Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

Case Nr: 642/2009
Case Heard: 10/07/2009
Date delivered: 17/07/2009

In the matter between:

[A]

BRC-Diamondcore Limited — Applicant
River Corporate Finance (Pty) Ltd — First Respondent
Diamond Core Resources (Pty) Ltd ("In Liquidation") — Second Respondent

IN RE

River Corporate Finance (Pty) Ltd — Applicant
Diamond Core Resources (Pty) Ltd — Respondent

And

[B]

River Corporate Finance (Pty) Ltd — Applicant(Respondent)

And

Diamond Core Resources (Pty) Ltd — Respondent(Applicant)

Coram: Henriques AJ

JUDGMENT

Henriques AJ:

INTRODUCTION

1. The applicant Diamond Core Resources (Pty) Ltd (hereinafter referred to as" Diamond Core) brought an urgent application in which it sought the following relief:

   "1. That the forms and service provided for in Rule 6 (12) of the Uniform Rules of Court be dispensed with and that this application be heard as one of urgency;

   2. That the judgment of his Lordship Judge Kgomo JP delivered on 3 July 2009 placing the Respondent in liquidation be suspended, pending adjudication of the Applicant's appeal of the aforesaid judgment;

   3. Costs of the application in the event of opposition."

2. This application which I shall refer to as the suspension application, was opposed and subsequently on 9 July 2009 a further application was issued in which the applicant was BRC Diamond Core Limited (hereinafter referred to as" BRC).

3. BRC sought the following order:

"1. The winding up of the Respondent pursuant to the order of the Court on 3 July 2009 be stayed in terms of s354(1);

2. A rule nisi is issued calling upon all interested persons to appear before the Court on a date to be determined by the Court as to why:

2.1. the winding up should not be set aside in terms of s354(1); alternatively

2.2. by the liquidation order should not be suspended pending the outcome of the Second Respondent's appeal against the liquidation order;

2.3. *the costs of the application should not be paid by any party opposing the application;*

2.4. *service of the rule be effected on:*

2.4.1. the Master;

2.4.2. by one publication in the Kimberley Herald newspaper;

2.4.3. the employees of the respondent;

2.4.4. the South African Revenue Service; and

2.4.5. by prepaid registered post on all known creditors of the company who have claims in excess of R10 000,00.

3. That the First Respondent is entitled to anticipate the return date hereof on 24 hours notice on the Applicant's attorneys of record.

3. I had on receipt of the initial application issued directives which appear not to have been communicated to Counsel Mr Howie who appeared for BRC and Diamond Core. I was informed by Mr Howie that he would only at this stage be proceeding with the application by BRC and that the application by Diamond Core was contingent on BRC's application.

4. At the hearing of the matter Mr Howie handed up a proposed draft order. The wording of the draft order differs somewhat from the relief sought in the notice of motion and it is convenient for me to mention the draft order. This order and amendments thereto were the subject of much debate between Mr Howie and Mr Ackermann who appeared for River Corporate Finance (Pty) Ltd, cited as the First Respondent in BRC's application and Respondent in Diamond Core's application. For the sake of convenience I will refer to it as River Corporate Finance. The draft order provides as follows:

"1. The winding-up of the second respondent pursuant to this Court's order of 3 July 2009 ("the order") is stayed in terms of s354(1);

2. A rule nisi is issued calling upon all interested persons to appear before this Court at 10h00 on , or as soon thereafter as counsel may be heard, and show cause why:

   2.1 the winding-up of the second respondent should not be set aside in terms of s354(1), alternatively, the winding-up of the second respondent should not be stayed in terms of s354(1) pending the final determination of the second respondent's appeal against the order; and

   2.2 the costs of the application should not be paid by any party opposing the application.

The remainder of the relief sought is the same as that appearing in the notice of motion.

5. I must also record my dissatisfaction with the manner in which the application papers were drafted. The reference to the parties is confusing and appear to have been drafted in haste without much thought for the convenience of the court. I may add that Mr Howie indicated that he had no part in the drafting of the papers and the comments are therefore not directed at him. It's also worth mentioning in addition that part of the relief which BRC seeks in the rule nisi is the same as the relief which Diamond Core seeks in its application.

6. Prior to the matter proceeding I enquired from both counsel whether either of the parties required an opportunity to file further

affidavits. Both parties indicated that they did not intend doing so in either of the applications and this was also formally placed on record at the hearing of the matter.

7. At the commencement of his argument, Mr Howie informed me that the relief that the BRC sought was for the winding-up to be stayed. When I indicated to him the difficulty that I had with the draft order and relief he sought in relation to the interests of creditors, he indicated that BRC would be content with a rule nisi should I be persuaded to grant the application. One will note from a reading of the papers and from the heads of argument the relief sought does not appear to be confined to merely an application to stay.

8. Before dealing with the applications that served before me, it is necessary for me by way of background to deal with the liquidation application and the application by Diamond Core to re-open its case.

THE LIQUIDATION APPLICATION AND DIAMOND CORE'S APPLICATION TO REOPEN ITS CASE

9. The liquidation application was heard by Mr Justice Kgomo and the somewhat acrimonious relationship between the parties is evident from the papers filed. River Corporate Finance launched the liquidation proceedings on the basis of Diamond Core's inability to pay its debts. The deponent to the affidavit opposing the liquidation order was Brian Scallan in his capacity as Director of Diamond Core.

10. A final winding up order was granted on 3 July 2009. Prior to this order being granted, Kgomo J also had to consider an application by Diamond Core to reopen its case to introduce new and material evidence.

11. The basis for such application was that information had come to light which indicated that Diamond Core was solvent and able to pay its debts. Incidentally, the deponent to the affidavit in support of the order to reopen its case was Stephen Thompson a Director of Diamond Core who also appears to be the same Thompson of Thompson Wilks, both Diamond Core's and BRC's attorney of record.

12. In the supporting affidavit Thompson alleges the following:-

12.1. Diamond Core had alleged in its opposition to the liquidation order, that an agreement had been concluded which would establish its solvency;

12.2. the precise nature of the agreement could not be disclosed as negotiations were taking place and the parties to such agreement had not consented to disclosure of the details of the agreement and in addition the parties to the agreement were bound by stock exchange regulations relating to disclosure;

12.3. consent to the disclosure of such agreement was provided on 29 May 2009 by KIG Mining PLC (KIG);

12.4. Diamond Core is the ultimate recipient of the proceeds of the agreement.

13. After considering the submissions of Counsel who appeared, an application for a postponement was dismissed as well as the application to reopen the case. I have had the benefit of perusing a transcript of the proceedings of 3 July 2009. Counsel who appeared for Diamond Core could not argue the matter on the papers as drafted, and was instructed to move for a postponement of the matter.

14. During the course of argument he made the following submissions in relation to the application…" *Dit so vol soveel foute, dat as ek moet begin dan gaan ons 'n uur lank staan net om die foute te bespreek. En ek kan nie anders-ek kan nie-I cannot make a responsible submission My Lord. The other big, big problem that I have got to concede is that notwithstanding the directive-it contradicts my instructions.* …". Later on he further concedes as follows:.." *As I have said My Lord, my instructions are to move for a postponement of this application and I am duty bound to inform the Court that I have gone through the application. And I could not find any responsible submissions to make, even if I were to argue the application today….".*

THE APPLICATION TO STAY ITO S354(1)

15. In support of the application for a stay of the winding-up, BRC filed a supporting affidavit deposed to by Brian Scallan who is the Vice-President of Finance and a Director of BRC. It is further common

cause that Diamond Core is a wholly owned subsidiary of BRC and is cited in these papers as the second respondent.

16. In paragraph 5 of the affidavit BRC seeks the following relief namely:

16.1. the setting aside of the winding-up in terms of s354(1) pursuant to this Court's order of 3 July 2009;alternatively

16.2. suspending the operation of the liquidation order pending the adjudication of the Second Respondent's application to set the winding-up aside.

17. BRC seeks to set aside the liquidation order on two specific grounds. Firstly, that the liquidation should not have occurred because River Corporate Finance did not have locus standi to proceed with the application as it was not a creditor of Diamond Core. It alleges that at the time of the liquidation application River Corporate Finance had ceded its claim against Diamond Core to a third party. (This point was not pursued by Mr Howie.)

18. Secondly BRC seeks to set aside the liquidation application on the basis of events which occurred subsequent to the arguing of the application and the delivery of judgment on 3 July 2009. The subsequent events which BRC relies on is that it has concluded an agreement for the sale of its assets to KIG Mining PLC (KIG). To this end BRC indicates that it will receive $10.7 million in cash and tradable shares from the sale and as such puts it in a position where it can settle River Corporate Finance's claim in full. In support of such allegation BRC relies on an affidavit of Vicken

Kaprelien dated 7 July 2009 which is annexed to the application for the suspension of the liquidation order.

19. Scallan indicates that the transaction confirms that Diamond Core is able to pay its debts including that of River Corporate Finance although, will do so under protest. The winding-up is no longer necessary as Diamond Core is solvent and able to pay its creditors.

20. Scallan indicates that the winding-up would undermine the transaction with KIG and this was disclosed to him personally in a meeting with Kaprelian on 1 July 2009. As a result of this meeting with Kaprelian, BRC resolved to immediately pursue this application in an attempt to salvage the transaction.

21. At paragraph 6 of the papers Scallan avers that the relief sought in the main and in the alternatives are necessary as:-

21.1. The continuation of Diamond Core as a going concern is imperative to ensure that the assets which are being sold to KIG are capable of being delivered;

21.2. Employees are becoming disconcerted and are threatening to leave the company and this undermines Diamond Core's ability to keep its operations intact to ensure delivery to KIG in the event of an appeal being successful;

21.3. An appeal process he is advised takes a considerable period of time and in the event of the application for leave to appeal not being granted it will then have to petition the Supreme Court of Appeal which may also delay matters;

21.4. Depending on how long the appeal process takes Diamond Core cannot operate under the limited circumstances which exist in a liquidation environment pending its appeal and ensure the preservation of assets for ultimate delivery to KIG.

22. As grounds for urgency BRC relies on the indication given by Kaprelian of KIG on 1 July 2009 that the liquidation proceedings undermine the transaction with KIG.

BRC'S LOCUS STANDI

23. BRC alleges that it has *locus standi* to bring this application as it owns all the issued ordinary shares in Diamond Core and is also a creditor of Diamond Core. It avers that it provides a management and consulting service to Diamond Core in terms of a contractual arrangement and Diamond Core is required to pay it at least $30 000.00 a month. To assist Diamond Core to maintain its cash flow in order for it to pay its administrative costs and trade creditors, BRC has not enforced payment of the contractual agreement since October 2008. I may also add that having perused the liquidation papers together with the application to reopen its case and lead further evidence at no stage did BRC ever come forward as a creditor of Diamond Core, nor did the papers contain any allegation that it in fact had a contractual arrangement in place with Diamond Core.

24. Scallan annexes to his affidavit a resolution, BSC1 by directors of Diamond Core Resources Proprietary Limited signed at Sandton on 14 April 2009. Such resolution reads as follow:

"It is hereby resolved by the COMPANY that-

1. *BRIAN SCALLAN be and is hereby appointed to represent the COMPANY in regard to any litigation against or by RIVER CORPORATE FINANCE (PTY) LTD, and is further authorised to sign any documents necessary in the prosecution and/or opposition of such litigation; …"*

25. Mr Howie indicated that a new resolution was being obtained and would be filed. Such resolution was indeed filed on 13 July 2009 subsequent to the matter having been argued. Such resolution is dated the 10 July 2009 after Scallan deposed to the affidavit on behalf of BRC.

GROUNDS OF OPPOSITION

26. River Corporate Finance opposes the application on the grounds firstly of urgency as BRC only launched these proceedings on 9 July 2009 but had resolved on 1 July 2009 to immediately pursue this application in light of the meeting with Kaprelian.

27. As regards the merits of the application, River Corporate Finance opposes the relief on the following basis:

27.1. that there are insufficient averments to support BRC's contention that it is a member of Diamond Core;

27.2. that insofar as its alleges it is a creditor of Diamond Core, this debt was not disclosed by Diamond Core in the liquidation application;

27.3. the allegations concerning a cession is merely a further attempt on behalf of BRC, Scallan and Diamond Core to avert the liquidation process;

27.4. Diamond Core is not a party to the agreement with KIG.

27.5. BRC had not provided any proof that the liquidators will receive payment of their fees.

THE SUSPENSION APPLICATION

28. In the application to suspend the judgment delivered by Kgomo J on 3 July 2009 the applicant Diamond Core relies on the following allegations. Once again I must place on record that Brian Scallan is authorised to depose to the affidavit by virtue of a resolution dated 14 April 2009.

29. Essentially it relies on the following in support of such application:

29.1. that an application for liquidation was launched on the basis of a claim for non-payment of a fee owed by Diamond Core to River Corporate Finance;

29.2. this application was argued on 19 June 2009 and judgment was to be handed down on 3 July 2009;

29.3. subsequent to 19 June 2009 new and material facts became known to Diamond Core which had a material bearing on the liquidation application as such facts served to confirm the solvency of Diamond Core and its ability to pay its creditors.

29.4. Diamond Core did not make full disclosure of these facts prior to 19 June, as it was precluded from doing so due to an obligation of confidentiality in terms of stock exchange regulations in Frankfurt and Johannesburg;

29.5. on 29 June 2009, the transaction was finalised and it was then authorised to make full disclosure of the transaction and the parties thereto. That is why it sought to apply to re-open its case to introduce these new facts;

29.6. such application was filed on 1 July 2009, pursuant to a directive of Kgomo J. Diamond Core did not expect that the application would be argued that same day and as result its counsel who was more familiar with the matter was not available to argue the matter;

29.7. Scallan at paragraph 1.11 confirms that it has instructed its attorneys to appeal this judgment as well as the judgment in the liquidation application and will augment its notice of application for leave to appeal on receipt of the reasons in respect of the dismissal of the application to re-open its case;

29.8. Scallan once again indicates that he had during the liquidation application acknowledged Diamond Core's indebtedness but this was as a result of him being unfamiliar with the financial affairs of Diamond Core;

29.9. subsequent to him becoming more familiar with the financial affairs of Diamond Core, he realised that it was not indebted to River Corporate Finance as it had not fulfilled its duties and obligations in terms of the mandate agreement.

29.10. that the agreement between KIG and BRC show that Diamond Core is solvent and able to pay its debts and relies on an affidavit by Vicken Kaprelian deposed to on 7 July 2009 in his capacity as chairman and chief executive officer of KIG Mining which confirms that in terms of the agreement KIG will pay in cash and publicly tradable shares the sum of $10.7 million.

30. I may add that the contents of paragraphs 29.8 and 29.9 above were fully canvassed in the liquidation application.

31. In opposition to the suspension application River Corporate Finance alleges as follows:-

31.1. the application should dismissed for want of urgency;

31.2. the provisions of s150 (3) of the Insolvency Act 24 of 1936 applies by virtue of s339 of the Companies Act.

32. It further challenges the contention of Diamond Core that the application is urgent as liquidators would take control of its assets and begin the process of divesting the company of its assets. It alleges that in light of the provisions of s150 (3) the idea that the liquidators will begin the process of divesting the company of its assets is misconceived. Should an appeal be lodged, s150 (3) then governs the processes.

33. River Corporate Finance further contends that the purpose of s150 (3) is to protect the interests of creditors by laying and keeping the hand of the law on the assets of the company in liquidation pending an appeal while at the same time protecting the interests of the liquidated company, by barring the realisation of its assets without its written consent.

34. It further denies that new and material facts would have had an influence and bearing on the solvency of Diamond Core and its ability to pay its creditors. It alleges:

34.1. Diamond Core is not a party to the agreement with KIG but BRC is.

34.2. Clause 8.3 of the agreement with KIG which is relied upon, provides that the agreement is subject to the approval of each party's board of directors. There is no suggestion that such approval from the respective board of directors has been obtained.

34.3. There is further no indication that Diamond Core would receive any money pursuant to the transaction. The purchase price is destined for BRC and the only other company which will benefit in terms of the agreement is Diamond Core Technical Services (Pty) Ltd.

34.4. Shares in KIG are only convertible into cash after 1 May 2010.

34.5. Diamond Core will not receive us$2 million in cash as it is not a party to the agreement.

34.6. no where in the papers does Diamond Core indicate how its will pay its debt as the agreement between KIG and BRC does not make provision for the receipt of monies by Diamond Core. What is also apparent from the agreement is the fact that Diamond Core is not the owner of the assets being sold. The only assets which Diamond Core has are shares in its subsidiaries. The heads of agreement between KIG and BRC do not referred to any of the assets of Diamond Core.

35. River Corporate also points out that Diamond Core did not raise the fact of a counterclaim before and as such same is a "*trumped up claim*" which is merely an afterthought to avoid liquidation. In addition the respondent averse that in the application to place new and material facts before the Court the counter claim was not mentioned in that application.

<u>THE SUSPENSION APPLICATION</u>

36. The papers in this application are drafted in the form of an application for an interdict. I have considered the arguments presented by both parties in this matter and note the following.

37. Diamond Core has not filed an application for leave to appeal. The reasons for this is not clear in light of the allegation contained in the papers at paragraph 1.11 on page 8 in which the applicant says "*… although the respondent has instructed its attorneys to appeal this judgment in addition to the judgment placing the respondent in liquidation, the respondent will amend its notice of application to appeal, if necessary, upon consideration of the written reasons by Judge Kgomo. … JP for his judgment dismissing the application to reopen ….*"

38. A detailed judgment was delivered on 3 July 2009 in the liquidation application.

39. Section 150 (3) reads as follows:

> "*When an appeal has been noted … against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be released without the written consent of the insolvent concerned.*"

40. I have considered the authority which Mr Ackerman has referred me to namely that of <u>Choice Holdings Limited v Yabeng Investment Holding Co Ltd and Others</u> 2001 (2) SA 768 and I agree with him that the provisions of s150(3) would apply. I am in agreement with the finding of Wunsh J in which he found that the

consequence of the noting of an appeal does not suspend the operation and execution of the winding-up order.

41. In any event I am of the view that the application to suspend by Diamond Core ought not to succeed as it has not discharged the onus to show any good reason for this court to exercise its discretion. There is no difference in the application by Diamond Core to suspend the order and the application by BRC to stay the order. Both parties rely on similar reasons for their applications namely the agreement with KIG.

42. I am of the view that similar considerations apply in considering the application to stay and or set aside the order and the application suspend the order. For reasons set out hereinafter and the provisions of section 150 (3) should an appeal be noted, I am of the view that no purpose would be served by granting an order for the suspension of the winding up order pending an appeal of Kgomo J's judgement.

THE SECTION 354 APPLICATION TO STAY AND OR SET ASIDE THE ORDER

43. s354 of the Companies Act 61 1973, provides as follows:

> "(1) *The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntarily*

winding-up on such terms and conditions as the Court may deem fit.

(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence."

44. The only creditor before this court at present is River Corporate. I must also place on record that at no stage during the liquidation application did BRC opposed the granting of either a provisional winding-up order or a final winding-up order. At no stage prior to judgment being delivered on 3 July 2009, and subsequent to the agreement with KIG being amended on 29 May 2009, did BRC at any stage seek to intervene in the proceedings.

45. In considering the merits of these applications I have considered the authorities which Mr Howie referred me to in his heads of argument.

46. In <u>Helderberg Laboratories CC v Sola Technologies</u> 2008 (2) SA 627 at 632 Fourie J considered an appeal against an order granted by Traverso DJP for the winding-up of the appellants. Traverso DJP had granted a winding-up order on the basis of the inability of the appellant to pay its debts as contemplated in s344 of the Companies Act. She was of the view that as the tender and payment of the admitted indebtedness was made by a third party on behalf of the appellants, the appellants did not make payment in respect of their admitted indebtedness. This she concluded led to the inevitable inference that the appellants were unable to pay their debts. This was further reinforced by the fact that she

concluded that a tender subject to a condition did not constitute payment and as the appellants had not unconditionally paid their admitted indebtness the payment was insufficient to avoid liquidation. At para 16 of the judgment on appeal on p 632D Fourie J disagreed with the finding of Traverso DJP that the fact that the payment was made by a third party justified the inference that the appellants were unable to pay their debts. He held as follows: "I*n my view, the ability of a company or a close corporation to pay its debts may be demonstrated by the itself making payment or by its ability to obtain the necessary finance from an exterior source. …The emphasis in determining the ability of a company or close corporation to pay its debts should be on the fact of payment and not on the source of payment.*"

47. I agree with the views expressed by Fourie J. This is what I need to have regard to in determining whether BRC has discharged the onus to show that the winding up order ought to be stayed or set aside on the basis of new and subsequent events.

48. Mr Howie also referred me to the decision in <u>Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd</u>1998 (3) SA 175 where Scott JA remarked and ruled as follows:

> "*The language of the section is wide enough to afford the Court a discretion to set aside a winding-up order both on the basis that it ought not to have been granted at all on the basis that it falls to be set aside by reason of subsequent events…… In the case of the former, the onus on an applicant is such that generally speaking the order will be set aside only in exceptional circumstances.*" (**180 H – I**)

"The object of the section is not to provide for a rehearing of the winding-up proceedings or for the Court to sit in appeal upon the merits of the judgment in respect of those proceedings. To construe the section otherwise would be to render virtually redundant the facilities available to interested parties to oppose winding-up proceedings and to appeal against the granting of a final order…… It follows that an applicant under the section must not only show that there are special or exceptional circumstances which justify the setting aside of the winding-up order; he or she is ordinarily required to furnish, in addition, a satisfactory explanation for not having opposed the granting of a final order or appealed against the order. Other relevant considerations would include the delay in bringing the application and the extent to which the winding-up had progressed." (**181 B – D**)

49. In **Ex Parte Strip Mining (Pty) Ltd: In Rè Natal Coal Exploration Co Ltd (In liquidation) (Kangra Group (Pty) Ltd and Another Intervening) 1999 (1) SA 1086** in respect of the onus, Plewman JA remarked and ruled as follows:

"I see no parallel between applications for an attachment or an interdict and proceedings in terms of s 354(1). ………. But nothing in s 354 (1) suggests that a rule nisi procedure need necessarily be adopted and where it has (as in the present case) the stage at which appellant suggests the lesser standard of proof should be applied is the stage when a final determination of the issue is made. Even in the examples relied on by the

counsel, this has always been on the basis of the normal onus". (**1091 E – G**)

"It is these circumstances which, no doubt prompted Scott JA in the Ward case supra to suggest that the standard of proof would be that used in relation to an application to set aside a judgment -that is the normal onus". (**1091 H**)

"There is also the wording of s354(1) itself. What is said is that there must be proof 'to the satisfaction of the Court'. This phrase imposes the normal standard of proof of the facts which are to lead the Court to hold that the winding up 'ought' to be set aside." (**1091 I**)

"...... This clearly envisages proof according to the normal standard. (**1092 D**)."

49. What I am required to consider is whether the provisions of section 354 have been met.

50. It is also trite that even if a party is seeking interim relief in the form of a rule nisi it must make out a case in its founding papers in order for the relief to be granted.

51. I must at the outset say that these proceedings were launched on an urgent basis at very short notice to the parties concerned and with very little regard for the interest of creditors. Mr Howie submitted that it was not for River Corporate to be concerned about creditors apart from itself and that affected creditors could

intervene and make themselves heard on the return day. That to my mind is not the answer.

52. I now turn to consider the agreement between KIG and BRC. which BRC relies on as the grounds for subsequent events. This as I have already mentioned is also relied on by Diamond Core in the application to suspend the winding up order. These facts were also drawn to the attention of Kgomo J in the papers filed in support of the application to reopen Diamond Core's case.

53. Having regard to the agreement the following is noted:-

53.1. Diamond Core is not a party to the sale agreement with KIG;

53.2. The description of the assets to be sold in clause 3 of the agreement with KIG does not refer to the assets of Diamond Core, pgs 42 and 43;

53.3. It appears from the agreement that other companies and their assets are included in the assets to be sold, and BRC's contention that the purchase price will be used solely for the benefit of Diamond Core cannot be sustained;

53.4. BRC will not receive the cash component of the purchase price if one has regard to p 48 of the agreement same reads as follows:

"In terms of clauses 4.2.1 and 4.2.3 of the Heads of Agreement, instead of these payments being made to BRC Diamondcore Limited("BRC") the parties agree that these funds will be paid directly to the Diamond Core Technical Services Creditors and employees to be identified by Brian Scallan on behalf of BRC and payment will be made to these creditors and employees in the amounts determined by Scallan within 3 days thereof. Any balance will be transferred to an account number nominated by BRC."

53.5. Of paramount importance is the fact that this agreement between KIG and BRC is subject to a suspensive condition namely that prior to the sale agreement becoming effective the sale is subject to the approval by the Board of Directors of both BRC and KIG. In as much as Kaprelian has confirmed that KIG still wishes to continue with the sale, what has not been dealt with since 29 May 2009 being the date of the amendment of the agreement, is whether or not the Board of Directors of KIG have approved the agreement and or what steps have been taken in this regard.

54. The only basis upon which BRC seeks to stay and or set aside the order are to be found in the new and subsequent events namely the agreement between KIG and BRC. I am not satisfied that BRC has discharged the onus on it to satisfy this Court in this regard. I do not agree with Mr Howie that this must only be determined on the return date, as BRC has to make out a case at this stage in order for the granting of a rule.

55. In fact in his heads of argument Mr Howie has conceded that BRC is not relieved from the obligation to prove at the first hearing that it has satisfied all of the requirements in section 354 to justify a stay in the interim. See in this regard paragraph 22 of his heads of argument.

56. I would have thought that since 5 May 2009, being the date of signature of the agreement, alternatively 29 May 2009 steps would have been taken to convene a meeting of the board of directors of either KIG or BRC for the approval of the agreement. Nothing appears to have been done in this regard and neither have any facts been placed before me regarding this.

57. All that BRC has contented itself with is to simply file an affidavit by Kaprelian in which he confirms the conclusion of an agreement which is subject to a suspensive condition.

58. In addition as its explanation for not having opposed the final winding-up order BRC indicates that Diamond Core was bringing an urgent application to reopen its case in the winding-up application. However, Mr Howie submitted that BRC and Diamond Core are different parties and therefore I must conclude that BRC simply did not take any steps. BRC needs to provide an explanation – it did not seek leave to intervene in the application for a final winding-up order. There is simply no explanation provided in the papers as to why it did not oppose the winding up order. It contents itself and relies on the actions taken by Diamond Core which to my mind it cannot do.

59. Accordingly I am of the view that BRC has not provided an explanation to the satisfaction of this Court as to why it did not oppose the final winding-up order or at least seek to intervene in such application.

60. I agree that BRC did not delay in launching the application in terms of the provisions of s354 although I must express my dissatisfaction with the manner in which it was brought.

61. Both applications were brought on short notice without any regard for any of the creditors and/or parties who may have an interest in the matter. The only persons who appeared to have been considered were BRC and River Corporate Finance.

62. In addition Scallan contradicts himself in that there was no evidence which BRC could placed before the Court of any meeting of creditors nor of any appointment of a provisional liquidator. Yet in the application for a suspension of Kgomo JP's order on p 17 at paragraph 5.5 Scallan indicated that Thompson was advised on the evening of 6 July 2009 that a first meeting of creditors was convened for the purpose of appointing a liquidator. In the application in terms of s354 Mr Howie was not able to advance any argument in relation to how far the process of winding-up had gone and also in his heads of argument indicated that there is no evidence before the Court that any meeting of creditors had been called pursuant to which liquidators would be appointed.

63. If that is the case then surely sufficient notice ought to have been given to interested parties and/or creditors in this matter rather than BRC and Diamond Core rushing to Court on an urgent basis.

64. In light of the aforementioned reasons I am of the view that BRC has not discharged the onus and has not proved to the satisfaction of this Court that I should exercise my discretion to grant a stay of the winding up.

65. In addition I am also of the view that no purpose can be served in issuing a rule nisi in this matter in light of the fact that the provisions of s354 deal both with an application to stay and an application to set aside. The basis for both the application to stay and the order to set aside relates to the agreement with KIG.

66. For reasons already mentioned in this judgment I am of the view that BRC as well as Diamond Core have not and will not be able to satisfy the requirements for such an order. The parties indicated they did not want to supplement the papers.

67. Accordingly I made the following orders:

1. **In application A the application to stay and or set aside the winding up order in terms of s354, the application is dismissed and BRC is directed to pay the costs occasioned by such application on an opposed basis**

2. **In relation to application B, being the application to suspend the liquidation order pending an appeal such application is also dismissed and such costs should form part of the cost in the liquidation.**

J I HENRIQUES
ACTING JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff:	Adv R Howie
Instructed by:	Du Toit –Bomela, KIMBERLEY
For the Respondent:	Adv Ackerman
Instructed by:	Van der Wall & Partners,. KIMBERLEY