IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 111056/2025 & 111003/2025

DATE: 18-08-2025

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE 25-08-2025
SIGNATURE [redacted]

In the matter between

BENNIE KEEVY N.O. Applicant

and

MICAH KITCHENS Respondent

J U D G M E N T

THERON, AJ: In matters number S22 and S26, the matters of Keevy and two others, S22 and the matter of De Wet and another in their representative capacities as liquidators, I was asked to make a declarator in terms of section 388 of the old Companies Act, declaring that the respective companies are unable to pay their debts.

I intimated to Ms Pinder, when the matter was initially called, that I was not prepared to grant an order or to grant a declarator that these companies are unable to pay their debts.

I want to indicate that the path to convert a voluntarily creditors' winding up, which is the case in both these matters, is through section 346(1)(e) of the old Companies Act.

The applicants in this matter, however, does not have standing in terms of section 346(1)(e) of the Companies Act to seek a conversion from a voluntary winding-up to a court winding up, or so-called compulsory winding-up.

The mechanism of section 388 available *inter alia* to the liquidators to seek or to seek a determination of any question arising in the winding-up or for a Court to exercise any of the powers in the Act if a company was in fact being wound up by the Court, is a mechanism which is not meant to cater for the situation that the liquidators find themselves in.

Although it is so that a section 417 inquiry can only be held in circumstances where a company is unable to pay its debts, it does not mean that this Court needs to declare that to be so at this stage.

I have read the papers, and I am satisfied that on the facts placed before me, these companies are indeed companies which are unable to pay its debts, but I am only so satisfied on the untested say so, under oath, of the liquidators.

I must intimate immediate that that does not mean that I do not believe the liquidators or that I doubt their oath. I am, however, not prepared to grant a declarator that will be valid from now on and forever and a day in circumstances where further investigation into the trade dealing and affairs of the companies might show that the companies have other assets, hidden assets or that their assets and liability position is different from what the liquidators are, at this stage, aware.

In those circumstances it may later transpire that the companies were in fact able to pay their debts. I accept that it is unlikely on the facts that were placed before me in these two matters, but a declaratory order has consequences reaching far past today's date.

The Court, in *Hudson v The Master* 2002 (1) SA 862 (T) found that the time when the determination must be made whether a company is unable to pay its debts, is when the section is invoked.

It is unnecessary for me to at this stage, to make the declarator and implicit in granting the order that a 417 inquiry be held is my satisfaction, at this stage, that the companies are unable to pay their debts.

I therefore make the orders in the draft orders that were handed to me, that I have dated and signed. I marked it X.

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[redacted]……

THERON AJ

JUDGE OF THE HIGH COURT

DATE: 25-08-2025