FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3034/2013

In the matter between:-

JACOBUS ELISA KRITZINGER	First Applicant
IMESCO (PTY) LTD	Second Applicant

and

STANDARD BANK OF SOUTH AFRICA	Respondent

HEARD ON: 31 JULY 2013

JUDGMENT BY: RAMPAI, AJP

DELIVERED ON: 19 SEPTEMBER 2013

[1] The matter came to court by way of an urgent application on 29 July 2013 for a rule *nisi* returnable on 31 July 2013. The respondent opposed the application. I granted no interim order. Instead I determined formal deadlines and postponed the matter to 31 July 2013 for argument.

[2] The applicants sought a threefold relief whereby the respondent was, firstly, interdicted from enforcing certain guarantees; secondly, the suspension of certain bank accounts was uplifted and, thirdly, the respondent was interdicted from withholding certain funds deposited into the second applicant's bank account.

[3] The background facts were presented to me by way of three sets of affidavits, *viz* the founding affidavit, the answering affidavit and the replying affidavit. I made

an *ex tempore* order whereby I dismissed the application with costs. Subsequently the applicants filed a formal request for reasons.

[4] There were many facts which were largely undisputed. There were also facts which, although not admitted, could not be seriously denied. No harm could conceivably be done by treating both of the two types as common cause between the parties.

[5] The first applicant, Mr Jacobus Elisa Kritzinger, was a business rescue practitioner. He was appointed to rescue the second applicant from deteriorating financial distress. He was appointed in terms of section 129(3) by the company, in other words the second applicant, on 28 May 2013 – *vide* annexure "jek1".

[6] He was licensed in terms of section 138 Companies Act 71 of 2008 by the Companies and Intellectual Property Commission (CIPC) on 10 June 2013 to serve as a business rescue practitioner in regard to the rescue proceedings of Imesco (Pty) Ltd, the second applicant – *vide* annexure "jek5". He was subject to probation in terms of section 162(7). He was not disqualified in terms of section 69(8) from acting as a director of a company. He did not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that his integrity, impartiality or objectivity was compromised by such relationship. He was not related to anyone who had a relationship as contemplated in the preceding sentence. He deposed to the founding affidavit. I shall refer to him as the practitioner.

[7] The second applicant was Imesco (Pty) Ltd, a private company with limited liability and with a principal place of business in Welkom. The second applicant has principally conducted business operations as a provider of mining supplies in the Goldfields. It has seemingly been rendering such mining services since 1965 or so. Mr Graham Sydney Lloyd was the director of the company. I shall refer to the second applicant as the company.

[8] The respondent is the Standard Bank of South Africa Limited, a registered financial institution and an authorised financial and credit services provider. The

respondent conducted business in Welkom, but its head office is in Johannesburg. The respondent is simply a commercial bank. The respondent provided certain financial services to the company for years. Henceforth I shall refer to the respondent as the bank.

[9] In this province the agreements relative to the dispute, between the bank and the company were concluded; the banking accounts of the company were held; the guarantees to secure the repayment of the overdraft facility were given; the sureties signed the suretyship agreement and the principal place of business of the bank is situated. Accordingly the parties were in agreement that this court was clothed with the necessary jurisdiction to entertain the matter.

[10] The company had been a customer of the bank for approximately nine years immediately preceding the institution of these proceedings. There were two accounts of the company held at the respondent. The one was a current account number 4[…]. The limit of the overdraft facility associated with the current account was R800 000,00. The company utilised the account or overdraft facility to provide operating capital necessary to sustain its core mining operations. The other was a special account number 4[…]. It was designated as the so-called salary account. The company utilised the account for the exclusive purpose of paying salaries and wages of its employees. From now on I shall refer to the former as the overdraft account and the latter as the salary account. The limit of the overdraft facility was annually revised. The latest revision was done during September 2012. Since then the limit was fixed at R800 000,00.

[11] During May 2012 it became apparent to the company that it was unlikely that it would be able to pay all of its debts as and when they became due and payable within the immediately ensuing six months. The company was, therefore, financially distressed as contemplated in section 128. The board of its directors decided to embark upon a rehabilitative course of remedial action. To facilitate that process, the board of directors resolved that the company voluntarily commence with business rescue proceedings. The company resolved on 28 May 2013 to begin the process of placing itself under the external supervision of the business rescue practitioner.

[12] The requisite resolution was properly filed as contemplated by section 129(2). Within five days after the passing of the resolution the company gave notice of the resolution in the prescribed manner. The practitioner was then appointed by the company. Notice of his appointment was given to all the affected creditors. The bank was one of them – *vide* annexure "jek6". The notice in terms of section 129(2) together with the supporting affidavit was dispatched to the bank, among other affected creditors. The effective date on which the business rescue practitioner of the company commenced was 7 June 2013 – annexure "jek4".

[13] At the time this application was launched none of the affected parties, including the bank, had applied to this court: to have the resolution whereby the business rescue practitioner were commenced set aside; to have the appointment of the business rescue practitioner set aside; or to have security furnished by the business rescue practitioner.

[14] The business rescue proceedings which commenced on 7 June 2013 were still extant at the time this application was launched on 26 July 2013 by way of the following facts: The resolution to begin business rescue proceedings had not been set aside; the relative business rescue proceedings had not been converted into business liquidation proceedings and no notice of termination of business rescue proceedings had been filed with the CLPC.

[15] On 19 June 2013 and within ten days of his appointment, the practitioner convened and presided over the first meeting of creditors. A representative of the bank attended the meeting. The practitioner informed the creditors that, in his opinion, there was a reasonable prospect of rescuing the company. At that meeting the creditors submitted various claims to the practitioner.

[16] On the same day, 19 June 2013, the respondent favourably reviewed the banking facilities granted to and enjoyed by the second applicant as would more fully appear from the banking facility letter – annexure "jek3" to the founding affidavit. Subsequent to the meeting the practitioners approached the bank with the view of procuring post commencement funding of the business rescue

proceedings. That he did, in terms of section 135. However the bank declined to finance the business rescue of the company.

[17] On 17 July 2013 the bank informed the practitioner that it would apply the balance of R280 000,00 standing to the credit of the company in the salary account in partial reduction of its overdraft exposure and that it would retain all debtor funds (past, present and future) to settle in full its overdraft exposure – annexure “jek7”.

[18] In response to the decision of the bank to recall the overdraft, the practitioner addressed a letter (annexure “jek8”) to the bank on 18 July 2013. He questioned the lawfulness of the decision and actions of the bank to suspend the overdraft account, to withhold the funds in the salary account and to apply a set-off during the course of the business rescue proceedings – annexure “jek8”. He relied on section 133 in terms of which a company, subject to business rescue proceedings is generally immuned from legal proceedings.

[19] The bank turned down the practitioner’s request on 19 July 2013 to reconsider its decision. Instead it advised him of its decision to collect the debtors of the company. Moreover, the bank called upon the practitioner to account to the bank by 26 July 2013 for the proceeds of the book debts collected since 7 June 2013 being the effective date on which business rescue proceedings commenced and to pay the funds so collected over to the bank. The bank advised the practitioner (annexure “jek9”) on 22 July 2013 that it was entitled to collect the book debts in favour of the company by virtue of a cession agreement.

[20] At the close of business on 7 June 2013 the credit balance of the current account was R730 181,00. The business rescue proceedings commenced on that day. The current account was suspended on 18 July 2013. Between those two dates the sum of various amounts deposited or transferred into the two accounts was approximately R2,7 million. On account of the suspension of the bank accounts and the refusal of the bank to provide the company with post commencement finance, the practitioner opened a new banking account in the name of the company. The new account was held at Investec Bank. Since then the practitioner has being collecting book debts from the debtors of the company and

depositing them into the new account held at Investec. The practitioner conceded that he utilised the sum of R395 000,00 thereof which he withdrew from the overdraft account to provide operating capital to the company.

[21] Last year on 28 September 2012 the bank and the company concluded an agreement in respect of an overdraft facility, among others. The agreed limit was R800 000,00 – *vide* banking facility letter annexure "jek2".

[22] This year on 19 June 2013 the bank and the company concluded another agreement in respect of three facilities. The limit of the overdraft facility remained unchanged at R800 000,00 but that of corporate credit cards and that of vehicle and assets finance were substantially increased – *vide* the banking facilities letter annexure "jek3".

[23] Nine years ago, on 13 December 2004, the company ceded its book debts in favour of the bank as continuing covering security for all the amounts which the bank then or in the future may owe to the bank – annexure "0.12", answering affidavit.

[24] Those then were facts that were largely undisputed. There were a number of disputed factual allegations. I do not wish to catalogue them here. I shall deal with the most important of them only during my examination of the facts.

[25] The nub of the matter is whether the company as the financially distressed customer of the bank has a right to demand from the bank post commencement financing of its business rescue proceedings in order to stay alive.

[26] On behalf of the applicant, Mr Van Aswegen submitted that the issue had to be affirmatively determined in favour of the applicants. Accordingly, counsel urged me to grant the relief as set out in the notice of motion as modified during the course of argument – *vide* annexure "jek12", replying affidavit.

[27] On behalf of the respondent, Mr Snellenburg, differed and submitted that the issue had to be negatively determined in favour of the respondent. Accordingly counsel urged me to refuse the relief sought.

[28] Section 135 of the Companies Act, 71 of 2008 provides:

> "**Post-commencement finance**
>
> - (1) …..
> - (2) During its business rescue proceedings, the company may obtain financing other than as contemplated is (sic) subsection (1), and any such financing:
>
>   (a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and
>
>   (b) will be paid in the order of preference set out in subsection (3)(b).
>
> - (3) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated:
>
>   (a) in subsection (1) will be treated equally, but will have preference over;
>
>   (i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and
>
>   (ii) all unsecured claims against the company; or
>
>   (b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.
>
> - (4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation."

[29] Section 133 provides:

“**General moratorium on legal proceedings against company**

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

(a) with the written consent of the practitioner;

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

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

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

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

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

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.”

[30] Section 134 provides:

“**Protection of property interests**

(1) …..

(2) …..

(3) If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must:

(a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and

(b) promptly;

(i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or

(ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.”

[31] Section 150 provides:

“**Proposal of business rescue plan**

(1) The practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151.

(2) The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan, and must be divided into three Parts, as follows:

(a) Part A:Background, which must include at least:

(i) a complete list of all the material assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began;

(ii) a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;

(iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;

(iv) a complete list of the holders of the company's issued securities;

(v) a copy of the written agreement concerning the practitioner's remuneration; and

(vi) a statement whether the business rescue plan includes a proposal made informally by a creditor of the company.

(b) **Part B**:Proposals, which must include at least:

(i) the nature and duration of any moratorium for which the business rescue plan makes provision;

(ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;

(iii) the ongoing role of the company, and the treatment of any existing agreements;

(iv) the property of the company that is to be available to pay creditors' claims in terms of the business rescue plan;

(v) the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted;

(vi) the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and

(vii) the effect that the business rescue plan will have on the holders of each class of the company's issued securities.

(c) **Part C**: Assumptions and conditions, which must include at least:

(i) a statement of the conditions that must be satisfied, if any, for the business rescue plan to:

(aa) come into operation; and

(bb) be fully implemented;

(ii) the effect, if any, that the business rescue plan contemplates on the number of employees, and their terms and conditions of employment;

(iii) the circumstances in which the business rescue plan will end; and

(iv) a projected:

(aa) balance sheet for the company; and

(bb) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed business plan is adopted.

(3) The projected balance sheet and statement required by subsection (2)(c)(iv):

(a) must include a notice of any material assumptions on which the projections are based; and

(b) may include alternative projections based on varying assumptions and contingencies.

(4) A proposed business rescue plan must conclude with a certificate by the practitioner stating that any:

(a) actual information provided appears to be accurate, complete, and up to date; and

(b) projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.

(5) he business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by:

(a) the court, on application by the company; or

(b) the holders of a majority of the creditors' voting interests."

So much about the applicable provisions of the statute.

[32] The parties signed an agreement in Welkom on 28 September 2012. The agreement consisted of a two page document. The agreement made provision for the suspension or withdrawal of facilities. The three banking facilities granted by the bank to the company related to the overdraft, the business cards as well as the financing of vehicles and assets. Clause 3.1.1.9 thereof provides:

> "Suspension or withdrawal of facilities:
> The overdraft facilities are granted to you at our sole discretion. If there is a Material Deterioration in your financial position we may immediately suspend or withdraw, without notice to you, all or part of the Limit, or Reduced Limit (if applicable), and all amounts owing will immediately become due and payable to us."

[33] The full signatures of the respondent of the parties appear nowhere on the annexed two pages. However, it appears from the foot of page 2 that the complete agreement was embodied in eleven pages of which 9 were not annexed to the founding affidavit. I shall shortly demonstrate that of the unattached 9 pages probably contained the general terms and conditions for the grant of (annexure 2) overdraft facilities. That was the one agreement.

[34] It became necessary to compare annexure 3 with annexure 2. The respondent's representative appended his signature on page 4 and the second applicant's representative appended his on page 5, annexure "3". That five page primary component of annexure "3" has 4 paragraphs. The fourth of them deals with special conditions. The parties concluded another agreement (annexure 3) in Welkom this year. A certain Mr Glenton Greepe, the account executive signed the relevant banking facility on 19 June 2013 on behalf of the respondent. Mr J E Kritzinger signed it on 16 July 2013 on behalf of the second applicant. The agreement consisted of an eleven page document. The revision agreement increased the limits of two of the three banking facilities. The overdraft facility

was the exception whose limit remained unchanged. Clause 4.2.1.8 thereof (annexure 3) was identical to clause 3.1.1.9 annexure "2".

> "Suspension or withdrawal of facilities:
> The overdraft facilities are granted to you at our sole discretion. If there is a Material Deterioration in your financial position we may immediately suspend or withdraw, without notice to you, all or part of the Limit, or Reduced Limit (if applicable), and all amounts owing will immediately become due and payable to us."

[35] The rest of the document, in other words p6 – 11 were merely initialled. The 6 page secondary component of annexure "3" has 14 paragraphs. Its heading which appears on page 6, annexure "3" reads as follows:

> **"Terms and conditions for overdraft facilities."**

[36] The parties made provision for the second applicant's possible breach of the overdraft agreement in clause 10. In terms of sub-clause 10.1 the second applicant's default will occur if, among others: the second applicant is in breach of this overdraft agreement and fails to remedy such breach within the time period specified in the respondent's written notice of the breach; there is a material deterioration in the second applicant's financial position; or if the second applicant or any of its sureties commits an act of insolvency as contractually defined by the parties; or if the second applicant does or omits to do anything which may affect the respondent's contractual rights or collaterals in terms of this overdraft agreement.

[37] The parties further made provision in clause 10 for the respondent's possible remedies in the event of the second applicant's default. In terms of clause 10.2 overdraft facilities are repayable on demand if the second applicant is in default. In the case of the second applicant's default, the respondent is entitled to review the terms and conditions applicable to the facilities; or to increase the rate of interest charged in respect of such facilities; or to call, by way of a written notice to the second applicant, for the immediate repayment of all amounts whatsoever

owing to the respondent; or to terminate the facility, by way of a written notice to that effect, in the event of the second applicant's neglect to repay immediately or on the specific date all amounts owning and due to the respondent. Moreover the parties also expressly agreed that if the respondent should suffer any loss or damage as result of any act or omission other than any act or omission specified in clause 10 the agreed default clauses and default procedures would not apply.

So much about the applicable clauses of the overdraft agreement.

[38] The requisites of an interdict were definitely laid down in the classic decision of **Setlogelo v Setlogelo** 1914 AD 221.

[39] Now I proceed to examine the disputed factual allegations, bearing in mind the undisputed factual averments.

[40] The thrust of the one submission made by Mr van Aswegen was that the respondent's failure to give the second applicant written notice in terms of clause 10.2.3 of the secondary component of the overdraft agreement (annexure 3) was fatal to the respondent's case. The clause required the respondent to give the second applicant notice of termination of the facility.

[41] Mr Snellenburg countered that the respondent was entitled in terms of clause 4.2.1.8 of the primary component of annexure 3 to terminate the overdraft facility without notice to the second applicant. The clause empowers the respondent to immediately suspend or to withdraw the overdraft facility granted to the second applicant without giving notice to the second applicant.

[42] At a glance it may seem clause 1.0.2.3 and clause 4.2.1.9 of annexure 3 are in conflict of each other. As I have already pointed out, the former is contained in the general terms and conditions. In general such terms and conditions are standard to all overdraft agreements between the respondent and any of its customers. They were embodied in a separate document which has been in existence long before the 2012 overdraft agreement was concluded. In 2013 the general terms and conditions were simply incorporated into the current overdraft

agreement by reference and attached to it. Elsewhere in this judgment I previously described them as the secondary component of annexure 3 – (*vide* pages 6 -11 thereof). Previously I also described the special terms and conditions which govern the current overdraft agreement as the primary component of annexure 3 – (*vide* pages 1 – 5 thereof).

[43] Upon my integrated reading of annexure “3”, the significance of the aforesaid historical origin and structural composition of annexure “3” became very clear. There is no conflict between the aforesaid two clauses. The mutual and common intention of the parties cannot be accurately ascertained by fragmented and selective reliance on one clause in isolation as the applicant did. The document has to be considered as a whole. So holistically considered it becomes clear and obvious that the parties intended, by means of the special component to modifying the general component of annexure “3” if, in the opinion of the respondent, the financial position of the second applicant has materially deteriorated. This is the one important factor which strongly militates against the contention of the applicants.

[44] The second contention raised by the applicants was that second applicant was immuned in terms of section 133 from legal proceedings since 7 June 2013 being the date on which the second applicant placed itself under business rescue proceedings. By way of such moratorium the second applicant had the statutory right to have no legal proceedings commenced against the second applicant during the cause of business rescue proceedings without the prior written consent of the business rescue practitioner.

[45] The respondent attacked the aforesaid contention of the applicants. The respondents denied that its suspension of the banking facilities it had granted to the second applicant constituted an enforcement action or an unlawful infringement of the general moratorium against commencement of any legal process against the second applicant as envisaged in section 133.

[46] The respondent relied on the fact that the second applicant placed itself under voluntary business rescue process because it was financially distressed. It

followed, without saying, that the underlying cause of such financial distress was the material deterioration of the second applicant's financial position. That constituted default on the part of the second applicant which defaulted boiled down to breach of the material terms of the overdraft facility – clause 10.1.2. On the strength of such material deterioration the respondent was entitled to invoke the remedial provisions of clause 4.2.1.8 to suspend the facilities and to terminate the overdraft agreement in terms of clause 10.2 – see annexure "3".

[47] Indeed the respondent had the unassailable right to terminate the overdraft facility upon evidence of such material deterioration. The moment the company resolved to place itself under voluntary business rescue, it thereby signalled that material deterioration in its financial position had occurred. It was not open to the company or its business rescue practitioner to argue that the bank was wrong in concluding that material deterioration occurred. That was so because the parties had mutually agreed that the bank would, in its free and unfettered discretion, be the sole arbiter as to whether material deterioration has occurred.

[48] On the facts, I am not persuaded that the respondent was in breach of its contractual obligation towards the second applicant. I also failed to see how it could be argued that the respondents had unlawfully violated the statutory provisions of section 133 or the overarching objects of chapter 6 of the applicable statute. On the contrary, the first applicant has already made himself guilty by acting in contravention of section 134(3) to the financial detriment of the respondent. To compel the respondent by means of a court order to continue providing the second applicant's with post commencement finance against its will and contrary to the express terms and conditions of the overdraft agreement would exacerbate the prejudice already suffered by the respondent. In this instance I could find no contractual, legal or any equitable ground for making such a burdensome and invasive order against the respondent.

[49] The book debts of the company cannot be treated as the property of the company any longer. This is so because the company ceded them in favour of the bank to secure not only the overdraft, but other banking facilities as well (annexure "0.12"). Since the second applicant has ceded its debtor book to the respondent,

such book now constitutes the respondent's outright collateral security. Those facilities clearly exposed the bank to potentially unfavourable financial risk of default events. I view of the cession the practitioner, just like the company, was not entitled to collect the book debts of the company and without the respondent's consent in terms of section 134(3), to transfer the money so collected to an unknown banking account held at another bank for the sole benefit of the company. That the practitioner could not lawfully do.

[50] The respondent has no control over such account. It was impermissible for the practitioner to dilute the security of the bank in that manner. Such diversion of the secured funds was a direct and flagrant breach of clause 6.3, annexure "0.12). It expressly provides that the cedent (in other words the second applicant) will deposit the money in a special banking account in the name of the bank (in other words the respondent) over which the bank will have the sole control. Needless to say the respondent has virtually no control over the new account which the practitioner has since opened in the name of the company at Investec Bank.

[51] The law is settled. Where a creditor holds security over a debtor's property, in this instance the company's debtors, the practitioner cannot dispose or use such encumbered property without the secured creditor's consent unless he first discharges the debtor's debts in favour of the creditor – section 134(3). In this instance the business rescue practitioner has done neither. Instead he has drastically subverted the secured creditor's security. The respondent has called upon the first applicant to account for the debtors collected since he took over the rescue operations. The first applicant has, as on 30 July 2013, failed to respond to the respondent's request emailed on 19 July 2013. His contention that the debtor book still belonged to the second applicant, was misplaced.

[52] A similar argument was unsuccessfully raised in the case of **Francis Edward Gormley v West City Precinct Properties (Pty) Ltd** [2011] 19075 WCC [18] where Traverso DJP dismissively said:

> "From the replying affidavits, it appears that Gormley accepts that his initial view that the proceeds would accrue to West City was wrong and

that the full proceeds of the sale would accrue to the Bank in the business rescue proceedings. The moratorium on which he originally relied in terms of section 133(1) of the Act provides that no legal proceedings against the company or in relation to any property belonging to the company or lawfully in possession may be commenced during business rescue proceedings without the consent of the business rescue practitioner. The Bank's entitlement to all rents and revenue is a right which it will enforce against the third parties who owe rents and revenue. Such rents and revenue do not constitute property belonging to West City, nor are such rents and revenue in its possession nor will it ever be. The provisions of section 133(1), in my view, have no bearing on the Bank's entitlement to the rents and revenue, as the collection thereof does not constitute enforcement proceedings."

[53] The respondent is a secured creditor by virtue of the cession over the second applicant's book debts. That much is not open to any debate. The second applicant volunteered to place itself under business rescue proceedings. Such resolution has certain adverse impact on its creditworthiness. The voluntary placement of a company under business rescue management amounts to a form of legal disability. The public announcement that the second applicant reasonably believed that it would not be financially able to regularly pay its debt for a period of six immediately ensuing months simply meant that the second applicant sought to have its contractual obligations to pay any debt owing to any of its creditors on regular monthly basis deferred. By so doing the second applicant committed an act of insolvency according to the terms and conditions of the overdraft agreement – clause 10.1.3.1.

"You must tell us immediately if you, or any surety in terms of this Overdraft Agreement, are placed under an administration order, become insolvent, or have any other form of legal disability. On application for insolvency any amounts outstanding under this Agreement will immediately become due, owing and payable to us." *vide* clause 14.10.

[54] It must be obvious therefore, that the respondent has acted in no unlawful manner but that it merely exercised its contractual rights in a perfectly lawful manner in terms of the recognised hierarchy of creditors. The respondent is still a secured creditor post commencement of business rescue proceedings in much the same way as it was prior to the commencement of such proceedings. The commencement of such proceedings did not and could not demote the respondent from its rightful position as a creditor with a secured rank. What is questionable and deplorable in this matter is the conduct of the business rescue practitioner. I am persuaded that the applicants are currently acting contrary to the relevant statute and the contract.

[55] The applicant essentially seeks a court order whereby the respondent is compelled to finance the financially ailing company so that the company can pay, at the expense of the respondent, its other creditors. Moreover, they also seek a court order whereby the respondent is prohibited from collecting any book debts, in terms of the cession agreement, paid by the debtors of the company. The bank is entitled to enforce its rights against the debtors.

[56] The second applicant is in dire financial crisis. Implicitly the second applicant is commercially insolvent. Yet the applicants want to see the respondent compelled to allow them to exhaustively utilize the overdraft account and increase the level of the second applicant's indebtedness to the respondent whilst, at the same time, the first applicant is busy diluting the security given to the respondent. It is an ironical relief they seek. Certainly that is not the purpose of the remedy of business rescue proceedings. In my view all the components of the relief sought are untenable – **<u>Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd</u>** (609/2012) [2013] ZASCA 68 27 May 2013.

[57] The respondent was entitled to suspend or to withdraw the overdraft facilities which, after all, were granted at its sole and absolute discretion. No doubt, I have no jurisdiction in terms of any provision of the relevant statute to order the respondent to extend further credit, against its will, to the financially distressed company. It appears to me that the application was brought about by the

applicants' misconception of the respondent's entitlements *ex lege* and *ex contractu* - **Gormley**, *supra*. Whilst I accept that it is important for the company to survive and to continue trading, it cannot be licensed to do so by compromising the respondent's security.

[58] It is not the underlying purpose of the statute to force the commercial banks to finance companies which are in financial distress – **Oakdale**, *supra*. In this matter the first applicant on behalf of the second applicant applied to the respondent for funding but the application for post commencement finance as contemplated in section 135 was declined. The lawfulness of that decision cannot be doubted. It was precisely the practitioner's unrealistic request, unsupported by any business rescue plan, which prompted the respondent on 17 July 2013 to review, as it was entitled to, its earlier favourable decision of 19 June 2013 concerning the company. The casual conduct displayed by the practitioner in approaching the bank for post commencement finance, without a business rescue plan approved by the creditors, was tantamount to an act of default event not envisaged in terms of clause 10.1annexure 3. Such breach entitled the respondent to immediately terminate the overdraft facility without notice – *vide* clause 10.3.

[59] As regards the second leg of the notice of motion, the relief sought was to have the respondent interdicted and restrained from enforcing 8 collaterals. The collateral consisted of:

2 x unrestricted suretyship agreements;
1 x restricted suretyship agreement;
3 x ceded insurance policies;
1 x unrestricted cession of book debts; and
1 x unlimited pledge of call deposit.

[60] The applicants partially abandoned the aforesaid relief to the extent that it related to the three suretyship – *vide* paragraphs 2.2.1, 2.2.7 and 2.2.8 notice of motion read together with par 31 of the replying affidavit. They however, persisted with their case as regards the rest of the collaterals, *viz* paragraphs 2.2.2, 2.2.3, 2.2.4, 2.2.5 and 2.2.6.

[61] Those segments of the relief relative to the suretyships furnished by the thirds, *viz* G S Lloyds and Reatla CC were correctly abandoned. There are two reasons why the applicants were not entitled to such relief. Firstly, the general moratorium on legal proceedings in terms of section 133 is a special measure exclusively designed to protect a financially distressed company subject to business rescue proceedings. The statute does not provide protection to sureties for the debts of a company but rather to a financially distressed company subject to business rescue proceedings which company itself stood as surety and signed a suretyship agreement for a third party's debt - **Investec Bank Ltd v Bruyns** 2012 (5) SA 430 (WCC) paras [15] and [16] per Rogers AJ. It stands to reason, therefore, that such moratorium on legal proceedings does not avail a surety for the debts of such a company subject to business rescue proceedings – *vide* subsection (2).

[62] Secondly, even if a surety of such an ailing company all enjoyed the protection of the general moratorium, it would not have been open to the applicants to challenge, on behalf of such sureties, the steps taken by the respondent. The applicants would have had no standing to do so.

[63] In **Grobler v Oosthuizen** 2009 (5) SA 500 (SCA) the court held that in a case of an outright cession a cedent loses all his rights by transferring those rights to a cessionary and that nothing remains vested in the cedent after such cession – *vide* para [8]. In the case of a cession in *securitatem debiti* however, the court held that, although the cedent pledges the principal debt to the cessionary, the cedent nonetheless retains a "bare dominium" in other words a "reversionary interest" in the claim against the principal debtor – *vide* paras [15] and [17].

The parties were *ad idem, in casu*, that the type of cession in the present matter was a cession in *securitatem debiti* and not an outright cession.

[64] As regards the rest of the second leg of the notice of motion, the relief with which the applicants persisted revolved around the various cessions – *vide* paras 2.2.3, 2.2.4, 2.2.5 and 2.2.6 of the notice of motion. At the heart of the matter

was the cession of the book debts of the company. I have already devoted a great deal of time to that particular aspect of the case. I deem it unnecessary to labour the point any further. My views and findings are known by now.

[65] There is yet another important factor which shows that the contention of the applicants is misplaced. The parties agreed that if the respondent were to suffer any loss or damage occasioned by any unspecified act or omission attributable to the second applicant, then in that event, the default clauses and the default procedures as set out in clause 10 annexure "3" would not apply. The respondent's contractual obligation to give written notice of termination of the overdraft agreement could only be dispensed with in certain default events that fell beyond the scope of default events as expressly specified in clause 10.

[66] Among the collateral which the second applicant specially furnished to the respondent as security for the repayment of the facilities granted was the unrestricted cession of the book debts due to the second applicant by all its debtors – *vide* clause 3.1 annexure "3". In terms of clause 6.2, annexure "0.12" the second applicant was obliged to act as the respondent's agent in the collection of all money due or to become due to the second applicant. The second applicant undertook to immediately pay over to the respondent all the money it collects from its debtors. It is common cause that notwithstanding such a contractual obligation the first applicant, on behalf of the second applicant admittedly collected R395 000 from the second applicant's debtors (positive act) but diverted it to a certain account held at Investec Bank instead of immediately paying such sums of money to the respondent (negative act) as he was obliged to do.

[67] The conduct of the applicant constituted acts and omission prohibited in terms of clause 10.3, annexure "3" read with clause 6.3, annexure "0.12". In view of such flagrant violation of clause 6.3 of the cession agreement the respondent suffered financial loss as contemplated in clause 10.3 of the overdraft agreement. As result of such suffering of financial loss the respondent was well within its contractual rights to immediate terminate the overdraft agreement without given prior written notice in terms of clause 10.2.3 of annexure "3". In the light of all

this, I find that the second applicant had no procedural right *ex contractu* to demand written notice to terminate the agreement. Accordingly any submission to the contrary was untenable.

[68] I have also considered the insurance policies and the unlimited pledge. All those collaterals were, like the book debts, ceded to the respondent to secure the banking facilities granted to the second applicant. All of those various cessions were given by the second applicant to respondent for the sole purpose of securing the repayment of the overdraft and other banking facilities. It was common cause that the second applicant has not discharged the principal debt. There was no business rescue plan approval by the creditors. The first applicant had prepared no business rescue plan at all. Yet Mr Kritzinger, as the business rescue practitioner, wanted the respondent as the creditor and me as the court to believe there were excellent prospects after six months the financial distress of the company would be over. He laid no foundation for his very optimistic belief.

[69] Where, as in this matter, there was no workable restructuring plan for the healing and revival of an ailing company Traverso DJP pessimistically but correctly remarked:

> "It is difficult to understand on what this allegation is based. Unless there is a *bona fide* workable restructuring plan the moratorium provisions of the business rescue proceedings will lend themselves to abuse by company insiders seeking to use these provisions to frustrate creditors' rights and to stave off liquidation for motives of their own."

Vide **Gormley**, *supra*, par [15].

That being the case, the respondent was entitled to retain all those cession and to apply their proceeds in reduction of the second applicant's total indebtedness. To that effect the respondent duly notified the company – *vide* annexure 7.

[70] In the light of the aforegoing, I have come to the conclusion that, in law, the applicants are not entitled to have the respondent interdicted and restrained from enforcing any of the guarantees identified in paragraphs 2.2.2 to 2.2.6.

[71] As regards the third leg of the notice of motion, the relief sought was to have the suspension of the second applicant's current account, relative to the overdraft facility, uplifted alternatively re-instated for the duration of the second applicant's business rescue proceedings.

[72] I have thoroughly considered this aspect earlier. The conclusion I have reached was that the applicants are not entitled to the relief as set out in paragraph 2.3. To hold otherwise would undermine the contractual rights of the respondent.

[73] As regards the fourth leg of the notice of motion, the relief sought was to have the suspension of the second applicant's salary account uplifted or reinstated during the course of the second applicant's business rescue proceedings.

[74] The relief sought per 2.2.4 notice of motion was substantially similar to the one sought as per 2.2.3. Accordingly my views, findings and conclusions were also pretty much similar in substance. My conclusion is, therefore, that the applicants are not entitled to the relief prayed for.

[75] As regards the fifth leg of the notice of motion, the relief sought was to have the respondent interdicted and restrained from using any amount standing to the credit of the second applicant in the salaries account for the purpose of off-setting the amount standing to the debit of the second applicant in the current account.

[76] I have earlier pointed out how the second applicant was in breach of the obligatory terms and conditions of the overdraft agreement – *vide* clause 10.1. Similarly I was also at pains to point out the respondent's contractual remedies in the event of the second applicant's default – *vide* clause 10.2 again. I have to stress that the grant of an overdraft facility to a customer is a matter that resides within the discretionary province of a bank. Any amount due and payable to a

bank by a customer on the strength of an overdraft facility is repayable on demand. Once a customer is in default of contractual obligations, a bank has contractual rights to review the terms and conditions, and, in its discretion, demand the immediate repayment of all the amounts owing.

[77] To that extent a bank, as a secured creditor, is entitled *ex lege* to apply a set-off. Section 133(1) does not, on the facts, preclude the bank from applying the credit balance in one account to reduce the debit balance in another account. The bank has a common law right to do so. But even if I am wrong, it would be inequitable, in this instance, to order the respondent, whose security has been drastically diminished if not completed eroded by the applicants, to reverse the set-off transaction and to release the affected funds to the very same parties whose collaborative and subversive conduct has rendered its security for repayment of the overdraft facility meaningless. That the law cannot countermine.

[78] In the light of the aforegoing I have also come to the final conclusion that the applicants are also not entitled to the relief they seek under paragraph 2.5 of the notice of motion.

[79] Now the issue of costs. The respondent has been successful in its opposition of the application. By virtue of that the respondent is entitled to the fruit of its success.

[80] The decisions in **Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others** 2012 (3) SA 273 (GSJ) and **Southern Palace Investments 265 v Midnight Storm Investments 386** 2012 (2) SA 423 (WCC) provide instructive, useful and insightful material concerning the principles governing the concept of business rescue.

[81] In the circumstances as a whole I am satisfied that the applicants have not made out a proper case for the grant of the interdictory relief they sought, in all its various shades. None of the requisites of the remedy were established.

[82] These then were the reasons which impelled me to make the order I made earlier whereby I dismissed the application with costs.

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