

SOUTH AFRICA / JUDGMENT

Mabote and Others v Van Der Merwe NO and Another (2015/40324) [2016] ZAGPJHC 185 (8 July 2016)

[2016] ZAGPJHC 185

COURT

South Gauteng High Court, Johannesburg

BEFORE

Boruchowitz

CASE / FILE NUMBER

2015/40324

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IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2015/40324

In the matter between

SEDICK ARENDSE 1ST APPLICANT GEOFFREY OBED MABOTE 2ND APPLICANT ZAFAR AHMED
MAHOMED 3RD APPLICANT CHARLES HUBERT MYLBURGH 4TH APPLICANT ROBERT
ALEXANDER DODDS 5TH APPLICANT IAN CHILD LINDA SITHOLE SUSAN MAWER JOHAN
LIEBENBERG ANDREAS AVRABOS ROBERT BRUCE GRIFFITH SINCLAIR ARMANDO FLORES
FERNANDES MOCA MAUREEN ISOBEL BEEBY HUGHES MARC DE VILLIERS SHAUN
PRITHIVIRAJH 6TH APPLICANT 7TH APPLICANT 8TH APPLICANT 9TH APPLICANT 10TH
APPLICANT 11TH APPLICANT 12TH APPLICANT 13TH APPLICANT 14TH APPLICANT 15TH
APPLICANT and LIEBENBERG DAWID RYK VAN DER MERWE NO (in his capacity as joint
business rescue practi- tioner of AFRICAN BANK INVESTMENTS LIMITED 1ST RESPONDENT
JOHN FRANCIS EVANS NO (in his capacity as joint business rescue practitioner of AFRICAN
BANK INVESTMENTS LIMITED 2ND RESPONDENT

JUDGMENT

BORUCHOWITZ J:

- [1] This is an application in terms of section 133(1)(b) of the Companies Act, 71 of 2008 (the Act) for leave to commence legal proceedings against a company placed under business rescue.

[2] The applicants intend instituting such proceedings against African Bank Investments Limited (ABIL), as co-defendants, with Ellerine

Furnishers (Pty) Limited (in business rescue) ("EF"); and Ellerine Holdings Limited (in business rescue) ("EHL").

ABIL was placed under business rescue with effect from 5 June 2015 but, as will appear hereafter, is no longer under business rescue.

[3] The application for leave was argued on 29 April 2016 and judgment was reserved. After having substantially completed the judgment, I was informed by the parties that on or about 19 May 2016 the respondents filed a notice of substantial implementation of the business rescue plan pertaining to ABIL and the business rescue proceedings ended in terms of s 132(2) of the Act.

Accordingly, ABIL is no longer under business rescue and the moratorium provided for in s 133 no longer applies. The

relief sought is thus moot and the only live issue is the question of costs. In order to properly determine the incidence of costs, it is necessary to give consideration to the merits of the application.

[4] The need to obtain the Court's leave arose in the following circumstances. ABIL, EHL and EF form part of what is termed "the Ellerine Group of Companies" (the Group). EF is a wholly-owned subsidiary of EHL which, in turn, is wholly owned by ABIL. EF and EHL were placed under business rescue by board resolutions in terms of s 129 of the Act with effect from 7 August 2014 and 21 August 2014 respectively.

[5] The applicants were senior executives in the employ of EF. On 5 December 2013, an offer in writing was made to each of them to participate in what is styled the "Ellerine Holdings Limited Performance and Retention Incentive Scheme (PARIS)". They allege that, properly construed, and taking background facts into account, the offer was made by EF, alternatively EHL, further alternatively ABIL, represented by Mr Toni Fourie, the chief executive officer of both EF and EHL (Fourie), and/or Sinclair (the eleventh applicant). Each of the applicants accepted the offer during December 2013. The relevant terms of the PARIS will be referred to later in the judgment.

[6] It is alleged that on a proper interpretation of the PARIS it was an express, alternatively tacit, term that the award amounts payable to the participants were payable by one or more or all of EF, EHL or ABIL, whether singularly or jointly and severally, the one paying, the others to be absolved.

[7] Neither EF, EHL nor ABIL's business rescue practitioners has disputed the applicants' entitlement to payment of the amounts claimed by each of them, being, in each case, the full award amount stipulated in the offer, but each disputes liability to pay the award amount. The business rescue practitioner of EF supports the application but contends that

ABIL is liable for the amounts claimed. He has further indicated that in the event that litigation is commenced by the applicants against EF it intends to raise a point of non-joinder of ABIL to the proceedings unless ABIL is cited as a party to such proceedings.

- [8] Accordingly, the applicants contend that it is necessary that each of EF, EHL and ABIL be cited as co-defendants in the proposed legal proceedings so that it may be determined which of such defendants is liable to the applicants for the amounts claimed.

THE LEGAL POSITION

- [9] Section 133(1) of the Companies Act, 2008, places a moratorium on legal proceedings against a company under business rescue. The prohibition is subject to five exceptions. One of those exceptions is contained in section 133(1)(b) which provides, in material part, as follows:

“During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any

property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except – ...

- (b) with the leave of the court and in accordance with any terms the court considers suitable.”

- [10] I am unaware of any judgment, and none has been referred to me, in which the test to be applied by a court in deciding whether to grant leave in terms of s 133(1)(b) has been formulated. There is authority for the proposition that a court being asked for leave to proceed against business rescue 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 peculiar circumstances” (see *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Co (Pty) Ltd* 2013 JDR 1019 (GSJ) para 67). And, in *Redpath Mining SA (Pty) Ltd v Marsden NO and others* [2013] ZAGPJHC 148 at paragraph [71], the same learned Judge held that: “only in exceptional circumstances may a court permit litigation against a business rescue plan or related thereto.” It is to be noted that in neither of these cases did the court lay down a general test or pronounce on what constitutes “a well-motivated application”, or define the minimum threshold that must be met for an applicant to obtain such leave.

- [11] Section 133(1)(b) does not specify the criteria or procedural requirements that must be met in order to obtain the leave of the court. Ex facie the provision, the court would appear to enjoy a wide and unfettered discretion to make an order on “... any terms the court considers suitable”. That being the position, it is implicit that the court’s discretion must be dictated by the interests of justice. It is also implicit that the discretion must be exercised judicially, having regard to the purpose and objects of s 133(1)(b), read in the context of the Act as a whole. Considerations of fairness and convenience are fundamentally important.

- [12] To properly contextualise the section, reference should be made to the following provisions of the Act. Section 5 stipulates that the Act must be interpreted and applied in a manner that gives effect to the purposes set out in s 7. Section 7(k) provides that one of these purposes is to “provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders”.
- [13] Business rescue is defined in s 128(1)(b) to mean proceedings that facilitate the rehabilitation of a financially distressed company by providing, among other things, for the temporary supervision and moratorium on the rights of claimants, and the development and implementation of a plan to rescue the company.
- [14] Section 133(1) is a general provision providing for a moratorium on legal proceedings against a company under business rescue. The moratorium is central to the business rescue process since it provides the crucial breathing space to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process without the distraction of having to deal with legal proceedings (see *Cloete Murray NNO v First Rand Bank Limited t/a Wesbank* 2015 (3) SA 438 (SCA) at 441 para 14); *Chetty t/a Nationwide Electrical v Hart & another* NNO 2015 (6) SA 424 (SCA) at paras 35 and 39; *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Limited v Stedone Developments (Pty) Ltd and others* 2015 (4) SA 485 (KZD) at paras 7, 9 and 11).
- [15] But the moratorium is not an absolute bar to legal proceedings being instituted or continued against a company under business rescue. It is intended to be of a temporary nature only and cannot be utilised to indefinitely delay satisfaction of the claims of creditors; or result in the extinguishment of the claims of creditors. Subsection 133(1)(a)-(e) lists five exceptions when legal or enforcement proceedings may be continued with or initiated. Subsection 133(1)(a) permits a creditor to initiate or continue proceedings with the written consent of the practitioner and subsection 133(1)(b) permits a creditor to seek the Court’s leave to institute or continue legal proceedings in the event of a practitioner’s refusal to give consent, or even without the consent of the practitioner having been sought (see *Chetty v Hart* (supra) para 40).
- [16] In my view, an applicant seeking to obtain leave under the section must as a minimum requirement establish a prima facie case against the company in business rescue.
- [17] In this regard there are two issues in contention. First, the approach to be followed by a court in order to determine whether or not a prima facie case is established; and, second, whether the requisite prima facie case has been established.
- [18] What is meant by a prima facie case depends on the context in which it is used. The term is normally used to denote the quantum of proof required of a party upon whom the onus rests in the absence of rebutting evidence. In proceedings instituted on notice of motion, the determination of the question whether a prima facie case has been made out is usually made purely on a consideration of the evidence contained in the founding affidavit without

regard to any evidence adduced in rebuttal. This is especially so when a respondent takes the preliminary objection that the application does not make out a prima facie case for the relief claimed (see *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 976G-H; *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972

(1) SA 464 (D) at 469C-E. Compare also *Simon NO v Air Operations of Europe AB and others*

[1998] ZASCA 79; 1999 (1) SA 217 (SCA) at 228D).

[19] At the other extreme are applications for provisional sequestration and winding up of a company where evidence in rebuttal is considered. It is now settled that where there are real and fundamental disputes, a “prima facie case” is established where, on the affidavits of the parties, there is a balance of probabilities in favour of the applicant (see *Kalil* at 979A-B).

[20] The respondents urged the Court to adopt the intermediate position commonly encountered in applications for interim relief or temporary interdicts. The well-settled approach followed in such applications is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed (*Webster v Mitchell* 1948 (1) SA 1186 (W) 1189-1190, re-affirmed in *Simon NO* (supra) at 228H).

[21] The approach followed in relation to temporary interdicts was said to be appropriate for the following reasons. Under s 133(1)(b), the Court is vested with a discretion which must be judicially exercised. If, on an examination of the facts, both those supported by the evidence of the applicant and those of the respondents which the applicants admits or cannot dispute, there is insufficient material for concluding that the applicant could on those facts obtain final relief at trial, the application for leave should be declined. Approaching the matter in this way would enable the Court to properly exercise a judicial discretion. A higher degree of proof was appropriate as the legislature had placed a limitation on what would otherwise have been an unfettered right to institute legal proceedings against the company under business rescue.

[22] I disagree with the respondents’ submissions. The approach followed in relation to temporary interdicts sets too high a degree of proof than is warranted. It is trite that an applicant for a temporary interdict must establish a clear right to relief or, if it is not clearly established, a prima facie right “though open to some doubt”. In *Webster* Clayden J pointed out at 1189, that “[T]he use of the phrase ‘prima facie established though open to some doubt’ indicates ... that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required.”

- [23] An application for leave under s 133(1)(b) is generally required to be brought before the commencement or continuation of legal proceedings.[1] It is inappropriate for an applicant to at that stage, without the procedural advantages of a trial, including proper discovery, to show that he will necessarily succeed in the proposed action. It is undesirable that the court be required to evaluate the inherent probabilities as they emerge from the conflicting affidavits of the parties.
- [24] In the present case the applicants propose to institute action against EF, EHL and ABIL, citing them as alternative defendants as there is uncertainty as to which of them is liable to effect payment under the PARIS. It is permissible for a plaintiff to sue defendants in the alternative where there is uncertainty as to which of the defendants is in law liable, especially in circumstances where the defendants deny liability and reciprocally point to one another as being the party responsible for the plaintiff's claim. All that a plaintiff is required to do in such circumstances is to lay the necessary foundation of showing, prima facie, that one or other of the defendants are legally liable. This was emphasized by Corbett JA in *Mazibuko v Santam Insurance Co Ltd and another* 1982 (3) SA 125 (A), where the following is stated (at 135C-G):

"I agree with these decisions. It seems to me, moreover, that, for similar reasons, where, as in this case, a plaintiff has sued two defendants in the alternative and also, in the further alternative, jointly and severally for damages sustained by him (the plaintiff) and the defendants have denied liability and have also reciprocally pointed to one another as being the party responsible for plaintiff's damages, then, if at the end of the plaintiff's case there is evidence upon which a court, applying its mind reasonably,

could hold that it had been established that either the one defendant or the other defendant or both of them were legally liable (it being nevertheless uncertain as to which of the alternatives was the correct one), the Court should not grant an application for absolution at the suit of either defendant. In such a case, which is in effect a tripartite suit between three adversaries, it is, in my opinion, in the interests of justice that the case should be decided on the evidence which all the parties might choose to place before the Court, provided, as I say, that the plaintiff, when presenting his case, has laid the necessary foundation of showing, prima facie, that one or other or both of the defendants are legally liable. To hold otherwise would, in many instances, defeat the object of the Rule which permits a plaintiff who is uncertain as to the legal responsibility of two defendants to sue them both in the alternative and, in the further alternative, jointly and severally."

- [25] The principles generally followed by the courts in regard to applications for the joinder of defendants[2] are also relevant. These are encapsulated by Miller J (as he then was) in *Mgobozi and others v The Administrator of Natal* 1963

(3) SA 757 (D&CLD), at 760D-761A.

“When an application of this nature is made, namely, for joinder of a party as co-defendant, the purpose is clearly to avoid multiplicity of actions and to save costs by bringing before the Court at one and the same time all those parties who have an interest in and are materially affected by the litigation. Such procedure has been sanctioned on innumerable occasions, and I need only refer to the case to which Mr. Milne referred me, namely S.A. Steel Equipment Co. (Pty.) Ltd. and Others v Lurelk (Pty.) Ltd., 1951

- (4) SA 167 (T). It follows that where allegations are made by a plaintiff, which, if substantiated, would show that he has a claim which he is desirous of advancing against a party who is at that stage not before the Court, his application to join that party will normally be granted unless it appears that there would be no purpose in doing so or unless it appears that to do so at the particular stage at which such application is made would cause such prejudice to the other side as could not be adequately remedied by any order of costs. It is not necessary for the applicant to satisfy the Court at this stage that he will necessarily succeed against the defendant whom he wishes to join, on the issue raised by sec. 34. I do not think that the court should expect more of him than that he should make such allegations as would show that he has a *prima facie* case, that his application is seriously made and is not frivolous. One might test the correctness of what I have said by having regard to the fact that if such a plaintiff, instead of applying for leave to join a party, were to issue an independent summons against the party whom he now wished to sue, he could not be prevented from doing so. His issue of summons would set in motion the proceedings which he desired to bring before the Court. If he were shown to be frivolous it may be that application could be made to strike out the summons as a misuse of the process of the Court, but short of that, the matter would proceed in the ordinary course, and if it was destined to fail it would fail because of the validity of the defence raised by defendant in his plea in the ordinary course of procedure.”

- [26] In limited instances it may be permissible to take into account facts in the opposing affidavits, especially facts that an applicant is unable to contradict, and where there is no reason to believe that in future proceedings, with the advantages of discovery, those facts are capable of being challenged. Support for this proposition is to be found in *Imperial Marine Company v Pasquale della Gatta*; *Imperial Marine Company v Filippo Lembo* 2012 (1) SA 58 (SCA), where Wallis JA (in a different context, namely an application for the attachment of a vessel), said the following (at para [22]):

“... For that latter reason I indicate briefly why there is much to be said, in deciding whether the applicant has established a prima facie case, for taking into account the facts in the opposing affidavits that an applicant does not contradict, at least where there is no reason to believe that in future proceedings, with the advantages of discovery, those facts are capable of being challenged. The primary reason is that in principle to do otherwise is to shut one’s eyes to relevant factual material that may fatally undermine the arresting party’s claim and courts do not ordinarily disregard relevant and admissible evidence when reaching their decisions. Disregarding such evidence seems inconsistent with the constitutional requirement that both parties are entitled to a fair hearing and confers an unjustifiable advantage on the arresting party. In the present context, our courts have repeatedly stressed that the arrest of a ship is a matter with serious consequences. That being so, it seems

incongruous for a court faced with a decision whether to order or sustain such an arrest to ignore materially relevant and undisputed evidence.”

- [27] To conclude, there is no justification why an applicant for leave under s 133(1)(b) should be obliged to establish a prima facie case with a higher degree of proof than would ordinarily be required in a summons or founding affidavit. It is sufficient if it be shown that the averments made, if unchallenged, establish a cause of action or demonstrate the existence of a triable issue. The fact that the averments made are contradicted or the probabilities are against the version advanced, would not disentitle an applicant to relief. Nor is it necessary for an applicant to satisfy the court that the proposed legal proceedings will be successful. In the present case, the quantum of proof required to establish a prima facie case is even less onerous as the applicants are unable to say with certainty which of EF, EHL and ABIL is liable to effect payment under the PARIS (see Mazibuko (supra)).
- [28] What needs to be fully set out in any application for leave are the reasons why legal proceedings against the company in business rescue are necessary and appropriate (see Merchant West (supra)). As mentioned above, the Court has a wide discretion which must be dictated by the interests of justice. There is no closed list of the factors that may be taken into account in deciding whether or not to grant leave as each case must be determined on its own facts. Without being prescriptive in any way, the following considerations are relevant: (a) The effect that the grant or refusal of leave would have on the applicants' rights as opposed to other affected persons and relevant stakeholders; (b) The impact that the proposed legal proceedings would have on the well-being of the company and its ability to regain its financial health; and
- (c) whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7(k) and 128(b) of the Act.
- [29] I disagree with the observation in Redpath that leave in terms of s 133(1)(b) may only be granted in exceptional circumstances. The learned Judge in Redpath did not refer to any authority or provide any reasoning for the conclusion that “exceptional circumstances” should apply generally to an application brought in terms of s 133(1)(b) of the Act. If the legislature had intended to limit the grant of leave to “exceptional circumstances” that test would have been expressly stated in the section. Instead, the Court is given wide powers not only to grant leave, but also to determine the terms on which such leave is granted.

THE ISSUE

- [30] The only question to be decided is whether the applicants have made out a prima facie case for relief against ABIL. Counsel for the respondents submitted that on a conspectus of the relevant affidavits there is no factual dispute which, if resolved in the applicants' favour, would result in a finding that ABIL was liable on the remuneration scheme provided for in the PARIS. In the final analysis, the applicants' case is simply based on conjecture, perception and supposition.

- [31] What is in dispute is which of EF, EHL or ABIL is liable to make good on the promise contained in the PARIS. This turns on an interpretation of the PARIS. The proper approach to the interpretation of a contract is to have regard to the language of the contract, read in the light of its context, apparent purpose and the factual background against which it came into existence (*National Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Pty) Ltd v S Bothma & Seun Transport (Pty) Ltd* 2014 (2) SA 494 (SCA). Also see *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) para 28).
- [32] The offer to participate in the PARIS is set out in a document which bears the EF name and address and is signed by Mr Toni

Fourie, who describes himself as the chief executive officer. Although Fourie is the chief executive officer of both EF and EHL, he does not indicate in what capacity he signed the document. The scheme is described as the “ELLERINE HOLDINGS LIMITED PERFORMANCE AND RETENTION INCENTIVE SCHEME”. The following provisions of the PARIS are relevant for present purposes:

“The Ellerine Holdings Limited (‘EHL’) Performance and Retention Incentive Scheme (‘‘PARIS’’) was approved

on 28th November 2013 by the African Bank Investments Limited (ABIL) Remuneration Committee, a fully mandated committee of the ABIL Board.

The primary objective of PARIS is that of Executive retention over the next 2 years whilst a secondary objective is to drive performance of EHL. As you are aware, there is the possibility that the ownership of EHL may change in the foreseeable future, and it is thus critical that the skills of key Executives are retained over the next 2 years.

You are viewed as a critical employee to retain over this 2 year period and I am pleased to advise you that the Remuneration Committee

(Remco) has approved your participation in PARIS with an award amount of R5,000,000. You are therefore invited to participate in this scheme knowing that such participation will be entirely at you (sic) discretion and the acceptance of the following terms and conditions:

...

If ABIL sells EHL before the expiry of the 2 year retention period i.e. before 01st October 2015, and the acquirer terminates your employment for reasons based on operational requirements i.e. retrenchment, the PARIS will terminate upon the date of termination of your employment. The same rules will apply as above, measured at the date of acquisition, as if the 2 year retention period had run its course, except for performance above budget, where the excess PARIS payment will be pro-rated.

If ABIL sells EHL before the expiry of the 2 year retention period i.e. before 01st October 2015, and the acquirer retains your services, the PARIS award will be paid out on the anniversary of the 2 year retention period.”

[33] Broadly stated, the case which the applicants seek to advance in their proposed action is based on the following facts. The case against EF is that it was the contractual employer liable for the applicants’ remuneration at the time that the offer was made; the offer was on an EF letterhead and signed by its chief executive officer. The case against EHL is that the document bears EHL’s logo and was signed by EHL’s chief executive officer; the scheme is also styled “the Ellerrine Holdings Limited performance and retention incentive scheme”. The case against ABIL is premised on the assertion that the scheme was conceived primarily for ABIL’s benefit; ABIL’s duly-authorised remuneration committee approved the scheme. It subsidiaries, EHL and EF, contend that it was the intention of the parties that ABIL would pay out the awards.

[34] Counsel for the respondents submitted that the following facts militate against the conclusion that ABIL would have been liable to pay out the awards. The offer is on the letterhead of EF. The heading in the offer identifies the PARIS as the EHL PARIS. This identification is repeated a number of times in the document. It is stated in the PARIS that its primary objective is to retain executive employees; and its secondary objective to drive the performance of EHL. The addressee of the offer was identified as a critical employee. The PARIS was stipulated to be for a two-year period during which it was contemplated that there would be a sale of EHL to a third party acquirer. The award would be paid out earlier than two years if the employee was retrenched at the instance of the third party acquirer, and at the end of two years if the employee was not retrenched. Both of these payment events were contemplated to take place at a time after ABIL had ceased to be the shareholder of EHL. Participation by the employee in the PARIS would terminate if the employee’s services with EHL terminated before termination of the scheme by reason of resignation or dismissal for misconduct. The value of the award was related to the performance of EHL and not that of ABIL. The award was to be determined and payable after approval by the board of EHL of

its financial results. The offer was made by Fourie, the chief executive officer of EHL, and not made by the chief executive officer of ABIL.

CONCLUSION

[35] Based on the averments set out in the founding affidavit and those facts in the answering affidavit which the applicants are unable to dispute, I am satisfied that the applicants have at the very least a prima facie claim against either EF, EHL or ABIL, or a combination of one or more or all of them, jointly and severally.

- [36] Although the PARIS does not indicate in express terms which entity would be liable to pay the awards, contextual evidence given at a trial in due course may establish that the PARIS was conceived for ABIL's benefit and that it was to pay out the awards. The above-quoted clauses of the PARIS are not inconsistent with such interpretation. There is, *prima facie*, a triable issue involving ABIL.
- [37] As mentioned above, it is permissible for a plaintiff to sue defendants in the alternative where there is uncertainty as to which of the defendants is in law liable, especially in circumstances where the defendants deny liability and reciprocally point to one another as being the party responsible for the plaintiff's claim (see *Mazibuko*, *supra*).
- [38] The applicants were justified in approaching this Court for leave to institute legal proceedings against the respondents. It is only by instituting proceedings in a court that the applicants would be able to obtain an executable order against ABIL, should it be found that ABIL was in fact the party liable. The dispute resolution procedures provided for in the business rescue plans of EF and EHL do not permit a joinder of a third party such as ABIL, and it would not be competent for the expert adjudicating the dispute to make a finding that would render ABIL liable to pay the awards. Attempts to refer the matter to arbitration have failed. The business rescue practitioners of EHL and EF have consented to the institution of legal proceedings, but the consent of the business rescue practitioner of EF is conditional upon the institution of proceedings against ABIL simultaneously therewith.
- [39] For these reasons I would have granted the applicants leave to institute legal proceedings against the respondents.
- [40] The following considerations are relevant in determining an appropriate costs order. The grant of leave in terms of s 133(1)(b)

of the Act is exclusively in the discretion of the Court. An applicant does not have any right or entitlement thereto. In

the exercise of that discretion the Court is required, among other things, to give consideration to the views of the business rescue

practitioner. It was not unreasonable for the respondents to have resisted the application. It was indeed arguable whether or not the applicants had established the requisite *prima facie* case. The submissions made on behalf of the respondents were not unreasonable or untenable. It is clear from the papers that the applicants' primary contention is that either EF or EHL is liable and that the need to join ABIL only arose after the business rescue practitioner of EF indicated that he was not prepared to consent to proceedings against EF unless ABIL was joined as a party. For these reasons, I consider it appropriate that the costs of the application as well as the costs incurred by the respondents be paid by the applicants.

- [41] In the result, the following order is made.

The costs of the application are to be paid by the applicants jointly and severally, the one paying, the others to be absolved. Such costs are to include the costs incurred by the respondents in opposing the application.

BORUCHOWITZ J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING : 29 April 2016

DATE OF JUDGMENT : 08 July 2016

ON BEHALF OF

THE APPLICANTS : ADVOCATE C E WATT-PRINGLE SC

with ADVOCATE D MAHON

INSTRUCTED BY : SCHINDLERS ATTORNEYS

Ref: Ms L SHER

THE RESPONDENTS : ADV J PETER SC

INSTRUCTED BY : FLUXMANS ATTORNEYS

Ref: Mr C STRIME

[1] See *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* 2015

(4) SA 485 (KZD). But it has been held that in appropriate cases leave may be granted notwithstanding that proceedings were commenced before the grant of leave (see *Standard Bank of South Africa Limited v Dalhousie Land Corporation (Pty) Ltd* and another (unreported decision – GLD Case No 2014/42541); *African Bank Corporation of Botswana Limited v Kariba Furniture Manufacturers (Pty) Ltd* and others 2013

(6) SA 471 (NGP) at para 7.)

[2] Rule 10(3). See, also, *Erasmus Superior Court Practice* (2 ed) D1-128 and cases there cited.

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