**IN THE HIGH COURT OF SOUTH AFRICA**
**FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 1841/2012

In the matter between:

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| **STALCOR (PTY) LTD**<br>(Registration Number 2006/031549/07) | Applicant |
| and | |
| **JACOBUS ELISA KRITZINGER NO**<br>(In his capacity as Business Rescue Practitioner<br>For TIRADEPROPS 1140 (in Business Rescue –<br>Registration Number CK1999/007941/23) | 1st Respondent |
| **TIRADEPROPS 1140 CC**<br>(Registration Number CK1999/007941/23) | 2nd Respondent |
| **JAN JOHANNES BLIGNAUT** | 3rd Respondent |

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| **CORAM:** | RAMPAI, J |
| **HEARD ON:** | 19 NOVEMBER 2015 |
| **JUDGMENT BY:** | RAMPAI, J |
| **DELIVERED ON:** | 21 JANUARY 2016 |

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[1] The applicant applies to have the value of its claim as currently reflected in the business rescue plan increased, the business rescue practitioner directed to investigate certain business affairs of the financially distressed enterprise and the respondents

directed to pay the costs on a punitive scale. The respondents resist the grant of such an order.

[2] The undisputed facts need to be captured. The applicant supplied certain goods to the second respondent on credit. The second respondent failed to pay the debt. The applicant applied to have the second respondent liquidated. A provisional sequestration order was granted on 28 August 2012 by Jordaan J. He issued the rule *nisi* returnable on 11 October 2012. (vide "anx jmc5")

[3] The return date of the rule *nisi* was anticipated to 28 September 2012 by then then sole respondent, Tiradeprops 1140 CC. On that day I discharged the rule *nisi* on certain conditions as would appear from "anx jmc3". The costs relative to the abandoned liquidation proceedings were, by consent, awarded to the applicant on the special scale as between attorney and client. That order applied not only to the return proceedings before me but also to the initial proceedings before Jordaan J.

[4] Those conditions were not fully met by Tiradeprops. As a result of the breach, the applicant launched another application against Tiradeprops and two others. The application was heard on 22 November 2012 by Kruger J. The matter was settled. The first respondent and the second respondent, in other words Tiradeprops 1140 CC and Jan Johannes Blignaut were directed to pay the costs of that application on the special scale as between attorney and client. (vide "anx jmc4")

[5] The order I made, "anx jmc3", paved the way for the adoption of a resolution by the third respondent whereby the current second respondent was placed under business rescue scheme and the current first respondent was appointed as the business rescue practitioner of the second respondent. The business rescue proceedings effectively commenced on 22 February 2013. The first meeting of creditors was held in Bloemfontein on 11 March 2013. After his appointment, the practitioner had various communiqués with the applicant's attorney, Mr R C Christie and the applicant's directors. At one stage, on 11 April 2013 to be precise, the practitioner travelled to Germiston to have an exclusive meeting with the applicant's representatives. During that special visit the applicant's capital claim of R2 666 482,29 was tabled and discussed.

[6] The practitioner then convened the second meeting of the second respondent's creditors in terms of section 151 of the Companies Act, 71 of 2008. The meeting was held in Bloemfontein on 21 June 2013. All in all nine creditors attended the meeting. Among them was a certain Mr H B Steyn who attended the meeting as the applicant's proxy. (vide "anx o3") During the second meeting the creditors were afforded the opportunity of updating their claims. On behalf of the applicant, Mr Steyn recorded the applicant's claim as R2 666 482,00 (vide "anx o4"). The figure represented the capital only. The accrued interest and the taxed costs in terms of the court orders were not included. Besides, there was no reference to interest and costs on the ballot paper. (vide "anx o4")

[7] The practitioner went ahead during the second meeting to prepare a business rescue plan. In due course he distributed the approved business rescue plan among the creditors. The applicant's name was on the distribution list. The business rescue plan set out the value of each creditor's claim. The practitioner copied the applicant's attorney as well as the applicant's directors. He received no objection concerning the value of the applicant's claim which was recognised and recorded as R2 666 482,00. No variation of the business rescue plan was subsequently requested by or on behalf of the applicant. At the creditors second meeting held in Bloemfontein on 21 June 2013 the business rescue plan was approved by the majority.

[8] On 28 August 2014, at the very earliest it would appear, interest due to the applicant by the second respondent was calculated in accordance with the two court orders. A composite document labelled "anx jmc6" was then drawn up. The total interest which accrued from the two applications was the sum of R622 513,65.

[9] The applicant's three bills of costs were drawn up and presented for taxation on 20 March 2013, 23 April 2014 and 9 May 2014. The total sum of the three taxed bills of costs was R442 594,94 according to "anx jmc7".

[10] The real purpose of the current application is to have the applicant's claim recorded as R2 66 482,00 increased by R1 065 108,62, being interest in the sum of R622 513,68 plus costs in the sum of R442 594,94, to the total of R3 731 590,62. The increased portion thereof represents a ±40% shortfall. The

applicants bemoaned that its recorded and recognised claim had been substantially understated and that the enormous deficit would have a materially adverse impact on the real quantum of its claim. For those reasons the applicant seeks rectification of its understated claim as recorded in the business rescue plan by the first respondent, in other words the business rescue practitioner. This is the first relief sought.

[11] The second respondent, a business corporate enterprise in rescue proceedings had eight other creditors besides the applicant. Those creditors and holders of the securities issued by the second respondent were all parties to the business rescue plan. These proceedings were initiated on 12 May 2015. The applicants caused the current application to be served on them. Although there were, in that way, given notice of this application none of them was cited as a correspondent. I may add that none of them chose to enter the arena on the strength of such notice.

[12] On 12 August 2013 the applicant’s attorney provided the practitioner with the exact figures of the interest due to the applicant by the second respondent. The figure was R425 937,52. At that stage the exact total figure of the costs was still unknown. The applicant’s two more bills had still not been presented for taxation. The attorney estimated a provisional figure. He then concluded that the claim of his client was not correctly calculated and blamed the practitioner for the prejudice suffered by the applicant as a result of the miscalculation (vide “anx o1”).

[13] On 22 August 2013 the business rescue practitioner replied. He declined to increase the value of the applicant's claim. He alleged that the interest and costs components of the applicant's claim were out of time. He denied the applicant's contention that he was to blame for the applicant's understated claim. He asserted that it was the responsibility of a creditor to submit proof of a claim to a business rescue practitioner.

[14] As regards the first relief, the applicant applies for an order whereby the business rescue plan is amended. The business rescue plan was finally threshed out and approved in Bloemfontein on 21 June 2013. It concerned the business rescue of the second respondent. I deal with the first relief first.

[15] The issue was whether the applicant had made out a case for the relief sought. Mr Roux, counsel for the applicant, submitted that the answer to the question must be in the affirmative. He, therefore, urged me to find for the applicant. Mr Snellenburg, counsel for the first and second respondent, differed. So did Mr Greyling, counsel for the third respondent. They both submitted that the relief sought was untenable and that the answer to the question therefore had to be in the negative.

[16] The applicable portions of section 145 of the Companies Act, 71 of 2008 provide:

"**145 Participation by creditors**

(1) Each creditor is entitled to-

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter; and

(d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.

(2) In addition to the rights set out in subsection (1), each creditor has-

(a) the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152; and

(b) if the proposed business rescue plan is rejected, a further right to-

(i) propose the development of an alternative plan, in the manner contemplated in section 153; or

(ii) present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153.

[17] Section 152 of the Companies Act, 71 of 2008 provides:

"**152 Consideration of business rescue plan**

(1) At a meeting convened in terms of section 151, the practitioner must-

(a) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;

(b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;

(c) provide an opportunity for the employees' representatives to address the meeting;

(d) invite discussion, and entertain and conduct a vote, on any motions to-

(i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or

(ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and

(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d) (ii).

(2) In a vote called in terms of subsection (1) (e), the proposed business rescue plan will be approved on a preliminary basis if-

(a) it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and

(b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.

(3) …

(4) A business rescue plan that has been adopted is binding on the company, and on 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.

(5) The company, under the direction of the practitioner, must take all necessary steps to-

(a) attempt to satisfy any conditions on which the business rescue plan is contingent; and

(b) implement the plan as adopted.

(6) …

(7) …

(8) When the business rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the business rescue plan."

[18] The application stands to be adjudicated on the trite principles as set out in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634H.

By now it is a trite principle that an applicant's founding affidavit must contain all the allegations necessary to sustain the relief sought in the notice of motion. An applicant is required to set out all the primary and necessary averments of his or her case in the founding affidavit. To this end all the affidavits in motion proceedings constitute the pleadings and the evidence. It is impermissible to make allegations in the replying affidavit later that were supposed to have been made in the founding affidavit earlier.

**Transnet Limited v Rubenstein** 2006 (1) SA 591 (SCA) [28], **De Lange v Presiding Bishop Methodist Church of Southern Africa and Another** 2015 (1) SA 106 (SCA), **Minister van Wet en Orde v Matshoba** 1990 (1) SA 280 (A) at 295, 303 and 305.

[19] The rule that the necessary and primary facts on which the applicant relies must appear in the founding affidavit and that the applicant will not generally be allowed to materially supplement his cause of action thinly set out in the founding affidavit by providing material supporting facts later in the replying affidavit was applied in this court in **Ferreira v Premier: Free State and Others** 2000 (1) SA 241 (O).

[20] In this matter the applicant basically applied to have the existing business rescue plan varied in order to include the amounts of interests and the amounts of costs previously awarded to the applicant in terms of court orders. Yet the very business rescue plan was not even attached to the applicant's papers. Therefore, I was asked to vary a document that I had not even seen. Moreover, the applicant tendered no explanation whatsoever in its founding affidavit as to why its claim as ultimately recorded in the business rescue plan did not include such interest and costs at the crucial time, being 21 June 2013, when the creditor's claims in the business rescue plan were finally revised or updated and finally approved. Once approved the business rescue plan binds every creditor – sec 152(4).

[21] The applicant's credit director and first deponent, Ms J M Coppin stated the following in connection with the applicant's capital amount recorded as its claim:

> "11. At that time, the Applicant's claim was recorded in the sum of R2 666 482,00 (two million six hundred sixty six thousand four hundred eighty two rand). However, that amount constituted only the capital amount owed and did not incorporate either the interest accrued nor the Bill of Costs to which the Applicant is also entitled, which entitlement arises from the Court Orders referred to above."

[22] On the second element of its claim, in other words interest, Ms Coppin commented as follows in the founding affidavit:

> "12. I attach hereto a calculation (as **JMC6**) in respect of the interest which has accrued on the capital sum and such was in accordance with the consent agreed between the parties pertaining to the Applicant's claim. Such consent was confirmed by an Order of this Honourable Court on both 28 September 2012 and again on 22 November 2012."

[23] Now "anx jmc6" was unsigned and undated. I have no idea as to who its author was. Precisely when interest was calculated by the anonymous author did not appear anywhere *ex facie* the documents itself. Those discrepancies were not explained in the founding affidavit. The business rescue plan was finally adopted by the stakeholders in the estate of the second respondent on 21 June 2013. The applicant could easily have calculate its interest up to and including the effective date, being 22 February 2013, on which day the business rescue proceedings commenced. At that stage accumulated interest was seemingly R152 179,60 (R752 652,99 – R600 473,04) (vide p30) plus R470 334,00 (R2 536 343 – R2 066 009) (vide p28). The calculation could have been done in order to update its claim accordingly at the second meeting of creditors. It was never done. There was no satisfactory explanation given as to why it was not done or before or on that crucial meeting.

[24] The last transaction captured, according to the annexure, were on 28 August 2014 some 15 months since the second meeting that was held on 21 June 2013 and well over 21 months since the last court order that was granted on 22 November 2012. It would, therefore, appear that interest was calculated on some unknown date after 28 August 2014. It was unclear as to why the applicant

had waited for so long for something that could have been done long before the second meeting of creditors was held. The annexure showed that since the 7 November 2013 until 28 August 2014 the applicant received payments in excess of R505 103 (p28 of the record) and further payments in excess of R150 873 – vide p30 of the record. Those 14 payments indicated that the business rescue practitioner had been implementing the business rescue plan. I am of the view that, through the exercise of reasonable diligence, the applicant's interest could and should have been accurately calculated between 22 February 2013 and 21 June 2013. Had the applicant done so the amount of interest at least would have been included in the business rescue plan.

[25] On the third element of its claim, in other words costs, Ms Coppin commented as follows in the founding affidavit:

> "16. The total costs which are due to the Applicant in accordance with various Orders of this Honourable Court arising out of Taxations which took place on 20 March 2013, 23 April 2014 and 9 May 2014 in the sum of R442 594,94 (four hundred forty two thousand five hundred ninety four rand ninety four cent) as can be seen from annexure **JMC7.**"

[26] Firstly, the applicant presented its first bill of costs on 20 March 2013 for taxation. That bill concerned the initial stage of the liquidation proceedings heard by Jordaan J on 28 August 2012 (vide "anx jmc5"). The costs of those proceedings were awarded in favour of the applicant on 28 September 2012. The applicant presented its first bill on 20 March 2013 about six months after the grant of the court order that entitled the applicant to recover

such costs from the second respondent but three months before the second meeting of creditors during which the business rescue plan was finally approved. Notwithstanding its availability, the applicant's first taxed bill was not submitted to the practitioner or its amount used to update the applicant's claim – vide "anx o4" the applicant's ballot paper signed on 21 June 2013. It can, therefore, be seen that the excuse that the taxation of the bills delayed the quantification of the costs did not really hold water.

[27] Secondly, the applicants presented its second bill on 23 April 2014 for taxation. That bill concerned the return date of the rule *nisi* of the liquidation proceedings over which I presided on 28 September 2012. The costs of those proceedings were awarded in favour of the applicant on the same day. The applicant's bill was presented and taxed about seven months after the grant of the court order that entitled the applicant to recover such costs from the second respondent and about 11 months after the final approval of the business rescue plan. A period of 9 months lapsed between the grant of the court order and the approval of the business rescue plan. During that period the second bill could have been drawn up, presented and taxed.

[28] Thirdly, the applicant presented its third bill on 9 May 2014 for taxation. That bill concerned the proceedings relative to the attachment of securities over which Kruger J presided on 21 November 2012. On the same day the costs of those proceedings were also awarded in favour of the applicant. The applicant's bill was presented and taxed over 17.5 months after the grant of the entitling court order and over 11.5 months since

the business rescue plan was finally approved at the second meeting of creditors during which all the creditors were afforded the last opportunity of verifying their claims.

[29] In the founding affidavit there was no explanation as to why the second and third bills were not drawn up, presented and taxed before the business rescue plan was approved on 21 June 2013. I have already indicated that the applicant had ample opportunity of 9 and 7 months in respect of the second and the third bills respectively to have its costs taxed. However the applicant took its time to get its bills taxed. That in my view was a problem.

[30] The applicant's second deponent and attorney, Mr R C Christie replied:

> "8. At the meeting of 11 April 2013, the First Respondent was supplied with a copy of the Court Order (I handed such to him), as well as the fact that being an Order of Court, the aspects of interest and costs could not at that stage be calculated. I personally addressed the First Respondent on the issue that the Taxation of the Bills of Costs and that the quantification of the costs would take place as soon as it was possible for the Bills to be taxed by the Registrar of the Court. In the premises, I dispute and deny the First Respondent's version of events specifically regarding knowledge of the Bills of Costs."

[31] The aforesaid explanation constituted a new matter. Apart from that it was clear that the last two bills had hardly been drawn up as at 11 April 2013. There was no explanation given as to why

the costs would not be quantified at that stage, 2.5 months before the adoption of the business rescue plan. But the real sting in the tail was that the first bill had already been drawn up, presented and taxed before 11 April 2013. Therefore, there was no good reason why it took such inordinately long periods to have the other two bills expeditiously taxed.

[32] Any suggestion or insinuation that the taxation process was retarded by the registrar of this division is untenable. The practice in this division has always been that an attorney submits a written request for the allocation of a taxation date. The relevant dropbox is emptied thrice a week on Mondays, Wednesdays and Fridays, The requests are then distributed among three taxing officials. They respond to such requests within 2 days after receipt and allocate a date within 30 days of the reply. Therefore, the turn-around period from the date of the receipt of the request to the date of taxation is, at most, five weeks.

[33] The belated allegation of the second deponent that the applicant had to wait its turn to tax its costs was a hollow point. There was no substance in that excuse. There was no patent error communicated by the first respondent in the recording of the applicant's claim or in the adoption of the business rescue plan. It has to be stressed that the applicant through a proxy participated in the final approval process he raised no objection that voting was based on incorrect values. The fact of the matter was that he was mandated to record the applicant's claim as he did – "anx o4"). He was an attorney. He was simply not briefed about the

outstanding and still to be quantified elements of the applicant's claim.

[34] The applicant's first and even second deponent did not given any material facts to substantiate the applicant's belated excuse for the considerable delays in having its bills drawn up, presented and taxed before the business rescue plan was finally approved by the creditors.

[35] Of course the applicant was entitled to proceed in order to have its costs taxed. However the applicant was not entitled to proceed at a snail's pace as if the applicant had all the time in the world. It must be borne in mind that there were other creditors who looked up to the business rescue practitioner to expeditiously execute the business rescue plan so that their debts could be paid. Time is money. The applicant's fellow creditors clearly wanted the business rescue plan implemented and the business rescue proceedings completed without undue delay. The business rescue practitioner was aware that the applicant's claim flowed from court orders with three elements being capital, interest and costs. However, it remained the responsibility of the applicant, as a creditor, and not the first respondent as the business rescue practitioner, to quantify the interest and costs relative to the applicant's claim and to incrementally adjust and update its claim. The applicant had several opportunities to do just that but hopelessly failed to do so because it unreasonably assumed or erroneously believed it was the practitioner's duty to prove a creditor's claim.

[36] The approved business rescue plan was subsequently sent to the directors of the applicant. None of them immediately raised any objection. The same plan was also sent to the applicant's attorney. He too raised no immediate objection that the applicant's claim had been inadequately recorded in the business rescue plan. In the replying affidavit the applicant accused the business rescue practitioner for the omission of the interest and costs in the business rescue plan. He said:

> "23. Accordingly, first respondent was at fault in not recognising the capital, interest and cots at that time."

[37] The crux of the matter is that the practitioner did not repudiate the applicant's claim in respect of interest and costs. The undisputed fats showed that the applicant furnished the practitioner with no details concerning interest and costs notwithstanding the considerable passage of time and ample opportunities given to the applicant. These were material considerations. The omission of those two components was, in my view, due to lack of reasonable diligence coupled with erroneous assumption on the part of the applicant.

[38] The applicant applied for an order: whereby its claim in the estate of the second respondent and its corresponding voting rights were amended to accord with the relevant court orders. Mr Greyling contended that the applicant's apparently wished to get the blessing of the court to go back in time, to undo what had already been done, to rescind the business rescue plan and to restart the whole rescue process all over again. I share those

sentiments. The practical problem was that the business rescue plan was approved some time ago. It has been largely implemented. The business rescue operation was almost nearing its natural end at the time the current application was initiated. That factor is a material consideration.

[39] Section 154(2) of the Companies Act, no 71 of 2008 reads:

> "(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan."

The debt owed by the financially distressed enterprise, the second respondent, existed immediately before the commencement of the business rescue plan. Its three constituent elements were capital, interest and costs. It is no one's fault but the applicants that its debt was partially provided for in the business rescue plan. The interest and costs were not provided for in the business rescue plan. Because they were excluded, albeit negligently or inadvertently or deliberately, the applicant as a creditor is precluded by the section from enforcing directly or indirectly those two elements of the original debt. It was the applicant's responsibility to see to it that provision was made for them in the business rescue plan prior to its approval and implementation.

[40] In the instant matter the business rescue plan was approved by the stakeholders in the presence of the applicant. There was no objection. It was subsequently sent to the applicant. There was no objection. The applicant's attorney was copied. There was no objection. Almost 8 weeks after the approval of the business rescue plan the applicant complained to the business rescue practitioner that its claim in the business rescue plan was not correctly calculated because interest and costs were not taken into account. The complaint was dated 12 August 2013 – vide "anx o5". Ten days later the business rescue practitioner dismissed the applicant's complaint. He declined to have the business rescue plan re-opened and revised in order to increase the applicant's claim – vide "anx o2".

[41] It will, therefore, readily be appreciated that the dispute between the applicants and the first respondent was declared on 22 August 2013. No further action was immediately taken by the aggrieved applicant. That was in keeping with its tendency to go slow. The applicant apparently set back and relaxed. The first respondent carried on to implement the business rescue plan in the meantime as finally approved on 1 June 2013. The applicant received14 payments distributed in accordance with the business rescue plan from 7 March 2013 until 28 August 2014 – vide "anx jmc6". I guess many more payments were subsequently made by the first respondent to the applicant in accordance with the business rescue plan and the practitioner's distribution scheme. It seemed to me, therefore, that the applicant notwithstanding its earlier objection later acquiesced and willingly participated in the pro-rata distribution made by the first respondent in accordance

with the business rescue plan, now under attack. The applicant was not allowed to probate and reprobate as it did. The first respondent said the applicant must be deemed to have waived its interest and costs by omitting to include them in the ballot paper – vide “anx 04”. Although I would be reluctant to say that the applicant had waived its right, I am nonetheless inclined to believe that it can be fairly said that the applicant had tacitly abandoned the said portions of its original claim. “Anx 04” was the forerunner to the business rescue plan. The subsequent participation of the applicant in the implementation phase of the business rescue plan tended to strengthen the first respondent’s point.

[42] On 10 November 2015, some 28.5 months since the final approval of the business rescue plan and some 25.5 months since the dispute was declared, the applicant rushed to court. I pause to make an obvious comment. The applicant’s conduct in relation to this matter was characterised by endless acts of remissness. This is yet another, example thereof. Worse still none of the second respondent’s creditors were cited as co-respondents, their direct and substantial interest notwithstanding. That too was a material omission.

[43] The mere service of the application, although it constituted proper notice to them, was not enough. It could not be regarded as a proper substitute for citation. Citation is not a mere notice of intention to go to war. It is a declaration of war itself. Once a party is cited as a respondent then the rules of engagement apply. Such rules do not have their ordinarily binding force

where, as in this matter, an uncited individual or enterprise with a direct and substantial interest in the relief sought is merely given notice of the application.

[44] In an application for setting aside of a business rescue plan every creditor of a company in financial distress has a direct and substantial interest in the matter and should, as such, be joined. **Absa Bank Limited v Naude** (20264/2014) [2015] ZASCA 97 (1 June 2015). In my view there was substance in the submission of Mr Snellenburg, which was supported by Mr Greyling, that the applicant's omission was fatal. The material defect could not be cured by a mere notice in terms of section 130 of the Companies Act, 71 of 2008 given to the creditors.

[45] So far I have approached the matter from the angle, obviously assumed, in favour of the applicant but without deciding the point, that it was permissibly on good cause shown, to have a business rescue plan revised and varied. Having done so, I have come to the conclusion that the applicant failed to make out a case in its founding affidavit as to why the business rescue plan should be varied, amended or rectified by supplementing its claim – **Rubenstein**, *supra*. The replying affidavit contained a whole range of new explanations, accusations and facts contrary to the rules of engagement in motion proceedings. There was hardly any hint of those in the founding affidavit. Therefore, the matter had to be decided primarily on the version of the respondent – **Plascon-Evans**, *supra*. I am, therefore, inclined to deny the applicant the first relief.

[46] Now I turn to the second relief, prayer 2 of the notice of motion. The prayer has its origin from two paragraphs in the founding affidavit. Those were paragraphs 18 and 19. The applicant, so it seemed to me, suspects that before the business rescue proceedings started the second respondent and third respondent had committed certain voidable transactions or engaged themselves in reckless trading or committed material breach of certain contractual obligations. Based on that suspicion the applicant applies for an order in terms of section 141(2)(c) of the Companies Act, no 71 of 2008 whereby the first respondent as the business rescue practitioner is directed to investigate the activities of the close corporation and its member, and to file a report within 6 months with the registrar – vide paras 18 and 19, founding affidavit.

[47] The first respondent answered as follows:

> "43. The provisions of section 141 is clear. I duly investigated the affairs of the company. There is no support of the relief, at least none that I can comment on without speculating. I am not called on to speculate and I will refrain from doing so. This is not an invitation to the applicant to supplement its papers in its replying affidavit. It was supposed to make out its case in the founding affidavit."

[48] The applicant's second deponent did not specifically deal with par 43 of the first respondent's answering affidavit. In the replying affidavit the only allegations of the first respondent that were selectively and pertinently challenged were paras 24 and 27. The former was only partially dealt with. The applicant's second

deponent denied the allegation of the first respondent that no basis was laid down for the second relief. At paragraph 13 of the replying affidavit he said:

> "As regards the allegation that no legal basis is laid for the relief sought, I respectfully submit that the first respondent is essentially incorrect in his understanding. This application does not seek a variation after the event, simply to supplement its claim with the additional amounts as ordered by this Court. He was fully aware at all times that the applicant's claim consisted of capital and interest and costs to be taxed."

[49] The aforesaid passage represented the high watermark of the legal basis for the second relief sought. In my view the applicant was groping in the dark here. The point was what was the factual foundation of the relief sought? There was absolutely no evidence tendered by the applicant in the founding affidavit or even in the replying affidavit to substantiate its prayer for the second relief. No *facta probanda* whatsoever appeared anywhere – not in the founding affidavit and not even in the replying affidavit. I was completely at a loss as to what factual matrix gave rise to the applicant's belief or suspicion concerning the alleged voidable transactions, reckless trading and material contractual breaches. Virtually no particulars, however flimsy, were mentioned about any of the alleged suspicious activities committed before the business rescue proceedings commenced. The reason for the relief was simply not given at all, not even belatedly in the replying affidavit let alone properly in the founding affidavit – **<u>Goldfields Limited & Others v Montley Rice</u>**, *supra* at para [122].

[50] I have considered the three sets of affidavits, and the annexures attached to them, which constituted both the pleadings as well as evidence in motion proceedings. There was absolutely no reason to believe that the proposed investigation would unearth possible illegal dealings by the second respondent and third respondent. The first respondent averred, and the applicant did not deny, that he had already investigated the prior activities of the co-respondents. I understood him to mean that a second investigation would, therefore, serve no useful practical purpose.

[51] In the light of all these material considerations I am satisfied that it had not been shown that there was cause to be concerned; that there is no reason to believe that the applicant's suspicion was well founded; that the proposed further investigation is likely to reveal any foul play by the suspected respondents and that the first respondent had not properly complied with his obligations in terms of section 141. In any event section 141(2)(c) does not countenance the type of relief sought by the applicant. I would, therefore, also deny the relief.

[52] In appropriate cases there is a constitutional imperative that a high court should develop common law. However, before a judge can embark upon such an exercise a party calling upon the court to do so has demonstrate there are *facta nova* and *lacuna* in existing law. This is important because common law cannot be developed in a vacuum. Accordingly I decline the invitation

extended to me by the applicants to develop common law by extending the scope of section 141(2)(c).

[52] On two occasions the question of costs was reserved for later adjudication. The answering affidavit of the first respondent and the second respondent was filed on 18 June 2015. So was the third respondent's answering affidavit. The applicant was supposed to file its replying affidavit on 2 July 2015 at the very latest – vide rule 6. The applicant did not meet that formal deadline. Days went by. The respondents called upon the applicants to file the replying affidavit. However, they got no joy.

[53] Thirty two days later, the applicant's replying affidavit was still outstanding. On 4 August 2015 Messrs Honey Attorneys took it upon themselves on behalf of the first and second respondents to enrol the matter. The matter was enrolled for hearing on Thursday, 20 August 2015. Therefore, the applicant's heads of argument together with the counsel's practice notes were supposed to be filed by 12:00 on Wednesday, 12 August 2015 – vide rule 13(3).

[54] On 14 August 2015 the applicants filed its replying affidavit. Although the replying affidavit was awfully belated, it was not accompanied by any formal application to have its late filing condoned.

[55] On Thursday 20 August 2015 the matter came up for hearing. The applicant's condonation application and heads of argument were still outstanding. The matter could not proceed, it had to be

postponed in order to afford the applicants an opportunity of filing a condonation application for the late filing of the replying affidavit. I pause to comment that the applicant's heads were also still outstanding. A second condonation application would, in due cause also be required for the late filing of such heads. The costs of that first postponement were reserved.

[56] On Thursday, 10 September 2009 the matter once again came up for hearing once again. On that day the applicant was still in default. The required condonation application was still outstanding. Once again the matter could not proceed but had to be postponed to give the applicant another change to file its condonation application. The late replying affidavit could not simply be allowed without an acceptable explanation for its late filing. The costs relative to the second postponements were reserved.

[57] At last the applicant filed the required condonation application on Thursday 8 October 2015. The next day, being Friday, 9 October 2015, the applicant filed the long outstanding heads of argument. Those heads were filed some 7 weeks out of time. At the very latest they were supposed to have been filed on Wednesday 7 October 2015 so that the respondents could file theirs on Friday 9 October 2015 before 11:00 for the matter to be heard the next Thursday. The procedural rights of the respondents were therefore infringed. They were hardly afforded one day after the condonation application and the applicant's heads of argument were filed. The applicant again breached rule 13(3). There was

no explanation or an apology extended to the respondents for the infringements of their procedural rights.

[58] There was no formal explanation for the applicant's non-compliance. The papers were also not paginated and indexed on time. In the absence of satisfactory explanation non-compliance with the court directives should not be tolerated. The directives were designed to afford the respondents a minimum of 47 hours to consider the applicant's heads of argument and to draft and file the respondent's heads of argument. Since the applicant's heads of argument were filed at 12:49 not on Wednesday but on Thursday 8 October 2015. The respondents were robbed of 13 out of the permissible minimum of 47 hours. They were left with 34 hours only to react to the applicant's heads in order to meet their formal deadlines at 11:00 on Friday 9 October 2012. Violation of other litigant procedural rights is a serious matter.

[59] On Thursday 15 October 2015 before the substantive merits of the matter could not be heard. The applicant's condonation application for the late filing of the replying affidavit had to be considered first. The third respondent intended to oppose such a condonation application. The third respondent required time to prepare the required opposing affidavit. Consequently the condonation application could not be heard. That necessitated the third postponement of the main application. Both applications had to be postponed. The costs were reserved one more time.

[60] On Thursday 19 November 2015 I was seized with the matter. The respondents decided not to oppose the applicant's

condonation application for the late filing of its replying affidavit any more. I granted condonation. I have to mention that the applicant never filed a condonation application for the late filing of its heads of argument.

[61] The reserved costs were argued. The applicant's counsel submitted that the applicant was entitled to the reserved costs. Counsels for the respondents submitted that the applicant's disregard of the local directives was the cause of all the wasted costs. Like the applicants, the respondents urged met to award costs on the special scale as between attorney and client.

[62] I am persuaded that the applicant, and none of the respondents, was to blame for all the postponements. The applicant's conduct was characterised by a series of acts of omissions. The applicant flagrantly breached the rules and practice directives of the court. In the circumstances, I am inclined to award all the costs in favour of the respondents. To ensure that the respondents are not put out of pocket as a result of the applicant's failings, I believe that it is appropriate and just to award the costs on the special scale as between attorney and client in favour of the respondents. I cannot demonstrate my displeasure strongly enough.

[63] Accordingly I make the following order:

63.1 The application is dismissed.

63.2 The costs of this application including all the wasted costs occasioned by the postponements shall be borne and paid by the applicant.

63.3 The respondents are entitled to have their costs taxed on the special scale as between attorney and client.

**M.H. RAMPAI, J**

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| On behalf of applicants: | Adv. C. D. Roux<br>Instructed by:<br>L & V Attorneys<br>BLOEMFONTEIN<br>and<br>R C Christie<br>JOHANNESBURG |
| On behalf of the first and<br>second respondents: | Adv. N. Snellenburg SC<br>Instructed by:<br>Honey Attorneys<br>BLOEMFONTEIN |
| On behalf of the third<br>Respondent: | Adv. P. du P Greyling<br>Instructed by:<br>Steenkamp, De Villiers Coetzee<br>BLOEMFONTEIN |

/EB