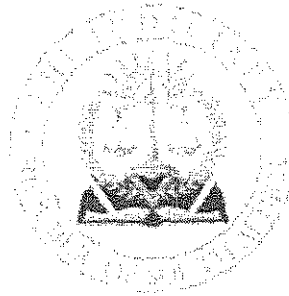



REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 1205/2020

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
1.REPORTABLE:	YES/NO
2.OF INTEREST TO OTHER JUDGES:	YES/NO
3.REVISED	
<u>06/01/2020</u>	<u></u>
DATE	SIGNATURE

In the matter between:

**ZIEGLER SOUTH AFRICA (PTY) LTD**  
(Registration No.: 2005/017338/07)

Applicant

and

**SOUTH AFRICAN EXPRESS AIRWAYS SOC LIMITED**

(Registration No.: 2017/039864/07)

First Respondent

**THE MINISTER OF FINANCE**

Second Respondent

**THE MINISTER OF PUBLIC ENTERPRISES**

Third Respondent

COMPANIES AND INTELLECTUAL PROPERTY  
COMMISSION

Fourth Respondent

THE MASTER OF THE HIGH COURT

Fifth Respondent

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JUDGMENT

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DIPPENAAR J

Introduction

[1] The applicant ("Ziegler") as a matter of urgency seeks an order placing the first respondent ("SA Express"), a state owned enterprise, under supervision and commencing business rescue proceedings in terms of s131(1) of the Companies Act<sup>1</sup> ("the Act") together with ancillary relief.

[2] In the alternative, it seeks a final winding up order in terms of s344(f) of the old Companies Act<sup>2</sup> ("the old Act")<sup>3</sup> on the basis that SA Express is unable to pay its debts. Reliance was placed on s344(f) and s345(1)(c) of the old Act and 131(4)(b) of the Act.

[3] The founding papers make it clear that the primary focus of the application pertains to the business rescue proceedings.

[4] The relevant portions of s131 of the Act provide:

*"(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing a company under supervision and commencing*

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<sup>1</sup> 71 of 2008

<sup>2</sup> 61 of 1973

<sup>3</sup> which still applies in terms of item 9 of schedule 5 to the Act

*business rescue proceedings.*

(2) *An applicant in terms of subsection (i) must –*

- (a) *serve a copy of the application on the company and the Commission; and*
- (b) *notify each affected person of the application in the prescribed manner.*

...

(4) *After considering an application in terms of subsection (1), the court may –*

(a) *make an order placing the company under supervision and commencing business rescue proceedings, if a court is satisfied that:*

(i) *the company is financially distressed;*

(ii) *the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract with respect to employment related matters; or*

(iii) *it is otherwise just and equitable to do so for financial reasons,*

*and there is a reasonable prospect for rescuing the company; or*

(b) *dismissing the application, together with any further necessary and appropriate order, including an order placing the company*

*under liquidation.”*

#### Relevant background facts

[5] It is common cause that Ziegler, a provider of global logistics solutions, concluded an agreement with SA Express on 23 January 2017. Such services would be provided by Ziegler and a joint venture partner, APG Logistics (Pty) Ltd. In terms of the agreement concluded with SA Express, Ziegler provided freight forwarding and custom clearing services. This entailed the billing and receiving of payment for the services as well as day to day operational contact point which included the facilitation of international and domestic movement of aircraft parts and aircraft engines to maintain and service all aspects of aircraft on behalf of SA Express. The services included the facilitation of international and domestic movement of aircraft parts and engines and the maintenance and service all aspects of aircrafts on behalf of SA Express. A service level agreement was also concluded which formed an attachment to the agreement. It is undisputed that a significant portion of the services rendered by Ziegler included disbursements to third parties.

[6] It is further common cause that an addendum was concluded to the agreement on 16 August 2018 in terms of which SA Express' payment terms were extended from 30 days to 60 days and it was ensured that SA Express maintained credit approval from Ziegler's credit insurers, Credit Guarantee Insurance Corporation of Africa Limited ("CGIC"). In terms of the addendum agreement, SA Express further agreed that should it fall into arrears with its payment obligations for a period of six months or longer, Ziegler would be entitled to obtain judgment against it and the addendum would serve as proof of SA Express' consent to judgment.

[7] SA Express gave notice of termination of the agreement on 21 December 2018 and confirmed in its correspondence that there were outstanding payments. The agreement was terminated with effect from 17 February 2019.

[8] On 1 April 2019, SA Express through its attorneys alleged that the agreement contravened its procurement policy and that three invoices issued in November and December 2019 were disputed. The aggregate value of these invoices was some R2.1 million. As no payment was forthcoming Ziegler delivered a letter of demand in terms of s129(7) of the Act on 30 December 2019. In response, SA Express sought an indulgence for purposes of settlement discussions and promised to revert by 10 January 2020. It failed to do so and the present application was launched on 17 January 2020.

#### Ziegler's case and opposition

[9] Ziegler's case is based on an indebtedness of R11 294 966.80 as at 23 December 2019 which due and payable by SA Express to it. It is a creditor and an affected person as envisaged by s128(1)(a) of the Act and thus claims locus standi to launch the application.

[10] It alleges that SA Express is financially distressed as envisaged by s128(1)(b) of the Act and there is a reasonable prospect of rescuing the company as envisaged by the aforesaid provision. It further contends that it is otherwise just and equitable for financial reasons to place SA Express in business rescue rather than in liquidation in the interests of other affected persons, particularly the majority of its creditors as contemplated by s131(4)(a)(iii) of the Act. Ziegler's primary case is that business rescue is preferable to its alternative claim for liquidation as there is a prospect of saving the business.

[11] Ziegler has illustrated compliance with the peremptory service and notification provisions of s131(2)(a) and s131(2)(b) of the Act which requires service on Sa Express and the fourth respondent and notification of every affected person in the prescribed manner. SA Express did not in its papers provide any comprehensive list of creditors, nor did it dispute proper compliance with this requirement.

[12] It is significant that none of the affected persons have opposed the application, including those creditors who have already launched winding up proceedings against SA Express.

[13] The only party who opposes the application is SA Express. It is apt to note that its answering affidavit is deposed to by the general manager of its legal department, rather than by a director. The answering papers do not contain any board resolution authorising the opposition to the application.

[14] SA Express disputes the urgency of the application and opposes the merits of the application on the grounds that: (1) that the application constitutes an abuse of the court process as it was instituted with an ulterior motive in relation to a disputed debt in an agreement which contains an arbitration clause and (2) that Ziegler has not demonstrated a reasonable prospect for rescuing SA Express and thus the business rescue application must fail. It contends that the application should be struck from the roll for lack of urgency or dismissed with costs.

#### Urgency

[15] SA Express contended that the application lacked urgency as Ziegler did not demonstrate that it would not obtain substantial redress at a hearing in due course and that a pending winding up application due to be heard on 31 January 2020, had been removed from the roll. No facts were put up by SA Express to refute Ziegler's averments regarding the dire and deteriorating financial position of SA Express.

[16] Ziegler on the other hand contended that the application was inherently urgent due to SA Express' dire financial position which could only worsen over time, exacerbated by South African Airways being placed in business rescue during December 2019.

[17] It is a well-recognised principle that commercial urgency can constitute urgency in certain circumstances<sup>4</sup>. Considering the facts set out in the papers, I am persuaded that the application is sufficiently urgent to entertain it on its merits.

#### Abuse of process, disputed debt and arbitration

[18] SA Express contend that the application constitutes an abuse of process as Ziegler has an ulterior motive in launching it, being to obtain payment of its claim from CGIC utilising the mechanism of the urgent court. In support of this contention reliance is placed on the addendum agreement concluded between the parties, which contains a consent to judgment if SA Express defaults in its payment obligations and makes reference to the cover obtained from CGIC.

[19] This argument lacks merit. The agreement is clear in its terms and does not support the conclusion contended for by SA Express.

[20] SA Express further challenges Ziegler's claim on the basis that the agreement concluded between the parties contains an arbitration clause, which Ziegler misleadingly omitted to refer to and that the dispute resolution mechanism contractually agreed upon was not followed by Ziegler. It contends that Ziegler's claim is disputed and that Ziegler is improperly attempting to obtain an order in the urgent court to avoid going through the proper channels. It is argued that this highlights the abuse.

[21] These arguments are misconceived. Ziegler is not attempting to obtain a monetary judgment against SA Express in the present proceedings and the relief presently sought falls outside the powers and jurisdiction of an arbitrator.

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<sup>4</sup> IL&B Marcow Caterers (Pty) Ltd v Gretermans Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd 1981 (4) SA 108 (C); Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd 1982 (3) SA 582 (W) 586F-G

[22] On SA Express' own version, only three invoices issued in November and December 2019 are in dispute aggregating some R2 154 459.59, resulting in an amount of between some R8 million and R9 million of its indebtedness to Ziegler being unchallenged.

[23] I am not persuaded that the "dispute" raised by SA Express constitutes any defence to the relief sought. I am satisfied that in motivating SA Express' indebtedness to it, Ziegler has illustrated its locus standi as creditor and affected person as envisaged by s128(1)(a) of the Act. It is further clear from the papers that Ziegler is not attempting to obtain payment of its claim in these proceedings and SA Express' contentions on the issue are misconceived.

[24] SA Express further in broad terms alleges that there is a further "dispute" being that its agreement with Ziegler contravened its procurement policies. It is contended that the agreement *"has been flagged as potentially one that has not been awarded in accordance with the proper procurement processes"*. It is alleged that it *"would be irresponsible and amount to wasteful and fruitless expenditure if the first respondent (SA Express) was to make payment on the invoices submitted by the applicant (Ziegler) in circumstances where the first respondent is aware of potential irregularities"*.

[25] However, SA Express failed to set out any factual or legal basis in its answering papers which could give rise to the conclusions being sought to be drawn. To the contrary, the papers evidence a repeated acknowledgment by SA Express of its indebtedness to Ziegler.

[26] Whilst recognising the obligation on state owned enterprises funded with tax payers' money to take steps to set aside an irregularly awarded contract and rectify breaches of its procurement policies, albeit phrased in the context of "organs of state", it is significant that on SA Express' version, it has not taken any steps to do so in relation to the Ziegler agreement. It simply contends that it will do so.



[27] For these reasons I am not persuaded that the aforesaid unsubstantiated allegations present any defence to the relief presently sought or that the application constitutes an abuse of process. The allegations further do not give rise to any bona fide factual disputes<sup>5</sup>.

#### Financially distressed

[28] It was common cause between the parties that SA Express is financially distressed as envisaged by s 128(1)(f) of the Act. It was not disputed that SA Express is commercially insolvent and unable to pay its debts as and when they fall due. SA Express contends that: *“it is a matter of public record that it, like all other state owned entities, are facing serious financial challenges”*.

[29] The high water mark of SA Express’s case is that it has been able to secure an additional amount of R164 million from government for the 2020/2021 financial year<sup>6</sup> and that its strategy and business plan indicates that it is (post grounding) on a growth path. It is also averred that SA Express *“is in the process of engaging private equity partners, the details of which cannot be disclosed due to confidentiality”*. It does not deny that it is financially distressed or had to rely on substantial cash injections from government since early 2017 to survive.

[30] Despite these statements, the answering affidavit is significantly silent on matters of importance to this application, notably its financial position and the “business and strategy plan”. Stripped of broad allegations and unsubstantiated conclusions, the answering papers fail to grapple with the central factual averments made by Ziegler.

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<sup>5</sup> Considering the approach adopted in *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA) paras [12] and [13]

<sup>6</sup> Considering SA Express’ financial statements, this amount would be woefully inadequate to resolve its liquidity issues.

[31] Rather, it attacks the conduct of Ziegler and emphasises issues which seek to detract from the central issues in this application. By way of example it challenged the urgency of the application on the basis that the pending liquidation application which had been enrolled for hearing on 31 January 2020 had been removed from the roll. In doing so, it misconceives the inherent urgency in resolving the precarious financial position in which SA Express finds itself and the important consideration that it is reliant on public funding.

[32] Curiously, SA Express did not deal in its answering papers with its present financial position or the position of its employees and was coy in disclosing any relevant information. It disputes that Ziegler has illustrated a reasonable prospect that the company can be rescued, and in bald terms alleges that the applicant's version is based on speculation.

[33] It is reasonably to be expected of SA Express to provide cogent and comprehensive financial information regarding its position. It manifestly failed to do so.

[34] Despite receiving a demand in terms of s129(7) of the Act from Ziegler on 30 December 2019, SA Express has not responded to or acted on the said correspondence. The aforesaid demand drew attention to the mandatory obligation on the board of directors, when there are reasonable grounds to believe that SA Express is financially distressed, to deliver a notice to each affected person, setting out the criteria for financial distress as set out in s128(1)(f), and its reasons for not adopting a resolution for voluntary business rescue.

[35] It does not meaningfully address this issue in its answering papers. There may well be merit in Ziegler's contention that the directors and management of SA Express are in denial as to the true state of affairs and that they are further contributing to its decline.

[36] In its papers, SA Express further failed to disclose material information pertaining to an admitted claim of some USD2 587 317 and correspondence received from another creditor, NAC Aviation 19 Limited, after launching of the current application, which inter alia challenged the first respondent to disclose its financial distress, inability to pay its debts and its commercial insolvency in its answering papers and to disclose in totality its liability to creditors.

[37] The company report emanating from the fourth respondent attached to the founding papers, reflects two default judgments having been granted against SA Express in amounts of R929 647.00 and R2 559 895.00 respectively. No disclosure was made by SA Express in its papers of these judgments or its defences to the pending liquidation proceedings, other than the allegation that payments to the said creditors are not due. It is undisputed that no less than three winding up applications have been launched against SA Express.

[38] Ziegler is an independent creditor of SA Express and is not privy to all its relevant financial information. In its founding papers, it relies on the Auditor's General's report pertaining to SA Express's financial statements for the 2018/2019 financial year, which contains various disclaimed opinions occasioned by a lack of accurate information provided by SA Express and expresses material uncertainty relating to the company's going concern status.

[39] The Auditor General's report identified key areas of concern: First, the financial statements were disclaimed due to material misstatements relating to property, plant and equipment, inventories, trade and other receivables, trade and other payables, provisions, other financial liabilities, revenue, other operating expenses, gains of foreign exchange adjustments, finance costs, effects on taxation, contingencies, related parties, directors' emoluments, financial instruments, prior period errors, new standards as well as fruitless and wasteful expenditure.

[40] Second, findings were made on the quality of the financial statements, revenue management, expenditure management, supply chain management, liability management, strategic planning and performance management, effecting consequences and procurement and contract management.

[41] Third, there was a material limitation on performance as no performance report was made.

[42] Fourth, irregular expenditure was identified in an amount of R248 million for the 2017/2018 financial year and R156 million for the 2018/2019 financial year. The full extent of the irregular expenditure could not be confirmed and was the basis of the Auditor General's disclaimed opinion.

[43] In reply, reliance was further placed on a set of financial statements of SA Express provided to it by a third party. It reflects an excess of assets over liabilities of some R300m, but shows operating losses increase by 803% from R65 million in 2018 to R547 million in 2019. The statements reflect a loss of R590 million in 2019, after an adjustment due to a deferred tax asset of R164 million.

[44] It is beyond dispute that the 2019 financial statements paint a picture of an entity in a dire financial crisis. To exacerbate matters, the accuracy of the available financial statements is open to debate, due in part to SA Express not providing the necessary information as commented on by the Attorney General's office.

#### Reasonable prospect of rescue

[45] Against this backdrop, the central issue to be determined is whether Ziegler has illustrated a reasonable prospect that SA Express can be rescued or whether it should be placed in liquidation. The alternative goal of ensuring a better return for creditors envisaged by s128(1)(b)(iii) as read with 128(1)(h) of the Act, was relied on by Ziegler in

the alternative, but was not fully canvassed in the application papers. Ziegler further relied on s131(4)(a)(iii) and argued that the absence of opposition to this application by the government, employees and creditors of SA Express illustrates that it would be just and equitable to place it in business rescue.

[46] It is important to bear in mind the purpose of business rescue set out in s7(k) of the Act, being to provide for the efficient rescue and recovery of financially stressed companies in a manner that balances the rights and interests of relevant stakeholders.

[47] It is further important to bear in mind the sentiment expressed by Justice Tsoka in *Welman v Marcelle Props 193 CC*<sup>7</sup>, that:

*“Business rescue proceedings are not for terminally ill close corporations. Nor are they for the chronically ill. They are for ailing corporations which, given time, will be rescued and become solvent.”*

[48] SA Express challenges the application on the basis that Ziegler has failed to provide a cogent factual foundation to support the existence of a reasonable prospect that either of the objectives of business rescue can be achieved and contends that Ziegler’s case is based on speculation and constitutes a mere precursor to liquidation. SA Express itself put up no facts to controvert Ziegler’s averments.

[49] Such contention is damning of SA Express’ position as by challenging the reasonable prospects of rescue it inexplicably condemns itself to liquidation, absent any frank disclosure of its current financial position, or a cogent challenge to the factual evidence provided which illustrates SA Express’s dire financial position.

[50] A reasonable prospect as envisaged in s131(4)(a) of the Act requires more than a prima facie case or an arguable possibility. As stated by the Supreme Court of Appeal in

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<sup>7</sup> (2019) JOL 28714(GSJ) para 28

*Oakdene Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others:*

*“Of even greater significance, I think, that there must be reasonable prospect – with the emphasis on “reasonable” – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy to the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers”.*

[51] Put differently, Ziegler is obliged to place before court a cogent evidential foundation that supports the existence of a reasonable prospect of rescuing SA Express.<sup>8</sup>

[52] The case made out by Ziegler is that whilst SA Express is currently reliant on taxes, government guaranteed debt and resources from outside the aviation industry, it is inconceivable that SA Express would not be able to trade profitably if properly managed.

[53] It has various substantial assets, including a fleet of 24 aircraft and a valuable trade route network that provides flights *inter alia* to all major cities in South Africa as well to neighbouring countries such as Namibia, Botswana, Zimbabwe and the Democratic Republic of Congo (“DRC”).

[54] As identified by the Attorney General in its report, many of the reasons for SA Express’ ailing finances, including poor corporate governance and operations, irregular and wasteful expenditure, burdensome procurement contracts and funding issues can be attributed to poor management on various levels. Once an investigation has been conducted into the affairs of SA Express its liquidity and funding requirements can be

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<sup>8</sup> Koen & another v Wedgewood Village Golf and Country Estate (Pty) Ltd & others 2012 (2) SA 378 (WCC) at para 17.

assessed and addressed and equity partners can be identified and additional funding procured.

[55] Given the contents of the Auditor General's report and the areas of concern identified by it, many of the issues which currently plague SA Express relate to poor management. With the information presently available, it cannot definitively be concluded that SA Express is terminally ill.

[56] The obligations placed on an applicant is stated thus in *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa & Another v Bestvest 153 (Pty) Ltd*<sup>9</sup>:

*"[it was] argued that an application for business rescue should, to all intents and purposes, contain a summary of the proposed business rescue plan. [It was] contended that only once this had been done could a court decide whether there was a reasonable prospect of the company being saved from insolvency. I do not agree with that submission. In my view, it should be left up to the business rescue practitioner to formulate the rescue package once he/she has had an opportunity to properly assess the company, its prospects going forward and, most importantly, the reasons for its commercial distress."*

[57] It is thus not necessary for Ziegler to set out a summary of the proposed rescue plan in its papers. It is the duty of the business rescue practitioners to formulate a plan once a proper assessment of SA Express has been done. Due to the issues surrounding the accuracy of the financial information which is presently available, a proper assessment can only be made once the affairs of SA Express have been properly disclosed and assessed.

[58] There is merit in Ziegler's contention that even if the business rescue practitioners are unable to secure sufficient funding for a successful rescue, the sale of SA Express may well yield a better return for creditors than its immediate liquidation. Once again, SA Express was perversely silent on this issue.

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<sup>9</sup> 2012 (5) SA 497 (WCC), paras 40 and 41.

[59] Ziegler emphasised the disastrous effects of liquidation, another aspect which SA Express failed to address in its papers. Such consequences include: (1) that South Africa would lose an asset that could, if properly managed, contribute significantly to the economy; (2) the government would be further burdened by the calling up of government guarantees; (3) SA Express would lose its air licenses, Civil Aviation approvals and routes, which are all valuable assets and without which a sale of its business would be less attractive to potential buyers; (4) a significant amount of jobs, in excess of 1000, would be lost, resulting in hardship for many families; (5) the fixed assets of SA Express would be sold at a forced sale value which would return a substantially lower amount than their market value.

[60] A further important factor to take into consideration is that, as previously stated, none of the other affected persons, including the government as shareholder, the employees and creditors of SA Express have opposed the application, thus signaling at least acquiescence if not support for the attempt to rescue the company.

[61] S131(4) of the Act affords a court a discretion in a loose sense, and requires of the court no more than a value judgment. As to whether there is a reasonable prospect of rescuing a company, it cannot be said that it involves a range of choices which a court can legitimately make. The answer to the question can only be "yes" or "no".<sup>10</sup>

[62] Considering all the facts, I am persuaded that the answer to the question is "yes" and that applicant has met the threshold of illustrating a reasonable prospect as required by s131(4). At the very least in all these circumstances it would be in the interests of justice and the public interest to afford the business rescue practitioners the opportunity to investigate the affairs of SA Express and formulate an appropriate business rescue plan.

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<sup>10</sup> *Oakdene* (*supra*) at para 21.



[63] I am satisfied that the relevant provisions of chapter 6 of the Act provide sufficient safeguards to ensure that the rights and interests of all affected persons will be protected and that the business rescue proceedings will be terminated if it proves to be a fruitless endeavour.

[64] Considering the absence of opposition from any of the other stakeholders, including the government, its sole shareholder, and its creditors, there is merit in Ziegler's criticism of the conduct of SA Express in opposing this application on unconvincing grounds whilst manifestly failing to address the relevant issues, the particularity of which falls peculiarly within its knowledge.

[65] For the above reasons I am persuaded that the necessary jurisdictional requirements have been met and that the business rescue application must succeed. It is not in the interests of justice or appropriate to grant a final liquidation order, as sought by Ziegler in the alternative and in the context of s131(4)(b).

[66] No reasons were advanced why the proposed interim business rescue practitioners should not be appointed.

#### Costs

[67] The normal principle is that the costs of the application follow the result. In its founding papers, Ziegler sought an order that its costs be declared costs in the business rescue on the attorney and client scale, save in the event of opposition. Both parties were represented by both senior and junior counsel and it was not disputed that the employment of two counsel was justified in the circumstances.

[68] In reply, and at the hearing, the applicant however sought a costs order against the directors of the respondent in the following terms:

*“That Fikile Thabethe (the deponent to the answering papers) and all directors of the applicant identified as active directors...are called upon to show cause..... as to why they should not be held personally liable for the costs of this application”.*

[69] In the alternative, a punitive costs order was sought against SA Express and an order directing its deponent and directors to pay the legal costs incurred by SA Express for the appointment of its attorneys and counsel in opposing the application. It was contended that the opposition to the application was unreasonable, mala fide and in breach of the duties owed by directors in terms of the Act, thus justifying a punitive order.

[70] Although such order will increase the costs of the application, there is merit in the applicant's contention that SA Express's board of directors should be held accountable and called upon to explain their conduct and why it is not in the public interest that they must bear the costs of the application and/or its opposition as SA Express is solely funded by the government and thus the people of South Africa.

[71] The answering papers are vague and lack the necessary disclosure of relevant and material information which peculiarly falls within the knowledge of SA Express and its board of directors. As previously stated, the answering affidavit is deposed to by a manager in its legal department, rather than by one of its directors, who would be better placed to provide material information pertaining to the relevant issues, including the present financial position of SA Express. The contents of the answering affidavit were of little assistance in clarifying the reasons for the precarious financial position in which SA Express presently finds itself or the steps taken to remedy the undisputed issues which exist.

[72] For reasons already stated, there is merit in Ziegler's contention that the application was opposed on unreasonable and spurious grounds.

[73] Thirteen active directors of SA Express<sup>11</sup> are identified in the records of the fourth respondent attached to the founding papers. These directors were not forewarned of the costs order presently sought in the founding papers and there is merit in SA Express' contention that the directors have not been afforded a proper opportunity to deal with the costs issue. Ziegler quite correctly, conceded that they should be afforded an opportunity to do so and included such relief in a draft order presented to court.

#### Order

[74] I grant the following order:

[1] The first respondent, South African Express Airways SOC Limited (registration number 1990/007412/30), is placed under supervision in terms of chapter 6 of the Companies Act 71 of 2008 ("the Act") and business rescue proceedings commence in respect of the first respondent as envisaged in terms of s131(4) of the Act;

[2] Daniel Terblanche and Phalani Mkhombo are appointed as the joint interim business practitioners of the first respondent, subject to ratification by the holders of the majority of the independent creditors' voting interests at the first meeting of creditors as contemplated in terms of s131(5) of the Act;

[3] The attorney of record of the applicant, Gareth Cremen of Lawton's Africa, is hereby authorised to sign all such documents and forms as may be necessary to enable the fourth respondent, the Companies and Intellectual Property Commission, to give effect to this order;

[4] The costs of the application are reserved;

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<sup>11</sup> According to the records of the fourth respondent dated 16 January 2020

[5] The applicant is granted leave to amend its notice of motion and to join the active directors of the first respondent and Mr Fikile Tabethe, the deponent to its answering papers, as respondents to the application, for the purposes of advancing reasons why they should not be held personally liable for the costs pertaining to the application, including the costs of opposition;

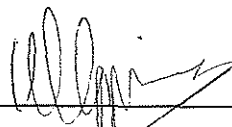
[6] The applicant is directed to take the necessary steps to effect the joinder of the parties referred to in [5] above and any amendments to its notice of motion within 10 days of date of this order;

[7] A copy of this order and the application papers are to be served personally on Mr Fikile Thabethe and all active directors of the first respondent in accordance with the provisions of r4(1)(a)(i) of the uniform rules of court;

[8] The parties referred to in [5] above are granted fifteen days from date of service to deliver their answering affidavits;

[9] The applicant is directed to deliver any replying affidavits within ten days thereafter,

[10] The application is postponed sine die for determination of the issue of costs.



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**EF DIPPENAAR**  
**JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

**APPEARANCES**

**DATE OF HEARING** : 28 January 2020

**DATE OF JUDGMENT** : 06 February 2020

**APPLICANT'S COUNSEL** : Adv. N Cassim SC  
Adv A Vorster

**APPLICANT'S ATTORNEYS** : Lawtons Africa  
Mr G Cremen

**FIRST RESPONDENT'S COUNSEL** : Adv. W Mokhare SC  
: Adv Hutamo

**FIRST RESPONDENT'S ATTORNEYS** : Werksmans Attorneys  
Mr K Motshane and Ms T Matshabela