**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

**CASE NO: B445/2023**
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:
DATE: 18 July 2024
SIGNATUTR

In the matter of:

**THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE** Applicant

and

**MAJESTIC SILVER TRADING 275 (PTY) LTD** First Respondent
**[in Business Rescue]**

**GIDEON JOHANNES SLABBERT N O**
**THOMAS GEORGE NELL N O**
**[In their capacities as joint Business Rescue practitioners of the First Respondent]** Second Respondent

**NGWANE ROUX SHABANGU N O** Third Respondent

**PROE SHABANGU N O** Fourth Respondent

**STEMBILE ALPHOSINA SHABANGU N O** Fifth Respondent

**NOMZAMO PERSEVERANCE SHABANGU N O** Sixth Respondent

**[in their capacities as the appointed trustees of the Roux Shabangu Trust, IT48/05]**

**NGWANE ROUX SHABANGU** Seventh Respondent

**NOMZAMO PERSEVERANCE SHABANGU** Eighth Respondent

**THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION** Ninth Respondent

**ABSA BANK LTD** Tenth Respondent

*This judgment was handed down electronically by circulation to the parties' legal representatives via email and by uploading it to the electronic file of this matter on CaseLines. The date of judgment is deemed to be 10 July 2024.*

---

**JUDGMENT**

---

**MOGAGABE AJ**

**Introduction**

[1] On 17 April 2024, I granted an order confirming the provisional preservation order granted against Majestic Silver on 14 February 2024, a copy of which is attached hereto marked annexure "A", and uploaded on Caselines,[1] on 23 April 2024, and indicated that reasons therefor will be furnished at a later stage. I set out hereafter the reasons for granting such an order.

[2] However, before doing so, I deem it apposite to essay a brief background of the matter.

---

[1] Caselines sec 003-1 to 003-8.

**Background**

[3] On 14 February 2023, Le Roux AJ granted a provisional preservation order in terms of section 163 of the Tax Administration Act 28 of 2011 (the TAA) against the first respondent, Majestic Silver Trading 275 (Pty) Ltd ("**Majestic Silver"**), placing under provisional curatorship the business of Majestic Silver, Mr Ngwane Roux Shabangu (**"Mr Shabangu"**), the Roux Shabangu Family Trust (**"the Family Trust")** and Mrs Nomsa Perseverance Shabangu (**"Mrs Shabangu"**) and appointed a certain Johannes Zacharias Human Miller as the provisional curator and conferred on him certain extensive powers as contained therein.

[4] In terms of the said provisional preservation order, Majestic Silver, Mr. Shabangu the Family Trust, Mr and Mrs Shabangu and any other interested parties were called upon to show cause on 1 June 2023, the return date thereof, why such provisional preservation order should not be made final. At the time of the issue of such provisional preservation order, Majestic Silver was already placed under business rescue proceedings and a business rescue practitioner was appointed.

[5] The Family Trust, Mr. and Mrs. Shabangu anticipated the return date thereof and enrolled the matter for hearing on 29 May 2023 ("**the Anticipation Application**"). This was opposed by the applicant (SARS). The anticipation application served before Davis J, who after hearing argument reserved judgment. On 11 October 2023, Davis J delivered written judgment in terms of which he:

- [5.1] confirmed the provisional preservation order in respect of the Family Trust and Mr Shabangu with costs jointly and severally;

- [5.2] discharged the provisional preservation order in respect of Mrs Shabangu with costs; and

- [5.3] authorised the curator to give effect to the order in respect of taxes due by Mr. Shabangu and the Trust by means of disposing of any or all of the taxpayer's

assets by means of auctions or out-of-hand sales, with specific guidelines for the disposal thereof.[2]

[6] The nett effect of the judgment of Davis J is that it did not deal with the confirmation of the provisional preservation order granted against the first respondent (Majestic Silver) represented by the business rescue practitioners (BRPs) cited as second respondent herein. Hence the subject matter of the present proceedings is the confirmation of the provisional preservation order made against Majestic Silver, which is not opposed by the BRPs, as more fully outlined hereinafter.

**Applicable statutory framework**

[7] Section 163 of the Act provides thus:

> *"1. A senior SARS official may, in order to prevent any realisable assets from being disposed of or removed which may frustrate the collection of the full amount of tax that is due or payable or the official on reasonable grounds is satisfied may be due or payable, authorise an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates.*
>
> *…*
>
> *3. A preservation order may be made if required to secure the collection of the tax referred to in subsection (1) and in respect of –*

[2] Judgment of Davis J CaseLines 027-23 to 027-25.

*(a) realisable assets seized by SARS under subsection (2) [providing for seizure, safeguarding and the appointment of a curator bonis in whom such assets shall vest];*

*(b) the realisable assets as may be specified in the order and which are held by the person against whom the preservation order is being made;*

*(c) all the realisable assets held by the person, whether it is specified in the order or not; or*

*(d) all assets which, if transferred to the person after the making of the preservation order, would be realisable assets;*

*4. The court to which an application for a preservation order is made may-*

*(a) make a provisional preservation order having immediate effect;*

*(b) simultaneously grant a rule nisi calling upon the taxpayer or other person upon a business day mentioned in the rule to appear and to show cause why the preservation order should not be made final;*

*(c) upon application by the taxpayer or other person, anticipate the return day for the purposes of discharging the provisional preservation order if 24 hours' notice of the application has been given to SARS; and*

*(d) upon application by SARS, confirm the appointment of the curator bonis under subsection (2)(a) or appoint a curator bonis in whom the seized assets vests."*

[7.1] In terms of 163(7) a court granting a preservation order is empowered to make ancillary orders pertaining to the manner in which the assets are to be dealt with, including the power authorising the seizure of all movable assets; appointing a curator bonis in whom such assets vests; the realisation of such assets in satisfaction of the tax debt and any order that the court considers appropriate, for the proper, fair and effective execution of such preservation order.

[7.2] It is apposite in the circumstances to refer to the dicta of Rogers J explaining the approach regarding the suspicion or fear harboured by SARS concerning a respondent dissipating assets with the intention of frustrating the collection by SARS of a tax debt to the following effect:

*"I do not think that 'required' in s163(3) entails proof of such an intention on the part of the taxpayer. However, SARS is required to show, I think, that there is a material risk that assets which would otherwise be available in satisfaction of tax will, in the absence of a preservation order, no longer be available. The fact that the taxpayer bona fide considers that it does not owe the tax would not stand in the way of a preservation order if there is the material risk that realizable assets will not be available when it comes to ordinary execution. An obvious case is that of a company which, believing it owes no tax, proposes to make a distribution to its shareholders."*[3]

[3] **Commissioner, South African Revenue Services v Tradex (Pty) Ltd & Others** 2015 (3) SA 596 {WCC) para [36].

[7.3] Insofar as it pertains to the exercise of a court's discretion in granting a preservation order the pronouncements of Rogers J in **Tradex** are likewise apposite for present purposes to the following effect:

> *"[37] The question whether a preservation order is 'required' and whether the court should exercise its discretion to grant one, calls for a consideration of the specific terms of the order sought by SARS. The question whether a preservation order is required cannot be answered in the abstract. The practicality of the actual terms must be assessed."*[4]

**Majestic Silver**

[8] Majestic Silver is a property holding company established in February 2007 with an initial focus on investment and property development. It is the registered owner of nine immovable properties, which make up office blocks in an office park, all of which are encumbered or mortgaged in favour of the tenth respondent herein, ABSA Bank Limited (ABSA).

[9] In addition thereto Majestic Silver owns four movable assets comprising of the following four vehicles, viz two Ford Rangers, a V250 Mercedes and a Ford Ranger encumbered by ABSA. At all times material hereto, ABSA is currently the registered creditor of Majestic Silver and has a secure claim in the amount of R163,401,268.00 (as at 24 March 2023).

[10] It is apparent that during the COVID-19 pandemic, Majestic Silver sustained significant losses, due to the tenants vacating the office blocks and leaving the office blocks with approximately 9000 square meters of vacant space. To pre-empt more tenants vacating, Majestic Silver significantly reduced the rent payable, resulting in a significant loss of income.

---

[4] **Tradex** supra para [37].

**Intervening application**

[11] Before the delivery of the judgment of Davis J, J B Property Fund (Pty) Ltd (the intervening applicant) launched an intervention application seeking leave to intervene in the anticipation application and the present main application (provisional preservation order), on the basis, firstly, that it has an automatic right to participate in the preservation application and secondly that its interests as 100% shareholder in Majestic Silver, are adversely affected by virtue of the relief sought in the preservation application, and as such seeking to be joined as a party thereto, as the eleventh respondent in the preservation application.

[12] The relief sought by J B Property Fund as the intervening applicant is in essence for an order discharging the rule nisi (the provisional preservation order) so granted by Le Roux AJ on 14 February 2023. SARS filed affidavits opposing the intervening application. This opposed intervening application was duly allocated by the Deputy Judge President as a special motion to be adjudicated together with the main application (preservation application) on the 16th and 17th of April 2024. This opposed intervening application and the preservation application served before me as a special motion on the 16th and 17th of April 2024, as per the directives of the Deputy Judge President.

[13] However, before the hearing of the matter on Friday 12 April 2024, the attorneys of record of the BRPs (second respondents) filed a formal "notice of non appearance and abide" to the following effect:

"**Kindly take notice that:**

1. **There will be no appearance on behalf of the second respondents [BRPs] in their capacity as the joint business rescue practitioners at the hearing of this matter.**

2. **The business rescue practitioners <u>abide the decision</u> of the honourable court."[5] (my emphasis)**

[14] The nett effect thereof is that the court was not only formally notified that at the hearing of the matter on 16 April 2024, there will be no appearance by the legal representatives of the BRPs (including their counsel, Mr. Badenhorst), to present argument on behalf of the BRPs, but more importantly that the BRPs abide the outcome of the matter i.e. the decision of the court concerning this matter. However, the heads of argument, practice note and chronology prepared by their counsel, before the hearing of the matter remained part of the papers before the court .

[15] On the eve of the hearing of the matter (15 February 2024) the attorneys of record of J B Property Fund (intervening applicant) filed a formal notice of withdrawal, withdrawing as J B Property Fund's attorneys of record, with the attendant consequences that its counsel could not appear in court on the day of the hearing to argue the matter on behalf of J B Property Fund.

[16] On Monday 16 April 2024, the first day of the hearing of the matter, new attorneys acting on behalf of the BRPs, filed a formal notice terminating the appointment of the previous attorneys of record of the BRPs and a notice appointing them as the new attorneys of the BRPs. Subsequent thereto the new attorneys of record of J B Property Fund also filed a formal notice withdrawing in its entirety the intervening application so brought by J B Property Fund. The nett effect thereof in fact and law is that on the first day of the hearing of the matter (16 April 2024) the intervening application so brought by J B Property Fund based on it allegedly being a 100% shareholder of Majestic Silver, was withdrawn in its entirety, with the concomitant effect that J B Property Fund no longer formed part of the proceedings before the court.

---

[5] **See CaseLines 033-1 to 033-4. This notice was also emailed to the parties attorneys as per CaseLines 033-5.**

[17] In terms of an affidavit filed by the new attorney so representing the liquidators of J B Property Fund, it was explained that J B Property Fund had been placed under liquidation with the attendant consequences of the said liquidators being appointed as its liquidators, which liquidators gave instructions or mandated that the intervention application be withdrawn, hence the formal notice withdrawing such intervening application.

[18] I interpose to point out that Mr. Roux Shabangu in the founding affidavit claimed to be the sole director or member of J B Property Fund and as such was mandated or authorised by the resolution of the company to launch the intervention application. I point out *en passant* that at the hearing of the matter, neither Mr Roux Shabangu nor any legal representative on his behalf appeared in court concerning these supervening events, regarding the determination of the provisional preservation order.

[19] It is also important to highlight the fact that the matter was argued on the first day of the hearing whereafter same was adjourned (i.e. rule nisi extended) until the next day Tuesday 17th April 2024 at 14h00, to enable the court to consider the matter as well as provide an opportunity for any other party interested in the proceedings to appear in court. However, lo and behold on 17th April 2024 neither Mr Roux Shabangu nor any representatives on behalf of Majestic Silver or any other interested parties or persons in the matter made any appearance, except for legal representatives of SARS and of the liquidators of the JB Property Fund.

[20] The provisional preservation order (*rule nisi*) so granted on 14 February 2023 was since then extended several times by consent of the parties or by court order, until confirmation thereof on 17 April 2024 as outlined in para 1 above.

[21] Notwithstanding the non-appearance of counsel for the BRPs (second respondents) on the day of the hearing to make submissions on behalf of the BRPs, the court did have due regard and consideration of the point of law raised by the BRPs in their Rule 6(5)(d)(iii) as well as the argument and submissions in the heads of argument submitted by Mr Badenhorst on behalf of the BRPs, in the determination of the provisional preservation order, as more fully detailed hereafter.

**Business rescue proceedings**

[22] On 30 June 2022, Majestic Silver's board declared that it was in financial distress and passed a resolution in terms of section 129 of the Companies Act 71 of 2008 (the Act), commencing business rescue proceedings, effective 4 July 2022. This resulted in a certain Mr Zaheer Cassim being appointed business rescue practitioner of Majestic Silver from 5 September 2022 to 11th May 2023, when he filed a report in the anticipation application of the provisional preservation order (*rule nisi*) so granted on 14 February 2023. In his report, Mr Cassim summarised the history and standing of Majestic Silver, its assets and particulars as available on 20 May 2023.

[23] Mr. Cassim was replaced by Attorney Naude as BRP, who in turn was replaced on 14 September 2023 by the current BRPs Messrs Gideon Johannes Slabbert and Thomas George Nell, cited as second respondent herein.

[24] On 16 May 2023, ABSA Bank launched an urgent application, seeking an order that all immovable properties of Majestic Silver as so referred to above be released from the provisional preservation order. On 29 May 2023 and by agreement between ABSA Bank, SARS and the curator bonis (Mr. Miller), the court ordered that all the immovable properties and vehicles which were secured in favour of ABSA Bank are excluded (i.e. fall outside) from any provisional or confirmed preservation order granted or to be granted in favour of SARS in this

matter. So much then for the summary of the facts germane to determining the confirmation or discharge of the provisional preservation order (*rule nisi*).

[25] I turn now to deal with the defence set out by the BRPs in their Rule 6(5)(d)(iii) notice, resisting the confirmation of the provisional preservation order i.e. seeking to set aside or discharge same.

**Rule 6(5)(d)(iii) Notice**

[26] It is important to bear in mind that the BRPs instead of filing affidavits opposing the confirmation of the provisional preservation order (*rule nisi*), elected to file a notice in terms of Rule 6(5)(e)(iii) of the Uniform Rules of Court, only raising a point(s) of law challenging the competency or propriety of the provisional preservation order. The nett effect in law of such election on the part of the BRPs is that the merits of the preservation application remain unopposed, with the attendant consequences that the averments or allegations so made in the founding papers of SARS remain uncontested or undisputed and as such established facts, in determining whether the rule nisi or provisional preservation order should either be discharged or confirmed. As such, the BRPs must stand or fall on the outcome of these point(s) of law so raised in the notice.

[27] In essence, then the point of law so raised by the BRPs in terms of their rule 6(5)(d)(iii) notice is to the following effect:

> *"Was the order of 14 February 2023 [provisional preservation order] that anti dates the commencement of the business rescue proceedings wholly or partially competent in law?"*[6]

*[28]* The analysis and proper construction of this legal or preliminary point shows that it bears the hallmarks of challenging the competency of either a creditor (like SARS in casu) to seek and obtain such preservation order against a company or a court

[6] **See CaseLines 023 – 1 to 023 – 5 at 023-5 para 3.**

(like Le Roux AJ in casu) granting such order, in circumstances where such company (as is Majestic Silver) has been placed under business rescue and a BRP appointed.

*[28]* As such the BRPs have elected to rely on such point(s) of law, as being dispositive of the dispute between the parties, and not to file an affidavit setting out their defence(s) on the merits of the matter. Such failure to file an affidavit opposing the merits of the matter has the attendant consequences that in the event of such preliminary point(s) or point(s) of law being unsuccessful, failure to do so carries with it the attendant consequences that the material allegations in the founding papers of SARS, (which are undisputed or uncontroverted) are taken as established facts,[7] with the attendant consequences for present purposes, that amongst other facts, *the following facts* remain uncontested or undisputed facts in the determination of the merits of the matter (i.e. the confirmation or discharge of the provisional preservation order), namely:

[28.1] As at 24 January 2023, Majestic Silver is indebted to SARS in respect of outstanding taxes in the sum of R37,319,416.73, which is due and payable.

[28.2} There exists a real risk of the dissipation of Majestic Silver's assets in that Mr Shabangu, when he was in control of the bank accounts of various entities forming part of the Roux Shabangu Group, moved around funds between the accounts at will or as he wishes, which conduct resulted in frustrating the collection steps taken by SARS.

---

[7] **Hubby's Investments (Pty) Ltd v Lifetime Properties (Pty) Ltd** 1998 (3) SA 775 (SCA) at p779; **Standard Bank of SA Ltd v RTS Techniques and Planning (Pty) Ltd** 1992 (1) SA 432 (T) at 442A-B; **Bader v Weston** 1967 (1) SA 134 (C); **Boxer Superstores Mthatha v Mbenya 2007 (5) SA 450 (SCA) at para 4; Minister of Safety and Security v Tembop Recovery CC** [2016] JOL 35628 (SCA); **Marie NO & Other v Ntombela & Others** [2024] JOL 63567 (SCA); **MEC for Health Eastern Cape Province v Mbodla** [2016] JOL 33578 (SCA); **Minister of Finance v Public Protector & Others** 2022 (1) SA 244 (GP).

[28.3] The primary reason that resulted in the applications by Mr. Shabangu and related entities for compromise of tax and deferral of payment of tax debts being declined by SARS, was the lack of full disclosure of information. The curator had managed to obtain some information. However, the bulk of the information required in terms of the provisional preservation order remains outstanding.

[28.4] The trend of not disclosing complete information, or even accurate information, became evident in the intervention application when JB Property Fund was disclosed as Majestic Silver's shareholder, which information was contrary to the information that had previously been disclosed by Mr Shabangu and/or the previous BRPs.

[29] The aforesaid point of law so raised by the BRPs is devoid of any merit in that there is nothing in the Companies Act that precludes a creditor from seeking or obtaining a preservation order or renders a court incompetent to grant such preservation order in circumstances where a company has been placed under business rescue and a BRP appointed. On the contrary, the moratorium on legal proceedings or enforcement action against a company placed under business rescue in terms of section 133(1) of the Act, does not constitute an absolute prohibition or bar against the institution of legal proceedings, as such moratorium is subject to certain express exceptions as more outlined hereinafter. Put otherwise, a creditor is perfectly entitled in law to institute legal proceedings against a company that has been placed under business rescue and a BRP appointed (provided such legal proceedings are compliant with the provisions of subsections (1)(a),(b),(c),(d)(e) and (f) of section 133 of the Act) to obtain a provisional preservation order, and it is competent for a court (on being satisfied that on the evidence before it a proper case has been made) to grant such preservation order. In the circumstances, such preliminary point or point of law, so foreshadowed in para [27] above, must fail. Accordingly, it is dismissed.

**MORATORIUM PROHIBITING LEGAL PROCEEDINGS AGAINST COMPANIES UNDER BUSINESS RESCUE**

[29] It is common cause that the business rescue proceedings of Majestic Silver commenced on 30 June 2022 and were pending at the time of the granting of the provisional preservation order on 14 February 2023. It is contended by the BRPs as per the point of law so raised in the Rule 6(5)(d)(iii) notice on behalf of Majestic Silver, read with the submissions made in the heads of argument by Mr. Badenhorst on Majestic Silver's behalf, that the preservation application was fatally defective for non-compliance with the provisions of section 133(1)(b) of the Act. The contention raised in this regard is to the effect that section 133(1)(b) prohibits legal proceedings against a company placed under business rescue, unless done with leave of the court in accordance with the terms the court considers suitable. In developing this argument, it is contended that, as SARS did not seek the leave of the court before launching the provisional preservation application, such non-compliance rendered the provisional preservation order incompetent, unlawful and invalid, with the attendant consequence that the provisional preservation order (rule nisi), likewise falls to be discharged.

[30] The starting point is the statutory provision in question. The relevant provisions of section 133(1) of the Act read:

> *"**General moratorium on legal proceedings against company***
>
> *133(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) …
>
> (d) …

(e) …

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

**Interpretation and analysis of section 133**

[31] The applicable approach to statutory interpretation is enunciated in **Endumeni**,[8] where the court said:

"*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

[8] **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para [18]**

[32] The plain reading and interpretation of section 133 of the Act indicates the imposition of a general moratorium on legal proceedings or enforcement action instituted or proceeded with against a company or in relation to the property or assets belonging to the company, whilst the company is under business rescue. However, such moratorium is subject to six express exceptions contained in subsections (1)(a),(b),(c),(d),(e ) and (f) as set out above. This being so, the moratorium on legal proceedings against a company under business rescue proceedings is not absolute. Such moratorium can be lifted provided a creditor or any affected party does so in compliance with any of the aforesaid exceptions i.e. the legal proceedings so instituted are compliant with these express exceptions. It is common cause that SARS neither sought nor obtained the written consent of the BRP as so contemplated in subsection (1)(a) nor placed reliance on the exceptions contemplated in subsection (1)(f), before launching the preservation application. As such, these exceptions have no application in the present proceedings. Sars contends that the preservation application was instituted with leave of the court as so contemplated in subsection (1)(b) of the Act.

[34] I turn to deal with the interpretation and application of the exception contemplated in subsection (1)(b) i.e. uplifting the moratorium with leave of the court.

**The interpretation and application of the provisions of section 133(1)(b)**

[35] The primary purpose of business rescue proceedings is to provide for the efficient rescue and recovery of financially distressed companies, in such a manner that ensures a proper or equitable balance of the rights and interests of all relevant stakeholders in such company.[9]

[9] **Diener v Minister of Justice** 2019 (4) SA 374 (CC) at para [38].

[36] This entails that a relevant stakeholder like a creditor is entitled with leave of the court to uplift the moratorium, which leave can be sought simultaneously upon the institution of the main proceedings or subsequent thereto.[10]

[37] *In casu*, it is common cause that when SARS launched the provisional preservation application *ex parte* in February 2023, leave of the court to uplift the moratorium was sought and granted in the self-same application for the provisional preservation order.[11]

[38] The challenge raised in this regard is to the effect that it was incompetent for SARS to apply simultaneously for the lifting of the moratorium against legal proceedings in the same proceedings for the provisional preservation application order, and that SARS ought to have instituted two distinct legal proceedings: by first initiating proceedings to obtain leave of the court for the lifting of such moratorium and thereafter having so obtained such leave, to launch the application for the provisional preservation order.

[39] In essence, the assertions on the part of the BRPs challenging the propriety of the procedure employed by SARS in obtaining the preservation order, without first obtaining leave of the court to uplift the moratorium, is that such conduct was in the circumstances fatal to obtaining confirmation of the provisional preservation order, with the attendant consequence of discharging the provisional preservation order.

[40] It is common cause that at the time of launching the application for a provisional preservation order, Majestic Silver was already placed under business rescue and a business rescue practitioner was appointed. It is also common cause *in casu* that SARS sought in the same application for a preservation order, leave of the court to uplift the moratorium against legal proceedings in respect of Majestic

---

[10] **Booysen v Jonkheer Boere Wyn Makery (Pty) Ltd (in business rescue) & another** {2017] 1 All SA 862 (WCC) at para 61-62.
[11] See provisional preservation order CaseLines p006-10, para 26.

Silver. This being so, the crisp question for determination in this regard is whether it is permissible in law for SARS to use or employ a hybrid process of seeking leave of the court to uplift the moratorium in the same proceedings in terms of which it sought the provisional preservation order. Put otherwise, was SARS obliged in law to initiate a separate application seeking such leave of the court and thereafter having obtained such leave, launch the application for the provisional preservation order.

[41] In my view, the analysis of section 133(1)(b) of the Act, reveals that having regard to its text, context and purpose, there is no exclusion or preclusion of a creditor from utilising the hybrid procedure of simultaneous seeking in the same legal proceedings for the preservation order, leave of the court to uplift the moratorium in order to avoid a multiplicity of legal actions and to save time and limited court resources. Such hybrid procedure was endorsed by the full bench of this division in **National Director of Public Prosecutions v Knoop and Others**[12], rejecting the contention that leave of the court should be sought by way of a prior substantive application, holding that "*our courts have recognised that the request for leave may be made together with the main application [and] that prospects of an application for leave would generally be reliant on the prospects of success in the main relief to be sought"*

[42] Consequently, the hybrid procedure adopted by SARS in the present proceedings was proper, valid and permissible.

[43] There are conflicting authorities on whether it is competent or permissible for an applicant to seek the uplifting of the moratorium simultaneously in the self-same application for a preservation order. In other words the jurisprudence on this topic reveals or shows that conflicting or divergent views have been expressed by the courts pertaining to whether the provisions of section 133 oblige an applicant (creditor) to initiate a distinct and separate application seeking leave of

[12] Unreported decision of the Gauteng High Court, Pretoria (23 March 2022) para 71

the court to commence or proceed with legal proceedings against a company under business rescue, before launching the main application, or whether it is competent or permissible to seek such leave in the very same application in which the main relief is sought for the provisional preservation order. These conflicting or divergent judgments are neatly collated in the judgment of Sher AJ in Booysen.[13] As such it is not necessary to repeat or traverse same, save where necessary and relevant for present purposes. In **Elias Mechanicos**[14] and **Msunduzi Municipality**,[15] the court held that it is impermissible for an applicant to use the hybrid procedure i.e. seek relief for the upliftment of the moratorium in the very same application seeking relief in respect of the main application for the preservation order.

[44] In **BP Southern Africa (Pty) Ltd v Intertrans OIL SA (Pty) Ltd & Others**[16] the first respondent was placed under business rescue and a business rescue practitioner was appointed. Applicant was its major creditor. The applicant applied for the liquidation of first respondent contending that there was no prospect that first respondent will recover in terms of the business rescue proceedings. One of the preliminary issues that the court had to decide was whether separate *prior* proceedings were required by way of a substantive application, to lift the moratorium under section 133 of the Act, before the liquidation application was launched, having regard to the fact that the applicant sought in the main application a separate prayer for leave of the court to institute these proceedings. The court (per Van de Linde J) in dismissing such contentions said the following: "*…where the main relief to be sought goes to the very status which invokes the moratorium protection, it seems overly technical to insist on two distinct applications as opposed to one application with two (sets of) prayers: one for permission and one for the substantive relief.*

---

[13] **Booysen** supra fn 9.
[14] 2015 (4) SA 485 (KZD) paras [10] to [13].
[15] **Msunduzi Municipality v Uphill Trading 14 [2014] ZAKZPHC 64 (decided 27 June 2014;**2015 JDR 0702 (KZP).
[16] 2017 (4) SA 592 (GJ).

[45] Furthermore, Van de Linde J said: *"In other words, if the application is bad on the merits, the order should be to refuse leave to institute the proceedings. In short, this point goes with the substantive issue, … as regards the matter of form, i.e. whether a court should insist on a distinct prior application: …it would appear that a full court of the Gauteng Provincial Division has decided the issue against the first and second respondents argument",*[17] referring to the case of **LA Sport 4x4 Outdoor CC & Another v Broadsword Trading 20 (Pty) Ltd**[18] which held that it was not necessary to insist on two distinct applications i.e. a distinct prior application for leave of the court and thereafter another application for the main or substantive relief.

[46] The case of **LA Sport 4x4** (a Full Court decision of this Division) is instructive. The facts thereof are summarised as follows. The appellants were the owners of a business called LA Sport. They concluded a franchise agreement enabling the respondent company to conduct business under the LA Sport brand. Subsequent thereto the board of the company passed a resolution placing the company under business rescue proceedings and appointed a business rescue practitioner. The appellants applied to court to set aside the resolution and for certain consequential relief. One of the defences advanced by the BRP was whether the appellants were entitled to approach the court below to set aside the resolution and for other relief they sought without first obtaining leave of the court under section 133(1). The court a quo dismissed the application. On appeal, the respondents contended that the failure by the appellants to obtain leave of the court below in the form of a formal prior application was fatally defective. The Full Court (as per the judgment of Tuchten J) stated that a formal prior application is not required in every case where a court is asked for leave to proceed against a company under business rescue as there is no such requirement in section 133(1). He went forth and stated that a court should be slow to interpret a statutory measure so as to unnecessarily abridge its own power to do justice.

---

[17] **BP Southern Africa** paras [27] and [28].
[18] [2015] ZAGPPHC 78 (26 February 2015).

Tuchten J further stated that in certain instances, the opposition to the relaxation or upliftment of the moratorium "*will be self – evidently frivolous and lacking in substance"* constituting "*an exercise in empty formalism, designed cynically to perpetuate the advantages of immunity from the normal processes of the law which a company can secure for itself under the business rescue regime in the new Companies Act by a stroke of its own pen, and no more.*"

[47] The nett effect of Tuchten J's judgment in **LA Sports 4x4** is that there exists no need to launch a separate and distinct prior application for leave of the court as so contemplated in section 133(1) of the Act particularly where the issues concerning the relaxation (upliftment) of the moratorium are the same as those in the main application.

[48] I am inclined to follow the decisions of **LA Sport** and **BP Southern Africa** for the following reasons. Firstly, I am bound to follow the decision of **LA Sport** being a decision of the Full Court of this Division. Secondly, I agree with the ratio of both decisions to the effect that where the main relief sought relates to the very status for invoking the moratorium, as is *in casu*, it will be overly technical to insist on two distinct applications i.e. a distinct prior application for leave of the court and thereafter a main application for the substantive relief i.e. preservation order. Thirdly, the applicants (SARS) prospects of success on the merits are in the circumstances not only reasonable but strong. Fourthly, insisting on two distinct applications would in the circumstances be impractical and unnecessary having regard to the merits of the main application i.e. the two stage approach would not only be unnecessary and impractical but would in the circumstances be tantamount to promoting form over substance, particularly in circumstances as *in casu*, where the enquiry in both stages is based on the same set of facts, especially taking into account that the assessment of the initial part of the application (i.e. whether or not to grant leave under section 133(1)(b) of the Act, would in the circumstances *ipso facto* entail a consideration of the merits (prospects) of the main application i.e. the preservation application. Fifthly, in

order to avoid unnecessary duplication of costs, multiplicity of actions, and overburdening of outstretched judicial resources, it would be impractical and insensible to require an applicant to institute a separate and distinct application for leave of the court and thereafter launch the main application. Logic and common sense dictate that in matters of this nature it may not be fair, convenient or appropriate to compel an applicant to initiate a separate distinct application to obtain the court's leave instead of considering or determining such relief in the very same application for the main or substantive relief, in the form of a provisional preservation order, on such terms as the court may consider suitable having regard to the particular circumstances of the case. It would be impractical and illogical to apply a one-size-fits-all approach in such matters to lay down a rigid or inflexible rule or requirement that leave of the court should be sought and obtained by way of a separate and distinct prior application, which should thereafter be followed by a substantive or main application for substantive relief. Each case will be decided on the basis of its own facts or circumstances and subject to the proper or judicious exercise by the court of its discretion. It is not a matter of an inflexible and rigid once-size-fits-all approach.

[49] I am fortified in this conclusion by the decision of **Booysen.**[19] In this case the court was faced with a similar situation as *in casu*. The facts are briefly as follows. The applicant launched an application in which he sought an order directing the respondents and in particular the BRP to pay certain monies due to him. In terms of paragraph 2 of the notice of motion he also sought an order granting him leave to "bring" the application in terms of section 133(1) of the Act. One of the defences raised by the respondent was that the applicant had contrary to the provision of section 133(1) not obtained inter alia leave of the court prior to launching the application i.e. applicant was required to seek leave of the court in a separate and distinct application before launching the main application. In dealing with the issue, Sher AJ traversed the conspectus of all the cases that dealt with this issue including the conflicting or divergent judgments

[19] **Booysen fn 10.**

delivered in the South and North Gauteng Divisions on the one hand and the Kwa-Zulu-Natal Divisions on the other, including those dealt with above.

[50] In his comprehensive and well-reasoned judgment, Sher AJ stated out that the provisions of section 133(1) must be construed in a manner which is less or least restrictive on a litigant's Constitutional right of access to court and if possible to "*adopt a 'generous' construction over a merely textural or legalistic one in order to afford affected parties the fullest possible protection of such right of access*".[20]

[51] Sher AJ went forth and pointed out that as the moratorium under section 133(1) was intended merely to serve as a procedural limitation on the litigant's rights of action and not a bar in itself to proceedings against a company under business rescue, hence the Supreme Court of Appeal held in **Chetty** [21] that the requirement of consent from the practitioner or leave from the court, is not a jurisdictional fact or condition precedent for such legal proceedings and the legislature did not intend to invalidate or nullify such proceedings if they were brought before the requisite prior consent or leave having been obtained and that on this basis cases such as **Elias Mechanicos** were in his view wrongly decided. Sher AJ went forth and stated that as the principal objectives which the court should have in mind in dealing with such matters was to protect and give effect to the business rescue process and to advance it rather than to stifle or retard it and to this end "*the provisions of s133 are not to be understood to be a 'shield behind which a company not needing the protection may take refuge to fend off legitimate claims*'".[22] Having traversed all the interpretative strands as set out in these various judgments, Sher AJ held that "*it would be wrong to hold that in each and every matter in which leave of the court is required, such leave needs to be sought and obtained by way of a formal application, nor in my view, would it be correct to hold that such leave must, of* ***necessity****, always be sought by way*

[20] **Booysen** para 44.
[21] **Chetty t/a Nationwide Electrical v Hart and Ano NNO 2015 (6) SA 424 (SCA) para [38]; Booysen [51]**
[22] **Booysen para [53]**

*of a separate, prior application. In my view, there is no one-size-fits-all approach to be followed and what will be sufficient, will depend on the circumstances of each particular matter*".[23]

[52] In conclusion Sher AJ held that "*applying a purposive and contextual interpretation to the language used in the provisions in question, there is nothing in s133(1) which excludes the leave of the court being sought and obtained, in appropriate circumstances either together with or subsequent to the launch of the principal proceedings or action in question".* He went forth and stated that to his mind *"it makes little sense to compel an applicant seeking to obtain an order from a court simply directing the business rescue practitioner and company in rescue to implement the terms of a rescue plan which has been adopted, to obtain leave to do so by way of a separate and prior application and to do so would result in an unnecessary duplication of costs and would unnecessarily delay the rescue process".*[24]

[53] For present purposes, the relevance and importance of the **Booysen** judgment is that it firstly disagrees with and declines to follow the reasoning of the **Elias Mechanicos** line of cases[25] requiring the initiation of a separate and distinct application leave of the court before launching the main or principal application. Secondly, it endorses the principle that such leave can be sought and obtained in the same main or principal application for the interim relief sought i.e. that there is nothing in the provision of section 133(1) that excludes the leave of the court being sought and obtained in appropriate circumstances in the very same main application or subsequent to (after) the launch of the main or principal application and to require an applicant to do so by way of or in terms of a distinct and separate prior application will not only result in unnecessary multiplicity of actions and duplication of costs but would also have the effect of placing unnecessary formalistic obstacles in the path of a litigant (creditor) seeking and

[23] **Booysen para [54].**
[24] **Booysen para [62]**
[25] **Booysen para [56]**

obtaining such leave of the court. The case of **Booysen** is thus authority for rejecting the decisions of the **Elias Mechanicos** line of cases in this regard.

[54] The case of **National Director of Public Prosecutions v Knoop and Others**[26] a Full Court decision of this division, is illuminating as it deals with a comparable scenario of preservation orders under the Prevention of Organised Crime Act 121 of 1998 (POCA). The facts thereof for present purposes are briefly as follows. The company had already been placed under business rescue in terms of the Companies Act and the BRPs were appointed. Subsequent thereto , the NDPP applied for a preservation order in terms of section 38(1) of POCA[27], preserving certain assets of the company. The BRPs raised various defences in opposing the application.

[55] One of the defences raised was to the effect that the NDPP had failed to obtain leave of the court by way of a prior substantive application, before launching the restraint application. As such, the NDPP had failed to comply with the provisions of section 133(1)(b) of the Act. Notwithstanding the absence of a specific prayer in the notice of motion for such leave to be granted, the court nonetheless granted such leave, under the prayer seeking "further and/or alternative relief", based on the submission in the founding affidavit to the effect that "*there is an overwhelming case for consent for these proceedings to be granted under section 133(1)(b)".* [28]The court dismissed all the defences raised by the BRPs and granted the preservation order sought by the NDPP. On appeal by the BRPs, the Supreme Court of Appeal did not overturn or upset such a ruling but instead dismissed the appeal on the basis that the preservation order granted under Chapter 6 of POCA was not appealable.[29]

---

[26] Unreported decision of the Gauteng Division of the High Court, Pretoria, case number 62604/2021, delivered on 23 March 2022.
[27] *Sec 26(1) provides that "The National Director may by way of ex parte application apply to a High Court for an order prohibiting any person … from dealing in any manner with any property."*
[28] **Knoop paras [67 to 71]**
[29] **Knoop NO & Others v National Director of Public Prosecutions [2023] ZASCA 141 (30 October 2023)**

[56] The nett effect of this case is that the said finding or ruling by the Full Court remains binding and extant until overturned by an appeal court. The relevance of this comparable scenario, albeit decided within the context of POCA, is that the failure or omission by a party in the notice of motion, to seek leave of the court to uplift the moratorium, is not fatal to the application in that such relief can be granted under the prayer for "further and/or alternative relief", as long as such order is clearly indicated in the founding affidavit and established by satisfactory evidence.

[57] In any event, the court expressly disagreed with the submission that the NDPP should have sought leave by way of a prior substantive application, endorsing the decision in **BP Southern Africa**[30]**,** to the effect that such leave may be sought in the very same main application, stating that prospects of an application for leave would generally be reliant on the prospects of success in the main relief to be sought.[31] This being a Full Court decision of this division, I am bound to follow such decision, unless it is clearly wrong, which in my considered view, it is not. This decision is also in line with the decision of **Booysen** as outlined above.

[58] Accordingly, having regard to the facts of this case, particularly the established facts as outlined above, it was not incompetent, impermissible or unlawful for SARS to seek and obtain the provisional preservation order after Majestic Silver had already been placed under business rescue and the BRP had been appointed. Nor was it necessary or required for SARS to initiate a separate and distinct formal application to seek and obtain the leave of the court as so contemplated in section 133(1)(b) of the Act, prior to launching the preservation application. It was likewise, not improper, unlawful or impermissible for SARS to use the hybrid procedure to seek and obtain such leave of the court in the same main application i.e. provisional preservation application. Nor was it incompetent for the court to grant such provisional preservation application in circumstances

[30] Supra at paras 27 – 28.
[31] **Knoop** at para 71.

where leave of the court was sought in the self-same main application for the preservation order. On this score too, the provisional preservation order should be confirmed. This effectively should be the end of the matter, as this point of law constitutes in the main the basis on the part of the BRPs (in the absence of filing an opposing affidavit), in resisting the confirmation of the provisional preservation application. However, there are other issues or points raised in the Rule 6(5)(d)(iii) notice.

[59] I turn now to deal with such other issues or points raised in the notice. I point out that the Rule 6(5)(d)(iii) notice contains a general recitation of the various provisions of the Act without specifying the purpose same are cited or relied upon or in what respects same are relied upon. These issues are only clarified and elucidated in the heads of argument filed on behalf of the BRPs, as more detailed hereafter. It is important to highlight the fact that in the absence of an opposing affidavit, these issues are not substantiated or supported by any facts or evidence.

**The inappropriateness of SARS proceeding by way of an ex parte application**

[60] This issue is captured as follows in para 3 of the notice:

" 3. The granting of the order of 14 February 2023 ( on an ex parte basis and on a date that antedates the commencement of the of the business rescue proceedings) in terms of section 163 of the Tax Administration Act, 28 of 2011 … was in conflict with the provisions of the Companies Act and accordingly incompetent in law." Thereafter follows a recitation of the provisions of section 5 of the Act, as per para 3.1 of the notice. There is no elucidation or substantiation as to which provisions of the Act are in conflict with the granting of the provisional preservation order, nor is it specified in what respects such preservation order, is in conflict with the provisions of section 5 of the Act.

[59] Such elucidation or substantiation is only raised in the heads of argument of counsel for the BRPs. In the heads it appears to be contended that it was inappropriate, improper or impermissible for SARS to have initiated or launched the provisional preservation application *ex parte*, asserting that SARS was in the circumstances obliged or duty bound to give all relevant stakeholders i.e. all interested or affected persons (including other creditors of Majestic Silver such as ABSA Bank) as well as Majestic Silver itself (as represented by the BRPs) prior notice of such application to comply with the requirement of *audi alteram partem*. That by approaching the court by way of such *ex parte* application, SARS deprived all interested and affected persons the opportunity to make representations and to be heard, with the attendant consequence that such *ex parte* application was *per se* fatal to the grant and confirmation of the provisional preservation order so obtained by way of *ex parte* proceedings.

[60] This challenge is not only misguided or misplaced but is in essence devoid of any substance, simply in that section 163 of the TAA[32] expressly authorises the institution or launching of such provisional preservation application by way of *ex parte* proceedings. The regime of section 163 gives SARS the right to proceed by way of an *ex parte* application for the preservation order. As such it is not for the courts to read into the TAA constraints or limitations to the right to do so, which are not embodied in the TAA.[33] Put otherwise, the TAA expressly authorises SARS to employ an ex parte application for a preservation order, which dispenses with notice and service of application papers to Majestic Silver (as represented by the BRPs), to prevent realisable assets from being dissipated or disposed of (in the absence of a preservation order), which may frustrate the collection of tax, if SARS is desirous of obtaining an order in terms of section 163 of the TAA. In this regard, it is apposite to refer to the dicta of the Constitutional Court, dealing with the comparable if not identical scenario under section 38 of POCA, to the effect that section 38(1) "… means no more than that, if the

---

[32] **The provisions of sec 163 are set out in para 7 above**

[33] *See* **Knoop** dealing with the comparable if not identical provisions under sec 38(1) of POCA at para 65.

National Director is desirous of obtaining an order under s 38, she or he may use an ex parte application …."[34].

[61] Having regard to the established facts outlined above, i.e. Majestic Silver's tax liability in the sum of R37.3m which is undisputed, including the fact that the material assets of Majestic Silver comprised not only immovable property but also movable property and funds, SARS has established that there exists a real risk of the dissipation of the assets of Majestic Silver in that Mr. Shabangu, when he was in control of the bank accounts of the various entities forming part of the Roux Shabangu Group, moved around funds between the accounts at will, which conduct frustrated the collection steps taken by SARS, to recover Majestic Silver's tax indebtedness. Such facts are undisputed. As such SARS has established that there is a material risk that such realisable assets which would otherwise be required for the collection of tax, or otherwise available to satisfy the tax indebtedness of Majestic will, in the absence of the preservation order be diminished, by the time SARS is able to execute, warranting the ex parte proceedings. As such, the preservation order was required to secure the tax collection, thus conferring a substantial advantage in the collection of the tax,[35] warranting or justifying the use of ex parte proceedings for the grant of a preservation order pursuant to the provisions of section 163 of the TAA.

[62] It is important to bear in mind that in the present case, the confirmation of the provisional preservation order is unopposed, unlike in cases such as **Tradex.** This is an election made by the BRPs, electing not to file an opposing affidavit resisting the confirmation of the provisional preservation order/rule nisi and opting to raise legal points as outlined above. There are thus no material factual disputes in these confirmation proceedings, pertaining to SARS proceeding by way of ex parte proceedings.

---

[34] **National Director of Public Prosecutions and Ano v Mahomed NO 2003 (5) BCLR 476; 2003 (1) SA 1 (CC) para 33**

[35] **Commissioner for the South Afrcan Revenue Service v Van der Merwe (WCC case no.13048/13, Feb 2014; [2014] ZAWCHC 59); para 43; Tradex paras [30]– [36].**

[63] Furthermore, I find on a conspectus of all the evidence, particularly on the basis of the established (uncontested) facts of Mr. Shabangu channelling funds between the accounts of the various entities forming part of the Roux Shabangu Group at will or as he wished, that SARS was justified in being concerned about further such manipulation of funds and transfers, tantamount to dissipation of assets from one taxpayer to another, all of such conduct being designed or intended to frustrate the collection or recovery of tax debts by SARS, hence the need for an ex parte application.

[64] In any event, the provisional preservation order was coupled with a *rule nisi* which served to afford all the relevant stakeholders i.e. all interested and affected parties (including other creditors of Majestic Silver) an opportunity to file affidavits to oppose the confirmation of the provisional preservation order/rule nisi on the return date, if they so wished. As stated above, no affidavit was filed by the BRPs in opposing confirmation thereof. Other parties (including Mr Shabangu) anticipated the return date and filed an anticipation application as alluded to in para [5] above. Absa Bank launched the urgent application as alluded to in para [24] above.

[65] In the circumstances, the procedure adopted by SARS in launching the ex parte application for the provisional preservation order was not only statutorily authorised, but SARS has also established that the ex parte application was in the circumstances warranted, entitling it to the grant of the preservation order in terms of section 163.

**Setting aside of resolution and termination of business rescue proceedings**

[66] This issue is captured in para 2.3 of the notice in these bald terms :

" 3. The Companies Act specifically determines when business rescue proceedings end, whereas the Tax Administration Act does not." This statement is preceded

likewise by a recitation of the provisions of section 132(2) of the Act dealing with the ending of business rescue proceedings. This statement is merely a neutral or general statement regarding which legislation determines the termination of business rescue proceedings. Nothing more or less. It will be straining the language thereof to contend that it constitutes a point of law.

[66] It is only in the heads of argument that an attempt is made to rescue this bald and general statement to reformulate this terse statement to the effect that in terms of section 132(2)(a) of the Act, business rescue proceedings shall terminate when the court sets aside either the resolution placing the company under business rescue proceedings or the order that commenced the business rescue proceedings or converts the proceedings into liquidation proceedings. As such, the BRPs contend that SARS did not apply in the preservation application for an order in terms of section 130(1)(a) of the Act to set aside the resolution by the board of Majestic Silver placing the company under business rescue and no relief to this effect was sought nor granted according to the wording of the provisional preservation order so issued on 14 February 2023. This new contention cannot in the circumstances hold sway, in that in the founding affidavit this aspect has been pertinently dealt with. In paras 151 and 152 of the founding affidavit[36], SARS submits that " it clearly has locus standi as an admitted creditor to seek the setting aside of the resolution" and that 'it is just and equitable for the resolution to be set aside and furthermore that there are no reasonable prospects for the adoption of a successful implementation of the BR plan"[37]

[67] Considering all the facts and circumstances of this matter and in particular the fact that these averments and/or submissions are uncontested, I am satisfied that a sufficient case or satisfactory evidence has been made for the setting aside of the resolution. Following the decision of **Knoop,**[38] such relief can be granted pursuant to the prayer of "further and/or alternative relief" as contained in prayer

[36] **CaseIlLines 001-103**
[37] **CaseLines 001-103 paras 151 and 152.**
[38] **Knoop paras 67 to 70.**

28[39] of the notice of motion. Thus, it is also just and equitable that the resolution placing the company under business rescue be set aside. It is also in the interests of justice to do so.

[67] In any event, this contention is devoid of any merit in that SARS did seek such relief in terms of prayer 27 of the notice of motion, to the following effect:

" Upon the return date the business rescue proceedings of the first respondent are set aside and terminated …"

[68] A court has the power in instances where there is an unreasonable delay in finalising business rescue proceedings, to set aside such proceedings. It is important in the circumstances to highlight the fact that business rescue proceedings are not intended or designed to indefinitely protect a company to the prejudice of its creditors. This is so, in that in instances where there is an unreasonable delay in completing such business rescue proceedings, a court will upon application by a relevant stakeholder i.e. creditor, on proper or sound grounds, be competent or justified in setting aside or terminating such proceedings.[40]

[69] In this regard, SARS provided sufficient if not satisfactory evidence establishing that the business rescue proceedings were not commenced with the genuine and *bona fide* belief that there was a reasonable prospect of rescuing Majestic Silver from financial distress as well as establishing that there were no longer any reasonable prospects of rescuing Majestic Silver at any level based on that fact that such business rescue proceedings had been continuing for more than a year since 30 June 2022, without yielding any positive results and more importantly without the adoption of a business rescue plan, coupled with ABSA having obtained an order to dispose of the immovable properties in Majestic Silver's

[39] **CaseLines 001-9 prayer 28**
[40] **South African Bank of Athens v Zennies Fresh Fruit** 2018 (3) SA 278 (WCC) at para [43].

name encumbered in favour of ABSA, which immovable properties constitute the foundation of Majestic Silver's income streams. Furthermore, neither the BRPs nor Mr. Shabangu has placed any new information before the court demonstrating or establishing that such grounds or assertions are devoid of any substance or attacking the veracity thereof. In the absence thereof, the only reasonable inference to draw therefrom is that the BRPs have no answer or defence at all for such conduct.

[70] On the facts of this matter, there could be no reasonable grounds for believing that the company could be rescued. Consequently, the resolution falls to be set aside, it being just and equitable to do so. This being so, the business rescue proceedings are susceptible to be set aside and should be set aside. In accordance with the provisions of section 130(1) read with subsection (5) thereof, such proceedings are not subject to the moratorium provisions contemplated in section 133.[41]

**Inconsistences between the Companies Act and the Tax Administration Act**

[71] It is contended in the heads of argument filed on behalf of the BRPs, that there are inconsistencies between the provisions of the Tax Administration Act and in particular section 163 thereof and the provisions of the Act relating to business rescue. The argument advanced in this regard is to the effect that the rights of attachment in terms of the preservation order under section 163 of the TAA, were not intended to supersede compliance with sections 133 and 134(1)(c) of the Act, having regard to the fact that in the event of inconsistencies or conflict between the provisions of the TAA and the Act, the provisions of the Act shall prevail in terms of section 5(4)(b)(ii) of the Act. The interpretation and application of both statutory provisions reveal that there are no conflicts or inconsistencies between the provisions of the TAA governing or regulating preservation orders and those of the Act relating to business rescue. The two complement each other. Hence the BRPs do not identify any specific conflicts or inconsistencies in the Rule

[41] **Booysen** para [27]

6(5)(d)(iii) notice except to state that "the granting of the preservation order in terms of the provisions of section 163 of the TAA was in conflict with the provisions of the Companies Act" followed by a recitation of the provisions of section 5 of the Act, as outlined in para 60 above, or except to indicate that the Companies Act determines when the business rescue proceedings are completed or finalised as opposed to the TAA. It is not clear how these provisions advance the contentions by the BRPs rendering incompetent in law the preservation order so granted to SARS. This proposition, likewise must fail.

**Overlap of duties of the curator and BRPs**

[73] This issue is captured in the recitation in paras 2; 2.2.1; 2.2.3; of sections 140(1)(a), 140(3)(a), 141 of the Act dealing with the duties and functions of a BRP; sections 134 of the Act dealing with the property interests of a company under supervision and section 145 of the Act relating to the entitlement of creditors such as SARS to notification of inter alia court proceedings, meetings or other relevant events concerning a company's business rescue proceeding and participation therein. Nothing more or less. Likewise, such restatement of the provisions of the Act does not constitute a point of law.

[74] It is only in the heads of argument of counsel for the BRPs in which it is contended that this issue relates to or is directed at the purported overlap of the duties and powers of a curator appointed in terms of the TAA and those of a BRP appointed in terms of the Companies Act. In developing this argument, it is contended that the preservation order creates an anomalous situation whereby the company remains in business rescue in terms of Chapter 6 of the Act but subject to the control of a curator not referred to or provided in Chapter 6 of the Act. That in terms of the preservation order all the assets of the company forthwith vest in the curator and the business rescue practitioner is effectively replaced by the curator to effectively take control of the company and its assets, impacting on the powers and duties of the BRP to balance the interests of all affected persons and not in the interest of a single curator, with the attendant

consequences that the effect of the preservation order is to impose the interests of SARS and the curator above all those of the other affected persons. This argument is in the circumstances misconceived and misguided for the following reasons.

[75] Firstly, the curator's actions are limited to those strictly necessary in the interests of the company (Majestic Silver) and with the objective of ensuring that the maximum value of the company be maintained. Secondly, the BRPs retain control of the business and are entitled to exercise all powers in respect of the business that are lawfully vested in them as BRPs subject to the authority of the curator. Thirdly, the provisional preservation order endeavoured to harmonise potential conflicts between the Companies Act and the TAA, with the result that the business rescue practitioner can continue with his functions and duties with the oversight of the curator as it directs the BRPs as may be reasonably required to assist and cooperate with the curator in respect of the assets of Majestic Silver, as per para 10.5 of the order.[42] Fourthly, there is nothing in the Act or the common law that precludes the appointment of a curator while a business rescue practitioner is appointed. A sensible approach must be applied and followed in the overlap of duties of the curator and those of the BRPs and in interpreting the provisions of the Companies Act and the TAA in this regard.

[76] As so outlined above, it cannot be gainsaid regarding the validity or correctness of the legal position to the effect that section 133 of the Act imposes a general moratorium on legal proceedings against a company placed under business rescue, subject to the exceptions as outlined above and that section 140 of the Act provides for the general duties of a business rescue practitioner once a company has been placed under business rescue as well as the fact that in terms of section 141 of the Act a business rescue practitioner is entitled or enjoined to undertake an investigation regarding the affairs of a company under business rescue. However, it is not clear as to how these provisions support or advances

[42] **CaseLInes 006-5 para 10.5**

the contentions of the BRPs rendering invalid, improper and incompetent in law the preservation order so sought and obtained by SARS. This argument cannot in the circumstances hold sway

[77] In any event, a preservation order pursuant to the provisions of section 163 of the TAA is analogous to a preservation order in terms of section 26(1) of POCA, with the statutory formulation of the said provisions in POCA being held as to be similar or identical to the one provided for in section 163(7)(b) of the TAA.[43] In **Knoop**, a similar contention or argument was raised relating to the overlap of powers and duties of a curator and a BRP. In this case, the court held that a sensible approach should be followed in the overlap of the duties of the curator and those of a BRP and crafted a relief harmonising the powers and duties thereof to enable both the curator to work together with the BRPs. Likewise, this argument or contention must fail.

**Confirmation of provisional preservation order**

[78] There is no version put up by the BRPs controverting or disputing the assertions or averments in the founding papers. Accordingly, on the basis of the facts of this matter and in light of the aforegoing, I am of the considered view that SARS has established that the confirmation of the preservation order is indeed required against Majestic Silver to secure the collection and recovery of tax, on the evidentiary material before court i.e. uncontested version contained in its founding papers.

**Costs**

[80] I find no cogent reason or basis to depart from the customary rule that costs should follow the event.

---

[43] Section 26(1) if POCA provides that the National Director of Public Prosecutions may apply on an *ex parte* basis "to any competent High Court for an order prohibiting any person…from dealing in any manner with any property to which the order relates". The operative triggering provision for the NDPP is provided for in section 28(1) of POCA providing that "where a High Court has made a restraint order, that court may at any time appoint a curator bonis". See **Van der Merwe** para [20].

**Conclusion**

[81] In the circumstances, it is likewise apposite to restate the dicta of Tuchten J in **LA Sports 4x4** regarding the stance adopted by the BRPs *in casu* in so opposing the confirmation of the provisional preservation order/*rule nisi* as outlined above, as being tantamount to nothing more than "*an exercise in empty formalism, designed cynically to perpetuate the advantages of immunity from the normal processes of the law which a company can secure for itself under the business rescue regime*" [44] and the dicta of the Supreme Court of Appeal, that the provisions of s133(1) should not be misused or abused as a "*shield behind which a company not needing the protection may take refuge to fend off legitimate claims*"[45]

[82] In the result, the court confirmed the provisional preservation order as per the court order, a copy of which is attached hereto as annexure "A".[46]

**R MOGAGABE**
**ACTING JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

**APPEARANCES:**

| | |
|---|---|
| For the applicant: | M P van der Merwe SC assisted by A Louw |
| For the first respondent: | No appearance |
| For the second respondents (in their capacity as the joint business rescue practitioners | No appearance (heads of argument drawn by M A Badenhorst SC) |

[44] **LA Sport 4x4** para 29.
[45] **Chetty t/a Nationwide Electrical v Hart & Another NNO** 2015 (6) SA 424 (SCA) para 40.
[46] CaseLines 003-1 to 003-8.

of the first respondent):

| | |
|---|---|
| For the third respondent: | No appearance |
| For the fourth, fifth, sixth, seventh, eighth and ninth respondents: | No appearance |
| For the tenth respondent: | No appearance |