REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 13/12406

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

2013-05-10
DATE

SIGNATURE

In the matter between:

MERCHANT WEST WORKING CAPITAL SOLUTIONS (PTY) LIMITED Applicant

and

ADVANCED TECHNOLOGIES AND ENGINEERING COMPANY (PTY) LIMITED First Respondent

GAINSFORD, GAVIN CECIL NO (AS BUSINESS RESCUE PRACTITIONER OF THE FIRST RESPONDENT) Second Respondent

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J U D G M E N T

KGOMO, J:

INTRODUCTION

[1] The new Companies Act, 2008 (Act 71 of 2008) as amended came up with novelties or innovations that did not exist in the old Companies Act 1973

(Act 61 of 1973) as amended ("*the Act*"). Among those innovations is the so-called business rescue. Our courts have already started pronouncing themselves on this new phenomenon, however, there is still in my considered view, quite a long way before the organised profession completely muster all the nitty-gritties, explore all the nooks and crevices of the new Companies Act and lay or cast a well travelled path that would engender and ensure consistency and sure-footedneth in the implementation and interpretation of this "*new baby*" (business rescue)

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

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

[3] Business rescue, as the definition proclaims or explains, is a regime which is largely self-administered by the company, under independent supervision within the constraints set out in Chapter 6 of the Act, and subject to court intervention at any time on application by any of its stakeholders.

This is an important difference or aspect that differentiate business rescue from its counterpart in the old Companies Act, 1973, namely, judicial management. Business rescue is geared at saving significant costs, thus among others enabling financially distressed small (and big) companies to opt for it as a viable alternative to "*last resort*" liquidation.[1]

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

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

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

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

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

> "*(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediate ensuing six months; or*
>
> *(ii) it appears to be reasonably likely that the company will become insolvent within the immediate ensuing six months.*"[2]

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

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

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

[10] Both business rescue and judicial management provide for the control by a third party of companies that are in severe financial difficulties and for their temporary reprieve from creditors' claims. However, they differ in most other respect.

[11] Judicial management entailed the following:

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

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

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

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

[12] In or during business rescue proceedings or processes it is no longer necessary for a company to get or obtain the court's approval first in order to obtain the protections offered by business rescue, including the freezing of creditors' claims. All that is now required, to get the machinery in motion is a directors' resolution that effectively declares that the company is, or could soon be, in a financial difficulty and that also appoints an independent person, selected by the board of directors, called "*a business rescue practitioner*". This business rescue practitioner has replaced the judicial manager under the old process of judicial management.

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

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

company has already adopted a resolution to commence business rescue processes under s 129 of the Act.[3]

CONSEQUENCES OF EXISTENCE OF BUSINESS RESCUE PROCEEDINGS

(a) MORATORIUM

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

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

[3] Section 131(1).

[16] The nett effect of the above quoted subsection (of section 133) is that the existence of a business rescue process prohibits all legal proceedings inclusive of enforcement actions against the company under business rescue.

(b) PROTECTION OF PROPERTY INTERESTS

[17] Section 134(3) of the Companies Act protects creditors and shareholders by ensuring that the company does not dispose of any assets otherwise than in the ordinary course of business without the practitioner's consent. One of the effects of this subsection is that if during business rescue proceedings the company wishes to dispose of any property over which another company or person has any security or title interest, the company under business rescue must obtain that person's prior consent unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest.[4] In such circumstances the company is expected to promptly pay the proceeds of such disposition or sale to that person holding security or title interest up to the amount of the company's indebtedness to that person or provide security for the amount of those proceeds, in any event, to the reasonable satisfaction of that person.[5]

[18] When business rescue proceedings are under way or have commenced, irrespective of the fact that there may be "*doubting Thomas's*", no person can exercise any right in respect of any property in the lawful

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

possession of the company under business rescue, irrespective of whether the property is owned by the company unless the rescue practitioner consents thereto in writing, which consent need not or may not be unreasonably withheld.[6]

EFFECTS OF BUSINESS RESCUE ON SECURITY HOLDERS

[19] During business rescue proceedings, the classification or status of any issued securities of a company cannot be altered, other than by way of a transfer of securities in the ordinary course of business, except to the extent that the court otherwise directs, or to the extent contemplated in an approved business rescue plan.[7]

RANKING OF CREDITORS' CLAIMS IN TERMS OF BUSINESS RESCUE PROCEEDINGS

[20] Section 135 of the Act deals with the ranking of creditors' claims. It provides among others[8] that after payment of the practitioner's remuneration and expenses as set out or referred to in s 143 as well as other claims arising out of the costs of the business rescue proceedings –

> "*... all claims contemplated in –*
>
> *(a) s. 135(1) (amounts due and payable to employees during the business rescue proceedings) will be treated equally but will have preference over all unsecured claims against the company*

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

and all claims contemplated in s. 135(2), irrespective whether or not they are secured. An employee is also a preferred unsecured creditor for any remuneration, reimbursement of expenses or other employment – related amount which became due and payable by the company at any time before business rescue proceedings began, and had not been paid to the employee immediately before those business rescue proceedings began;[9] *or*

(b) s. 135(2) (third party financing) will have preference in the order in which they were incurred over the unsecured claims."[10]

21. Claims rank in the following order of preference:

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

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

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

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

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

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

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

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

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

[23] With the above introductory remarks and comments, we can now go into the matter at hand.

ORIGINAL NOTICE OF MOTION

[24] On 10 April 2013 the applicant herein caused to be issued a Notice of Motion in the following terms:

"*1. Permitting this application to be heard as one of urgency in terms of Uniform Rule 6(12)(a) and dispensing with the forms and service provided for in the rules and permitting this application to be heard as one of urgency.*

2. *The Sheriff of the above Honourable Court is authorised to take into attachment the asset described below which forms part of the Applicant's security arising from the agreement of cession and pledge dated 15 January 2012 attached to the founding affidavit as Annexure 'H' and the pledge dated 15 January 2010 attached to the founding affidavit as Annexure 'K' and to be found at the premises of the First Respondent, situate at 998, 16th Road, Midrand (Randjesfontein), Midrand (sic), Gauteng, being the following:-*

   'DESCRIPTION OF ASSETS:

   1 x Euro Copter EC 635, 2009 Serial Number AS550C2 Engine 1 (LH5) 32570 Date of Manufacture 25/06/2009 Engine 2 (RHS) 32577 Date of Manufacture 26/06/2009 Rotor Blades, Serial Numbers: 4288, 4543, 4539, 4550, Date of Manufacture 28/11/2009, Flight Time of 10 hours.'

   ('helicoper')

3. *The Sheriff of the above Honourable Court is authorised to remove the said helicopter from the place of attachment and to employ such persons and/or contractors and/or personnel as may be necessary at the cost of the Respondent to dismantle if necessary, transport and deliver the helicopter to the Applicant.*

4. *Alternative to 3 above:*

   Leave is granted to the Applicant in terms of section 113(b) of the Companies Act 71 of 2008 for the helicopter to be removed from the possession of the First Respondent and be retained by the Applicant in a hangar, or some place of safety, pending the duration of the business rescue plan and/or until the business rescue plan is set aside.

5. *Declaring that the Applicant has a right of security over the said helicopter.*

6. *Perfecting such attachment of the said helicopter as against the First Respondent.*

7. *An interim interdict is granted in favour of the Applicant against the First Respondent and/or Second Respondent, with immediate effect from:*

   7.1 *Delivering and/or giving the said helicopter to Eurocopter and/or any other Third party;*

   7.2 *Dealing with, in any manner whatsoever, with the helicopter; and*

7.3 Using the helicopter in any manner whatsoever;

pending an action to be instituted and/or proceedings to be instituted by motion, to be brought within thirty days of the grant of this order declaring that the First Respondent is the owner of the said helicopter and is (sic) an asset in its estate.

8. No order as to costs is sought against either the First and/or the Second Respondent, unless such Respondent opposes this application, in which event costs will be sought against the party which opposes this application and in the event of the Second Respondent opposing this application, costs will be sought against the Second Respondent, de bonis propriis, on the scale as between attorney and client.

9. Directing the grant of other and/or alternative relief."

[25] The application was served on the respondents on 11 April 2013. The hearing date of the application was 16 April 2013 at 10h00.

[26] The respondents' answering affidavit was served and filed on 15 April 2013.

[27] When the matter served before court on 16 April 2013, I stood the matter down for argument on 18 April 2013 as the roll was congested. Another reason I did not stand it down to the afternoon on 16 April 2013 or to 17 April 2013 was because the parties indicated to me that they were discussing the "*nuts and bolts*" of this application with a view to possibly settle issues therein contained.

[28] However, on 17 April 2013 at 10h25 the applicant served and filed a replying affidavit. On the same date, the applicant served and filed a Notice of Amendment of its Notice of Motion in which –

28.1 an *ex post facto* leave was sought from this Court to grant it (applicant) leave in terms of section 133(1)(b) of the Act to institute these already existing proceedings and to claim the relief sought;

28.2 it sought leave to amend the description of the helicopter in issue in its application;

28.3 it sought leave to delete its prayers 3 and 5 in its initial or original Notice of Motion;

28.4 it sought to re-arrange the numbering of the Notice of Motion to be in line with the proposed "*new Notice of Motion*";

28.5 abandoning the concept "*de bonis propriis*" where it appears in the Notice of Motion in relation to costs.

[29] I wish to state at this stage that during argument of this matter on 18 April 2013 from 14h30 until argument was concluded on 19 April 2013 around 13h00, no party directed an application to me or this Court for the amendment of the Notice of Motion as intended in the Notice of Amendment. What I have

seen attached to the papers on 18 April 2013 is a document titled "*Notice of Motion – Amended*". At no stage did I grant any order for the amendment of the Notice of Motion in this application.

[30] I mention the above because it was one of the central points or "*vital statistics*" of the applicant's argument and submission and the respondents' counsel intimated once during argument that they are not agreeing or have not agreed to the amendments sought by the applicant.

[31] It is my considered view that this Court would be derogating from the completeness of issues to be decided herein if this new "*Amended Notice of Motion*" is not quoted *verbatim*. Prayer 1 thereof is similar to the corresponding prayer in the original Notice of Motion. I will quote from prayer 2 thereof:

> "2. *In so far as may be necessary, leave from this Honourable Court is sought in terms of section 133(1)(b) to institute the proceedings and to claim the relief sought below.*
>
> 3. *The Sheriff of the above Honourable Court is authorised to take into attachment the assets described below which forms part of the Applicant's security arising from the agreement of cession and pledge dated 15 January 2012 attached to the founding affidavit as Annexure 'H' and the pledge dated 15 January 2010 attached to the founding affidavit as Annexure 'K' and to be found at the premises of the First Respondent, situate at 998, 16th Road, Midrand (Ranjesfontein), Midrand, Gauteng, being the following:*
>
> *'DESCRIPTION OF ASSETS :*
> *1 x Eurocopter AS 550 C2, 2009*
> *Serial number 2310.'*
> *('helicopter')*

4. *Declaring that the Applicant has a right of security over the said helicopter.*

5. *Perfecting such attachment of the said helicopter as against the First Respondent.*

6. *An interim interdict is granted in favour of the Applicant against the First Respondent and/or Second Respondent, with immediate effect from:*

   6.1 *Delivering and/or giving the said helicopter to Eurocopter and/or any other third party;*

   6.2 *Dealing with, in any manner whatsoever, with the helicopter; and*

   6.3 *Using the helicopter in any manner whatsoever;*

   pending an action to be instituted and/or proceedings to be instituted by motion, to be brought within 30 days of the grant of this order declaring that the First Respondent is the owner of the said helicopter and is an asset in its estate.

7. *No order as to costs is sought against either the First and/or Second Respondent, unless such Respondent opposes this application, in which event costs will be sought against the party which opposes this application and in the event of the Second Respondent opposing this application, costs will be sought against the Second Respondent, on the scale as between attorney and client.*

8. *Directing the grant of other and/or alternative relief.*"

URGENCY

[32] As this application was set down in the Urgent Court, it is incumbent on the parties, the applicant especially, to lay down the foundation and prove that the matter is urgent, thus justifying it being heard in this Urgent Court with accompanying abridging of rules relating to form and time frames.

[33] Unsurprisingly, the respondents contended that there is no urgency in the application, both in respect of the period the initial or original Notice of Motion was still the applicant's battle cry as well as now should this Court allow the amendment of the Notice of Motion.

[34] The applicant's take on the issue of urgency turned to be something not only unexpected or novel in itself but also "*couched in a lot of foliage*" that needs to be examined in the context of the chronology of events as they unfolded in this matter before the business rescue plan of the first respondent was approved by the affected parties and what counsel for the applicant submitted at the hearing of this application (on 18 to 19 April 2013).

[35] Right at the inception of its submissions at the hearing of this matter, the applicant conceded that according to them this application lost its urgency when the respondents served and filed their answering affidavit on 15 April 2013. In the exact words of the applicant's counsel,

> "*... if or once the matter is not urgent, then it is not necessary to argue or go onto the merits ...*"

[36] Nevertheless, despite the above concession counsel for the applicant still proceeded to also argue the merits, invariably leading to the respondents also arguing the merits.

[37] The applicant insisted that despite the currency or continued existence of the business rescue process approved or adopted in its presence, it nevertheless still was entitled to come up with these proceedings so as to perfect its security, arguing that these proceedings are not legal proceedings as contemplated in section 133(1) of the Act.

[38] Both parties are *ad idem* that these proceedings were launched when a business rescue process was under way i.e. having started to be embarked upon.

MATERIAL FACTS RELATING TO THE LAUNCH OF THESE PROCEEDINGS

[39] It is common cause that the first respondent was indebted to the applicant. According to the applicant, as on 30 March 2011 it was owed R2 824 513,01 by the first respondent. As on the date the business rescue plan was approved, i.e. 9 April 2013 the amount due and payable to it was R2 584 000,00.

[40] The board of directors of the first respondent passed a resolution in terms of section 129 of the Companies Act 71 of 2008 ("*the Act*") to place the first respondent under business rescue on 26 September 2011. On 13 December 2011 the first rescue plan was preliminarily approved by most of the creditors but rejected by Jean-Mark Pizzano on behalf of two creditors of the first respondent, namely, ATE Asia Limited and Advanced Technologies

and Engineering International Hong Kong, which were owed a combined total of R288 699 350,34 by the first respondent. That business rescue plan was thus declared to have lapsed and was therefore a nullity as contemplated in section 129 of the Act due to non-compliance with section 129(3) and (4) of the Act.

[41] The first respondent passed another resolution on 5 June 2012 in terms of section 129(1) of the Act to place it under business rescue. This resolution became a nullity because it was not filed with the Companies and Intellectual Property Commission ("C*IPC*").

[42] Eurocopter brought an application for the winding-up of the first respondent on 27 June 2012.

[43] Investec Bank Limited, which had a claim against the first respondent in the sum of R65 168 179,35 brought an application for its winding-up on 23 July 2012. Two of the first respondent's creditors, Aeronautical Services Overseas Corporation and Pizzano, brought an application in the North Gauteng High Court for the suspension of Eurocopter's liquidation proceedings and asked that the placing of the first respondent under business rescue be considered.

[44] During November 2012 Aeronautical Services Overseas Corporation brought an urgent application in the North Gauteng High Court, Pretoria, to place the first respondent under business rescue prior to the date on which

the application for the winding-up of the first respondent as set out above was to be heard. This resulted in the first respondent being placed under business rescue ("*the second business rescue*") on 27 November 2012. This process was in terms of section 131 of the Act.

[45] On 22 March 2013 the business rescue plan was published to affected persons in terms of section 150(5) of the Act. The applicant received the notice for this the same day/date. On 27 March 2013 the applicant received second respondent's notice for a meeting on 9 April 2013 for purposes of considering and approving the first respondent's business rescue plan pursuant to section 152 of the Act. The second respondent, in his capacity as the business rescue practitioner of the first respondent acknowledged in that business rescue plan that the applicant's claim was being regarded as "*an excluded claim*" and that he had a "*secured claim*" against the first respondent.

[46] "*Secured creditors*" are defined therein as being –

> "*... all legal entities, including natural persons, having secured claims against ATE as at the commencement date as envisaged in terms of Insolvency Law.*"

[47] It is also common cause that both the applicant and the first respondent are financial services providers. In the normal course of business they entered into several contracts or agreements with each other. Among them, on 15 January 2010 the two parties entered into two agreements,

namely, what is or can be termed "*the discount agreement*" and what we can term, "*the cession and pledge agreement*". The cession and pledge agreement is the one material to issues in dispute herein and reads as follows insofar as it is relevant hereto:

> "2. *THE CESSION AND PLEDGE*
>
> *The cedent* [first respondent] *hereby pledges, cedes, assigns, transfers and delivers the right, title and interest in and to the security to the Lender* [applicant] *as security for the due and punctual performance of the indebtedness on the terms and conditions contained in this cession and pledge. For the purposes of clarity it is recorded that this Cession and Pledge is a cession in securitatem debiti and notwithstanding anything to the contrary contained herein, it is not the Cedent's intention to effect an 'out and out' cession in favour of the Lender.*"

[48] The security listed on or in the schedule to the cession and pledge is described therein as follows:

> "*DESCRIPTION OF ASSETS*
>
> *1 x Euro Copter AS 550 C2, 2009 Serial Number 2310, Engine 1 (LHS) 32570 Date of Manufacture 25/06/2009, Engine 2 (RHS) 32577 Date of Manufacture 26/06/2009, Rotor Blades, Serial Numbers : 4288, 4543, 4539, 4550, Date of Manufacture 28/11/2009, Flight Time of 10 hours.*"

[49] This helicopter was not delivered to the applicant and it is even presently still at the first respondent's premises. The applicant avers without any documentary proof, that he has been advised that the helicopter is registered in the names of the first respondent. He was advised as far back as 19 July 2012 that he can only obtain particulars of the registered owner of

the helicopter upon formal request in terms of the Promotion for Access to Information Act ("*PAIA*"). It did not follow this up until these proceedings were launched.

[50] The applicant in its founding affidavit gave the purchase price of the helicopter (described as the Fennec Helicopter) as R11 233 105,16, its depreciation being R2 295 590,75 and its book value being R8 937 514,41. The business rescue plan further depicted that in terms of the reversionary cession of debtors, the indebtedness of the first respondent to the applicant is R2 584 000,00 and the first respondent's total liabilities is the sum of R638 547 444,27.

[51] The applicant also correctly recited in its papers the purpose of business rescue and most importantly, the general moratorium on legal proceedings, including any enforcement action, against a company, or in relation to any property belonging to the company, or lawfully in its possession, while the company is subject to business rescue proceedings. They aptly capture the comprehension and recognition of this important aspect of the business rescue process at paginated folio 20 of the papers herein as follows:

> "*... The moratorium granted by section 113 is designed to provide the company with a breathing space, while the business rescue practitioner attempts to rescue the company, by designing and implementing a business rescue plan.*"

ISSUES TO BE DECIDED

[52] In the midst of all this welter of information as set out above the crisp issues that will determine this application appear to be:

52.1 whether this application was urgent when it was launched;

52.2 whether it lost its urgency at some stage, and which stage it was when it did lose its urgency;

52.3 whether these proceedings qualify to be classified as "*legal proceedings*";

52.4 whether or not the applicant was allowed to institute or launch this application when a moratorium in terms of the law and rules relating to business rescue was in place; and

52.5 whether or not Eurocopter was a sufficiently interest and/or affected party that ought to have been joined to these proceedings.

[53] It should also be mentioned at this juncture that the respondent served and filed an application on 17 April 2013 for the striking out of certain specified paragraphs from the applicant's replying affidavit for reasons that they constituted new matters in reply. This application, which was to be dealt

with as a point *in limine* at the hearing was not argued or persisted with. As such I will not deal with it in this judgment.

[55] The parties herein were expected to argue the urgency of the matter only. However, both of them proceeded to also argue almost all the aspects relating to the merits of this matter. After my initial warning to them to confine themselves to that aspect without much of success I took a conscious decision to allow them to argue their points to their hearts' delight and/or satisfaction, after taking into account the fact that the aspect or issue of business rescue is still virgin territory in our courts : Parties deserve to be allowed enough rope or leeway to traverse any aspect they wish to traverse as long as it is relevant to the matter at hand.

NON-JOINDER OF EUROCOPTER

[56] It is so that it is the applicant's case that the second respondent determined, in the business rescue plan approved on 9 April 2013, that Eurocopter was the beneficial owner of the Fennec AS 550 C2 helicopter in issue here. It is also common cause that Eurocopter has a claim in the first respondent in an amount of R125 665 604,00. The applicant in its replying affidavit conceded this point albeit for purposes of a full hearing that could be instituted in due course. It (applicant) put it as follows:

> "*The ownership of the helicopter is a triable issue, being the reason why an action is sought to be instituted in due course. Eurocopter will be required to be joined to such proceedings.*"[11]

[56] The respondent contended that in the circumstances Eurocopter has a direct and substantial interest in any order that this Court may make concerning the fate of the helicopter, that no order made by this Court can be sustained or carried into effect without prejudicing Eurocopter.

[57] It is my considered view and finding that the joinder or non-joinder of Eurocopter has been overtaken by events peculiar to this application, making it unnecessary for me to decide this point at this stage as would become clearer herein under. The ruling I intend making herein makes it unnecessary that I determine this aspect.

LOCUS STANDI OF APPLICANT TO BRING THIS APPLICATION

[58] The respondents contended that the applicant lacks the requisite *locus standi* to launch these proceedings on two grounds, firstly through section 133(1) of the Act and secondly, through section 152(4) of the Act.

[59] Firstly, section 133(1) of the Companies Act 71 of 2008 ("*the Act*") provides as follows:

[11] Replying Affidavit, page 205, paragraph 30.

"*(1) During business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –*

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;

(d) criminal proceedings against the company or any of its directors or officers;

(e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or

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

[60] That section 133(1) of the Act allows for a complete moratorium and in the clearest terms cannot be disputed. In any case, both parties concede or admit this. During this moratorium no "*legal proceeding*" including any "*enforcement action*" concerning the business under rescue plan shall be countenanced. The only exceptions allowed are those set out in section 133(1)(a) to (f) above. One of the objects of the new Companies Act is to provide for efficient rescue of financially distressed companies.[12]

[61] The applicant contends that these proceedings are not the legal proceedings outlawed by the above section. It further alleged that only claims

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

in general, not those like the one it instituted for the perfection of security are prohibited.

[62] I concur or agree with the respondents' submission that the applicant's contention is not sustainable.

[63] The words "*legal proceedings*" are not in my view susceptible of any other meaning than their ordinary every-day literal one.

[64] Legal proceedings were described in *Van Zyl v Euodia Trust (Edms) Bpk*[13] as follows:

> "... *the ordinary meaning of legal proceedings in the context of s.13* ['regsgeding' in the signed Afrikaans version] *is a law suit or 'hofsaak'.*"

[65] The above description or interpretation was adopted and applied by Howard JP in *Lister Garment Corporation (Pty) Ltd v Wallace NO.*[14] The learned judge president commented that the *Van Zyl v Euodia* judgment[15] in which this description or interpretation is set out was a –

> "... *closely reasoned judgment* ..."

[66] The applicant has not proven any of the set exceptions in section 133(1) as being the basis for proceeding against the first respondent in the

[13] 1983 (3) SA 394 (T) at 397F.
[14] 1992 (2) SA 722 (D) at 723G-H.
[15] *Loc cit.*

face and currency of the moratorium. It is my finding that the applicant's attempt in its replying affidavit[16] to seek to amend its Notice of Motion so as to include a prayer for leave to amend and thus *ex post facto* apply for leave to institute these proceedings is not only out of place but also an act susceptible to being categorised as an abuse of process. No basis has been laid for this proposed amendment, the applicant's papers have not been correspondingly amended or adjusted to justify the amendment and the respondents have not been afforded an opportunity to respond thereto.

[67] "*Leave of the court*" as laid down in section 133(1)(b) cannot be a simple one that can be advanced from the bar. Such leave in my view and finding must be motivated in the same way, just like, for instance, as criteria for departure from the Rules of Court to justify a prayer for urgency.[17] A court being asked for leave to proceed against a company under business rescue, thus during a moratorium, must receive a well motivated application for that so that it could apply its mind to the facts and the law if necessary and then be in a position to make a ruling in accordance with any terms it may consider suitable in the peculiar circumstances.

[68] It is my finding therefore that the application of the applicant before this Court are legal proceedings. I also find that the operative moratorium in place from the date of the adoption of the business rescue plan on 9 April 2013 precludes litigation against the first respondent. Furthermore, in the absence

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[16] Replying Affidavit, page 194, paragraph 12.1.
[17] *Luna Meubels Vervaardigers (Edms) Bpk v Makin and Another t/a Makin Furniture Manufacturers* 1977 (4) SA 135 (W).

of a prayer and motivated case for leave to proceed in the face of the moratorium, an application of this nature should not proceed.[18]

[69] From the applicant's papers alone it is clear that the applicant was well aware of these pitfalls. For example in its founding affidavit it states –

> "*The publication by the Second Respondent for the acceptance or rejection of the business rescue plan is Tuesday 9 April 2013 at 11h00. The business rescue plan was adopted by the creditors and the business rescue plan, will be implemented and can only be ended under the grounds contemplated by section 132(2) of the Act. This means that in terms of the moratorium and as the First Respondent is in possession of the helicopter, the Applicant will be prejudiced in that it will be precluded from instituting legal proceedings against the First Respondent to remove the helicopter from its possession, unless leave is granted to do so from this Honourable Court, in terms of the business rescue procedure under Chapter 6 of the Act.*"[19]

[70] From the above quotation it is apparent that the applicant knew very well that once a business rescue plan is adopted, no legal proceedings can be instituted against the first respondent except with prior authorisation by the court. Another inescapable inference that can and should be drawn from the quotation above is that this applicant's founding affidavit was drawn up before the business rescue plan was adopted on 9 April 2013. I can place no other interpretation to the applicant's assertion that –

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[18] See *Cerebos Food Corporation Limited v Diverce Foods SA (Pty) Ltd & Another* 1984 (4) SA 149 (T).
[19] Founding Affidavit, page 27, paragraph 60.

> *"... The business plan was (or would be adopted) by the creditors and ... would be implemented and can only be ended under the grounds contemplated by section 132(2) of the Act ... the Applicant will ... be precluded from instituting legal proceedings ... unless lave is granted ... from this Honourable Court ..."*

[71] It will be incongruous or incomprehensive, if not also illogical for the applicant to have embarked on these proceedings well knowing that they are not permitted and can only be instituted after a court had granted leave. Furthermore, it is my finding that the applicant recognised at that stage that it would be called upon to institute "*legal proceedings*" like it ultimately did here. As such its arguments and submissions that this application does not constitute legal proceedings is without substance.

[72] Secondly, section 152(4) of the Act provides as follows:

> *"A business rescue plan that has been adopted is binding on the company, and each of the creditors of the company and every holder of the company's securities, whether or not such a person –*
>
> *(a) was present at the meeting;*
>
> *(b) voted in favour of adoption of the plan; or*
>
> *(c) in the case of creditors, had proven their claims against the company."*

[73] The applicant is also a creditor of the first respondent and the business rescue plan was adopted by the majority of creditors on 9 April 2013, to be precise, 98% of them.

[74] The applicant admits that it is bound by the adopted business rescue plan. It has not disputed the applicability of section 152(4) of the Act. That being the case, I find that the applicant has no legal right or standing (*locus standi*) to request this Court to order a relief that is in conflict with the business rescue plan. To do so would in my considered view be rendering nugatory section 152(4) of the Act and thus the business rescue proceedings would also be rendered pointless.

FURTHER

[75] The applicant has conceded in its replying affidavit that this matter is no longer urgent. They state that it lost its urgency on 15 April 2013 when the respondents' answering affidavit was filed. In paragraph 6.3(b) of the replying affidavit the applicant states –

> "*The agreement attached marked 'AA1' is dispositive of the urgency of the application.*"

In paragraph 6.9 of the same replying affidavit the applicant states that –

> "*The undertaking which was accepted prior to the hearing of the application before Judge Kgomo had diffused the urgency.*"[20]

[76] According to the applicant, it had accepted the undertaking given by the respondent in a letter dated 14 April 2013 in their own letter dated 15 April

[20] Replying Affidavit, page 188, paragraph 6.9 (second sentence).

2013 which was annexed to the replying affidavit as Annexure "RA2". This letter of 15 April 2013 reached the respondents after their answering affidavit was filed, hence it was not attached to it as an annexure. The applicant acknowledges this in their letter.[21]

[77] The above situation in my view pre-supposes that this matter should have been removed from the roll as far back as 15 April 2013. Why this was not done was part of the reasons why such lengthy and comprehensive arguments were proceeded with on 18 April 2013 to 19 April 2013. The applicant submitted that the matter was urgent when it instituted the proceedings (issued) on 10 April 2013.

[78] It deserves mention that in their letter dated 14 April 2013 e-mailed by the respondent to the applicant on the same day at 08h42:23 p.m. the following appears:

> "6. *We hereby invite you to withdraw the application by 9:00 a.m. on Monday, 15 April 2013. If that occurs our clients are prepared to accept that withdrawal on the basis that each litigant pays its own costs.*
>
> 7. *Against the possibilities that your client may not accept the invitation we are continuing with the preparation of answering affidavits. If the application is not withdrawn this letter will be annexed to the answering affidavit in support of an application that your client pays the costs of its application on a punitive scale.*"[22]

[21] Replying Affidavit, page 213.
[22] Folio/page 149 (attachment to answering affidavit).

[79] The long and short of the above is that this application should have been withdrawn by 09:00 a.m. It is my finding also that the parties here were litigating on the basis of urgency. It is thus to be expected that the parties would have been exchanging correspondence during this particular weekend. As a result, this applicant's attorneys' assertion in their letter to the respondents' attorneys dated 15 April 2013, e-mailed to the latter at 08:32 a.m. that it only received the e-mail sent to them the previous evening around 21h00 only on the morning of 15 April 2013[23] cannot be regarded as reasonable in the circumstances. That is more so in the light of the applicant's own version that it had accepted the undertaking given by the respondents as set out hereinbefore in paragraph [75] of this judgment.

[80] Consequently, the applicant's argument in favour of the matter being urgent on 18 and 19 April 2013 has an empty ring to it.

[81] The applicant's assertion that it could not take the undertaking seriously without having had sight of or into the agreement embodying or underlying that undertaking cannot justify this application being proceeded with to finality in the circumstances.

[82] The applicant averred that the urgency of this application was predicated on or by the adoption of the business rescue plan.[24] This allegation contradicts what the applicant alleged in its founding affidavit. It also flies in the face of section 152(4) of the Act. The business rescue plan

[23] Folio 152 paragraphs 4.1 and 4.2.
[24] Replying Affidavit, page 191, paragraph 9.5.

was adopted on 9 April 2013. It is my finding that the applicant was thus by law precluded from serving and filing this application, be it on 11 April 2013 or any subsequent date, further finding that the applicant's averment that is susceptible to the interpretation that it prepared the application by or on 8 April 2013[25] exacerbates the applicant's dilemma.

[83] All said and done, the applicant became aware of the second respondent's stance as far back as 22 March 2013. This is the date on which the business rescue plan was published to the applicant in terms of section 151(1) of the Act. The applicant had taken a clear view if these papers are anything to go by, to launch the application. It waited until 10 or 11 April 2013 to do so. Considering its attitude towards what was to happen on 9 April 2013, I see no reason why, if such a court proceeding was justified, it should not have been launched earlier. Consequently, the initial urgency of these proceedings is very suspect. At best it could be regarded as being self-contrived. It attempted to have the meeting of 9 April 2013 postponed but was out-voted by the other creditors. Then it proceeded to act contrary to the law.

[84] The applicant's basis for what it terms a risk to it at page 42, paragraph 51 of its founding affidavit is that it fears what would happen if the business rescue plan ultimately fails.

[85] Success or failure of the business rescue plan is part and parcel of such a process. The aim of the process has already been set out in my

[25] Replying Affidavit, page 191, paragraph 9.6.

introduction. The company in distress is being helped to come back to profitability. If it fails, all parties will be notified and once the plan is cancelled, the applicant, who is a preferred creditor whose claim to or over the helicopter has been assured and noted, would be within his rights to perfect its security. Before then, the first respondent ought not to be deprived of one of its revenue generating assets, thus defeating the very object and purpose of the business rescue process.

[86] It is my finding that in those circumstances, even where the applicant would have been entitled to launch such an application as the one we are dealing with now, at present it is premature. There is no risk at this stage that the business rescue process would fail or that the applicant's claim would not be settled in full in accordance therewith. No reasons were advanced by the applicant why it avers that the business rescue plan would fail. It all remains speculation and/or conjecture.

[87] The undertaking given to the applicant in the second respondent's letter is in my view and finding finally dispositive of any issues of urgency in this matter. Their main gripe, i.e. the handing over of the helicopter to Eurocopter, would not be done before the applicant is notified.

CONCLUSION

[88] It is my considered view and finding that the applicant has not made out a case of urgency in this matter. It may result in it being struck off the roll.

However, both parties went on to argue the merits of this matter also. That obliges this Court to look at those arguments also.

[89] The law is not on the side of the applicant in this application. Its main argument that this application does not constitute legal proceedings cannot be sustained also.

[90] Prohibited legal proceedings in terms of the Act were instituted without the prior sanction of a court of law. There are no cogent grounds for allowing the applicant leave to apply after the event, or as they say, *ex post facto*, for leave to do so.

[91] It is thus my considered view and finding that this application stands to be dismissed with costs.

COSTS

[91] The only question to be answered is what the scale should be for such costs.

[92] This application was such that its complexity, as supplemented by the novelty of the issue of business rescue processes, is deserving of the employment of two counsel.

[93] The applicant originally sought an order of costs *de bonis propriis* on a scale as between attorney and client. During argument the applicant's counsel abandoned the *de bonis propriis* part of that order. On the other hand, the respondents are asking that the application be dismissed with costs on a scale as between attorney and own client, including the costs consequent upon the employment of two counsel.

[95] The issue of what costs order should be granted is in the discretion of the trial court and the court should apply its mind properly and exercise that discretion judicially and properly. A court has inherent powers to order a litigant to pay costs on a punitive scale if in the totality of the circumstances the legal process was not *bona fide* or it amounts to an abuse of the process of the court or is vexatious, *mala fide* or frivolous.[26]

[96] However, courts are reluctant to award attorney and client costs willy-nilly unless circumstances absolutely point to same being appropriate.[27]

[97] What makes the situation less daunting in this matter is the fact that both parties are agreed that costs to be granted should be on a punitive scale.

[98] After looking at all the angles in this matter it is my view that costs on attorney and own client scale are not appropriate.

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[26] *Trust Bank van Afrika Bpk v Pienaar* 1962 (4) SA 207 (O) at 209A; *Van Aswegen v Fourie* 1964 (3) SA 94 (O) at 101E-G; *Zeelie v General Accident Insurance Co Ltd* 1993 (2) SA 776 (E) at 779D-F.

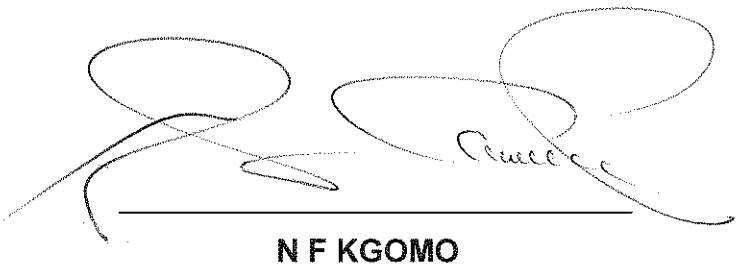
[27] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 807C-E.

[99] The applicant should have ameliorated or mitigated the costs by withdrawing this application when offered an olive branch by the respondents to do so in their letter of 14 April 2013. If not then, after the answering affidavit was filed on 15 April 2013 and the agreement premising the undertaking by the second respondent was seen, the applicant should have offered to do something to take advantage of the offer of that day from the respondents that the matter could be withdrawn without any costs consequences at that stage. Their (applicant's) insistence on arguing full blast, even arguing the urgency it conceded had fallen away, makes their conduct not *bona fide* and thus vexatious and/or frivolous. They thus qualify to be slapped with a punitive costs order.

ORDER

[100] The following order is made:

> "*The application is dismissed with costs on a scale as between attorney and client, which costs shall include the costs consequent upon the employment of two counsel.*"



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

FOR THE APPLICANT	:	ADV R G COHEN
INSTRUCTED BY	:	GLYNNIS COHEN ATTORNEYS EMMARENTIA, JOHANNESBURG TEL NO: 011 646 4662
FOR THE RESPONDENTS ASSISTED BY	:	ADV JOHN SUTTNER SC ADV PAOLA CIRONE
INSTRUCTED BY		WERKMANS ATTORNEYS SANDTON, JOHANNESBURG TEL NO: 011 535 8237
DATE OF ARGUMENT		19 APRIL 2013
DATE OF JUDGMENT		10 MAY 2013