IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

CASE NO.: 812/2012

In the matter between:

CLIMAX CONCRETE PRODUCTS CC **t/a CLIMAX CONCRETE PRODUCTS CC** **Registration Number CK 1985/014313/23**	**Applicant**

And

EVENING FLAME TRADING 449 (PTY) LTD	**First Respondent**
LAMPRECHT PROPERTIES CC	**Second Respondent**
FRIEDMAN SHECKTER	**Third Respondent**

JUDGMENT

BESHE, J:

INTRODUCTION

[1] This is an urgent application wherein the applicant seeks relief in the following terms:

> 1. That the matter be heard as one of urgency and that the time limits, forms and service provided for in the Rules of Court are dispensed with in terms of the provisions of Rule 6 (12);
>
> 2. That the resolution of the first respondent to commence Business Rescue Proceedings be and is hereby set aside in terms of section 130 of Act 71 of 2008 (The Companies Act);
>
> 3. The resolution of the second respondent to commence Business

Rescue Proceedings be and is hereby set aside;

4. The first and second respondents be and are hereby ordered and directed to maintain an amount of no less than R629 068.27 at any banking facility held by either the first respondent or the second respondent or in the Trust Account of the third respondent;

5. Cost of the application.

[2] First and second respondent responded by way of a counter application in terms of which they seek the court's approval to file a further resolution to commence business rescue proceedings in terms of section 129 (5) of the Companies Act.

THE PARTIES

[3] The applicant is a Close Corporation duly registered in terms of the Close Corporations Laws of the Republic of South Africa and carries on business from 49 Bell Street, Kruis River Industrial Area, Uitenhage, Eastern Cape. The applicant carries on the business of a supplier of concrete products to the building trade.

[4] The first respondent is Evening Flame Trading 449 (Pty) Ltd, a company duly registered in terms of the Company Laws of the Republic of South Africa which carries on the business of *inter alia*, a property developer within the area of jurisdiction of this court from its registered office, 2 Mimosa Street, Jeffrey's Bay an address within the jurisdiction of this court.

[5] The second respondent is Lamprecht Properties CC, a Close Corporation duly registered in terms of the Close Corporation Laws of the Republic of South Africa and carries on business as a property developer/construction company within the jurisdiction of this court, from its registered office, 2 Mimosa Street, Jeffrey's Bay, Eastern Cape. First and second respondents fall under the "Lamprecht Group of Companies".

[6] The third respondent against whom no substantive relief is sought, is Friedman Schekter, a firm of attorneys of 75 – 2nd Avenue, Newton Park, Port

Elizabeth. Third respondent is first and second respondents' attorney in respect of a property transaction whose proceeds are part of funds sought to be frozen/preserved by the applicant.

COMMON CAUSE FACTS

[7] The second respondent is indebted to the applicant in the amount of R629 088.27 in respect of a large quantity of bricks sold and delivered to the second respondent by the applicant. First respondent's indebtedness to the applicant arises out of an undertaking to pay, to the applicant, a sum of R204 000.00 from the proceeds of a sale and transfer of Daku Shopping Centre whose registered owner is the first respondent. The said undertaking recorded that the third respondent has been instructed to effect such payment directly into the account of the applicant. It is also common cause that the undertaking recorded that the second respondent was the contracting entity for the first respondent, and that the second respondent waived their right and title to these proceeds in favour of the applicant. There has been no payment in terms of the undertaking.

[8] It is common cause that the shopping centre referred to above is in the process of being sold. However what is in dispute is whether the transfer of the said shopping centre is in imminent or not.

[9] Common cause also, is the fact that the third respondent, being the transferring attorneys of the first and second respondents has refused to give an undertaking to hold funds in the amount owed to the applicant pending the outcome of the proceedings to secure payment, on the basis that it has not received any instructions to pay the applicant.

[10] It is common cause that on the 27 February 2012 the first respondent filed a notice of commencement of rescue proceeding in terms of the Companies Act (Form COR 123.1). This form together with a Resolution of the directors of the first respondent was lodged with the Companies and Intellectual Property Commission. On the 9 January 2010 the second respondent had apparently filed Form COR 123.2 which is a notice of appointment of a Business Practitioner in terms of the Companies Act.

[11] The first and second respondent purported to act in terms of section 129 of the Companies Act which provides that:

129 Company resolution to begin business rescue proceedings

1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that –

   a) the company is financially distressed; and

   b) there appears to be a reasonable prospect of rescuing the company.

2) A resolution contemplated in subsection (1)-

   a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

   b) has no force or effect until it has been filed.

3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must-

   a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and

   b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

4) After appointing a practitioner as required by subsection (3) (b), a company must-

   a) file a notice of the appointment of a practitioner within two business days after making the appointment; and

   b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.

5) If a company fails to comply with any provision of subsection (3) or (4)-

   a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and

   b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an *ex parte* application, approves the company filing a further resolution.

6) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132 (2).

7) If the board of a company has reasonable grounds to believe that the company has financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128 (1) (*e*) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section.

[12] It became common cause that the respondents' resolutions did not comply with *inter alia*, section 129 (3) (a) of the Act and that therefore they (the resolutions) are irregular, a nullity and of no force and effect.

DISPUTED ISSUES

[13] The following remain in issue:

(a) Is the application urgent?

(b) Have the requirements of an interlocutory interdict been established by the applicant?

(c) Have the respondents made a case for the order that they seek in their counter application?

URGENCY

[14] The reasons given by the applicant for claiming that it will not be afforded substantial redress if the matter were to be heard in the normal course as opposed to being heard as a one of urgency are, *inter alia* that:

> 1. Transfer of the respondents' property is imminent. No undertaking has been forthcoming from the respondent's attorney in regard to the applicant's demand for payment.
>
> 2. Once these funds have been paid to the respondents, there is a high likelihood that these funds will be dissipated via inter-company accounts, and the applicant will not be paid that money which is lawfully due to it.
>
> 3. Given that the respondent has already applied for business rescue, there is no doubt that the applicant will not see its money, were it to wait for the matter to be heard in due course which will have a negative effect on its trading results, and will place its business at risk. **See paragraph 59.1 to 59.3 of founding affidavit.**

[15] First and second respondents deny that the application is urgent. They contend *inter alia* that the transfer of the first respondent's property is not imminent. In view of the fact that the transfer of the said property has not yet been lodged. Respondents also deny that the applicant will suffers negative effect on its trading and that its business will be placed at risk should it wait for the matter to be heard in due course. Urgency is also disputed on the basis that, the fact that applicant might suffer financial consequences if it awaits its turn in the ordinary course, does not entitle it to preferential treatment on the roll. **See paragraph 46 of answering affidavit.** It was however held in ***20th Century Fox Film Corp. V Black Films 1982 (3) SA WLD 582*** that the urgency of commercial interests might justify the invocation of Uniform Rule of Court 6 (12) no less than any other interest.

[16] In my view, the fact that applicant seeks to have a resolution to commence business rescue proceedings set aside, on its own entitles the applicant to be heard on an urgent basis. This is so because, if the first and second respondents were to successfully commence business rescue

proceedings, that would provide a **"temporary moratorium"** on the rights of claimants against the company/companies or in respect of property in its possession. **(Section 128 (b) (ii) of the Act)** In addition thereto no undertaking has been forthcoming from the third respondent in regard to the applicant's demand for payment. This despite the fact that the undertaking by the first respondent recorded that the third respondent has been instructed to effect payment directly into the account of the applicant. In my view, on these grounds alone, the matter is of sufficient urgency to justify applicant approaching this court by way of an urgent application as regards both the application to set respondents' resolution to commence business recue proceedings aside, and in respect of the anti-dissipatory order.

REQUIREMENTS: INTERIM INTERDICT

[17] In an application for an interim interlocutory relief such as the present application, it is trite that the applicant must establish:

(a) A *prima facie* right.

(b) A reasonable apprehension of harm should the interim relief not be granted, but final relief be granted.

(c) Balance of convenience.

(d) Absence of satisfactory alternative relief.

[18] In this case applicant contends that it has a *prima facie* right against the respondents, by virtue of the fact that the first and second respondents are indebted to it (the applicant). First and second respondent do not deny that they are indebted to the applicant. I am of the view that applicant has established that it has a *prima facie* right against the first and second respondents.

[19] As regards having a reasonable apprehension of harm should the interim relief not be granted and the balance of convenience, applicant contends that; It entertains a well-grounded fear that if first and second respondents are not interdicted they will dissipate their assets. Applicant alleges that first and

second respondents, styled as a “group of companies” are trying to secure themselves some benefit by invoking the voluntary business rescue procedure. This, based *inter alia*, on the fact that they did not give the applicant, which is its creditor, or affected party peremptory notice of the commencement of the business rescue proceedings; and that in all likelihood has to do with the imminent receipt of the proceeds flowing from the sale of the Daku Centre.

[20] According to the applicant, this can also be inferred from respondents’ conduct of:

> (1) Not advising the applicant’s attorney of the impending business rescue;
>
> (2) Not securing the payment of applicant’s claim;
>
> (3) Appointing different attorneys to process the business rescue proceedings;
>
> (4) Failing to set out in a sworn statement the basis upon which the resolution to commence business rescue proceedings is based;
>
> (5) Failing to give proper notice to the applicant.

[21] In support of its contention applicant also drew the court’s attention to the fact that in the answering affidavit the deponent, Mr Abraham Jacob Lamprecht, denies that he is the director of the first respondent having resigned on the 25 August 2011. However, in the Business rescue motivation on behalf of first and second respondent, it is stated that Mr Lamprecht is the sole stakeholder and director of second respondent and holds 90% of shares of the first respondent, with the balance of 10% being held by Mr H Swanepoel. The directors are H Swanepoel and E Erasmus. It is also noted that the preamble to the motivation states that both entities (first and second respondent) are part of a Construction and Development Group having common shareholding by way of holdings being controlled by Mr A J Lamprecht either directly or indirectly via members or Trust and Directorships.

[22] It is also noteworthy that Mr Lamprecht, despite his resignation as first respondent's director in August 2011, the undertaking to pay to the applicant a sum of R204 000.00 from the proceeds of the sale and transfer of Daku Centre on behalf of the first respondent, is signed by him as a shareholder and director of first respondent. The undertaking is signed on the 15 November 2011. **See Annexure "E".** *Mr Dyke* for the applicant argued that this is an indication that all is not well with first and second respondent and coupled with their failure to pay what is due to it, reasonably gives rise to an apprehension that first and second respondent will dissipate funds via inter-company accounts or put them beyond applicant's reach.

[23] On the other hand, first and second respondent contend that applicant has failed to make out any case, nor lay a factual basis to show that either respondent is wasting or getting rid of funds to defeat its creditors or is likely to do so. There being no evidence of an intention on the part of the respondents to secret their assets.

[24] *Mr Beyleveld* for the respondents argued that this was mere speculation on the part of the applicant. That all that applicant want to do is to secure payment ahead of other creditors.

[25] Further that the applicant makes a bold and unsubstantiated averment that the respondent entities are conducted collectively and or that they are alter ego of Mr Lamprecht. It was argued that even if the entities are conducted collectively, there is no evidence proffered to indicate that they intend to secret funds of the entities with the intention of defeating applicant's claim. That the application for the anti-dissipation order stands to be dismissed.

[26] In my view however, the applicant is justified in its apprehension that *inter alia* the resolution to commence business rescue proceedings by the respondents, coupled with their failure to comply with the provisions of section 129 of the Companies Act *vis-a-vis* the applicant is an indication that the respondents intend avoiding the payment of the amounts that they owe to the applicant. I am satisfied therefore that the balance of convenience favours the

granting of the relief sought by the applicant. It was not suggested that the applicant has at its disposal an alternative satisfactory relief.

COUNTER APPLICATION

[27] It was argued on behalf of the respondents that they are entitled to the relief sought in the counter application because the applicant did not file any opposition to the counter application, and that the facts set out in the counter application should stand.

[28] It is indeed so that the applicants in the main application did not file any opposing papers in respect of the counter application and chose to raise the point that there is no evidence that the respondents dully resolved to institute the counter application, in argument. It is trite that a respondent should file his or her affidavits on the merits at the same time as he or she takes a *point in limine*. In ***Bander and Another v Weston and Another 1967 (1) SA 134 at 136*** it was stated that it is normally not proper for a respondent not to file opposing affidavits but merely to take a preliminary point. *Corbett J*, as he then was, however acknowledged that "situations may arise where this procedure is unexceptionable". The learned judge gave the example of a respondent who is suddenly and without notice confronted with a complex application and who would normally be entitled to a substantial postponement to enable him to frame opposing affidavits, might be permitted to take a preliminary point.

[29] I think the present is one such situation. In the present case, the applicant in the main application, which is brought urgently, is confronted with a notice of a counter application accompanied by the answering affidavit, on the date appointed for the hearing of the urgent application, the 20 March 2012.

[30] In my view, in the circumstances it is appropriate to postpone the hearing of the counter application to enable the respondent in the counter application to prepare and file opposing papers, with no order as to costs.

CONCLUSION

[31] *Mr Beyleveld* drew my attention to the fact that in the notice of motion applicant does not pray that relief sought on the second leg of its application (anti-dissipation order) should be in place pending the determination of an action to be instituted against the respondents. An application to amend the notice of motion to incorporate this prayer was opposed.

[32] It is trite that the applicant must set out the relief he/she claims in the notice of motion. However the prayer for further and or alternative relief may be invoked to justify an order in terms other than that set out in the notice of motion where that order is clearly indicated in the founding affidavit. ***(See Superior Court Practice: H J Erasmus et al BI-42 B [Service 35 - 2010])***

[33] **Paragraph 58 of the founding affidavit (main application)** reads as follows:

> "It is respectfully submitted that this is an appropriate case for this Honourable Court to Order that the Respondents, and/or the Third Respondent should be ordered to maintain an available balance of R629 068.27 in the Respondents or the Third Respondent's Trust account pending the outcome of an action to be instituted for the recovery of the aforesaid amount against the respondents, such action to be instituted within thirty days of the granting of any Order that this Honourable Court may deem meet to make."

Clearly therefore the order sought by the applicant in this regard is indicated on the founding affidavit and I will therefore be amenable to granting the relief sought in the manner indicated in the founding affidavit.

[34] In the circumstances the following order will issue:

> **(a) That the forms and service provided for in the Rules be abridged and this application be heard as one of urgency;**
>
> **(b) That the resolution of the first respondent to commence Business Rescue Proceedings in terms of section 130 of Companies Act be and is hereby set aside;**

(c) That the resolution of the second respondent to appoint a Business Rescue Practitioner be and is hereby set aside;

(d) That the first and second respondent be and are hereby ordered and directed to maintain an amount of no less than R629 068.27 at any banking facility held by either the first or the second respondent or in the trust account of the third respondent pending the outcome of an action to be instituted for the recovery of aforesaid amount against the respondents;

(e) Applicant is directed to commence the action set out in part (d) of this order against the respondents within 30days of this order being issued failing which the order stipulated in (d) above shall lapse;

(f) That the counter application be and is hereby postponed to enable the respondent therein to file its notice of opposition if any, within ten (10) days of this order being issued and within 15 days of notifying the applicant of its intention to oppose the counter application, deliver its answering affidavit if any;

(g) First and second respondent are ordered to pay the costs of the main application.

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N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant:	ADV: B C Dyke
Instructed by:	STRAUSS DALY ATTORNEYS

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Date Heard:	20 March 2012
Date Reserved:	20 March 2012
Date Delivered:	21 June 2012