REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19661/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

21/6/2019
DATE

RT SUTHERLAND

In the matter between

TJEKA TRAINING MATTERS (PTY) LTD **APPLICANT**

and

KPPM CONSTRUCTION (PTY) LTD
(UNDER SUPERVISION) **FIRST RESPONDENT**
FENWICK NEIL MILLER NO **SECOND RESPONDENT**
BYRON NORMAN CHEVALIER NO **THIRD RESPONDENT**

J U D G M E N T

SUTHERLAND J:

Introduction

[1] The critical controversy in this matter concerns the interpretation of section 129(2) of the Companies Act 71 of 2008 (the 2008 Act). The relevant portion of the section reads:

"Company resolution to begin business rescue proceedings

(1) Subject to subsection (2)*(a)*, the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-
    (a) the company is financially distressed; and
    (b) there appears to be a reasonable prospect of rescuing the company.
(2) A resolution contemplated in subsection (1)-
    (a) may not be adopted if liquidation proceedings have been initiated by or against the company; and
    (b) has no force or effect until it has been filed.

[2] The point of dispute arises from these few facts:

2.1 On 18 April 2019 the applicant in these proceedings (Tjeka) obtained the issue of a liquidation application in the High Court.

2.2 On 15 May 2019, the first respondent (KPPM) filed a resolution as contemplated in section 129(2) of the 2008 Act.

2.3 On 28 May 2019, the liquidation application was served on Tjeka.

[3] The question is simply whether the resolution trumps the liquidation application which, though issued before the resolution was filed, was not yet served; ie does the mere issue of the liquidation application satisfy the meaning to be

attributed to the phrase: ....proceedings have been initiated ....against the company".

[4] Tjeka is a creditor of KPPM. The third and fourth respondents are the business rescue practitioners appointed pursuant to the resolution, who are the *de facto* controlling mind for the time being of KPPM.[1]

[5] The rival interpretations of section 129(2) producing antithetical results are examined. Plainly the remarks in *Cool Ideas 1186 CC v Hubbard & Another 2014 (4) SA 474 (CC) at [28]* inform the appropriate approach.[2]

[6] It is argued on behalf of Tjeka that the word "initiated" is the point of departure. Its dictionary meaning is alluded to as being getting something started; ie, the Oxford English Dictionary describes "initiated" as to "cause a process or action to begin". Taken literally, the "first move" in any process seems a likely candidate for "initiate." It is insinuated in the argument that the word "commence" could be a synonym. The authority of *Marine and Trade Insurance Co Ltd v Reddinger 1966 (2)*

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[1] The matter was brought as an urgent application owing to a meeting scheduled for 30 June to pursue the business rescue process. The matter was heard on 13 June 2019. It was held that those grounds were sufficient to warrant the matter being heard urgently, despite no steps having been taken earlier when on 28 May, the issue to be decided had become obvious.

[2] "[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

> *(a)* that statutory provisions should always be interpreted purposively;
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> *(b)* the relevant statutory provision must be properly contextualised; and
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> *(c)* all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in *(a)*."

SA 407 (A)(Reddinger) is marshalled to fortify this perspective. I was referred a passage at 413D where it was argued that the court held that:

> "Although an action is commenced when summons is issued the defendant is not involved in litigation until service has been effected" (emphasis supplied)[3].

Upon this premise, it is argued that the phenomenon of "litigation" is distinguished from the juridically cognisable event of the "issue" of a matter, its literal true beginning.

[7] The difficulty which is encountered with such textual treatment is that most words can be turned to fit meanings that can be attributed to them. What cannot be stressed enough is that a word can never be interpreted on its own because it exists only as a part of a greater whole, whether a phrase, a sentence or an entire section, not to mention a whole statute. Moreover the duty to interpret language purposively compels a court to cast a wider net over what must be explored.[4] Accordingly, it is

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[3] The Sentence in the judgment was not cited fully in the heads of argument. The text reads:
"Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made against him.

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 at [*18]:
"Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.* The present state of the law can be expressed as follows. 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 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 and the material known to those responsible for its production. 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 unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The

the work that the phrase or sentence performs in the context of the whole that must be examined.

[8] The text of section 129(2)(a) must be read as a whole. Whatever "initiated" means, it must be understood to be "...by or against the company". To omit this aspect is to not do justice to this part of the sentence. It is plain that the liquidation proceedings which are initiated, must be cognisable by reference to its effect upon the company, otherwise the notion of it being "by" or "against" the company is mere verbiage. Thus, it can be asked: if a deed (ie the issue of an application) which is juridically cognisable occurs, but without the company being in the least aware of its existence, can that deed be said to be an example of a deed initiated *against* the company?[5] At the levels of both grammar and logic this seems doubtful.

[9] The next argument invoked the decision in *Firstrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd 2012 (4) SA 266 (KZD)* (*Crown Trading*). The passage at [[17] is relied on; the relevant passages are:

> "[16] It is clear, however, that Act 71 of 2008 draws a distinction between the inter-relationship of business rescue proceedings and liquidation proceedings, depending upon whether the source of business rescue proceedings lies in the resolution of the board of a company to begin such proceedings in terms of s 129(1), or whether the source of such proceedings lies in an application brought by an 'affected person' in terms of s 131(1), for an order placing the company under supervision and commencing business rescue proceedings.
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> [17] In the former case, as pointed out, in terms of s 129(2)*(a)* such a resolution may not be adopted 'if liquidation proceedings have been initiated by or against the company'. The reference to liquidation proceedings 'by or against the company', is clearly a reference to a voluntary winding-up of a company in terms of s 352 of Act 61 of 1973, as well as a reference to a winding-up of a company by the court in terms of s 348 of Act 61 of 1973. In this regard, the authors of the work Davis et al *Companies and other Business Structures in South Africa* 2 ed at 229 n6 express the view that it is unfortunate that it is unclear whether the word 'initiated' (which is not defined) is intended to have the same meaning as the word 'commenced' contained in the aforesaid sections of Act 61 of 1973, and which is clearly defined in Act 61 of 1973. In this regard it should be noted that s 131(6) of Act 71 of 2008 refers to liquidation

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> "inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[5] Axiomatically such a scenario cannot apply to liquidation proceedings "by" a company.

> proceedings having 'been commenced by or against the company' at the time application is made for an order placing the company under supervision and commencing business rescue proceedings in terms of s 131(1) of Act 71 of 2008. It would be anomalous if what was meant by liquidation proceedings being 'initiated' by or against the company for the purposes of s 129(2)*(a)* differed from what was meant by liquidation proceedings being 'commenced' by or against the company for the purposes of s 131(6). In my view, due regard being had to the fact that these provisions of Act 61 of 1973 expressly continue to be applicable to the winding-up of companies, the word 'initiated' must be intended to have the same meaning as the word 'commenced' in the applicable sections. To conclude otherwise would be to introduce uncertainty where none is justified, by virtue of the clear definition of the 'commencement' of proceedings in ss 348 and 352 of Act 61 of 1973."

[10] Upon this foundation it is contended that Section 348 of the Companies Act 61 of 1973 (the Old Act) has relevance. That section reads:

> "A winding up of a company by the Court shall be deemed to commence at the time of the presentation to the court of the application for winding up."

[11] Thus, the outcome contended for is that a meaning attributed to a portion of Section 348 in the Old Act must be the same meaning to be attributed to a portion of section 129(2) in the 2008 Act, even though different terminology is employed. The fact that companies are liquidated in terms of the regime of the Old Act and business rescue is regulated by the regime of the 2008 Act bedevils the exercise of interpretation because the two regimes intersect. The problem of untwining that overlap is not novel and has occurred elsewhere too.[6] Obviously, what is desirable is a coherent outcome; however, that happy result is not necessarily inevitable, and it is dangerous to proceed from the premise that it must be so. To do so is to sanctify the question, not offer an answer.

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[6] Eg; *Van der Merwe v Duraline (Pty) Ltd [2013] ZAWCHC (23/08/2013)* in respect of the conflict between section 23(3) of the 2008 and Section 12(1) of the Old Act as to the place at which service of a liquidation application must be effected being the registered office or principal place of business. Se too *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Nedbank intervening) 2013 (1) SA 191 (WCC).*

[12] The premise of *Crown Trading* is that an alignment is required between like and like. That notion *per se* is unobjectionable. In turn, the proposition contended for is dependent on the *function* of section 348 of the Old Act being like with the *function* of section 129 of the 2008 Act. In sofar as this is assumed, in my view, the dictum is *Crown Trading* is misconceived. The counter to that notion is given by Ploos Van Amstel J in *Standard Bank of South Africa Ltd v A-Team Africa CC 2016 (1) SA 503 (KZP)* (A-Team) In A-Team, the court was examining section 131 of the 2008 Act not section 129. The actions being investigated were the efforts of an interested party, not the company itself, to place the company into business rescue. The application to place the company into business rescue came before court after the liquidation application had been served on the company, but before the liquidation application could be heard. The case was thus not identical to the present case. The Court, *inter alia*, dealt with the dictum in Crown Trading. Importantly, at [8] – [10] the court found:

> " [8] In *Imperial Crown Trading* a bank sought an order for the provisional liquidation of the respondent company on the ground that it was unable to pay its debts. At the hearing before Swain J the respondent sought a postponement of the matter so as to enable it to investigate the advisability of launching an application for business rescue. Counsel for the bank urged the court to grant a provisional winding-up order with an extended return date so as to give the respondent sufficient time to bring a business rescue application if it was so advised. Counsel for the respondent asked the court not to grant a provisional order as, he submitted, it would preclude an application for business rescue. Swain J pointed out that this was not so and said the following:
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> 'Consequently, on the facts of this case, if a provisional order of liquidation is granted, the board of the respondent will be precluded from resolving that the respondent voluntarily begin business rescue proceedings and place the company under supervision. The grant of such an order will, however, not preclude an "affected person" from applying to court to place the respondent under supervision and the commencement of business rescue proceedings.'
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> Whether the launching of the liquidation application itself precluded the adoption of a resolution by the board to begin business rescue proceedings was neither argued nor decided. The decision must be read in the context of the facts of the case. I do

not consider that it is authority for the proposition that the expression 'liquidation proceedings' in section 131(6) does not include an application for a liquidation order.

[9] I should add that I do not think it is helpful in determining when liquidation proceedings commence, for the purposes of s 131(6), to have regard to sections 348 and 352 of the 1973 Act. Those sections do not define when liquidation proceedings commence. Section 348 provides as follows:

'A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up'.

And s 352(1):

'A voluntary winding-up of a company shall commence at the time of the registration in terms of section 200 of the special resolution authorising the winding-up'.

[10] These sections deal with the commencement of the winding-up, in other words the time from when the company is, or is deemed to be, in liquidation. A distinction must be made between the proceedings which lead to a winding-up order, and the winding-up process during which the liquidator performs his duties in terms of the Act."

[13] In my view this reasoning, by Ploos Van Amstel J, demonstrates that the function of section 348 is different to the function of section 129(2). Accordingly, the eliding of "commenced" with "initiated" is shown to be inappropriate. The device utilised in section 348 is a fiction triggered by a public formal act that has retrospective effect; ie it deems the date of presentment to be the beginning of the winding up process, which in truth it was not. The policy choice that informed that provision in the statute is that a protection was needed against nefarious manipulation after the fact of the application becomes known between the time of presentment and the date of the grant of the order. It cannot be said that a similar problem arises pursuant to a resolution contemplated in section 129(2) in the 2008 Act when unknown to the company a liquidation application has been issued but remains a secret. An application to place the company into business rescue, albeit by interested third parties, rather than the debtor company, may occur in terms of

section 131 after service of a liquidation application.[7] Thus the work that section 348 does and the work that section 129 (2) does is different.[8]

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[7] Section 131: Court order to begin business rescue proceedings

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

(2) An applicant in terms of subsection (1) must-

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.

(4) After considering an application in terms of subsection (1), the court may-

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that-

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.

(5) If the court makes an order in terms of subsection (4) *(a)*, the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.

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

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

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

(7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.

(8) A company that has been placed under supervision in terms of this section-

(a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 132 (2); and

(b) must notify each affected person of the order within five business days after the date of the order."

[8] The views expressed in *Henochsberg in the Companies Act 71 of 2008, vol 1*, at page 462 on Section 129(2) insofar as they accept the idea of an alignment between section 348 of the Old Act and section 129(2) of the 2008 Act cannot be endorsed. Although referring to *A-Team* and to *Crown Trading* the commentary does not address the issues dealt with in this judgment and merely notes the differing view in *A-Team* to that of *Crown Trading*, which latter view is preferred. The decision in *Sulzer Pumps (South Africa) (Pty) Ltd v O& M Engineering CC (unreported 2014/19740 GP)* per Potterill J, cites an earlier version of *Henochberg* with approval in this respect, but that court did not have the benefit of the judgment in *A-Team* to consider. For that reason it ought not to be followed on this point.

[14] The principal proposition advanced on behalf of KPPM is that a liquidation application must be served, not merely issued, to satisfy the meaning of section 29(2).

[15] It was argued that the advent of business rescue should be understood to bring into being a bias in favour of business rescue when it is in contestation with liquidation proceedings.[9] I do not think that this species of consideration is necessarily absent in particular circumstances, but I am however of the view that such a notion is likely to be a legitimate factor in weighing up the merits of a business rescue application, rather than in the exercise of understanding the procedural niceties.

[16] On the facts, it is common cause that the board of KPPM was bona fide ignorant of the issue of the liquidation application by Tjeka.[10] It is true that KPPM had fended off two other attempts to liquidate the company and it may reasonably be supposed that a prudent self-examination of the straits in which the company found itself included an appreciation that the risk of further creditors bringing liquidation applications was not over. However, the very decision by a company to deliberate whether to place itself into business rescue is precisely that kind of risk; thus, no fair rebuke is conceivable.

[17] It is argued that it would be strange indeed that a board that acted, as did the board of KPPM, acted irregularly by passing a resolution under these factual

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[9] Eg: *Sulzer Pumps (South Africa) (Pty) Ltd v O & M Engineering CC (supra at footnote 8)* at [28] takes this view. See too: *Absa Bank Ltd v New City Group (Pty) Ltd & Another [2013] 3 All SA 146 (GSJ)* at esp [30].

[10] This assertion was faintly challenged by Tjeka, but on the *Plascon Evans* Rule, the unrebutted allegation must be taken as correct. (see: *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 620 (AD)*)

circumstances. I need not decide whether knowledge of an issued, but not yet served, liquidation application might result in a different conclusion.

[18] The contention is advanced that the dictum in *Reddinger*, cited, in part, on behalf of Tjeka, when read as a whole, supports the conclusion that service is a necessary event in the context of section 129(2). The dictum is :

> "Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made against him". (Emphasis supplied)

I am in agreement with the contention because that court has held that the "involvement" in litigation by means of a "formal claim" is the relevant trigger.

[19] The authority of the decision in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd & Others 2013 (2) SA 204 (CC)* was invoked to support the contention that service was necessary. That case dealt with the generic problem of calculating a time by when a juridically cognisable event had to occur. The court *a quo* had ordered certain interim relief pending a review application yet to be instituted. An order was made that " .... such review proceedings shall be initiated by no later than ...[date]." A controversy arose as to whether the mere issue of the review application met that order or whether service on the other party was required. At [16] – [20] the court held thus:

> "[16] The submission advanced on behalf of BHP was that the application had been initiated on 25 January 2006 when it was lodged and issued by the office of the registrar and that service of the process was merely a second step in the proceedings. Counsel further contended that there was proper service, albeit the application had been served by hand on the state respondents' legal representatives. He thus supported the conclusions of the court a quo.

[17] In my judgment, the argument on behalf of BHP cannot be sustained. The interpretation favoured by it will give rise to absurd consequences and could never reflect Preller J's intention. In *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* Rumpff JA held:

'Hoewel 'n dagvaarding eers deur die griffier uitgereik word voordat dit beteken word (Reël 17(1) en (3)), word dit nie in die Reëls vereis dat 'n kennisgewing van mosie deur die griffier uitgereik moet word of by hom ingelewer moet word voordat dit aan die respondent beteken kan word nie. . . . Die doel van 'n dagvaarding en kennisgewing van mosie is natuurlik om die verweerder of respondent by 'n geding te betrek, en wat hom betref, word hy eers dan betrek wanneer 'n betekening van die dagvaarding of kennisgewing van mosie plaasgevind het.'

[18] There can be no doubt that Preller J intended that the review should effectively proceed by 25 January 2006. He could never have intended for BHP to have an application issued and a case number allocated by the registrar and thereafter remain supine.

[19] In my view the Preller J order falls squarely within the ambit of the cases to which we were referred by counsel for *Finishing Touch.* These cases were concerned with statutory provisions or regulations which require that an application had to be made within a specified period. I shall mention only two of them. In *Mame Enterprises (Pty) Ltd v Publications Control Board* Nicholas J held that it was manifest from uniform rule 6 and from the contents of Form 2*(a)* that the giving of notice to the respondent in a case where relief is claimed against him is an essential first step in an application on notice of motion. In *Tladi v Guardian National Insurance Co Ltd* the court had to determine whether an application had been made within a period of 90 days as contemplated in s 14(3) of the Motor Vehicle Accidents Act 84 of 1986. Botha J held that the application could not be considered to have been made if it had merely been issued but not served.

[20] It follows, in my view, that in ordering that the review proceedings 'shall be initiated by no later than Wednesday, 25 January 2006' Preller J intended that notice of the application be given to the registrar and the application served on the affected parties by 25 January 2006. Accordingly, the finding of the court below that the filing of the application papers with the registrar and the issue thereof must be regarded as the initiating of proceedings cannot be sustained."

[20] The conceptualisation of the critical juridical act in *Republikeinse Publikasies(Edms) Bpk Afikaanse Pers Publikasies 1972 (1) SA 773 (AD),* cited in the decision, regarding the purpose of a summons or notice of motion, being, a "respondent by 'n geding te betrek"[11] and that only when served is a respondent thus "betrek", is in my view, an expression of the inherent policy choice that a litigant remains unaffected in law until made formally aware of the steps being taken against

[11] This phrase would in English be rendered as: "to implicate or involve a respondent..."; - literally to be "drawn in".

that litigant. Those exceptional cases where it is legitimate to take an order against an unsuspecting party *ex parte* do not constitute an exception to this principle because of the contingency of a reversal at the instance of the party adversely affected once made aware of the order.[12]

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

[22] Accordingly, in my view:

22.1 The liquidation proceedings contemplated in section 129(2) of the 2008 Act must be served on the company, not merely issued to meet the requirements of the section.

22.2 The resolution of 15 May 2019 trumps the Liquidation proceedings served on 28 May 2019.

[23] The costs of these proceedings should follow the result.

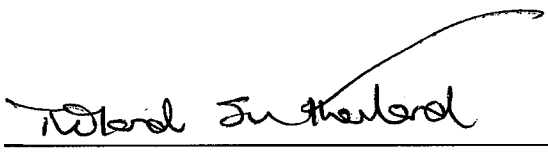
[12] Rules 6(8) and 6(12) (c) of the Uniform Rules of Court.

The Order

(1) Section 129(2)(a) of the Companies Act 71 of 2008 contemplates that the liquidation proceedings referred to therein, to be initiated by service thereof on the debtor company.

(2) The resolution of the first respondent of 15 May 2019 is valid and effective against the liquidation application served on the First Respondent on 28 May 2019.

(3) The Applicant shall bear the costs of this application.



ROLAND SUTHERLAND
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of Hearing: 13 June 2019
Date of Judgment: 21 June 2019

For the Applicant:
Adv R. Dorning,
Instructed by Ryan Hall attorneys.

For the Respondents:
Adv C Van der Linde,
Instructed by Knowles Husain Lindsay Inc