REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 18486/2013

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

2013-06-14
DATE

SIGNATURE

In the matter between:

REDPATH MINING SOUTH AFRICA (PTY) LIMITED	Applicant
and	
PIERS MARSDEN NO (In his capacity as the business rescue practitioner Of Umnotho we Sizwe Resources (Pty) Ltd)	First Respondent
UMNOTHO WE SIZWE RESOURCES (PTY) LTD (Under business rescue) (Registration Number 198/010730/07)	Second Respondent
INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED	Third Respondent
THE CREDITORS REFLECTED IN THE SCHEDULE MARKED "A"	Fourth Respondent
THE SHAREHOLDERS REFLECTED IN THE SCHEDULE MARKED "B"	Fifth Respondent
COMPANY AND INTELLECTUAL PROPERTY COMMISSION (CIPC)	Sixth Respondent

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J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] The applicant herein launched an application on an urgent basis pursuant to Rule 6(12) of the Uniform Rules of Court for an order:

1.1 Directing that the application be heard as one of urgency and condoning the failure of the applicant to comply with the forms, periods and other provisions of Rule 6 of the Uniform Rules of Court.

1.2 Granting the applicant leave in terms of section 133(1)(b) of the Companies Act, 2008, to institute these proceedings and the proceedings referred to in paragraph 1.3 below.

1.3 Pending the final determination of proceedings to be instituted by the applicant within two (2) weeks of the grant of the order setting aside the business rescue plan purportedly adopted at the meeting of creditors on 21 May 2013 and annexed as "SJH2" to the founding affidavit ("*the business rescue plan*"), interdicting and restraining the first and second respondents

from implementing same and staying the implementation of the business rescue plan.

1.4 Authorising the applicant to serve a copy of this order per telefax or e-mail on each of the respondents.

1.5 Reserving the costs of this application for determination at the hearing of the proceedings referred to in paragraph 1.3 above.

1.6 For such further and alternative relief as may be appropriate.

[2] The application was opposed by all the respondents except the sixth respondent.

[3] After all the parties have argued the application in full and at the stage the applicant was to reply to the respondents' submissions, counsel for the applicant tendered the following offer to dispose of the application:

3.1 If the application is not struck off for want of urgency, the applicant is abandoning all the other prayers save for prayer 1.3 in the following terms:

> *"... That this Court grant the applicant leave in terms of section 133(1) of the Companies Act, 2008, to institute and/or prosecute proceedings within three (3) weeks of the grant of this order, to set aside the business rescue plan adopted by creditors at a meeting on 13 May 2013."*

3.2 That the applicant be ordered to pay the costs of all the opposing respondents, which costs should include costs of two counsel.

[4] Counsel for all the respondents opposing this application opposed the applicant's tender as it is ambiguous and inconclusive, more so that the proposed new application may take a life of its own unrelated to the present application or take a different form or even not deal with issues dealt with in the present application.

[5] The respondents however gave assurances that they will not take the next step until a judgment I promised to have ready within a week has been delivered or handed down. The respondents also invited the applicant to send them written representations while the ruling or judgment was still awaited, which they promised to consider.

THE PARTIES

[6] The applicant, Redpath Mining South Africa (Pty) Limited, is a company duly registered and incorporated, with limited liability, in terms of the company laws of the Republic of South Africa ("*RSA*"), with is principal place of business and registered address being at 18 Industry Road, Isando, Kempton Park, Gauteng Province.

[7] The applicant renders contract and related services to the mining industry and has done so for the second respondent at its Mooihoek Chrome Mine, in Limpopo.

[8] After the third respondent, the applicant claims to be the largest creditor in respect of contract mining services rendered to the second respondent. The applicant further claims, which claim is hotly contested by the respondents, that it exercises or claims a lien over the second respondent's mine which it relies on or will rely on to secure its claim. When the disputed lien is taken out of the equation, the applicant is a creditor of the second respondent for an amount of at least R75 377 612,00.

[9] The first respondent, Piers Marsden NO is sued in his representative capacity as the court-appointed business rescue practitioner of the second respondent, which is under business rescue. The first respondent carries on business at 1st Floor, One-on-Ninth, Corner Glenhove Road and Ninth Street, Melrose Estate, Johannesburg, Gauteng Province.

[10] The business rescue practitioner was appointed on 1 February 2013 pursuant to an application made by one of the second respondent's shareholders to this Court to place the second respondent under business rescue.

[11] The first respondent or business rescue practitioner interchangeably, proposed a business rescue plan, which was accepted by the second respondent's creditors on 21 May 2013. The applicant is one of the instances or creditors that were present at that voting meeting of 21 May 2013.

[12] It is the implementation of this business rescue plan that the applicant now seeks to interdict.

[13] The second respondent, Umnotho we Sizwe Resources (Pty) Ltd, is a limited liability company duly registered and incorporated in terms of the company laws of the RSA bearing registration number 1998/010730/07, with its principal place of business and registered address situate at Ground Floor, Cederwood House, Ballywoods Office Park, 33 Ballyclare Drive, Bryanston, Johannesburg. I will refer to it hereinafter as "*the company under business rescue*" or the second respondent, interchangeably".

[14] The company under business rescue is a holder of a statutory mining right or licence for chrome and platinum group metals which it was granted around 2009 in terms of the Mineral and Petroleum Resources Development Act, 2002 (as amended) "*MPRDA*". It is this chrome mine, situated on a portion of Portions 1 and 2 of the farm Mooihoek, 255 KT, Limpopo Province, situated near Steelpoort and Burgersfort in Limpopo, that the applicant constructed on behalf of the second respondent and in respect of which it conducted contract mining, extracting chrome ore on behalf of the second respondent.

[15] The third respondent, Industrial Development Corporation of South Africa Limited ("*IDC*"), is a corporation established under section 2 of the Industrial Development Corporation Act, 1940 (as amended), which has its principal place of business or head office situated at 19 Fredman Drive, Sandton, Johannesburg.

[16] The IDC or third respondent is the largest creditor of the second respondent, its claim having been accepted by the business rescue practitioner in the amount of R216 826 897,00. The IDC is also a 30% shareholder in the second respondent.

[17] The IDC has been cited in this application in the above light – as the largest creditor and significant shareholder. Furthermore, in terms of the business rescue plan the IDC is prepared to advance post-commencement finance to the business rescue practitioner in the amount of R3,6 million against the registration of a special notarial bond in its favour over various assets, including the assets that form the subject matter of the applicant's claimed lien.

[18] The fourth respondent, the Remaining Creditors of the company under business rescue, are set out in Schedule "A" annexed to the business rescue plan.

[19] The fifth respondent are the Remaining Shareholders of the company under business rescue set out in Annexure "B" annexed to the business rescue plan.

[20] The sixth respondent is the Company and Intellectual Property Commission ("CIPC") which is a state organ with its address being at DTI Campus, Block F-Entfutfukweni, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng Province.

[21] The fourth, fifth and sixth respondents are cited herein to the extent they may have an interest in the relief sought. No costs are sought from the third to sixth respondents save where they oppose this application.

[22] The third, fourth and fifth respondents joined the first and second respondents in opposing this application.

[23] I will not set out all the facts and background information to this application save for what is material for a decision in this matter.

APPLICANT'S REASONS FOR APPLICATION

[24] The applicant is alleging that a business rescue plan in respect of the second respondent, which was approved by creditors on 21 May 2013 is unlawful, among others, in that –

24.1 it deprived it (applicant) of its security in the form of a lien by substituting the applicant's factual possession of the assets that are the subject of the lien with illusory possession, thus, in doing so, as a matter of law, depriving the applicant of its security; as well as diminishing its security by requiring that the applicant forego 15% of its secured claim in favour of other creditors in circumstances where this deprivation of security is not sanctioned by Chapter 6 of the Companies Act, 2008; and if so sanctioned, would be an unconstitutional and arbitrary deprivation of the applicant's right to property; and

24.2 in compelling the applicant to partake in an expert determination at the instance of an arbitrator who in his sole and absolute discretion will determine the rules, regulations, procedures and other aspects relating to the expert determination and in respect of which there will be no subsequent review or appeal process, and in so doing, denying the applicant its constitutional right to access to the courts to determine the disputes that exist between it and the business rescue practitioner.

[25] The applicant further contended in its papers that the Companies Act does not permit the business rescue practitioner, in proposing a plan, to make inroads into the applicant's security without the latter's consent or as provided for in section 134 of the Companies Act. It further submitted that to the contrary, Chapter 6 of the Companies Act specifically recognises and protects

the applicant's right as a secured creditor. That implementing the business rescue plan as it is presently will unlawfully deprive it of its security.

[26] Further alluding unconstitutionality, the applicant went on to submit that:

> "*... to the extent that such a deprivation of security is sanctioned by the Companies Act, such statutory provisions infringe the applicants' constitutional rights not to be arbitrarily deprived of its property in the form of its security interest.*"[1]

[27] It is the applicant's further contention that the plan, if implemented, also infringes the applicant's constitutional right to access to court and more particularly, the applicant's rights that its disputes with the business rescue practitioner and the company under business rescue be decided in a fair and public hearing before a court of law.

[28] Consequently, this application is about preventing the implementation of the business rescue plan pending proceedings to be initiated by the applicant wherein it will seek to set aside the business rescue plan on the basis that it is unlawful and/or unconstitutional because the plan prescribes various periods for the implementation of various aspects thereof and which periods, once they have lapsed, will cause the applicant and third parties irreparable harm.

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[1] Applicant's Founding Affidavit, paragraph 18.

SHORT FACTUAL MATRIX

[29] On 7 January 2013 the applicant launched proceedings in this Court under Case No. 99/2013 for the liquidation of the second respondent. The amount the applicant was owed was in the region of R75 377 612,30.

[30] On 24 January 2013 a shareholder of the second respondent, i.e. Umnotho we Sizwe Group (Pty) Limited launched an application in this Court also for the second respondent to be put under business rescue under Case No. 2013/02653. During April 2013 the applicant submitted its claim to the business rescue practitioner amounting to R92 648 283,95. The latter disputed the allegations or claims made by the applicant that this amount was secured or the extent of the claim itself. This was contained in a letter dated 23 April 2013. The business rescue practitioner ultimately admitted the applicant's claim at an amount of R75 377 612,30. At the end of the day the applicant contended that it enjoyed a secured claim exceeding R93 million, of which at least R75 377 612,30 is admitted.

[31] The secure-ness of the applicant's claim is hotly contested. Among others, the business rescue practitioner has contested that the applicant enjoys a lien. He also disputed the claim by the applicant that it enjoyed sufficient factual possession to constitute a lien.

[32] The launching of the business rescue proceedings suspended the liquidation proceedings.

[33] It deserves mention here that the third respondent's accepted claim in the business rescue plan is an amount of R216 827 897,00.

[34] The applicant participated during the lead-up to the meeting called for the adoption of the business rescue plan drawn up by the business rescue practitioner, by sending various representations that sought to place its claim in a preferential position *vis-à-vis* other creditors' claims. The applicant further among others proposed that it would be happy and consequently not oppose the adoption of the business rescue plan if the shareholders of the company under business rescue, i.e. the second respondent, provided post-commencement finance to be used by the practitioner in the amount of R8,4 million so that inroads should not be made into moneys available for distribution to creditors. Such use of those funds, so hoped the applicant, should have been *inter alia,* to pay for the costs of care and maintenance of the assets of the mine it was servicing, i.e. Mooihoek Mine.

[35] It is so that the IDC (third respondent) is only prepared to provide post-commencement finance in the amount of R3,6 million in addition to the R8,4 million that has already been expended, which should be secured by special bonds against various assets of the second respondent in favour of the IDC.

[36] The appellant is aggrieved about this.

[37] By its own admission the applicant did attend the meeting of creditors scheduled for 21 May 2013 to consider the adoption of the business rescue plan after it was adjourned on 8 May 2013 to work into the report additional suggestions and/or recommendations from affected parties. It emerged that the applicant abstained from voting on that date and the plan was adopted.

[38] It appears that the applicant is sulking because it did not get its way with the business rescue practitioner.

[39] During argument in court the applicant did not really persist to argue the unconstitutionality of the first respondent's actions. I assume and will accept that this challenge (on constitutionality) was not followed up. Even if it was persisted with, I would still have ruled against the applicant here-on.

THE REQUISITE PRESCRIPTS

[40] The new Companies Act, 71 of 2008 came up with novelties or innovations that did not exist in the old Companies Act, 1973 (Act 61 of 1973) as amended ("*the Act*"). Among those innovations is the so-called business rescue. Our courts have already started pronouncing themselves on this new phenomenon, however, there is still in my considered view, quite a long way before the organised profession completely muster all the nitty-gritties, explore all the nooks and crevices of the new Companies Act and lay or cast a well travelled path that would engender and ensure consistency and sure-

footedness in the implementation and interpretation of this "*new baby*" (business rescue).

[41] Business rescue is defined in the Act as follows:

> "*Business rescue means proceedings to facilitate the re habilitation of a company that is financially distressed by providing for –*
>
> *(i) a temporary supervision of the company, and for the management of its affairs, business and property;*
>
> *(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*
>
> *(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.*"

[42] Business rescue, as the definition proclaims or explains, is a regime which is largely self-administered by the company, under independent supervision within the constraints set out in Chapter 6 of the Act, and subject to court intervention at any time on application by any of its stakeholders. This is an important difference or aspect that differentiate business rescue from its counterpart in the old Companies Act, 1974, namely, judicial management. Business rescue is geared at saving significant costs, thus

among others enabling financially distressed small (and big) companies to opt for it as a viable alternative to "*last resort*" liquidation.[2]

[43] Unlike during judicial management, business rescue does not require that a company be restored to solvency, though this is of course one of the objectives of business rescue. As the definition (of business rescue) further demonstrates, business rescue is also a system that is aimed or geared at temporarily protecting a company against the claims of creditors so that its business can thereafter be disposed of (if concern could not be saved) for maximum value as a going concern in order to give creditors and shareholders a better return than they would have received had the company been liquidated.

[44] Business rescue clearly envisages a restructuring of a company's business, followed, if all else fail, by a realisation of its assets by, for example, a sale of its business to a third party followed by a voluntary winding-up of the company under s 80 of the Act, in accordance with the rules regulating voluntary winding-up of solvent companies.

[45] Throughout the process of business rescue the expression "*financially distressed*" takes centre stage. This makes it crucial that we define or give forth how this concept "*financially distressed*" is set out in the Act.

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[2] See Carl Stein & Geoff Everingham : *The New Companies Act Unlocked*, 2011 Edition, pp 409-411.

[46] "*Financially distressed*" in reference to a particular company at any particular time means that –

> "*(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediate ensuing six months; or*
>
> *(ii) it appears to be reasonably likely that the company will become insolvent within the immediate ensuing six months.*"[3]

[47] From the above definitions it is clear that a business rescue plan cannot be invoked where a company is already insolvent. This is one of the aspects differentiating business rescue from judicial management : Proceedings can be started six months in advance when the tell-tale signs are starting to appear. For instance, a company that is trading profitably and is cash positive but does not have the wherewithal to repay a large debt which will become due and payable within the next six months would qualify to be classified as being "*financially distressed*", thus being a candidate for business rescue.

[48] I have alluded to business rescue *vis-à-vis* its predecessor, judicial management. How do they differ!

[49] Both business rescue and judicial management provide for the control by a third party of companies that are in severe financial difficulties and for

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[3] Section 128(1)(f) of the Act.

their temporary reprieve from creditors' claims. However, they differ in most other respect.

[50] Judicial management entailed the following:

50.1 an application be launched in the High Court for judicial management as a requirement;

50.2 a court order of judicial management was not easily granted. It was an extraordinary remedy and was also treated by the courts as such;

50.3 the applicant had to demonstrate to the court that a reasonable probability existed that, if given the protection of judicial management, the company would be able to pay its debts and be restored to a successful concern; and

50.4 a court-appointed judicial manager investigated the company's affairs and the likelihood of a successful rehabilitation. His report and creditors' views were then taken into account by the court when considering whether or not to grant the final order of judicial management.

[51] In or during business rescue proceedings or processes it is no longer necessary for a company to get or obtain the court's approval first in order to

obtain the protections offered by business rescue, including the freezing of creditors' claims. All that is now required, to get the machinery in motion is a directors' resolution that effectively declares that the company is, or could soon be, in a financial difficulty and that also appoints an independent person, selected by the board of directors, called "*a business rescue practitioner*". This business rescue practitioner has replaced the judicial manager under the old process of judicial management.

[52] A business rescue practitioner has a duty to investigate the company's affairs and then decide whether or not there are any reasonable prospects of rehabilitating the company. If the rescue practitioner decides or is of the view that there is such a prospect, he must then prepare a business rescue plan which must be placed before shareholders, creditors and all affected or interested parties or persons for approval. Once approved, the business rescue practitioner must oversee its implementation. Court sanction of the business plan is not strict requirement.

[53] The above must not be construed to mean that a business rescue process may not be commenced by a court order : For instance, any affected person not being the company in issue, may apply to a court for an order placing the company under supervision and commencing business rescue proceedings. That may be done at any time except where the board of the company has already adopted a resolution to commence business rescue processes under s 129 of the Act.[4]

[4] Section 131(1).

CONSEQUENCES OF EXISTENCE OF BUSINESS RESCUE PROCEEDINGS

(a) Moratorium

[54] Section 133(1) of the Act provides as follows:

> *"(1) During business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company or lawfully in its possession, may be commenced or proceeded with in any forum, except –*
>
> *(a) with the written consent of the practitioner;*
>
> *(b) with the leave of the court and in accordance with any terms the court considers suitable;*
>
> *(c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;*
>
> *(d) criminal proceedings against the company or any of its directors or officers;*
>
> *(e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or*
>
> *(f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner."*

[55] The nett effect of the above quoted subsection (of section 133) is that the existence of a business rescue process prohibits all legal proceedings

inclusive of all enforcement actions against the company under business rescue.

(b) Protection of property interests

[56] Section 134(3) of the Companies Act protects creditors and shareholders by ensuring that the company does not dispose of any assets otherwise than in the ordinary course of business without the practitioner's consent. One of the effects of this subsection is that if during business rescue proceedings the company wishes to dispose of any property over which another company or person has any security or title interest, the company under business rescue must obtain that person's prior consent unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest.[5] In such circumstances the company is expected to promptly pay the proceeds of such disposition or sale to that person holding security or title interest up to the amount of the company's indebtedness to that person or provide security for the amount of those proceeds, in any event, to the reasonable satisfaction of that person.[6]

[5] Section 134(3)(a).
[6] Section 134(3)(b).

[57] When business rescue proceedings are under way or have commenced, irrespective of the fact that there may be "*doubting Thomas's*", no person can exercise any right in respect of any property in the lawful possession of the company under business rescue, irrespective of whether the property is owned by the company or not unless the rescue practitioner consents thereto in writing, which consent need not or may not be unreasonably withheld.[7]

EFFECTS OF BUSINESS RESCUE ON SECURITY HOLDERS

[58] During business rescue proceedings, the classification or status of any issued securities of a company cannot be altered, other than by way of a transfer of securities in the ordinary course of business, except to the extent that the court otherwise directs, or to the extent contemplated in an approved business rescue plan.[8]

RANKING OF CREDITORS' CLAIMS IN TERMS OF BUSINESS RESCUE PROCEEDINGS

[59] Section 135 of the Act deals with the ranking of creditors' claims. It provides among others[9] that after payment of the practitioner's remuneration and expenses as set out or referred to in s 143 as well as other claims arising out of the costs of the business rescue proceedings –

[7] Sections 134(1)(c) and 134(2).
[8] Section 137(1).
[9] Section 135(3).

"*... all claims contemplated in –*

(a) s. 135(1) (amounts due and payable to employees during the business rescue proceedings) will be treated equally but will have preference over all unsecured claims against the company and all claims contemplated in s. 135(2), irrespective or not they are secured. An employee is also a preferred unsecured creditor for any remuneration, reimbursement of expenses or other employment-related amount which became due and payable by the company at any time before business rescue proceedings began, and had not been paid to the employee immediately before those business rescue proceedings began,[10] *or*

(b) s. 135(2) (third party financing) will have preference in the order in which they were incurred over the unsecured claims.[11]

[60] Claims rank in the following order of preference:

60.1 The practitioner, for remuneration and expenses, and other persons (including legal and other professionals) for costs of business rescue proceedings.

60.2 Employees for any remuneration which became due and payable after business rescue proceedings began.

60.3 Secured lenders or other creditors for any loan or supply made after business rescue proceedings began, i.e. post-commencement finance.

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[10] Section 144(2).
[11] Stein & Everingham : *New Companies Act,* Unlocked, *op cit*, pp 420-421.

60.4 Unsecured lenders or other creditors for any loan or supply made after business rescue proceedings began, i.e. post-commencement finance.

60.5 Secured lenders or other creditors for any loan or supply made before business rescue proceedings began.

60.6 Employees for any remuneration which became due and payable before business rescue proceedings began.

60.7 Unsecured lenders or other creditors for any loan or supply made before business rescue proceedings began.

[61] Section 135(4) of the Act provides that if business rescue proceedings are superseded by a liquidation order, the above preference will remain in force except to the extent of any claims arising out of the costs of that liquidation.

SHORT EVALUATION

[62] Section 152(4) of the Act provides that –

> *"A business rescue plan that has been adopted is binding on the company and each of the creditors of the company and every holder of the companies securities, whether or not such a person –*
>
> *(a) was present at the meeting,*

(b) voted in favour of adoption of the plan, or

(c) in the case of creditors, had proven their claims against the company."

[63] I have listened to argument and submissions tendered in court on behalf of the applicant and those respondents who opposed this application. In my considered view, the applicant sounded like an egoistic, self-centred entity that believes, either it gets its way 100% or everything must stop. That cannot be the intention of the Legislature when it promulgated the new Companies Act.

[64] In the totality of all the welter of data contained in the applicant's voluminous papers, it is my view and finding that the applicant has not succeeded in convincing or persuaded this Court why it should depart from the *naturalia* and/or *essentialia* of a business rescue plan as per the spirit of the legislation creating this entity or process.

[65] It cannot be true, as argued by the applicant, that the court should look into a crystal ball and imagine the possibility of the rescue plan failing. In my view, if the above speculative reasoning was for argument's sake to be accepted, there would on the other hand be an equal possibility of the self-same business rescue plan succeeding. Unfortunately the courts do not decide issues based on conjecture and speculation.

[66] It is my further view and finding that in a business rescue atmosphere secured creditors stand on the same footing during its subsistence as the other creditors. The common purpose and desire and objective is that each creditor ultimately get every cent he/she is owed, unlike in a liquidation or in its predecessor, the judicial management system. Should the rescue plan run into difficulties and the liquidation of assets become necessary, section 134(3) serves as a safeguard and assurance that the interests of secured creditors especially, are protected.

[67] As stated above, the applicant's claim, if ultimately proved, of being a secured creditor, is also protected by section 137 of the Act. During the business rescue process the classification or status of any issued securities of a company cannot be altered other than by way of transfer of securities in the ordinary course of business, save where the courts rule otherwise.[12]

[68] As already alluded to above, the problem here is that the applicant's purported *lien* is disputed. However, they have avenues to deal with that: They should make use of the appointed dispute resolution mechanism set out in the business rescue plan. This consists of a panel of retired judges of the High Court. It is my view and finding that this is not an unreasonable mechanism that is open to all interested or affected parties.

[69] Any court proceedings or litigation in general is out-lawed during the period the business rescue process is in operation.

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[12] Section 137(1) and (3) of the Act.

MORATORIUM ON ANY LITIGATION

[70] Section 133(1) of the Act calls for a complete moratorium in the clearest and unambiguous terms. During this moratorium no legal proceedings, including any enforcement action concerning the business under the rescue plan is countenanced. The only exceptions allowed are set out in provisos (a) to (f) of subsection (1) of section 133 as quoted above. One of the objects and/or objectives of the new Companies Act in this regard is to provide for efficient rescue of financially distressed companies in an atmosphere that is not hindered or cluttered with or by litigation.[13]

[71] Only in exceptional circumstances may a court permit litigation against a business rescue plan or related thereto. I have listened attentively to the submissions made before me by counsel for the applicant. I am not persuaded that the applicant has made out a cogent case for such leave to litigate. It is my further finding that the application for leave of the court to litigate here was not sufficiently motivated to convince this Court to indulge

[13] Preamble of the Companies Act 71 of 2008.

the applicant.[14] It is so that a court being asked to grant leave to proceed against a company under business rescue –

> *"..., thus a moratorium, must receive a well motivated application for that, so that it could apply its mind to the facts and the law if necessary, and then be in a position to make a ruling in accordance with any terms it may consider suitable in the peculiar circumstances."*[15]

[72] Indeed, a lot of things and circumstances have been alluded to by or on behalf of the applicant. However, all of them do not cumulatively constitute sufficient motivation for the breach of the statutorily set moratorium against legal proceedings during the period a business rescue plan is in operation. The applicant is asking for leave to challenge and if successful, ask and have the business rescue plan set aside. As already stated above, the applicant's individual motivations as informed by its grief that it did not convince the business rescue practitioner to take all of its recommendations into account or act as it wished, cannot be a basis for sacrificing at the alter of convenience and self-pumped umbrage the interests of the rest of the shareholders and creditors, who are in any event in the overwhelming majority. This Court cannot entertain the applicant's submission that the IDC's claim ought to be left out of the equation, thereby making or promoting it (applicant) to being the biggest creditor of the second respondent.

[73] To do so would in my view and finding, be tantamount to creating a fictitious and/or paper-made body of creditors with the improper purpose of

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[14] *Luna Meubels Vervaardigers (Edms) Bpk v Makin and Another t/a Makin Furniture Manufacturers* 1977 (4) SA 135 (W).

[15] Unreported case by N F Kgomo J in South Gauteng High Court – *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies (Pty) Ltd and Another* dated 10 May 2013.

sabotaging the will of the majority of creditors weight wise and other stakeholders herein.

[74] I am also convinced that on the facts before this Court, the applicant has not shown that a liquidation process would yield better results than a business rescue process.

APPLICATION FOR INTERIM RELIEF

[75] The applicant is asking for an interim relief here. It is my finding that such a relief is not appropriate in the circumstances of this case.

[76] It is so that the applicant has made clear their intention, win or lose, to defy everybody and refuse to move from the mine in question, thus obstructing the start of business rescue interventions that are likely to start in 3 (three) months time. The question arising is what the need is now for this application, now that the applicant has taken a stand.

[77] It is the duty or prerogative of the business rescue practitioner to decide what should be done in those circumstances in the course and scope of his business as a business rescue practitioner.

URGENCY

[78] I have also listened to argument from both sides on urgency. I also read the papers.

[79] In the light of the order that I intend issuing, I do not find it necessary to make a ruling on the issue of urgency as a technical aspect.

[80] The grounds tendered by the applicant on urgency are not clear-cut. Hence the respondents labelled its claim of urgency as at best, self-contrived urgency. The applicant has not come up at any stage whatsoever with or propose an alternative business rescue plan that would have also served before the body of creditors and other stakeholders, just like those that did so and caused the first adoptive meeting of 8 May 2013 to be postponed to 21 May 2013.

[81] I there find the applicant's belated legal challenge a step too far.

CONCLUSION

[82] It is my considered view and finding that the real reason for the applicant to launch this application is a fear for what the dispute resolution processes set out in the business rescue plan can come out with. That this

process is a speedy process to delimit and resolve disputes has not been successfully challenged.

[83] There is nothing unconstitutional about the business rescue plan and accompanying processes herein, it is my finding that a business rescue plan is not inconsistent with the Constitution.

[84] A business rescue plan should be implemented "*as soon as yesterday*", i.e. immediately, if the ailing business is to be healed and rehabilitated for the benefit of all creditors and affected and interested instances. If leave is granted to launch the legal proceedings the applicant seeks to institute, it may be years before such proceedings are finalised. At that stage, the company in financial distress would be long dead and buried. This, cannot be what was intended when the system of judicial management was replaced with the new baby or animal – business rescue.

[85] I do not intend going over to discuss whether the requirements of the grant of interim interdict were satisfied. I may only mention that during argument, counsel for the applicant never uttered a word about the requirement, "*balance of convenience*".

[86] It is thus my finding that the application is very ill indeed.

EX POST FACTO AUTHORISATION OF THESE PROCEEDINGS

[87] The applicant is asking this Court, through this application, to grant it leave *ex post facto*, to bring this very application. For practical purposes, it is my view and finding that such leave should be and is hereby granted *ex post facto*. It must be clearly understood that this leave to litigate does not include permission to institute or prosecute or continue proceedings against the business rescue process. It is merely permission to argue this present application.

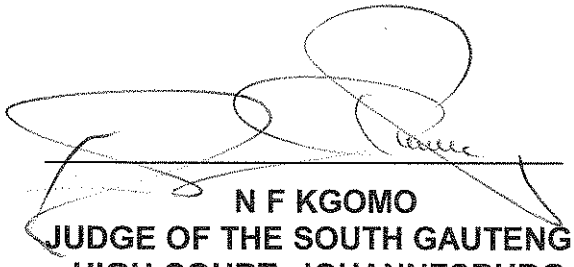
ORDER

[88] After listening to all submissions, going through all the papers filed of record herein and considering this matter, the following order is made:

88.1 The applicant is *ex post facto* granted leave to institute the present application only.

88.2 This application is struck off the roll due to lack of substance and urgency.

88.3 The applicant is ordered to pay the costs of the application, which costs shall also include the costs attendant on the employment of two counsel wherever they were employed.



N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF ARGUMENT	6 JUNE 2013
DATE OF JUDGMENT	14 JUNE 2013