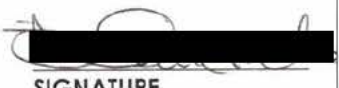




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>23 April 2025</u> DATE	 SIGNATURE

Case No. 2024/024546

In the matter between:

NICOLAAS JOHANNES DE WET
MARIA CATHRINA ORIANI-AMBROSINI

First Intervening Applicant
Second Intervening Applicant

In re:

OLIVE TRADING COMPANY (PTY) LTD

Applicant

and

KUYANDA COMMODITIES 34 CC t/a BAFANA
PETROLEUM

Respondent

(Registration number: CK2001/086230/23)

JUDGMENT

NEUKIRCHER, J

[1] The Winkelhaak Verspreiders Bafana Group of Entities (the Group) conducts business as a wholesaler of fuel. The various close corporations and companies within the Group have been supplying over 20 million litres of fuel for over twenty years to its approximately 2000 clients mainly in the agriculture and mining sectors, but to general businesses as well. During/about 2019 the Group operated approximately 22 petroleum depots in Mpumalanga, Gauteng, Limpopo and North West Province.

[2] As things stand, Engen Petroleum Ltd (Engen) launched a liquidation application against four of these and provisional liquidation orders were granted against them on 26 July 2024 – these orders were granted in the Middelburg Division of the Mpumalanga High Court. All these are opposed by the present Intervening Applicants who hold (together) 50% of the member's interest of the various entities in provisional liquidation. They also allege that they are creditors in each entity. None of the provisional orders were granted in respect of the present respondent – a close corporation known as Kuyanda Commodities 34 CC t/a Bafana Petroleum (Kuyanda).

[3] However, during April 2024, Q4 Fuel Pty (Ltd) (Q4) launched liquidation applications against two more close corporations in the Group of which Kuyanda is one. These applications are pending in the Mpumalanga High Court and both are opposed by the present Intervening Applicants.

[4] On 4 August 2024 and 6 September 2024, the present Intervening Applicants launched applications to commence business rescue proceedings in respect of the five provisionally liquidated entities. A sixth business rescue application was launched in respect of Kuyanda.

[5] It was not argued, nor even suggested by the present applicant (Olive), that the provisions of s131(1) and/or s131(2) of the Companies Act 71 of 2008¹ (the 2008 Act) had not been complied with.

[6] At present it is alleged that:

"2.19 An application has been launched to the Judge President of the Mpumalanga High Court, Middelburg seat, for case management to commence in terms of the practice directives of that court, the applications to be considered collectively in relation to all of the entities by the same Presiding Judge. The Applicants applied for a collective hearing in terms of their application;

2.20 The application to the Presiding President in terms of the practice directives, includes that the pending liquidation applications be case managed together with the business rescue applications, in order to ensure compliance with the provisions of section 131 in relation to the interaction between business rescue proceedings being adjudicated upon first (in terms of section 131(2)), and the outcome thereof being determinative of the pending liquidation applications envisaged in section 131(2);"

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

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

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

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

Lutchman NO and Others v African Global Holdings Pty (Ltd) and Others 2022 (4) SA 529 (SCA) paragraph 28

[7] On 7 November 2024 Olive issued out summons against Kuyanda. The action is defended and a plea and counterclaim was filed on 20 February 2025. Although I will return to the issue later in this judgment, in the counterclaim the very agreement which founds the basis of Olive's assertion that it is a creditor in terms of s345(1)(a) of the Companies Act 61 of 1973 (the 1973 Act), is disputed by Kuyanda.

[8] On 5 March 2024 Olive launched the present liquidation application against Kuyanda in this Division². The application is opposed by Kuyanda. There is also an application for leave to intervene in the liquidation application by the two minority members of Kuyanda (the Intervening Applicants). In response, Olive filed a Notice in terms of Rule 6(5)(b)(iii)³ (sic) – no answering affidavit was filed.

[9] Thus, at the adjudication of this matter on 10 March 2025, the following issues were argued:

- a) whether the application for leave to intervene should be granted;
- b) whether the business rescue proceedings in Mpumalanga suspended the present liquidation application in terms of the provisions of s131(6) of the 2008 Act;
- c) whether the liquidation application should be transferred to the Mpumalanga High Court, to be heard with the other liquidation applications brought by Engen and Q4 and/or the business rescue application.

² This is because Olive argues that the principle place of business and chosen *domicilium* are situated in Gauteng. It is common cause that Kuyanda's registration address is in Mpumalanga at the Farm Platrand, district Standerton

³ It is clear that what Olive intended to do was file a notice in terms of Rule 6(5)(d)(iii) as the rule it cited does not exist

This liquidation application

[10] The facts upon which Olive relies are not complex. It alleges that:

- a) Olive and Kuyanda entered into a written Murabaha Fuel Trade Agreement (the Agreement) on 24 February 2022. At the time, Kuyanda was represented by a Mr Diedericks who purported to be the “owner and director” of Kuyanda;
- b) Olive would make an amount of money⁴ available to Kuyanda on certain terms and conditions and subject to a certain limit;
- c) Olive would then, through Kuyanda, purchase goods from a vendor at cost price and would sell those back to Kuyanda at cost plus profit on deferred payment terms⁵ pursuant to the execution of a Transaction Request and an Offer letter;
- d) Kuyanda would then be invoiced and was obliged to pay the amount due on each deferred payment date.

[11] Olive alleges that it complied with the terms of this written agreement - unfortunately Kuyanda did not. As a result, and after several demands, Olive served a formal s345 demand⁶ on Kuyanda. In this, it demanded payment of the amount of R9 209 967-91 from Kuyanda within the statutory three-week period, but Kuyanda failed to pay.

[12] Olive states that Kuyanda's failure to pay the amount demanded “leads to the only reasonable inference, namely that the respondent is unable to pay its debts within the meaning of the 1973 Companies Act”, that Kuyanda “is accordingly deemed and

⁴ Which the Agreement calls “the Investment”

⁵ Which was 30 days

⁶ In terms of the Companies Act, 1973 (the 1973 Act)

demonstrated to be unable to pay its debts” and that Kuyanda should be wound up on this basis.

The Answering Affidavit

[13] The answering affidavit was filed on 3 June 2024. It is deposed to by one Adriaan Evert Prakke (Prakke), a forensic chartered accountant who was instructed by the Intervening Applicants to investigate the affairs of several entities within the Group. The Intervening Applicants have both provided confirmatory affidavits.

[14] The background is that the Group was established in the early 2000's by Mr. John Peter De Wet (De Wet). De Wet managed Kuyanda and several other entities together with Pieter Blignaut Diedericks (Diedericks) each of whom had a 50% interest.

[15] After De Wet passed away it was agreed that, given his experience and involvement in the operations and administration of the Group, Diedericks would continue in this role and would retain his 50% interest. The remaining 50% interest would be equally shared between the Intervening Applicants.

[16] According to the Intervening Applicants, they invested approximately R43 million in cash in the Group. The agreement between them and Diedericks was that they would be paid a dividend on this amount in the sum of R2 million each per year.

[17] However, during 2014 the wheels came off and Diedericks terminated his communications with the minority members and “practically excluded them from the operations of the entire business enterprise”, including that of Kuyanda.

[18] The allegation is made that by 2020/2021 there was tangible evidence that Diederick was enriching himself "at a large scale". The investigation by Mr Prakke revealed that, *inter alia*, the company profile indicates that the Group is "privately owned by the main shareholder" ie Diedericks. This is incorrect as:

- a) De Wet passed away on 12 November 2010 and according to his last will and testament his estate was inherited in equal shares by each of the Intervening Applicants;
- b) Mr J de Wet (ie first Intervening Applicant) was registered as a member of Kuyanda on 13 November 2004;
- c) Ms Ambrosini (ie second Intervening Applicant) was registered as a member of Kuyanda on 5 February 2013.

[19] Effectively, what this means is that when the Agreement was signed on 24 February 2022, both Intervening Applicants were existing minority members of Kuyanda.

[20] Further "evidence" of Diedericks' alleged unlawful conduct was that:

- a) he applied for a loan of R4 million as a credit facility from Porta Plant (Pty) Ltd t/a Porta Verspreiders (Porta Plant) on 29 July 2020; the funds were advanced to Kuyanda but not repaid to Porta Plant, and as a result, Porta Plant is taking legal action against Kuyanda;
- b) he cashed in and received the proceeds of all endowment policies that were intended to secure repayment of investments in the Group to the members, including Kuyanda;

- c) he took out endowment policies with Discovery without the knowledge of the Intervening Applicants in the name of "Kuyanda Commodities 34 CC" - these were paid out without the Intervening Applicants knowledge and co-operation;
- d) he received remuneration greatly in excess of agreed dividends;
- e) he failed to properly (or at all) consult (or consult with) the Intervening Applicants on agreements or payments or receipt of monies which would either directly profit him or encumber Kuyanda or pose a negative direct financial obligation on either Kuyanda and/or the Intervening Applicants;
- f) he breached his fiduciary duty towards Kuyanda and the Intervening Applicants by failing to disclose financial benefits he personally received from transactions he entered into without consulting and obtaining consent of the majority of members;
- g) he withheld information material to the affairs of the company and effectively shut the Intervening Applicants out of any decision-making process and that his conduct was such that it constitutes a fraudulent non-disclosure.

[21] One such transaction, according to the Intervening Applicants, is the Agreement. The Intervening Applicants argue that there was no meeting held between them and Diedericks and there is no resolution adopted authorising him to enter into that Agreement. As stated, the Agreement states that Diedericks is "the owner and director" of Kuyanda – a fact not borne out by the CIPC records and is, in fact, untrue.

[22] In fact, it is alleged that the Agreement itself contains a condition precedent: that there be compliance in accordance with schedule 1 which requires that a

resolution be obtained from the three members of Kuyanda, together with documentary proof of compliance that Kuyanda committed itself to the terms of the Agreement in a resolution which was legally adopted by the members.

[23] The Intervening Applicants also allege that the payment of R9 million is also not reflected in Kuyanda's bank account and that there is not, nor was there, any unanimous resolution taken by all three of Kuyanda's members authorising Kuyanda's further encumbrance. The allegation is also made that, as result of Diederick's conduct, s75(3)⁷ of the 2008 Act was breached and the Agreement is void *ab initio*.

[24] As much as Olive denies that this was a requirement, and argues that "Diedericks possessed the requisite authority", it is not in a position to make that denial as it does not possess knowledge of the arrangements or agreement between Kuyanda's members regarding the day-to-day running of the entity or its financial arrangements.

[25] Olive is, however, in possession of a suretyship signed by Diedericks to secure the debt of Kuyanda. It was argued by the Intervening Applicants that Olive is not without recourse as Diedericks he is personally liable to Olive in terms of s77⁸ of the 2008 Act, as well as the suretyship he signed. As this is not an issue that I am required to determine, nothing more need be said.

⁷ 75(3) If a person is the only director of a company, but does not hold all of the beneficial interests of all of the issued securities of the company, that person may not—

(a) approve or enter into any agreement in which the person or a related person has a personal financial interest; or

(b) as a director, determine any other matter in which the person or a related person has a personal financial interest, unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders.

⁸ Which prescribes the liability of directors and prescribed officers

The application for leave to Intervene

[26] On 12 February 2025, not one month before this hearing, the Intervening Applicants launched their application. The Notice of Motion seeks the following relief:

- “1. That leave be granted to the Intervening Applicants to launch this interlocutory application in the current and pending liquidation application of the Applicant in the Gauteng High Court, Pretoria under the above case number;
2. That an order be granted that the liquidation application of the Applicant, is hereby suspended in terms of section 131(6) of the Companies Act No. 71 of 2008 until the Mpumalanga High Court has adjudicated upon the pending business rescue by the Intervening Applicants’ application of the Respondent in the Mpumalanga High Court, the Middelburg Seat, under case number *3927/2024;
3. That an order be granted in terms of section 27 of the Superior Courts Act No. 10 of 2013 in terms of which this court orders that the application for liquidation by the Applicant, Olive Trading Company (Pty) Ltd, of the Respondent Kuyanda Commodities 34 CC, be removed to the Mpumalanga High Court, Middelburg seat, to be adjudicated upon in that court;
4. That the costs of this interlocutory application, be costs in the liquidation application.”

[27] Although paragraph 1 of the Notice of Motion is, in my view, somewhat inelegantly worded. it is clear from the papers, the heads of argument and the (limited) argument on Prayer 1 that what both Intervening Applicants sought was their joinder under Rule 12 as respondents to the liquidation application, as well as leave to launch the interlocutory application set out in Prayers 2 and 3 of their Notice of Motion.

[28] It appears that one of the main reasons for the request for leave to intervene is that Prakke⁹ unexpectedly passed away on 14 September 2024.

[29] As stated supra, it is common cause that the Intervening Applicants are owners of 25% each (ie a total of 50%) of the membership interest in all the entities in respect of which business rescue applications were launched, including Kuyanda. There was also no argument presented that any of the business rescue applications had not been properly commenced nor that the requirements set out in s131 of the 2008 Act, met.

[30] The Intervening Applicants allege that they have locus standi based on:

- a) their members interest;
- b) that they are creditors of Kuyanda and therefore have an interest in the proceedings, their agreed dividends of R2,5 million per annum¹⁰ has remained unpaid since 2014¹¹;
- c) that they thus each have claims against the entities for the dividends accrued to them but not paid.

[31] Rule 12 states:

“Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order including any order as to costs, and to give directions as to further procedure in the action as to it may seem meet.”

⁹ Who has deposed to several affidavits, including the main answering affidavit before this court, and other liquidation applications, as well as the Business Rescue application.

¹⁰ Being interest on their investment of R43 million

¹¹ Which they allege has been established by a forensic accountant appointed by them

[32] In *SA Riding for the Disabled Association v Regional Land Claims Commissioner*¹² the Constitutional Court re-stated the test to be applied:

"[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre decision hearing. This is so fundamental that an order is generally taken to be binding on parties to the litigation."

[33] The Intervening Applicants allege that they have a direct and substantial interest in the subject-matter of the present dispute as they are minority members of Kuyanda and creditors of Kuyanda.

[34] In *Levay and Another v Van Den Heever and Others NNO*¹³ the court stated:

"[20] In my view the conclusion in *Regal*¹⁴ should not be confined to sole shareholders or majority shareholders. A share in a company consists of a bundle, or conglomerate, of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends. Those rights include the right to attend and vote at meetings of

¹² 2017 (5) SA 1 (CC)

¹³ 2018 (4) SA 473 (GJ)

¹⁴ *Registrar of Banks v Regal Treasury Private Bank Ltd (under Curatorship) and Another (Regal Treasury Holdings Ltd Intervening)* 2004 (3) SA 560 (W)

shareholders. For this reason a minority shareholder does in my opinion have a sufficient legal interest to intervene in a winding-up application in order to oppose it and does not have to show an additional interest. This is consistent with *Regal* where the court questioned the proposition that a shareholder must show an interest in addition to his shareholding in order to be allowed to intervene.”¹⁵

[35] In response to the application, Olive filed a notice in terms of rule 6(5)(d)(iii) in which it takes the following points:

- a) that the Intervening Applicants have not established any substantial interest in terms where they should be or maybe joined to the proceedings;
- b) that the fact that they have conceded that Kuyanda carries on business within the court’s jurisdiction means that they raise no cognizable claim, even though all the other applications are presently pending in Mpumalanga;
- c) no proper case is made out to suggest that it is not convenient for this court to exercise its jurisdiction over the application for liquidation and that removal of the application to Mpumalanga at this late stage hampers the efficient exercise of justice;
- d) that only a liquidator has the authority to set aside any impeachable dispositions, and insofar as the allegations exist that these exist, any business rescue practitioner (BRP) would have no power to deal with this at all. Thus liquidation is the more expedient and justifiable course of action;
- e) Kuyanda conducts business, hold its assets, and has its employees at its Pretoria main place of business within the jurisdiction of this court and

¹⁵ Also: *Shapiro v South African Recording Rights Association Ltd (Galeta Intervening)* 2008 (4) SA 145 (W)

therefore it is convenient that the application for liquidation be heard within this court jurisdiction;

- f) s131(6) of the 2008 Act does not automatically suspend this liquidation application.

Is Olive's liquidation application suspended?

[36] This question flows from the provisions of s131(6) of the 2008 Act:

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

- (a) the court has adjudicated upon the application; or
- (b) the business rescue proceedings end, if the court makes the order applied for.”

[37] Olive does not argue that the business rescue proceedings in Mpumalanga were not properly commenced¹⁶ - its argument is that that application does not automatically suspend this liquidation application.

[38] The argument is that s131(6) distinguishes between a business rescue application and liquidation proceedings. It argues that in *Absa Bank Ltd v Summer Lodge (Pty) Ltd*¹⁷ (Summer Lodge) Makhoba J aligned himself with the view of Van Der Byl AJ in *First Rand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd*¹⁸ (Imperial Crown) where the court stated that for purposes of s131(6), liquidation proceedings only commence by the granting of a liquidation order, whether provisional or final and

¹⁶ *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ)

¹⁷ [2013] ZAGPPHC 554 paragraph 9-15

¹⁸ 2012 (4) SA 266 (KZD)

that the provisions of s131(6) do not suspend any liquidation proceedings prior to the granting of a provisional or final order.

[39] However, in *Standard Bank of South Africa v A-Team Trading CC*¹⁹ (*A-Team*)

Ploos van Amstel J stated:

“[12] I regret to say that I find the reasoning of both judges in *Summer Lodge* unpersuasive. They seem to have overlooked the fact that liquidation proceedings are commenced by the launching of an application, and that subsection (6) refers to liquidation proceedings ‘by or against’ the company. If a liquidation application is dismissed the proceedings come to an end. That does not mean that the application did not constitute liquidation proceedings. If a liquidation order is granted the company is, in terms of section 348 of the Companies Act of 1973, deemed to have been placed in liquidation when the application was launched. And the liquidation proceedings continue until the order is discharged or the company is deregistered on completion of the liquidation process. I think with respect that Van Der Byl AJ misread section 348. It is not the liquidation proceedings which are deemed to have commenced when the application was presented - it is the winding up of the company. The reliance by Makgoba J on the dictionary definition of the words ‘liquidation’ and ‘proceeding’ is not helpful. The words are used together in section 131(6) and they must be understood in the proper context. By way of analogy, eviction proceedings in every day practice commence with an application for an eviction order and include the process of serving the eviction order and ejecting the unlawful occupant. I do not see why it should be different in the case of liquidation proceedings.”

[40] Olive’s argument is that, as Makhoba J’s judgment emanates from this Division, this court is bound by it in accordance with the principle of *stare decisis*: a court is

¹⁹ 2016 (1) SA 503 (KZP)

bound and must abide by and consistently apply its prior decisions and those of courts of an equal or higher status unless they are patently flawed.

[41] In *Director of Public Prosecutions, KwaZulu-Natal v Ndlovu*²⁰, the SCA explained the principle thus:

"[24] Therefore, it is necessary to say something about the fundamental importance of precedent and the doctrine of *stare decisis*. In *S v Cock; S v Manuel*, Pickering J, who penned the unanimous judgment of the court, was cognisant of the intrinsic value of precedent when he rightly noted that:

'a deviation from a Supreme Court of Appeal decision can only be justified on one of three possible grounds. Firstly, where the case before the Judge is on the facts so distinguishable that the *rationes decidendi* of the Supreme Court of Appeal does not find application, however this requires a careful factual analysis and [is] a ground that must be ventured into carefully so as not [to] undermine the principle of stare decisis on perceived differences that are more contrived than real. Secondly a decision of the Supreme Court of Appeal can be deviated from if it is rendered per incuriam. Per incuriam does not refer to an instance where a lower court deems the Supreme Court of Appeal to have erroneously interpreted the law. It refers to the situation where the Supreme Court of Appeal overlooked legislation governing the case. Thirdly, a decision of the Supreme Court of Appeal is rendered nugatory or obsolete due [to] subsequent legislative development.'

[25] And the Constitutional Court unambiguously tells us in *Camps Bay Ratepayers' and Residents' Association & another v Harrison and another* that:

'Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a

²⁰ 2024 (1) SACR 561 (SCA) para 24-26

manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.’”

[42] I am of the view, for the reasons set out in *A-Team* – with which I respectfully agree - that *Summer Lodge* and *Imperial Crown* were incorrectly decided. But even were this view to be flawed, the SCA has put this issue to bed in *Richter v ABSA Bank*²¹ (*Richter*) where it stated:

“[17] There is no sensible justification for drawing the proverbial ‘line in the sand’ between pre and post final liquidation in circumstances where the prospects of success of business rescue exist. The legislature did not do so and to restrict business rescue to those cases in which a final winding up order has not been granted is inimical to the Act.”

[43] In my view, it is clear that, as the decision of *Richter* was decided after *Summer Lodge* and *Imperial Crown*, it has overruled them.

[44] The main thrust of the argument centered around whether or not this liquidation application was automatically suspended in terms of s131(6) – in my view, it is. The fact is also that the entire basis upon which Olive relies to found its liquidation application is in dispute and forms the subject matter of a pending action, which also means that a court would eventually decide whether Olive is a creditor or not.

[45] A brief overview of the thrust of the business rescue application pending in Mpumalanga demonstrates the following *prima facie* facts:

²¹ 2015 (5) SA 57 (SCA)

- a) the application is one of six presently pending in that court in which it is alleged that there are prospects of success to turn around the financially parlous state of Kuyanda;
- b) the Intervening Applicants rely on the provisions of s163(1)(a) to (c), as read with s163(2)(c) of the 2008 Act²² to found their complaint that, as minority members, they were subjected to oppressive conduct by Diedericks, that they are thus entitled to seek the remedy of business rescue, especially as it is admitted that Kuyanda is in financial distress²³;
- c) that the Group has assets of approximately R180 million, four gully operational depots (including that of Kuyanda) and that Kuyanda has assets recently valued at R40 million;
- d) thus there are prospects of success in the business rescue proceedings via-a-vis Kuyanda.

[46] Although the business rescue application had been filed on CaseLines, the parties informed me that it was unnecessary to read it, and that the papers were incomplete. I accept that the respondent and Intervening Applicants version in respect of the business rescue application – as set out in the application before me - is not so untenable or far-fetched²⁴ that their version should be rejected. In my view, they have thus demonstrated that there are prospects of success in the business rescue

²² 163. (1) A shareholder or a director of a company may apply to a court for relief if—
 (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; ... or
 (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.
 (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including—
 ... (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)(a) apply;

²³ Section 163 as read with s131(4)(a)(i) of the 2008 Act

²⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

proceedings and the liquidation proceedings should thus be suspended in terms of the provisions of s131(6) of the 2008 Act.

Removal to Mpumalanga

[47] Olive argues that this Court has the jurisdiction to entertain the liquidation as the principal place of business of Kuyanda is within this Court's jurisdiction, as are its assets – this is admitted by Kuyanda. It argues that the court is seized with the matter and should not, at the eleventh hour have to hear argument to remove the matter – the removal would simply result in a waste of judicial resources and time in an already strained court.

[48] In *Goode, Durrant and Murray (SA) Ltd and Another v Lawrence*²⁵ (*Lawrence*) the respondent applied for a transfer of the matter to the Durban and Coast Local Division alleging that it would be more equitable and convenient for that Division to hear the matter as:

- a) the issues to be enquired into ie voidable dispositions had occurred in that court's jurisdiction;
- b) the respondent, his wife and other witnesses resided there;
- c) it was only the two applicants, apparently the remaining creditors of the respondent, who resided out of the jurisdiction of that court, where there was also certain other properties of the respondent.

[49] In granting the removal, the court stated that the question of convenience is decided with reference to what happens after the order is granted and that:

²⁵ 1961 (4) SA 319 (W) at 330G

"It follows the moment that an order for sequestration is granted, that the Court granting the order is vested with jurisdiction in regard to everything that follows upon the order; all applications to Court and the Master's control of that estate is absolute and even rehabilitation must be in that forum. On a consideration of the present facts, I must look to the case made out by the applicant, not that made out by the respondent, because I must look to the convenience in the event of an order being granted and not in the event of an order being refused. I think that the convenience is overwhelming in favour of the Durban and Coast Local Division. The matters to be enquired into occurred in the jurisdiction of that Court; the respondent and his wife who will have to be examined, reside there; their witnesses reside there; and on the other hand, the two applicants, apparently the only remaining creditors of the respondent, reside out of the jurisdiction of that court, and it is said that their convenience is of importance because they will have to give instructions to the trustee. No doubt the affairs of Windsor Motors will have to be enquired into and the records of those affairs are within this jurisdiction, but that I did not find inconvenient. In practice one knows from experience that creditors have very little to do with what happens after an order of sequestration has been granted; they give verbal or written instructions to the trustee and he proceeds to carry on with the investigation. The records of the liquidation of Windsor Motors can easily be transmitted to the other Court, I have come to the conclusion that everything points to it being equitable and convenient that not this Court but the Durban and Coast Local Division should hear the matter."

[50] Olive argues that the *Lawrence* judgment as authority that "if there was competition between the jurisdiction of two provinces and in the one province there was little or no assets, and in the other large assets, the court would certainly refuse sequestration in the Province where the smaller assets were to be found..."

[51] In my view, were it not for the fact that the Mpumalanga High Court were seized with multiple liquidation applications and multiple business rescue applications, all based on either the same or similar facts, where all those parties are already before that court and that court's jurisdiction engaged on multiple levels²⁶, I may have agreed that the issue of convenience should be decided in favour of this court's jurisdiction – but I do not. In my view, given everything that is presently pending, the present application should be decided by the Mpumalanga High Court.

[52] In my view, the matter in casu is distinguishable on the facts from the *Lawrence* matter exactly because there are pending proceedings against several entities within the Group, as well as against Kuyanda in Mpumalanga. The Mpumalanga court is seized with all these applications and the facts germane to each, which all appear to be intertwined – certainly the facts pertaining to the two Kuyanda applications are. Were this application to be transferred, the Mpumalanga court can hear both applications *pari passu* and may decide (if it dismisses the business rescue application) to grant a liquidation order - it can only do so if both applications serve before it.

[53] Were Olive's objection to transfer to be upheld it would also mean that, if Kuyanda's business rescue application is unsuccessful, Olive would have to apply for a date of hearing in this Division and wait its turn in the queue and a judge (unfamiliar with all the facts of all the matters) would have to consider the application. That is not conducive to the efficient and effective disposal of litigation. It unnecessarily encumbers scarce judicial resources and enforces a piece-meal disposal of litigation which is undesirable.

²⁶ Including that the registered address is in Mpumalanga

[54] As a judge has been appointed to case-manage all the pending applications in Mpumalanga, it is my view that Olive's liquidation application would be both more conveniently, expediently and appropriately heard and determined in the Mpumalanga High Court, Middelburg in terms of s27(1) of the Superior Courts Act 10 of 2013²⁷.

Costs

[55] The Intervening Applicants have not sought costs in the in the event they are successful. They seek an order that the cost of the interlocutory application be costs in the liquidation application.

The Order

[56] The order I grant is the following:

1. The Intervening Applicants are granted leave to intervene and are granted leave to launch the interlocutory application in the pending liquidation application launched by Olive Trading Company (Pty) Ltd against Kuyanda Commodities 34 CC t/a Bafana Petroleum (GP case no. 2024/024546).
2. The liquidation application of the applicant is hereby suspended in terms of s131(6) of the Companies Act 71 of 2008 until the Mpumalanga High Court has adjudicated upon the pending business rescue application

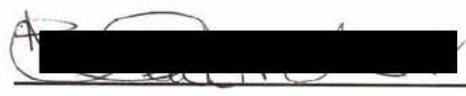
²⁷ If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings-

- (a) should have been instituted in another Division or at another seat of that Division; or
- (b) would be more conveniently or more appropriately heard or determined-
 - (i) at another seat of that Division; or
 - (ii) by another Division,

that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.

launched by the Intervening Applicants against Kuyanda Commodities 34 CC t/a Bafana Petroleum (case no. 3927/2024).

3. The application for liquidation of Olive Trading Company (Pty) Ltd vs Kuyanda Commodities 34 CC t/a Bafana Petroleum (GP case number: 2024/024546) is removed to the Mpumalanga High Court, Middelburg in terms of s27 of the Superior Courts Act 10 of 2013, to be determined by that court.
4. The costs of the interlocutory application shall be costs in the liquidation application.


B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 23 April 2025.

For the applicant	:	Adv M Desai
Instructed by	:	Govender Patel Dladla Inc
For the respondent and		
Intervening Applicants	:	Adv MA Badenhorst SC
Instructed by	:	Eastes Inc
Matter heard on	:	12 March 2025
Judgment date	:	23 April 2025