

**VOLUNTARY BUSINESS RESCUE PROCEEDINGS: TO INITIATE,
TO BEGIN, OR TO COMMENCE LIQUIDATION PROCEEDINGS –
IS THERE A DIFFERENCE?**

OPSOMMING

**Vrywillige ondernemingsreddingsverrigtinge: Die inisieer, begin, of aanvang van
likwidasiEVERRIGTINGE – Is daar ’n verskil?**

Ondernemingsreddingsverrigtinge kan begin word deur ’n hofbevel of ’n besluit van die direksie. Artikel 129(2)(a) van die Wet op Maatskappye verbied egter ’n direksie om ’n maatskappy onder ondernemingsredding te plaas indien daar reeds stappe geneem is om die maatskappy in likwidasie te plaas. Omdat artikel 129(2)(a) verwys na likwidasiEVERRIGTINGE wat teen die maatskappy “initiated” is, ontstaan die vraag of die term “initiated” dieselfde betekenis het as “commenced”. Beide die houe in *Mouton v Park 2000 Development 11 (Pty) Ltd* 2019 6 SA 105 (WCC) en *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd* 2019 6 SA 185 (GJ) het die betekenis van “initiated” en “commenced” oorweeg. Volgens hierdie twee uitsprake verwys “initiated” na stappe wat geneem word voordat ’n formele regsproses begin. “Commenced” verwys dan na die formele aanvang van ’n regsproses. In hierdie aantekening word die betekenis van hierdie begrippe aan die hand van regspraak ondersoek. Die praktiese probleme veroorsaak deur die houe se verskillende benaderings tot die interpretasie van hierdie begrippe word ook uitgelig.

1 Introduction

Business rescue proceedings can start either voluntarily by means of a resolution of a company’s board or by the grant of an application for business rescue by a court (s 129, read with s 131, of the Companies Act 71 of 2008 (“the Act”). According to section 131, an affected person may apply to court “... at any time ...” for an order placing the company under supervision and commencing business rescue proceedings in the absence of a resolution in terms of section 129(1). In practice, an application for the liquidation of a company is often followed by an application for business rescue in terms of section 131. Such applications for business rescue are brought by an “affected person” who holds the view that relief in the form of business rescue would be more appropriate than an order for the winding-up and liquidation of a company (for the definition of an “affected person”, see s 128(1)(a); see also *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 2 SA 378 (WCC) para 14), where the court stated that the legislative preference exists in favour of business rescue where appropriate, as it acknowledges the social and economic hardship the liquidation of companies holds for communities and other stakeholders of such companies (see further *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 2012 2 SA 423 (WCC) para 21; *Collard v Jatara Connect (Pty) Ltd* 2018 5 SA 238 (WCC) paras 13–14; *Al Maya International Limited (BVI) v Valley of the Kings Thaba Motswere Proprietary Limited* (unreported), case number EL926/2016, 226/16 of 23 August 2016, [2016] ZAECELLC 5).

The filing of a court application for business rescue subsequent to an application for liquidation holds important practical and legal consequences for the winding-up application.

Section 131(6) of the Act 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.”

In terms of section 131(6), a business rescue application will suspend liquidation proceedings (see also Stoop “When does an application for business rescue proceedings suspend liquidation proceedings?” 2014 *De Jure* 329). The suspension of the liquidation proceedings remains until the merits of the business rescue application are adjudicated and/or the business rescue proceedings end (see s 131(6)(a) and (b); see also *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 2 SA 518 (SCA) (“*Boschpoort*”) para 25; *FirstRand Bank Ltd v Imperial Crown Trading (Pty) Ltd* 2012 4 SA 266 (KZN) (“*Imperial Crown Trading*”) para 21 (*obiter*)).

The focus of this note is on section 129. This provision states that the board may adopt a resolution to place the company in business rescue only if the board has reasonable grounds to believe that the company is financially distressed (see s 129(1)(a)) and there appears to be a reasonable prospect of rescuing the company (see s 129(1)(b)). However, section 129(2)(a) prohibits the adoption of such board resolution “if liquidation proceedings have been initiated by or against the company” (emphasis added; see *Sulzer Pumps (South Africa) (Pty) Ltd v O & M Engineering CC* [2015] JOL 32825 (GP) para 29, where the court explained that business rescue proceedings cannot be utilised for the purpose of avoiding a pending application for the liquidation and winding-up of a company where the objectives of business rescue cannot be achieved). This has the result that courts are often required to adjudicate disputes the outcomes of which centre on whether or not a board resolution to place a company in business rescue has been adopted prior to the initiation of liquidation proceedings. The Act does not define the term “initiated”, which contributes to uncertainty and inconsistency in the application of section 129(2)(a) (see *Davis et al Companies and other business structures* (2019) 266–267). Recently, some judgments were reported relating to the interpretation of section 129(2)(a) and related provisions of the Act. These judgments not only hold significant implications for the interpretation of crucial provisions of chapter 6 of the Act, but are also of great practical importance.

The purpose of this note is to provide a critical analysis of the current legal position in respect of the adoption of a board resolution to place a company in business rescue and the barring of the adoption of such a resolution by the initiation of liquidation proceedings against a company. This is done with reference to the judgments in *Imperial Crown Trading, Mouton v Park 2000 Development 11 (Pty) Ltd* 2019 6 SA 105 (WCC) (“*Mouton*”) and *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd* 2019 6 SA 185 (GJ) (“*Tjeka*”).

In this note I shall demonstrate that the judgments in *Mouton* and *Tjeka* hold important implications for the understanding of the *obiter* comments of the court in *Imperial Crown Trading*. In conclusion, I shall argue that the inconsistent application of the terms “initiated” and “commenced” in judgments such as *Mouton* and *Tjeka* creates legal uncertainty. I shall argue that the court in *Mouton* failed to adopt an interpretation appropriate to the context of the provisions in section 129. This makes it difficult to derive clear principles from the judgment that can be consistently applied to the facts of other similar cases. I shall argue

that the approach adopted in *Tjeka* advances legal certainty and is to be preferred to that adopted in *Mouton*. Although the main focus of this note is on the implications of the judgments in *Mouton* and *Tjeka*, I shall give a brief summary of *Imperial Crown Trading* for ease of reference, because the court in both *Mouton* and *Tjeka* referred to the reasoning adopted in *Imperial Crown Trading*. It is further important to note how the facts and legal questions before the court in *Imperial Crown Trading* differed from the facts and legal questions before the courts in *Mouton* and *Tjeka*.

2 *FirstRand Bank v Imperial Crown Trading*

2.1 *Facts*

The applicant applied for the liquidation of the respondent company. The application was based on the respondent company's inability to pay its debts in terms of section 345(1)(c), read with section 344(f) of the Companies Act 61 of 1973 ("the 1973 Act") (paras 1 and 9). The respondent raised several grounds of opposition to the application, but the most important aspect raised by the respondent company was the postponement of the liquidation application (paras 10 and 13). According to the respondent company, a postponement of the liquidation application would provide it with the opportunity to place the company in business rescue (paras 10 and 13).

2.2 *Judgment*

2.2.1 Factual solvency as a defence to an application for liquidation

A *prima facie* case for a provisional liquidation order is made when a creditor, such as the applicant, demands, without any success, the payment of an outstanding liquidated debt (para 8). Despite the fact that the assets of a company may exceed its liabilities, the company may be liquidated on the basis that it is commercially insolvent in terms of section 345(1)(c) of the 1973 Act (para 8; see also *Boschpoort*).

2.2.2 Section 129(2)

In its *obiter* remarks, the court referred to section 129(2)(a) of the Act (para 17). Section 129(2)(a) provides that the board of a company may not adopt a resolution to place the company in business rescue when liquidation proceedings have already been initiated by or against the company (para 17). According to the court, the words "by" and "against" the company refer to voluntary liquidation proceedings in terms of section 352 of the 1973 Act and liquidation proceedings ordered by a court in terms of section 348 (para 17).

To establish the meaning of "initiated" for purposes of section 129(2)(a), the court referred to the use of the word "commence" in sections 348 and 352 of the 1973 Act and in section 131(6) of the Act. According to the court, it would be anomalous if the word "initiated" in section 129 had a different meaning to the word "commenced" in section 131(6) of the Act (para 17). It would also introduce uncertainty "by virtue of the clear definition of the 'commencement' of proceedings, in section 348 and 352 of the Act 61 of 1973" (para 17).

The effect of section 131(6) is to suspend liquidation proceedings upon a subsequent application for business rescue (para 19; see also *Boschpoort*). This suspension of the liquidation proceedings continues until the business rescue application is adjudicated, or, should relief in the form of business rescue

proceedings be granted, until such business rescue proceedings are ended in terms of section 132(2) (paras 19–20; see also *Boschpoort*). The court stated that although the board of a company's board would be precluded by section 129(2)(a) from placing the company in business rescue while it was being wound up, an affected person could still apply to court for an order placing the company in business rescue (para 22).

3 Mouton v Park 2000 Development 11

3.1 Facts

3.1.1 The parties

The first respondent was Park 2000 Development 11 (Pty) Ltd, a property development company. Renier van Rooyen and his son were the directors of the first respondent (para 9).

The applicant, Mouton, subscribed to debentures in the first respondent (para 5). After the first respondent defaulted on its obligations in terms of the debentures, the applicant obtained judgment against the first respondent (paras 7–8) which he enforced by obtaining a writ of execution against the movable property of the first respondent (para 9). After receiving a *nulla bona* return from the sheriff, the applicant applied for a writ of execution against the immovable property of the first respondent (para 10) and the successful attachment of two immovable properties owned by the first respondent (paras 10–11).

3.1.2 The winding-up application

One day prior to the public auction of the two attached properties, the applicant's attorneys were informed by Meiprops Twee en Twintig (Pty) Ltd, a creditor of the first respondent, of an application for the liquidation and winding-up of the first respondent (para 11). Meiprops Twee en Twintig (Pty) Ltd alleged that it was a creditor that had loaned some R2 359 642 to the first respondent (para 15). It alleged that the first respondent was commercially and factually insolvent and that it would be just and equitable to wind up the first respondent to the benefit of its creditors (para 15).

3.1.3 The placement of the first respondent under voluntary business rescue

Shortly after receiving notification of the liquidation application against the first respondent, the applicant's attorneys were notified that the first respondent had been placed under voluntary business rescue (para 12). Meiprops Twee en Twintig (Pty) Ltd withdrew its application for the liquidation of the first respondent the following day (para 12).

3.1.4 The contradictory affidavits

The Van Rooyens were also the directors of Meiprops Twee en Twintig (Pty) Ltd (para 11). Van Rooyen senior deposed both to the affidavit in support of the liquidation application against the first respondent and to that for the application for business rescue by the first respondent (para 14).

In contrast to the affidavit deposed to on behalf of Meiprops Twee en Twintig (Pty) Ltd, Van Rooyen senior alleged on behalf of the first respondent that although the first respondent was financially distressed, it would be able to trade profitably once it had been placed in business rescue and been afforded

protection against legal proceedings in the form of a moratorium (para 16). The court found the affidavits deposed by Van Rooyen senior to be “mutually contradictory” (para 17).

3.2 *The argument before the court*

Despite the applications for liquidation and business rescue, the first respondent’s properties were sold on public auction for R135 000 and R3,89 million (para 13).

The applicant sought to set aside the voluntary resolution that placed the first respondent in business rescue, on the basis that the resolution was adopted in breach of section 129(2)(a) (paras 104–106). It was argued on behalf of the first respondent that it had been voluntarily placed in business rescue prior to the initiation of liquidation proceedings (para 46). According to this argument, the liquidation proceedings were initiated at the moment when the application was issued by the registrar of the High Court (para 46). As this occurred only after the adoption of a resolution to begin with business rescue, there were no grounds to set aside the resolution based on non-compliance with section 129(2)(a), as the first respondent was placed in business rescue prior to the initiation of liquidation proceedings (para 25).

3.3 *Legal question(s)*

As both business rescue and the liquidation proceedings were launched on the same day, the court had to determine whether liquidation proceedings were initiated prior to the voluntary commencement of business rescue. (para 19). To do so, it had to decide whether the “initiation” of liquidation proceedings in section 129(2)(a) had the same meaning as the word “commence” in sections 348 and 352 of the 1973 Act (para 24). (Item 9(1) of Schedule 5 of the Act provides that chapter 14 of the 1973 Act continues to apply to the winding-up and liquidation of insolvent companies.) Section 348 provides that the liquidation of a company is deemed to “commence” at the time the application is presented to the court, whilst section 352 provides that the voluntary winding-up of a company “commences” at the time a special resolution to that effect has been registered.

3.4 *Judgment*

3.4.1 *The Mouton court’s consideration of the judgment in Imperial Crown Trading*

The court considered the findings relating to the interpretation of section 131(6) made in *Imperial Crown Trading* and emphasised that, as that judgment dealt primarily with section 131(6), the comments in that judgment in respect of the words “commenced” in sections 348 and 352 of the 1973 Act and “initiated” in section 129(2)(a) of the Act were *obiter* (para 53).

The court implied that the judge in *Imperial Crown Trading* had failed to apply the correct principles of statutory interpretation to the relevant provisions in the Act (para 56). The *Mouton* court relied on *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (“*Edumeni Municipality*”) to hold that what was required was an interpretation of the relevant statutory provisions that was “contextual, purposive and commercially sensible” while “having regard for the language which was used therein” (para 57; see 3.5.2 below for comment on the interpretational approach adopted by the court). To

achieve this, the whole of the Act and the 1973 Act must be considered, not only the provisions dealing with business rescue and winding-up (para 57). The court emphasised that, while the purpose of the winding-up provisions in the 1973 Act is to terminate the existence of a company, the purpose of chapter 6 of the Act is, where possible, to save the company from being wound up (para 57; see 3.5.1 below for comment on chapter 14 of the 1973 Act as a “temporary arrangement”).

The court was of the view that the provisions of chapter 14 of the 1973 Act applied only to the winding-up of insolvent companies and that they formed part of a “temporary arrangement” (para 57). In accordance with “a contextual, global interpretation”, the language of the statutory provisions in both the 1973 Act and the Act had to be considered when dealing with the winding-up of companies (para 57).

The court held that the judge in *Imperial Crown Trading* had failed to appreciate the fact that provisions such as sections 348 and 352 of the 1973 Act were “expressly” excluded from the application to the winding-up of solvent companies (para 59). Based on this, the court concluded that the court in *Imperial Crown Trading* “did not arrive at an interpretation of the relevant provisions which was harmonious *ie* which could apply equally in the case of both solvent *versus* insolvent companies” (para 59; see 3.5.3 below for comment on the difference between the winding-up and liquidation of solvent and insolvent companies).

3.4.2 The winding-up of companies in terms of the 1973 Act

The court highlighted that when the provisions of the 1973 Act and the Act are compared, both statutes provide for the winding-up of a company by voluntary means by way of the adoption of a “special resolution of its Board”, or by way of a court order (para 60; see 3.5.5 below for comment on the court’s use of the phrase “special resolution of its Board”).

Depending on whether the winding-up of a company has commenced voluntarily or by way of a court order, the moment when the winding-up of a company commences is the moment when the special resolution is registered, or the moment determined by the deeming provision in section 348 (para 61). The court was further of the view that the purpose of the retrospective effect of the deeming provision in section 348 is to prevent any prejudicial conduct in the time between the filing of application for winding-up and the granting of the provisional or final order (para 62).

3.4.3 The winding-up of companies in terms of the Act

As with insolvent companies, the winding-up of solvent companies can “be effected” either by way of a voluntary resolution of the company or by an order of court (para 63). The court found it “immediately noticeable” that “the empowering provisions which give effect to these modes of winding-up are now omnibus provisions which deal not only with the determination of the moment when the winding-up ‘commences’ but also seek to set out the circumstances, mechanisms and processes in terms of which the winding-ups may be obtained” (para 64; footnote omitted).

The use of the word “begin” in the Act, in contrast with the use of the word “commence” in the 1973 Act, was specifically highlighted as one of the “notable differences” between the provisions in the Act and those of the 1973 Act. In the context of a solvent company, winding-up begins when a resolution is filed in

the event of a voluntary winding-up, while, in the event of a court order, winding-up begins, depending on the circumstances, either when the application is presented to the court or when the court grants such an order (para 65). The court concluded that the word “begin” in the Act carries a similar meaning to the word “commence” in the 1973 Act in that it signals when proceedings, “as a matter of law”, have “formally commenced”, although this was not always the case (*ibid*).

3.4.4 The business rescue provisions in the Act

According to the court, business rescue may begin voluntarily by way of a board resolution or by an order of court (para 66). In relation to the use of the word “begin”, the court remarked that “there appears to be a similar lack of uniformity” (*ibid*). While section 132(1)(a) provides that voluntary business rescue proceedings “begin” only when the resolution which has been taken is filed, section 129(2)(b) provides, in the context of voluntary proceedings, that business rescue “begins” when the company adopts a “special resolution”, but the resolution has “no force or effect until it is filed” (para 67). According to the court, the legislature distinguishes between the beginning of proceedings in a “factual sense”, on the one hand, and when proceedings are deemed to commence in a “legal sense”, on the other hand (paras 67 and 69). The court emphasised that the use of the word “begin” in the Act cannot be equated with the use of the word “commence” in the 1973 Act (para 67). In some instances, the word “begin” may refer to the “factual moment in time” when business rescue proceedings have started, while, in other instances, it refers to the moment when, as a matter of law, proceedings have “commenced” (para 69). The court reached this conclusion after considering the use of the word “commence” in section 131 to connote the moment when business rescue proceedings start as the moment when a court makes an order to place a company under supervision (para 67). However, it should be noted that section 132 provides that business rescue proceedings “begin” when the company files a resolution placing itself under business rescue, or when the company applies to court for permission to file such a resolution, or when an affected person files an application for business rescue (para 68). When a winding-up process is converted into business rescue proceedings, the latter proceedings “begin” only when the court makes an order to this effect (*ibid*).

Section 131(6) of the Act finds application only when an application for business rescue is made after liquidation proceedings have already “commenced” (para 70), while section 129(2)(a) regulates only the position prior to the “commencement” of liquidation proceedings (para 71). Cher J held that the court in *Imperial Crown Trading* had failed to take into consideration that the commencement of liquidation proceedings could connote “the time or moment when a court makes an order, granting liquidation” in terms of the Act (*ibid*). The word “commenced” in section 131(6) does not necessarily carry the same meaning as “initiated” in terms of section 129(2)(a) (para 72). After considering the use of the word “commenced” in both the 1973 Act and the Act, the use of the word “begin” in the context of the winding-up provisions in terms of the Act and its “contradictory” in the provisions dealing with business rescue, the use of the word “initiated” cannot be described as a “linguistic accident”. Therefore, the word “initiated” must carry a different meaning than “commenced” or “begin” (paras 73 and 77). The court also noted that, except for its use in section 129, the word “initiated” is used only in section 79(1)(a) (para 74). To establish the

meaning of “initiate”, the court referred to its ordinary grammatical meaning – to cause or to begin a process (paras 75 and 81). In the interpretation of section 79(1)(a), the court found that the word “initiate” referred to an act “which precedes the publicly formal beginning or “commencement” of the legal process referred therein (liquidation proceedings) *ie* it refers to a pending act or conduct which sets the process in motion” (para 75). The court added that “[s]uch interpretation is supported, in the context of s 79(1)(a), by the phrase in which it appears, which qualifies what that preceding act or conduct is to be and how it is to be effected *ie* the adoption of the necessary resolution” (*ibid*). It provides, essentially, that the legal process of voluntarily winding up a company is put in motion by means of the adoption of a resolution to such effect. However, as we have seen from the preceding discussion, the formal “commencement” of the liquidation process, as a matter of law, occurs only at the moment “when the resolution is filed” (*ibid*).

In conclusion, the court found the word “initiate” to “denote the factual causative action by means of which the legal process which gives rise to the proceedings concerned is put into motion” (para 76). When this meaning is applied to section 129(2)(a), the word “initiated” refers to “conduct by which liquidation proceedings are set in motion” and does not refer to the moment when liquidation proceedings have formally “commenced” (paras 77 and 81). The conduct that sets liquidation proceedings in motion “will depend on the facts and circumstances of each matter” (para 81). The conduct that initiates liquidation proceedings for corporate entities, trusts, or voluntary associations takes the form of the adoption of a resolution to institute such proceedings (*ibid*). According to the court, this approach to the interpretation is supported by section 131(8), which prohibits a company from adopting a resolution placing itself in liquidation before business rescue proceedings have ended (para 82). The court specifically emphasised that this section prohibited the adoption of such a resolution (para 81). The purpose of section 129(2)(b) is to prevent the abuse of resolutions in terms of section 129(2)(a), and this is achieved by stating that the adoption of a business rescue resolution has no legal force or effect unless it is lodged with the Companies and Intellectual Property Commission (para 78).

Following a similar reasoning, the court held that it could not have been the legislature’s intention that liquidation proceedings initiated against a company could be trumped by the adoption of a business rescue resolution in terms of section 129 prior to the filing of the winding-up resolution, or a court application (para 78). The court concluded that “[t]he salient facts of the matters which are before me illustrate why it could never have been intended that a company could only be barred from resolving to place itself under business rescue, even if it knew that the winding-up and liquidation proceedings were imminent or had already ‘initiated’ such proceedings itself after those proceedings had formally ‘commenced’ *ie* after the papers in respect of such proceedings had been filed” (para 79). When natural persons or other entities are involved, the determination of their conduct to initiate liquidation proceedings will be more problematic, but “[f]ortunately, this is not something which I need to decide in this case (which concerns a liquidation application by a corporate entity), nor would it in my view be appropriate or even possible to formulate a general rule or principle in this regard” (para 81).

3.4.5 Application of the provisions to the facts

The court found that the liquidation proceedings had been initiated against the first respondent prior to the adoption of a resolution placing the first respondent

under business rescue (paras 83 and 104). This meant that the liquidation proceedings had been initiated at the moment when the creditor's resolution to launch an application for liquidation had been adopted, as opposed to the moment when the application for liquidation had been filed with the court (paras 83 and 104).

Significantly, the court found that the resolution to place the first respondent under business rescue was not taken in good faith, as there was "no genuine intention to attain the objectives of the Act in regard to business rescue" (para 105). The application was brought to frustrate the enforcement of a judgment obtained by the applicant against the first respondent (*ibid*). In these circumstances, and given the non-compliance with the provisions of section 129(2)(a), the court found that it was just and equitable to set aside the resolution to launch business rescue proceedings (para 106). In the alternative, the court held that the business rescue resolution was not adopted by a properly constituted board of the first respondent, as Van Rooyen senior adopted the resolution in the absence of his son, and accordingly the resolution was a nullity (paras 107 and 108).

3.5 Comment

Relying on *Endumeni Municipality*, the court in *Mouton* found that it was the function of a court to establish the meaning of legislation through a process of interpretation (para 56). In this interpretation, each and every word must be assigned its own ordinary grammatical meaning, unless it is required that a different meaning be attributed to a word or words (paras 56–57). Legislative provisions must also be interpreted in their context and understood as forming part of a whole (para 57). The reason or circumstances for the creation or drafting of the relevant document or provision may be a valuable aid to the interpretation of a provision (in this regard, the purposes stated in section 7, more specifically section 7(k), of the Act, are significant). In conclusion, the court found that the objective of statutory interpretation is to "arrive at a contextual, purposive and commercially sensible interpretation" by "having regard for the language" used (*ibid*). To arrive at a proper interpretation of the relevant statutory provisions, both the 1973 Act and the Act must be read in context and as a whole.

Despite the court's outline of the correct interpretational approach to be applied, the court's interpretation and judgment can be criticised on several fronts, as I shall show below.

3.5.1 The 1973 Act as a "temporary arrangement"

The court's interpretation took into consideration that the application of chapter 14 of the 1973 Act applied only to the winding-up of insolvent companies and was only a "temporary arrangement" (para 58). But the court did not clearly articulate how the "temporary" nature of the application of chapter XIV of the 1973 Act influenced its interpretation of the provisions of the two statutes. However, the court made this remark soon after stating that in order to arrive at an appropriate interpretation, the 1973 Act and the Act must be read as a whole (para 57).

In its interpretation of the winding-up provisions in the 1973 Act and the Act, the court stressed that these provisions should be given an interpretation that was aligned and harmonious. Despite this, the court seemed to have attached less

weight to the wording of the 1973 Act, because of its status as a “temporary arrangement” (see 3.5.2 below). Based on this “temporary arrangement”, the court explained that the provisions dealing with the winding-up of companies should be interpreted in accordance with the winding-up provisions of the Act. This was possibly as a result of the more permanent status of the Act.

I consider it inappropriate to describe the winding-up provisions in the 1973 Act as a “temporary arrangement”, because these provisions remain valid and enforceable legislation which were not repealed by the Act. Other than the repeal of certain specific provisions, the winding-up of insolvent companies has, prior to and after commencement of the Act on 1 May 2011, been dealt with in terms of the 1973 Act. It would be inappropriate for the court to attribute a meaning to these provisions, because of their “temporary” nature, different to that given to them prior to the commencement of the Act.

3.5.2 Sections 5 and 7 of the Act

In the *Endumeni Municipality* judgment, the Supreme Court of Appeal outlined the principles and objectives of legal interpretation. The court in *Mouton* relied on this to find that the court in *Imperial Crown Trading* had failed to consider these principles and so did not arrive at a proper interpretation and meaning of the relevant statutory provisions (paras 56–59).

Although the court’s reliance on *Endumeni Municipality* as authority cannot be faulted, it is disappointing that the court did not seize the opportunity to refer expressly to sections 5 and 7 of the Act, which pertinently deal with its interpretation and purposes. Section 5(1) requires that the Act “must be interpreted and applied in a manner that gives effect to the purposes set out in section 7”. One of the purposes is to “provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders” (s 7(k) of the Act).

Given the court’s emphasis on the correct approach to statutory interpretation, one would have expected the court to refer to and apply these provisions of the Act. Section 5 requires that the provisions of the Act and the 1973 Act must be interpreted in a manner that gives effect to the purposes of both statutes, subject to the condition that the interpretation and application of the provisions of one do not violate the provisions of the other. When factual scenarios arise where both the provisions of the 1973 Act and the Act must be interpreted and applied to resolve a dispute, and where an apparent inconsistency arises between the provisions of both statutes, regard must be had to section 7(4) of the Act. It states that when an inconsistency between the Act and other national legislation arises, both pieces of legislation must be applied concurrently, to the extent possible, by adopting and applying an interpretation that complies with both pieces of legislation (s 7(4)(a)). If such an approach is not possible, the interpretation and application of the provisions of certain pieces of legislation mentioned in section 5(4)(b) enjoy priority over the provisions of the Act. As they are not mentioned in section 5(4)(b), the provisions of the 1973 Act do not enjoy such priority (see s 7(4)(b) of the Act).

In addition, I should highlight that the court emphasised that, in *Imperial Crown Trading* the provisions dealing with solvent companies in the Act had not been considered (para 58). I submit that when provisions in the 1973 Act and the

Act are interpreted, this must be done in the context of these statutes as a whole, but this does not resolve the dilemma that confronted the court in *Mouton*.

When the court's interpretation of the 1973 Act and the Act is evaluated against the principles enunciated in *Endumeni Municipality* and sections 5 and 7 of the Act, one has to conclude that the court's interpretation and application in *Mouton* falls short of the required approach to legal interpretation.

3.5.3 Equating the winding-up provisions for solvent and insolvent companies and the exclusion of sections 348 and 352 of the 1973 Act

The court found it significant that, in terms of the Act, chapter 14 of the 1973 Act still applies to the winding-up of companies (paras 58–59; item 9 of schedule 5 of the Act). However, certain specific provisions, such as sections 348 and 352 of the 1973 Act, are expressly excluded. In this regard, the court stated (para 59):

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

I submit that this part of the court's reasoning is difficult to follow. It is not clear whether the *Mouton* court was of the view that the court in *Imperial Crown Trading* had unjustifiably failed to recognise that the winding-up of solvent and insolvent companies is to be treated differently, or whether it considered that the winding-up of solvent and insolvent companies should be treated in the same way. I submit that to interpret the winding-up provisions in the 1973 Act and the Act correctly, one must acknowledge that the nature of the interests at stake differ, depending on whether the relevant company is solvent or insolvent. For this reason, the winding-up of insolvent and solvent companies cannot always be treated on the same footing. While the Act regulates the winding-up of solvent companies, the provisions of chapter 14 of the 1973 Act regulate the winding-up of insolvent companies. While an interpretation that will harmonise the 1973 Act and the Act is noble, one must be cautious not to force an interpretation that equates the provisions dealing with the winding-up of insolvent companies in the 1973 Act and those that apply to the winding-up and liquidation solvent companies in terms of the Act. This is because the interests at stake and the statutory protection measures differ, depending on whether the company to be wound up is solvent or insolvent. When a solvent company is wound up, the interests of creditors are protected, because the company has enough assets to satisfy the claims of creditors in full (Cilliers & Benade *Corporate law* (2000) 495). For this reason, the input of creditors in the winding-up process is far more limited, compared to the process followed in the winding-up of an insolvent company (*ibid*). This difference was recognised by courts even when the winding-up of solvent and insolvent companies was regulated in the same legislation. It is in this light that one has to understand the exclusion of sections 348 and 352 of the 1973 Act from application to companies to be wound up

under the Act. This is because only solvent companies may be wound up in terms of the Act. Additionally, sections 348 and 352 have been replaced by similar provisions in the Act, which can be found in sections 80(6) and 81(4), respectively.

Section 80(6) of the Act states that “[a] voluntary winding-up of a company begins when the resolution of the company has been filed in terms of subsection (2)”. Section 81(4) of the Act, in turn, states:

“A winding-up of a company by a court begins when –

- (a) an application has been made to the court in terms of subsection (1)(a) or (b);
or
- (b) the court has made an order applied for in terms of subsection (1)(c), (d), (e) or (f).”

3.5.4 Business rescue by means of “a special resolution of its Board”

The *Mouton* court stated that business rescue may voluntarily be commenced with the adoption of “a special resolution of its Board” (para 60). This is clearly incorrect, as boards of companies do not adopt special resolutions, and section 129(1) specifically provides that “the board of a company may resolve that a company voluntarily begin business rescue proceedings”. Incorrect descriptions of the legal position cast doubt on the correctness of the court’s interpretation and application to the relevant statutory provisions of the Act.

4 *Tjeka Training Matters v KPPM Construction*

4.1 *Background and legal question*

In this matter, the Gauteng Local Division of the High Court was required to determine whether a resolution to commence business rescue proceedings in terms of section 129 was trumped by an application for liquidation of the company (para 3). It is important to note that the liquidation application had been issued by the registrar of the High Court, but had not yet served on the company, prior to the adoption of the resolution to place the company in business rescue (para 2).

4.2 *The judgment and its relevance*

The court held that for a liquidation application to bar the adoption of a board resolution placing a company in business rescue for purposes of section 129 of the Act, the application for liquidation must be not only issued but also served on the company. The mere issue of an application for liquidation does not constitute proceedings initiated against the company in terms of section 129(2).

4.3 *The judgment*

4.3.1 Against the company

To establish the meaning of “initiated” in section 129(2)(a), the section must be read as a whole (para 8). The initiation of liquidation proceedings must be understood with reference to its effect on the company (*ibid*). “[I]nitialled” must further be understood in light of the liquidation proceedings “by or against the company” (*ibid*). The court doubted whether legal proceedings of which a company is not aware or not yet aware could be described as proceedings initiated against the company (*ibid*).

4.3.2 “Initiate” and “commence”

The argument before the court that the words “commence” and “initiate” can be regarded as synonyms for purposes of section 129 of the Act was rejected.

The court in *Tjeka* also considered the judgment in *Imperial Crown Trading*. Like the *Mouton* court, the court had difficulty in accepting that the word “initiated” in section 129(2) must be given the same meaning as the word “commence” in section 348 of the 1973 Act, based on the different terminology used (para 13).

4.3.3 The functions of section 129 of the Act and section 348 of the 1973 Act

The court found that sections 129 of the Act and 348 of the 1973 Act fulfilled different functions, which the court in *Imperial Crown Trading* had failed to recognise (paras 12–13). Section 348 of the 1973 Act is a fiction in terms of which the date of the presentation of the liquidation application is deemed to be the date on which the winding-up process begins. The purpose of this provision is to protect creditors and stakeholders from any manipulative conduct after the application for liquidation of a company becomes known (para 13). This problem does not arise in the context of the adoption of a resolution in terms of section 129 of the Act. This is also the position when an application for the liquidation of the company has been issued but not yet served on the company (*ibid*). The fact that an affected person may bring an application to place a company in business rescue after an application for liquidation has been served on the company, clearly indicates that section 348 and section 129(2) have different functions (*ibid*). The court approved the *dictum* in *Reddinger*, which requires service as “a necessary event in the context of section 129(2)” (para 18). In the context of an application for liquidation proceedings, service is necessary to include the person as party to the litigation in the light of the context and purpose of section 129(2) of the Act (paras 20–21).

The court held that, for purposes of section 129(2) of the Act, an application for liquidation must be served and not merely issued (para 22). As the resolution to place the company in business rescue was adopted prior to the service of the liquidation application, the resolution was valid and enforceable (*ibid*).

4.4 Important observations from the judgment

The court did not have the opportunity to consider the judgment in *Mouton*, although it, too, considered the judgment in *Imperial Crown Trading*. It was also of the view that the words “initiated” and “commence” could not carry the same meaning, as was held in *Imperial Crown Trading*.

The *Tjeka* court emphasised the function of sections 348 and 352, when interpreting them (para 13). In *Mouton*, emphasis was placed on the repeal of these sections in relation to the winding-up of solvent companies. This served to align the interpretation of the 1973 Act with the winding-up provisions in the Act.

It is ironic that the court relied also on the guidelines and principles of the interpretation of statutes as set out in *Endumeni Municipality*, but arrived at a very different outcome or result (para 7 n4). I submit that the reasoning in the *Tjeka* judgment is preferable to that in *Mouton*, as it took into consideration the purpose of the relevant provisions in the context in which they would be applied (see also *Pan African Shopfitters (Pty) Ltd v Edcon Ltd* (10652/2020)

[2020] ZAGPJHC 158 (10 July 2020) (“*Edcon*”) para 24). The fact that the court held that the board of a company would be barred from adopting a resolution placing the company in business rescue only once the company has been served with an application for liquidation is a clear principle that can easily be established and consistently applied. Although the court did not refer specifically to sections 5 and 7 of the Act, the judgment also promotes a predictable environment in which companies are regulated, while balancing the rights and interests of all stakeholders of companies in financial distress (see s 7(k) and (l)).

5 Conclusion

It is clear that the interpretational difficulties caused by the fragmented nature of the legislation that plague the winding-up and liquidation of companies, are also rearing their head in the context of business rescue proceedings. This is exacerbated by the inconsistent use of terminology. From the discussion above, one can see how the courts materially differed in their interpretation of the Act and the 1973 Act while dealing with exactly the same legal question. There is a clear tension between the business rescue regime and the provisions relating to the winding-up of companies in terms of the 1973 Act, read with the Insolvency Act 24 of 1936. Both the Act and decisions of the Supreme Court of Appeal require the courts to provide a purposive and commercially sensible meaning when interpreting the applicable statutory provisions, while balancing the interests of the various stakeholders.

While, in contrast with the *obiter* remark in *Imperial Crown Trading, Mouton* and *Tjeka* both held that “initiated” and “commence” cannot carry the same meaning, the latter two courts differed in the meaning they attributed to these terms. In *Mouton*, the court held that the Act drew a distinction between the factual adoption of a resolution to place a company in business rescue and its legal effect or consequences. The court adopted the same reasoning when it was required to determine when liquidation proceedings have been initiated against a company. I argue above that this distinction is artificial and difficult to apply to practical scenarios, because the effect of such an interpretation is that liquidation proceedings could be “initiated” against a company without its knowledge. This casts doubts on the court’s interpretation as purposive and commercially sensible, both of which are essential elements of a predictive commercial environment. The effect of the *Mouton* judgment is that a board that adopts a resolution to place a company in business rescue will always be plagued by the risk that its decision may be challenged on the basis that liquidation proceedings have already been “initiated” against the company, even when the company has not yet received notice of it. The *Tjeka* judgment differs from the *Mouton* judgment as it held that an interpretation of the word “initiated” to the effect that liquidation proceedings can be initiated against a company without its knowledge is not sustainable (see also *Edcon* para 24). For purposes of section 129(2)(a), liquidation proceedings are initiated the moment when such an application is served on the relevant company (*ibid*). I submit that this is the preferred approach as it promotes legal and practical certainty. Based on the principles in *Tjeka*, it is easy to determine the exact moment when liquidation proceedings are “initiated” against a company, which is the moment of service of the application for liquidation. However, the court in *Tjeka* specifically noted that it was not required to consider whether knowledge on the part of the board of a company of the issued liquidation proceedings may affect the view on whether liquidation

proceedings were initiated prior to the resolution to commence with business rescue (para 17). This aspect also did not receive the attention of the court in *Mouton*, where the board of the creditor company and that of the company that adopted a resolution to place the company under business rescue consisted of the same people. However, the court in *Mouton* did find that the adoption of the resolution to commence business rescue proceedings voluntarily lacked *bona fides*, as there was no true intention to achieve the objectives of business rescue (para 105).

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