



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 1088/2020

In the matter between:

RALPH FARREL LUTCHMAN N.O.	FIRST APPELLANT
CLOETE MURRAY N.O.	SECOND APPELLANT
TANIA OOSTHUIZEN N.O.	THIRD APPELLANT
MARIANNE OELOFSEN N.O.	FOURTH APPELLANT

In their capacities as the joint provisional liquidators of African Global Operations (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O.	FIFTH APPELLANT
CLOETE MURRAY N.O.	SIXTH APPELLANT
SELBY MUSAWENKOSI NTSIBANDE N.O.	SEVENTH APPELLANT
ANDRE BOTHA OCTOBER N.O.	EIGHTH APPELLANT

In their capacities as the joint provisional liquidators of Bosasa Properties (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O.	NINTH APPELLANT
CLOETE MURRAY N.O.	TENTH APPELLANT
NURJEHAN ABDOOL GAFAAR OMAR N.O.	ELEVENTH APPELLANT

In their capacities as the joint provisional liquidators of Global Technology Systems (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O.	TWELFTH APPELLANT
CLOETE MURRAY N.O.	THIRTEENTH APPELLANT
ROYNATH PARBHOO N.O.	FOURTEENTH APPELLANT
LIZETTE OPPERMAN N.O.	FIFTEENTH APPELLANT

In their capacities as the joint provisional liquidators of Leading Prospect Trading 111 (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O. SIXTEENTH APPELLANT
CLOETE MURRAY N.O. SEVENTEENTH APPELLANT
OFENTSE ANDREW NONG N.O. EIGHTEENTH APPELLANT
TSHEPO HARRY NONYANE N.O. NINETEENTH APPELLANT

In their capacities as the joint provisional liquidators of Bosasa Youth Development Centres (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O. TWENTIETH APPELLANT
CLOETE MURRAY N.O. TWENTY-FIRST APPELLANT
TARYN VALERIE ODELL N.O. TWENTY-SECOND APPELLANT
GORDON NOKHANDA N.O. TWENTY-THIRD APPELLANT

In their capacities as the joint provisional liquidators of Black Rox Security Intelligence Services (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O. TWENTY-FOURTH APPELLANT
CLOETE MURRAY N.O. TWENTY-FIFTH APPELLANT
MILANI BECKER N.O. TWENTY-SIXTH APPELLANT

In their capacities as the joint provisional liquidators of Bosasa Supply Chain Management (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O. TWENTY-SEVENTH APPELLANT
CLOETE MURRAY N.O. TWENTY-EIGHTH APPELLANT
MARC BRADLEY BEGINSEL N.O. TWENTY-NINTH APPELLANT

In their capacities as the joint provisional liquidators of Bosasa IT (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O. THIRTIETH APPELLANT
CLOETE MURRAY N.O. THIRTY-FIRST APPELLANT
MARIETTE BENADE N.O. THIRTY-SECOND APPELLANT

In their capacities as the joint provisional liquidators of Rodcor (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O. THIRTY-THIRD APPELLANT
CLOETE MURRAY N.O. THIRTY-FOURTH APPELLANT
JACOLIEN FRIEDA BARNARD N.O. THIRTY-FIFTH APPELLANT

In their capacities as the joint provisional liquidators of Watson Corporate Academy (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O. THIRTY-SIXTH APPELLANT
CLOETE MURRAY N.O. THIRTY-SEVENTH APPELLANT
DEIDRE BASSON N.O. THIRTY-EIGHTH APPELLANT

In their capacities as the joint provisional liquidators of ON-IT-1 (Pty) Ltd (in liquidation)

PARK VILLAGE AUCTIONEERS AND

PROPERTY SALES (PTY) LTD

THIRTY-NINTH APPELLANT

THE COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICES

FORTIETH APPELLANT

and

AFRICAN GLOBAL HOLDINGS (PTY) LTD

FIRST RESPONDENT

SUN WORX (PTY) LTD

SECOND RESPONDENT

KGWERANO FINANCIAL SERVICES (PTY) LTD

THIRD RESPONDENT

Case No: 1135/2020

In the matter between:

AFRICAN GLOBAL HOLDINGS (PTY) LTD

FIRST APPELLANT

SUN WORX (PTY) LTD

SECOND APPELLANT

KGWERANO FINANCIAL SERVICES (PTY) LTD

THIRD APPELLANT

and

RALPH FARREL LUTCHMAN N.O.

FIRST RESPONDENT

CLOETE MURRAY N.O.

SECOND RESPONDENT

TANIA OOSTHUIZEN N.O.

THIRD RESPONDENT

MARIANNE OELOFSEN N.O.

FOURTH RESPONDENT

In their capacities as the joint provisional liquidators of African Global Operations (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O.

FIFTH RESPONDENT

CLOETE MURRAY N.O.

SIXTH RESPONDENT

SELBY MUSAWENKOSI NTSIBANDE N.O.

SEVENTH RESPONDENT

ANDRE BOTHA OCTOBER N.O.

EIGHTH RESPONDENT

In their capacities as the joint provisional liquidators of Bosasa Properties (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O.

NINTH RESPONDENT

CLOETE MURRAY N.O.

TENTH RESPONDENT

NURJEHAN ABDOOL GAFAAR OMAR N.O.

ELEVENTH RESPONDENT

In their capacities as the joint provisional liquidators of Global Technology Systems (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O.	TWELFTH RESPONDENT
CLOETE MURRAY N.O.	THIRTEENTH RESPONDENT
ROYNATH PARBHOO N.O.	FOURTEENTH RESPONDENT
LIZETTE OPPERMAN N.O.	FIFTEENTH RESPONDENT

In their capacities as the joint provisional liquidators of Leading Prospect Trading 111 (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O.	SIXTEENTH RESPONDENT
CLOETE MURRAY N.O.	SEVENTEENTH RESPONDENT
OFENTSE ANDREW NONG N.O.	EIGHTEENTH RESPONDENT
TSHEPO HARRY NONYANE N.O.	NINETEENTH RESPONDENT

In their capacities as the joint provisional liquidators of Bosasa Youth Development Centres (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O.	TWENTIETH RESPONDENT
CLOETE MURRAY N.O.	TWENTY-FIRST RESPONDENT
TARYN VALERIE ODELL N.O.	TWENTY-SECOND RESPONDENT
GORDON NOKHANDA N.O.	TWENTY-THIRD RESPONDENT

In their capacities as the joint provisional liquidators of Black Rox Security Intelligence Services (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O.	TWENTY-FOURTH RESPONDENT
CLOETE MURRAY N.O.	TWENTY-FIFTH RESPONDENT
MILANI BECKER N.O.	TWENTY-SIXTH RESPONDENT

In their capacities as the joint provisional liquidators of Bosasa Supply Chain Management (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O.	TWENTY-SEVENTH RESPONDENT
CLOETE MURRAY N.O.	TWENTY-EIGHTH RESPONDENT
MARC BRADLEY BEGINSEL N.O.	TWENTY-NINTH RESPONDENT

In their capacities as the joint provisional liquidators of Bosasa IT (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O.	THIRTIETH RESPONDENT
CLOETE MURRAY N.O.	THIRTY-FIRST RESPONDENT
MARIETTE BENADE N.O.	THIRTY-SECOND RESPONDENT

In their capacities as the joint provisional liquidators of Rodcor Corporate Academy (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O. THIRTY-THIRD RESPONDENT

CLOETE MURRAY N.O. THIRTY-FOURTH RESPONDENT

JACOLIEN FRIEDA BARNARD N.O. THIRTY-FIFTH RESPONDENT

In their capacities as the joint provisional liquidators of Watson Corporate Academy (Pty) Ltd (in liquidation)

RALPH FARREL LUTCHMAN N.O. THIRTY-SIXTH RESPONDENT

CLOETE MURRAY N.O. THIRTY-SEVENTH RESPONDENT

DEIDRE BASSON N.O. THIRTY-EIGHTH RESPONDENT

In their capacities as the joint provisional liquidators of ON-IT-1 (Pty) Ltd (in liquidation)

**PARK VILLAGE AUCTIONEERS AND
PROPERTY SALES (PTY) LTD THIRTY-NINTH RESPONDENT**

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICES FORTIETH RESPONDENT**

Neutral citation: *Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others* (1088/2020 and 1135/2020) [2022] ZASCA 66 (10 May 2022)

Coram: Saldulker, Molemela and Gorven JJA and Meyer and Smith AJJA

Heard: 07 March 2022

Delivered: 10 May 2022

Summary: Company law – business rescue – Companies Act 71 of 2008 – s 131(6) – interpretation – s 131(6) provides for the suspension of liquidation proceedings at the time a business rescue application is made – meaning of when business rescue application is ‘made’ – business rescue application must be issued, served by the sheriff on the company and the Commission, and each affected person must be notified of the application in the prescribed manner, to meet the requirements of s 131(6) in order to trigger the suspension of the liquidation proceedings – practice – judgments and orders – interpretation of order – applicable principles – determining the manifest purpose of the order – to be determined by also having regard to the relevant background facts which culminated in it being made.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (De Villiers AJ sitting as court of first instance):

1. The auction appeal (case no. 1088/2020) is upheld with costs, including those of two counsel for the first to thirty-ninth appellants and the fortieth appellant.
2. Paragraphs 7, 8, 9, 10 and 11 of the order of the high court are set aside and replaced with the following:

‘The application under case no. 44827/19 is dismissed with costs, including those of two counsel for the first to thirty-ninth respondents and the first intervening party, the Commissioner for the South African Revenue Services.’

3. Save to the extent reflected in paragraph 3.1 hereof, the first, second and third appellants’ business rescue appeal (case no. 1135/2020) against paragraphs 16, 17 and 18 of the high court’s order is dismissed with costs, including those of two counsel for the first to thirty-ninth respondents and the fortieth respondent.

- 3.1 Paragraph 16 of the order of the high court is set aside and replaced with the following:

‘The business rescue application is struck from the roll.’

- 3.2 The first to thirty-ninth and the fortieth respondents’ appeals against paragraph 17 of the high court’s order are upheld.

- 3.3 Paragraph 17 of the order of the high court is set aside and replaced with the following:

‘The applicants are ordered to pay the respondents’ costs of the business rescue application, such costs are to include the costs of two counsel.’

JUDGMENT

Meyer AJA (Saldulker, Molemela and Gorven JJA and Smith AJA concurring):

[1] The sensational revelations made during the Zondo Commission of Enquiry into Allegations of State Capture, *inter alia* by the former COO of Bosasa, Angelo Aggrizzi,

shocked the country. Bosasa is now known as Global Holdings (Pty) Ltd (Holdings). This prompted the bankers of African Global Operations (Pty) Ltd (Operations) - a wholly-owned subsidiary of Holdings that performed all the treasury functions of the Bosasa Group of companies, including receiving payments and making payments on behalf of the various operating companies in the Bosasa Group - to indicate that they would be withdrawing Operations' banking facilities and closing the banking accounts, which was catastrophic for its continued business operations.

[2] After the Bosasa Group had failed to find another bank that would provide Operations with banking facilities, the directors of Holdings and of Operations resolved to place Operations and its ten wholly-owned subsidiaries¹ under voluntary winding-up in terms of section 351 of the Companies Act 61 of 1973 (the 1973 Companies Act).² However, when the joint provisional liquidators³ (the liquidators) started to exercise their statutory powers, Holdings attempted to have the resolutions in which the Bosasa companies were placed under voluntary winding-up (the special

¹ The subsidiaries are Global Technology Systems (Pty) Ltd (GTS), Bosasa Properties (Pty) Ltd (Properties), Rodcor Corporate Academy (Pty) Ltd (Rodcor), Watson Corporate Academy (Pty) Ltd (WCA), On-IT-1 (Pty) Ltd (On-IT), Bosasa IT (Pty) Ltd (BIT), Bosasa Supply Chain Management (Pty) Ltd (BCSM), Leading Prospect Trading 111 (Pty) Ltd (Leading Prospect), Bosasa Youth Development Centres (Pty) Ltd (Youth Centres) and Black Rox Security Intelligence Services (Pty) Ltd (Black Rox), all in liquidation.

² I refer to Operations and its ten subsidiaries as 'the Bosasa companies', and to the directors of Holdings, Operations and the Bosasa companies jointly as 'the directors'.

³ They are: Mr Ralph Farrel Lutchman N.O., Mr Cloete Murray N.O., Ms Tania Oosthuizen N.O. and Ms Marianne Oelofsen N.O. in their capacities as the joint provisional liquidators of African Global Operations (Pty) Ltd; Mr Ralph Farrel Lutchman N.O., Mr Cloete Murray N.O., Mr Selby Musawenkosi Ntsibande N.O. and Mr Andre Botha October N.O. in their capacities as the joint provisional liquidators of Bosasa Properties (Pty) Ltd; Mr Ralph Farrel Lutchman N.O., Mr Cloete Murray N.O. and Mr Nurjehan Abdool Gafaar Omar N.O. in their capacities as the joint provisional liquidators of Global Technology Systems (Pty) Ltd; Mr Ralph Farrel Lutchman N.O., Mr Cloete Murray N.O., Mr Roynath Parbhoo N.O. and Ms Lizette Opperman N.O. in their capacities as the joint provisional liquidators of Leading Prospect Trading 111 (Pty) Ltd; Mr Ralph Farrel Lutchman N.O., Mr Cloete Murray N.O., Mr Ofentse Andrew Nong N.O. and Mr Tshepo Harry Nonyane N.O. in their capacities as the joint provisional liquidators of Bosasa Youth Development Centres (Pty) Ltd; Mr Ralph Farrel Lutchman N.O., Mr Cloete Murray N.O., Ms Taryn Valerie Odell N.O. and Mr Gordon Nokhanda N.O. in their capacities as the joint provisional liquidators of Black Rox Security Intelligence Services (Pty) Ltd; Mr Ralph Farrel Lutchman N.O., Mr Cloete Murray N.O. and Ms Milani Becker N.O. in their capacities as the joint provisional liquidators of Bosasa Supply Chain Management (Pty) Ltd; Mr Ralph Farrel Lutchman N.O., Mr Cloete Murray N.O. and Mr Marc Bradley Beginsel N.O. in their capacities as the joint provisional liquidators of Bosasa IT (Pty) Ltd; Mr Ralph Farrel Lutchman N.O., Mr Cloete Murray N.O. and Ms Mariette Benade N.O. in their capacities as the joint provisional liquidators of Rodcor (Pty) Ltd; Mr Ralph Farrel Lutchman N.O., Mr Cloete Murray N.O. and Ms Jacolien Frieda Barnard N.O. in their capacities as the joint provisional liquidators of Watson Corporate Academy (Pty) Ltd; and Mr Ralph Farrel Lutchman N.O., Mr Cloete Murray N.O. and Ms Deidre Basson N.O. in their capacities as the joint provisional liquidators of On-Lt-1 (Pty) Ltd (in liquidation). It will be noted that Messrs Lutchman N.O. and Murray N.O. are amongst the joint provisional liquidators of Operations and each of its ten subsidiaries.

resolutions) declared null and void. In addition, and as a consequence of the aforementioned, Holdings attempted to have the appointment of the liquidators declared null and void and of no force and effect. That was the beginning of a litigious battle between the liquidators and Holdings.

[3] Holdings did that by initiating an application as a matter of extreme urgency in the Gauteng Division of the High Court, Johannesburg (the high court). The case was argued before Ameer AJ on 13 March 2019. The following day judgment was delivered, granting Holdings the relief it had sought and ordering the liquidators to pay the costs of the proceedings in their personal capacities. However, the high court granted the liquidators leave to appeal to this Court against that order. On 22 November 2019, this Court delivered its judgment, upholding the appeal and altering the Ameer AJ order to one dismissing the application with costs, including those of two counsel.⁴ Therefore, the effect of this Court's order is that the Bosasa companies remained in a creditor's voluntary winding-up. On 3 December 2019, Holdings⁵ caused an application to be issued by the Registrar of the high court. This was for an order placing six of the eleven Bosasa companies⁶ (the six Bosasa companies) under supervision and commencing business rescue proceedings in terms of s 131(1) of the Companies Act 71 of 2008 (the Companies Act). During 4-6 December 2019, the liquidators caused most of the assets of the six Bosasa companies to be sold by public auction.

[4] Holdings⁷ responded by launching what is referred to as the 'auction application'.⁸ Therein they sought an order against the liquidators: (a) interdicting them from selling any further assets owned by the six Bosasa companies before the final

⁴ *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* [2019] ZASCA 152; [2020] 1 All SA 64 (SCA); 2020 (2) SA 93 (SCA).

⁵ Sun Worx (Pty) Ltd (Sun Worx) and Kgwerano Financial Services (Pty) Ltd (Kgwerano) were cited as the second and third applicants.

⁶ They are Operations, GTS, Properties, Leading Prospect, Youth Centres and Black Rox.

⁷ Again with Sun Worx and Kgwerano as the second and third applicants.

⁸ The liquidators of the eleven Bosasa companies in liquidation are cited as the first to thirty-eighth respondents, the auctioneer, Park Village Auctioneers and Property Sales (Pty) Ltd (the auctioneer) as fortieth respondent, and the Commissioner for the South African Revenue Services (SARS), the largest third-party creditor of the Bosasa companies, was permitted to intervene as the first intervening party in both the auction and business rescue applications. were cited as the respondents in the auction and business rescue applications. was permitted to intervene. The business rescue and auction applications only concern the six Bosasa companies in liquidation:

adjudication of the business rescue application and/or before the second meeting of creditors, without the written consent of Holdings; (b) a declaration that the sale of assets before the final adjudication of the business rescue application and/or before the second meeting of creditors, without the written consent of Holdings, to be null and void; and (c) interdicting them from delivering the movable assets to, and cause transfer and registration of ownership of the immovable assets into the names of, anyone who had purchased the assets of the six Bosasa companies before the final adjudication of the business rescue application and/or the second meeting of creditors, without the written consent of Holdings.

[5] The auction and business rescue applications (and another application which is presently not relevant) were argued before the high court (De Villiers AJ) in a consolidated hearing. In one judgment, the high court granted the relief sought in the auction application and dismissed the business rescue application. It gave the liquidators and SARS leave to appeal its order in the auction application. It also gave Bosasa, Sun Worx, and Kgwerano leave to appeal its order in the business rescue application. The liquidators and SARS were also granted leave to appeal one of the costs awards made in the business rescue application. In each case, leave was given to appeal to this Court.

[6] I now return to the pertinent contextual background facts from when the liquidators were given leave to appeal the Ameer AJ order.⁹ Holdings sought and was granted an order: (a) that the special resolutions placing the Bosasa companies in a creditor's voluntary winding-up had not been lawfully passed and were thus 'null and void *ab initio* and of no force and effect'; (b) that; as a result, the appointments of the liquidators were not validly and lawfully made and were thus also 'null and void *ab initio* and of no force and effect'; and (c) for the liquidators to deliver control of the Bosasa companies and all their assets to the directors.

⁹ As I have mentioned, the liquidators and SARS were the respondents in both the auction and business rescue applications. The facts alleged by them, therefore, must be accepted 'unless they constituted bald or uncreditworthy denials or were palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers' and a 'finding to that effect occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of evidence' (see *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2016] ZASCA 119; [2016] 4 All SA 311 (SCA); 2017 (2) SA 1 (SCA) para 36 and *National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others* [2012] ZASCA 47; 2012 (5) SA 300 (SCA) para 22). That test was not satisfied in both applications.

[7] Notwithstanding the pending appeal against the Ameer AJ order, the directors did not accept that there had been a *concursum creditorum* in respect of any of the Bosasa companies or that the liquidators held any rights or powers as 'provisional liquidators'. They maintained that the suspension of the Ameer AJ order as a result of the pending appeal did not resolve the disputes between them and the liquidators, whether the Bosasa companies had indeed been placed into liquidation and whether the liquidators had the powers of provisional liquidators to take control of the assets and affairs of the Bosasa companies. They asserted that they (and not the liquidators) remained in control of the assets and affairs of the Bosasa companies, and they refused to relinquish their control to the liquidators. The liquidators, on the other hand, maintained that because of the appeal and through the operation of s 18 of the Superior Courts Act 10 of 2013, the order setting aside the special resolutions and their appointments as provisional liquidators was suspended pending the outcome of the appeal and that the Bosasa companies, therefore, remained in liquidation and under their control (the dispute).

[8] However, the liquidators and the directors agreed to implement a mechanism through which they could, in consultation with one another, attend to the affairs of the Bosasa companies despite the dispute between them to avoid further unnecessary skirmishes and costly litigation pending the outcome of the appeal. That mechanism included joint and mostly monthly meetings between them when they discussed matters arising in connection with the affairs of the Bosasa companies and took joint decisions in relation to the conduct of the Bosasa enterprise (the interim arrangement).

[9] On 2 April 2019, the high court (Tsoka J) granted an interim order extending the powers of the liquidators in terms of s 386(5), read with s 388, of the 1973 Companies Act, authorising them to: (a) transact on the banking accounts of the Bosasa companies; (b) continue to conduct their businesses; (c) institute or defend legal proceedings; and (d) reach reasonable settlements with debtors and accept payment of any such debts. Once the Tsoka J interim order had been made, Holdings and the directors intervened in that first application to extend the liquidators' powers. The directors and the liquidators then agreed on inserting the following paragraphs 6 and 7 in the final order to be made:

'6. The powers in paragraphs 4 and 5 above shall be exercised by the Applicants in consultation with the board(s) of directors of the specific company or companies involved in the transaction(s) and decisions and the Applicants shall at all times be obliged to give the directors in question reasonable notice of the meeting at which it is sought to consult and of the subject matter thereof.

7. This order shall lapse and be of no further force and effect immediately upon the grant of an order by the Supreme Court of Appeal that the appeal against the order granted under case number 2103/2019 has been successful. However, if the appeal is successful, then the provisions in paragraph 6 shall lapse and be of no force or effect.'

[10] On 14 May 2019, Mudau J made the Tsoka J interim order final with the addition of the above-quoted paragraphs 6 and 7. In support of such additional relief, the directors stated the following in their founding affidavit in the intervention application:

'25. None of Holdings or the Directors were included as Respondents but some of the latter were given notice. The directors of Holdings and the Directors had considerable concerns regarding the relief which was sought given that the Applicants were essentially seeking the sanction of the Court of powers beyond those which vest in provisional liquidators in the ordinary course and effectively to enable the Applicants to proceed post-haste with the winding up of the companies in advance of the consideration of the appeal in the Supreme Court of Appeal.

26. If that appeal is unsuccessful (and Holdings and the Directors have every reason to believe that it will be), the effect will be that the resolutions implementing the winding up of the companies will be declared to be void and the [liquidators] be directed to hand control of the companies back to the Directors with all of their assets as at 21 February 2019.

27. The intention of the Applicants in seeking the relief they did, was to give them sole control with extensive powers without the need to engage or consult with the Directors. Notwithstanding that the Registrar of the Supreme Court of Appeal has been requested to expedite the appeal, the final grant of the orders sought may well result in the winding up of the companies being a *fait accompli* before that appeal is finalised.

. . .

30. In the event, from the perspective of Holdings and the Directors, the interim arrangement whereby the powers granted to the Applicants in the interim Order and exercised in consultation with the board(s) of directors of the specific company or companies involved in the transaction(s) and decisions in question has been working well, and agree to the continuation of that arrangement pending the outcome of the appeal.'

[11] The liquidators and the directors realised that the six Bosasa companies had lost their substratum and that there was a need to dispose of their assets expeditiously. The founding affidavit fully explained the need to support a further application to the high court to extend the liquidators' powers (the second application to extend the liquidators' powers). In short, the liquidators were advised that Cabinet decided that 'all service level agreements between Departmental and State Owned Companies and any companies related to African Global Operations (Bosasa) group of companies' must be terminated. The six Bosasa companies were awarded lucrative income-generating contracts, *inter alia* with the Department of Correctional Services, Airports Company of South Africa and the Department of Social Development. Most such agreements had already been terminated by the time the founding affidavit was deposed. Those contracts were 'the proverbial backbone of the group of companies', and their termination had significantly impacted the ability of the Bosasa companies to continue with their business operations. The majority of the significant assets, movable and immovable, of the six Bosasa companies were acquired to provide services in terms of the then cancelled contracts. Their substantial but then redundant, movable assets had to be kept in a safe location, guarded, under surveillance and insured. The monthly insurance charges alone amounted to R150 000. Without the power to sell the redundant assets, the situation would continue, and the six Bosasa companies that no longer generated an income would have to keep on paying those substantial expenses. The upkeep of the immovable properties also drained the financial resources of Operations and Properties.

[12] The dilemma the liquidators and directors faced was thus articulated in the founding affidavit of the liquidators in the second application to extend their powers: '87. In ordinary liquidation proceedings the Master of the High Court will convene a first meeting of creditors, members and contributories to, amongst other things, enable creditors to prove their claims and vote on the final appointment of liquidators. I stress the fact that in accordance with section 364 of the Companies Act only the Master may convene a first meeting and that it is beyond the powers of provisional liquidators to do so. 88. As soon as liquidators are finally appointed, they are empowered to convene a second meeting of creditors. It is only at this second meeting where creditors are asked to consider and adopt resolutions authorising liquidators to generally act in their best interest (by, for example, appointing attorneys or selling assets).

89. Typically it takes anywhere between two to eight months for a second meeting of creditors to take place. In the companies involved in this application this position is unfortunately much worse, as the first creditors' meetings will only be convened when the afore-mentioned pending appeal is finalised.

90. I wish to point out that section 386(2B) of the Companies Act entitles the Master of the High Court to authorise the sale of assets in situations like this. In the present instance the Master indicated that it would prefer not to take a decision itself, and indicated that it regarded an approach to court (i.e. the current application) as more appropriate. A true copy of the Master's relevant email is annexed hereto as "FA17". In light thereof, the applicants have no choice other than to seek an extension of our powers in terms of this application.'

[13] The founding affidavit *inter alia* deals with the dispute between the directors and the liquidators and the interim arrangement they reached pending the finalisation of the appeal; and the background to and the purpose of the Tsoka J interim order, the intervention application and the interim arrangement reached between the liquidators and the directors, which interim arrangement is reflected in paragraphs 6 and 7 of the Mudau J final order.

[14] It is necessary to refer to certain specific paragraphs in the founding affidavit of the second application to extend the liquidators' powers:

'39. In acknowledgment of the interests which African Global Operations (Pty) Ltd (in liquidation) (represented by the first to third applicants mentioned above), and the ultimate holding company (African Global Holdings (Pty) Ltd, a solvent company to which reference is made in paragraph 48 that follows) have in the outcome of the sale of assets of the relevant companies, the co-provisional liquidators have, [as was envisaged in the 2 April order (referred to in paragraph 51 that follows) and the 14 May 2019 order (referred to in paragraph 53 that follows)], agreed that the assets referred to in paragraphs 37 and 38 above will not be sold other than in consultation with and with the consent of the boards of African Global Operations (Pty) Ltd (in liquidation) and African Global Holdings (Pty) Ltd. The applicants are accordingly supported in this application by the boards of directors of each of the seven companies referred to above and by African Global Holdings (Pty) Ltd.

...

46. As a result of the appeal, and through the operation of section 18 of the Superior Courts Act, 10 of 2013, the order setting aside the special resolutions is suspended pending the outcome of the appeal. The Applicants are advised that the eleven companies remain in liquidation and remain under the control of their respective co-provisional liquidators. As

appears more fully what I say here under, the boards of the companies in question and African Global Holdings (Pty) Ltd hold a different view which has necessitated agreement on the practical solution in terms of which the companies have been managed until now.

...

51. Substantial exchanges between Standard Bank and the co-provisional liquidators followed but, notwithstanding attempts to explain our position, Standard Bank adopted the stance that they would not allow the provisional liquidators to transact on the accounts unless a court order was obtained, authorising us to do so. In consequence of the above the applicants launched an urgent application for an interim order under case number 11954/2019. On 1 April 2019 the Applicants' attorney received a letter from the attorneys representing African Global Holdings (Pty) Ltd and the directors of the companies in respect of which the extensions of powers were being sought. A copy of the letter is attached as "FA8" ("the Letter"). The said attorneys recorded in the Letter that their client did not accept that there had been a *concursum creditorum* in respect of any of the companies within the African Global Group or that the applicants therein then held any rights or powers as "provisional liquidators". The said attorneys however made certain proposals in paragraphs (a) - (c) thereof, agreement to which would preclude the necessity for their clients to intervene urgently and to oppose the application. As a matter of practicality the Applicants agreed to the proposals, and on 2 April 2019 obtained a court order incorporating them and authorising us to, *inter alia*, transact on the bank accounts. A true copy of the court order is annexed hereto as "FA9" (the 2 April order).

...

53. The application for leave to intervene referred to in paragraph 6 of the 2 April order was launched and an order granting leave to thirteen parties to intervene in the pending proceedings was granted on 14 May 2019. However, given that the interim agreement whereby the powers granted to the Applicants in the 2 April order are exercised in consultation with the board(s) of directors of the specific company or companies involved in the transaction(s) and decisions in question has been working well, agreement was reached upon the continuation of that agreement pending the outcome of the appeal. A true copy of the order reached by agreement is annexed hereto as "FA10" (the May order). Although the May order substituted the April order, for all intents and purposes it had the same effect.'

[15] Once the draft second application to extend the liquidators' powers had been considered by Holdings and the directors, their attorneys, on 4 September 2019, advised the liquidators' attorneys as follows:

'We refer to the correspondence exchanged between our respective offices regarding the proposed application for the extension of the powers of your clients.

We represent African Global Holdings Proprietary Limited, the directors of that company as well as the directors of the African Global Operations Proprietary Limited as well as those of the various subsidiary companies of African Global Operations Proprietary Limited mentioned in the proposed application as having supposedly been placed in provisional liquidation during February 2019.

We refer to amongst others paragraph 51 of the draft affidavit and confirm the said paragraph correctly records the position of our clients as does our letter of 1 April 2019 (attached to the founding affidavit as annexure FA 8) regarding the status of the companies as well as the basis upon which our clients agreed to both the April order and the May order.

We also confirm that by virtue of your clients agreeing that they will not exercise their powers other than:

1. in consultation with our clients; and
2. without the consent of our clients,

and as a matter of practicality (without conceding the legal position or rights) our clients consent to the relief claimed in the notice of motion.'

[16] On 28 October 2019, Bhoola AJ granted the consent order sought for the extension of the liquidators' powers. It reads:

'1. The applicants' powers are extended in terms of section 386(5), read with section 388, of the Companies Act, 61 of 1973 (the Companies Act), authorising them to sell all the movable assets belonging to African Global Operations (Pty) Ltd, Global Technology Systems (Pty) Ltd, Bosasa IT (Pty) Ltd, Leading Prospect Trading 111 (Pty) Ltd, Bosasa Development Centres (Pty) Ltd, and Black Rox Security Intelligence Services (Pty) Ltd (all in liquidation), by way of public auction, public tender or private contract, as contemplated in section 386(4)(h) of the Companies Act.

2. The applicants' powers are extended in terms of section 386(5), read with section 388, of the Companies Act authorising them to sell all of the immovable properties belonging to Bosasa Properties (Pty) Ltd (in liquidation), by way of public auction, public tender or private contract, as contemplated in section 386(4)(h) of the Companies Act.¹⁰

3. The assets referred to in paragraphs 1 and 2 above shall be sold in consultation with and with the consent of the board of African Global Holdings (Pty) Ltd, African Global Operations

¹⁰ Paragraph 2 of the Bhoola AJ order was subsequently varied by the insertion of the words 'and African Global Operations (Pty) Ltd (in liquidation)' after the words 'Bosasa Properties (Pty) Ltd (in liquidation)'.

(Pty) Ltd (in liquidation) and the respective boards of its subsidiaries referred to in paragraphs 1 and 2 above.’

[17] The liquidators initially instructed the auctioneer to sell the majority of the six Bosasa companies’ assets by way of public auction on 26 and 27 November 2019. The dates of the intended auction sale were then changed to 4-6 December 2019. Other than for the sale of certain movable assets,¹¹ Holdings and the directors objected to the sale of the other assets by public auction at the end of November or in December, maintaining that they had not consented to the sale thereof as required in terms of the Bhoola AJ order. The liquidators’ attorneys advised their attorneys that there was no reason for the sale by public auction not to proceed and that they would be proceeding with the advertisement and sale of the assets. The appeal was argued in the Supreme Court of Appeal on 15 November 2019.

[18] On 20 November 2019, Holdings’ attorneys addressed a lengthy and comprehensive letter to the liquidators’ attorneys, commencing by stating that they ‘address this letter on the instructions of the directors of African Global Holdings (Pty) Ltd (“Holdings”)’. They referred to the Mudau J, and Bhoola AJ orders extending the liquidators’ powers and the letter continued thus:

‘We are instructed that there is no plausible reason to rush the disposal of the remaining assets. The liquidators first engaged our clients on the application for the extension of powers in the first half of 2019. It was only after the master refused to grant his or her consent to the extended powers by virtue of the pending SCA appeal that the liquidators approached the directors for their consent granting such extension. The first drafts of the proposed application only surfaced in July 2019 and the application itself was only issued on 12 September 2019. The remaining assets have been preserved and secured since February 2019 and the liquidators have given rational reasons for the sudden need to urgently dispose of the remaining assets.

The appeal brought by the liquidators against the Order of Ameer AJ was heard by the Supreme Court of Appeal on Friday 15 November 2019. In all likelihood, judgment will be given by the appeal court before the end of this year. Once the judgment is handed down either the liquidators, alternatively the directors, will be permitted to take control of the various

¹¹ The directors consented to the sale of the firearms, equipment and furniture in respect of the repatriation and youth centres, equipment to the Department of Correctional Services and the shareholding in Ntsimbintle.

companies and make decisions regarding the disposal of the assets of those companies. The liquidators may be permitted to dispose of the assets without the consent of the directors or *vice versa*. The directors may be inclined to sell the assets in a different manner to that which the liquidators have proposed (by way of auction) if the appeal is dismissed (such as sale to private buyers and not by way of auction at a forced sale value). For this reason alone, it would be unreasonable to insist that the sale take place this year before the judgment is handed down.'

[19] On 22 November 2019, this Court delivered its judgment, upholding the appeal and altering the Ameer AJ order to one dismissing the application with costs, including those of two counsel, with the effect that the Bosasa companies remain in a creditor's voluntary winding-up. Holdings nevertheless demanded that the liquidators do not proceed with the three-day public auction of the assets of the six Bosasa companies scheduled to take place from 4 to 6 December 2019, maintaining that paragraph 3 of the Bhoola AJ order remains operative and that it and the directors had not consented to the scheduled public auction. The liquidators refused to accede to its demand. On 3 December 2019, Holdings, Sun Worx and Kgwerano caused the business rescue application to be issued. Holdings still demanded that the public auction be cancelled, also maintaining that that application had suspended the liquidation proceedings, including the scheduled public auction in terms of s 131(6) of the Companies Act, but the liquidators steadfastly refused to accede to the demand.

[20] The public auction commenced on 4 December 2019 and continued until 6 December 2019. The total value realised pursuant to the auction and sale of most of the six Bosasa companies' assets amounted to R113,048,407.00 in circumstances where the estimated forced sale market value of the realised assets amounted to R89,803,295.00. Holdings, Sun Worx and Kgwerano then brought the auction application, wherein they sought and obtained the relief set out in paragraph 4 *supra*.

[21] The auction application and appeal are premised on two grounds: First, the liquidators were statutorily prohibited from proceeding with the auction and any subsequent sales of the assets of the Bosasa companies due to a suspension of the Bosasa liquidation proceedings in terms of s 131(6) of the Companies Act, because the application for business rescue was 'made' on 3 December 2019, which was prior

to the commencement of the auction on 4 December 2019. This ground raises two questions: (a) when is a business rescue application ‘made’ within the meaning of s 131(6); and (b) whether the business rescue application *in casu* was indeed ‘made’ within the meaning of s 131(6). These questions raise the proper interpretation of s 131(6). The findings in respect of these questions may well be dispositive of the business rescue appeal. The second ground upon which the auction application and appeal are premised is that the liquidators were not clothed with the requisite power or authority to sell the assets on auction at the time when the auction was held or thereafter, because they were provisional liquidators, the directors have not consented to the public auction as contemplated in paragraph 3 of the Bhoola AJ order and the second meeting of creditors has not yet been held. This ground raises the interpretation of paragraph 3 of the Bhoola AJ order.

[22] The high court held that the liquidators were legally prevented from proceeding with the auction and any subsequent sales of the Bosasa assets due to the business rescue application having been ‘made’ on 3 December 2019 prior to the auction, which triggered the suspensions of the Bosasa companies’ respective liquidation proceedings in terms of s 131(6) of the Companies Act. It also held that Holdings and the directors did not consent to nor, on a proper interpretation of paragraph 3 of the Bhoola AJ order, were the liquidators clothed with the requisite power or authority to sell the assets on auction at the time when it was held. It accordingly granted the relief sought in the auction application. The business rescue application was dismissed on its merits.

[23] Section 131(1) of the Companies Act provides that ‘[u]nless 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’. Section 131(2) provides that ‘[a]n 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’.¹² In addition, s 131(3) provides that ‘[e]ach affected person has a right to

¹² The ‘Commission’ referred to is the Companies and Intellectual Property Commission established by s 185. Affected persons are defined in s 128(1)(a)(i), (ii) and (iii) as a shareholder or creditor of that company and include any registered trade union representing employees or each of the individual

participate in the hearing of an application in terms of this section'. Furthermore, s 131(6) provides that '[i]f liquidation proceedings have already been commenced by or against the company at the time an application is *made* in terms of subsection (1), the application will suspend those liquidation proceedings until (a) the court has adjudicated upon the application; or (b) the business rescue proceedings end, if the court makes the order applied for'. Moreover, s 132(1) provides that '[b]usiness rescue proceedings *begin* when- (a) the company- (i) files a resolution to place itself under supervision in terms of section 129(3); or (ii) applies to the court for consent to file a resolution in terms of section 129(5)(b); (b) an affected person *applies* to the court for an order placing the company under supervision in terms of section 131(1); or (c) a court makes an order placing a company under supervision in terms of section 131(7).¹³

[24] There are conflicting high court judgments on when a business rescue application is 'made' within the meaning of s 131(6) of the Companies Act. What some considered constituting the 'making' of a business rescue application are the issue, service and prescribed notification thereof,¹⁴ and others the mere lodging of the business rescue application with the registrar and the issue thereof.¹⁵ For the reasons that follow, I subscribe to the interpretation that a business rescue application must be issued, served on the company and the Commission, and each affected person must be notified of the application in the prescribed manner, to meet the requirements of s 131(6) in order to trigger the suspension of liquidation proceedings that have already commenced.

employees. Regulation 124 of the Company Regulations, 2011, published under GN 351 in GG 34239 of 26 April 2011 provides that '[a]n applicant in court proceedings, who is required, in terms of either section 130(3)(b) or 131(2)(c), to notify affected persons that an application has been made to a court, must deliver a copy of the court application, in accordance with regulation 7, to each affected person known to the applicant.

¹³ Emphasis added.

¹⁴ *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2013 (5) SA 444 (GNP) para 16, *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC; Joubert v Pro Wreck Scrap Metal CC and Others* 2013 (6) 141 (KZP) paras 8-11, *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2014 (3) SA 90 (GP) para 19, *Standard Bank of South Africa Ltd v Gas 2 Liquids (Pty) Ltd* 2017 (2) SA 56 (GJ).

¹⁵ *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC) para 29, which was followed by the high court in this instance.

[25] Section 131(6), read with the provisions of ss 131(1) to (4) and 132(1)(b), must be interpreted in accordance with the well-known principles of interpretation.¹⁶ Those principles were recently thus summarised in *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* (264/2019) ZASCA 16 (25 March 2020):¹⁷

‘It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The approach is as applicable to taxing statutes as to any other statute. The inevitable point of departure is the language used in the provision under consideration.’

[26] This Court elaborated further on the context for the interpretation of statutes, thus:¹⁸

‘The difference in the genesis of statutes and contracts provides a different context for their interpretation. Statutes undoubtedly have a context that may be highly relevant to their interpretation. In the first instance there is the injunction in s 39(2) of the Constitution of the Republic of South Africa, 1996 . . . that statutes should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. Second, there is the context provided by the entire enactment. Third, where legislation flows from a commission of enquiry, or the establishment of a specialised drafting committee, reference to their reports is permissible and may provide helpful context. Fourth, the legislative history may provide useful background in resolving interpretational uncertainty. Finally, the general factual background to the statute, such as the nature of its concerns, the social purpose to which it is directed and, in the case of statutes dealing with specific areas of public life or the economy, the nature of the areas to which the statute relates, provides the context for the legislation.’

[27] The word ‘made’ is the past participle of the word ‘make’. The dictionary meaning of the verb ‘make’ includes ‘bring about or perform; cause’.¹⁹ But, as was

¹⁶ *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, and approved by the Constitutional Court in inter alia *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) para 29. Also see *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

¹⁷ *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* ZASCA 16 (25 March 2020), para 8. (Footnote omitted.)

¹⁸ *Ibid* para 17. (Footnotes omitted.)

¹⁹ *Concise Oxford English Dictionary* (Twelfth Edition).

said in *Natal Joint Municipality Pension Fund v Endumeni Municipality*,²⁰ '[m]ost words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise'. And in *Plaaslike Oorgangraad, Bronkhortspruit v Senekal*,²¹ '. . . dat mens jou nie moet blind staar teen die swart-op-wit woorde nie, maar probeer vasstel wat die bedoeling en implikasies is van dit wat gesê is. Dit is juis in hierdie proses waartydens die samehang en omringende omstandighede relevant is'.²²

[28] That is also true of the words 'application is made' in s 131(6), 'apply' in s 131(1) and 'applies' in s 132(1)(b) of the Companies Act. However, on a proper interpretation of the word 'made' in isolation, in the context of s 131 as a whole (especially subsections 131(1) to (3)), in the context of the Companies Act as a whole (especially the nature and purpose of business rescue proceedings *vis-à-vis* those of winding up proceedings as well as s 132(1)(b)), and the apparent purpose to which s 131(6) is directed, its meaning becomes clear: The business rescue application must be issued, served on the company and the Commission, and all reasonable steps must have been taken to identify affected persons and their addresses and to deliver the application to them, to meet the requirements of s 131(6) in order to trigger the suspension of the liquidation proceedings.

[29] Liquidation proceedings are strictly proceedings to constitute a *concursum creditorum*. The liquidation process continues until the company's affairs have been finally wound up, and the company is dissolved.²³ Whereas, '[b]usiness rescue is a process aimed at avoiding the liquidation of a company if it is feasible. There are two routes through which a company may enter business rescue, namely, by way of a resolution of its board of directors (s 129(1)) or by way of a court order (s 131(1))'.²⁴ The purpose to which s 131(6) is directed is to suspend liquidation proceedings until

²⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 25.

²¹ *Plaaslike Oorgangraad van Bronkhortspruit v Senekal* 2001 (3) SA 9 (SCA) para 11.

²² See the case of *Elan Boulevard (Pty) Ltd v Fryn Investments (Pty) Ltd* [2018] ZASCA 165; 2019 (3) SA 441 (SCA) para 16 footnote 6 where it has been loosely translated as: 'One should not stare blindly at the black-on-white words, but try to establish the meaning and implication of what is being said. It is precisely in this process that the context and surrounding circumstances are relevant.'

²³ *Richter v ABSA Bank Limited* [2015] ZASCA 100; 2015 (5) SA 57 (SCA) para 10.

²⁴ *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* [2015] ZASCA 76; 2015 (5) SA 63 (SCA); [2015] 3 All SA 274 (SCA) para 8.

the court has adjudicated upon the business rescue application or the proceedings end.

[30] Significant consequences ensue upon the commencement of liquidation proceedings. As was said in *Standard Bank of South Africa Ltd v Gas 2 Liquids (Pty) Ltd*:²⁵

[22] Provisional liquidators have, in terms of the Act, those powers statutorily granted to them, those which the Master may specially confer and those which they are granted by the court. They cover a wide range of activities. These may include the carrying on of a business, institution or defence of legal proceedings and the sale (or even the acquisition) of assets. Pursuant to the exercise of such powers, the provisional liquidator may operate banking accounts, receive and disburse funds, remunerate employees, conclude contracts and generally carry out the duties of the directors of the company in liquidation.

[23] Where there is no service upon the provisional liquidator of the application for business rescue, the provisional liquidator may have absolutely no knowledge of that business-rescue application. In fact, knowledge alone would be insufficient. The provisional liquidator is entitled to service in terms of section 131 of the Act. Absent such service, the provisional liquidator does not officially know that he or she is “suspended” in his or her duties and powers, if such suspension of the liquidation proceedings were to eventuate solely by reason of lodgement of papers at court and the issue of a case number.

[24] It may be that service upon the company/liquidator, upon the Commissioner and notification to affected parties may take quite some time. In fact, respondent’s counsel informed me that such service and notification need only take place “in due course”. And while the course time ebbs and flows, the provisional liquidator is carrying out his or her duties and exercising his or her power in ignorance. Money may go in and out, employees may report for duty or be sacked, and legal proceedings may be commenced or terminated. All this should not be permitted or implemented by a provisional liquidator who is suspended because the liquidation proceedings are suspended. . . . He or she may not do anything which may impact upon the business rescue application. But the provisional liquidator would continue to carry out his or her duties and exercise his or her powers where there has been no service of the business rescue application upon the provisional liquidator. Lodgement of papers at court and issue of a case number does not mean that anyone other than the applicant, the messenger and the individual clerk in the office of the registrar has knowledge that the provisional liquidator should do nothing further because the liquidation proceedings are suspended.

²⁵ *Standard Bank of South Africa Ltd v Gas 2 Liquids (Pty) Ltd* 2017 (2) SA 56 (GJ).

[25] Such a situation cannot be allowed to eventuate. It cannot be that mere lodgement of papers and issue of a case number is sufficient to trigger a suspension. As I have pointed out, if that were the case, a provisional liquidator may be acting without authority (and perhaps unlawfully) in a multiplicity of respects. That cannot have been the intention of the legislature. The question would then also arise as to when. . . where. . . why and by whom these unauthorised actions of a provisional liquidator are to be undone and with what consequences to third parties or to the company whose liquidation is suspended but which is not yet (and may never be) in business rescue.²⁶

[31] In *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk*,²⁷ it was held that the purpose of a summons or notice of motion is to involve a respondent in a lawsuit. Only when a provisional liquidator and the Commission are served with a business rescue application and affected persons have been notified thereof will they thus be involved in or drawn into the business rescue application proceedings. Until then, they remain unaffected in law. It will give effect to the purpose of s 131(6) to suspend liquidation proceedings only where the application for business rescue has been publicly and formally (by its issue, service on the company and the Commission, and notification to each affected person) been 'made'. An interpretation that the word 'made' in s 131(6) is used to denote the mere issuing of the business rescue proceedings and thereby triggering the suspension of the liquidation proceedings, in my view, results in absurdity, militates against logic, leads to an insensible or unbusinesslike result, and undermines the purpose of the section.

[32] By analogy, in *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Others*²⁸ and in *Pan African Shopfitters (Pty) Limited v Edcon Ltd and Others*,²⁹ the word 'initiated' used in s 129(2)(b) of the Companies Act, which provides that a resolution to begin business rescue proceedings and place a company under supervision 'may not be adopted if liquidation proceedings have been initiated by or against the company', was interpreted to mean that the liquidation proceedings must be served on the company, not merely issued, to meet the requirements of the section.

²⁶ See also *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC; Joubert v Pro Wreck Scrap Metal CC and Others* 2013 (6) 141 (KZP) para 11.

²⁷ *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780E-F.

²⁸ *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Others* 2019 (6) SA 185 (GJ).

²⁹ *Pan African Shopfitters (Pty) Ltd v Edcon Limited and Others* [2020] ZAGPJ 158 (10 July 2020).

[33] In *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others*,³⁰ this Court interpreted the word 'initiate' used in a court order granting an interdict pending certain review proceedings that were intended to be launched on condition that it be initiated by no later than a certain date, to mean not only the filing of the review application papers with the registrar and the issue thereof but also service thereof. In reaching that conclusion, this Court *inter alia* placed reliance on *Mame Enterprises (Pty) Ltd v Publications Control Board*,³¹ wherein it was held that it was manifest from rule 6 of the Uniform Rules of Court and from the contents of Form 2(a) thereof that the giving of notice to the respondent in a case in which relief is claimed against him is an essential first step in an application on notice of motion; and on *Tladi v Guardian National Insurance Co Ltd*,³² wherein it was held that an application, which was required to have been made within a period of 90 days as contemplated in s 14(3) of the Motor Vehicle Accidents Act 84 of 1986, could not be considered to have been made if it had merely been issued but not served.

[34] In *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC; Joubert v Pro Wreck Scrap Metal CC and Others*,³³ it was held that the reasoning in judgments, which held that applications contemplated in similar legislation governing claims for damages arising from personal injuries caused by motor vehicle accidents could only be considered to have been made within the time periods prescribed in such legislation if such applications had been filed with the registrar and served, 'is both relevant and apposite to a consideration and interpretation of the words "apply", "application is made" and "applies" in s 131(1), s 131(6) and s 132(1)(b) of the Companies Act, with reference to when a business rescue application may be considered to have been made'.³⁴

³⁰ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) paras 14-20.

³¹ *Mame Enterprises (Pty) Ltd v Publications Control Board* 1974 (4) SA 217 (W) at 220B.

³² *Tladi v Guardian National Insurance Co Ltd* 1992 (1) SA 76 (T) at 80B.

³³ *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC; Joubert v Pro Wreck Scrap Metal CC and Others* 2013 (6) 141 (KZP) para 9.

³⁴ The authorities referred to are *Fisher v Commercial Union Assurance Co Of SA Ltd*, 1977(2) Sa 499 (C); *Peters v Union and National South British Insurance Co Ltd*, 1978(2) SA 58 (D) and *Tladi v Guardian National Insurance Co Ltd*, 1992(1) SA 76 (T).

[35] This brings me to the question whether the business rescue application was indeed 'made' within the meaning of s 131(6) as set out above, on 3 December 2019, thereby suspending the liquidation proceedings prior to the auction. The answer is no.

[36] In *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd*,³⁵ this Court said:

'[10] Starting with basic principles, in terms of s 131(2)(a) of the Act an application for business rescue must be served on the company or closed corporation. Where it is already being wound up, whether provisionally or finally, that means that the persons on whom it must be served, as representing the company, are its liquidators. That necessarily follows from the fact that, upon the compulsory winding-up of a company, its directors (read members in the case of a close corporation) are deprived of their control of the company, which is then deemed to be in the custody or control of the Master until the appointment of liquidators. Thereafter it is in the custody or control of the liquidators.

[12] It is apparent from the provisions of s 131 that the company that is the subject of the business rescue application is entitled to oppose it. At the time the application is made in relation to a company under provisional or final winding-up, its affairs will be in the hands of the liquidators. On ordinary principles it seems obvious that liquidators, whether provisional or final, faced with such an application should be entitled either to support or oppose the application depending upon their judgment as to the interests of the company and its creditors.

[13] Furthermore, as a matter of principle, when a party is cited in legal proceedings it is entitled without more to participate in those proceedings. The fact that it was cited as a party gives it that right. . . . '

[37] The auction application and the business rescue application needed to have been served on each of the joint liquidators of each of the six Bosasa companies. They represent the Bosasa company in liquidation in respect of which they were appointed. Furthermore, each of them was cited as a respondent in the auction application and business rescue applications. They, in terms of s 382(1) of the 1973 Companies Act, 'shall act jointly in performing their functions as liquidators and shall be jointly and severally liable for every act performed by them'. Knowledge of the business rescue application would be insufficient. The Commission is one of the regulatory agencies

³⁵ *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd* [2019] ZASCA 7; 2019 (4) SA 532 (SCA). (Footnote omitted.)

established under Ch 8 of the Companies Act and ‘has a direct and substantial interest in any order that the court might make’.³⁶ Hence, there is a statutory obligation on an applicant to cause a business rescue application to be served on it.

[38] Each affected person – a shareholder or creditor of the company in liquidation, any registered trade union representing employees of that company or each of the individual employees – is entitled to oppose or support the business rescue application. That necessarily follows from the right afforded to each of them in terms of s 131(3) to participate in the hearing of the business rescue application. Each should have been notified of the business rescue application in terms of s 131(1)(b) in the prescribed manner.

[39] The service and notification requirements set out in s 131(2) of the Companies Act are not merely procedural steps. According to *Taboo*, [t]hey are substantive requirements, compliance with which is an integral part of making ‘an application for an order in terms of s 131(1) of the Companies Act’.³⁷ Strict compliance with those requirements is required because business rescue proceedings can easily be abused. As this Court noted in *Pro-Wiz*, ‘[i]t has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted’.³⁸

[40] On a proper conspectus of the papers, it cannot be said that there has even now been compliance, or even substantial compliance, with the service and notification prescripts s 131(2) of the Companies Act and the Regulations. First, the business rescue application ought to have been served by the sheriff on each joint liquidator of each of the six Bosasa companies in the manner provided for in rule 4(1)(a) of the Uniform Rules of Court.³⁹ It is a substantive Form 2(a) application, and

³⁶ *Engen Petroleum (Pty) Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ) para 15.

³⁷ *Taboo*, para 11.3.

³⁸ *Pro-Wiz* para 22.

³⁹ Rule 4(1)(a) of the Uniform Rules of Court provides that ‘[s]ervice of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application

not an ancillary or interlocutory application, which, in terms of rule 4(1)(aA),⁴⁰ may be served upon an attorney representing a party in proceedings already instituted. In general, rule 4(1)(aA) applies to proceedings already instituted so that it in effect applies to ancillary and interlocutory applications.⁴¹ On 3 December 2019, the sheriff only served it on Mr Cloete Murray, and a candidate attorney delivered it by hand to Mr Ralph Lutchman, who are joint liquidators of each of the six Bosasa companies. The sheriff did not serve it on the many other joint liquidators. Furthermore, it is not the directors' or Holdings' case that Mr Murray N.O. (or Messrs Murray and Lutchman N.N.O.) were authorised by each other liquidator to accept service of the business rescue application on their behalf.

[41] Second, it is common cause that the Bosasa Group had approximately 4 500 employees as of 12 February 2019, when the directors of Holdings and the Bosasa companies passed the special resolutions, which were filed with the Commission on 14 February 2019, when the creditors' voluntary winding-up of each of the Bosasa companies commenced. Its workforce was thereafter reduced to 50 employees as at 29 November 2019. On 3 December 2019, only 29 employees were notified by electronic means of the business rescue application. It is not stated that all the employees of the Bosasa companies have been notified of the business rescue application, nor is any explanation proffered why the full staff compliment of 50 employees was not notified. Third, it is not stated what steps, if any, were taken to identify affected persons and their addresses and to deliver the business rescue application to them in order for the high court to have considered whether all reasonable steps had been taken to identify affected persons and their addresses and to deliver the application to them.

[42] I conclude, therefore, that the business rescue application was not 'made' within the meaning of s 131(6) of the Companies Act, and the suspension of the liquidation

proceedings shall be effected by the sheriff . . .'. It continues to provide ways in which this is to be achieved (Rule 4(1)(a)(i)-(ix).

⁴⁰ Rule 4(1)(aA) provides that '[w]here the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.'

⁴¹ *BHP Billiton Energy Coal South Africa Limited v Minister of Mineral Resources and Other* 2011 (2) SA 536 (GNP) para 25; *Finishing Touch* para 24; *ABM Motors v Minister of Minerals and Energy and Others* 2018 (5) SA 540 (KZP) para 26.

proceedings, including the public auction and any subsequent sales, was not triggered in terms of the section. My findings and conclusions thus far are dispositive of the business rescue appeal. Instead of dismissing it, the high court ought to have struck the business rescue application from the roll; it was not made.

[43] I now turn to the second ground upon which the auction application is premised. That is the contention that the liquidators did not have the consent of the directors or were not clothed with the requisite power or authority to sell the assets of the six Bosasa companies by public auction at the time when the auction was held or at any time thereafter. As I have mentioned, this question calls for the proper interpretation of the Bhoola AJ order.

[44] Very recently, this Court in *HLB International (South Africa) v MWRK Accountants and Consultants*,⁴² held that the now well established test on the interpretation of court orders is that the starting point is to determine the manifest purpose of the order, and that in interpreting the order the court's intention is to be ascertained primarily from the language of the order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. The manifest purpose of the order is to be determined by also having regard to the relevant background facts which culminated in it being made.

[45] The proper interpretative analysis leads to the inevitable conclusion that, although the Bhoola AJ order did not expressly state that its paragraph 3 shall lapse and be of no further force and effect immediately upon the granting of an order by the Supreme Court of Appeal in the liquidators' appeal against the Ameer AJ order, the intention of the high court in granting the Bhoola AJ order by consent between the liquidators and the directors was to extend the powers of the liquidators by authorising them to sell the movable and immovable assets of the six Bosasa companies, but subject to consultation with and the consent of the directors pending the outcome of the appeal. The order and the high court's reasons for giving it cannot be read as a

⁴² *HLB International (South Africa) v MWRK Accountants and Consultants* [2022] ZASCA 52 paras 26-27.

whole to ascertain its intention since it was a consent order. But its manifest purpose becomes crystal clear when the order is placed in proper perspective, and the context in which it was made is considered.⁴³

[46] When the purpose of and the context within which the Bhoola AJ order was made is considered - the dispute between the directors the liquidators and the interim arrangement pending the finalisation of the appeal agreed upon as a result thereof; the Tsoka J interim order; the directors' own version set out in their founding affidavit in the intervention application; the Mudau J order; the *consensus* reached amongst the liquidators and the directors that the assets of the six Bosasa companies should be sold expeditiously and that the sale thereof could not await the final appointment of liquidators and the second meeting of creditors should the liquidators' appeal be successful; the liquidators' approach to the Master to extend their powers and to authorise them to sell the assets of the six Bosasa companies and the Master's refusal to entertain their request by virtue of the pending appeal; the liquidators' subsequent approach to the directors for their consent to such an order being obtained from the high court (which they gave subject to the assets being sold in consultation with them and subject to their consent); the liquidators' assertions in their affidavit in support of the second application to extend their powers which were met with the approval of the directors; and the letter of the attorneys representing the directors of Holdings dated 20 November 2019 setting out the purpose and intention of the order - it becomes manifestly clear that paragraph 3 of the Bhoola AJ order was at all material times intended to lapse when the Supreme Court of Appeal gave judgment in the appeal, which it did on 22 November 2019. The fundamental *raison d'être* for paragraph 6 of the Mudau J order and paragraph 3 of the Bhoola AJ order had then fallen away.

[47] Clearly, it could never have been the intention of the high court, as the directors would have it, to have ordered the liquidators never to sell the assets of the six Bosasa companies without consultation with and without obtaining the directors' consent should the liquidators be successful in their appeal. Indeed, such a conclusion would

⁴³ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 14; *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* [2010] 4 All SA 398 (SCA); 2011 (4) SA 149 (SCA) paras 43 *et seq.*

be absurd. It would ignore the extended powers granted to the liquidators and the statutory prescripts applicable to the liquidation process that ultimately results in the company's demise. The auction appeal, therefore, should be upheld.

[48] What remains to decide is the award of costs made by the high court in the business rescue application. It awarded the successful respondents (first to thirty-ninth respondents in this appeal) only 50% of their costs. In doing so, the high court stated that 'they crossed the line in the litigation and they acted unlawfully in two major respects (disregarding the Bhoola AJ order and the business rescue application)'. In departing from the general rule that costs should follow the event and that the successful party is awarded costs as between party and party⁴⁴ and depriving them of 50% of their costs, the high court failed to exercise its discretion judicially. First, the liquidators attempted to establish that the sudden business rescue application was issued merely to stifle the liquidation proceedings and thus constitutes abuse. Second, they did not act unlawfully in either of the two respects mentioned by the high court; their interpretation of the Bhoola AJ order turned out to be correct, and the business rescue application was not 'made' and, therefore, did not trigger the suspension of the liquidation proceedings as contemplated in s 131(6) of the Companies Act. Therefore, the high court should not have deprived the liquidators of 50% of their costs of opposing the business rescue application.

[49] In the result, the following order is made:

1. The auction appeal (case no. 1088/2020) is upheld with costs, including those of two counsel for the first to thirty-ninth appellants and the fortieth appellant.
2. Paragraphs 7, 8, 9, 10 and 11 of the order of the high court are set aside and replaced with the following:
'The application under case no. 44827/19 is dismissed with costs, including those of two counsel for the first to thirty-ninth respondents and the first intervening party, the Commissioner for the South African Revenue Services.'
3. Save to the extent reflected in in paragraph 3.1 hereof, the first, second and third appellants' business rescue appeal (case no. 1135/2020) against paragraphs 16,

⁴⁴ See *LAWSA 2* (ed) Vol 3 Part 2 paras 292 and 320.

17 and 18 of the high court's order is dismissed with costs, including those of two counsel for the first to thirty-ninth respondents and the fortieth respondent.

3.1 Paragraph 16 of the order of the high court is set aside and replaced with the following:

'The business rescue application is struck from the roll.'

3.2 The first to thirty-ninth and the fortieth respondents' appeals against paragraph 17 of the high court's order are upheld.

3.3 Paragraph 17 of the order of the high court is set aside and replaced with the following:

'The applicants are ordered to pay the respondents' costs of the business rescue application, such costs are to include the costs of two counsel.'

P.A. MEYER
ACTING JUDGE OF APPEAL

Appearances:

Appeal (case no. 1088/2020)

1st to 39th Appellants' counsel: KW Lüderitz SC (assisted by P Lourens)
Instructed by: MacRobert Attorneys, Brooklyn, Pretoria
C/o Lovius Block Inc., Bloemfontein

40th Appellant's counsel: HGA Snyman SC (assisted by K Kollapen)
Instructed by: VZLR Inc., Pretoria
C/o MacIntire Van der Post, Bloemfontein

1st to 3rd Respondents' counsel: F Joubert SC (assisted by J de Vries)
Instructed by: Goodes & Seedat Attorneys,
Sandton, Johannesburg
C/o Honey Attorneys, Bloemfontein

Appeal (case no. 1135/2020)

1st to 3rd Appellants' counsel: F Joubert SC (assisted by J de Vries)
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1st to 39th Respondents' counsel: KW Lüderitz SC (assisted by P Lourens)
Instructed by: MacRobert Attorneys, Brooklyn, Pretoria
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40th Respondent's counsel: HGA Snyman SC (assisted by K Kollapen)
Instructed by: VZLR Inc., Pretoria
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