IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 1981/2016

In the matter between:

LUTHULI POWER CORPORATION (PTY) LTD	1st Applicant
THE EMPLOYEES OF TRANSFIX TRANSFORMERS SA (PTY) LTD	2nd Applicant
MTHUNZI ALBERT LUTHULI	3rd Applicant

and

TRANSFIX TRANSFORMERS SA (PTY) LTD	1st Respondent
TRANSFIX S.A.	2nd Respondent

CORAM: DAFFUE, J

HEARD ON: 13 OCTOBER 2016

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 22 DECEMBER 2016

I INTRODUCTION

[1] A financially distressed company is the subject of the litigation in *casu*. The court is faced with a main application, *inter alia* to

place the financially distressed company in business rescue and a counter-application in terms whereof, *inter alia,* a declaratory order is sought to the effect that second respondent has validly exercised a call option granted to it in respect of the sale of shares in the financially distressed company.

II THE PARTIES

[2] First applicant is Luthuli Power Corporation (Pty) Ltd, an entity with a 30% shareholding in first respondent and therefore an affected person as contemplated in s 128(1)(a)(i) of the Companies Act, 71 of 2008 ("the Act").

[3] The employees of Transfix Transformers SA (Pty) Ltd are cited as the second applicant.

[4] The third applicant is Mr Mthunzi Albert Luthuli, an adult male engineer and businessman and the sole shareholder and director of first applicant.

[5] First respondent is Transfix Transformers SA (Pty) Ltd, a financially distressed company.

[6] Second respondent is Transfix SA, a company registered and incorporated in terms of the company laws of France, the parent company of first respondent, it being the holder of a 70% shareholding in first respondent.

[7] In order to avoid confusion and without disrespect to any of the parties, I shall refer to first applicant as LPC, second applicant as

the employees, third applicant as Luthuli, first respondent as TTSA and second respondent as Transfix.

III THE RELIEF SOUGHT

[8] The following relief is sought in the main application:

> “1. Placing the first respondent under supervision and commencing business rescue proceedings as contemplated in section 131(1)(4)(a) of the Companies Act, 71 of 2008 (“the Act”).
> 2. Appointing Jay Pema or such other person as this honourable court sees fit, as the interim business rescue practitioner as contemplated in section 131(5) of the Act.
> 3. In the alternative to prayer 2 above, directing the Companies and Intellectual Property Commission (“the Commission”) to appoint Jay Pema as interim business rescue practitioner as contemplated in section 131(5) of the Act.
> 4. Further in the alternative to prayers 2 and 3 above, directing the Commission to appoint such suitably qualified person as business rescue practitioner who satisfies the requirements of section 138 of the Act.
> 5. Costs of the application in the event of it being opposed.

[9] In paragraph 1 of the counter-application second respondent seeks the following relief:

> “1. An order in terms whereof it is declared that the second respondent has validly exercised the call option granted to the second respondent by the first applicant in terms of clause 4.1.9 of the Reinstatement and Amendment to Sale Agreement dated 11 February 2013 (sic) concluded on 3 October 2013 hereinafter the “Reinstatement Agreement”, annexed to the answering affidavit in the main application as annexure “A10”, read with the Sale of Shares

Agreement concluded 11 February 2013, hereinafter the Sale of Shares Agreement, annexed to the founding affidavit in the main application as annexure "MAL6".

[10] Second respondent seeks further orders which will not be quoted *verbatim*. In terms hereof first applicant is to be directed to transfer its shares in first respondent to second respondent and to cede its claims on loan account in first respondent to second respondent against set-off of the purchase price payable in terms of the call option, and in the event of first applicant's failure to transfer the shares and/or to cede the claims, that the sheriff of the court be authorised and directed to sign all documents needed for the transfer of the shares and cession of the claims on loan account. Second respondent also seeks the costs of the counter-application.

IV <u>FACTUAL MATRIX</u>

[11] Groupe Cahors (Cahors) is a foreign company registered in the Republic of France. Its business is to manufacture and supply electrical equipment including transformers worldwide. Transfix is a subsidiary of Cahors.

[12] During or about 2008 Cahors extended its business activities in South Africa, the result being that in about 2010 Transfix acquired all the shares in TTSA. At the time TTSA traded in the supply of electrical equipment, including transformers, although it did not manufacture transformers. Currently TTSA carries on business as an importer, manufacturer and supplier of transformers,

components of transformers, transformer consumables and related products within and around the Republic of South Africa.

[13] In 2010, after the acquisition of the TTSA shares, Transfix and TTSA concluded a technology licence agreement for the manufacture, sale and supply of transformers and related equipment. In terms of this agreement TTSA was licensed to use the intellectual property of Transfix in the manufacturing of transformers and related equipment.

[14] The majority of TTSA's customers and potential customers are State-owned companies and municipalities within South Africa. These customers are required to follow a procurement process which includes the public invitation of bids in terms of a tender process. In order to be more competitive in the tender processes required by the State-owned companies and municipalities, TTSA resolved to engage a shareholder that would enable TTSA to satisfy the relevant requirements of the Broad Based Black Economic Empowerment Act, 53 of 2003.

[15] After negotiations Transfix and LPC concluded a sale of shares agreement on 11 February 2011. In terms of this agreement LPC purchased 30% of the shares in TTSA and 30% of Transfix' claims on loan account against TTSA. The agreed purchase price was R10,7m.

[16] Notwithstanding extensions agreed upon, LPC was unable to obtain the required financing. The sale of shares agreement eventually lapsed on 30 September 2013 in that no financing could be obtained notwithstanding several extensions of the

deadline. A reinstatement agreement was concluded between the particular parties on 3 October 2013. The purchase price was reduced to R9,134m. In terms hereof Transfix lent and advanced the amended purchase price to LPC by means of a loan which had to be repaid on or before 30 June 2015. The 30% shareholding and 30% of the claims on loan account passed to LPC effectively from 1 September 2013. Another extension was granted to LPC, but it failed to repay the loan on or before the agreed deadline, to wit 30 December 2015.

[17] In terms of the reinstatement agreement LPC granted Transfix the option to call upon LPC to sell the relevant shares and its claims on loan account against TTSA to Transfix at a purchase price equal to the aforesaid loan granted to LPC which purchase price would be set-off against the amended purchase price referred to *supra*.

[18] LPC has no assets, save for its shareholding in and loan account against TTSA. Luthuli is the sole director of Madlanduna Corporation (Pty) Ltd which company was placed under business rescue on 18 August 2015. Three judgments, one by Nedbank Ltd in the amount of R1 308 710,00, the second by The Patrick Partnership in the amount of R78 485,00 and a third by Growthpoint Properties in the amount R62 585,00 were obtained against Luthuli during December 2014, April 2011 and September 2010 respectively. During June 2015 Luthuli obtained a personal loan from Societe Nouvelle Transfix Toulon in the amount of R178 240,00. According to respondents Luthuli also undertook to contribute an amount of between R4m and R5m to TTSA for working capital by the end of March 2016 which he failed to do.

LPC and/or Luthuli elected not to respond pertinently to these allegations in the replying affidavit.

[19] It is TTSA and Transfix' case that the aforesaid facts illustrate that it is highly unlikely, in the event that TTSA is placed under the business rescue, that LPC and Luthuli would be able to contribute to post commencement finance; in this regard a total amount of R32m will be needed as set out in the draft business rescue plan to which I shall refer *infra*.

[20] During the beginning of 2016 Luthuli expressed an interest to purchase 100% of the shares in TTSA and in fact applied to the National Empowerment Fund (NEF) for funding in respect of the amount of R20m, being the proposed purchase price. LPC admitted in its application to NEF, compiled by Luthuli, the following in respect of LPC's 30% shareholding in Transfix: "…For various reasons LPC's 30% (shareholding) has reverted back to Transfix." This application was unsuccessful, as was the case with a similar application, simultaneously made to the Industrial Development Corporation ("IDC").

[21] During the first few months in 2016 Transfix through its Bloemfontein's attorneys corresponded with LPC and Luthuli in terms whereof the call option was exercised and efforts made to arrange for the signing of the required documentation to re-transfer the shares and cede the claims on loan account. I refer to the letters dated 27 January 2016, 17 February 2016, 8 March 2016 and 11 April 2016. On 13 April 2016 Transfix's attorneys requested a meeting in this regard, but were informed the next day that the issue surrounding the shares was irrelevant and not

pressing. Three weeks later the business rescue application, i.e. the main application, was issued.

[22] In terms of its audited financial statements for the 2015 financial year TTSA's accumulative financial loss amounted to R58,3 m. Mr Steyn Strauss, TTSA's attorney pointed out at a board meeting of 9 March 2016 that if a company does not pass the liquidity and insolvency test under s 4 of the Act, it must consider filing for business rescue. However no such decision was taken at the time. Subsequently TTSA issued a notice to employees in terms of s 189 of the Labour Relations Act, 66 of 1995 wherein it categorically stated that it was financially distressed. A further notice to employees was sent, indicating that TTSA anticipated that between 17 to 20% of its employees were likely to be retrenched. It is admitted by Transfix that it has decided to disinvest in South Africa, but that TTSA together with its plant and infrastructure would remain in the country. In order to successfully dispose of its shares, Transfix has to ensure that TTSA remains operational. It is in its interest, it being the only shareholder that has provided financial assistance to TTSA all along.

[23] On 21 April 2016 LPC, represented by Luthuli, also a director of TTSA and without the knowledge and consent of TTSA and Transfix and/or their directors, concluded a memorandum of understanding with JSHP Transformers (China) ("JSHP") and Shanbao Machinery (Pty) Ltd ("Shanboa"), two rival companies. In a letter dated 28 April 2016 the managing director of Shanbao stated *inter alia* that this company is the sole agent for JSHP and continued as follows:

"The parties are currently in negotiations in respect of the deal. Our representatives are also currently in China with JSHP discussion the acquisition.

…

We together with JSHP, are willing to support the business rescue of TTSA as s post commencement financier should the parties agree to the deal.

…

As a point of departure, should we decide to invest in TTSA through the provision of post commencement finance, we would require new class A shares to be issued to the investors proportionate to their contributions. All existing issued shares in TTSA will also have to be converted into class B shares. The rights associated with the respective share classes will have to be negotiated and determined in due cause." (emphasis added.)

A copy of the letter is attached to the papers, but more importantly, it is not confirmed under oath and therefore contains inadmissible evidence. In a letter of 30 April 2016 LPC indicated that it would also be prepared to act as post commencement financier as envisaged in the draft business rescue plan. I referred to its financial position *supra*.

[24] A draft business rescue plan ("BRP") is attached to the founding affidavit. The draft BRP makes it clear that the plan is premised on the injection of post commencement finance without which there is no reasonable prospect of rescuing the company. R32m would be required in the form of post commencement finance in order to give effect to the declared proposals and turnaround strategy.

[25] Luthuli claims that he has a 15,1% shareholding in Nuclear Consultants International (Pty) Ltd which shares have been valued between R15m and R28m. At the time of deposing to his founding affidavit on 4 May 2016 he was allegedly in the process of disposing these shares. According to him the proceeds or part thereof would be used towards TTSA's post commencement funding. This version is highly contested. Luthuli does not have any shares in the particular company, but the shares are held by Madlanduna Investment Corporation (Pty) Ltd *ex facie* the financial statements attached to the replying affidavit in the main application.

[26] The draftsman of the draft BRP, Mr Stefan Steyn, is a business rescue practitioner who also assisted Luthuli and/or LPC with the loan application made to the NEF referred to *supra*. Mr Steyn never consulted with any of the other directors of Transfix or TTSA and it is also apparent that he is the very same person who valued the shares of Nuclear Consultants International (Pty) Ltd as is evident from his letter dated 29 July 2016 to the directors of Madlanduna Investment Corporation (Pty) Ltd. It is respondents' case that Mr Steyn is not an independent person, but in any event, the draft BRP is premised on the injection of post commencement finance subject to certain conditions, at least one which will never be obtained, i.e. Transfix will not agree to conversion of its shares as anticipated, and therefore business rescue as suggested remains a "pie in the sky".

V APPLICABLE PRINCIPLES IN MOTION PROCEDURE

[27] In motion proceedings the affidavits not only serve as the pleadings, but must also contain the essential evidence which would ordinarily be let at the trial. See *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para [28].

[28] A party in motion proceedings is obliged to state the facts as well as the conclusions drawn from such facts in his or her affidavits and is not allowed to base an argument on passages and documents annexed to the papers unless the conclusions sought to be drawn from such passages have been canvased in their affidavits. See *Minister of Land Affairs and Agriculture and Other v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) at 200B-E. An applicant must make out his case in the founding affidavit and will not be allowed to do so and/or to rely upon new matter in the replying affidavit, notwithstanding the fact that such matter has not been struck-out. See *Van Zyl and Others v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) at 307E - 308A and see also *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein Kyalama (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) at para [29].

[29] In line with *Plascon-Evans* final relief may only be granted in motion proceedings if the facts averred by the applicant which have been admitted by the respondent justify such an order, unless the allegations and denials by the respondent are so far-fetched or untenable that the court is entitled to reject the respondent's version merely on the papers. In general, decisions of fact cannot properly be made in motion proceedings on a

consideration of the probabilities, unless the court is satisfied that there is no real and genuine dispute on the papers regarding the facts in question, or that one of the parties' allegations are so far-fetched that it may be rejected on the papers, or *viva voce* evidence would not disturb the probabilities. See *Administrator of the Transvaal and Others v Theletsane & Others* 1991 (2) SA 192 (A) at 197A-B.

VI **PRINCIPLES APPLICABLE TO COUNTER-APPLICATIONS**

[30] Rule 6(7) of the Uniform Rules of Court provides as follows:

> "Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action. In the latter event rule 10 shall apply *mutatis mutandis*."

[31] It is the premise of the rule that the main and counter-application should be adjudicated *pari passu*. The purpose of the established practice to dispose of a claim and counter-claim *pari passu* is to avoid a multiplicity of actions and to dispose of all issues between the parties in a single trial.

VII **PRINCIPLES PERTAINING TO BUSINESS RESCUE IN PARTICULAR**

[32] In *Absa Bank Ltd v Caine NO and Another, in re: Absa Bank Ltd v Caine NO and Another* 3813/2013, 3915/2013 [2014] ZAFSHC 46

(2 April 2014). I pointed out in paragraph [39] that business rescue proceedings are much better suited to provide solutions for financially distressed companies than was the situation with judicial management under the Companies Act, 61 of 1973, in particular insofar as one of the prerequisites of that Act was that a reasonable probability had to be shown that if a company was placed under judicial management, it would be enabled to pay its debts or meet its obligations and become successful. The legislature earnestly tried to avoid the problems experienced with judicial management. Business rescue proceedings are much more flexible and financially distressed company friendly than judicial management. The Act must be interpreted and applied in a manner that gives effect to the purposes set out in s 7 of the Act. One such purpose is of particular relevance, i.e. 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. See s 5, read with s 7(k) of the Act.

[33] "Business rescue" is defined in s 128(1)(b) of the Act as: "proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for -

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) the temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from an immediate liquidation of the company."

[34] The *locus classicus* on business rescue is *Oakdene Square Properties supra.* Insofar as major creditors may be opposed to a contemplated or potential BRP, it is apposite to quote the following *dicta* contained in paragraphs [37] and [38] of *Oakdene Square Properties supra*:

> "[37] In these circumstances I do not believe Nedbank and Imperial can be branded unreasonable in their declared intent to oppose any business plan in line with either of the two options proposed by the appellants. The court a quo regarded this declared intent by the two major creditors – and the holders of 60 per cent of the shareholding in the company – as one of the reasons why business rescue was doomed to fail (see para 47). In argument before us the court a quo was criticised for doing so. Authority for this criticism was sought in the following statement from Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd 2012 (5) SA 497 (WCC) in para 55:
>
> 'In the answering affidavit both [the major creditors] make it clear that they are not in favour of any BRP plan, and that they will vote against it at any meeting to be convened by the business rescue practitioner in terms of ss 132(2)(c) and 152 of the Act. They accordingly urged the court not to sanction an exercise in futility, and to rather make an order of winding-up. Such an approach appears, at first blush, to be a stratagem to advance the argument for winding-up: one would have expected a responsible creditor to be open to any proposal that may ultimately redound to its benefit. Such an approach certainly does not accord with the overall purpose of BRP which, as I have demonstrated above, are aimed at saving

> rather than destroying a business, and in which consultation and consensus-seeking would be the point of departure.'
>
> [38] If the statement is intended to convey that the declared intent to oppose by the majority creditors should in principle be ignored in considering business rescue, I do not agree. As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or mala fide. By virtue of s 132(2)(c)(i) read with s 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the court in terms of s 153. But that, of course, will take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable. In these circumstances I do not believe that the court a quo can be criticised for having regard to the declared intent of the major creditors to oppose any business rescue plan along the lines suggested by the appellants."

[35] I was also referred by Mr Van der Walt on behalf of respondents to *Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC and Others* 47327/2014 [2015] ZAGPPHC 255 (11 March 2015) at para [38]; *ex parte: Target Shelf 284 CC; Commissioner, South African Revenue Service and Another v Cawood NO and Others* 21955/2014; 34775/2014 [2015] ZAGPPHC 740 (13 October 2015) at para [44]; *Senwes Limited v Zellenhen Boerdery CC and Others; Zellehen Boerdery CC v Senwes Ltd* 50799/2015; 50486/2015 [2016] ZAGPPHC 373 (31 March 2016) at paras [26],

[27] and [39] and *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 7076/2015 [2016] ZAKZDHC 24 at para [57]. Applicants' counsel, Mr Bitter, submitted that these judgments were irrelevant and distinguishable insofar as all of them dealt with the situation where business rescue proceedings had been commenced with and the business rescue practitioners having presented affected persons with their business rescue plans for voting. In any event, according to Mr Bitter, *in casu* the applicants went further than was required by the Act and relied on a draft BRP, but it was not for the respondents to at this stage voice their objection as this can be done when the business rescue practitioner to be appointed eventually presents his plan to affected persons.

[36] I quote from para [38] of the judgment of Tuchten J in *Shoprite Checkers supra:*

> "<u>I do not accept that a vote by a creditor which is cast in good faith, in the sense that the creditor genuinely believes that a vote against the proposed plan would advance that creditor's interests, can be inappropriate. I can see nothing unsuitable, unfitting or improper in a vote that honestly reflects a voter's opinion as to his best interests</u>. … The purposes of business rescue, broadly stated, are to revive faltering companies or achieve improved dividends for those companies which cannot be revived; in short, to put more money in the pockets of affected persons in general. In this context the interests of creditors, whose own money is at risk, are predominant. Whether either of these results can be achieved in a particular case depends on a forecast, which itself is based on one or more assumptions; in short on an assessment of risk. The business of companies and their creditors, in the present context, is the pursuit of monetary profit. <u>I do not think that the purposes of the new</u>

<u>Companies Act will be advanced by vesting in the courts a power to impose upon business people financial risks which they, on honest reflection, judge ill advised</u>." (emphasis added.)

[37] In *Senwes supra* Molefe J dealt with matter as follows:

"[26] It is evident from the record that at the time when Senwes exercised its vote against the plan, it knew that there was a substantial yield which would become available from the crops. Senwes was not willing to sacrifice its security in exchange for the hope that over a period of a year, contemplated by the plan, it must hope for a favourable realization of the other assets of the CC and its sureties. Had the CC been put in liquidation, Senwes would have enjoyed a first right to the entire proceeds of the crops ahead of all the other creditors. Therefore, it cannot be said to be inappropriate for Senwes to prefer a winding-up instead of a business rescue. I have no doubt that Senwes exercised its vote by voting against the plan in the belief that it would further its interest this way. <u>I do not find anything unsuitable or improper by Senwes voting against the plan.</u>

[27] There is nothing in section 134 (3) of the Act that suggests or indicates that a secured creditor can be compelled to surrender his security. It is inconceivable to view a vote against the plan to be inappropriate, if the bona fide belief is that the plan entails a risk for security.

…

[39] By voting against the plan, Senwes casted a vote in good faith in genuine belief that its vote against the plan would advance its interests because if there is no business rescue plan and the CC is liquidated, Senwes would outrank the claims of all other creditors on the proceeds of the crops. <u>In the prevailing circumstances, I find nothing unfit, unsuitable or improper in Senwes' vote which is inappropriate.</u> I therefore cannot, from

> these considerations conceivably think how it can be contended that Senwes had exercised its vote inappropriately." (emphasis added.)

[38] In para [57] of *JVJ Logistics supra* Olsen J expressed him in the following terms:

> "The business plan postulates the first respondent capitalising the company and for the achievement of that purpose being kept out of its lawful entitlement to possession of its property for over three years. The plan did not propose merely to compromise the first respondent's existing claim as a creditor, but sought to compel the first respondent to fund the company, and against its will to submit to a regime of risks, and infringements of its own future rights represented by its proprietary interest in the vehicle. I cannot discern any basis upon which a court could burden the first respondent with these obligations against its will by declaring its vote "inappropriate", and in effect thereby giving the plan the requisite approval." (emphasis added.)

[39] There is no doubt that "reasonable prospects" is a lesser requirement than "reasonable probability" which was the yardstick for placing a company under judicial management as mentioned *supra*. Brand JA dealt at paragraph [29] in *Oakdene Square Properties supra* with the term "reasonable prospect" and submitted that the emphasis should be on "reasonable", i.e. that the prospect must be based on reasonable grounds. A mere speculative suggestion is not enough and the same applies to an arguable possibility. Furthermore reasonable grounds must be established in accordance with the laws of motion proceedings stated *supra*, which generally speaking, require that an applicant must make out its case in its founding papers. Brand JA, in

dealing with a submission of appellant's counsel and dismissing it as incorrect, made the following remarks at paragraph [31] of *Oakdene Square Properties supra*:

> "… Self-evidently the development of a plan cannot be a goal in itself. It can only be the means to an end. That end, as I see it, must be either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process. I have indicated my agreement with the statement in Propspec that the applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of s 141. <u>But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)(b)</u>." (emphasis added.)

VIII **<u>EVALUATION OF THE EVIDENCE AND SUBMISSIONS OF THE PARTIES</u>**

[40] Although respondents' case is that Luthuli is neither a creditor, nor an employee of TTSA and that he has no *locus standi* in the application, which I am prepared to accept based on *Plascon Evans,* it is apparent that LPC as a 30% shareholder is an affected person. However I accept respondents' version that LPC is not a creditor of TTSA. Respondents deny that NUMSA and the employees of TTSA are properly cited as parties to the proceedings and/or have been joined properly. I tend to agree with this submission, but it is not taking the issue any further insofar as LPC as an affected person has *locus standi* in the main application for business rescue.

[41] There is no doubt severe animosity between Luthuli and TTSA's other directors and Mr Hibon, the deponent to the affidavits on behalf of Transfix and TTSA, in particular. I considered the various accusations made in the letters and emails attached to the papers, but it would serve no purpose to evaluate the accusations in any detail and I shall refrain from doing so. The most important aspects relating to the main and counter-application will be dealt with in my evaluation of the evidence. Bearing in mind the versions presented to me, I wish to state already at this stage that I am prepared to accept, on the basis of *Plascon Evans,* the version of respondents in respect of the factual disputes relating to the main application. There is no reason to find respondents' version as far-fetched, false or even improbable.

[42] It is clear that neither Luthuli, nor LPC, has any funds readily available to make any meaningful contribution to the financial obligations of TTSA and/or to contribute to post commencement finance as anticipated in the draft BRP. I accept that Luthuli was instrumental in TTSA receiving substantial orders from Eskom in particular, but as indicated by respondents, he exposed TTSA to business risks in that he negotiated prices that were too low and on more than one occasion accepted orders from Eskom whilst TTSA did not have the required cash flow to purchase the relevant components and was unable to deliver accordingly. His actions were even considered to be out of control, reckless and unacceptable. Simultaneously it may be pointed out that Luthuli received commission on sales and it would therefore be in his interest to obtain so many orders as possible, notwithstanding the fact that it might not be in the interest of TTSA. I do not have to

make any finding in this regard as the dispute is not relevant for present purposes and consequently I shall refrain from doing so.

[43] Luthuli makes a song and dance of the fact that the purchase price initially agreed upon for 30% shareholding in TTSA, as well as the revised purchase price, is out of proportion with the value of the shareholding, relying on misrepresentations pertaining to the financial position of TTSA. This can never be regarded as acceptable evidence. He was presented with the 2013 financial statements of TTSA before the re-instatement agreement was entered into and had an opportunity to study these audited financial statements. He made several comments in this regard in his email of 29 July 2013 and even made the following comment:

> "We are business people and we can settle on any reasonable figure that we are both comfortable with. Over the years, I have come to realise that value is not always determined by financial figures only. What figure do you suggest we settle on – a figure that is fair to both Transfix and LPC?"

LPC and Luthuli failed to disclose that the re-instatement agreement was concluded against the background that Luthuli addressed the email communication on behalf of LPC wherein he specifically recorded that the parties should settle upon a reasonable purchase price.

[44] One gets the impression from LPC's answering affidavit to the counter-application deposed to by Luthuli that LPC is entitled to the 30% shareholding in TTSA without any consideration payable

by it. On 21 December 2015 two letters were addressed to Transfix, one by Luthuli personally and the other by his attorney. The attorney sought extension for repayment of the loan until 30 May 2016. In Luthuli's letter he requested that the LPC shares be transferred to Madlanduna Investment Corporation (Pty) Ltd, "which is the company that has money and assets".

[45] It is respondents' case that the business rescue application has been filed with an ulterior motive, i.e. to open the door for the acquisition of TTSA's shareholding and its business operations by JSHP and Shanboa. LPC's submissions that the counter-application is irrelevant, does not hold any water as alleged by respondents who submitted that the counter-application is indeed relevant. Respondents submitted that, once relief is granted in terms of the counter-application and the shares in and claims on loan account against TTSA are retransferred and ceded respectively to Transfix, Transfix would be in total control of TTSA. It would then be able to either subordinate its claims on loan account against TTSA or to convert such claims on loan account into shares in order to place TTSA in solvent circumstances. Once TTSA is solvent, Transfix will be able to alienate or dispose of its interest in TTSA on favourable terms. This proposition cannot be rejected and bearing in mind the enormous financial contributions already made by Transfix, it is only reasonable that its views and vision be considered thoroughly. If TTSA is sold as a going concern, the employees or the majority of them, will probably be retained by the new owners if their expertise and experience are taken into consideration.

[46] It is unacceptable that LPC can rely on its 30% shareholding in TTSA to be regarded as an affected person with *locus standi* to bring the business rescue application, but simultaneously persisting in its failure (and/or refusal) to settle its indebtedness relating to acquisition of the shares. In any event, in its application to NEC, it unambiguously made it clear that its 30% shareholding in TTSA had reverted back to Transfix and therefore it needed funds to obtain a 100% shareholding in TTSA (and not only 70%). This serves as proof that Transfix is entitled to relief in the counter-application which I shall discuss *infra.*

[47] It is no doubt true as stated by Brand JA in *Oakdene Square Properties supra* that it is not required of an applicant to set out a detailed business rescue plan in its founding affidavit. The fact of the matter is that the applicant must establish grounds to show a reasonable prospect of achieving one of the goals in section 128(1)(b) of the Act. Respondents have criticised the draft BRP presented by Mr Steyn and in order to counter that, LPC submitted in reply that the draft BRP is not the alpha and omega and that the business rescue practitioner to be appointed may eventually come up with a different final plan. LPC therefore submitted that Transfix was premature to voice its objection to business rescue and the draft BRP. Mr Bitter also submitted as mentioned *supra* that the various judgments referred to by Mr Van der Walt should not be followed as they are distinguishable on the basis that in all those cases business rescue proceedings had been commenced and affected persons were called upon to vote for or against the plans as presented.

[48] In my view Transfix as majority shareholder and majority creditor with a total value of approximately 92% of the total claims, is the major role player whose views must be considered seriously. I refer to Brand JA's comments in *Oakdene Square Properties* pertaining to the views of Nedbank and Imperial. I have considered Transfix's reasons why it would not support the BRP prepared by Steyn and cannot find any reason to differ from its approach. It is apparent that LPC, JSHP and Shanboa were in the process of negotiating and no firm agreement was entered into. It is highly unlikely that the two international companies will contribute to any post commencement finance, considering the condition that new class A shares be issued to investors proportionate to their contributions and that all existing shares in TTSA should be converted into class B shares and Transfix' declared unwillingness to consent to such conversion. This should really be the end of the road. Furthermore it is clear that the prospects of these two companies contributing to post commencement finances are dependent upon a number of contingencies and consequently highly speculative. In any event, Transfix is not prepared to accept R20m in full and final settlement of its claim on loan account which claim is in excess of R65m, while other creditors are paid in full. The Memorandum of Understanding has lapsed in the meantime and no evidence has been tendered in respect of alternative plans.

[49] Mr Steyn assumes in his draft BRP that TTSA will be able to increase its share in the South African transformers supply market to 25% by the year 2020. No substantive and acceptable evidence supporting this assumption is disclosed in the BRP or in

the founding affidavit, rendering the assumption mere conjecture. Currently TTSA's market share is merely 5%.

[50] The draft BRP is also premised on the basis that TTSA must produce 52 units per week whilst it is currently only producing 20 units per week. In order to double its production TTSA would require a larger industrial plant as well as an increased workforce. This will result in a serious increase in respect of the overhead costs and would jeopardise any prospect of rescuing TTSA.

[51] Mr Steyn emphatically states in the draft BRP that without the injection of post commencement finance in the amount of R32m, there is no reasonable prospect of rescuing TTSA. Bearing in mind the acceptable and admissible evidence placed before me, I am of the view that Transfix as the major creditor and shareholder cannot be criticised for adopting its stance. Its declared intent is to vote against any BRP plan to be drafted on the basis of the draft BRP. In doing so I am satisfied that it will act in good faith. There is no reason to believe that Transfix is unreasonable or *mala fide.* There is nothing unsuitable, unfitting or improper in the stance taken. It must be remembered that Transfix invested millions of Rands in TTSA, whilst LPC has not provided any financial assistance at all. Notwithstanding Transfix' financial assistance, TTSA is running at a loss. Transfix should be allowed to deal with TTSA as suggested in the papers.

[52] Luthuli does not have any shares in Nuclear Consultants International (Pty) Ltd. His version is in direct contrast with the documentary evidence presented by him. The 15.1% shareholding referred to by him is held by Madlanduna

Investment Corporation (Pty) Ltd, a company which is presently under business rescue. As a result Luthuli is not entitled to dispose of the shares which this company holds, even if he is a director thereof. LPC, by its own admission, does not have any assets, save for its shareholding in and claims on loan account against TTSA. LPC was, for a period of about three years, unable to make any payment in respect of the purchase price pertaining to the shares in and loan account against TTSA following the conclusion of the sale of shares agreement. When the re-instatement agreement was entered into, it also failed to repay the loan amount notwithstanding an extension of the deadline. LPC tried to raise finance to purchase the entire shareholding in TTSA, but neither NEC, nor IDC was prepared to come to its assistance. Luthuli and/or LPC also failed to raise an amount of between R4m and R5 m agreed upon to contribute to the working capital of TTSA which amount had to be paid before the end of March 2016. The inability of LPC and Luthuli to settle their debts and/or to successfully apply for financing, stands in sharp contrast to the financial position of Transfix. It has a claim on loan account against TTSA in the amount of R65 429 021,00 resulting in it holding more than 92% of the creditors' voting interest in TTSA. It has been supporting TTSA financially since 2010 and is not prepared to accept R20m only in respect of its loan account.

[53] I am satisfied that even if the inadmissible evidence pertaining to the negotiations between LPC, JSHP and Shanboa is considered for purposes of evaluation of the evidence, these negotiations remain nothing more than talks. It was pointed out during oral argument that the Memorandum of Understanding relied upon by

LPC had lapsed in the meantime without any indication that a new agreement had been entered into. Any suggestion that business rescue would achieve any of the two purposes mentioned in the Act is speculative and baseless. Business rescue is doomed to fail *in casu.*

[54] LPC has not presented any defences whatsoever to Transfix' counter-application and in my opinion a proper case has been made out why the counter-application should be granted. Insofar as LPC contradicts Transfix's version in the counter-application, it is rejected as far-fetched and improbable. Luthuli, representing LPC, admitted on 28 January 2016 at a TTSA shareholders' meeting that LPC was not able to settle the loan owed to Transfix and that Transfix was entitled to exercise the call option. It is not LPC's case that the call option was not properly exercised. Luthuli also admitted in the loan application to NEC that LPC is not entitled to any shareholding in TTSA as the 30% shareholding it previously held, had reverted back to Transfix. The defences relied upon by LPC are unfounded, either in law or in fact. I have indicated *supra* that the alleged inflated valuation of TTSA was irrelevant to the final purchase price agreed upon in terms of the re-instatement agreement concluded on 3 October 2013. The liquidity and/or profitability of TTSA are irrelevant *in casu* and there is no basis to read a tacit term into the written contract that the purchase price had to be paid out of monies generated by TTSA. The full purchase price was advanced by Transfix on loan to LPC and as a result it was be able to and did make payment of the purchase price. LPC had to, if needed, obtain third party finance to settle the loan which it failed to do. I am satisfied that a call option was contractually agreed upon and that Transfix was

entitled to exercise it, which it duly did. LPC failed to sign the relevant documentation as requested.

IX CONCLUSION

[55] It follows that applicants have not made out a case for the relief claimed the main application, but that second respondent's counter-application should succeed. There is no reason why costs should not follow the event.

X ORDERS

[56] 1. The main application:

1.1 The main application is dismissed with costs, such costs to be paid jointly and severally by first and third applicants, the one to pay, the other to be absolved.

2. Counter-application:

2.1 It is declared that second respondent has validly exercised the call option granted to it by first applicant in terms of clause 4.1.9 of the re-instatement agreement concluded on 3 October 2013, read with the sale of shares agreement concluded on 11 February 2013;

2.2 First applicant is directed to transfer the relevant shares which are the subject matter of such call option to the second respondent against set-off of the purchase price payable in terms of the call option against the second respondent's claim against first applicant in terms of the loan granted by the second respondent to the first applicant in terms of clause 4.1.5 of the re-instatement agreement read with the sale of shares agreement, i.e. the capital of such loan together with the accrued interest thereon in terms of such re-instatement agreement read with the sale of shares agreement.

2.3 First applicant is directed to sign all documents required in terms of the provisions of the Companies Act, 71 of 2008 to effect the transfer of such shares to the second respondent in the securities register of first respondent.

2.4 The sheriff of this court is authorised, mandated and directed to do everything necessary and to sign all documents required to effect the transfer of such shares as set out above in the event that the first applicant fails to sign such documents within 10 days after written request thereto by second respondent's attorneys of record.

2.5 First applicant is directed to cede its claims as shareholder on loan account which are the subject of such call option, to the second respondent against set-off of the purchase price payable in terms of the call option against the second respondent's claim against first applicant in terms of the loan granted by the second respondent to the first applicant in terms of clause 4.1.5 of the re-instatement agreement read with the sale of shares agreement, i.e. the capital of such loan together with the accrued interest thereon in terms of such re-instatement agreement read with the sale of shares agreement.

2.6 First applicant is directed to sign an agreement of cession in accordance with the provisions of annexure

"A20" to the answering affidavit filed in the main application.

2.7 The sheriff of this court is authorised, mandated and directed to do anything necessary and to sign all the documents required to effect the cession of such claims on loan account as set out above in the event that the first applicant fails to sign such documents within 10 days after written request thereto by the second respondent's attorneys of record.

2.8 First applicant is ordered to pay second respondent's costs of the counter-application.

J.P. DAFFUE, J

On behalf of applicants: Adv. J. J. Bitter
Instructed by:
Govender Patel Dladla Inc.
c/o Webbers Attorneys
BLOEMFONTEIN

On behalf of the respondents: Adv. D. J. van der Walt SC
Instructed by:
Phatshoane Henney Attorneys
BLOEMFONTEIN

/EB