IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NO: 10999/16

In the matter between:

JOHN FREDERICK BOOYSEN Applicant

and

JONKHEER BOEREWYNMAKERY (PTY) LTD
(In Business Rescue) First Respondent

DANIEL TERBLANCHE
(In his capacity as the
Business Rescue Practitioner
appointed to the First Respondent) Second Respondent

Heard: 13 October 2016
Delivered: 15 December 2016

JUDGMENT

SHER, AJ:

[1] This matter deals with certain provisions of Chapter 6 of the Companies Act,[1] (the "*Act*") which introduced the concept of business rescue into our company law in 2011. It concerns, in particular, an interpretation of the statutory moratorium provision[2] which forms an integral part of the business rescue process, and the issue of whether or not a business rescue practitioner may reserve for himself the right to amend a business rescue plan (and a creditor's claim reflected therein) unilaterally, even after it has been adopted.[3]

The background circumstances

[2] First respondent is a company which formerly conducted business as a liquor wholesaler in the Southern Cape and the Karoo. It was established in Bonnievale in 1963. The following year the applicant's father opened a branch in De Aar and some 20 years later the applicant joined him there as an employee. It is common cause that during 2013 first respondent found itself in financial difficulties and on 26 August 2013 its directors accordingly resolved to place it under business rescue, and to appoint the second respondent as the business rescue practitioner tasked with giving effect thereto. The resolution was filed with the Companies and Intellectual Property Commission (the "*Commission*") and on 29 August 2013 second respondent was duly authorised by the Commission to serve as business rescue practitioner.

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[1] Act 71 of 2008.

[2] In s 133(1).

[3] In terms of s152.

[3] Subsequent to his appointment second respondent duly assumed control of the company and convened a first meeting of creditors and employees on 12 September 2013, at which time he informed those present that he believed there was a reasonable prospect that the business rescue process would result in a better outcome than would be achieved on a winding-up, and he called on creditors to submit any claims they might have. On 16 October 2013 the applicant, who was the manager of the De Aar branch of the business at the time, duly lodged a claim in the amount of R698 830.12 for outstanding remuneration which was allegedly owing to him in respect of 'commission' on gross profit for the 2011 – 2012 and 2012 – 2013 financial years.

[4] On 8 November 2013 second respondent published a draft business rescue plan he had prepared, for consideration by the creditors and employees. In accordance with the statutory requirements in this regard he duly set out the company's financial position therein as well as details of its indebtedness to each of its secured, preferent and concurrent creditors, and his proposals as to how their claims would be settled.

[5] As far as the preferent creditors were concerned, second respondent made provision for the retrenchment of the De Aar staff complement, and also listed the full value of the applicant's claim as an admitted preferent claim.

[6] According to his rescue plan the bulk of the claims of the secured creditors were to be settled by way of a first distribution, at which time the claims of all

the preferent creditors (including the applicant's claim), were also to be settled, in full.

[7] The plan was duly put forward and adopted at a second meeting of creditors which was held on 22 November 2013. But, despite this, it is common cause that some 3 years later the applicant has still not been paid the major portion of his claim, and this after second respondent indicated in a progress report dated 20 November 2015 that an amount of R2.7 million had already been paid to preferent creditors and a total of some R39 million overall had been *"distributed"* to the general body of creditors.

[8] On 28 November 2015 applicant sent an e-mail to second respondent in which he pointed out that more than 2 years had elapsed since the start of business rescue proceedings and he enquired when he could expect payment.

[9] Second respondent replied on 2 December 2015 by enclosing a copy of his latest monthly report in which he indicated that there were 2 immovable properties that were in the process of being transferred, and he said the directors had indicated that they might consider making an *ex gratia* payment to the applicant in an attempt to *"expedite the process"*. It will be noted from the terms of this response that not only was it initially not disputed that the applicant's claim was due, owing and outstanding but second respondent also indicated that an attempt would be made to effect payment thereof. Of importance also is the fact that although as a matter of law second respondent was seized with the management and control of the first

respondent, its erstwhile directors nonetheless clearly had decision-making powers in regard to the settling of claims against it whilst it was under business rescue. This issue is a matter of some concern as it is apparent that the answering affidavit was also deposed to by one of such directors and not by the second respondent, and it seems already from this response by the second respondent that, in effect, the rescue process has largely been managed by the erstwhile directors.

[10] However, notwithstanding the promise implicit in second respondent's e-mail of 2 December 2015 no payment was forthcoming and consequently, on 29 March 2016 applicant's attorneys addressed a further correspondence to the second respondent in which they called upon second respondent to advise by close of business on 4 April 2016 when the applicant could expect such payment, failing which, legal action would be taken. A few days later applicant's attorneys received a letter from a firm of attorneys acting on behalf of the second respondent, in which they requested an indulgence until 8 April 2016 in order to respond. On 7 April 2016 they duly replied to the applicant's attorneys in a letter in which, for the first time, the applicant's claim was contested. They stated that the first respondent's directors had informed the second respondent that the *"formula"* which had been used to calculate the value of the applicant's claim had been applied *"incorrectly"* as it did not *"take into consideration the bank interest"* (sic) and the auditors were accordingly engaged in a process of *"re-calculating"* the value of the claim. In addition, it was alleged that independent legal advice had been obtained to the effect

that the applicant's claim was in fact not preferent, but concurrent, and would be 'treated' accordingly.

[11] On 1 May 2016 an amount of R33 859.61 was paid to the applicant, without any explanation for how it was made up and arrived at. On 11 May 2016 applicant's attorneys sent yet another letter of demand to second respondent's attorneys calling upon them to settle the balance of R664 970.51 by no later than 17 May 2016. This letter prompted a response from second respondent's attorneys on 24 May 2016 in which they indicated that they were now acting on the instructions of the directors of the first respondent, and that no legal action could be taken for enforcement of the applicant's claim whilst the business rescue plan was *"still in the process of being implemented"*. The letter also went on to state that the applicant's claim was disputed and that he was only entitled to *"additional payments"* over and above his ordinary remuneration when the company had made a net profit, and in this regard the financial statements of 2011 – 2013 *"seem(ed) to indicate"* that no amount was due and payable to the applicant and that he had in fact received payments to which he was not entitled, and which would have to be refunded. In addition, the letter also stated that the second respondent had reserved to himself the right to amend the business rescue plan should it come to his attention that material information had been withheld, or in the event that *"additional"* (sic) information was brought to his attention, and second respondent had advised the directors that he would be amending the plan in respect of the applicant's claim *"accordingly"*. However, on 30 May 2016 second respondent circulated a further monthly progress

report in which he stated that he was in the process of implementing the *"sanctioned"* business rescue plan and that he expected that the business rescue process would be finalised shortly.

[12] Failing compliance with the letter of demand, on 24 June 2016 applicant launched the instant application in which he sought an order directing the respondents to pay the outstanding balance of R664 970.51 to him, together with interest thereon at the prescribed rate, from 1 May 2016 to date of payment. On 26 August 2016 applicant was paid a further sum of R18 449.12. Once again, how this subsequent payment was made up and arrived at was not disclosed. The balance outstanding in respect of the applicant's claim thus, as at date hereof, amounts to R646 521.39 and he seeks judgment in this sum, together with interest thereon. In terms of paragraph 2 of the Notice of Motion he also seeks an Order granting him leave to 'bring' the application, in terms of s 133(1) of the Act.

The respondents' defences: an introduction

[13] An answering affidavit which was deposed to by one Dirk Jonker, an erstwhile director of the first respondent, was filed on behalf of the respondents on 13 September 2016. In it Jonker said that he had been actively involved in managing the first respondent's business before it went into business rescue, and he had assisted the second respondent in assessing claims submitted by creditors.

[14] The affidavit itself is perfunctory, to say the least. It declares that the application is opposed on 2 grounds. In the first place, it avers that the claim is *"grossly overstated"* and notwithstanding that it was listed as preferent it was *"properly treated"* as concurrent, and the applicant has (already) been paid the *"appropriate"* dividend. It further contends that the business rescue plan was subject to a proviso in terms of which second respondent had reserved the right to amend it unilaterally, without reference to creditors, and after *"additional"* information in respect of the applicant's claim had come to his attention (the nature of which information was not disclosed), it had been so *"amended"*. When such amendment was effected and in what manner and in what amount, was not disclosed and the affidavit is entirely silent in this regard. Second respondent also chose not to enlighten the court and simply filed an affidavit in which he confirmed the answering affidavit.

[15] In heads of argument which the respondents filed shortly before the matter was due to be heard they sought to rely on a further defence which had not been pleaded or raised before viz that contrary to the provisions of s 133(1) of the Act the applicant had not obtained the written consent of the second respondent or the leave of the court before launching the instant proceedings, and it was submitted that on this ground alone the application fell to be dismissed. Notwithstanding that this point had not been taken in the answering affidavit I allowed argument to be presented in regard thereto on the assumption that it was a matter of law which the respondents were

entitled to raise without the need for this to be dealt with in their affidavits,[4] and on the understanding that the applicant had not been prejudiced as he filed supplementary submissions dealing with this aspect.

Business rescue proceedings

[16] In *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Ano*,[5] Rogers AJ pointed out that the business rescue provisions in the Act *"reflect a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction"*.[6]

[17] In *Oakdene Square Properties (Pty) Ltd and Ors v Farm Bothasfontein (Kyalami) (Pty) Ltd and Ors*,[7] the court expressed the view that the new provisions in the Act were in line with modern trends in corporate rescue regimes in that they attempted to secure and balance the competing interests of creditors, shareholders and employees, and envisaged a shift away from only having regard for creditors' interests, and are predicated on the belief that to preserve a business and the experience and skill of its employees, might, in the end prove to be a better option for creditors and enable them to secure a better recovery of their debts from their debtor.[8] In their work

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[4] Compare *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Ors* 2004 (4) SA 490 (CC) para [27].

[5] 2011 (5) SA 600 (WCC).

[6] *Id* para [6], 603E.

[7] 2012 (3) SA 273 (GSJ) para [12], 278F.

[8] *Id*.

entitled *Companies and Other Business Structures in SA*,[9] the authors have explained that whereas it is fundamental to healthy market-based economies that companies which cannot be competitive will fail, owing to the negative social impact such failures can have on employees and their dependents and considering the effect on sovereign economies as a result of the loss of revenue previously generated by such failed companies, since the 1990s there has been a shift in approach in most industrialised nations towards 'rescuing' financially distressed corporate entities rather than liquidating them, and indeed, the *"straightforward"* liquidation of companies has become rather *"unfashionable"*.[10]

[18] *"Business rescue"* is defined in the Act as proceedings taken to facilitate the rehabilitation of a financially distressed company by providing for its temporary supervision and the management of its affairs, business and property,[11] a temporary moratorium on the rights of claimants against the company (or in respect of property in its possession),[12] and the development and implementation, if approved, of a plan to rescue the company by restructuring its business affairs, liabilities and equity in a manner that will maximise the likelihood of it continuing in existence on a solvent basis, or if

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[9] D Davis, W Geach *et al* (3rd ed) 2013.

[10] *Id,* p 235.

[11] S 128(1)(b)(i).

[12] S 128(1)(b)(ii).

this is not possible, which will result in a better return for creditors or shareholders than would otherwise result from its immediate liquidation.[13]

[19] In terms of the Act there are two ways a company may be placed under business rescue: the board of a company may resolve voluntarily to begin rescue proceedings if it has reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of being able to save it,[14] or any affected person (ie a shareholder, creditor, representative trade union or an employee not represented by a trade union) may apply to the court for an order placing the company under temporary supervision.[15]

[20] The business rescue practitioner who is appointed to attend to a company in business rescue is responsible for preparing a so-called 'business rescue plan' after consulting creditors and other affected persons (including shareholders, employees and management[16] (which is intended to constitute his plan in terms of which the company will be saved and rehabilitated), and is responsible for implementing it once it has been adopted.[17] The plan is required to deal pertinently with a number of issues and must contain all information reasonably required in order to facilitate its proper consideration by affected persons in order to enable them to decide whether to accept or

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[13] S 128(1)(b)(iii).

[14] S 129(1)(a) and (b).

[15] S 132(1)(b) rtw s 131(1).

[16] S 150(1).

[17] S 140(1)(d)(ii).

reject it. Amongst other things, it must set out all the secured, preferent and concurrent creditors and which of them have proved their claims,[18] as well as the probable dividend which they would receive were the company to be placed in liquidation instead.[19] The plan is also required to propose how the company is going to discharge its debts,[20] and in this regard must include details as to how any assets which are available may be realised in order to settle creditors' claims,[21] and the order of preference in terms of which the proceeds thereof will be applied to pay creditors.[22] In addition, it must set out a statement of any conditions which must be satisfied in order for it to come into operation and to be fully implemented,[23] and the effect, if any, that it will have on the number of employees and their terms and conditions of employment,[24] as well as the circumstances in terms of which the rescue process will come to an end.[25]

[21] The plan must be published by the company within 25 business days[26] after the appointment of the business rescue practitioner, and within 10 business days thereafter the practitioner must convene and preside over a meeting of creditors and the holders of voting interests in the company, which must

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[18] S 150(2)(ii).

[19] S 150(2)(iii).

[20] S 150(2)(b)(ii).

[21] S 150(2)(b)(iv).

[22] S 150(2)(b)(v).

[23] S 150(2)(c)(i)(aa) and (bb).

[24] S 150(2)(c)(ii).

[25] S 150(2)(c)(iii).

[26] Or on such extended date as may be allowed either by the court on application to it, or by the holders of the majority of the creditors' voting interests (Ss 150(5)(a)-(b)).

consider its adoption.[27] At the meeting which is so convened the practitioner must introduce the proposed plan to the creditors and shareholders[28] and must provide employees' representatives with an opportunity to address the meeting,[29] and must thereafter invite discussion and conduct a vote on a proposal to adopt or to amend the proposed plan.[30] If the proposed plan is rejected by the meeting the practitioner may seek approval from the holders of voting interests to prepare and publish a revised plan,[31] which must be tabled and sanctioned within 10 business days thereafter.[32]

[22] The Act provides that once a rescue plan has been adopted in meeting, it is binding on the company and on each of its creditors as well as the holders of its securities, whether or not such persons were present at the meeting and voted in favour of the plan or not, and irrespective of whether or not such persons, if they were creditors, had proven their claims against the company.[33] And once the plan has been adopted, the company is required, under the direction of the practitioner, to take all necessary steps to attempt to satisfy any conditions on which the plan may be contingent[34] and to implement the plan "*as adopted*".[35] After the practitioner has *"substantially"*

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[27] S 151(1).

[28] S 152(1)(a).

[29] S 152(1)(c).

[30] Ss 152(1)(d)(i)-(ii) and (e).

[31] S 153(1)(a)(i).

[32] S 153(3)(a)(i) and (ii).

[33] S 152(4)(a) – (c).

[34] S 152(5)(a).

[35] S 152(5)(b).

implemented the rescue plan, he may terminate the rescue proceedings by giving notice of substantial implementation to the Commission.[36]

The respondents' defences: an evaluation

[23] (i) Non-compliance with s 133(1):

S 133 of the Act contains a general moratorium on legal proceedings against a company in business rescue. Sub-section (1) is the provision in issue. It provides that during business rescue proceedings no legal proceedings (including enforcement action) against a company[37] may be *"commenced or proceeded with"* in any forum, except with the written consent of the business rescue practitioner[38] or with the leave of the court, in accordance with such terms as the court may deem *"suitable"*.[39] There are certain proceedings which are expressly exempt from such consent or leave.[40] But as none of

[36] S 152(8).

[37] Or in relation to any property belonging to the company or lawfully in its possession-see *Kythera Court v Le Rendez-Vous Café CC* 2016 (6) SA 63 (GJ) where it was held that the moratorium did not apply to proceedings for the ejectment of a company in business rescue, as the lease regulating rights of occupation had been validly cancelled and the company had failed to vacate and was thus not in lawful possession of the property.

[38] S 133(1)(a).

[39] S 133(1)(b).

[40]These include criminal proceedings against the company or any of its directors or officers (s 133(1)(d)), proceedings concerning any property or right over which the company exercises the powers of a trustee (s 133(1)(e)), proceedings by a regulatory authority against the company (s 133(1)(f)), or proceedings in which a party seeks to set off any rights or claims it may have against a company (s 133(1)(c)).

these are of relevance or application to this matter this aspect requires no further discussion.

[24] Inasmuch as the proceedings in this matter concern a claim by the applicant for payment of a sum of money (which formed part of a claim which was admitted and included in the rescue plan), it is common cause that they constitute an *"enforcement action"* within the meaning of the provision under discussion. As such, on the face of it these proceedings required either the written consent of the practitioner or the leave of this court before they could be *"commenced"* or "*proceeded"* with.

[25] The respondents contend that inasmuch as the applicant's claim is one which arose prior to the commencement of business rescue proceedings, in the absence of any written consent from the practitioner the applicant was required to make an initial, separate application for leave to institute these proceedings before commencing therewith, and he is not at liberty to seek the court's leave in this regard afterwards, in one and the same application, as the applicant has sought to do. On the other hand, the applicant contends that inasmuch as his claim arises out of its acceptance and adoption by the creditors and affected persons in meeting, as part of the first respondent's rescue plan, it is not a claim which arose prior to the commencement of rescue proceedings and, on a proper interpretation of s 133 it should be held that the legislature intended that only pre-existing claims ie pre-business rescue proceedings claims are to be subject to the requirement of consent or the leave of the court, and it was not intended that the provisions of the

section would apply to claims arising out of a rescue plan which has been adopted after rescue proccedings had commenced, and in respect of which the applicant simply seeks an order directing the respondents to give effect thereto.

[26] The provisions of s 133 have been subject to conflicting interpretations in a number of decisions. Before dealing with these, it must be pointed out that notwithstanding the injunction that no legal proceedings may be commenced or proceeded with during business rescue proceedings unless consent from the practitioner or leave from the court has been obtained, in a number of matters which were brought in terms of the provisions of s 130(1) of the Act courts have consistently held that such proceedings are not subject to the provisions of s 133.

[27] In this regard s 130(1) provides that any time after an adoption of a resolution to commence business rescue[41] and prior to the adoption of a business rescue plan[42] an affected person may apply to a court for an order either setting aside the resolution by the company to commence business rescue proceedings (on the grounds that at the time there was no reasonable basis for believing that the company was financially distressed or there was no reasonable prospect of rescuing the company, or it failed to comply with the prior procedural requirements of s 192),[43] or for an order setting aside the

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[41] In terms of s 129.

[42] In terms of s 152.

[43] S 130(1)(a)(i)-(iii).

appointment of the business rescue practitioner.[44] In such matters the courts have held that the provisions of ss 130(1) and (5) constitute separate enabling provisions authorising applicants to approach the courts for relief, and the resultant proceedings are therefore not subject to the moratorium provisions in s 133.[45]

[28] Similarly, in *National Union of Metalworkers of SA obo Members v Motheo Steel Engineering CC*,[46] the Labour Court held that unfair dismissal claims brought in that court were not subject to the moratorium in s 133. The court based its finding on s 210 (1) of the Labour Relations Act,[47] which provides that the provisions of such Act shall prevail in the event of conflict with any other law, save for the Constitution.

[29] In the various conflicting judgments on the issue divergent views have been expressed 1) in regard to whether the provisions of s 133 require a separate prior application to be made for leave to commence or proceed with legal proceedings, or whether such leave may be sought in one and the same matter (ie together with the principal matter in terms of which the relevant

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[44] On the grounds that he / she does not possess the requisite formal qualifications (s 138), or is not independent of the company or its management or lacks the necessary skills to perform his duties (s130(b)(i) – (iii)).

[45] *DH Bros Industries v Gribnitz NO* 2014 (1) SA 103 (KZP); *LA Sport 4X4 Outdoors CC and Ano v Broadsword t/a 20 (Pty) Ltd and Ors* [2015] ZAGPPHC 78; *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd and Ors* [2015] ZAKZPHC 21; *ABSA Bank Ltd v Golden Dividend 339 (Pty) Ltd* 2015 (5) SA 272 (GP); *Griessel and Ano v Lizemore and Ors* 2016 (6) SCA 236 (GJ); *Cordeiro Holdings CC and Ors v Market Demand Trading 254 (Pty) Ltd and Ors* [2016] ZAGPJHC 284.

[46] [2014] JOL 32257 (LC).

[47] Act 66 of 1995.

proceeding is instituted) and 2) as to whether or not proceedings pertaining to the implementation of a rescue plan are covered by the terms of s 133 and also require either the prior consent of the practitioner or the leave of the court, or not. The divergent judgments are broadly split between the South Gauteng and Kwazulu-Natal divisions on the one hand, and the North Gauteng division on the other.

[30] In what appears to be the first reported decision on the point in the South Gauteng division in May 2013 viz *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies (Pty) Ltd and Ano*,[48] Kgomo J held that it was not permissible for an applicant to seek to amend its notice of motion *ex post facto* by the inclusion of a prayer therein for leave to institute proceedings against a company in business rescue. In that matter the proposed amendment was first motivated in the replying affidavit and no basis for it had been laid in the founding papers, and the respondents had not been afforded an opportunity to respond thereto.[49] Kgomo J held that the leave of the court which was required in terms of s 133(1) was not *"a simple one"* which could be *"advanced from the Bar"* and needed to be motivated substantially, in the same form and manner as would ordinarily be the case when an applicant sought a departure from the rules of court in order to justify a matter being heard as one of urgency.[50] In the result, a court which was asked to grant leave to proceed against a company under business rescue

[48] [2013] ZAGPJHC 109, decided on 10 May 2013.

[49] *Id* para [66].

[50] *Id* para [67].

should receive *"a well-motivated application"* so that it could properly apply its mind to the facts and the law and thereafter be in a position to make a ruling in accordance with any terms which it might consider to be suitable in the particular circumstances.[51]

[31] A month later, in *Redpath Mining*[52] the same court went further and held that litigation 'against or related to' a rescue plan was only to be permitted in *"exceptional circumstances"*.[53] As a result, it refused to grant the applicant leave to institute proceedings interdicting the implementation of a rescue plan which had been adopted.

[32] However, later that year in *African Banking Corporation*,[54] an application before the North Gauteng division for leave to sue was sought and granted in one and the same application for the setting aside of an approved rescue plan.

[33] In contrast to these decisions, in July 2014, in *Moodley v On Digital Media (Pty) Ltd and Ors*,[55] a minority shareholder of a company in business rescue sought leave from the South Gauteng division to proceed with an application interdicting the company from implementing certain transactions which it was

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[51] *Id.* S 133(1)(b) provides that in granting leave the court may do so on such terms as it considers "*suitable*".

[52] *Redpath Mining SA (Pty) Ltd v Marsden NO and Ors* [2013] ZAGPJHC 148 decided on 14 June 2013.

[53] *Id* para [71].

[54] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Ors* 2013 (6) SA 471 (GNP).

[55] 2014 (6) SA 279 (GJ).

claimed were contrary to the business rescue plan which had been adopted. The court held that proceedings pertaining to the development, adoption and implementation of a business rescue plan, and its interpretation, did not fall within the ambit of s 133 and the consent of the business rescue practitioner or the leave of the court was thus not required for such proceedings.

[34] Applicant's counsel urged me to accept the reasoning and decision in *Moodley* but, after due consideration I am, with respect, not persuaded that its ratio can withstand scrutiny and for the reasons that follow hereinafter I do not believe that it was correctly decided. But it has subsequently been endorsed[56] or followed[57] in a number of decisions.

[35] In December 2015, the Gauteng North division held in the matter of *Safari Thatching*,[58] that it was open to an applicant in winding-up proceedings which had commenced prior to a company being placed under business rescue, to thereafter seek leave to proceed with such application without the need for a substantive and separate application to be made in this regard.

[36] In contrast to the conflicting stances adopted by the Gauteng courts, in June 2014 an *ex post facto* application before the Kwazulu-Natal division for leave to sue, which was made during argument from the bar, in an application[59] by

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[56] See *Resource Washing* n 45, at para [11].

[57] See *Hlumisa Investment Holdings (RF) Ltd and Ano v Van der Merwe NO and Ors* [2015] ZAGPHC 1055 at para [17].

[58] *Safari Thatching Lowveld CC v Misty Mountain Trading 2 (Pty) Ltd* 2016 (3) SA 209 (GP).

[59] *Msunduzi Municipality v Uphill Trading 14 (Pty) Ltd & Ors* [2014] ZAKZPHC 64 decided on 27 June 2014.

a municipality for an order against a company in business rescue directing it to cease all business operations, was refused. The court held that in such matters a substantive, prior application for leave to sue was required, on affidavit, so that the company could have a proper opportunity to consider and oppose the application if necessary and so that the court could have regard for all the relevant circumstances.[60]

[37] Similarly, during December 2014 the same division[61] held in *Elias Mechanicos*[62] that leave to institute proceedings against a company in business rescue must be obtained prior to the commencement of the principal proceedings and cannot be sought as part of the relief claimed therein. As a result, an application for an order directing the respondent company (which was in business rescue) to provide certain documentation pertaining to an alleged joint venture which the parties had previously engaged in for the purposes of a housing development, was dismissed, summarily.

[38] In my view, in arriving at a determination of which of these conflicting judgments is to be preferred and followed, there are a number of cardinal principles which I must have regard for. In the first place, I believe the proper

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[60] At para [8].

[61] Sitting in Durban- *Msunduzi* (n 59) was heard in Pietermaritzburg.

[62] *Elias Mechanicos Building and Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and Ors* 2015 (4) SA 485 (KZD).

starting point is the current approach to statutory interpretation as set out in *Endumeni* [63] where Wallis JA said the following:[64]

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed …. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document.*"

[39] At the same time, I am required to guard against any temptation to substitute what I may regard as reasonable, sensible or business-like for the words actually used, in order not to *"cross the divide"* between interpretation and legislation.[65]

[40] In *Panamo Properties*,[66] a recent decision of the Supreme Court of Appeal which also deals with business rescue proceedings, Wallis JA pointed out that in attempting to arrive at a *"sensible"* interpretation the court should aim towards giving a meaning to every word used and will not lightly construe a provision under scrutiny such that it will have no practical effect. And where

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[63] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[64] At para [18].

[65] *Id.*

[66] *Panamo Properties (Pty) Ltd and Ano v Nel and Ors NNO* 2015 (5) SA 63 (SCA).

there are provisions which may appear to conflict with one another the court must attempt to arrive at an interpretation which reconciles them.[67]

[41] In the second place, and although this is not an aspect which has been in the forefront in recent decisions involving an interpretation of the provisions of s 133(1), in my view, when interpreting them I must do so through the prism of the Constitution,[68] and insofar as they may implicate or negatively affect the constitutional right of access to court which a litigant would ordinarily enjoy,[69] I am bound to promote the spirit, purport and objects of the Bill of Rights in my interpretation of such provisions.[70]

[42] In this regard in *Lesapo*[71] the Constitutional Court pointed out that the right of access to court is *"foundational to the stability of an orderly society. It ensures… peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help… As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable".*

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[67] *Id* para [27].

[68] *Investigating Directorate; Serious Economic Offences and Ors v Hyundai Motor Distributors (Pty) Ltd and Ors In re: Hyundai Motor Distributors (Pty) Ltd and Ors v Smit NO and Ors* 2001 (1) SA 545 (CC) at para [21], 558E.

[69] Which is guaranteed in s 34 of the Constitution.

[70] S 39(2) of the Constitution; *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13 at para [88].

[71] *Lesapo v North West Agricultural Bank and Ano* 1999 (12) BCLR 1420 (CC) at para [22].

[43] In *Zondi*[72] the Constitutional Court further pointed out that the right of access to court is a fundamental aspect of the rule of law, which in turn is one of the foundational values on which our constitutional democracy has been established.

[44] In the circumstances, inasmuch as the provisions of s 133(1) may limit or intrude upon the constitutional right of access to court which a litigant may ordinarily enjoy, they must, in my view, be interpreted in a manner which is least restrictive of such rights[73] and, if at all possible, I am enjoined to adopt a 'generous' construction over a merely textural or legalistic one in order to afford affected parties the fullest possible protection of such right of access.[74]

[45] In the third place, one must also bear in mind that the provisions in question must be read in the context of the statutory presumption that unless a contrary intention clearly appears from the language, the legislature did not intend *"unfair, unjust or unreasonable"* results to flow from its enactments[75] and it is to be presumed that the legislation was not meant to be absurd or anomalous.[76]

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[72] *Zondi v MEC for Traditional and Local Government Affairs and Ors* 2005 (3) SA 589 (CC) at para [82].

[73] *SATAWU and Ors v Moloto and Ano NNO* 2012 (6) SA 249 (CC) at para [44].

[74] *Department of Land Affairs and Ors v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para [53].

[75] *Road Accident Fund v Smith* 1999(1) SA 92 (SCA) at 102C-D; *Principal Immigration Officer v Bhula* 1931 (AD) 323, at 337.

[76] Du Plessis *The Re-Interpretation of Statutes* at 162*; Barnard v Regspersoon van Aminie* 2001 (3) SA 973 (SCA) at para [27].

[46] In addition, there are legislative provisions in the Act itself which serve as a guide to interpreting its contents. In this regard s 5 provides that the Act must be interpreted and applied in a manner which will give effect to the legislative purposes enunciated in s 7,[77] and if appropriate, in doing so a court may consider foreign company law.[78] S 7 in turn provides that the purposes of the Act are *inter alia* to promote compliance with the Bill of Rights in the application of company law,[79] and to provide for the *"efficient"* rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all stakeholders.[80] In *Nedbank Ltd v Bestvest 153*[81] Gamble J expressed the view that the effect of these provisions was that courts were now required to adopt a *"fresh approach"* when assessing the affairs of corporate entities and should interpret the Act in such a way as to promote the values inherent in the Constitution.[82]

[47] In addition, when seeking to interpret the provisions in a manner which promotes the *"efficient"* rescue of corporate entities the court must, in my view, also bear in mind that *"it is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition".*[83] Legislative recognition of this is reflected in the relatively short

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[77] S 5(1).

[78] S 5(2).

[79] S 7(a).

[80] S 7(k).

[81] *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Ano v Bestvest 153 (Pty) Ltd and Ors* 2012 (5) SA 497 (WCC).

[82] Para [20].

[83] *Koen and Ano v Wedgewood Village Golf Club and Community Estate (Pty) Ltd and Ors* 2012 (2) SA

time-periods which are provided for in the Act for the implementation of such proceedings. In this regard it is evident from the provisions of s 132(3) that the legislature envisaged that business rescue proceedings should occur within a framework period of 3 months (or such further period as the court might allow by extension), as the business rescue practitioner is required after such period to file a monthly progress report with all affected parties and the Commission until the conclusion of the rescue process.

[48] So, in my view, when giving effect to the provisions of s133(1) it is important to strive towards an interpretation which will allow for the speedy, cost-effective and efficient implementation of an adopted rescue plan and the timeous completion of the business rescue process as opposed to an interpretation which will prolong it or drag it out unnecessarily.

[49] As was pointed out in *Chetty*,[84] the obvious purpose of placing a corporate entity under business rescue is to provide it with *"breathing space"* so that its financial affairs may be assessed and re-structured in a way which will allow it to return to financial viability. The moratorium on legal proceedings against an entity under business rescue constitutes a vital part of that *"breathing space"* and allows for a *"period of respite"*[85] for the necessary re-structuring and rehabilitation to take place in terms of a rescue plan which the business

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378 (WCC) at para [10].

[84] *Chetty t/a Nationwide Electrical v Hart and Ano NNO* 2015 (6) SA 424 (SCA) at para [29].

[85] *Cloete Murray and Ano NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) at para [14].

rescue practitioner must formulate in conjunction with creditors and other affected parties, such as shareholders and employees.[86]

[50] The moratorium, in effect, amounts to a stay of legal proceedings against the company, except in certain circumstances envisaged in the sub-sections[87] or with the consent of the business rescue practitioner or the leave of the court.

[51] To extend the nautical metaphor adopted in *African Banking*,[88] if the purpose of the rescue plan is to throw a life-line to a company in financial distress to help keep it afloat, then the moratorium serves to prevent it from being overwhelmed by stormy financial waters, and from being sunk by an opportunistic creditor's torpedo. It is plain however that the moratorium is not intended to be an absolute bar to legal proceedings against a company and it is intended to serve merely as a procedural limitation on a litigant's rights of action.[89] Because it is only a procedural limitation and not a bar in itself to proceedings against a company in business rescue, the Supreme Court of Appeal held in *Chetty*[90] that the requirement of consent from the practitioner or leave from the court, is not a jurisdictional fact or condition precedent for such legal proceedings and the legislature did not intend to invalidate or nullify such proceedings if they were brought without the requisite prior

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[86] *Id*.

[87] S 133(1)(a) – (e).

[88] *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd* 2015 (5) SA 192 (SCA) at para [42].

[89] *Chetty* n 84 paras [40] and [42]; *Arendse v Van Der Merwe* 2016 (6) SA 490 (GJ) para [15]; *Kythera* n 37 para [8].

[90] *Chetty* n 84 para [38].

consent or leave having been obtained.[91] On this basis matters such as *Elias Mechanicos* were, in my view, wrongly decided and even were I to find in the respondents' favour on this point, the relief sought by them (ie the dismissal of the principal application) cannot be granted and at best they are merely entitled to a stay of the proceedings.

[52] It must be pointed out that in *Chetty* the SCA held that the purpose of obtaining the consent of the business rescue practitioner or the leave of the court, was in order to afford the practitioner an opportunity to consider the nature and validity of the proposed claim which was to be made in the envisaged proceedings, and its potential impact on the *"wellbeing"* of the company and its ability to regain its financial health, and how best it was to be dealt with eg by settling it or by continuing with the litigation.[92]

[53] Finally, it must be stated that one of the principal objectives which the court should have in mind is to protect and give effect to the business rescue process and to advance it, rather than to stifle or retard it. To this end, the provisions of s 133 are not to be understood to be a *"shield behind which a company not needing the protection may take refuge to fend off legitimate claims"*.[93] So, where, in a matter such as the one on hand, the purpose of the proceedings against the company for which leave of the court is sought is to implement and give effect to a rescue plan which was properly adopted, the court should, in my view, be slow to refuse such leave and should be alive to

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[91] *Id* paras [40] and [42].

[92] *Id* para [28].

[93] *Id* para [40].

the danger of putting unnecessary formalistic obstacles in the path of the achievement of such purpose.

[54] Thus, in my view, the consequence of all these interpretative strands as laid out in the various judgments I have referred to is that it would be wrong to hold that in each and every matter in which leave of the court is required, such leave needs to be sought and obtained by way of a formal application, nor, in my view, would it be correct to hold that such leave must, of necessity, always be sought by way of a separate, prior application. In my view, there is no one-size-fits-all approach to be followed and what will be required and what will be sufficient, will depend on the circumstances of each particular matter. It will in each case be a matter for the court's discretion, which as was held recently in *Arendse*,[94] is to be exercised judicially on the basis of considerations of convenience and fairness, and what will be in the interests of justice.[95] There may be matters where by virtue of the nature of the envisaged proceedings very little is necessary in the way of applying for, or seeking the court's leave. For example, if one has regard for the facts in the *Safari Thatching* matter which concerned a prior application for the liquidation of a company which had been brought before it went into business rescue, and which was automatically stayed when business rescue proceedings commenced, it would surely have been otiose and inefficient to require that the leave of the court to proceed therewith should be sought by way of a

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[94] *Arendse v Van Der Merwe* 2016 (6) SA 490 (GJ) para [11].

[95] A similar approach was adopted in *Mabote & Ors v Van Der Merwe* [2016] ZAGPHC 185 at para [11].

separate prior application, if the business rescue process had ground to a halt or was otherwise defective.

[55] On the other hand, there will be instances where it will be proper and necessary that a formal, substantive and separate application for the court's leave must be brought and where it will not be appropriate for such an application to be conflated with the main application or action concerned. One must, in my view, also have regard for the fact that there may be instances where it is necessary to proceed for relief as a matter of urgency, and it will thus be necessary to launch proceedings immediately, and in such circumstances unless the provisions of s 133(1) are incapable of such a construction the applicant should be allowed to ask for leave to proceed as part of such urgent proceedings, albeit *in limine* thereto.

[56] In the circumstances, I respectfully differ from the approach adopted by the courts in both *Elias Mechanicos* as well as in *Moodley,* and I find the reasoning in both matters not to be persuasive. As far as *Elias Mechanicos* is concerned, the principal rationale for the decision seems to be that because a court might impose terms on an applicant in granting leave for legal proceedings to be commenced or proceeded with, such leave must, of necessity, be obtained before such proceedings were commenced *"as that will be the time to impose the terms contemplated in the section"*.[96] I cannot discern any reason why this would, of necessity, be so in each and every case. Where the facts of a particular matter dictate that prior to commencing

[96] Note 62 para [12].

with certain legal proceedings a court would be required to impose certain terms and conditions, it would obviously be sensible and proper to approach the court for the necessary leave and guidance in this regard, before such proceedings were commenced. But, as I have already indicated, there may well be instances where proceedings have to be launched as a matter of urgency or where the panoply of facts and circumstances relevant to the principal application are inevitably going to have to be dealt with in any interlocutory application for leave to launch such application, and I can see no reason why in such matters it may not be appropriate, fair and convenient to obtain the court's leave on such terms as it may deem fit in one and the same matter, by way of an interim order, before the main application or action itself is heard and the relief sought therein is granted. In my view this application is such a matter. In seeking the court's leave to proceed with his application for an order directing the respondents to give effect to the business rescue plan which was adopted, the applicant has to set out the entire history of his claim and how it came about, and must in the course of this of necessity deal with the inclusion of his claim in the rescue plan and how the plan was adopted but subsequently not complied with. In my view a sensible, business-like approach does not require the applicant to have to deal with all of this in a separate, prior application, only to have to repeat it all again, in the principal application, at a later stage.

[57] As far as the decision in *Moodley* is concerned, the *ratio* appears at para [10] of the judgment. It is stated therein that inasmuch as it is the business rescue practitioner who must develop and implement the business plan (once it is

adopted), and it is the company which must take all necessary attempts to satisfy any conditions on which the plan is contingent and which must thereafter implement the plan under the direction of the business rescue practitioner, any legal proceedings which seek to give effect to such plan (ie to implement it) will be legal proceedings which must be instituted against *both* the business rescue practitioner and the company, and are thus not legal proceedings against the *company* within the meaning of s 133(1).[97] To my mind and with all due deference, the distinction which is sought to be made is an artificial one. Any plan which is adopted and which needs to be implemented by a company in business rescue, is a plan which belongs to that company and the business rescue practitioner merely seeks to give effect thereto as the manager in charge of the company. To this end, the business rescue practitioner steps into the shoes of the board of the company and its management during the period when it is temporarily under supervision for the purposes of business rescue. But, any proceedings taken in relation to such plan ie to set it aside or to enforce its implementation, are proceedings taken against the company, which is represented by the business rescue practitioner and, to my mind, there is no justification in seeking to distinguish such proceedings or to hold that they are not the kind of proceedings covered by the provisions in question.

[58] Furthermore, there may well be instances where a creditor may seek to obtain some preference or undue advantage in respect of the implementation of part of a rescue plan eg by seeking payment when it is not yet due or where even

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[97] *Id* rtw para [11].

though it may be due in terms of the plan, as a result of unexpected financial difficulties (such as an asset not being realised as and when it was supposed to have been), the company is unable to pay out such claim strictly according to the time-lines envisaged in the rescue plan. In such instances I can see no reason why the leave of the court should not be obtained sanctioning any proceedings brought in order to give effect to, or to implement, the rescue plan, and the court would have every reason to consider whether or not to grant leave to proceed with such proceedings, in the interests of the company and the business rescue to which it was subject, as the precipitous launch thereof may well endanger the chances of the successful rehabilitation of such a company, if the proceedings were to be allowed. I am of the view that it could never have been intended by the legislature to exclude any and all legal proceedings that deal with the adoption or implementation of a business plan, from the requirement of the consent of the business rescue practitioner or the leave of the court.

[59] It is important to note that S 133(1) provides that no legal proceedings against a company in business rescue may be *"commenced"* or ***"proceeded"*** with (my emphasis), without the consent of the practitioner or the court's leave. The wording in this provision follows similar wording adopted in the Australian equivalent legislation which is contained in s 440D of Part 5.3A of the Corporations Act 50 of 2001 and which provides that during the administration of a company a proceeding *"in a court against a company or in relation to any of its property cannot be begun or proceeded with"* except with the

administrator's written consent[98] or with the leave of the court in accordance with such terms, if any, as the Court may impose.[99] In like vein s 440F provides that any enforcement process against a company in administration is suspended and cannot be *"begun or proceeded with"* except with the leave of the court.[100] According to a limited survey I was able to perform it does appear as if Australian courts seized with giving effect to these provisions commonly grant leave to 'commence and proceed', as part of the relief sought in the principal application itself.[101]

[60] In contrast to the provisions in Australian and South African law, the relevant provisions of Chapter 11 of the US Bankruptcy Code provide that any petition for 'reorganization' which is filed in terms thereof, shall operate as a stay of the *"commencement or continuation, including the issuance or employment of process of a judicial, administrative or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case … or to recover a claim against the debtor that arose before the commencement of the case"*.[102] The relevant provision in Canadian

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[98] S 440D(1)(a).

[99] S 440D(1)(b).

[100] S 440F(a).

[101] See *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWC 1305 (leave granted to commence and proceed with an application for the enforcement of an interim arbitral award); *Hallmark Consolidated Ltd & Anor v Centaur Mining & Exploration Ltd (Administrators Appointed)(Receivers & Managers Appointed)* [2001] WASC 190 (leave granted to commence and proceed with a mandatory injunction).

[102] S 362(a)(i) 11 USC.

legislation[103] similarly provides that "*no action, suit or proceeding in any court or tribunal against or in respect of a company or the Monitor, or affecting the dominium of (its) property shall be commenced or continued with except with the written consent of the company or the Monitor or with the leave of the Court*."

[61] S 133 does not provide for a stay on the commencement or *continuation* of any legal proceedings against a company under business rescue, but a stay on the commencement or *proceeding* with such litigation. Had the section referred to the 'commencement or *continuation'* of proceedings, it would, in my view, have been very clear that it was not open to an applicant to seek leave to sue after such proceedings had already been commenced ie after such proceedings had already been launched, and the requisite leave in respect of matters arising after the advent of business rescue proceedings, could thus only be obtained by way of an application for leave which was brought separately and prior to the commencement of the substantive proceedings themselves. In my view, the use of the words *"proceeded with"* in s 133(1) allows for leave to be obtained from a court in respect of proceedings which have a cause of action arising both before as well as after business rescue proceedings have commenced, and also allows for the necessary leave of the court to be obtained, in appropriate instances, subsequent to the principal application or action already having been launched, or even as part thereof, in the form of an *in limine* order ie by way

[103] The Companies' Creditors Arrangement Act RSC 1985 C 36.

of interim relief. In this regard *"proceed"* is defined[104] as meaning both to *"go (on) to a further or (the) next stage"* or to *"go on to do something"* or "*continue*" with something (ie to "*continue*" with a course of action which began previously) or to "*start a lawsuit*" or "*take legal action*". On the other hand *"continue"* implies a prior commencement only, and is not susceptible of an interpretation of a course of action or a legal proceeding *commencing* at the same time. In this regard *"continue"* is defined as meaning *"to remain in existence, operation or a particular state"* or to *"carry on with"*.[105]

[62] In the circumstances, in my view, applying a purposive and contextual interpretation to the language used in the provisions in question, there is nothing in s 133(1) which excludes the leave of the court being sought and obtained, in appropriate circumstances, either together with or subsequent to the launch of the principal proceedings or action in question. Similarly, in my view, applying a purposive interpretation with the aim of promoting the efficient, timeous and expeditious rehabilitation of a company according to its business rescue plan, where legal proceedings concern the implementation of such plan the leave of the court can and should ordinarily be obtained by way of a substantive application, but, in order to avoid unnecessary expense and formalism such application can properly be made as a part of the principal matter and can be heard *in limine* prior to the commencement thereof, without doing violence to the provisions of the section. To my mind, it makes little

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[104] According to the Oxford Advanced Learners' Dictionary (4th ed).

[105] *Id*. The Chambers 20th Century Dictionary defines *"continue"* to mean *"to extend, go on with, to resume, to be a prolongation of"* whereas to *"proceed"* means both *"to continue"* or to *"go on"* or *"to begin and go on",* or to *"prosecute"* or *"take legal action"*.

sense to compel an applicant seeking to obtain an order from a court simply directing the business rescue practitioner and company in rescue to implement the terms of a rescue plan which has been adopted, to obtain leave to do so by way of a separate and prior application and to do so would result in an unnecessary duplication of costs and would unnecessarily delay the rescue process.

[63] When pressed, respondents' counsel was unable to provide any substantive reason why leave to proceed could and should not be granted in this matter, particularly inasmuch as all that the applicant seeks is an order directing the respondents to implement (ie to give effect to) the business plan as adopted, and to discharge his claim in terms thereof. In the circumstances the comments by Tuchten J in *LA Sport 4x4*[106] that the attitude adopted amounts to nothing more than *"an exercise in empty formalism, designed cynically to perpetuate the advantages of immunity from the normal processes of the law which a company can secure for itself under the business rescue regime"* are apposite. And, given that the respondents' defences to the merits were fully dealt with in the answering affidavit and were fully traversed when argument was heard on the merits of the principal application, it would, in my view, be an injustice to the affected parties were the matter to be brought to a halt, simply in order to compel the applicant to make a separate application for leave to proceed with the relief he seeks in the main application.

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[106] *LA 4x4 Outdoor CC and Ano v Broadswood Trading 20 (Pty) Ltd and Ors* [2015] ZAGPPHC 78 at para [29].

(ii) The nature of the applicant's claim: preferent or concurrent

[64] As I previously pointed out the applicant's claim was treated as a preferent claim in terms of the rescue plan which was proposed and adopted, whilst respondents now contend that it was in fact a concurrent claim, and as a result they aver that the applicant has been paid in full in accordance with the dividend which was applicable. In this regard the respondents contend that the applicant's claim, properly construed, amounts in essence to a 'bonus' claim and not a claim for remuneration, and they say they have been advised that such claims are ordinarily treated in insolvency law as concurrent claims and not as preferent claims.

[65] In terms of s 98A(1)(a)(i) of the Insolvency Act[107] an employee ordinarily only has a preferent claim in respect of unpaid "*salary or wages*" for a period not exceeding 3 months and up to a maximum of R 12 000[108] and any claim for monies pertaining to remuneration, outside of that, would be concurrent and not preferent. This is however not an insolvency matter and s 144(2) of the Act is much broader as it provides that to the extent that *"any remuneration … or other amount of money relating to employment"* became due and payable by a company to an employee before business rescue proceedings commenced, such employee becomes a "*preferred"* unsecured creditor in respect thereof. It is common cause that the applicant's claim is based on a so-called incentive remuneration agreement in terms of which applicant was

[107] Act 24 of 1936.

[108] S 98A(1)(a)(ii)-(iv) also provides for claims for leave, holiday or other 'absence' pay (to a maximum of R 4000), and claims for severance or retrenchment pay (to a maximum of R 12 000).

contractually entitled to a percentage share, or 'commission' of the first respondent's annual nett profit. It is also common cause that as at the date when the company went into business rescue, that percentage was in the order of 12%, if one has regard for paragraph 20 of the answering affidavit of Jonker. In the circumstances, it is common cause that the applicant's claim is in respect of outstanding *remuneration* and is not one in respect of outstanding bonuses. *"Bonuses"* are traditionally defined as discretionary payments which may be made by an employer to an employee without any legal obligation, as and when the employer may deem fit. In the applicant's case, it is common cause that he was paid an annual 12% share of the first respondent's nett profits from 2007 onwards, after his father died and his percentage share of the incentive remuneration was simply added to that due to the applicant. It is not disputed that the applicant received such payments for each year between 2007 and 2009. In respect of his payment for the financial year 2010 – 2011 it is also not disputed that the applicant entered into an agreement with Dirk Jonker in terms of which a portion thereof was to be paid to him together with his 'normal' salary on 25 December 2011 and the balance thereof was to be paid in two equal instalments on 25 January and 25 February 2012. At the same time it was also agreed that his share of incentive remuneration for the 2011 – 2012 financial year, would be paid at the end of 2012. In the circumstances, in my view the monies claimed by the applicant constitute monies pertaining to his remuneration or 'relating to his employment', in terms of s 144(2) and as such the applicant became a preferent (albeit unsecured) creditor vis-à-vis the first respondent, and his claim was not a concurrent one.

(iii) The purported amendment of the applicant's claim

[66] The Act provides that when a company goes into business rescue, the business rescue practitioner is required to investigate its financial circumstances and within 10 days from the date of his appointment must convene and preside over a meeting of creditors at which, *inter alia,* he may receive proof of their claims.[109] Thereafter, as I have previously pointed out, the practitioner is required to prepare a rescue plan for consideration and possible adoption at a meeting of creditors and affected parties[110] which plan must set out the secured, preferent and concurrent creditors and the *quantum* of their proven claims,[111] and how the company proposes discharging its indebtedness to them. The Act provides that each creditor has the right to vote to approve, amend or reject the proposed rescue plan[112] at a meeting to be called for this purpose,[113] and if the plan is rejected the creditors may propose the preparation of an alternative plan[114] or one or more of them may present an offer to acquire the interests of any of the others.[115] If the plan is adopted it becomes binding on the company and on each of its creditors and every holder of its securities, whether or not such persons were present at the meeting and voted in favour of the adoption of the plan or not, and in the case

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[109] S 147(1)(ii).

[110] S 150(1).

[111] S 150(2)(a)(ii).

[112] S 145(2)(a).

[113] At which every creditor, secured or unsecured, has a voting interest equal to the value of his or her claim.

[114] S 145(2)(b)(i).

[115] S 145(2)(b)(ii).

of creditors, whether they proved their claims against the company or not.[116] Thereafter, the Act requires the company under the direction of the business rescue practitioner to take all necessary steps to implement the plan as adopted.[117]

[67] In the circumstances, the whole scheme of these provisions is such that, there is, to my mind, no room for a business rescue practitioner to reserve to himself the right to amend a business rescue plan. By doing so, he would effectively circumvent the procedure set out in the Act in terms of which the claims, which are to be discharged as per the rescue plan, derive their binding force. Insofar as second respondent thus sought in terms of the provisions of clause 2.4 of the plan to reserve to himself the right to amend the plan, such a right could, at best, only have been a right to amend the *proposed* ie draft plan prior to its adoption by the creditors in meeting, and not thereafter. Any other interpretation would make nonsense of the process provided for in the Act whereby control over the rescue proceedings is to be exercised by democratic majority vote of the creditors and affected parties, and would allow the business rescue practitioner to unilaterally reduce or compromise creditors' claims to their prejudice (or even perhaps to increase certain claims at the expense of others), thereby exposing the whole process to uncertainty and possible corruption. I point out that in any event, although on the papers before me there is a bare allegation that an amendment of sorts was effected to the applicant's claim there is no proof that this was in fact done. There is

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[116] S 152(4)(a)-(c).

[117] S 152(5)(b).

not even an attempt to state when, in what manner, and in what amount this was done.

Concluding remarks

[68] Prior to setting out the terms of the Order which I propose granting in this matter it remains for me to deal with one issue, which concerns the conduct of the second respondent in this matter and the two erstwhile directors of the first respondent who, despite the company being in business rescue, appear nonetheless to be running it and controlling the rescue process. S 140(1)(a) provides that during business rescue proceedings the business rescue practitioner shall have *"full management control"* of the company in substitution for its board and pre-existing management. Although the practitioner may delegate[118] any power or function he has to any person who was part of the board or management, it is nonetheless clear that the legislature intended that the business rescue practitioner should be more than a nominal figurehead responsible for the rehabilitation of the company. Indeed, the Act requires that only an accredited person in good standing as a member of the legal, accounting or business management professions may serve as a business rescue practitioner.[119] The Act also requires the practitioner to be a person of integrity and impartiality who must not have any relationship with the company he is to supervise, such as would lead a reasonable and informed third party to conclude that he was compromised in

[118]S 140(1)(b).

[119]S 138(a).

any way,[120] and during the course of rescue proceedings the practitioner functions as an officer of the court[121] and must account to the court in accordance with its rules and any orders or directions it may make.[122] The practitioner also has the responsibilities, duties and liabilities of a director during the business rescue process.[123] Where the business rescue practitioner has delegated certain powers to former directors or has authorised them to continue in some or other capacity on the board any actions taken by such persons which would require the approval of the practitioner will be void unless such approval has been obtained.[124] Similarly, such directors can only continue to exercise their powers and functions subject to the authority of the practitioner[125] and may only exercise any management function they have within the company in accordance with the express instructions or direction of the practitioner, and to the extent that it is reasonable to do so.[126]

[69] There is no indication on the papers before me that second respondent ever formally delegated any of his powers or functions to the erstwhile directors, and no attempt was made to explain how they came to be directing or controlling the company whilst it was in business rescue, or on what basis they apparently are controlling the rescue process and effectively deciding

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[120] S 138(e).

[121] S 140(3)(a).

[122] S 140(3)(a).

[123] S 140(3)(b).

[124] S 137(4).

[125] S 137(2)(a).

[126] S 137(2)(b).

against paying the applicant's claim, even though it was admitted by the second respondent and adopted as part of his business plan. According to para 3.8 of the business rescue plan, the company's day-to day affairs were to be attended to by the second respondent.

[70] In the circumstances I have serious concerns in regard to whether or not second respondent and the directors of the first respondent have discharged their duties and functions in accordance with what is required of them, in terms of the provisions I have referred to. It is apparent from the initial letter from the respondents' attorneys which I referred to above, that although they were originally engaged to represent the second respondent in his capacity as rescue practitioner, they indicated in subsequent correspondence that they were now acting on the instructions of the directors of the company. No attempt was made to explain any of this by the second respondent who appears to have adopted an entirely supine attitude in regard to the litigation, confining himself to filing a confirmatory affidavit in which he confirmed the allegations made by Jonker in the answering affidavit. Such allegations, *inter alia,* pertained to an alleged amendment of the business rescue plan by the second respondent without providing any indication of the date or manner in which such amendment was effected, and no written proof of any such amendment ever having been effected, and second respondent made no attempt to take the court into his confidence in this regard and appears merely to have gone along with what was said in the answering affidavit, and with the opposition to the application adopted by the directors of the board. This is, with respect, not what is required of an officer of the court occupying the

position of the second respondent and one is left with an uneasy feeling that the necessary impartiality, objectivity and independence which is required of the office he occupies may not be present in this matter. In *African Banking*[127] the Supreme Court of Appeal pointed out that a business rescue practitioner is expected to act objectively and impartially in the conduct of business rescue proceedings, including when it comes to the institution of legal proceedings (ie either on behalf, or in defence of, the company in rescue). The indelible impression one is left with after perusing the answering affidavit, is that it is in fact the former directors of the first respondent who are pulling the strings, as it were, in regard to the process. This is a matter for great concern, not least because it is apparent in terms of the rescue plan which was adopted that second respondent is to be paid a not inconsiderable fee of R500 000.00 for his services in regard to this assignment, as a basic fee, following upon the second distribution which was made to creditors, and an initial fee calculated at R1500 for every hour spent on the matter, before that. In the circumstances, a copy of this judgment is to be sent to the Companies and Intellectual Property Commission for its consideration.

[71] In the result, I make the following Order:

(i) The applicant is granted leave to proceed with this application in terms of s 133(1)(b) of the Companies Act, no. 71 of 2008;

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[127] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Ors* 2015 (5) SA 192 (SCA) at para [38].

(ii) First respondent is directed to pay to the applicant the sum of R646 521.39, together with interest thereon at the prescribed rate from 1 May 2016 to date of payment;

(iii) Respondents shall be liable jointly and severally (the one paying the other to be absolved) for the costs of the application;

(iv) A copy of this judgment is to be sent to the Registrar of the Companies and Intellectual Property Commission, for its consideration.

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SHER, AJ

Appearances:

For applicant: Mr R Patrick
Instructed by: Cluver Markotter Inc, Stellenbosch (M Koen)
For respondents: Mr P Bothma
Instructed by: CK Attorneys, Cape Town (AJ Van Greunen)