REPUBLIC OF SOUTH AFRICA.

NORTH GAUTENG HIGH COURT, JOHANNESBURG

DELETE WHICHEVER NOT APPLICABLE:

(1) REPORTABLE YES/NO
(2) OF INTREST TO OTHER JUDGES YES/NO
(3) REVISED

24 JAN 2014
DATE

SIGNATURE

CASE NO: 66088/2012

66087/12

24/1/2014

In the matter between:

ABSA BANK LIMITED	Plaintiff
and	
ETIENNE JACQUES NAUDE N.O.	First Respondent
LOUIS PASTEUR INVESTMENTS LIMITED	Second Respondent
LOUIS PASTEUR HOLDINGS (PTY) LIMITED	Affected Party

J U D G M E N T

Ismail J:

[1] This matter embraces an application and a counter application. During the course of this judgment I will deal with the application and the counter application in turn under different heads.

[2] The applicants also launched an urgent application against Viador SA Limited [Viador] on the 15 November 2012, in this court, in order to set aside the resolution taken to place Viador under business rescue. Viador was placed under business rescue in terms of section 129 (1) of the Companies Act. The application did not proceed as the papers were not in order. The parties agreed that that matter would also be argued during these proceedings as the issues are similar.

Background

[3] The applicant in the main application seeks an order setting aside The business rescue plan which was adopted in respect of the second respondent. The first respondent was appointed the business rescue practitioner [BRP] of the second respondent.

[4] Apart from setting aside the business rescue plan the applicant also seeks an order for the removal of the first respondent as the BRP of the second respondent in terms of s139(2) of the Companies Act No 71 of 2008 (as amended).

[5] On the 30 August 2012 the applicant supplied the first respondent with details of its claim against the second respondent. The second respondent is indebted to the applicant in the sums of R 5 776 836,52 and R2 675 132, 83 respectively as principal debtor. It is also indebted to the applicant as surety and co-principal debtor for three sums amounting to approximately R143 758 859, 00. The second respondent is indebted as surety arising out of a cross-suretyship. The sureties, including the second respondent, are jointly and severally liable to the applicant as principal debtors.

[6] Correspondence was exchanged between the applicant and the first respondent's representatives. Mr Du Toit on behalf of the applicant dealt with the applicant's voting rights in terms of the suretyships. In an e-mail he referred to the applicant's claims in terms of the suretyships as 'contingent liabilities' and enquired why they were not recorded for the purposes of voting rights.

[7] Further correspondence was exchanged wherein the first respondent

in an e-mail dated 3 October 2012 stated:

" it is my view that a contingent creditor does not have voting rights".

In response to this view expressed by the first respondent, Mr van Wyk, on behalf of the applicant, through an e-mail, expressed his disagreement with the first respondents view.

[8] A meeting in terms of section 151 of the Act was held in order to consider the business rescue plan. This meeting was held o the 12 October 2012. The business rescue plan was passed by a majority.

[9] The applicant avers that if it were awarded its full voting rights the business rescue plan would not have been approved, since section 152 (2) (a) of the Act prescribes the support of more than 75% of the creditors voting.

The issues:

[10] The applicant in its papers alleges that the s 151 meeting held on 12 October 2012 was fatally flawed and unlawful in that unsecured creditors, in particular, the applicant, was not afforded a voting interest equal to the value of its claim. The applicant avers that had its voting interest been properly allocated, the business rescue plan [the plan] would not have been passed by virtue of the threshold, stipulated in section 152 (2) of the Act not

having been met.

[11] The applicant also alleges that the plan was not published as required in terms of section 150(5) of the Act and that proper notice of the meeting was not given in terms of the Act. The Applicant in this regard relied upon the matter of *D H Brothers Industries (Pty) Ltd v Karl Johannes Gribnitz N.O and Others* [an unreported decision of Gorven J in the KwaZulu Natal Division, Pietermaritzburg under case number 3878/2013). Since reported in 2014 (1) SA 103 (KZP) at paragraph [28] of the judgment the learned judge stated:

" [28] I favour the approach that the failure to publish a plan within the given or extended period results in termination of the business rescue proceedings. This has the benefit of allowing creditors to enforce their rights against the company as soon as the time elapses..... However, what is clear is that the stated need for strict adherence to time limits and the need for certainty has a necessary corollary that time to publish a plan cannot be extended after it has elapsed.

[29] This brings me to the manner in which an extension can be allowed by creditors under s 150(5)(b). as already mentioned, business rescue proceedings contain strict parameters. .... This provision does not lend credence to a submission that the legislature envisaged an informal approach to extending the time period."

[12] The applicant's view is that its claim for voting purposes should have been considered in terms of s 145(4)(a) of the Act and not 145(4)(b)

of the Act, which it claims simply does not apply. The applicant in this regard relied upon the matter of the *Commissioner of the South African Revenue Service v M B Beginsel N.O. and other* [unreported, WCC. Case No 15080/12] where Fourie J at par [25] stated:

" In my opinion, the wording of section 145(4) is clear and unambiguous and leaves no room for the artificial and strained interpretation that SARS wishes to place on it. Section 145(4)(a) refers to secured or unsecured creditors who have a voting interest equal to the value of the amount owed to them by the company. The categorization of creditors is uncontentious and well-known in legal parlance. Secured creditors are those who hold security over the company's property such as a lien or a mortgage bond Unsecured creditors are those whose claims are not secured, including concurrent creditors. The unsecured creditors are either preferent or concurrent creditors."

[13] The applicant is of the view that the position taken by the first respondent whereby the applicant was not accorded the full extent of its voting interest was wrong and misconceived. It was submitted that the first respondent did not appreciate the nature of its claim. The first respondent's construing of the applicant's claim as being 'contingent', thereby not entitling it to voting interest for such a claim, was misconstrued and incorrect. It relied upon the proposition set out in *Milman and Another NNO v Masterbond Participation Bond Trust Managers (Pty) Ltd (Under Curatorship) and Others* 1997 (1) SA 113 (C) where Friedman JP and Farlam J held:

" In our judgment the liability of a surety and co-principal debtor is not contingent unless the principal debt itself is contingent.."

[14] It was submitted on behalf of the applicant that it's claim as contemplated by section 145(4)(a) of the Act as it was not subject to assessment. Only subordinated claims in terms of section 145(4)(b) of the Act are subject to an independent appraisal. Furthermore the appraisal must be done by an independent appraiser and not the BRP- section 145(5)(b). The applicant in its papers contends that the first respondent believed that he had the power to assess and allocate voting interest. In his answering affidavit at p 240 par 40.4 the following is stated:

" On registration each creditor received a hand held electronic device disclosing it's particulars and voting rights that I had given it" (my underlining)

[15] The applicant is of the considered view that the approval of the plan is unlawful and invalid as it was denied a voting interest equal to the value of the amount owed to it by the second respondent.

[16] Apart from the voting interest referred to above, the applicant avers that the business rescue plan does not comply with the provisions of section 150 (1) of the Act. The plan must comply with all the requirements set out in section 150(2) of the Act. The applicant contends that the plan does not indicate when a creditor(s) qualifies as secured, statutory,

preferent and concurrent in terms of the laws of insolvency and it does not indicate which creditors have proved their claims. In this regard the plan does not comply with this section of the Act.

[17] The applicant also raised the issue of non compliance with the provisions of section 150 (2)(b)(iii) and (iv) of the Act. The role of ongoing contracts and the property from which creditors are to be paid should be specified. In this regard the plan merely states;

' No agreements will be cancelled and the company will continue with the normal operations.' and

' when market conditions improve, it may be in the interest of the Company to sell some of its assets in order to pay the creditors.'

No mention is made of the property from which creditors may be paid, nor is any mention made of whether the company would be in a position to honour the contracts which it concluded timeeously. The plan is also silent regarding when and the manner in which the creditors will be paid before the ten year moratorium. The applicant submitted that the plan does not meet the requirements of section 128 (1)(b)(iii) of the Act. In this regard the applicant relies upon the dicta of Eloff AJ in *Southern Palace Investment 386 Ltd v Midnight Storm Investment 386 Ltd* 2012 92) SA 423 (WCC):

" [24] While every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have reasonable prospects of success of the company concerned continuing on a solvent basis, unless it addresses the cause of the

demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony, i.e. by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice"

[18] The applicant also raised an issue that the first respondent failed to publish the business rescue plan within 25 days of his appointment as the business rescue practitioner. It was published on 6 October 2012, namely seventy business days after his appointment (26 June 2012).
The first respondent tried to overcome this difficulty by suggesting that the creditors condoned the lateness, in that the meeting had to be postponed because of the Muslim month of Ramadan as many creditors were unable to attend during that period.

[19] The applicant submitted that the first respondent did not seek condonation for an extension of the period to be extended prior to the expiry of the period . The first respondent simply ignored the prescribed time period in terms of the Act- see *D H Brothers* matter, par [10] *supra.*

[20] On behalf of the first and second respondent it was submitted that the applicant was present at the meeting of creditors when the issue of business rescue was decided. The applicant participated at the meeting. The applicant's view was defeated and the majority of creditors voted in

favour of the plan. The applicant now cries foul and seeks to have the business rescue proceedings set aside. It was suggested on behalf of the first and second respondents that if the applicant felt aggrieved at the allocation of its voting rights it should have sought a review of such rights.

Apart from this, the applicant's own functionaries descried their claims as being contingent. Even if the BRP was wrong in determining their claim to be contingent it was not done with any *mala fides*, and at best he was mistaken. Such a mistake in itself is not sufficient ground for his removal as a practitioner of the second respondent.

[21] Mr Suttner SC on behalf of the first and second respondents raised two grounds in opposition to the setting aside of the business rescue plan, firstly the issue of non-joinder and secondly the question of a moratorium which applies in business rescue proceedings. I will deal with both points in turn.

[22] The point relating to non-joinder is that the creditors were paid in terms of the plan adopted and such payment was also made to the applicant, over the period 12 to 16 November 2012. The respondents argued that the effect of undoing the plan would be (1) that it would undo what the majority of the creditors voted for and (2) all the creditors who have been paid would be required to repay such amounts to LPI.

[23] The argument goes further in that all the creditors who received a payment would be an 'interested party' in this application and *a fortiori* therefore they ought to have been joined in this application. In *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) the court held that it could *mero motu* raise this issue. At p 659 the court referring to *Home Sites (Pty) Ltd v Senekal* 1948 (3) SALR 514 (AD) and *Collins v Toffie* 1944 AD 456 stated:

" The two cases last mentioned are both instances in which the question of non-joinder of a third party who was found to have a direct and substantial interest in the decision of a point before the Court was taken by the court mero motu."

[24] The issue of non- joinder must also be viewed with the issue of the applicant's failure to give creditors notice. Section 145 (1) of the Companies Act stipulates that:

" each creditor is entitled to –

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) formally participate in the company's business rescue proceedings to the extent provided for I this Chapter; and

(d) informally participate in those proceedings by making proposals for the business rescue plan to the practitioner."

The first and second respondents submitted that apart from the issue of non-joinder, an applicant has to satisfy the court that it has taken all reasonable steps to notify all affected parties.- see *Engen Peroleum Ltd v Multi Waste (Pty) Ltd & Others* 2012 (5) SA (SG) at 602 par [24]

" An applicant must satisfy the court that all reasonable steps have been taken to notify all affected persons known to the applicant, by delivering a copy of the court application to them in accordance with reg 7. Where compliance proves impossible, an applicant may apply to the high court for an order of substituted service (see reg7(3))..."

During argument before me it appeared as if the applicant sent notices of a prospective application which would be launched, however the first and second respondent submitted that they were not privy to such notices and in any event the application was not served on each of the creditors in terms of section 145

Mr Suttner submitted that on this ground alone the application should fall to be dismissed.

Moratorium issue

[25] Section133 (1) of the Act provides a moratorium which precludes any form of litigation against a company in business rescue, except in six instances. The section reads as follows:

" During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in 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 power of a trustee;

(f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner."

The question regarding the moratorium has been dealt with in two judgments in this division of the High court, namely *African Banking*

Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others [a judgment by Kathree-Setiloane J in the North Gauteng High Court under case no 20947] and the matter of *Redpath Mining South Africa (Pty) Ltd v Piers Marsden NO and Others* [a judgment by Kgomo J in the South Gauteng High Court under case no 18486/2013 delivered on 14 June 2013].

[26] There is no need for me to re-invent the wheel on this aspect and suffice it to say that I agree with both my colleagues on the issue of a moratorium. Kgomo J dealt with this aspect at para's [54] ; [55] and [70] in his judgment, whilst Kathree Setlioane J dealt with it at para [4] - [7].

[27] Section 133 (1) (b) is worded in the following terms- "that no proceedings may be ....except with the leave of the court". Mr Suttner submitted that where a party seeks to bring proceedings against a company which is in business rescue it should have a prayer akin to that where a litigant applies to bring an urgent application. He submitted that such a party needs to obtain the court's permission to bring the application before the merits are entertained. It was submitted that the notice of motion does not include a prayer for the leave of the court to overcome the moratorium nor does it give reasons why the moratorium be ignored. This problem, it was submitted, was compounded by the fact that the respondents raised this aspect in their answering affidavit and despite this, nothing was done to

overcome the problem.

[28] I am persuaded by the arguments raised by the first and second respondents regarding the issues of non- joinder and the issue regarding the moratorium. Having said that, it is so that the business rescue practitioner did not follow the spirit of the Act in that he did not comply with the procedure as prescribed by the Act such as holding meeting promptly as prescribed and not having the plan within the stipulated period. Notwithstanding these infractions I am of the view that the company was under business rescue and the applicant was duty bound to bring the application within the parameters of section 133 and it ought to have joined the other creditors in this application. The applicant's failure in this regard is fatal and for that reason I am of the view that the application ought to be dismissed.

[29] Having made the above finding I am of the view that the applicant has not made out a case for the removal of the first respondent as BRP of the second respondent. Section 139 (2) of the Act governs the issue regarding the removal of a business practitioner.

The section sets out six reasons for the removal of a BRP. I do not intend to repeat them herein, they were adequately dealt with in the heads of argument. The applicant did not specifically refer to which of the grounds it relies upon in order to remove the first respondent. Looking at the grounds

it appears to me that grounds (a) ; (c) (d) (e) and (f) do not apply. The only ground, although not specified, which the applicant could possibly rely on is ground 139(2)(b), namely "failure to exercise the proper degree of care in the performance of the practitioner's functions."

[30] Mr Burman SC, who appeared for the third respondent, during his Address, also argued that the first respondent at best made a mistake when he categorized the applicant's claim as contingent. This error was also made by the applicant's own representatives. This error, he submitted, was not in itself a ground for the first respondent's removal as the BRP of the second respondent. The reason for the delay in the holding of the meeting was given under oath, namely that the creditors expressed a desire that it be held later for the reasons alluded to in para [17] above. The delay was attributed to religious and compassionate grounds rather than incompetence on the part of the first respondent.

Counter application:

[31] The parties in the counter application will be referred to as referred to as in the main application. The applicants in the counter application are the first and second respondents. The respondent in the counter application is the applicant in the main application. For the purposes of convenience they will be referred to as cited in the heading.

[32] The first and second respondents seek an order that the cross-suretyship referred to in para [5] supra, is deemed to be void by virtue of the provisions of s 226 (1) of the Companies Act No.61 of 1973.

[33] In terms of the cross-suretyship Medical Review Corporation Limited (MRC); Medical Empowerment Consortium Investment Limited ('MECI'), FirstClinic ('FirstClinic'); Viador SA Ltd ('Viador') and the second respondent bond themselves jointly and severally as sureties and co-principal debtors for each other's obligations to the applicant.

[34] The first and second respondent aver that it is common cause that the that:-

34.1 Dr. Mohammed Adam [Dr Adam] was a member of MRC; MECI; FirstClinic Viador and LPI;

34.2 Dr Adam was a director of the companies referred to in 32.1;

34.3 MRC; MECI; FirstClinic and Viador were subsidiaries of LPI;

34.4 LPI was a subsidiary of LPI Holdings (Pty) Ltd;

34.5 LPI Holdings (Pty) Ltd was a subsidiary of Louis Pasteur Holdings (Pty) Ltd;

34.6 the provisions in the articles of association of MRC, MECI, First

-Clinic, Viador, LPI, LPI Holdings (Pty) Ltd and Louis Pasteur Holdings (Pty) Ltd do not dilute a majority shareholder's normal right to appoint directors;

34.7 the provisions of the articles of association of MRC, MECI, FirstClinic and Viador do not detract in any respect from the powers that Dr Adam has by virtue of his position as the decision maker and representative of the majority shareholder in LPI; and

34.8 no members resolution was adopted in LPI as contemplated by the provisions of section 226 (2)(a)(iv) of the old Companies Act

[35] Section 226 of the Companies Act stipulates:

"226. Prohibition of loans to, or security in connection with transactions by, directors and managers.

(1) No company shall directly or indirectly make a loan to-

(a) any director or manager of-

(i) the company; or

(ii) its holding company; or

(iii) any other company which is a subsidiary of its holding company; or

(b) any other company or other body corporate controlled by one or more directors or managers of the company or of its holding company or of any company which is a subsidiary of its holding company;

or provide any security to any person in connection with an obligation of such director, manager, company or other body corporate.

(1A) For the purpose of subsection (1)-

(a) 'loan' includes-

(i) a loan of money, shares, debentures or any other property; and

(ii) any credit extended by a company, where the debt concerned is not payable or being paid in accordance with normal business practice in respect of the payment of debts of the same kind; and

(b) one or more directors or managers of a company contemplated in subsection (1) (b) shall be deemed to control another company or body corporate only if-

(i) such director or manager or his nominee is a member or such directors or managers or their nominees are members of such other company or body corporate and the composition of its board of directors is controlled by such director, manager or nominee or such directors, managers or nominees, and such composition shall be deemed to be so controlled if such director or manager or his nominee or such directors or managers or their nominees may, by the exercise of some power and without the consent or concurrence of any other person, appoint or remove the majority of the directors concerned, and such director, manager or nominee or such directors, managers or nominees shall be deemed to have power to appoint a director where a person cannot be appointed as a director without his or their consent or concurrence; or

(ii) more than one-half of the equity share capital of that other company or body corporate or, if that other body corporate is a corporation as defined in section 1 of the Close Corporations Act, 1984 (Act 69 of 1984), more than 50 per cent of the interest in such corporation is held by such director, manager or nominee or such directors, managers, or nominees; and

(c) 'security' includes a guarantee.

(2) The provisions of subsection (1) shall not apply-

(a) in respect of-

(i) the making of a loan by a company to its own director or manager;

(ii) the provision of security by a company in connection with an obligation of its own director or manager;

(iii) the making of a loan by a company to any other company or other body corporate controlled by one or more of the directors or manager of the first-mentioned company; or

(iv) the provision of security by a company in connection with an obligation of any other company or other body corporate controlled by one or more of the directors or managers of the first-mentioned company,

with the prior consent of all the members of the company or in terms of a special resolution relating to a specific transaction: Provided that in respect of any such loan made or security provided at any time before the date of commencement of the Companies Amendment Act, 1992, such consent shall be deemed to have been given if the transaction concerned has subsequently, whether before or after that date, been ratified by all the members of the company

[36] The first and second respondents submitted that the general principles of interpretation of statutes leads inevitably to a conclusion that section 226 (1B) does not constitute an absolute exception to the provisions of section 226(1)(b). I was referred to several decisions relating to the interpretation of statutes. The most recent being *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at par [18] and what Wallis JA stated therein.

I am also alive to the remarks of Innes CJ in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 543 where the following was stated:

" A judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what we may think to be the policy or the object of the particular measure"

[37] Section 226(1) and (1A) prohibit the making of a loan or the granting of security when the company to which the loan is made or the security furnished is controlled by one or more directors or managers of (a) the lending or securing company; or (b) its holding company; or (c) any company which is a subsidiary of its holding company.

[38] Directors or managers of a company are deemed to control another or body corporate only if: (a) they or their nominees hold more than one half of its equity share capital or if the other body corporate is a close corporation, more than 50 per cent of the interest in such corporation; or (b) they are members of it and can control the composition of the board. They are deemed to control the composition of its board if they may, by the exercise of some power and without the consent or concurrence of any other person, appoint or remove the majority of its directors; and they are

deemed to have the power to appoint a director where a person cannot be appointed as a director without their consent or concurrence. These deeming provisions constitute an exhaustive definition of 'control' for the purposes of the section. See: *The Law of South Africa W A Joubert First reissue Volume 4 Part 2 251 par 148*

[39] The first and second respondents were of the view that Dr Adam controlled MRC, MECI, First Clinic Viador and the second respondent and that the provisions of section 226(1) and (1A) (b)(i) of the Act applied. They were of the view that the cross-suretyship contravened the provisions of these sections and for that reason it was void.

[40] The applicant on the other hand submitted that the companies referred to belonged to a group and for that reason the exemption in terms of s 226(1B) applied and that it made no difference that Dr Adam may have had control of the group of companies. In this regard the applicant relied on the matter of *S v Pouroulis and Others* 1993 (4) SA 575 (W).

[41] On behalf of the first and second respondents counsel submitted that *Pouroulis* judgment was decided in the context of a criminal case, and must be seen from that angle. Whilst it is true that it was a criminal trial and the

onus in a criminal matter differs from a civil dispute, the judge in the matter dealt with the provisions of section 226 of the Act in a carefully reasoned and scholarly manner. Stegmann J dealt with the issue of section 226 from pages 587-604 under the rubrics of *loans made directly or indirectly; simulated transactions; indirect economic benefit to prohibited borrowers; differences between s 37 and s 226 and deemed control of directors , managers or nominees.*

[42] At 588I the learned Judge stated the following:

" Before grappling with the detailed problems of construction of this section, I propose to consider the broad object. In *Neugarten and Other v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A), the following statement by Nicholas AJA at 802A-C was concurred in by Smalberger JA:

' The first question which arises are, what is the purpose of s 226, and in whose interest was it enacted? Goldblatt AJ said (at 658F-G) :

" the clear purpose of s 226 of the Act is to prevent directors or managers of a company acting in their own interest and against the interest of shareholders by burdening the company with obligations which are not for its benefit but are for the benefit of another company and/or for the benefit of its directors and/or managers. "

Flemming J expressed a similar view. I respectfully agree. Subsection (2), by providing that ss (1) shall not apply where the transaction specified are concluded "with the consent of all the members of the company or in terms of a special resolution relating to a specific transaction", makes it clear that the prohibition in ss (1) is solely for the benefit of the members of the company."

[43] Stegmann J dealt with the group of companies scenario at 596D-587A to illustrate the provisions of s 226 and the provisions of s 226(1B) in his example. The illustration in my view is both useful and helpful in understanding the provisions of section 226. Although I am alerted by respondent's counsel's remarks that *Pouroulis* was decided in the criminal context, the principle regarding s226 is erudite and in my view correct and therefore relevant.

[44] Counsel for the applicant submitted that the exemption in terms of section 226 (1B) applies to a group scenario as is the situation *in casu.* At 596E the judge stated:

' It is, I think quite clear that s 226 (1B) specifically leaves every company in this model group of four free to make loans to every other company in the group. Such freedom is unaffected by the fact that the same directors may control all the companies in the group.

The situation would be different where a company is loosely associated to a group. Specifically where the director, one D, owns the majority of the equity shares of X. Mr D therefore controls X in terms of section s 226(1A)(B)(II). Section 2226(1B) does not deal with the position of X. Because Mr D is the director of S2 and also controls X, section 226(1)(b) prohibits loans by S2 to X. –see *Pouroulis* 586E-F

[45] Dr Adam may be a person who is a director of the companies as set out in par [34], supra, and he may be in control as suggested. The question that arises is was the loan made in a holding- subsidiary relationship or whether the cross -suretyship was made by one company in favour of another company wherein the director happened to be the common denominator and the companies were not related to each other.

[46] I am of the view that the provisions of section 226(1B) constitutes an exception to the provisions of section 226(1)(b) and that the cross suretyships are not void in terms of the latter section.

[47] On behalf of the first and second respondents, it was submitted that there is no reference to section 37 in the provisions of section 226 and the converse is also true, namely there is no reference to section 226 to section 37 it was submitted that section 37 was aimed at regulating the way loans, between holding and subsidiary companies are noted in the annual financial statements.

The applicant on the other hand contended that section 37 of the Act applies in this matter, because MRC, MECI, FirstClinic, Viador and the

second respondent belong to a group. The effect of exception, in terms of s 226(1B), is that the prohibition contained in section 226 shall not prevent a company in a group from making loans or providing security to other companies in the group. This is consistent with s 37 and, which does not prohibit the transactions.

See *Pouroulis* 599I- 600I.

[48] In the circumstances I make an order that the cross suretyship application should be dismissed with costs, such cost to include the cost incidental to the usage of two counsel.

[49] I deliberately left the issue of the question of costs regarding the main application to be dealt with at this juncture. The reason being that Mr Suttner argued that the application should be dismissed with costs on a punitive scale as the first respondents professional ability was challenged and that there was no reason to seek his dismissal as such. He referred to a passage from Shakespeare's Othello, namely Act iii Scene iii 155-161, which paraphrased equates to:

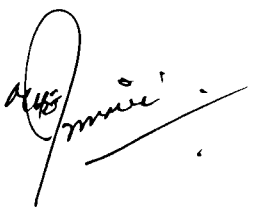
when you steal my money you steal nothing , however when you rob me of my good name you rob me of what makes me poor.

[50] I have given consideration to this aspect and although I have dismissed the application for the reasons given, I am not of the view that the prayer seeking the removal of the first respondent as BRP was without merit. If I were to have followed the BH Brother's matter I would have made such an order.- see par [16], [17] and [18] above.
In essence I followed the Kgomo decision and Kariba matter regarding the issues of the moratorium and the aspect of non-joinder.

[51] Accordingly I make the following order :-

1. the application is dismissed with costs. Such costs is to include the costs of two counsel on behalf of the first and second respondent and the costs of two counsel on behalf of the third respondent;

2. the counter application is dismissed with costs, such cost is to include the costs of two counsel. The respondents are order to pay the costs jointly and severely the one paying the other being absolved.



Appearances:

For the Applicant :	Adv P F Rossouw SC assisted by Adv Minnie instructed by de Vries incorporated c/o Riaan Bosch attorneys Pretoria
First and second Respondents:	Adv J Suttner SC assisted by Adv P Cirone instructed by Etienne Naude Attorneys, Pta.
Third respondent:	Adv B Burman assisted by Adv D. MAHON instructed by Terry Mahon attorneys, Sandton.
Date of Hearing:	13 November 2013.