmatory affidavit in respect of the founding affidavit which was made by Stewart, in his interdict application. By doing so Van Rooyen therefore also confirmed that the business rescue resolution had been taken on 11 December 2018.

38. At the time when Stewart deposed to the founding and replying affidavits in his application to interdict the transfer of the properties both he and Van Rooyen were therefore adamant and clear that the resolution to commence business rescue proceedings had been taken on 11 December 2019.

39. Once again, I emphasise that in the light of the objective facts and the inferences which one can draw from them in relation to the times pertaining to the liquidation application (ie when the draft of the liquidation application was prepared and when it was settled, signed, copied, issued and then served), as set out above, it must follow that the resolution to launch the liquidation proceedings could not have been taken *after* 09h30 on the morning of 11 December 2018. As was previously pointed out, according to Stewart the affidavit in the liquidation application in terms of which Van Rooyen confirmed that he was proceeding on the authority of a resolution which had been taken by the board of Meiprops and a copy of which was attached to his affidavit as an annexure, was deposed to and signed before a commissioner of oaths between 09h15 and 09h30 at the latest. This means that the resolution in the liquidation application must have been taken before the resolution to commence business rescue could have been taken at 09h30.

40. However, in contrast to this, in his answering affidavit in the Mouton application (which was filed on 14 March 2019) a very different version was put forward by Stewart. Clearly, as a result of Mouton's founding affidavits in the principal application he had been alerted to the anomalies with the times which he put

forward in his affidavits in the interdict application, and he was alive to the fact that as a result thereof the business rescue proceedings could possibly be impeached.

41. In order to meet these difficulties, he now alleged[12] that the business rescue resolution had in fact been taken telephonically by both directors on 8 December 2018 (a Saturday) but was minuted and signed by Van Rooyen senior, as the 'authorised' director, on 11 December. This, he claimed, Van Rooyen's secretary recalled had occurred between 09h00 and 09h05 (!) that morning and the reference to 09h30 on the resolution was an error, as she had made use of a *pro forma* wherein that time had previously appeared, when she typed up the resolution at 07h30 on 11 December, at the company's offices in Bellville.[13] According to this version after the business rescue resolution had been signed by Van Rooyen in Bellville he then proceeded to his attorneys' offices in Durbanville where he settled the founding affidavit in the liquidation application, before deposing to it before a commissioner of oaths.

42. Of course, the obvious question which arises in respect of this version is why the document which Van Rooyen's secretary typed up incorrectly reflected that the resolution had been adopted on 11 December, when it was allegedly adopted on 8 December 2018. In this respect it was then still incorrect, yet no explanation for this error was provided, either by Stewart or Van Rooyen or his secretary, and no attempt was made to correct it. Given the time when it was allegedly typed up (07h30) and that it allegedly preceded the resolution which was taken subsequently to launch liquidation proceedings, this error cannot be ascribed to the use of an earlier precedent. Furthermore, that Van Rooyen's secretary could somehow recall that he had signed the business rescue resolution between 09h00 and 09h05 on 11 December 2018, is to my mind just too convenient to be at all plausible. It smacks of a contrived attempt to make the story fit the objectively incontrovertible facts ie that the liquidation papers were signed and commissioned in Durbanville and thereafter copied and despatched to the High

[12] At para [18].
[13] Para [19].

Court for issue, in time for service on the Master at 10h48. I think that Mouton's senior counsel is correct when she says that the new version which was provided by Stewart viz that the business rescue resolution was adopted on 8 December, was one contrived in order to deal with the difficulties posed by the facts surrounding the signature and issue of the liquidation papers early in the morning of 11 December 2018.

43. It was a necessary adjustment which had to be made in order to deal with the travelling and time issues that arose from the fact that Van Rooyen had to proceed from his offices in Bellville where he supposedly signed the business rescue resolution before thereafter attending at his attorneys' offices, which are in Durbanville, and then to the office of the commissioner of oaths in order to settle and sign his founding affidavit in the liquidation, whereafter he returned the liquidation papers to his attorneys' offices for copying before they were taken to Cape Town in order that they could be issued at the High Court and served on the Master by 10h48. I will revert to these various versions in due course.

44. Before turning to discuss the relevant legal provisions and how these impact on the facts I may point out that the sworn statement of Van Rooyen which was submitted as part of the business rescue application (which was transmitted to the CIPC by Steward's PA at 15h45 on 11 December 2018), was only deposed to and signed by him before an attorney in High Street, Bellville at approximately 14h00 that day.

45. It will therefore be apparent to the reader that Van Rooyen did an extraordinary amount of travelling that day, if these various versions are to be believed, from his home/office in Bellville, then to his attorney and a commissioner of oaths in Durbanville in the morning before returning later that day to depose to the business rescue affidavit before another commissioner of oaths in Bellville.

The law

(i) <u>The issues</u>

46. As has been pointed out, the respondents' case is predicated on the assumption that the liquidation proceedings were 'initiated' when the papers in the application

were issued out of the High Court at 10h30 on 11 December 2018. For reasons which I set out previously, in my view the application had to have been issued earlier than 10h30, and whilst this probably occurred closer to 10h00 the very latest it could have happened was 10h15.

47. Be that as it may, the respondents contend that inasmuch as the business rescue proceedings commenced prior to this, with the adoption of the necessary resolution on Saturday 8 December 2018, they cannot be assailed for wont of compliance with s 129 of the Companies Act of 2008.[14]

48. In this regard s 129(1) provides that the voluntary placement of a company under business rescue 'begins' when its board takes a resolution to such effect, if it has reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing it. But in terms of s 129(2)(a) such a resolution may not be adopted if liquidation proceedings have (already) been 'initiated'.

49. If the liquidation proceedings were 'initiated' at the time, and by way of, the adoption of the necessary resolution to wind-up the company then it would follow, given what is set out above, that the 'beginning' of the business rescue by the subsequent adoption of a resolution to this effect occurred in breach of this provision.

(ii) The interpretation adopted in *FirstRand Bank Ltd*

50. In support of their contentions the respondents rely on the decision in *FirstRand Bank Ltd v Imperial Crown Trading (Pty) Ltd* [15] in which it was held that the word 'initiated' in s 129(2)(a) must have been intended to have the same meaning as the word 'commenced' in ss 348 and 352 of the previous Companies Act of 1973.

51. In this regard s 348 provided that the compulsory winding-up of a company at the instance of a creditor shall be deemed to have 'commenced' at the time of the presentation of the application ie at the time when the application was lodged with the Court. S 352 in turn provided that the voluntary winding-up of a company

[14] Act 71 of 2008.
[15] Note 5.

at its own instance (or that of its creditors)[16] 'commenced' at the time of the registration[17] of a special resolution which it had taken to such effect.

52. In *FirstRand Bank Ltd* a provisional order for the compulsory winding-up and liquidation of the respondent was sought by the Bank on the grounds that it had defaulted on a commercial loan facility which had been granted to it, and was both factually as well as commercially insolvent. The respondent opposed the grant of a provisional order on the grounds that it needed time to consider whether or not an application for business rescue should be launched by it and it accordingly requested a postponement for this purpose. The Bank was not amenable to the suggestion. It averred that in terms of s 131(6) of the Act even if liquidation proceedings had 'commenced' this would not subsequently preclude the institution of business rescue proceedings, and these would have the effect of suspending the liquidation proceedings until the Court had pronounced upon the merits of the business rescue application, or the business rescue had otherwise come to an end. In response the respondent pointed out that in terms of s 129(2)(a) once a liquidation had been 'initiated' the company was precluded from adopting a resolution to place itself under business rescue.

53. Swain J (as he then was) was of the view[18] that no valid ground existed for the refusal of a provisional order of liquidation, or for an adjournment of the application as sought by the respondent, and he accordingly granted an Order in the terms sought. In light thereof it seems as if the comments which he made in regard to the interpretation and comparison of the meaning of the words 'commenced' (as utilised in s 348 and 352 of the previous Companies Act) and 'initiated' in s129(2)(a) of the current Act, were not part of the *ratio* of his decision, which was more concerned with an interpretation of the ambit and effect of s 131(6).[19] In any event, he held[20] that the injunction which was present

[16] In terms of s 351 of Act 61 of 1973.
[17] With the CIPC, within 1 month of the passing thereof, as per s 200 of Act 61 of 1973.
[18] Para [24].
[19] See the extensive discussion in this regard at paras [16], [18]-[22].
[20] At para [22].

in s 129(2)(a) did not preclude a shareholder or any other affected party from launching an application to place the respondent under business rescue.[21]

54. In affording a meaning to the provisions of s 129(2)(a), he held that the reference therein to liquidation proceedings which were launched 'by or against' a company, was clearly intended to be a reference to either the voluntary winding-up of a company in terms of s 352 of Act 61 of 1973, or to its compulsory winding-up in terms of s 348 thereof.

55. He pointed out that the authors[22] of the work *Companies and other Business Structures in South Africa* [23] have remarked that it is unclear whether the word 'initiated', which is not defined in the current Act, was intended to have the same meaning as the word 'commenced' in the previous Act. He came to the conclusion[24] that it would be anomalous if what was meant by liquidation proceedings being 'initiated' by or against a company for the purposes of s 129(2)(a), differed from what was meant by such proceedings having 'commenced' for the purposes of s 131(6). In his view, inasmuch as the 'provisions' of the previous Act expressly continued to be applicable to the winding-up of companies, the word 'initiated' consequently must have been intended to bear the same meaning as the word 'commenced' in the 'applicable' sections of the previous Act. He was of the view that to conclude otherwise would be to introduce uncertainty where none was justified.

(iii) <u>The applicable principles of interpretation</u>

56. I respectfully differ with the learned judge's interpretation of the provisions in question. In seeking to arrive at the proper meaning to be afforded to them I remind myself, as a start, of the seminal approach to the interpretation of legislation, as set out by Wallis JA in *Endumeni*: [25]

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as*

[21] In terms of s 128(1)(a).
[22] Davis *et al*.
[23] 2nd Ed at 229 fn 6.
[24] At para [17].
[25] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, 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 …. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document."

57. In essence therefore I am required to arrive at a contextual, purposive and commercially sensible interpretation of the subsection concerned, having regard for the language which was used therein. This cannot be done without having regard for the relevant legislative instruments which were referred to as a whole ie both the previous as well as the current Companies Acts, and not just the provisions which have been referred to, which only deal with certain winding-up and business rescue proceedings. In order to do this one must necessarily also contextualize and distinguish between winding-up and business rescue proceedings, which are directed at achieving opposite purposes. The former is aimed at putting an end to a company's life, the latter at saving it.

58. Secondly, it is important to note that whereas the current Act provides[26] that the provisions of Chapter XIV of the previous Act will continue to apply in regard to the winding-up and liquidation of companies, this is only to be a temporary arrangement,[27] and in addition the provisions of the previous Act are only applicable to the winding-up of insolvent companies.[28] The winding-up of solvent companies occurs in terms of the relevant provisions[29] of the current Act. It will immediately be noted that the Court in *FirstRand Ltd* did not take this into account, and only had regard for the applicable provisions which it referred to, in the previous Act. In its defence, it did so presumably because it was dealing with the winding-up of an insolvent company and not a solvent one. But, nonetheless, when one adopts a contextual, global interpretation one should, in my view, also consider the language which has been adopted in the relevant provisions in the current Act, which deal with winding-up proceedings.

[26] By way of Item 9(1) of Schedule 5.
[27] Until the Minister otherwise determines by notice in the Gazette.
[28] In terms of Item 9(2) of Schedule 5.
[29] Ss 79-81.

59. It is further important to note that in providing that the winding-up provisions of Chapter XIV of the previous Act are to continue to apply to the winding-up of companies in terms of the current Act, a number of the provisions of the Chapter have been expressly excluded, including the sections which were referred to by the Court in *FirstRand Ltd* ie ss 348 and 352, insofar as these pertain to solvent companies. In my view, by failing to take account of the distinction between the different treatment to be afforded to the winding-up of insolvent v solvent companies, the Court in *FirstRand Ltd* did not arrive at an interpretation of the relevant provisions which was harmonious ie which could apply equally in the case of both solvent as well as insolvent companies, and its reference to and use of ss 348 and 352 only and not to the relevant provisions in the current Act, was risky.

(iv) Winding-up in terms of Act 61 of 1973

60. In Chapter XIV of the previous Act there is no reference to the 'initiation' of liquidation proceedings, only the 'commencement' thereof. As in the case of the current Act the previous Act made provision[30] for the winding-up of companies either on a voluntary basis (usually at the instance of the company itself[31]) by means of a special resolution of its Board, or on a compulsory basis ie in terms of a court order. The latter would usually be at the instance of a creditor, or a disaffected shareholder or director.

61. Consonant with the source of the winding-up ie internally via the company or externally via a disaffected party or creditor, the previous Act provided that a voluntary winding-up 'commenced'[32] at the time of the registration of a special resolution which the company had taken to such effect, whilst a compulsory winding up was 'deemed'[33] to have 'commenced' at the time of the presentation of the application ie at the time when the application was lodged with the Court.

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[30] S 343.

[31] Voluntary winding-up at the instance of creditors is also possible *vide* s 343(2)(a) rtw s 351 of the previous Act and s 79(1)(a)(ii) of the current Act.

[32] S 352.

[33] In terms of s 348.

62. As is pointed out in the commentary in *Henochsberg* [34] the effect of the deeming provision in the previous Act in regard to the compulsory winding-up of companies was to make the commencement thereof retrospective to the time when the application was filed with the Registrar, provided that a winding-up order was granted thereafter,[35] and the purpose of such retrospectivity was to prevent any attempt by a dishonest company or its creditors, or a third party, to 'snatch some advantage' in the intervening period between the filing of papers and the grant of a provisional or final order.[36]

(v) Winding-up in terms of Act 71 of 2008

63. That then as far as winding-up in terms of the previous Act is concerned. In terms of the current act[37] the winding-up of solvent companies may similarly be affected voluntarily by means of a resolution which is taken by the company itself[38] or compulsorily[39] by means of a court order.

64. What is immediately noticeable is that the empowering provisions[40] which give effect to these modes of winding-up are now omnibus provisions which deal not only with the determination of the moment when the winding-up 'commences' but also seek to set out the circumstances, mechanisms and processes in terms of which the winding-ups may be obtained. A further distinction is that whereas the provisions of the previous Act speak of the 'commencement' of proceedings the current provisions[41] speak of the 'beginning' thereof. And, in this regard there are further notable differences between the provisions of the previous Act and those in the current Act.

65. Whereas the voluntary winding-up of a (solvent) company is also considered to 'begin' ie 'commence' when a resolution to this effect is filed[42] a compulsory

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[34] *Henochsberg on the Companies Act 71 of 2008* (Delport *et al*) Vol 2 at APPI-94(16).
[35] *Id; Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) 961-962.
[36] *Henochsberg* n 36 at APPI-94(17); *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W) at 347.
[37] S 79.
[38] S 79 (1)(a) rtw s 80.
[39] S 79 (1)(b) rtw s 81.
[40] Ss 80 and 81.
[41] Ss 80 (6) and 81 (4).
[42] S 80 (6).

winding-up 'begins' either at the time when application is made to the court [43] (as in the case of the winding-up of insolvent companies in terms of the previous Act) or, at the time when the court has granted an order,[44] depending on the circumstances. The former will be the case in regard to applications by the company itself [45] whereas the latter will be applicable to winding-up applications which are brought by creditors [46] or to those brought on the grounds of deadlock between directors or shareholders,[47] or on the grounds that the directors or other persons in control of the company have acted in a fraudulent or illegal manner or failed to comply with a compliance notice from the CIPC.[48] In the circumstances the use of the word 'begin' in relation to the winding-up provisions of the current Act seems also, but not always, to be analogous in meaning to the use of the word 'commenced' in regard to similar provisions in the previous Act ie it denotes the moment when, as a matter of law, the proceedings are considered to have formally commenced. But there are instances where it is used only to denote the time when the proceedings commenced, factually.

(vi) Business rescue

66. If one then turns to consider the relevant provisions of the current Act pertaining to business rescue proceedings[49] one notes similarly that these may be brought about either voluntarily by means of a company resolution to place itself under supervision[50] or compulsorily by means of a court order.[51] However, although these provisions also refer to when proceedings 'begin', there appears to be a similar lack of uniformity in relation to the use of the word.

67. In the case of voluntary proceedings, although the empowering provision[52] provides that these 'begin' when the special resolution by the company is taken,

[43] S 81(4)(a).
[44] S 81(4)(b).
[45] In terms of ss 81(1)(a) and (b).
[46] S 81(1)(c).
[47] S 81(1)(d).
[48] Ss 81(1)(e) and (f).
[49] Which are set out in Chapter 6.
[50] In terms of s 129.
[51] In terms of s 131.
[52] S 129- the heading of which expressly states that the proceedings 'begin' when the resolution is adopted.

the resolution has no force and effect until it is filed[53] and another provision[54] expressly stipulates that the proceedings (only) 'begin' when the company has filed the resolution it has taken. In the circumstances, it seems that although voluntary business rescue proceedings may start ie 'begin' in the factual sense with the adoption of the necessary resolution, the moment when they are deemed to 'commence' ie to 'begin' in the formal, legal sense, just as in the case of a voluntary winding-up, is when the resolution is filed. Thus, the use of the word 'begin' in relation to voluntary business rescue proceedings in terms of the current Act, is also not always analogous to the use of the word 'commence' in relation to winding-up proceedings.

68. Similarly, in the case of compulsory business rescue there are also seemingly contradictory provisions. The relevant subsections[55] of the empowering provision[56] (which in its heading refers to the 'beginning' of proceedings) state that the proceedings 'commence' when the court makes an order placing the company under supervision, whereas s 132 provides that voluntary business rescue proceedings 'begin' either when the company files a resolution to place itself under supervision,[57] or when the company applies to the court for permission to file such a resolution[58] or an affected person applies for such an order.[59] In addition, inasmuch as the Act provides that a court may at any stage whilst a company is in liquidation convert the winding-up process to a business rescue, the (rescue) proceedings in such a case will 'begin' when the court makes an order to such effect.[60]

69. Thus, and by way of summary, it is apparent that in relation to business rescue proceedings in terms of the current Act the word 'begin' may, depending on the

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[53] S 129(2)(b).
[54] S 132(1)(a). Regulation 123 and Form CoR 123.1 also clearly state that in the case of voluntary placement under business rescue the proceedings only 'commence' when the resolution is filed.
[55] Ss 131(1) and 131(4).
[56] S 131.
[57] This will be the case in a voluntary business rescue, in terms of ss 129(1) and 129(3).
[58] This will be the case where the company has previously taken a resolution within the preceding 3 months, which became a nullity because it failed thereafter to publish it, or to appoint a business rescue practitioner within 5 days of taking the resolution (ss 132(1)(a)(ii) rtw ss 129(3) and (4)).
[59] S 132(1)(b).
[60] In terms of s 131(7).

context and the subsection in which it is used, similarly either be intended to refer to the factual moment in time when the rescue is considered to have started, or the moment when, as a matter of law, the proceedings formally 'commenced'.

(vii) A re-interpretation of ss 131(6) and 129(2)(a)

70. I now turn to discuss the provisions which were considered in *FirstRand Bank Ltd*[61] ie s 131(6) and s 129(2)(a). The former provides that if liquidation proceedings have already been 'commenced' by or against a company at the time when an application to place it under business rescue is made,[62] such proceedings will be suspended until the business rescue application is adjudicated upon or the business rescue otherwise comes to an end.

71. Given that, when considering whether the bar in s 129(2)(a) applies we are dealing with the prior 'commencement' of winding-up proceedings, 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 *FirstRand Bank Ltd* (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 *FirstRand Bank Ltd* we must add, as a third possibility, the time or moment when a court makes an order, granting a liquidation. On this ground too, in my respectful view the decision which was arrived at in *FirstRand Bank Ltd* is unsound as it did not take account of this third meaning of the word, in the context of the current Act.

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[61] Note 5.

[62] That is the time when the application is filed with the court.

72. Furthermore, because the word ‘commenced’ in s 131(6) might bear the same meaning which the word has in the relevant winding-up provisions of either the previous or the current Act, it does not necessarily follow that it should have the same meaning as the word ‘initiated’ in s 129(2)(a), nor in my view would it be anomalous if it didn’t.

73. If one notes the pervasive use of the word ‘commenced’ in the winding-up provisions of both the previous and the current Act and the use of its occasional synonym ‘begin’ in the winding-up provisions of the current Act, as well as the contradictory use of the word ‘begin’ in relation to business rescue proceedings in the current Act, as illustrated in the preceding passages, it cannot be a linguistic accident that the legislature chose to use the word ‘initiated’ in s 129(2)(a), rather than either the word ‘commenced’ or the word ‘begin’.

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.[63]

75. The ordinary, grammatical meaning of the verb to ‘initiate’ is to cause a process or action to begin.[64] 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 in 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

[63] In terms of s 81.
[64] *Concise Oxford Dictionary* 10th ed.

'commencement' of the liquidation process, as a matter of law, only occurs at the moment when the resolution is filed.

76. Thus, whereas as 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 ss 348 and 352 of the previous Act, and it was never intended that it should have the same meaning.

78. It is important to note that, from its wording it is apparent that s 129(2)(a) was intended to be of application not only where liquidation proceedings have been 'initiated' *against* a company ie in the case of a compulsory winding-up by a creditor but also where they have been 'initiated' *by* the company itself. In this regard it has been held[65] that the legislative purpose of subsection (b), which provides that a business rescue resolution shall have no force and effect until it has been filed, is to prevent a company from thwarting an application to liquidate it, simply by adopting a business rescue resolution, without intending ever to file it or to take any real steps to place the company under supervision. In order to avoid such a stratagem the resolution will only have legal force and effect if it is filed ie formally lodged with the CIPC, together with the necessary documentation required.[66] I am of the view that the legislature must have had a similar intention in mind in relation to subsection 129(2)(a), when it provided that a company may not begin business rescue proceedings by adopting a resolution to this effect, if

[65] *Sulzer Pumps (SA) (Pty) Ltd v O & M Engineering CC* 2016 (1) SA 503 (KZP) at para [8].

[66] Regulation 123 provides that the resolution must be filed together with a Notice of Commencement of Business Rescue Proceedings in terms of Form CoR 123.1.

liquidation proceedings have already been 'initiated' ie put into motion. The object of the provision would be defeated if a company could simply thwart impending liquidation proceedings which it was aware had been launched, but had not yet formally 'commenced' by means of the filing of the winding-up resolution, or (in the case of a compulsory liquidation) of the necessary application, or the grant of a court order, as the case may be, simply by adopting a resolution to place the company under supervision.

79. The salient facts of the matters which are before me illustrate why it could never have been intended that a company could only be barred from resolving to place itself under business rescue, even if it knew that winding-up and liquidation proceedings were imminent, or had already 'initiated' such proceedings itself, after those proceedings had formally 'commenced' ie after the papers in respect of such proceedings had been filed. The Van Rooyens, who were directors of both the creditor Meiprops as well as of Park 2000 resolved that Park 2000 should be wound up, as it was hopelessly insolvent, both commercially and factually. By doing so they surely 'initiated' the liquidation proceedings which followed ie they set those proceedings in motion. It is no coincidence that those proceedings were formally launched on the day before the auction was to be held, at which Park 2000's properties were due to be sold in satisfaction of the judgment which Mouton had obtained a year earlier. Once the papers in respect of such proceedings had been filed by 10h00-1015 at the latest on 11 December 2018, they were deemed, as a matter of law, to have 'commenced'. Thereafter the Van Rooyens also launched business rescue proceedings, primarily because (according to Stewart who is the only person who has provided an explanation in this regard), once their company was placed under business rescue it would be afforded protection from any legal action by the statutory moratorium[67] which came into effect, and could thereby prevent Mouton from enforcing and executing the judgment he had obtained against the company. However, once they realized that the business rescue proceedings which they had launched were open to

[67] In terms of s 133 of the Companies Act, 2008.

challenge on the basis that they had been launched after the liquidation proceedings, they cynically withdrew the liquidation application the following day.

80. In the same way as it is unacceptable for directors of a company to attempt to frustrate a liquidation application simply by adopting a resolution to place the company under business rescue without ever filing it, so too it seems to me it must be unacceptable for them to frustrate a liquidation by adopting a resolution to place the company under business rescue before the papers in the liquidation application have been filed, but after such an application has already been set into motion by them.

(viii) The meaning of 'initiation' in s 129(2)(a)

81. In summary therefore I am of the view 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. Where other entities or natural persons are involved it may be more difficult to determine what qualifies as such an act, and if and when it was taken. Fortunately, this is not something which I need to decide in this case (which concerns a liquidation application by a corporate entity), nor would it in my view be appropriate, or even possible to formulate a general rule or principle in this regard. Unlike in the case of corporate entities, trusts or voluntary associations, something more than a conscious and deliberate taking of a decision to launch liquidation proceedings may be required, otherwise there would be no way to controvert or challenge an averment that is made in this regard, on the simple say-so of a party. Perhaps the courts may decide that in such matters the providing of instructions to a legal representative to launch winding-up proceedings, or the drafting of papers for the application will constitute the necessary 'initiation' of such proceedings. But in my view any difficulties which may ensue in this regard are not insurmountable, and the law can be developed

incrementally on a case-by-case basis. The fact of the matter is that by deliberately referring in s 129(2)(a) to the 'initiation' of proceedings rather than either the 'beginning' or the 'commencement' thereof the legislature clearly had something else in mind than what is meant by the use of either of the latter terms in the provisions I have referred to.

82. I derive support for the interpretation and reasoning I have adopted in relation to s 129(2)(a), from s 131(8), which provides that a company that has been placed under supervision may not thereafter adopt a resolution placing itself under liquidation until the business rescue proceedings have ended.[68] It will be noted that it is the *adoption of the resolution* which precipitates the statutory injunction. By providing in a similar fashion that the adoption of a resolution to launch liquidation proceedings will 'initiate' such proceedings and that a company that has taken such a step may not thereafter adopt a resolution to commence business rescue proceedings I believe we will ensure parity in treatment between the two regimes.

The law applied

83. In the circumstances, I am of the view that the liquidation proceedings against Park 2000 were 'initiated' when the resolution to launch them was taken, and not when the liquidation application was filed with the Court. As I set out above, that occurred before 09h30 on 11 December 2018 and before the subsequent resolution which was adopted (at 09h30 or thereafter), to place the company under business rescue.

84. In arriving at these findings, I am mindful of the long-established principle[69] that in opposed motions where there is a dispute of fact on the affidavits, an applicant is only entitled to succeed if the facts which are stated by the respondent, together with the admitted facts, justify an Order in its favour. In such circumstances an applicant is therefore bound to accept the version which has been put forward by its opponent.[70]

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[68] In terms of s 132.
[69] *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[70] *Id* at 634E.

85. At the same time, it is equally well established that where a dispute of fact is not a 'real, genuine or *bona fide*' one the Court will be justified in ignoring it and may proceed to find on the applicant's version thereof.[71] So too, where the respondent's version is clearly or palpably far-fetched or untenable, the Court may take a robust approach and decide the matter on the basis of the applicant's version.[72] As always, in evaluating the contents of the affidavits the Court must have due regard for the treatment which the respondent has given to the averments under reply. In this respect a respondent has a duty to engage with the facts which are put up by the applicant, and to deal with them fully and comprehensively.[73] Any 'skimpiness'[74] and improbabilities in his version may thus count against him. It is also well-established that when a party deposes to an affidavit (be it an answering or a founding affidavit) he commits himself to its contents, and only in exceptional circumstances will he be permitted to disavow them.[75]

86. I have already pointed out[76] the difficulties which I have with the various contradictory and generally unsatisfactory versions of the material events which were put forward by Park 2000 via Stewart (who was not the primary source of the facts and did not have first-hand knowledge thereof) as 'confirmed' by Van Rooyen senior (who filed confirmatory affidavits only). These difficulties do not only pertain to when the business rescue resolution was allegedly adopted, which Stewart originally (in his affidavits in his interdict application) expressly and repeatedly contended occurred at 09h30 on the morning of 11 December 2018, but then alleged (in his answering affidavit in the Mouton application) occurred 3 days earlier, on the morning of 8 December 2018. They also pertain to the circumstances under which, and the alleged times when, the resolution and the papers in the liquidation proceedings were settled, signed and issued, which for

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[71] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 *et seq*.
[72] *Plascon-Evans* n 69 at 635B-C.
[73] *Wightman t/a JW Construction v Headfour (Pty) Ltd & Ano* 2008 (3) SA 371 (SCA) at para [13].
[74] Per the dissenting judgment of Bozalek J a *quo* in *Wightman t/a JW Construction v Headfour (Pty) Ltd & Ano* 2007 (2) SA 128 (C) at para [14].
[75] *Wightman* n 73 at para [13].
[76] At paras [21]-[43] above.

the reasons I previously set out must have occurred earlier on 11 December 2018 than was suggested by him. In this respect too, the affidavits of Stewart are highly unsatisfactory.

87. Not only did Stewart not have any first-hand, direct knowledge of the alleged facts which underpinned the various versions which he deposed to but in addition there are other important reasons why the Court must be wary of accepting what he puts forward in those versions.

88. Stewart is not a disinterested party, who is before the Court merely in order to discharge his duties in the interests of Park 2000 as its duly appointed business rescue practitioner. He has taken an active and leading role in all three applications. Not only did he oppose the principal application (ie the Mouton application), which was launched in March 2019, in circumstances where many other business rescue practitioners would have abided and let the main protagonists (ie Mouton and the Van Rooyens) fight it out. A month prior to this he launched an interdict application in which he actively sought to restrain the passing of transfer of the properties which had been bought on auction. In this application he too deposed to the principal affidavit, on behalf of the company. For the purposes thereof he must of necessity have obtained the relevant information which was required, from the Van Rooyens. And in that application, as I have previously pointed out he stoutly and repeatedly declared, under oath, at a number of places in his affidavits, that the business rescue resolution had been adopted on 11 December 2018. Van Rooyen confirmed his averments in this regard, under oath, by way of a confirmatory affidavit. This version, which is supported objectively by the time and date which was recorded on the document which embodied the resolution, was contradicted a month later, when Stewart alleged in his answering affidavit in the Mouton application that the business rescue resolution had in fact been taken 3 days earlier, on 8 December 2018. Once again, the source of this version must have been Van Rooyen.

89. One would have expected that a disinterested and impartial business rescue practitioner would have been embarrassed by the fact that he was required to put up a contradictory version, under oath, to that which he had previously given, and

would have distanced himself from what was alleged to be a false, prior version, and would accordingly have let the Van Rooyens do the explaining. But in this instance too, all we have are confirmatory affidavits from them, supposedly also confirming the second version, which stands in direct contrast to the first. No attempt was made to obtain a proper, comprehensive explanation for the discrepancies and inconsistences from the Van Rooyens, or their *volte face*. The best that counsel for Stewart could do to explain this state of affairs was to suggest, somewhat nonchalantly, that Stewart must have 'obviously' based his first affidavits on the contents of the document which embodied the business rescue resolution. But of course this is not an explanation which washes nor is it one which has been put forward by the Van Rooyens, who simply made confirmatory affidavits in which they confirmed the contents of the original affidavits and the version set out therein, only to file a second set of confirmatory affidavits in which they confirmed a contrary version, which was clearly designed to meet the difficulties they had with the first. The overwhelming impression which one is therefore left with, from the papers, is that Stewart was happy to say whatever was required in order to defeat the applicant's case, even if that meant coming up with a version which was contrived to meet the case which was put up. And the obvious question which one must ask oneself in the circumstances is whether or not the explanation for Stewart's behaviour is that he is motivated primarily by his own personal, financial interest in earning fees in the matter rather than by his obligation to act in the best interests of Park 2000 as business rescue practitioner.

90. From the papers it appears that prior to his appointment by the company on 11 December 2018 (as officially confirmed by the CIPC two days later) he was approached by one Muller, who is associated with an entity which is referred to in the papers as 'Problembond' (and which may be a debenture holder of Park 2000) to advise as to whether or not, in the circumstances where Park 2000 was facing the imminent sale in execution of the immovable properties it owned, at the instance of a judgment creditor, it could avoid this by placing itself under business rescue, and by his own admission Stewart advised that it could and that

he would be willing to assist it in this regard, both in respect of the preparation and submission of the necessary application to the CIPC as well as in regard to the appointment of himself as business rescue practitioner.

91. Not only did Stewart advise Park 2000 that it should place itself under business rescue, but his office thereafter assisted in processing its application to the CIPC. After Van Rooyen had completed the necessary forms and documents required, these were sent to Muller, who then forwarded them on to Stewart's PA at his offices at Smoken Consulting in Kwazulu-Natal, from which she transmitted the application to the offices of the CIPC at 15h45 on the afternoon of 11 December 2018.

92. Thus, Stewart not only had an interest in the matter even before he was appointed, but was intimately involved in processing the application to place the company under business rescue and to appoint him as its business rescue practitioner. There is a clear conflict of interest visible in all of this.

93. His conduct after his appointment also raises a number of questions. He does not appear to have been particularly fussed about the deadlines which are set out in the Act for the proper discharge of his duties and statutory obligations, nor does he appear to have attended to them with any sense of urgency, if at all.

94. He was required in terms of s 147(1) to convene and preside over a first meeting of creditors, within 10 days of his appointment. In breach of this requirement he gave notice on 18 December that such a meeting would be held more than a month later, on 24 January 2019 'because of the holiday period between 15 December and 15 January 2019 and the *dies non*'(sic). The *dies non* do not, as far as I am aware, apply in relation to the provisions in question, and the Act does not stipulate that the period between 15 December of one year and 15 January of the following year is a 'holiday period' which excuses a business rescue practitioner from carrying out his duty to meet with creditors. Clearly therefore, the date was set with reference to what suited and was convenient to Stewart, with no regard for what what was required in terms of the law ie the expeditious rescue of the company.

95. It further appears that, also contrary to his duties in this regard, he failed to give the debenture holders notice of the first meeting of creditors. The only explanation for this extraordinary state of affairs, such as it is, is apparently that he considered that this was not necessary as they were only 'contingent' creditors.

96. A so-called 'supplementary' first meeting was convened, for 15 February 2019. But this was not because he had a change of mind in relation to his statutory obligations. He convened a meeting on 15 February because the day before this his interdict application had been struck from the roll on the grounds that the alleged urgency for it had been self-created, given that the auction had taken place some 2 months earlier and the application had only been launched when transfer of the properties which had been bought at the auction was imminent. But once again it appears that notwithstanding the legislative requirements in this regard not all the creditors, contingent or otherwise, were given notice of the meeting. Mouton claimed he did not receive notice, and by Stewart's own admission some of the debenture holders were also left out.

97. His explanation for this was that he was still (some 2 months after his appointment) in the 'process' of establishing who all the debenture holders were, an extraordinary state of affairs, given that the debenture holders essentially were persons who had loaned the company substantial sums of money in order to finance a development which, more than 14 years later, had still not been completed, for reasons which are not clear from the papers. Notably, in providing this explanation Stewart did not claim that the reason why he had not been able to ascertain the identity of all the debenture holders was because of circumstances beyond his control, such as that the company's books and records were in utter disarray.[77] In the absence of a proper explanation for what exactly he was doing for more than 2-3 months the impression that one has is that he was simply not bothered to find out who all the debenture holders were. Again, one must ask what the likely explanation for this must be if Stewart was truly

[77] There was only some reference to problems with the 'register'.

acting in the due and proper discharge of his duties as business rescue practitioner.

98. In terms of the Act[78] he was required as soon as was 'practicable' after his appointment to investigate the company's 'affairs, business, property and financial situation' with a view to considering whether there was any reasonable prospect that it could be rescued. Clearly, as at the date of the filing of his last affidavits, in March he had not properly discharged his duties in this regard, for no apparent or good reason. But, even without carrying out his duties and ascertaining what the company's actual financial situation was, he was able to inform the creditors that there were reasonable prospects of rescuing it.

99. Insofar as he adopted the view that there were reasonable prospects of the company being rescued he was required[79] to prepare and publish a business rescue plan within 25 days from the date of his appointment (ie by 22 January 2019 at the latest according to my reckoning (excluding public holidays)), or such longer period as might be allowed by the Court, on application to it, or as might be agreed upon between the holders of a majority of the creditors' voting interests. Within 10 days from such date the plan was to be put forward for consideration and possible adoption at a meeting of creditors.[80] To date hereof neither of these obligations have been complied with and no attempt was ever made to obtain an extension of the date from the Court. I note, from the minutes of the 'supplementary' first meeting which was held on 15 February, that no indication was given that a business plan had been prepared, or even that it was under preparation. Instead, Stewart simply decided, unilaterally, that because of the various legal matters which were before the Court publication of a plan would 'of necessity' have to be postponed '*sine die*'. Once again, on what basis he decided unilaterally to ignore the very clear statutory provisions concerned and to decide that he could postpone, indefinitely, the production and presentation of a business plan, which lies at the very heart of business rescue proceedings, is not apparent. The delay in coming up with even a hint of a viable business plan gives

[78] S 141(1).
[79] In terms of s 150(5).
[80] S 151.

cause for suspicion that the real purpose of the process of which he is in control is not to rescue the company, but simply to buy time in order to obtain shelter and protection for as long as possible from creditors, and in particular from enforcement of the judgment which Mouton obtained.

100. Added to all of this is the fact that the sole source of the information which is contained in Stewart's various affidavits, in relation particularly to when and how the liquidation and the business rescue proceedings were launched is Van Rooyen senior, a man whose credibility as I pointed out above is clearly in issue, given that he has been quite happy to make a number of mutually contradictory statements, under oath. On one and the same day he swore that Park 2000 was hopelessly insolvent without any hope of paying its creditors or staying afloat, only to declare, hours later, that it was not yet insolvent and based on current cash flow and sales figures it was quite capable of trading itself into a profitable state, and of being rescued.

101. In like vein, he initially confirmed in a supporting affidavit that the business rescue resolution had been taken on 11 December, only to later confirm under oath that it had allegedly been taken 3 days earlier on 8 December 2018. When one notes that the document which he signed, which embodies the resolution, reflects that it was supposedly taken at 09h30 on 11 December 2018 than it appears that even on his own version he paid no regard for whether or not the contents of papers which he was signing for official purposes were true and correct. One or other of the versions he 'confirmed' was palpably false and untenable. All of this amounts to mendacious conduct, such as to make it impossible to believe or rely on anything which he 'confirmed' which is not substantiated by way of objective, extraneous evidence, of which there is very little one can rely on, other than a date-stamp on the notice of motion in the liquidation application. There is therefore no real, genuine or *bona fide* dispute of fact present, and in my view, this is not a matter where the respondents' version can and must prevail. When properly weighed in the scale the respondent's version is worthless, as it is based on information provided by an outright liar, which is not substantiated or corroborated.

102. In a last-ditch attempt to persuade me that, on the basis of the principle in *Plascon-Evans* I was nonetheless bound to accept Stewart's second version as to when the business rescue resolution was adopted, his counsel pointed out that Van Rooyen's secretary Ms Conradie had filed a confirmatory affidavit in support thereof. But when one considers exactly what she confirmed in her affidavit then it does not appear that it is of any real value in relation to the cardinal issue ie when the business rescue resolution was *adopted*, as opposed to when it was *signed*. In this regard Stewart said in his answering affidavit[81] in the Mouton application that 'the director' ie Van Rooyen senior had 'confirmed' to him that the resolution was taken, not on 11 December (as Stewart and Van Rooyen had originally claimed in their affidavits in the interdict application), but that it was (allegedly) taken telephonically on 8 December 2018. It was then typed up by Van Rooyen's secretary early on the morning of 11 December, and she 'recalled' that Van Rooyen had thereafter signed it between 09h00 and 09h05 before leaving to go to his attorneys' offices to settle, sign and depose to the papers in the liquidation application.[82]

103. In her confirmatory affidavit Ms Conradie confirmed the correctness of Stewart's affidavit, insofar as it pertained to her. Thus, she simply confirmed the averment that she typed up the resolution early in the morning and that Van Rooyen had signed it thereafter, sometime between 09h00 and 09h05. She could not, and did not, confirm that the resolution was in fact taken on the Saturday (three days earlier) instead of at 09h30 that day. The only source of this allegation was Van Rooyen, and as I have previously pointed out his credibility is so shot that one cannot accept anything which he says, which is not supported by extraneous evidence or which is not common cause, and the time and date when the business rescue resolution was signed was not common cause, and the objective evidence ie the document in which it is embodied reflects that it was taken on <u>11 December</u> and not 8 December 2018. On this aspect it is notable that nothing was said by Stewart, and by Conradie, in this regard (thus only the

[81] Para [18].
[82] Para [19] of the answering affidavit.

time on the document and not the date was wrong according to her), and in the circumstances the evidence, and the probabilities therefore indicate, in my view, that the resolution was indeed taken on 11 December and not on 8 December 2018.

Conclusion

104. For the aforegoing reasons I came to the conclusion that the resolution to launch business rescue proceedings must have been taken *after* the resolution to launch liquidation proceedings, and not before. Given that I also found that the liquidation proceedings were 'initiated' by the adoption of the necessary resolution in this regard, it follows that the business rescue resolution was adopted in breach of the provisions of s 129(2)(a) of the Act. Consequently, the applicant in the principal application (Mouton) is entitled,[83] in my view, to an Order setting the resolution aside. It follows from this that the business rescue will come to an end and Stewart's appointment as business rescue practitioner must fall away.

105. I may add there is no doubt that the resolution to place the company in business rescue was not passed in good faith in that, as in the *Alderbaran*[84] and *Griesse*l[85] matters there was no genuine intention to attain the objectives of the Act in regard to business rescue. The application was not one genuinely brought to try and save Park 2000 from a parlous financial state, and to place it on the road to recovery. This much is clearly evident from the fact that it was launched the day before the auction sale in execution of the judgment which Mouton had obtained a year or more before, was due to take place. The property developments which Park 2000 had been engaged in commenced many years ago, and the company had been able to continue therewith notwithstanding various downturns in the property market, which had occurred since 2008 and which had affected the entire sector. Nothing in the financial picture which was sketched by Van Rooyen senior, limited as it was in respect of detail, suggests that there was any sudden,

[83] In terms of s 130(1)(a)(iii).
[84] *Alderbaran (Pty) Ltd & Ano v Bouwer &Ors* 2018 (5) SA 215 (WCC).
[85] *Griessel & Ano v Lizemore & Ors* 2016 (6) SA 236 (GJ).

significant change in the company's financial circumstances, if at all, in the months or days before the application was brought, which precipitated a need to be 'rescued' (or for that matter to be placed in liquidation). The application was simply brought as a deliberate stratagem to frustrate the enforcement of the judgment Mouton was seeking to execute.[86] As in *Alderbaran*[87] it appears that the company aims to hold onto the immovable properties, particularly the Stilbaai property, with a view to continuing with the subdivision and sale of plots, in order that it might continue to make substantial profits. In this regard Stewart's remarks are telling. He says that the Stilbaai erf is a large 54 hectare plot which can be subdivided into some 340 individual erven, which could sell for between R 300 000 and R 500 000 each, depending on their location and views. After taking account of the costs of installing services and the expected capital contributions which will be levied in this regard by the municipality, he envisages that the sale of these erven could generate a gross profit of approximately R 85 million.[88]

106. In the circumstances, and given non-compliance with the provisions of s 129(2)(a), I believe that an Order setting aside the resolution will be just and equitable.[89]

107. In the alternative, I would have upheld the application on the grounds that even if the resolution could not be set aside for wont of compliance with subsection 129(2)(a), it should be declared to be a nullity. In this regard, on the basis that the (second) version which was put forward by Stewart as to when the resolution was adopted, cannot be accepted, for all the reasons I have set out above, the ineluctable conclusion to which one must arrive is that the resolution was taken

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[86] Stewart says, in para [76] of his answering affidavit, that Van Rooyen launched the application in order to obtain protection from legal action, by way of the statutory moratorium and in para [40] of his minute of the supplementary first meeting of creditors, which was held on 15 February 2019, he recorded that the resolution to commence business rescue proceedings was taken 'as a result' of Mouton 'instigating' (sic) action against the company for the refund of R 400 000 he had advanced the company, by way of debentures.

[87] Note 84 at para [48.3].

[88] This calculation surely gives the lie to the allegation which was made that the company's liabilities exceeded its assets.

[89] S 130(5)(a)(ii). See *Alderbaran* n 84 at paras [48]-[49]. In *Panamo Properties v Nel & Ors NNO* 2015 (5) SA 63 (SCA) the SCA held that a resolution cannot simply be set aside, in terms of s 130(5)(a)(ii), on the grounds that it is just and equitable- at least one of the grounds set out in s 130(1)(a), which includes non-compliance with s 129, also needs to be present.

at 09h30 on 11 December 2018, as the document stating it declares, by Van Rooyen senior only, and not by both directors, as required. In this regard Stewart confirmed in the minute of his supplementary first meeting of creditors[90] (which Van Rooyen attended), that 'the director' (singular) ie Van Rooyen senior, had resolved to commence business rescue proceedings. The parties were *ad idem* that both of the two directors were required to approve and be party to the resolution, and it could not have been taken by only one of them.

108. In *Panamo Properties*[91] the Supreme Court of Appeal held[92] that where a resolution to launch business rescue proceedings is not taken by a properly constituted board of directors it is a nullity, and as such, ineffective for the purposes of commencing business rescue proceedings.

109. That brings me to the remaining applications, which are for interdictory relief by Stewart and for leave to intervene therein by the Hanekoms, as intervening parties, following the Order which was made on 14 February, striking the interdict application from the roll for lack of urgency. Inasmuch as the interdict which was sought was to be an interim one (restraining transfer of the properties which were bought on auction) pending the outcome of the principal application, the parties were *ad idem* that on determination of the principal application the relief sought would be rendered moot, and as such both the other applications should be dismissed.

110. Before doing so I need to make a few remarks in regard to these applications. I find it disconcerting that even though this Court struck the interdict application from the roll on the grounds that it lacked urgency, instead of allowing it to be heard in due course it was immediately re-enrolled on an urgent basis. This constitutes an abuse of the rules and process of this Court and is contemptuous of the Order which this Court made. It appears that an attempt was made to justify this conduct on the grounds that a group of creditors (not all the creditors were invited and Mouton was also excluded), had been called to a meeting which was convened by and under Stewart's direction the day after the Order which

[90] Note 86.
[91] *Panamo Properties v Nel* 2015 (5) SA 63 (SCA).
[92] At para [22].

was made in regard to the interdict application, at which it was resolved that two of the creditors, Hanekom senior and his son, would make application for leave to intervene. Clearly, inasmuch as the Order which was made was not appealable, re-enrolling the interdict application under the guise of an application to intervene was a deliberate stratagem which was adopted in order to achieve what could not originally be achieved by means of the interdict ie a way to prevent transfer from going through. And once again it appears Stewart was an active participant and not, as one would have expected to be the case, a mere spectator from the sidelines. In this regard he went so far as to provide an indemnity to the Hanekoms, on behalf of the company, in respect of their legal costs in relation to the intervention application. He was accordingly happy to use the supposedly paltry kitty which the company has to cover the costs of litigation against it.

111. To my mind, this is yet another instance of behaviour which appears to run counter to the proper discharge of his obligations as business rescue practitioner and shows a lack of impartiality and objectivity. In my view, given these circumstances not only should there be an Order for costs against the applicants in those matters, including Stewart, but this is also a situation where fairness dictates that the respondents should not be out of pocket for any legal expenses which they incurred ie they should have an attorney-client Order in their favour. In regard to the principal application, given the active stance which Stewart adopted in that matter, in which he opposed the relief which was sought even after he was made aware of the possible falsity of the version(s) which he was to advance, I see no reason why he should not be ordered to be jointly liable for the costs of suit, together with the other respondents, including the company though which his services were offered and enlisted.

112. Finally, inasmuch as the status and validity of the sales in execution of the properties was challenged (on the grounds that the company was under business rescue at the time) and is therefore dependent on the outcome of the principal application, the Order which I hand down should deal with this aspect, failing which it will leave uncertainty for both parties. In my view, given the decision to

which I have come, in terms of s 130(5)(c) it is necessary and appropriate to confirm the validity of the sales in execution and to authorise and direct finalization of transfer of the properties concerned[93] in order to avoid any further unwarranted and unjustified delay.

113. In the result, I make the following Order:

(a) Ad the application under case no. 1070/19:

113.1 In terms of ss 130(1)(a)(iii) and 130(5)(a)(i)-(ii), read with ss 130(5)(c), 132(2)(a)(i) and s 129(2)(a) of the Companies Act 71 of 2008, the resolution which was adopted in terms of which the first respondent (Park 2000 Development 11 (Pty) Ltd) was placed under business rescue is declared to be invalid and is set aside, and the company is discharged from business rescue on the grounds that it has come to an end, and insofar as may be necessary the appointment of fourth respondent as business rescue practitioner is discharged.

113.2 The sale in execution on 12 December 2018 of the immovable property known as Erf 541, being a portion of Erf 539, The Fisheries, Hessequa Municipality, Division Riversdale (Western Cape), held by virtue of deed of transfer T39566/2005, is declared to be valid and enforceable.

113.3 The sale in execution on 12 December 2018 of the immovable property known as Erf 4513, Stilbaai West being portion 60 (remaining extent) of Farm Plattebosch 485, in the Hessequa Municipality (Western Cape), held by virtue of deed of transfer T19355/1977, is declared to be valid and enforceable.

113.4 Transfer of the properties referred to in the two preceding subparagraphs shall be effected as soon as possible, as against due payment of any amounts which may be owing in respect thereof (including any fees, disbursements charges and taxes) and/or the discharge of any obligation(s) which may be outstanding in lieu of such payment.

[93] As was done in *Alderbaran* n 84 at paras [50]-[57].

113.5 First, third and fourth respondents shall be liable for the costs of the application (including the costs of two counsel where so employed), jointly and severally, the one paying the other to be absolved.

(b) Ad the applications under case nos. 8488/16 and 2535/19

113.6 The applications are dismissed.

113.7 The applicants shall be liable for the costs of the application on the scale as between attorney and client (including the costs of two counsel where so employed), jointly and severally, the one paying the other to be absolved.

M SHER

Judge of the High Court

Attendances: (Heard on 13 May 2019)

(a) In case no. 1070/19:

Applicants' counsel: Advs T Dicker SC and M McChesney

Applicants' attorneys: Madeleyn Inc (Durbanville)

Respondents' counsel: Advs P Van Eeden SC and R Appoles

Respondents' attorneys: Lucas Dysel Crouse Inc (Durbanville)

(b) In case no. 8488/16:

Applicants' counsel: Advs P Van Eeden SC and R Appoles

Applicants' attorneys: Lucas Dysel Crouse Inc (Durbanville)

Respondents' counsel: Advs T Dicker SC and M McChesney

Respondents' attorneys: Madeleyn Inc (Durbanville)

(c) In case no.2535/19:

Applicants' counsel: Adv L Zazeraj

Applicants' attorneys: Lucas Dysel Crouse Inc (Durbanville)

Respondents' counsel: Advs T Dicker SC and M McChesney

Respondents' attorneys: Madeleyn Inc (Durbanville)