

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **2021-59389**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	_____
DATE	SIGNATURE

In the matter between:

GLOBUSTARR TRADING CO L.L.C.

Applicant

and

MAYANA PROPERTIES (PTY) LTD

Respondent

JUDGMENT

H A VAN DER MERWE AJ:

- [1] This is an application for the liquidation of the respondent, Mayana Properties (Pty) Ltd (*Mayana*) on the basis that it is unable to pay its debts. The applicant in the liquidation application is Globustarr Trading Co L.L.C., (*Globustarr*) a company incorporated in Dubai.
- [2] At the hearing of the application, Mayana sought an adjournment of the application in terms of section 347(1) of the Companies Act 61 of 1973 (*the Old Companies Act*). The adjournment is sought so that an application brought by a

director of the respondent (Mr Miguel Da Corte) for Mayana to be placed in business rescue in terms of section 131(1) of the Companies Act 71 of 2008 (*the Companies Act*), can adjudicated before the liquidation application is decided. Mr Desai, who appeared for the respondent, tendered the costs occasioned by the adjournment, to be paid by the Mr Miguel Da Corte, *de bonis propriis*.

[3] I was provided with the business rescue application. Globustarr delivered a notice in terms of rule 6(5)(d)(iii) in opposition to that application. I was also provided with this notice. That despite, the business rescue application is not before me and I cannot make an order on it.

[4] In terms of section 131(6) of the Companies Act:

“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.”

[5] Therefore, if section 131(6) finds application the adjournment application brought by Mayana in terms of section 347 of the Old Companies Act is a foregone conclusion.

[6] Globustarr opposes the adjournment application, on the basis that the business rescue application is an abuse and lacks merit.

[7] For the reasons set out below, in my view, but for section 131(6) and the adjournment application, the liquidation application should be granted. The liquidation application was issued on 22 December 2021. The liquidation application was enrolled to be heard before me on 3 March 2025. The extraordinary delay in the finalisation of the liquidation application is, in part at least, to be blamed on Mayana’s machinations. In terms of section 348 of the Old Companies Act, if an order for the liquidation of Mayana is made, the deemed concursus date will be 22 December 2021 – which can have dramatic consequences for any third parties who innocently transacted business with

Mayana since that date. For instance, any dispositions made by Mayana is in principle void in terms of section 341(2) of the Old Companies Act.

- [8] Any further delay in the adjudication of the liquidation application therefore holds the potential of yet further prejudice to innocent third parties, apart from the prejudice to Globustarr in being kept out of an order to which it is otherwise entitled, if the business rescue application is ultimately dismissed. An adjournment of the liquidation application should therefore not be granted lightly.
- [9] However, the Companies Act has a clear preference for business rescue over liquidation.¹ Section 131(6) is perhaps the most important mechanism by which the preference is made effective.

Is the business rescue application an abuse?

- [10] As mentioned above, the applicant in the business rescue application is Mr Miguel Da Corte, who describes himself as a director of Mayana. He is not the deponent to the answering affidavit in the liquidation application (the deponent is Mr Eduardo Abreu Da Corte), although he did depose to a confirmatory affidavit in the liquidation application. Mr Miguel Da Corte is the deponent to the founding affidavit in the business rescue application and Mr Eduardo Da Corte deposed to a confirmatory affidavit in that application. That being so, it seems artificial to me to draw a sharp line between the manner in which Mayana conducted its opposition to the liquidation application and the business rescue application. When I consider whether the business rescue application is an abuse, it seems apposite to me that I should also consider at the same time Mayana's conduct in the liquidation application.
- [11] As mentioned above, the liquidation application was issued on 22 December 2021. The liquidation application was enrolled to be heard on 23 October 2023. On the court day before, on 20 October 2023, Mayana delivered an answering affidavit. The unsurprising consequence was that the liquidation was postponed. Mayana's notice of intention to oppose the liquidation

¹ *Diener NO v Minister of Justice and Correctional Services and Others* 2019 (4) SA 374 (CC) at para 54

application was served on Globustarr on 10 January 2022, yet there is no explanation for the exceptionally late delivery of the answering affidavit in any affidavit before me. The only reasonable inference to be drawn from this is that the timing of the delivery of the answering affidavit was cynically designed to delay the adjudication of the liquidation application.

[12] I have no explanation before me for Globustarr's own ostensible tardiness in enrolling the liquidation application after Mayana's notice of intention to oppose was delivered, but whether that delay is excusable or not, it cannot exculpate Mayana's conduct. Moreover, Globustarr has not been called upon to provide an explanation and I have not heard argument on it either.

[13] In the answering affidavit, Mr Eduardo Da Corte accuses Globustarr of fraudulently colluding with a third party. There is no basis in fact for these accusations. The opposition to the liquidation application is, if not dishonest, at least reckless for the reasons I deal with below.

[14] Mayana did not deliver heads of argument or a practice note in the liquidation application, as is required in terms of the practice rules applicable in this court. Nor did Mayana cooperate with Globustarr to reach agreement on a joint practice note, as is also required in this court. Mayana sought to justify its refusal to engage Globustarr on a joint practice note, on the basis that Mayana's attorneys were instructed to "... *launch an application for, inter alia, our client to be placed in business rescue...*". (This appears from an email dated 12 February 2025 Mayana's attorneys sent to Globustarr's attorneys, in response to a request by the latter for comment on a draft joint practice note).

[15] In my view, Mayana was not relieved of its procedural duties to deliver heads of argument, a practice note and to engage Globustarr's legal representatives on a joint practice note in the liquidation application, just because the business rescue application was in the offing. At the very least, Mayana should have recorded its intention to seek an adjournment of the liquidation application in a joint practice note, together with heads of argument on the topic.

[16] The business rescue application was served only on 25 February 2025, less than a week before the liquidation was set down to be heard on 3 March 2025. The

last event relied on in the founding affidavit in the business rescue application took place on 23 January 2025 (when a company called Beryl Holdings (Pty) Ltd (in liquidation) (Beryl) is supposed to have given an undertaking to make payment to Mayana), yet the business rescue was launched just over a month later. (The undertaking is worthless, for the reasons set out below, but for now its relevance lies in the timing of launching of the business rescue application). There is no explanation for this delay in bringing the business rescue application. That being so, I cannot but conclude that the business rescue application was brought as late as it was, so that it could have the maximum disruptive effect on the hearing on the liquidation application.

- [17] In summary, these facts show, to my mind, a deliberate campaign by Mayana and Mr Miguel Da Corte to frustrate the adjudication of the liquidation application.

The merits of the business rescue application

- [18] Mr Spiller, who appeared for Globustarr submitted that Mr Miguel Da Corte did not show that he has locus standi to bring the business rescue application, because in the founding affidavit in that application he merely states that he is an employee and does not, for instance, provide an employment contract or the like. I do not agree. It is so that that the bare allegation is made that Mr Miguel Da Corte is an employee of Mayana, but it seems to me to go too far to find that for this reason I should conclude that Mr Miguel Da Corte's locus standi has not been established. As I referred to above, no doubt due to the circumstances in which the business rescue application was brought, Globustarr delivered only a notice in terms of rule 6(5)(d)(iii) and not an answering affidavit. Had this allegation been challenged in an answering affidavit, then the enquiry would shift to whether Mr Miguel Da Corte could meet the challenge in a replying affidavit. For now, however, it seems to me that I should accept that Mr Miguel Da Corte has locus standi to bring the business rescue application.

- [19] An applicant for order placing a company in business rescue is required to establish grounds on which a court can conclude that there are reasonable

prospects that the business of the company concerned can be rescued.² For the reasons set out below, whether business rescue will result in a better dividend for creditors does not arise on the facts.

- [20] In the founding affidavit in the business rescue application, Mr Miguel Da Corte says that Mayana's financial distress was caused by "*third party fraud and extortion*". However, there is nothing in the founding affidavit to suggest that placing Mayana in business rescue will in any way address the 'fraud and extortion' that led to Mayana's financial distress. That alone should be the end of the business rescue application.
- [21] Annexed to the founding affidavit is a document that Mr Miguel Da Corte refers to as Mayana's "financial statements" for the financial year ending 29 February 2024. Whether that is an apt description of the document is debatable, inasmuch as the document calls itself "*Unaudited Unreviewed Financial Statements*". It is also not signed by a director. Nor does it contain all the information that is typically contained in a private company's annual financial statements. It also reflects the position as it was a year ago. Be that as it may, it is nonetheless Mr Miguel Da Corte's version of Mayana's financial position, so it cannot be ignored altogether.
- [22] The "financial statements" show that, as at 29 February 2024, Mayana had total liabilities in the amount of R83 783 444.00 – all of which is made up of loans from parties related to Mayana. It does not reflect the amount of US\$962 343.76 claimed by Globustarr in the liquidation application (which, for the reasons set out below, I take as established). At the current exchange rate, that amount comes to some R17 300 000.00. Taken together, Mayana's liabilities exceed R100 000 000.00. The "financial statements" show assets in the total amount of R95 621 972.00 but for the reasons that follow, this amount is unreliable.
- [23] The "financial statements" also show "cash and cash equivalents" of only R990 535.00, so to call Mayana "financially distressed", is a euphemism. A more accurate description is hopelessly insolvent, so far as commercial solvency is

² *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* 2013 (4) SA 539 (SCA) at para 29–31.

concerned. To that extent the case for Mayana's liquidation so far as its inability to pay its debts is concerned is emphatically clear.

[24] Mr Miguel Da Corte contends that Mayana can expect payment from Beryl in the amount of R19.9 million, in terms of a settlement agreement Mayana concluded with Beryl that provides for Beryl to make payment of that amount in instalments. The settlement agreement was concluded on 24 April 2024 and although Beryl has so far paid only a fraction of what is due under the settlement agreement, all that is supposed to have changed when Beryl gave the undertaking on 23 January 2025 I referred to above. What is not stated in Mr Miguel Da Corte's founding affidavit is that Beryl is in final liquidation. The settlement agreement itself records, bizarrely, that Beryl was placed in final liquidation by an order of this court on 5 October 2023, yet the settlement agreement is not signed by Beryl's liquidator, but one Reabetswe Kgoroadira. Obviously, the settlement agreement and the undertaking are both equally worthless. Once a liquidation order was granted, all Beryl's property was first deemed to be in the custody and control of the Master and thereafter one or more provisional or final liquidators (section 361(1) of the Old Companies Act). The payment Beryl made to Mayana after its liquidation is irredeemably void, as would be any further payments that could somehow be made by Beryl.³

[25] The other source of payment (some R29 900 000.00) that Mayana can expect is supposed to come from a company called Our Comp (Pty) Ltd, which is also in liquidation (*Our Comp*). According to Mr Miguel Da Corte, Mayana did not prove its claim in Our Comp's liquidation proceedings, for fear of attracting a contribution. No more need be said about this.

[26] As I mentioned above, in the "financial statements", total assets in the amount of R95 621 972.00 is reflected. However, as it is clear that the amount supposedly owed by Beryl is not a recoverable debt in any sense of the word, and as the same goes for Our Comp, I cannot take the figure of R95 621 972.00 at face value. There can however be no doubt about the total liabilities in excess of R100 000 000.00.

³ *Pride Milling Co (Pty) Ltd v Bekker NO* 2022 (2) SA 410 (SCA) para 18–21.

- [27] That leaves only one more potential source of income for Mayana. According to Mr Miguel Da Corte, a party related to Mayana (Macla Commodities (Pty) Ltd (*Macla*)) concluded a “*memorandum of understanding*” with Lizwelakhe Solutions (Pty) Ltd (*Lizwelakhe*), in terms of which Macla will mine what is described as “*a lucrative seam of coal*”. Macla and Lizwelakhe in turn concluded an agreement with Mayana, in terms of which Mayana is appointed as agent to sell the coal that Macla will mine, for which it will be paid R50 per tonne sold. This, according to Mr Miguel Da Corte’s estimate can yield as much as R500 000 000.00 for Mayana.
- [28] However, Lizwelakhe (according to Mr Miguel Da Corte) has only a prospecting right in respect of this coal reserve. A mining permit that it had, lapsed on 29 May 2024. Mr Miguel Da Corte also did not mention in his founding affidavit that the mining permit lapsed. To the contrary, in his founding affidavit he states “*Lizwelakhe was issued with a mining permit of [sic] Portion 1 of the Farm Klipspruit 136 HT*” – which is plainly not the truth. Moreover, the amount of R500 000 000.00 is based on Mr Miguel Da Corte’s estimation, that between 7 and 10 million tonnes of coal could be mined on five farms in Mpumalanga. The lapsed mining permit pertained to only one portion of land, not all five farms. The yield that can be expected from the single farm over which Lizwelakhe held a mining permit is not evident from the founding affidavit in the business rescue application. This to my mind does not amount to grounds on which I can find that there is a reasonable prospect that either Mayana’s business can be rescued, or that business rescue will provide Mayana’s creditors with a better dividend than what can be expected if Mayana is liquidated.
- [29] Mr Miguel Da Corte does mention in his founding affidavit that Lizwelakhe’s prospecting rights lapsed, but he also says that those rights has been renewed. However, as he does not annex any document that shows this to be the case to his founding affidavit and as he does not explain his inability to produce such a document, I find it difficult to accept his *ipse dixit* on this score.
- [30] The “financial statements” also show that for the whole of the financial year ending on 29 February 2024, Mayana had no turnover at all – thus it conducted no business at all. From the founding affidavit it appears that Mayana entered

into “*mutual separation agreements*” with six of its employees during June and July 2024. Thus, it is straining the language to speak of rescuing Mayana’s business. There is no active business to rescue. More properly, what is envisaged is that Mayana’s business may be resuscitated, rather than rescued, strictly speaking. The point was not fully argued before me and while I am not without reservations about it, I will assume for purposes of the applications before me that it is proper to place a company in business rescue when it does not in fact have an active business at the time when an application is brought in terms of section 131(1). Nonetheless, the fact that Mayana does not have an active business is a factor against granting an order for it to be placed in business rescue.

[31] Unless it can be shown that there are reasonable prospects of resuscitating Mayana’s business, the prospect of business rescue achieving a better dividend for creditors than would be the case if it is placed in liquidation does not arise. There is nothing before me to suggest that a business rescue practitioner will be better able to dispose of Mayana’s assets than a liquidator. There is also nothing before me to suggest that the fees payable to a liquidator will be any greater than the fees payable to a business rescue practitioner. In short therefore, for the business rescue application to succeed, there must be a reasonable prospect that its business can first be resuscitated and then rescued.

[32] However, all of that may be, as referred to above, without Mr Miguel Da Corte dealing with the cause of Mayana’s financial distress and how placing it in business rescue will address that cause, a reasonable prospect to rescue Mayana’s business has not been shown.

The liquidation application

[33] Globustarr’s case in the founding affidavit in liquidation application is relatively straightforward. Globustarr does business as an international minerals and metals trader. Globustarr concluded oral agreements with Mayana in terms of which Globustarr would purchase chrome ore from Mayana. Globustarr would then sell the chrome ore to third parties, mainly in Asia. The chrome ore was so-called ‘run-of-mine’ ore, that is unrefined ore, as it is extracted from the earth.

[34] Globustarr made cash advances to Mayana. The parties anticipated that once Mayana supplies the chrome ore to Globustarr, then the advances would be made good from the purchase price for the ore that would become payable to Mayana.

[35] Mayana supplied ore to Globustarr on a number of occasions, but in insufficient quantities to effect repayment of the advances made to it. In the result, Globustarr made advances to Mayana that was not repaid in the total amount of US\$962 343.76.

[36] On 22 August 2021 Globustarr sent an email to Mayana (represented by Mr Eduardo Da Corte). In the email the following is stated:

“It is getting very difficult for us to reply to our bank for this huge outstanding amount of USD 962 343.76, so it is our humble request to let us know how and when you are going to adjust through shipment or return our advances”.

[37] Mr Eduardo Da Corte responded on 23 August 2021 with an undertaking to revert. Mr Eduardo Da Corte’s letter of 6 September 2021 followed, in this letter, the following is stated:

“... we are committed to settle your advance payment over the next 2 months, being end of October 2021 but if any unplanned or unforeseen delays arise, will be regrettable [sic] stretched to then end of November 2021, but it is our every intention to settle your payments within the two months we discussed last week, being the end of October 2021.”

[38] When no ore was supplied and no payments were made, Globustarr addressed a letter of demand in terms of section 345 of the Old Companies Act dated 19 October 2021 to Mayana. There are vague references to interactions between the parties following the letter of demand on an allegation by Mayana that there were “*discrepancies with certain documents relating to the testing process*”. When the interactions did not yield results, Globustarr caused the liquidation application to be issued on 22 December 2021.

[39] As referred to above, no answering affidavit was forthcoming until the court day before the liquidation application was set down to be heard on 23 October 2023.

[40] In the answering affidavit Mr Eduardo Da Corte explains that the price ultimately payable to Mayana for the chrome ore it supplied to Globustarr, is a factor of the chrome concentrate contained in the ore. In the replying affidavit, Globustarr's case is that the price is determined by the concentration of chromium (or chromite) in the ore. However that might be, it is common cause between Globustarr and Mayana that price of the chrome ore varies relative to the grade of the ore. The grade is determined by independent testing agents.

[41] In the answering affidavit, Mr Eduardo Da Corte states that the ore was tested, at Globustarr's behest by two testing agents, Alfred H Knight (*AHK*) and Alex Stuart (*ALS*). The tests performed by AHK and ALS were done at the port at Maputo, from where the ore were loaded onto ocean going vessels bound for Asia.

[42] Mr Eduardo Da Corte states that Mayana was the victim of a fraud perpetrated on it by Globustarr in concert with either AHK or ALS (or both of them), by the misrepresentation of the grade of the ore that was actually supplied to Globustarr, to reflect a lower grade than was actually the case. In so doing, Globustarr paid less for the ore than was due in terms the agreements concluded with Mayana.

[43] In support of this accusation, Mr Eduardo Da Corte states that Mayana had the ore tested independently from Globustarr's appointed testing agents, AHK and ALS. On the documents that is supposed to reflect the tests performed at the behest of Mayana, Mr Eduardo Da Corte states the following:

"All such tests will be available in the action proceedings [a reference to an action instituted by Globustarr in the meantime, to interrupt the running of prescription]. The documents in question are voluminous owing to the number of tests undertaken [by] Mayana over varying sample batches constituted of different sample sizes. I attach samples of these tests as "**AA2.1**" to "**AA2.2**." (boldface in the original)

[44] This allegation lies at the heart of Mayana's opposition to the liquidation application. There can be no talk of fraud unless Mayana can show that the grade of the ore, as tested by AHK and ALS, was different to the actual grade of the ore. The actual grade would in all events be a matter of the result of a test of the

ore. AA2.1 and AA2.2 are supposed to be the results of those tests. It should strike one as odd that Mayana would not annex all of those test results to its answering affidavit, no matter how voluminous it might be, as goes to the very heart of its case.

[45] Both documents (AA2.1 and AA2.2) record as follows:

“These results are from samples prepared by AHK and should be read in conjunction with the corresponding sampling report. These results are indicative; these results cannot be used for commercial sale.”

[46] In the replying affidavit, it is explained in some detail why these test results are not related to ore that Mayana sold to Globustarr. The quantities of the ore to which the tests relate are 2 007.01 and 196.72 metric tonnes respectively. The smallest quantity of ore that was sold to Globustarr was 4 876 metric tonnes. The reference numbers attached to the ore are not related to Globustarr. These test results were also not sent to Globustarr. If there was an answer to these allegations one would have expected an effort by Mayana to meet it in a fourth set of affidavits (as are often permitted in liquidation applications).

[47] The two test results annexed to the answering affidavit as AA2.1 and AA2.2 are dated 3 and 5 February 2020 respectively. If, as Mr Eduardo Da Corte contends, these test results show that Mayana was a victim of fraud perpetrated on Mayana, then it is inconceivable that Mayana would make not only make no mention of it at the time, but also continue to do business with Globustarr on another seven occasions. It is also entirely incompatible with Mayana’s letter of 6 September 2021, (quoted above) in which there is not only no mention of any fraud, but in which Mayana undertakes to effect payment to Globustarr either by further supplies of ore or repayment of the advances in cash.

[48] In the result, I am driven to conclude not only that Mayana has no defence to the liquidation application, but also that the allegations of fraud made against Globustarr and the two testing agents in Mr Eduardo Da Corte’s answering affidavit, were made, if not dishonestly, then at least recklessly.

[49] As for proof of Mayana's inability to pay its debts, as I found above, the founding affidavit in business rescue application puts Mayana's inability to pay its debts beyond doubt.

The effect of section 131(6) and the adjournment application

[50] *Lutchman NO v African Global Holdings*⁴ is authority for the proposition that an application is "made" for purposes of section 131(6) only after it has been issued, served on the company and the Companies and Intellectual Property Commission (CIPC) and all reasonable steps have been taken to identify the affected persons and to deliver the application to them.

[51] The returns of service presented to me show that the application was served on the CIPC, the South African Revenue Service, a creditor of Mayana, Da Corte Investments (Pty) Ltd, all on 28 February 2025. The returns of service also show that there was service on Mayana itself, other creditors of Mayana in the form of Macla Logistics (Pty) Ltd and Macla Commodities (Pty) Ltd, all on 3 March 2025 (the day the application was heard) at 09h13. The application was also served on Mayana's employees on 3 March 2025, also at 09h13 "by affixing at its registered address within the court's jurisdiction at 2ND FLOOR MICA HOUSE CNR KIRBY AND OXFORD ROADS BEDFORDVIEW". (Service was effected on all those parties at precisely the same time, because all were served at the same address). I accept therefore that by the time the liquidation application and the adjournment application came before me, that the business rescue application had been served and notice given to the affected parties as meant by section 131(6), albeit mere minutes before the matter was first called in court.

[52] The effect of section 131(6) and the adjournment application fall to be considered in the context of the three key findings I made above: (a) there is no defence to the liquidation application; (b) the business rescue application was brought cynically at such a time so as to have the maximum disruptive effect on the adjudication of the liquidation application; and (c) there is no merit in the business

⁴ 2022 (4) SA 529 (SCA) (*Lutchman NO*) at para 28.

rescue application. The business rescue application is therefore an abuse, brought in the face of a sound liquidation application.

[53] In the recent judgement of the Supreme Court of Appeal in *PFC Properties (Pty) Ltd v Commissioner, South African Revenue Service and Others*⁵ Weiner JA found:

“[36] From what is set out above, it is clear that the DRFT trustees have sought to use the legal process provided for companies, which may legitimately be rescued, for an ulterior purpose — to thwart the winding-up proceedings and the consequences for the De Robillards that may arise therefrom. This stratagem, as stated in *Villa Crop*, 'subverts fundamental values of the rule of law'. The conduct of the DRFT trustees and PFC is so tainted by impropriety that this court must use the power it has to 'safeguard the integrity of its process'.

[37] In so acting, the power of this court to non-suit the DRFT trustees is warranted. As a consequence, their ill-fated application should not have been entertained by reason of its use in a scheme of abuse. Although the application was correctly dismissed by the Pietermaritzburg High Court, it fails in this court, on appeal, for different reasons.

[38] PFC sought to oppose the liquidation application on the basis of the moratorium provided for in s 131(6) of the Act. But the legislature could not have intended that a business rescue application, tainted by abuse, would have that effect. In essence, because the DRFT trustees were non-suited for the reasons set out above, the doomed business rescue application was not 'made', as envisaged in s 131(6). Thus, the moratorium did not come into operation and did not suspend the winding-up proceedings. That being so, there was no impediment to the winding-up proceedings.”
(footnotes omitted)

[54] In *PFC Properties* a liquidation application was granted by this Division (sitting in Pretoria), while an application for business rescue was pending in the KwaZulu-Natal Division, Pietermaritzburg. The appeal against the liquidation order was dismissed, on the basis that the pending business rescue application was an

⁵ 2024 (1) SA 400 (SCA) (*PFC Properties*) at para 36-38.

abuse. Therefore, it does not matter that the business rescue application is not before me, if it is, as I find, an abuse.

[55] Having found that the business rescue application is an abuse, it is the end of the matter. Section 131(6) does not apply and as the business rescue is an abuse, the adjournment application can obviously not be granted.

[56] It was argued before me that I am bound to follow the judgements in *Absa Bank Ltd v Summer Lodge (Pty) Ltd*⁶ and *Absa Bank Ltd v Summer Lodge (Pty) Ltd*⁷ and to take it for granted that section 131(6) does not apply to an application for liquidation. However, *PFC Properties*, so it seems to me, also brings an end to the controversy that existed over whether “liquidation proceedings” in section 131(6) means the proceedings before a court wherein a liquidation order is sought (as was found in *Standard Bank of South Africa Ltd v A-Team Trading CC*⁸), or the processes that follow after a liquidation order has been granted, or both.

[57] By necessary implication, if not in express terms, the Supreme Court of Appeal found that section 131(6) would suspend a liquidation application if it were not an abuse, as appears from especially paragraph 38 of *PCF Properties* quoted above. If section 131(6) did not apply to a liquidation application, then the question as to whether an abusive application for business rescue suspends a liquidation application does not arise. In my view, *PFC Properties* is therefore binding authority for the proposition that “liquidation proceedings” in section 131(6) includes an application for liquidation. The three reported judgements in this Division in which it was found that “liquidation proceedings” do not include a liquidation application (the two *Absa Bank Ltd v Summer Lodge (Pty) Ltd* judgements referred to above and *Absa Bank Ltd v Makuna Farm CC*⁹ must therefore be taken as overruled and the contrary conclusion reached by Ploos Van Amstel J in *Standard Bank of South Africa Ltd v A-Team Trading CC* must be taken as confirmed.

⁶ 2014 (3) SA 90 (GP)

⁷ 2013 (5) SA 444 (GP)

⁸ 2016 (1) SA 503 (KZP)

⁹ 2014 (3) SA 86 (GJ)

[58] Although the question does not come up in this application, it also seems to me that by parity of reasoning, the Supreme Court of Appeal found by necessary implication that “liquidation proceedings” in section 131(6) includes also the processes that follow after a liquidation order has been granted. This is so, because in *Lutchman NO*, the Supreme Court of Appeal was confronted with whether a business rescue application suspends the processes that follow after a liquidation order has been granted. That question would also not arise if section 131(6) did not apply to the processes post a liquidation order, if section 131(6) did not apply to those processes in the first place.

[59] As I set out above, Mr Desai tendered the costs of the adjournment application to be paid by Mr Miguel Da Corte *de bonis propriis*. It also seems to me that costs on a punitive scale is warranted.

[60] In the result, I make the following order:

1. Mayana Properties (Pty) Ltd is placed in final liquidation;
2. The costs of the liquidation application are in the liquidation;
3. The adjournment application brought by Mayana Properties (Pty) Ltd is dismissed;
4. Mr Miguel Da Corte is liable for the costs of the adjournment application, *de bonis propriis* on the scale as between attorney and client.



H A VAN DER MERWE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

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Instructed by: Webber Wentzel

Counsel for Respondent: Adv M Desai

Instructed by: Andraos & Hatchett Inc

Date of Hearing: 3 March 2025

Date of Judgement: 18 March 2025

