IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number **74827/2013**

In the matter between: 17/5/2017

ABSA BANK LIMITED	**Applicant**
And	
MEDICAL EMPOWERMENT CONSORTIUM INVESTMENTS Ltd	**1st Respondent**
LIEBENBERG DAVID RYK VAN DER MERWE N.O.	**2nd Respondent**
LOUIS PASTEUR HOLDINGS (Pty) Ltd	**3rd Respondent**
ETIENNE JACQUES NAUDE N.O.	**4th Respondent**
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**5th Respondent**

and

AHMED ISMAEL GUTTA (Pty) Ltd	**1st Intervening Party**
HAROON AHMED GUTTA N.O.	**2nd Intervening Party**
FERIEL GUTTA N.O.	**3rd Intervening Party**
ABDUL RAZAK AHMED GUTTA N.O.	**4th Intervening Party**
SALEEM OMAR GUTTA N.O.	**5th Intervening Party**
ZUNAID OSMAN TAYOB N.O.	**6th Intervening Party**
LEOPONT PROPERTIES (Pty) Ltd	**7th Intervening Party**
ABDUL RAZAK AHMED GUTTA	**8th Intervening Party**

JUDGMENT

PRELLER J:

There are two applications before me: this case and another under case number 74828/2013, which were argued together. The applications concern two related companies. Since the parties and the relevant facts are for practical purposes the same, I have found it practical to give one judgment for the two applications together.

The two companies respectively figure as the first respondent in the two applications and will, where necessary, be referred to by the acronyms **MECI** and **MRC**. The second respondent is the business rescue practitioner who has been appointed for the two companies and the third respondent is the sole shareholder in **MRC** and the majority shareholder in **MECI.** The fourth respondent is the business rescue practitioner of Louis Pasteur Investments (Pty) Ltd, a subsidiary of the third respondent. The third to fifth respondents have been joined only in so far as they may have an interest in the proceedings.

The intervening parties claim to be creditors of the two companies, which is disputed by the applicant, but accepted for purposes of the application. In the case of **MECI** there are eight of them: one individual named Gutta, A.I.Gutta (Pty) Ltd, Leopont Properties (Pty) Ltd and the five trustees of the H.A. Gutta Trust. In the case of **MRC** there are thirteen: the same five trustees of the Gutta Trust, five trustees of the Z O Tayob Trust, Mariam Investments (Pty) Ltd. and two individuals with the surname Gutta who act in their personal capacities as well as in their capacities as trustees of the Gutta Trust.

Each of the two first respondents is the owner of a building in central Johannesburg, consisting of ground floor retail space and several storeys of office space. The buildings are respectively the Kine Centre (belonging to **MECI**) and the Small Street Mall (**MRC**). The applicant is the holder of a first mortgage bond over each of the two buildings. In the case of **MRC** the amount owing in terms of the loan secured by the bond (and also three smaller loans) is in the order of R 60 million, and in the case of **MECI** just short of R 100 million. In addition **MECI** and **MRC** have both signed suretyships for one another and also for two other companies. The two bonds were registered in August and September 2005 respectively and general cessions of their rights in terms of any lease agreements in respect of the two buildings were executed simultaneously.

The loans from the applicant were entered into in order to finance the preparation of the two building for occupation by tenants. During February 2009 **MECI** succeeded in concluding a lease agreement with the City of Johannesburg for several floors in the Kine Centre. Due to various disputes the City did not take occupation of the leased premises and a new agreement was concluded in May 2010. The disputes were however not resolved and the tenant never took occupation of, nor paid any rental for, any part of the leased premises. This dispute dragged on for several years and despite the best efforts of *inter alia* the second respondent, no solution could be found. **MRC** had a similar problem: the company had entered into a lease agreement with the Department of Labour but its employees vacated the building because the "hazardous" condition of the air in the building posed a threat to their health. The building has since then been standing empty for years.

Due mainly to the failure to resolve the disputes with the tenants, the directors of both companies resolved during March 2012 that the companies be placed in

business rescue. The second respondent was appointed as business rescue practitioner for both.

The second respondent duly prepared and published business rescue plans for the two companies in terms of section 150(1) of the Companies Act and convened two meetings for their consideration on 12 November 2012. At the request of the third respondent both meetings were adjourned to 28 November. The third respondent and its subsidiary Louis Pasteur Investments (Pty) Ltd. (**"LPI"**) both lodged substantial claims against the two companies on the day before the adjourned meeting. Shortly before the commencement of the meeting Dr. M Adam, a director and the representative of both **MRC** and **MECI**, submitted alternative business rescue plans for the two companies. Unlike the second respondent, the applicant did not recognize the validity of the two claims, but the second respondent determined in terms of section 145(5)(a) that **LPI** and the third respondent were not independent creditors of the two companies. **LPI** thereupon launched two applications (under case numbers 3725 and 3732/13 respectively) to review and set aside the second respondent's determination in respect of both companies. These applications were eventually abandoned.

At the meeting of 28 November 2012 there were serious disputes about *inter alia* the status of the claims lodged by **LPH** and **LPI** and the meeting was eventually adjourned, first to 15 January 2013 and on the latter date to 28 January. On that date the second respondent informed the meeting that in his view there was no reasonable prospect of either of the two companies being rescued. Proper notice was given as prescribed by section 141(2)(a)(i). The applicant had in the meantime on 25 January 2013 launched two separate applications (under case numbers 2727 and 2728/13 respectively) for orders setting aside the resolutions placing the two companies under supervision and in business rescue and for the winding-up of

both. Having concluded that the two companies could not be rescued, there was no point in the rescue practitioner opposing either of the applications by **LPI** and the applicant. When the applicant subsequently withdrew its applications, he instituted two applications of his own in this court in May and July 2013 (case numbers 31785 and 40802/13 respectively) for the discontinuation of the business rescue proceedings and for the winding-up of both companies.

Although several parties gave notice of their intention to oppose the application, no answering papers were filed and the matter was set down for hearing on the unopposed roll of 1 November 2013. On the day before the hearing Etienne Naude attorneys on behalf of the third respondent (L P Holdings), gave notice of its intention to apply for leave to intervene in both applications and for orders declaring that the resolutions placing the two companies in business rescue had lapsed for failing to comply with the provisions of section 1219(3) and (4). The third respondent relied on the failure of the two companies to take the prescribed steps in the proceedings. The attorney of record was the fourth respondent, who is also the appointed business rescue practitioner of the third respondent. Prior to the two present applications, all the proceedings were instituted in the South Gauteng high court. It later transpired that this court is the only one with jurisdiction since the registered offices of both companies are situated in Pretoria.

The applicant instituted the two present applications on 10 December 2013, with the support of the second respondent. In March 2014 the third respondent made counter-applications in both cases for fresh business rescue proceedings. The deponent to the founding affidavit, which also served as the opposing affidavit in the main application, was Dr. M. Adam in both cases. The applicant (**ABSA**) filed affidavits which simultaneously served as answering affidavits to the counter-applications and replying affidavits in the main application.

Both applications came before Ranchod J in the opposed court on 28 August 2014. With the consent of all the parties an order was made of which the following is my summary:

In the case of **MRC** the rescue proceedings were terminated and a provisional winding-up order was made, returnable on 21 October 2014.

The application in respect of **MECI** was postponed to the unopposed roll of 21 October 2014. Written proof of financing from a registered financial institution or from another source approved by the applicant for the upgrade and tenant installation of the Kine Centre had to be provided by 3 October 2014 and the second respondent had to provide a comprehensive written business rescue plan by 10 October 2014. If the latter two conditions were not met, the business rescue proceedings would be terminated and the company provisionally liquidated. It is common cause that the two conditions have not been complied with.

That, however, was not the end of the matter. On 20 October the intervening parties in both matters gave notice of their intention to apply at the hearing for orders granting them leave to intervene, placing the company concerned under (fresh) business rescue and appointing one Zaheer Cassim as interim business rescue practitioner. The intervening parties say that they have *locus standi* because they are creditors of the company concerned. All of their claims are based on debenture certificates for amounts ranging between R 250 000 and R 700 000 and which were issued on either 2 May or 30 June 2005. According to the "Terms and Conditions of Debentures" annexed to some of the certificates the debentures would earn a return of 15% per annum payable monthly, which would increase by 10% per annum commencing from 15 July 2006. Table A in the Terms and Conditions indicate that the "deemed value" of, for example, a certificate issued for R 200 000 in 2005 would by year 9 (2013) have increased to R428 718. It does

not appear from the papers before me whether any of the envisaged income had been paid over the years or what the total "deemed value" of all these certificates was at the date of the affidavit.

The founding affidavit in both applications is made by one H A Gutta, the managing director of one of the intervening parties and a trustee of the HAG Trust. The two founding affidavits are to a large extent carbon copies of the same thing. The intervening creditors say in their affidavit (par. 38 – 40, p. 767) that both the applicant and the second respondent are mistaken in their views. Their first error was their acceptance of the "pure conjecture" that the rescue of **MECI** depends on the resolution of their dispute with the city. They are proved to be wrong by the fact that a lease agreement has in fact been concluded, a copy of which is annexed.

Their second error was their view that the rescue of **MRC** is entirely dependent on the resolution of the dispute between **MECI** and the City of Johannesburg. He does not give any reason for this view and merely refers to the copy of the intervention application in the **MECI** case, which is annexed. In that document I can likewise find no reason for this statement, which was in any event contradicted by Dr. Adam in his affidavit of 26 August 2014 (p. 527H of the papers) where he says: "..... it is common cause that the successful rescue of MRC has always been dependent on the successful rescue of MECI."

The affidavits allege that the third respondent had instructed "an independent management consultancy firm called Learning Strategies" to perform a viability review study of the rescue plan proposed. I shall revert more fully to that report later in this judgment.

Because of the service of the application to intervene at the eleventh hour, the application was postponed on 21 October. On 19 October Dr M Adam on behalf of

MECI deposed to a supplementary affidavit to his founding affidavit in the third respondent's counter-application for a fresh business rescue order. In the matter of **MRC**, and on the same day, he merely made a formal statement confirming the allegations made by Gutta in the application for intervention. The intervening parties and the third respondent were represented by the same firm of attorneys.

In the affidavit supporting the intervention application, the applicants explain that they had hitherto "keenly followed the developments in the main application" but did not get involved because they thought that the first and third respondents were handling the matter adequately. They seem to have been surprised by the order granted by Ranchod J and the fact that the third respondent's counter-application did not seem to have been even considered. They contend that the provisional winding-up order could not have been made in the face of the third respondent's pending counter-application and that the liquidation application could not have proceeded by virtue of the provisions of sections 129 and 131(6) of the Act. They say that when the order was made by consent, it had been common cause between the relevant parties that both resolutions to place the companies in business rescue had lapsed and were void because of non-compliance with the provisions of section 129.

In both cases the intervenors were of the view that the disputes with the main tenants were being attended to and that the companies could be rescued in accordance with the two plans proposed by Learning Strategies.

The stated purpose of the supplementary affidavit referred to above was mainly to appraise the court of certain new developments since the launching of the intervention application. The main development was that a lease agreement (of which a copy was annexed) had actually been concluded between **MECI** and the City of Johannesburg. That, says the deponent, meant that the reason why both

the applicant and the second respondent were of the view that the company could not be saved, had fallen away. In addition the necessary finance had been obtained from **Munaca Holdings** which would enable **MECI** to finance the required upgrade of the Kine Centre. He annexes a "term sheet" which sets out the basis on which the finance will be provided. He also explains in some detail how the company will be returned to profitability and annexes two reports by Learning Strategies, respectively headed "External Funding Scenario" and "Self Funding Scenario". They bear the same date (19 October 2014) as the one annexed to the intervention application, but are sub-titled "Feasibility Model - Version 13". They consist respectively of 10 and 11 pages of columns of figures in very small print, although both contain an index showing that there should be 23 pages in total. He concludes with the submission that what everybody considered necessary for the rescue of the company has now come about and that the rescue application should succeed.

The applicant filed what is actually the answering affidavit to the intervention application and which also dealt with the aforesaid supplementary affidavit. That is probably the reason why it was called a supplementary answering affidavit. A copy of that affidavit by the applicant was also filed in the In the **MRC** case. In the latter case there is in answer a brief affidavit by a bank official and the applicant relied mainly on the annexed copy of its opposing affidavit in the **MECI** matter, which is incorporated into the answering affidavit.

The applicant raises several answers to the opposing affidavit to the main application and also to the supplementary affidavit filed by Dr. Adam. Among the points raised against the supplementary affidavit are the following:

- The applicants point out that this was the third time that *inter alia* Dr. Adam and the third respondent had frustrated the final hearing and determination of the dispute at the eleventh hour;
- The alleged lease with the CoJ was void for vagueness because the commencement date thereof could not be determined and the nature, extent and quality of the required renovations are unspecified;
- The lease agreement is subject to the provision of about R 100 million by way of capital for the upgrade, which is purportedly provided for by the agreement with **Munaca** referred to above. In that regard:
    - The document is not signed on behalf of **Munaca;**
    - It is still subject to the signing of a binding agreement between the two parties involved;
    - **Munaca** requires as security the registration of a R100 million bond over the property of **MECI** and a cession of the lease agreement. These conditions could not be met, since the applicant already had two bonds for a total amount of R 320 million registered over the property, which precluded the registration of any further bond without the applicant's consent, and in terms of the standard bond terms all rights to rental income had already been ceded to the applicant.

In any event, says the applicant, the order of Ranchod J requiring the provision of proof of approved financing had not been met and in terms of paragraph 3 of his order the provisional liquidation of **MECI** should follow automatically. The applicant further contends that although it is clear that **MRC** would not survive unless **MECI** survived, it does not follow that **MRC** would also survive in the event of **MECI** surviving. **MRC** should accordingly be finally liquidated.

The applicant questions the validity of the claims of the intervening creditors, *inter alia* because of the late stage at which they appeared for the first time and the absence of any previous disclosure to the second respondent of the substantial debt owing to them, and also their failure to prove claims against the first respondent in business rescue.

There is a host of other complaints about the case of the intervenors, some of which will be dealt later in this judgment.

These latter two affidavits from the applicant not unexpectedly evoked a substantial replying affidavit on behalf of the intervenors in both cases plus, once again, a supplementary affidavit by Dr. Adam in the **MECI** case, the content of which to a substantial extent amounts to pure argument. Most of the concerns of the applicant are addressed in this set of affidavits, but things seem to have become somewhat confused amidst all the affidavits that were flying around. It will be recalled that there was a problem about the "hazardous" air in the Small Street Mall, resulting in the employees of the tenant vacating the building. In his replying affidavit in the **MRC** case Mr. Gutta, with reference to the problem with the air, refers to an annexure **IA18**. There is no such annexure to his affidavit and the annexures to the last affidavit before his were marked with the letters **TB** followed by a number, nor is such an annexure mentioned in the index of the relevant court bundle. The last set of annexures in the file of **MECI** (which did not have a problem with the air in the building) were marked with the letters **RA** followed by a number. At the very end of the papers in that file is a document marked **AA17**. It is a report by PSM Industrial Hygiene Services that purports to be in respect of the Nedbank Mall Building, situated at 145 Commissioner Street, which is the street address of the Small Street Mall. That at least seems to show that **MRC** did something about the problem of the employees.

When the matter was argued before me, it was common cause that the resolution for **MECI** to be placed in business rescue had lapsed and became a nullity as provided in section 129(5)(a) due to the failure of the company to comply with the provisions of section 129(3)(a). The resolution of **MRC** had already been set aside in terms of the order of 28 August 2014 by Ranchod J. The remaining issues were essentially the question whether a fresh rescue order should be made as applied for by the third respondent and the intervenors, if it be found that such an order is competent.

The applicant based its application to set the resolutions aside on section 130(1)(a)(ii) and (iii), alternatively on 130(5)(a)(ii) and there is a further prayer for a winding-up order. Although it seems to have been common cause between the parties that the resolution had lapsed, they probably accepted that the resolution remained in existence until set aside by a court. That view is reinforced by the fact that Ranchod J. (by agreement) kept the resolution alive by allowing the respondents time to come up with the required finances and a new rescue plan. If that view is correct the counter-application instituted by the third respondent would not have been competent in view of the provisions of section 131(1), which reads:

> *"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 the company under supervision and commencing business rescue proceedings."* (My underlining.)

Both companies have adopted such a resolution and unless they were to be ignored, the counter application was out of order. Nobody seems to have taken that point when the matter eventually came before Ranchod J. on 27 August 2014, nor that the application by the third respondent suspended the liquidation

proceedings. That is, however, now water under the bridge and the question to be considered is whether the third respondent and the intervenors can apply for a fresh order while the original resolutions still exists.

In my view there is a simple answer to be found in the wording of section 130. Sub-section (1) provides the necessary right for an affected person (which the applicant is) to apply for an order setting aside the resolution on *inter alia* the grounds that there is no reasonable prospect for rescuing the company or that it did not comply with the requirements of section 129. At the hearing of such an application a court can, in terms of sub-section (5), do one of two things: it can either set aside the resolution or afford the rescue practitioner more time to form an opinion, (which the practitioner has already done in this case.) There is simply no scope for making a fresh order in the place of the one that has been set aside. In the result the counter-application must fail. That finding really puts an end to the matter, but I should also record my view on the remaining issue.

I have perused a mass of papers, listened to a lot of argument and read many judgments, much of which was focused on finer technical points such as the rights of the company to its rental income which had been ceded to a creditor, whether the lease agreement between **MECI** and the CoJ was legally enforceable, whether the Department of Labour would start paying rent in view of the expert report on the quality of the air in the Small Street Mall and the like. The crucial question to be answered is contained in the final words of section 131(4)(a). In terms of that section a court may make and order for rescue proceedings if it is satisfied that *inter alia* the company is financially distressed (of which there can be no doubt in these two cases) "**..and there is a reasonable prospect for rescuing the company**" (my emphasis). This requirement can only be satisfied by taking a holistic view of the whole situation of the company and not getting ensnared in the *minutiae* of

the plan proposed and the criticisms thereof. On the other hand, these being motion proceedings, the requirement that an applicant must satisfy the court in its founding papers that there is such a reasonable prospect, should not be overlooked. As an example of this I shall later refer to the initial report by Learning Strategies.

In my view the past record of the two companies is one of the most important factors to be considered in trying to find an answer to the question. Each of the two companies purchased the building it presently owns in February 2003. In August 2005 a bond for R 20 million was registered over the property of **MECI** in favour of the applicant, which was increased in April 2009 to R 90 million in order to finance improvements to the building to suit prospective tenants. The major tenant would be the City of Johannesburg, with which more than one lease agreement was concluded. Unfortunately the latter never took occupation and not surprisingly, never paid any rentals.

MRC registered a bond for R 80 million over its property in favour of the applicant in September 2008. Initially it had better luck, in that it had a substantial number of tenants. That position changed after it lost the City of Johannesburg as a tenant during 2011. Thereafter both companies struggled along without ever succeeding in securing a sufficient number of tenants. Despite the best efforts of **MECI**, the applicant and the second respondent the dispute with the CoJ could not be resolved. The reason for this failure is not clear, but the unfortunate fact is that for three years the Kine Centre was virtually unoccupied while negotiations were going on and the financial position of the company was rapidly deteriorating. I can imagine three possible reasons for this state of affairs: firstly the tenant may have been unreasonable in its demands, in which event **MECI** should have given up the struggle much sooner and concentrated on finding other tenants. The other two

possibilities are incompetence on the part of the directors or a lack of tenant interest in that part of Johannesburg. If an incompetent directorate is to blame, it is a factor that might improve under the guidance of a rescue practitioner but will not necessarily remain so after the patient has been nursed back to health and the supervision comes to an end. If the problem is the lack of suitable tenants, no amount of guidance or rescue will make it go away. All three possibilities indicate that the prospects of the company being rescued are dim. Much the same applies to **MRC** and the conclusion is the same. The fact that both companies had for a period of several years been unable to satisfy their tenants despite the assistance of a big bank and a rescue practitioner, does not bode well for the future.

Another factor is the deterioration of the relationship between the second respondent and Dr. Adam at the helm of both companies. The second respondent describes how the directors of the two companies withheld important financial information from him, including the existence of several substantial creditors and a major restructuring of the whole group of companies during 2011. In addition there is a series of e-mails that were exchanged between the second respondent and Dr. Adam and from which it is clear that the relationship between them had broken down completely. Of course the failure to disclose the true financial position is disputed, but the fact is that the second respondent's actions after his appointment are consistent with his alleged ignorance of the true state of affairs. If anything, the factors indicate that Dr. Adam has indeed been less than frank with the appointed rescue practitioner.

I have mentioned the way in which the case for the applicants was presented and referred to the viability review from Learning Strategies. Although the allegation is made in the affidavits that the viability review was specifically instructed to be made of "the **plan** (my emphasis) that is proposed by the third respondent", the

report itself makes no mention of a plan and in fact purports to present the findings of a limited scope viability review of **MECI** in the one case and of **MRC** in the other. It is therefore an investigation of the viability of the company concerned itself and not of the proposed rescue plan. It seems that I will have to consider the report as if it were the business rescue plan. About 18 pages of the affidavit are devoted to an explanation of the two options and three phases of the plan proposed in the report.

The author of the report is described in the affidavit as "...an independent management consulting firm..." and it is further stated that the firm is "....a niche-focused management consulting **company**...." (my emphasis). The report is signed by

" Chris Elfick,

Managing Director"

without indicating of what he is the managing director.

The report is printed on the letterhead of

"LEARNING STRATEGIES

Consulting Services".

The letterhead does not purport to be that of a registered company and the usual company information is missing from it. Apart from the above *ipse dixit* of the deponent to the affidavit there is no indication of the qualifications or expertise of the author of the report. Nor am I told whether he works as a business rescue practitioner or has ever been appointed as such.

A copy of the report is annexed as annexure **IA12** at p.958 of the **MRC** papers. It is no simple matter to follow the exact workings of the rescue plan in the report, but it is clear, as is stated in the report, that "....the feasibility of financial recovery is largely contingent on lease being taken up....". It is also clear that the potential success of both companies is based on several assumptions. The chances of those assumptions materializing are not discussed.

A similar report is annexed in respect of **MECI** as annexure **IA8** at p. 880 of the relevant papers. That report likewise qualifies the prospects of success with the proviso that funding be obtained. Two possible ways of saving the company are postulated but both ".....relate fundamentally to the ability of **MECI** to raise a significant additional loan to cover the R80 million....." necessary to fund the required upgrade. I take this to mean that unless a loan of R80 million is obtained the lease will not materialize and the company has no hope of surviving.

Both reports have as annexures several pages consisting of numerous columns of figures which are printed too small for me to read, but I assume that they indicate how the companies' income will grow and their debts eventually be paid if the necessary funding is obtained. There is, however, another aspect which concerns me more: Both reports have as an annexure a "Comprehensive List of Information" which is stated in the Terms of Reference of the report to be a list of the information (presumably the documentation) received and on which the report is based. Absent from both lists is any mention of any of the affidavits deposed to by the applicant or the second respondent. That means that for purposes of the reports, the prospects of the companies surviving were decided without the benefit of knowing the grounds upon which two other parties that had been closely associated with their financial affairs had concluded that there was not a reasonable prospect of their survival. The report was improved and to some extent

explained in subsequent affidavits but that is the version on which the applicants asked me to consider the prospect of the companies succeeding.

In the same vein I can refer to the founding affidavit of Mr. Gutta in support of the application for intervention. It does not appear from his affidavit that he has any knowledge at all of the history of the dispute that the two companies had with their tenants or prospective tenants. I am not informed whether he has any experience in the running of a business or any expertise that enables him to express an informed view of the prospects of the two companies. No reason is advanced why I should accept his views on the topic in preference to those of the professional business rescue practitioner or the bank officials who presumably deal with providing loans to owners of commercial buildings.

It appears from the papers that the applicants for intervention have on three occasions succeeded in having the main application postponed by filing further applications or affidavits at the very last minute. There was an explanation, although not always a good one, for the lateness of their move but this history tends to cast doubt on the *bona fides* of the parties seeking the postponement.

I have mentioned above the application in October 2014 that was based on a new lease agreement with the CoJ and that **Munaca Holdings** would provide the financing for effecting the required improvements. After the bank pointed out several defects in the agreement on which the applicants (for intervention) relied, the latter changed horses and instead relied on financing that would be provided by **LPHoldings**. Had it not been for the vigilance of the bank in pointing out the defects in the **Munaca** agreement, a court may well have granted an application that had been built on sand. At the same time the question arises why **LPHoldings,** which is a member of the same group and had been sitting on the sideline while its two associated companies were struggling for survival through expensive litigation,

did not offer their assistance at a much earlier stage if there had been any merit in its belated offer. I do not believe that either **Munaca** or **LPH** would have been able to provide the assistance that they pretended to have available.

In the result I have not been persuaded that there is a reasonable prospect for rescuing either of **MECI** or **MRC** and the application for a fresh rescue order must be dismissed on those grounds as well. At the same time and for the same reasons all the applications for intervention must be dismissed.

It is clear from the papers that both companies are hopelessly insolvent, not only in that they are not able to pay their debts as they become due, but also in that their liabilities vastly exceed the value of their assets. Sufficient notice of the proceedings up to this stage and of the intention of the applicant to apply for the liquidation of both companies has been given to all possible interested parties. I can see no need for a provisional liquidation order of which the only effect will be to invite further litigation. Both companies are accordingly finally liquidated

COSTS:

There is no reason why the costs of the applicant shall not be taxable as between attorney and client in the liquidation. The same should apply to the second respondent as far as he may have incurred costs in these proceedings. It cannot be said that the first, third or fourth respondents made any contribution to the outcome of the application and with the exception of the third respondent, they have in fact greatly delayed the order that should be granted, wasting a vast amount of costs in the process. They should not be entitled to recover their costs in the liquidation. The third respondent seems to have abandoned its counter application at the time when Ranchod J. made his order and I assume that some arrangement was made in respect of its costs. Apart from that the third and fourth

respondents played only a minor part and did not substantially increase the costs of the proceedings. It would not be practical to make a separate cost order against them. On the other hand the intervening creditors made a major contribution to the costs of the proceedings and they should be held liable for the costs occasioned by their involvement. It is possible that the applicant may prefer to recover its costs from them rather than to prejudice the dividend that might accrue to creditors by recovering its costs from the insolvent estate. At the same time, I see no reason for a punitive cost order against them. What seems to be fair to me is that apart from the applicant's entitlement to recover all its costs from the liquidation, it should be able to hold the intervening creditors liable for its costs on the scale as between party and party, jointly and severally with the insolvent company. I did not debate this aspect with counsel and am not sure that the order that I have in mind will be practicable. For that reason I propose to allow the parties the opportunity to address me further on the cost order, provided that notice of their intention to do so is given to all concerned within 10 days from the date of this order.

I make the following order:

1. **As far as may be necessary the resolution in terms of section 129(1) of Act 71 of 2008 adopted by the first respondent on 26 March 2012 is set aside;**
2. **The application for intervention and the counter-application are dismissed with costs;**
3. **The first respondent is finally liquidated;**

4. **The applicant's costs, taxed or agreed on the scale as between attorney and client shall be costs in the administration;**
5. **The intervening creditors jointly and severally with the company in liquidation are liable for the costs of the applicant on the scale as between party and party;**
6. **Any party may address further argument to the court on the cost order provided that notice of the intention to do so is given to all other parties within 10 days of this order.**

F G PRELLER

JUDGE OF THE HIGH COURT

11/5/2017.