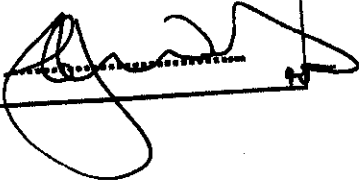


IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO.: 66068/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....11/2016.....	
	

29/11/2016

In the matter between:

THE SOUTH AFRICAN PROPERTY OWNERS  
ASSOCIATION

Applicant

and

MINISTER OF TRADE AND INDUSTRY  
DEPARTMENT OF TRADE AND INDUSTRY  
MICHAEL KATZ N.O.

First Respondent

Second Respondent

Third Respondent

THE TURNABOUT MANAGEMENT ASSOCIATION  
SOUTHERN AFRICA

Fourth Respondent

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JUDGMENT

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VAN DER WESTHUIZEN, A J

1. This application was enrolled on the unopposed roll. It concerns the interpretation of certain phrases appearing in sections 135(2) and 135(3) of the Companies Act, No. 77 of 2005 (the Act). I indicated that I would require some time to prepare a considered judgment in view of the relief sought.
2. In that regard, the applicant seeks a declaratory order that the rights of a landlord in respect of rental and other services rendered to

property utilised by a legal entity under business rescue fall within the ambit of either the phrase "*post-commencement financing*", or the phrase "*costs arising out of the costs of the business rescue proceedings*".

3. Section 21(1)(c) of the Superior Courts Act, 10 of 2013, provides that a court may in its discretion, subject to certain requirements, on application by any interested party determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. The principles applicable to the exercise of such discretion are succinctly set out in various judgments.<sup>1</sup> This application falls within the aforesaid principles.
4. The applicant, the South African Property Owners Association (SAPOA) is the umbrella organisation of Home Owners Associations that are members thereof. It acts as an association of property owners and associated persons in the interest of its members in terms of section 157(1)(c) of the Companies Act, 2008 (the Act). It represents approximately 1300 companies and organisations including major players in the industry such as banks, property owning companies and the like. Its members own or control about 90% of all commercial, retail office and industrial properties in South Africa.
5. The first respondent is the Minister of Trade and Industry. The second respondent is the Department of Trade and Industry and the third respondent is Michael Katz N.O., the chairperson of the Katz Committee. That committee has no juristic existence but is appointed by the first respondent to consider and recommend to the first respondent changes required in respect of the Act.

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<sup>1</sup> *Trinity Asset Management (Pty) Ltd v Investec Bank Limited* 2009(4) SA 89 (SCA); *Reinecke v Incorporated General Insurances Ltd* 1974(2) SA 84 (A); *Cordiant Trading CC v Daimler-Chrysler Financial Services (Pty) Ltd* 2005(6) SA 205 (SCA); *Dempa Investments CC v Body Corporate, Los Angeles* 2010(2) SA 69 (W)

6. The fourth respondent is the Turnaround Management Association Southern Africa, a representative body of business rescue practitioners. It has 123 members many of who give advice to or act as business rescue practitioners.

7. None of the respondents oppose the application and abide by the court's decision thereon.

8. The applicant contends that problems highlighted in the application relate to business rescue proceedings under the Act and which actually or potentially affect many of its members. In view of those highlighted problems a declaratory order is sought on the following basis. The order sought is:

"1. Declaring that the amounts payable by a company in business rescue proceedings in respect of the rent for immovable property occupied by the company including amounts payable for the company's share of rates and taxes and for public utility services including electricity, water, sanitation and sewage charges and payments to other service providers that are disbursed by the lessor of such premises:

1.1 Constitute "*financing*" as contemplated in section 135(2) of the Companies Act, 2008; or

1.2 Constitute "*costs of the business rescue proceedings*" as contemplated in section 135(3) of the Companies Act, 2008."

9. Further in this regard, the applicant contends that more than often companies are lessees in terms of a lease agreement with property owners and business rescue proceedings usually commence while the lease agreement is still in force and in terms of the business rescue application such companies remain in occupation of the

leased property. As such, the particular company incurs debt *vis-à-vis* the lease agreement. The tenant's lease obligations more that often include payment of rent and payment for public utility services and other services rendered to that company, either as part of the rental amount, or accessory thereto.

10. The practical effect thereof, once the company is under business rescue, is that the lessor continues, and is obliged, to pay those expenses and which could be substantial. Those expenses include the lessee's contribution to rates and taxes on the property, the lessee's share of the charges for electricity, water supplied to the property, refuse removal services, sanitation, sewage etc. Primarily the lessor bears the obligation and liability to pay those expenses or costs.
11. It is further contended that although during business rescue proceedings the company continues to trade from the leased premises, it does not pay the rent (the rent either including the aforesaid services, or in addition thereto). Furthermore, where the company is unable or unwilling to pay the aforementioned expenses, the business rescue practitioner may in terms of section 133 of the Act suspend the obligation to pay those debts.
12. The applicant submits that the question arises whether those debts are preferent claims, either because they are "*costs of business rescue proceedings*" or because they are "*post commencement financing*" within the meaning of section 135(2) of the Act.
13. The aforesaid query was proposed to the third respondent. However, the third respondent could not provide a definitive response. The third respondent advised the applicant that it was not prepared to recommend any amendment to the Act in that regard unless a declaratory order to the effect that the debts are neither "*costs of*

*business rescue proceedings*", nor "post commencement financing" as contemplated in the Act.

14. The Supreme Court of Appeal has recently confirmed the principles applicable to the interpretation of documents, contracts, statutes and the like.<sup>2</sup> The principles are trite and it is not required to restate them. What follows becomes apparent when applying those principles to the issues at hand in this application.

15. The applicant states that many business rescue practitioners do not accept that those debts fall within either of the aforesaid two categories, and hence, lessors are left without any reasonable remedy or preference in relation to the considerable costs they have to continue to pay on behalf of the companies under business rescue proceedings.

16. The legislator's intention with reference to business rescue proceedings is contained in section 128(1)(b) of the Act. That section provides:

*"(b) 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-*

- (i) the temporary supervision of the company, and of 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*

<sup>2</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk* 2014(2) SA 494 (SCA); *Chetty v Hart* 2015(6) SA 424 (SCA)

*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;"*

17. From the foregoing definition it can be discerned that the intention is to assist a company in distress to trade out of its problems, primarily that of financial nature.<sup>3</sup>
18. In order to achieve that aim, section 133 of the Act provides a general moratorium on legal proceedings against the company. Legal proceedings against that company may not be commenced, and if commenced, may not proceed without the written consent of the business practitioner or with leave of the Court.
19. A business rescue practitioner may in terms of the provisions of section 136(2) of the Act either entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises, whether from any agreement to which the company is a party at the commencement of the business rescue proceedings.<sup>4</sup>
20. Counsel for the applicant submits, correctly in my view, that given the clear intent of business rescue proceedings, the company in such proceedings would in all probability continue to remain on the premises from which it conducts its business. Should that company be obliged to vacate those premises at the commencement of the business rescue proceedings, the likelihood of a successful outcome of the business proceedings would diminish substantially.

<sup>3</sup> See *African Banking Corporation of Botswana v Kariba Furniture* 2015(5) SA 192 (SCA) at [42]

<sup>4</sup> See *Cloete Murray et al v FirstRand Bank Limited t/a Wesbank* 2015(3) SA 438 (SCA)

21. This application and in particular the relief claimed, is premised upon the provisions of either section 135(2) or 135(3) of the Act. Those provisions provide:

*"(2) During its business rescue proceedings, the company may obtain financing other than as contemplated is subsection (1), and any such financing-*

*(a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and*

*(b) will be paid in the order of preference set out in subsection (3) (b).*

*(3) After payment of the practitioner's remuneration and costs referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated-*

*(a) in subsection (1) will be treated equally, but will have preference over-*

*(i) all claims contemplated in subsection (2), irrespective whether or not they are secured; and*

*(ii) all unsecured claims against the company;*

*or*

*(b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company."*

22. In my opinion, and applying the principles of interpretation, the financing intended in subsection 2 of section 135 of the Act relates to the obtaining of financing in order to assist in managing the company out of its financial distress, hence the provision that any asset of the company may be utilised to secure that financing to the extent that the asset is not otherwise encumbered. It does not lean to an interpretation that encompasses existing obligations, other than to

company employees,<sup>5</sup> of the company that are utilised to assist in managing the company during the business rescue proceedings. Further in this regard, sections 133 and 136(2) of the Act militate against such interpretation.

23. Section 135(3) of the Act provides for two categories of costs. The first being those provided for in section 143 of the Act and other costs incurred due to the business rescue proceedings.
24. The costs contemplated by the applicant and relating to the lease agreement (either as part of rental or in addition thereto), are costs incidental thereto and are consequent upon the existence of the lease agreement. Those costs are a direct result of the terms of the relevant lease agreement.
25. It follows that those costs cannot constitute "*post-commencement financing*". Neither can those costs be classified as costs occasioned by the business rescue proceedings.
26. In my opinion, should it be held to be "*post-commencement financing*", or for that matter "*costs arising out of the costs of the business rescue proceedings*", the lessor would enjoy a preference over other creditors. To hold so, would defeat the purpose or aim of business rescue proceedings intended in section 128(1)(b) of the Act. The legislator could not have intended such a result or interpretation.
27. The costs referred to in the application are costs incidental to the leased property and are subject to the terms of the particular lease agreement and arise out of the terms of the lease agreement. Those costs do not constitute by any interpretation costs arising out of the business rescue proceedings. Furthermore, the liability of such costs arises out of the relevant lease agreement, despite being continually

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<sup>5</sup> See section 135(1) of the Act.



incurred, even after commencement of the business proceedings. To hold that such costs constitute post-commencement financing would elevate an obligation prior to commencement of business rescue proceedings to a preference over other creditors not provided or contemplated by the provisions of section 135 of the Act.

28. I am fortified in my view when regard is had to the provisions of sections 136(2) and (3) of the Act. Those provisions relate to contracts and the suspension or cancellation thereof, or of any provision thereof, in business rescue proceedings.
29. Furthermore, those costs are not akin to those relating to employees' remuneration contemplated in section 135(1) of the Act, which qualify as post-commencement financing.
30. If, however, the legislator had intended that the costs referred to in the application were either post-commencement financing, akin to that provided in section 135(1) of the Act, or to form part of the other costs arising from the business rescue proceedings, it would have clearly provided so. It follows that in so far as a declarator may be required, such would be along the lines of the interpretation of sections 135(2) and (3) as determined above, i.e. that it falls outside the provisions of the aforesaid subsections of section 135 of the Act.
31. It follows that the applicant is not entitled to the declaratory relief sought in the notice of motion.

The application is dismissed.

  
C.J. VAN DER WESTHUIZEN  
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:

A E Bham SC

A Dipa

Instructed by:

Norton Rose Fulbright South Africa