

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED. ✓

DATE

SIGNATURE

12/09/2023

Case number: **05174/2022**

In re the matter between:

Case number: **007819/2022**

SG COAL (PTY) LIMITED

Applicant

and

BERYL COAL (PTY) LTD

Respondent

AND

The matters between:

Case number: **022339/2022**

INCEKU MINING (PTY) LIMITED

and

BERYL COAL (PTY) LIMITED

Respondent

AND

In the matter between:

Case number: **040604/2022**

SG COAL (PTY) LIMITED

Applicant

and

BERYL COAL (PTY) LIMITED (In Business rescue

First Respondent

KURT ROBERT KNOOP N.O.

Second Respondent

THE MASTER OF THE HIGH COURT

Third Respondent

JOHANNES ZACHARIAS HUMAN MULLER N.O.

Fourth Respondent

MAC MOSES BALOYI N.O.

Fifth Respondent

JIMMY BALOYI N.O.

Sixth Respondent

INCEKU MINING (PTY) LIMITED

Seventh Respondent

BERYL PARTNERS SA (PTY) LTD

Eighth Respondent

AND

In the matter of:

Case number: **38877/2022** (Pretoria)

INCEKU MINING (PTY) LIMITED

Applicant

and

BERYL COAL (PTY) LIMITED

First Respondent

KURT ROBERT KNOOP

Second Respondent

KURT ROBERT KNOOP N.O.

Third Respondent

REABETSWE KGOROEDIRA

Fourth Respondent

JUDGMENT

Wepener, J:

[1] Inceku Mining (Pty) Limited ("Inceku") a registered company doing business in South Africa, which has a claim against Beryl Coal for the sum of R123 000 000 for services rendered.

[2] Beryl Coal (Pty) Limited ("Beryl Coal") is a company registered in the Republic of South Africa and doing business in the coal mining industry.

[3] SG Coal (Pty) Limited ("SG Coal") is a registered Company doing business in South Africa and who instituted liquidation proceedings against Beryl Coal.

[4] Kurt Robert Knoop N.O. ("Knoop") is a business rescue practitioner appointed as such in the business rescue proceedings of Beryl Coal.

[5] The Master of the High Court ("the Master") is cited in these papers as the official with authority who can appoint liquidators.

[6] Johannes Zacharias Human Muller N.O. ("Muller") is a joint provisional liquidator appointed by the Master in the provisional liquidation of Beryl Coal.

[7] Mac Moses Baloyi N.O. ("M. Baloyi") is a joint provisional liquidator appointed by the Master in the provisional liquidation of Beryl Coal.

[8] Jimmy Baloyi N.O. ("J. Baloyi") is a joint provisional liquidator appointed by the Master in the provisional liquidation of Beryl Coal.

[9] Beryl Partners SA (Pty) Limited (“Beryl Partners”) is a company duly registered in terms of the laws of South Africa and which is a shareholder of Beryl Coal.

[10] Reabetswe Kgoroadira (“Kgoroadira”) is a director of Beryl Coal.

[11] Fortunate Ramashidiza (“Ramashidiza”) is a director of Beryl Coal.

[12] The Companies and Intellectual Property Commission of South Africa (“the Commission”) is a body established by law. It took no part in the proceedings.

[13] All of the aforementioned parties joined or were joined in one or other capacity in the various applications that were launched and which served before me.

[14] Before me are several applications including an application for consolidation of two applications for the liquidation of Beryl Coal. Difficulties regarding what was before me and what was not arose when by counsel submitted draft orders after the hearing. In its covering letter, Beryl Coal refers to the letter of the Deputy Judge President only referring three case numbers for hearing to me, i.e. 038877, 022339 and 040604.

[15] This cannot be correct as Beryl Coal itself submitted a draft order seeking the dismissal of the application to consolidate case 022339 and case 9197. At the very least, case 9197, as referred to in case 022339, was also before me.

[16] Also, in concise heads of argument Inceku indicated that case 9197 was indeed before me. It also argued that application fully without any objection that it was not before me for determination. I consequently find that the after the fact email surprising considering all the matters that were argued before me. The email by Beryl Coal’s attorneys also states that “the application was not argued”. It does not say that the matter was not before me.

[17] After I reserved judgment and completed the bulk of my judgment, a notice of application in case number 9197 was filed by Beryl Partners. Therein it seeks that the judgment must be stayed or reserved further “while final adjudication and

determination” is made of an application to amend a document which features in the matter. All the matters that were downloaded under case number 05174 (the current proceedings) were before me and I shall deal with those matters which were argued and with the new application after it is heard.

[18] I, consequently hold that the application to consolidate case numbers 022339 and 9197 is properly before me. In it, Inceku seeks to consolidate and application by it for the liquidation of Beryl Coal with a similar application by SG Coal.

[19] There was also a matter launched in the Pretoria High Court (38877/2022) but which was transferred to this court and uploaded under the main case number of this matter, i.e. 005174. That matter is also before me and was argued fully.

[20] The application (case number 040604) in which SG Coal sought to set aside the final liquidation of Beryl Coal in terms of section 354 of the Companies Act¹ served before me on all versions. However, SG Coal did not appear to move for the order and it was the intervening parties and Beryl Coal who could participate in this application. But not a word was said about it save that Inceku submitted that although the application is before me for purposes of dealing with the return day of the provisional liquidation application, the application to set aside the initial order was not. This appears to be correct and no party sought relief pursuant to section 354 of the Companies Act. Although not submitted by Beryl Coal, Beryl Partners or Knoop, the papers indicate that Beryl Partners had launched an application in terms of section 345 of the Companies Act for the setting aside of the liquidation order of Beryl Coal granted on 17 October 2022 in favour of SG Coal. I am in no position to grant this relief in the absence of submissions before me as to why a liquidation order, on the face of it issued validly in 2022, should now be set aside. The onus to prove the requirements

¹ Act 71 of 2008.

set out in section 354 of the Companies Act is on the party seeking that relief. I must assume that the relief was abandoned, at least before me, and it calls for no order.

[21] Jabula Plant Hire (Pty) Limited ("Jabula") also instituted liquidation proceedings against Beryl Coal. During September 2021, D&R Mining (Pty) Limited ("D&R") was granted leave to intervene in liquidation proceedings of Beryl Coal, instituted by Jabula. Both claims were settled and I need not refer to the terms of thereof, save to indicate that upon reaching the settlement agreement, the application for liquidation was postponed sine die. It is common cause that there is an amount for the payment of interest and costs outstanding at the time of this hearing.

[22] On 26 July 2022, SG Coal instituted liquidation proceedings against Beryl Coal and on 19 October 2022 the court granted a final liquidation order. Thereafter, and in terms of section 149(2) of the Insolvency Act² the parties applied to court and obtained a variation of the final liquidation order to become a provisional liquidation order with a return date, which is now before me. In the time that followed, Beryl Coal also settled SG Coal's claim. The terms of the settlement that are relevant and will be referred to below. Probably because of that settlement, SG Coal did not appear before me on the return day of the rule nisi when these matters were argued, and the order in SG Coal's favour, should be discharged.

[23] Incek, who did not have knowledge of the pending liquidation applications brought by SG Coal and others, issued an application for liquidation of Beryl Coal during June 2022. This application is pending before me

[24] The provisional liquidators, appointed by the Master, are Muller, M. Baloyi and J. Baloyi referred to hereinbefore. They have gone a long way in the performance of

² Act 24 of 1936.

their duties and have filed reports from which some material and uncontested facts which are relevant to this application can be gleaned.

[25] Inceku, on becoming aware of the liquidation application by SG Coal, applied to court for a consolidation of its application with that of SG Coal. There was no substantive argument put forward why the application by Inceku, to consolidate its claim with that of SG Coal, must not be granted at this hearing.

[26] Also appearing and represented by the same counsel as counsel for Beryl Coal, was Beryl Partners, a shareholder of Beryl Coal. Beryl Partners obtained a court order placing Beryl Coal in business rescue on 7 March 2022. The relevance of this conduct appears from the provisions of section 129(2) of the Companies Act.³ The section reads as follows:

“(2) A resolution contemplated in subsection (1) -

(a) may not be adopted if liquidation proceedings have been initiated by or against the company”

[27] The question argued before me was that the proceedings launched by Beryl Partners to place Beryl Coal in business rescue was null and void or invalid due to the fact that, at the time when that occurred, liquidation proceedings against Beryl Coal were pending and instituted by creditors being SG Coal, D&R and Jabula, all being being applicants in such liquidation proceedings.

[28] Inceku submitted that the placing of Beryl Coal in business rescue was not competent, and Inceku's application for liquidation was lawful and not prohibited by the provisions of section 129 of the Companies Act, as the business rescue proceedings are a nullity. A declaration of invalidity of those proceedings, allows for Inceku to proceed with its application for liquidation unhindered. The questions are

³ Act 71 of 2008.

therefor: first, were there liquidation proceedings pending against Beryl Coal when the business rescue proceedings were initiated? If so, the business rescue proceedings are a nullity and void and falls to be set aside. Second, does the initiation of the business rescue proceedings fall to be impugned for lack of compliance with the legal prescripts and if so, it similarly falls to be set aside.

[29] The main issue that crystallised during argument was the validity of the business rescue proceedings. If set aside, Inceku has an undisputed claim for more than R5 000 000 against Beryl Coal. Despite the amount having been tendered by Beryl Coal, no payment had been made when this matter was heard. That admitted claim is consequently due and payable to Inceku. The disputed portion of the claim is then irrelevant for purposes of determining whether it has a valid claim to bring liquidation proceedings.

[30] Beryl Coal did not make submissions other than the submissions regarding the existence or otherwise of the liquidation applications when the resolution was passed, and the validity of the business rescue proceedings. I consequently need only answer the questions posed above. In addition, if it is found that the business rescue proceedings fall to be set aside, does Inceku have the right to step into the shoes of SG Coal as liquidating creditor? SG Coal did not appear on the return day and the order for the liquidation obtained by it, falls to be discharged.

[31] I requested all parties to submit their suggested draft orders to me and neither Beryl Coal, Knoop or Beryl Partners asked for relief in terms of section 354 of the Companies Act.

[32] The result is that if it is found that any of the earlier liquidation proceedings were still pending at the time the business rescue proceedings were initiated, the latter

would be void. In addition, if the initiation of the business rescue proceedings was unlawful, those proceedings fall to be set aside.

[33] If the business rescue proceedings fall away, the liquidation application launched by Inceku, has no bar and it can step into the shoes of SG Coal as liquidating creditor. As a point of departure, Inceku argued that the placing of Beryl Coal in business rescue, was void or stands to be set aside because it was done in direct contravention of the Act being in contravention of section 129. If it is found that there were indeed liquidation proceedings pending against Beryl Coal at the time of the initiation of the business rescue proceedings, the latter will be prohibited and thus unlawfully embarked upon and be void.

[34] Relying on *Lutchman N.O. and Others v African Global Holdings and Others*,⁴ Inceku submitted that the business rescue proceedings fall to be set aside. Several reasons were advanced. In order to consider these reasons, it is apt to refer to what Meyer AJA (as he then was) said in *Lutchman* in relation to an application to place a company in business rescue. It was held that the business rescue proceedings must be issued, served on the company and the Commission and all reasonable steps must have been taken to identify the affected persons.⁵ Only proper compliance with the provisions of section 131(6) will trigger a suspension of the liquidation proceedings. These requirements are not merely procedural steps but substantive requirements that call for strict compliance.⁶ A failure to comply results in a conclusion . . .

“that the business rescue application was not ‘made’ within the meaning of section 131(6) of the Companies Act, and the suspension of the liquidation proceedings, . . . was not triggered in terms of the section.”⁷

⁴ 2022 (4) SA 529 (SCA).

⁵ *Lutchman* para 28.

⁶ *Lutchman* para 39.

⁷ *Lutchman* para 42.

[35] The first attack on the business rescue application is that the application was not served on Beryl Coal. The return of service shows that it was served on a respondent being “the employees of the respondent”. It was so served, according to the return, pursuant to Rule 4(1)(a)(iii).⁸ The Sheriff’s intention is clear. He wanted to, and did serve, the document for attention of the employees of an undisclosed party. There is no other return of service amongst the papers and I find that there was a failure to serve Beryl Coal with the application and thus a failure make application as required by section 131(6) of the Companies Act. This is a failure to comply with a substantive requirement and not merely a point in limine. This is also not a standalone ground.

[36] There is also a requirement that affected persons must be informed of the application.⁹ It is common cause, and it was not contested, that there was no notification to the South African Revenue Services (“SARS”) of the application. It was submitted by Beryl Coal that it could not be said that SARS was an affected person. The submission must fail. On its own showing the financial statements attached to the application for business rescue show that SARS is indeed a creditor of Beryl Coal. Although there are other allegations of a failure to notify affected persons, I am of the view that the failure to notify SARS, which is clearly a creditor for many millions of Rands, suffices to conclude that there was a significant failure resulting in the business rescue application not having been made within the meaning of section 131(6) of the Companies Act as set out in *Lutchman*. Inceku raised a number of difficulties with the notices or lack thereof to creditors. But a serious omission was pointed out and it results in a failure to comply with the requirement of notification to be sent to creditors.

⁸ “... by delivering a copy thereof at the place of employment of the said person, guardian, tutor, curator or the like to some person apparently not less than sixteen years of age and apparently in authority over him. . . .”

⁹ Regulation 124 of the Company Regulations of 2011.

[37] In addition, the trigger of the business rescue proceedings, was at a time when liquidation proceedings were pending against it and thus invalid.

[38] The result is that the application for the liquidation of Beryl Coal initiated by Inceku, is properly before me and, in the absence of any argument or allegation of non-compliance by it, it is entitled to seek the liquidation of Beryl Coal. Its entitlement has the consequences as set out in *Fullard v Fullard*¹⁰. Despite Beryl Coal's complaint that there was not proof that SARS was a creditor, I find that there is clear and sufficient proof on the papers of this fact. In the papers before me, Beryl Partners (the shareholder in Beryl Coal) states that one of the liabilities of Beryl Coal, with reference to the latter's financial statements, that there is a debt of more than R5 900 000 for deferred tax as well as an amount in excess of R41 000 000 in respect of unpaid value added tax. Beryl Coal's apparent surprise about the argument raised by Inceku, should consequently be removed by the contents of the very papers filed by its shareholder in order to seek the initiation of business rescue proceedings against it.

[39] Inceku also raised the issue of the inadequacy of the email addresses used to inform creditors of the business rescue proceedings. Having found that a major creditor was omitted from the notification process, I need to deal with the manner of notification to the others.

[40] Based on both or either of these two cogent reasons, the liquidation proceedings instituted by any party was not suspended nor did it stand in the way of a creditor launching an application for the liquidation of Beryl Coal.

[41] In addition to the failure of Beryl Coal to pay its indebtedness to Inceku, there are concerning matters highlighted by the provisional liquidators of Beryl Coal. Firstly, the report that approximately R283 000 000 worth of assets have disappeared from

¹⁰ 1979 (1) SA 368 (T).

Beryl Coal within a period of less than 6 months. Secondly, they also reported that Beryl Coal is selling coal to Cain Coal at highly discounted prices that make no commercial sense and is causing enormous damage to Beryl Coal. Thirdly, Beryl Coal's right to mine on immovable property was cancelled.

[42] There is a second bow to the Inceku's string. It argues that if the order for business rescue is set aside, on the basis of non-compliance as I have found it should be, the liquidation applications brought by D&R and Jabula, as well as SG Coal, were all pending at the time when the business rescue was sought and there was no moratorium on those liquidation applications as provided for in section 133(1) of the Companies Act. Beryl Coal submitted that the applications for liquidation by those three parties have run their course and are no longer alive to cause a bar by Beryl Coal to be placed in business rescue.

[43] Section 129(2)(a) of the Companies Act expressly prohibits the adoption of a resolution to place a company in business rescue if liquidation proceedings have been initiated against the company. At the time of the adoption of the business rescue resolution, three applications for liquidation were pending. First, the D&R application, second Jabula and thirdly, SG Coal. This is common cause. Beryl Coal submits that those applications were not pending as all three those creditors were settled and no claims by them remained. This submission is not correct. All three the applications for liquidation were alive, despite a settlement of the debts. Both interest and costs were still owing in the D&R matter and the matters were postponed sine die. In my view, these applications remained alive especially if regard is had to the settlement agreement which provides, in essence that the agreement did not constitute a novation of rights of D&R and that should Beryl Coal fail to comply with the terms of the agreement, D&R should be entitled to elect in its discretion between enforcing its rights

in terms of the settlement agreement, or its rights in relation to any other cause of action or proceedings it may have had prior to the conclusion of the agreement, including, in particular, SG Coal's liquidation application. (I was advised that SG Coal, D&R all had similar provisions). The very fact that the provisional order obtained by SG Coal is only discharged now, at the request also of Beryl Coal in a draft order submitted by it, shows that the provisional order was pending until now. The other two liquidation applications by D&R and Inceku remain pending and have not been withdrawn.

[44] In the circumstances I conclude that Inceku's claim to become the liquidating creditor in the place of SG Coal, has no bar and its claim against Beryl Coal justifies the latter's liquidation.

[45] Beryl Partners sought the following relief after the matter was argued: amending the return of service referred to earlier in this judgment to now read like Annexure A annexed to its notice of motion; alternatively, condoning the non-compliance by Beryl Partners with the rules regarding service of process.

[46] It is immediately apparent that the relief is contradictory. The first is to file a new document in the place of the existing return of service, and the second is an admission that the original return of service is indeed flawed but should be condoned. I have found that the return of service is flawed and can find no reason why condonation should be granted to accept the flawed return of service, contrary to the findings of *Lutchman* above. The result is that the relief sought is to introduce a new return of service. The evidence tendered by Beryl Partners to overcome its difficulty is, in my view, insufficient. The Sheriff, Mr Timm, who furnished the original return of service was reluctant or refused to file an affidavit in support of Beryl Partners' contention that the original return of service was incorrect. In my view, that is fatal to this application.

Whatever the intention of the parties were, the return of service, rendered by Mr Timm, is the return that has to be considered. His refusal to change the return or support the application by Beryl Partners speaks volumes. There is no acceptable evidence before me that shows that Mr Timm intended anything else than that which is stated in the return of service, which is prima facie evidence of the facts therein stated. Section 43(2) of the Supreme Court Act¹¹ provides that “the return of the Sheriff . . . of what has been done upon a process of court, shall be prima facie evidence of the matters therein stated.” Beryl Partners seeks to change the prima facie evidence of Mr Timm without Mr Timm being willing himself to do so. I have great difficulty to come to the assistance of Beryl Partners and to amend prima facie evidence of a person who is unwilling or unable himself to do so and to explain his conduct.

[47] In the circumstances, the application regarding the return of service by Beryl Partners falls to be dismissed.

Orders

1. The application by Beryl Partners to place Beryl Coal in business rescue is struck from the roll. Beryl Partners is ordered to pay the costs of Inceku, such costs to include the costs of two counsel.
2. The separate applications for liquidation brought against Beryl Coal by Inceku and SG Coal are hereby consolidated and the existing provisional order of liquidation replaced with an order placing Beryl Coal in provisional winding up at the instance of Inceku as liquidating creditor.
3. The date on which the winding up is to commence is the date of deemed commencement consent of the winding up application sought by SG Coal in case number 2022-007819.

¹¹ Act 10 of 2013.

4. The return date of the provisional winding up application is 31 October 2023.
5. The costs of the consolidated applications, including the costs previously reserved, are costs in the winding up.
6. Beryl Partners is ordered to pay the reserved costs of 25 January 2023 under case number 2022-040604, which costs include the costs of two counsel.
7. The interim interdict of 13 July 2023 under case number 2022-058266 (Pretoria) is discharged.
8. The order for liquidation of Beryl Coal, obtained by SG Coal, is discharged.
9. The business rescue proceedings initiated by the adoption of a Board resolution in terms of section 129 on 25 August 2022, are set aside.
10. The application by Beryl Partners, to amend or condone the return of service, is dismissed with costs.



Wepener J

Heard: 1 August 2023 and 11 September 2023

Delivered: 11 September 2023

For the Inceku Mining (Pty) Limited: Adv P.G. Cilliers SC

With him: Adv B. Steyn

Instructed by: J.W. Botes Incorporated.

For the Beryl Coal (Pty) Limited, Beryl Partners SA (Pty) Limited
and K.R. Knoop (and K.R. Knoop N.O.): Adv M.V.R. Potgieter SC

With him: Adv L.V.R. van Tonder

Instructed by: Smit Sewgoolam Incorporated

For the Joint Provisional Liquidators: Adv J. Hershenson

With him: Adv R. de Leeuw

Instructed by: Schabert Potgieter Attorneys Incorporated