REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 35757/12

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. 30|03|2017

In the matter between:

STROCAM PROJECTS (PTY) LTD Applicant
(In the application for leave to appeal)

and

MANAGEMENT INFORMATION TECHNOLOGY (PTY) LTD
t/a IVOR LEE & ASSOCIATES Respondent
(In the application for leave to appeal)

JUDGMENT: Application for Leave to Appeal

AC BASSON, J

[1] This is an application for leave to appeal against this court's judgment on the following grounds: (i)This court erred in declining to exercise its discretion in terms of section 133(1)(b) of the Companies Act[1] (and to grant default judgment in favour of the applicant). (ii) *Lis pendens*: This court should have found that the business rescue proceedings suspended the liquidation and action proceedings. (iii) The action is not ready to be adjudicated.

Business rescue: Section 133 of the Companies Act

[2] Section 133 of the Companies Act reads as follows:

> "(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..."

[3] In brief it was submitted that this court should have declined to exercise its discretion afforded in terms of section 133(1)(b) of the Companies Act, in the absence of a substantive application from the respondent and that the court should have considered suitable terms as required by the said subsection.

[4] The applicant decided not to make any submissions in respect of the merits or demerits of the hearing of the trial as it is of the view that the trial should not have proceeded on 15 November 2016. (I will return to this aspect herein below).

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[1] Act 71 of 2008.

[5] Before dealing with the merits of the application for leave to appeal it is necessary to briefly refer to the background facts. The action was instituted in 2012 for the recovery and recoupment of the amount of R 4 873 359.50 which the applicant denies being correct and liable to pay.

[6] On the first trial date, during 2014, the matter was postponed with a costs order against the applicant as a result of its legal representatives having withdrawn on that date.

[7] On the second trial date, during March 2016, the business rescue practitioner filed a notice in terms of section 141(2)(b) of the Companies Act to the effect that the applicant was no longer in financial distress. This had the effect of ending the business rescue. The applicant then alleged that it was not ready to proceed to trial as a result of the fact that no pre-trials had taken place. Once again the trial was postponed and the applicant was ordered to pay the costs.

[8] On the third trial date, being 15 November 2016, the applicant submitted that the matter could not proceed to trial as business rescue proceedings against the applicant had (again) commenced on 27 October 2016.

Business rescue proceedings

[9] It is important to point out that, despite the fact that business rescue proceedings had commenced, counsel on behalf of the applicant conveyed to the court that the applicant admitted liability and was prepared to offer an amount in settlement together with legal costs which would be paid before 31 January 2017, irrespective of whether the application for business rescue proceedings would be adjudicated on 10 January 2017. It is further important to point out that the applicant did not seek a postponement of the trial.

[10] Counsel on behalf of the respondent sought leave from the court that the trial be finalised on the basis that it would prove a claim against the company

under business rescue. It was submitted that the leave was not asked on the basis that any claim that could be proved was to be enforced against the company whilst in business rescue.

[11] Counsel on behalf of the respondent further conveyed to the court that his client was not aware of business rescue proceedings and that had it been aware, it would have approached the court with a substantive application. In the alternative, it was submitted that, in any event, it is not a procedural requirement that a substantive application for leave to proceed, with legal proceedings (that have already begun), should be brought. The applicant, however, insisted that the attorneys on behalf of the respondent were well aware of the fact that business rescue proceedings had been launched. In support thereof the applicant attached an affidavit confirming this to the application for leave to appeal.

[12] In essence, it was submitted on behalf of the applicant, that by virtue of the fact that business rescue had commenced on 27 of October 2016, the general moratorium which grants companies protection against legal action on claims in general, came into operation.

[13] Section 133 of the Companies Act does not prescribe a substantive application as a prerequisite to obtain the leave of the court to proceed with legal proceedings, despite the fact that business rescue proceedings had commenced. In this regard the court in *Safari Thatching Lowveld CC v Misty Mountain Trading 2 (Pty) Ltd*[2] held as follows and I have taken the liberty of quoting at lenth from the judgment:

> "[18] Section 133(1)*(b)* however provides that, during business rescue proceedings, legal proceedings against the company may be 'commenced or proceeded with' with the leave of the court 'and in accordance with any terms the court considers suitable'.

[2] 2016 (3) SA 209 (GP).

[19] In *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and Others* 2015 (4) SA 485 (KZD) it was found that the moratorium on legal proceedings against a company has the result that leave to institute proceedings must be obtained by way of separate proceedings before the commencement of proceedings and not (even) as part of relief in the main proceedings.

[20] A contrary position was taken in *African Bank Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP) ([2013] ZAGPPHC 259), where the requisite leave to commence proceedings was granted as part of the relief claimed in the main proceedings.

[21] Whilst s 133(1) clearly prescribes substantial rights and consequences pertaining to the 'general moratorium on legal proceedings' against companies in circumstances like those of the respondent, no procedural requirements are laid down regarding the obtaining of the leave of the court.

[22] The requirement for the obtaining of the leave of the court (for example, by way of a separate application) prior to the commencement of legal proceedings against a company whilst business rescue proceedings are pending (as found in the *Elias Mechanicos* matter) is readily understandable and accords with the wording of the section. The judge in the aforesaid matter reasoned in this regard as follows:

> '[11] The construction which the applicant seeks to place on s 133(1)*(b)* is that the proceeding may be commenced without the leave of the court and that leave to do so may be sought as part of the relief in the main application. This is inconsistent with the wording of the section. It will also defeat one of the purposes of the moratorium, which is to give the company and the business rescue practitioner space and time to deal with the rescue of the company without having to deal with litigation by creditors. The practitioner will in each such proceeding have to deal not only with the application for the court's leave in terms of s 133(1)*(b)*, but also with the merits of the claim, because it is all part of one application.'

[23] To my mind, and with respect to the learned judge, the position is fundamentally different when proceedings have already been commenced and predate the commencement of the business rescue proceedings. The same considerations applicable to the requirement of obtaining the leave of the court prior to the commencement of legal proceedings would often be substantially

different from those applicable to the requirement of obtaining leave to continue with legal proceedings which had already commenced. Although numerous permutations might arise, an illustrative example is the following — say, for instance, a trial had commenced, and after the many months that it customarily takes to exchange pleadings, make discovery, deliver expert notices, apply for and obtain a trial date and have a matter set down have expired and taken place, and say, for example, further, the trial is on its third, fourth or fifth day of evidence, or even if evidence had been concluded and during argument, a director of the defendant company then suddenly 'commences' business rescue proceedings. Although the substantive law imposed by s 133(1) suspends the legal proceedings, it would be contrary to the administration of justice to require the trial to be postponed as a part-heard matter and to impose on the plaintiffs therein the obligation to launch a substantive application (possibly even on a different roll of the court) to obtain leave (from the same or a different judge) to continue with the trial. Both practicalities and the considerations contemplated in the Act clearly suggest that the trial court seized with the previously commenced legal proceedings would be in a position to consider the granting of the requisite leave to proceed with the trial or not. This would particularly be so where the applicant in such fresh business rescue proceedings would be a party to the action before that court.

[24] To bring the example closer to the present application, say, that the trial referred to in my example was one where an application for winding-up launched by one of the directors of the company had been referred to trial. To read into the Act that the consequences of the requirement for leave of the court contemplated in s 133(1)*(b)* were that the trial had to be 'halted' (to use a word used in the *Elias Mechanicos* judgment) so that the one director can launch a substantive separate application to obtain the leave of the court to continue with a pending trial, where a moratorium had been imposed by his co-director simply by the filing of an application commencing business rescue proceedings, may not only lead to absurdity, but might notionally unduly infringe the first-mentioned director's constitutional right of access to court contemplated in s 34 of the Constitution."

[14] I am in agreement with the approach take in the *Safari-* matter. In the present matter I am likewise of the view that it would result in an absurdity and unduly

infringe upon the respondent's right of access to court to halt the present proceeding, to allow the respondent to bring a separate substantial application for leave to continue with proceedings that have already commenced. I have also, in excersing discretion, taken into account that the action against the applicant had already been instituted as far back as 2012 and that the proceedings have already been postponed on two previous occassions. Further I have taken into account that counsel on behalf of the applicant, had admitted liability and that the applicant was prepared to offer an amount in settlement together with lelgal costs which would be paid before 31 January 2017, irrespective whether the application for business rescue proceedings would be adjudicated on 10 January 2017.

[15] In light of the above I am therefore not persuaded that the applicant has a reasonable prospect of success on appeal in respect of this ground.

Lis Pendens

[16] The applicant submitted that the fact that liquidation proceedings have been instituted by the respondent (under a different case number) on 11 October 2010, meant that there is a pending *lis* between the parties and that the trail could therefore not have proceeded. .

[17] On behalf of the respondent it was submitted that no special plea of *lis pendens* had been raised in the pleadings and the respondent furthermore submitted that this court is not entitled to raise the issue of *lis pendens mero motu* – it has to be pleaded by the defendant. See *Kerbel v Kerbel*: [3]

> "Therefore, with great respect to the learned Judge, I cannot go along with the suggestion that the Court has inherent power or as he puts it, an inherent discretion, to prevent '*inter alia* a multiplicity of actions'. It is always open to the parties themselves to decide whether the multiplicity is desirable or not and when they or one of them should take the necessary steps to put an end to one or other of the actions on the basis of *lis alibi pendens* then it is their

[3] 1987 (1) SA 562 (W) at 566G – I.

prerogative to apply to Court to do so. The Court adjudicates on that exception along certain principles but based on all the facts which the parties (both of them) then put before the Court. The history of the exception of *lis alibi pendens* shows that it is exactly that, namely an exception ; not one that the Court *mero motu* takes. But that is really the effect of saying in this context that the Courts have an inherent discretion to prevent multiplicity of actions, namely that this exceptio can be taken by the Court *mero motu*."

[18] Furthermore, it is trite that, as one of the requisites of a plea of *lis pendens*, the pending proceedings must be based on the same cause of action. This is not the case in the present proceedings: The cause of action in an application for liquidation is not to determine liability as is the case in an action. Furthermore, the application for liquidation could not be proceeded with as there was a dispute regarding the applicant's liability. Once liability is established (by way of action) the application for liquidation may be proceeded with. Moreover, there exists no legal basis in law or in fact, why an application for liquidation cannot pend, whilst awaiting the outcome of an action to establish the relevant indebtedness.

[19] In light of the above, I am therefore not persuaded that the applicant has a reasonable prospect of success on appeal in respect of this ground.

The action is not ready to be adjudicated

[20] According to the applicant, the respondent did not comply with its notice dated 4 July 2016, to discover important documents which had a direct bearing on the merits and the quantum, as well as the determination of the quantum contained in the summons, which documents would have been the subject of cross-examination during a trial. These documents are, according to the applicant, important in light of the fraud alleged against the respondent in the applicant's plea of defence, with regard to the listing of ghost-employees. In this regard it was submitted that the court ought to have afforded the applicant the opportunity to issue an application to compel the respondent to comply with Rule 35(3), alternatively that the court had the

inherent power and should have ordered the respondent to comply with the rules *mero motu* in accordance with any terms that the court considered suitable.

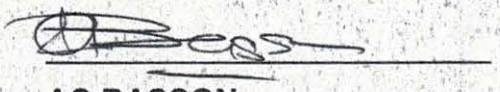
[21] The respondent denied that it is alleged in the plea that the respondent had listed ghost employees in its claims or invoices and pointed out that what is alleged in paragraph 7 of the plea is that - "The plaintiff attempted to mislead the defendant by submitting fictitious claims".

[22] The respondent, however, conceded that it should have replied to the notice in terms of Rule 35(3) but submitted that its failure to do so, is, in the context of the applicant's conduct, of no consequence for the following reasons: (i) Despite the applicant's objections regarding the respondent's failure to respond to the Rule 35(3) notice, the applicant had adequate information to be able to admit liability on record (as it did) and to submit an offer to settle the claim; (ii) Respondent's counsel was only informed on the morning of the trial of the allegation that the respondent had allegedly loaded ghost employees on its system. (iii) The applicant did not avail itself of an application to compel compliance with Rule 35(3). (iv) The applicant furthermore also did not avail itself of the opportunity to address the issues referred to in the Rule 35(3) notice at the pre-trials. In fact, according to the respondent, the applicant failed to attend the pre-trial conferences. (v) Despite the fact that the matter was set down for 15 November 2016, the applicant at no stage informed the respondent that it was unable to proceed to trial as a result of the respondent's failure to comply with Rule 35(3). (vi) The applicant did not seek a postponement of the trial on the morning of 15 November 2016 but merely raised the fact that the matter could not proceed as a result of the moratorium afforded to it in terms of section 133(1) of the Companies Act. (vii) Lastly, when the court granted leave for the matter to proceed, the applicant and its legal representatives merely withdrew from the proceedings and wilfully excused themselves without moving for a postponement or to withdraw as legal representatives of the applicant.

[23] In light of the above, I am therefore not persuaded that the applicant has a reasonable prospect of success on appeal in respect of this ground.

Order

The application for leave to appeal is dismissed with costs.



AC BASSON
JUDGE OF THE HIGH COURT

Appearances:

For the applicant:	: Adv FAG Swart
Instructed by	: Jan Kriel Attorneys
For the respondent	: Adv F Arnoldi SC
Instructed by	: Barnard & Patel Incorporated