Current Commercial Cases

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EDITORIAL POLICY
Current Commercial Cases is a reporter of judgments of importance to commerce and commercial practice. The underlying assumption of this publication is that judgments are important because they are indicators of the rules under which commerce is obliged to operate. Whether such judgments are consistent with each other or not, and whether rational or irrational, publication of them is necessarily beneficial to the operation of commercial practice.

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In this issue

TANSNAT DURBAN (PTY) LTD v eTHEKWINI MUNICIPALITY

JUDGMENT BY ZP NKOSI ADJP
KWAZULU-NATAL LOCAL DIVISION, DURBAN
11 JANUARY 2024

2025 SACLR 1 (KZD)

Contract

The fact that an arbitrator concludes that he has no jurisdiction to decide a particular issue does not mean that this is not an issue that has been placed before him in terms of his mandate. Whether or not an arbitrator correctly decided that he has, or does not have, such jurisdiction, is a matter which can be decided in action proceedings brought by one of the parties to the arbitration objecting to the arbitration award.

THE FACTS

In its Particulars of Claim, in an action brought by Tansnat Durban (Pty) Ltd against eThekwini Municipality, Tansnat pleaded that an arbitrator was required by clause 6 of a settlement agreement to evaluate and determine the validity and/or justification of any claims between the parties. The arbitrator delivered an arbitration award which included a finding that the arbitrator did not have jurisdiction to determine the parties' claims relating to certain 'PTIG buses'. The finding by the arbitrator that he did not have jurisdiction to determine the claims relating to the PTIG buses resulted in his having made a hybrid Arbitration Award. The Award was accordingly a nullity. The jurisdiction afforded to the arbitrator was to finally determine all the issues between the parties. The arbitration was not yet complete. The arbitrator decided some issues as a matter of finality but did not decide all the issues as a matter of finality

As there was no room in law for a hybrid Award such as made by the arbitrator, the arbitrator had no jurisdiction to make an Award determining only some of the issues and leaving some issues to be determined by the court; and the Arbitrator's finding that he lacked jurisdiction to determine the PTIG bus issue destroyed the entire basis for his jurisdiction in respect of all his findings.

The municipality excepted to the particulars of claim on the grounds that on facts pleaded by Tansnat, it could not be said that the Arbitration Award amounted to a 'hybrid award' and was therefore a nullity. Alternatively, on the facts pleaded, the Award did not amount to a nullity and at best might have amounted to an Award which was reviewable in terms of section 33(1) of the Arbitration Act (no 42 of 1965). Further alternatively, even if the Award was a nullity, then this fact did not afford the court jurisdiction to determine the claims which the parties had against one another. Furthermore, Tansnat's pleaded contentions regarding the PTIG buses, do not affect the entire Award. Therefore, no reason existed for setting aside the entire Award.

Tansnat opposed the exception on the grounds that the 'hybrid order' relating to the PTIG issue constituted an impermissible order as it related to one of the issues falling within his mandate to determine and he did not decide it, but instead left it for the court to decide.

THE DECISION

The fact that the arbitrator concluded that he had no jurisdiction to decide the PTIG issue did not mean that this was not an issue that was placed before him in terms of his mandate. Equally, it did not mean that this was not an issue he was asked to decide. The fact that a statutory provision restricted him in deciding the PTIG issue did not mean that it was not properly placed before him.

The rule against hybrid orders encompasses determinations, made partly by a court and partly by an arbitrator in respect of a matter which was still the subject of a further arbitration that had not finally run its course as in the present case. The court is asked to decide a question of law which remained undecided by the arbitrator due to lack of jurisdiction on his part thus leaving the whole PTIG issue alive and unresolved.

This was a typical case of an

impermissible hybrid order having the effect of nullity of the Arbitration Award. There was accordingly no bar to the institution of the present proceedings in this court and there was no merit in the municipality's contention to the contrary that the disputes should simply be referred to a new arbitrator on the grounds that the parties had agreed that the claim shall be determined by arbitration.

If the Award was a nullity on the grounds contended for, then holding so would serve no purpose since the new arbitrator would be faced with the same statutory restriction. What the municipality proposed was not only illogical but a legal impossibility since another arbitrator would merely perpetuate the problem and not resolve it.

The exception was dismissed.

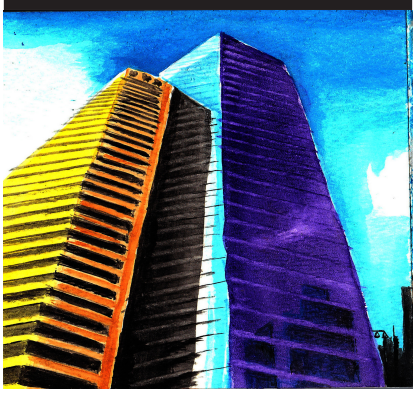
A pertinent reading of the POC does not support this contention. It is to be noted, in this regard, that there is no mention anywhere in the POC of the word 'severable' and equally no allegation to the effect that any one of the claims were severable from all other claims. On the contrary, there is an allegation to the exact opposite effect in paragraphs 33(e) and (f) of the POC. This allegation is that the PTIG issue is inextricably linked with the main issue between the parties, namely, whether it is the Municipality who is indebted to Tansnat or vice versa and the quantum of any such indebtedness and without a determination of the PTIG issue it is not possible to determine the main issue between the parties. That inextricability is the very antithesis of the severability.

TAYOB v LIFESTYLE FURNISHERS CC

A JUDGMMENT BY MBONGWE J
NORTH GAUTENG DIVISION,
PRETORIA
29 NOVEMBER 2024

2025 SACLR 48 (GDP)

Corporations



A close corporation which is not in a financial position to engage in litigation it has instituted, but relies on the allegation that it has a funder for its litigation may be ordered to furnish security for costs of its action.

THE FACTS

Lifestyle Furnishers CC in liquidation brought a claim against Tayob on the grounds that he had been grossly negligent in his conduct of the business rescue process resulting in the placement of Lifestyle in liquidation. It alleged that by his conduct Tayob had rendered himself liable, in the context and terms of the provisions of section 64 of the Close Corporations Act (no 69 of 1984), for payment of the total amount of Lifestyle's debt standing at R82 618 765.00.

Tayob contended that Kilianjee, the lead liquidator of Lifestyle, had used his position as the lead liquidator to influence the institution of the action proceedings against him as a vendetta for his removal by the Master.

Tayob applied for an order in terms of Rule 47 that Lifestyle pays an amount of R500 000 as security for his costs.

Lifestyle opposed the application on the grounds that it had a funder in the litigation which would ensure it could pay any costs.

THE DECISION

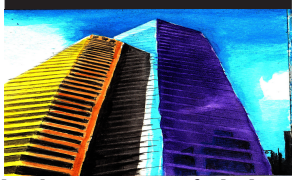
The primary reason behind the demand for the provision of security for costs is to protect a defendant in a claim that has been brought against him by a claimant who appears impecunious or would be unable to pay the costs of the defendant should he be successful in his defence.

Being in liquidation, Lifestyle was not in a financial position to engage in the litigation it had instituted. Its opposition to the demand that it furnish security for costs was buttressed on the contention that the demand was unnecessary as Lifestyle had a funder in the litigation was misplaced. This contention failed to take cognisance of the reality that Lifestyle's funder would impermissibly stand to benefit from the costs of the litigation should the claim succeed, without being liable to pay Tayob's costs in the event should the claim fail.

Unlike in the case of a company where the scope of considerations may be wider depending on nature and purpose of an action taken, in the present matter, it was a close corporation that was concerned, and the consideration was narrow. Actions that are reckless, vexatious, fraudulent or generally abusive of the process of the court are paramount considerations in the determination whether a plaintiff incola company should be ordered to provide security for costs. In the case of a close corporation the scope is narrowed by legislation. In terms of section 8 of the Close Corporations Act, it is the impecuniosity of the plaintiff close corporation or its being in de facto liquidation that informs the decision to order that it provides security for the costs of the defendant.

Tayob's application was granted.

ECKHOFF N.O. v VAN DEN HEEVER



AJUDGMENTBYTHULAREJ
WESTERN CAPE DIVISION,
CAPETOWN
19 NOVEMBER 2024

2025 SACLR 102 (WCC)

A declaration of personal liability for the debts of a company against a person who knowingly carried on business of company recklessly or fraudulently requires an applicant for such declaration to prove, on balance of probabilities, that person who was sought to be held liable had knowledge of the facts from which a conclusion could properly be drawn that the business of the company was carried on recklessly or with intent to defraud creditors of company or creditors of any person or for any fraudulent purpose.

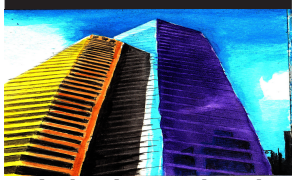
THE FACTS

The Vines Construction (Pty) Ltd conducted business as a property holding and developing concern prior to its name being changed shortly before its voluntary member's winding up on 27 November 2019. The third applicant and the company concluded a written deed of sale in terms of which the third applicant sold an immovable property described as sections 1 and 2 in the Vines sectional title scheme to the company for R6m. In an addendum to the deed of sale it was agreed that a R2m balance of the purchase price would be paid to the third applicant on or before 30 June 2018 and that the company would cause a mortgage bond to be registered over a portion of the property, in favour of Vines as security for the R2m balance.

The property was registered in the company's name on 30 January 2018 but the company failed to pay the R2m balance of the purchase price or to cause the mortgage bond to be registered in the third applicant's favour as security. The third applicant instituted proceedings against Vines to compel it to register the bond. In its answering papers Vines tendered payment of R300 988.10. It did not pay this amount as it intended to set it off in relation to a cost order made against the third applicant. Vine's position was that the amount was to be kept in trust and undertook that the funds would be paid over in the event that the third applicant succeeded in its appeal or be set off against possible future allocaturs once the third applicant's appeals had been exhausted and had been dismissed. The third applicant was successful on appeal and its position was that the defence to the payment of R300 988.10 was eliminated. The company failed to pay the amount in response to a demand made by the third applicant in terms of section 345 of the Companies Act. It contended that, as a result, the company was deemed unable to pay its debts

In early December 2019 third applicant learned that the company had undergone a name change shortly before being placed in voluntary member's winding up. Van den Heever, Vines' sole director and shareholder, failed to list or include the company's admitted liability towards the third applicant in his sworn CM100 statement of affairs submitted in terms of section 363 of the Companies Act. In 2022, during the enquiry into the company's affairs, Vines became aware that Van den Heever and the second respondent were personal friends. The third applicant also came to know that Van den Heever caused the entire proceeds of the sale of the company's property, which was its only asset, to be paid to Oude Chardonnay Retail (Pty) Ltd, where it was spent on settling Retail's revolving credit debt.

Vines and the third applicant contended that this amounted to conducting the company's business recklessly or fraudulently and to the prejudice of the company's creditors, or disregarded their interests, within the meaning of section 424 of the Companies Act. The applicants were precluded from becoming aware of the existence of the debt until 2022. On 22 January 2020 the liquidators were provided with the company's records and documents in the company's attorneys possession and these included the deed of sale of the property. On 23 January 2020 the first meeting of



creditors was held. On 8 February the liquidators were appointed as the company's final liquidators. On 6 March 2020 the second meeting of creditors was held. On 17 March 2020 the liquidators filed the first liquidation and distribution account in which the property was nowhere listed as an asset of the company.

On 22 September 2023, the company's liquidator, Eckhoff, and the other applicants brought an application seeking orders setting aside the company's disposition of its immovable property to the second respondent, or to recover the value of the property from her, in terms of the provisions of section 31 of the Insolvency Act (no 24 of 1936) and an order declaring the Van den Heever liable for all the company's debts in terms of section 424 of the Companies Act (no 61 of 1973).

The respondents argued that the applicants knew material information by 22 September 2020, three years before the issuing of their application on 22 September 2023. These were that the company was unable to pay its debts, was insolvent and had been liquidated; the mortgage bond in favour of the third applicant had not been registered over the property; the property was sold to a Ms Stemmet on 5 February 2019 and transferred to her and registered in Cape Town Deeds Office on 17 April 2019; that the property had been sold at a value of R1m, well below that for which the third applicant had it valued, which was R2m; despite the sale of the property, no portion of the debt due to the third applicant, including that portion of the debt that the applicants said was common cause was owed to the applicant.

The respondents opposed the application, both on the merits and on the grounds that the claim formulated against him in terms of section 424 had prescribed as contemplated in section 10 read with paragraph 11(d) of the Prescription Act (no 68 of 1969). The second respondent opposed the relief on the merits contending that the applicants had failed to make out a case that she colluded with Van den Heever in respect of the sale but also on the basis that the claim against her had prescribed.

THE DECISION

It was necessary to prove that the recipient of a disposition knew that the debtor contemplated sequestration when the disposition was made and that the recipient intended to be preferred above another or others and that the recipient intended to disturb the proper distribution of the debtor's assets in the event of the sequestration of the debtor's estate. Motion proceedings are not geared to deal with factual disputes, and are principally for the resolution of legal issues. Disputed alleged collusions involve the resolution of factual issues including what was known, the intention and the impact. In the present case, the factual disputes required evidence to prove and it would have been appropriate for the applicants to institute action proceedings. In the circumstances, motion proceedings were inappropriate.

The declaration of personal liability had to be established for debts of the company against a person who knowingly carried on business of company recklessly or fraudulently. The applicant for such declaration is required to prove, on balance of probabilities, that person who was sought to be held liable had knowledge of the facts from which a conclusion could properly be drawn that the business of the company was carried on recklessly or with intent to defraud creditors of company or creditors of any person or for any fraudulent purpose.

The dispute between the parties required that a court scrutinise the company's minute-books, correspondence, books of account and other records in order to gain a picture of the responsibilities undertaken and the part played by Van den Heever in the conduct of the company's affairs; to calculate the approximate date by which the company had lost its capital; to estimate the possible date or dates by which Van den Heever was likely to have become aware of the fact that the company had lost its capital and whether he, after the date on which he probably knew of the insolvency of the company, caused or permitted the company to carry on business (1) recklessly or (2) with intent to defraud creditors of the company or (3) creditors of any other person than the company or 94) for any fraudulent purpose.

UMHLABA ERF 1 PROPERTIES CC v SHELL DOWNSTREAM SOUTH AFRICA (PTY) LTD

JUDGMENT BY FRIEDMAN AJ
GAUTENG DIVISION,
JOHANNESBURG
24 JANUARY 2025

2025 SACLR 1 (GDJ)

Property

A judgment which provides for the registration of property in a party's name operates in rem, and is therefore binding on all parties contending that they have a right to ownership of the property. Such a party is bound by such a judgment unless it is rescinded, and cannot claim a right to ownership based on any alleged contractual right to transfer of the property to itself.

THE FACTS

Umhlaba Erf 1 Properties CC operated the Amandla Service Station from 1996. It then entered into negotiations with the Ekurhuleni Metropolitan Municipality, in 2001 and 2002, to purchase the property on which it operated. This led to the conclusion of a sale agreement in 2003. In 2006, it contemplated, but then abandoned, the idea of litigating against the Municipality to compel it to transfer the contested property to it.

For a period of around nine years, Umhlaba took no legal action to enforce its rights under the 2003 sale agreement. However, in 2012, it demanded that the Municipality co-operate to give it transfer of the contested property. On 25 July 2012, a court ordered the municipality to take steps to effect transfer of the property to Umhlaba. The property was registered in Umhlaba's name on 6 November 2017. In 2014, Shell was informed of the court order.

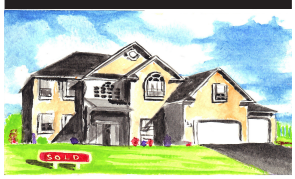
In 2017, Umhlaba wrote to Shell Downstream South Africa (Pty) Ltd to ask it to explain the basis on which it occupied the property and operated a Service Station. Umhlaba said that it was interested in concluding a long lease with an operator of a petrol station on the property, and was willing to enter into negotiations with Shell if it was interested. Umhlaba, in its letter to Shell, also explained that it was amenable to concluding a short-term lease pending the finalisation of any negotiations.

None of Shell's employees responsible for the property had proper knowledge of the history. This gave rise to a situation in which, for a significant period of time, the parties negotiated based on the commonly-accepted premise that Umhlaba was the owner of the contested property. It was only as a result of investigations conducted by Shell in parallel to these negotiations, that Shell's current employees began to discover that Shell had earlier been in negotiations with the municipality to acquire ownership of the property.

Until Shell finally had sufficient information to dispute Umhlaba's ownership of the contested property, the negotiations were aimed at concluding a long-term lease agreement. The parties were in dispute as to whether a short-term lease in respect of the Service Station portion was concluded to govern the relationship pending the finalisation of the long-term lease.

Umhlaba contended that a short-term lease agreement was concluded orally, and remained in force while the negotiations continued. When Shell decided to change tack, reject the premise that Umhlaba was the owner of the contested property, and decided to dispute Umhlaba's ownership, Umhlaba stated that it cancelled the short-term lease because it took the view that Shell had repudiated it. It also contended that if it was found that no short-term lease was concluded between the parties, Shell had been enriched at its expense in the amount of R105 000 per month (exclusive of VAT) which was the sum which it alleged the parties agreed as the rental under the short-term agreement, and that Umhlaba had been impoverished in the same amount.

Umhlaba brought an application for an order terminating or cancelling the short term lease of the premises, ejecting Shell from it, and claiming a monetary amount. The claim was primarily based



on the premise that Shell was liable for the rental which was due under the short-term lease until the date of Shell's apparent repudiation and then for the agreed monthly rental amount for the period between Shell's repudiation and the date on which it ultimately was to vacate the property.

Shell brought a counter-application, in which it sought to have the registration of the property in the name of Umhlaba cancelled. It also sought an order requiring the municipality to transfer the property to it. Shell stated that Umhlaba was aware, when it concluded the agreement of sale with the municipality, that Shell had already concluded an agreement with the municipality to acquire the property. In this agreement, the municipality agreed to exchange the contested property for a second property, subject to Shell paying a small sum reflecting the value by which the contested property exceeded the second property.

Shell also contended that it improved the value of the property substantially by building a service station on it, which meant that, as a bona fide possessor, it was entitled to be compensated for improvements. Until it was compensated for the improvements which it made to the property, and which amounted to approximately R10m, it was entitled to remain in possession pursuant to its lien.

THE DECISION

The first question was whether Shell was correct in arguing that the agreement between Umhlaba and the Municipality was void, in the light of the fact that in 2012 a court ordered the transfer of the property to Umhlaba.

A judgment in rem resolves the status of a person or a thing. The 2012 order operated in rem, because it provided for the registration of the contested property in Umhlaba's name. Umhlaba's claim against the municipality to obtain transfer of the property was based on a personal right, but that did not mean that the 2012 order did not operate in rem. This is because, having resolved the contractual question of Umhlaba's entitlement to the contested property, it also determined the property's status, it being impossible for two or more competing entities to be declared to be the owner of one property. If the 2012 order operated in rem, then it was clearly binding on Shell.

It was unavoidable to conclude that Shell was a privy of the Municipality and was therefore bound by the 2012 order.

Logic suggested that Shell should be treated as a privy of the Municipality. This would render the 2012 order res judicata between Shell and Umhlaba, just as it was res judicata between the Municipality and Umhlaba.

Shell has, in its counter-application, sought an order setting aside the registration of the contested property in Umhlaba's name. But, instead of basing its claim for this relief on the invalidity of the 2012 order— which it could have attempted by seeking an order rescinding the 2012 order coupled with a prayer to condone the delay in seeking rescission—or even the real agreement facilitating registration, Shell chose to attack the validity of the underlying agreement between Umhlaba and the Municipality.

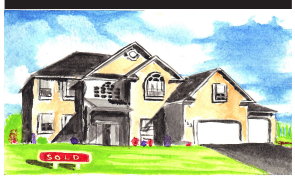
By adopting this approach, Shell sought to do the very thing which the abstract system of ownership precludes. Instead of attacking the basis for the registration of Umhlaba's ownership of the contested property, it attacked the underlying legal cause of the transfer of ownership. This is precisely what the Supreme Court of Appeal said, in *Legator McKenna*, 2010 (1) SA 35 (SCA) was precluded by the abstract theory of ownership. Therefore, Shell was precluded from seeking the cancellation of the registration of the contested property in Umhlaba's name without also seeking an order rescinding the 2012 order.

It followed that the 2012 order was an insurmountable obstacle to the relief sought by Shell.

The second question was whether or not Shell's claim had prescribed, given the fact that Shell, on its own version of the history, acquired the right to the contested property more than fifteen years before the 2012 order was granted. On its own version, it contemplated, but then abandoned, the idea of litigating against the Municipality in around 2006 to compel it to transfer the contested property to it.

Even if one were to try to construe the counter-application as an implicit rescission application, it would not be in the interests of justice to grant it. Leaving aside the fact that Shell had failed to plead a proper case for rescission, the bigger issue was that it could never make out a case to rescind the 2012 order. If its claim underpinning the counter-application had prescribed, as it had, then no possible purpose would be served by rescinding the 2012 order. If Shell's claim to the contested property has prescribed, then it had no further legal interest in overturning the 2012 order.

As far as Shell's enrichment claim was concerned, binding



authority, including of the SCA, clearly provided that all rights of real security, including, a lien are accessory to a valid underlying claim.The accessory nature of that lien means that, once the underlying claim cannot be pursued, the lien is lost.

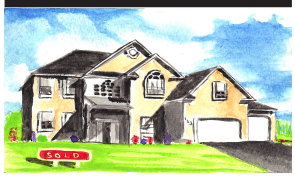
Any claim against Umhlaba would have prescribed no later than three years after the dates in 2014 when Shell was informed that Umhlaba had obtained an order confirming its ownership of the property. The claim would face the further obstacle that Umhlaba bought the property with the service station already built.

Shell was ordered to vacate the property. Claims to rentals and/or holding over damages were referred to trial.

A judgment in rem resolves the status of a person or a thing[1]. The 2012 order arguably operates in rem, because it provides for the registration of the contested property in Umhlaba's name. I am mindful that Umhlaba's claim against the Municipality to obtain transfer of the property was based on a personal right (as to which, see further below). That does not, however, mean that the 2012 order does not operate in rem. This is because, having resolved the contractual question of Umhlaba's entitlement to the contested property, it also determined the property's status (it being impossible for two or more competing entities to be declared both/all to be the owner of one property (in the absence, of course, of a co-ownership arrangement)). If the 2012 order operates in rem, then it is clearly binding on Shell. For present purposes, I assume that it only operates in personam and everything which I say below proceeds from that premise. In my view, it seems unavoidable to conclude that Shell was a privy of the Municipality and is therefore bound by the 2012 order

THE BODY CORPORATE SILVER STREAM v MATHIBELA

Property



A JUDGMENT BY LA RETIEF J
NORTH GAUTENG DIVISION, PRETORIA
31 JANUARY 2025

2025 SACLR 141 (GDP)

A property may be declared executable even after the lapse of considerable time from the granting of default judgment provided that a valuation of the property indicating a reasonable reserve price for property is given.

THE FACTS

The Body Corporate Silver Stream obtained default judgment against Mathibela for payment of outstanding rates and levies in the sum of R81 396.95. The judgment debt was sought and granted on 22 July 2016.

Nine years later, Silver Stream brought an application to declare Mathibela's immovable property specifically executable and for an order authorising the issuing of a writ of execution against such immovable property

The respondent attorneys did not file opposing papers, nor were any opposing papers delivered. Mathibela's daughter, Ms Pearl Mathibela, deposed to an affidavit opposing the application. The purpose of the affidavit was set out and three reasons were provided, therefor. The first reason proffered was to confirm that the application was opposed, and reference was made to the notice to oppose. The second reason proffered was to confirm that the process of finalising the opposing papers was currently underway as at the 20 August 2022. Lastly, Ms Pearl Mathibela stated that she wished to safeguard her mother's rights specifically as they related to the costs of the court appearance on the unopposed roll. No further rights of the respondent were alluded to. Ms Pearl Mathibela requested that the cost be reserved for the determination of the main application. It was confirmed that ownership of the property was that of the respondent, and Ms Pearl Mathibela merely occupied the property.

An updated sworn valuation was obtained and an appointed appraiser determined the property's forced sale value at R 900 000.00 and its market value at R 1 100.000.00.

THE DECISION

Considering all the facts, no triable defence to the attachment and relief application was demonstrated as against the unreasonable and unanswered delay. Taking into account that Ms Pearl Mathibela nor the respondent had made any payment arrangements, nor that either one of them tender payment into any attorney's trust account to show any good faith and or a willingness to at least pay the judgment debt, and considering all the facts and taking all the oral submissions into account, condonation should not be granted.

Having regard to the reserve price translating into a forced sale price, this was fair and reasonable, being R 900 000.00.

Silver Stream succeeded with its attachment and execution relief.

GEORGE LOCAL MUNICIPALITY v CAPE ESTATES PROPERTIES (PTY) LTD

JUDGMENT BY KEIGHTLEY JA (MOCUMIE and SMITH JJA and VALLY and MOLITSOANE AJJA concurring)
SUPREME COURT OF APPEAL
8 APRIL 2025

2025 SACLR 157 (SCA)

The effect of a zoning determination is that the entire portion of the property associated with the property concerned is conditionally zoned. For the purpose of any added condition aimed at determining the precise extent of that portion is not necessary to determine the extent to map out areas affected, when the zoning is not limited to them.

THE FACTS

Cape Estates Properties (Pty) Ltd owned a property known as Erf 2[...] situated within the area of the George Local Municipality. Initially, it formed part of a larger property, being the Remainder Kraaibosch 195/1, George (Kraaibosch 195/1). There was a sawmill on one part of the property, which had been in use since 1943. The rest of Kraaibosch was under pine plantation. Kraaibosch 195/1 had never been zoned. In 2021, the then owner of the property wished to obtain official confirmation of the applicable zoning. It engaged town planners to apply for a zoning certificate on its behalf. The Land Use Planning Ordinance 15 of 1985 (LUPO) which was then in operation provided that:

'With effect from the date of commencement of this Ordinance [1 July 1986] all land referred to in section 8 shall be deemed to be zoned in accordance with the utilisation thereof, as determined by the council concerned.'

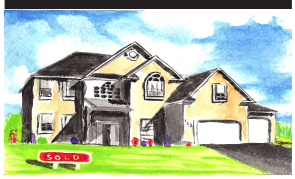
The 2001 zoning application described Kraaibosch 195/1 as being 259,4973 hectares in extent. The Municipality's Director: Planning and Economic Development (the Director) compiled a report, dated 7 May 2001, containing recommendations to assist the Planning Committee's determination under s14(1) of LUPO (the Director's report). The Director's report recorded 'support … (for) the zoning as Industrial Zone 1 (Industry) for the existing activities. . .' Conditions for approval included that a site plan be submitted showing the location of the saw mill with all structures and the surrounding plantations with access and other routes, and (condition 2) that the zoning of Kraaibosch 195/1, Division George be Industrial Zone 1 (for only the existing saw mill) with the remainder of the property zoned Agricultural Zone.

On 22 May 2001, the Planning Committee of the Municipality met and resolved to adopt the recommendations, as well as the conditions recorded in the Director's report (the 2001 zoning determination).

The effect of the 2001 zoning determination by the Municipality was that the entire Kraaibosch 195/1 was designated as having a split zoning, meaning part industrial and part agricultural.

The owner did not directly respond to the requirement in condition 2 by submitting the site plan as described. However, on 31 May 2001, that is between the time that the 2001 the zoning determination was made and the subsequent letter formally advising the owner the outcome, the owner's land surveyors submitted a subdivision application to the Municipality (the 2001 subdivision application). This was aimed specifically at subdividing the sawmill site from the remainder of Kraaibosch 195/1. In the application, the sawmill site for which approval was sought was referred to as Portion A.

A 2001 subdivision application was accompanied by, among others, a sketch plan illustrating the proposed subdivision of Portion A from the remainder of Kraaibosch 195/1 (the subdivision plan), a copy of the locality plan and a diagram of the property. The subdivision plan showed the proposed Portion A, measuring 17,3 hectares, to be subdivided from Kraaibosch 195/1 measuring 259,4793 hectares in total. The sawmill was depicted as being located on the proposed Portion A.



In the 2001 subdivision application it was stated that the subdivision was intended for 'industrial purposes'. The application repeated that Kraaibosch 195/1 had already been zoned as industrial and agricultural. The motivation given for the subdivision was that the portion of the property that is to be subdivided in terms of this application has been used since 1943 for sawmill purposes and thus assumes Industrial Zone 1 zoning in terms of Section 14 of LUPO. It stated that the owner required to separate the sawmill portion of the property from the remainder in order to be able to inject capital to upgrade the factory to modern standards.

The subdivision (the 2002 subdivision) was approved sometime between 23 January 2002 and 8 February 2002 by the Municipality's Development Control Committee (DCC). On 8 February 2002, the Municipality advised the owner's land surveyors, who had made the subdivision on the owner's behalf, that the DCC had approved the subdivision application.

In 2008 it became necessary to apply for a further subdivision affecting Portion A (the 2008 subdivision). This was because of a re-alignment of the N2 national road which had the effect of moving the new road reserve further south. Cape Estates had taken transfer of Portion F in 2007. In 2010 it obtained a certificate of registered title in respect of what had been identified as Portion A, later Portion F, in the 2008 subdivision. In the certificate of registered title the property acquired its present designation as Erf 2[...]. A diagram by the Surveyor General attached to the certificate of registered title depicted Erf 2[...] as measuring 11,1875 hectares.

In 2017, the Municipality published the George Integrated Zoning Scheme By-Law (the Zoning By-Law) and the 2017 zoning map. The Zoning By-Law set out the procedures and conditions relating to the use and development of land in the different zones, while the zoning map indicated the zoning of the municipal area into land use zones. Believing that the 2017 zoning map had erroneously designated only a portion of Erf 2[...] as industrial, rather than the entire erf, Cape Estates sought to exercise its rights under section 8 of the Zoning By-Law by instituting a rectification application.

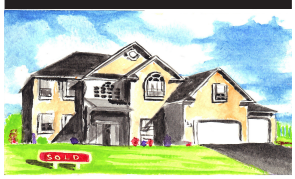
In support of the rectification application, the planners referred to the 2001 zoning determination, which they asserted designated a split zoning of industrial, for the sawmill portion of Kraaibosch 195/1, and agricultural for the remainder. They pointed out that the motivation for the 2002 subdivision was to separate the land on which the sawmill activities took place, with its industrial zoning, from the remainder of the larger Kraaibosch 195/1. The rectification application underlined that the Municipality had endorsed the subdivision plan, which showed no split zoning for Erf 2[...].

In a letter dated 10 January 2018 (the refusal letter), the Municipality stated its reasons for rejecting the rectification application. Referring to the 2001 zoning certification, the Municipality recorded that the industrial zoning was limited to the 'existing (sawmill) activities' only, and that a land use application was stated to have been necessary for any extensions to the existing sawmill. Moreover, and significantly for this appeal, the refusal letter recorded that there was no proof that there had been compliance with condition 2 attached to the 2001 zoning certification, which had required the submission of a site plan. The Municipality explained that it had relied on other information to determine the extent of the sawmill site. It had considered building plans dated 1984 and 1990 and aerial photographs from 1985 and 2002 showing the area of land disturbed by the sawmill activities. These were attached to the refusal letter. As to the 2002 subdivision, the refusal letter stated that the zoning of the two erven had not been recorded in the subdivision approval, and that, in any event, a subdivision application does not provide any zoning rights. For these reasons, the refusal letter concluded that the zoning as indicated on the 2017 zoning map was accurate.

Cape Estates applied for the rectification of the zoning of Erf 2[...] depicted in the Municipality's 2017 Zoning Scheme Map.

THE DECISION

The effect of the 2001 zoning determination was that the entire portion of the property associated with the sawmill was conditionally zoned industrial. Condition 2 was aimed at determining the precise extent of that portion. Its purpose was not to determine the extent only of the actual sawmill itself. To achieve the purpose of condition 2 it was not necessary to map out the sawmill buildings, because the zoning was not limited to them. The subdivision plan achieved the purpose of condition 2 by providing all the information necessary to make a precise determination of the extent of the industrial use



associated with the sawmill. It followed that there was substantial compliance with condition 2.

The Municipality determined a split zoning for Kraaibosch 195/1 based on the existing uses of part industrial, relating to the sawmill, and part agricultural, relating to the pine plantations. The primary focus of the determination must have been to demarcate the extent of the industrial zoning, on the one hand, and the agricultural zoning on the other. In this context, the words 'for only the existing sawmill, with the remainder . . . zoned Agricultural' were to serve this exact purpose. The words in brackets described that part of the property associated with the sawmill and hence to be zoned industrial. This was necessary, too, because the resolution itself did not deal with the demarcation of the split zoning, between industrial and agricultural at all. That function was served by condition 3.

The Municipality accepted that the zoning scheme applicable at the time made no provision for sawmill activities either as a primary or a consent use. The restriction to sawmill use would have been erroneous and unlawful. The interpretation of condition 3 could not proceed from the premise that the Municipality intended to act beyond the scope of its powers by imposing an unlawful use restriction. It had to proceed from the premise that the Municipality knew the extent of primary and consent uses associated with industrial zoning in 2001. As such, the sensible interpretation of the words appearing in brackets in condition 3, must be that they served no purpose other than to define the extent of the industrial zoning, distinct from the agricultural zoning for the remainder of Kraaibosch 195/1.

The application for rectification was correctly given. The Municipality's appeal was dismissed.

ABSA BANK LIMITED v SERFONTEIN

A JUDGMENT BY KEIGHTLEY JA and DOLAMO AJA (MOLEMELA P, KGOELE J and KOEN AJA concurring)
SUPREME COURT OF APPEAL
10 FEBRUARY 2025

2025 SACLR 81 (A)

Credit Transactions

If it is evident that an agreement deals with the same subject matter as a previously existing agreement such as an overdraft agreement which regulates the extension and repayment of credit between the credit provider and the consumer, then it will be considered to be a supplementary agreement as referred to in section 89 of the National Credit Act (no 34 of 2005).

THE FACTS

In terms of an overdraft agreement signed on 28 July 2014, when Serfontein's principal debt to ABSA Bank Ltd was R5.2m, Serfontein undertook to repay an amount of R2m on or before 25 July 2015. However, he defaulted, with the consequence that by August 2016 an amount of R6 202 787.42 was outstanding. This amount was increasing by approximately R50 000.00 per month in respect of compound interest charged monthly and capitalised. To curb the burgeoning debt and, according to ABSA, to avoid inevitable litigation for the recovery of the debt, ABSA initiated negotiations attempting to reach an amicable solution. ABSA's legal representative invited Serfontein and his father (the Serfonteins) to a meeting on 25 January 2019.

There followed an exchange of draft agreements between the legal representatives of both parties. In the first draft, signed by Serfontein, he offered to sell his immovable property and, with the proceeds thereof, settle the debt owing to ABSA, in the event of his default under a proposed payment plan. This version was rejected by ABSA. Instead, ABSA presented an AOD/POA that provided for the sale of the immovable property, as well as that of Mr Serfontein senior.

Clause 2, headed 'Power of attorney regarding immovable property' recorded Serfontein's ownership of the immovable property and ABSA's four covering bonds registered against the title deed thereof as security. In clause 2.3 the Serfonteins granted an irrevocable power of attorney, in favour of ABSA, to sell the immovable property.

Under clause 13, headed 'Disclosures in terms of the NCA' the Serfonteins acknowledge[d] that this agreement is not subject to [the] applicability of the National Credit Act (no 34 of 2005) (NCA).

The Serfonteins objected to the inclusion of the sale of Serfontein senior's property. Ultimately, ABSA agreed to excise the clause relating to that property, which resulted in the parties' agreement on the final version of the AOD/POA on 17 March 2019. The Serfonteins signed the final version of the AOD/POA after they had obtained 'practical legal advice with regard to the settlement of the debt' from their legal representative.

On the authority of the AOD/POA, ABSA proceeded to auction the immovable property on the 17 July 2019. However, the offer made at the auction was unacceptable to ABSA and was rejected. Although ABSA continued to market the property, an alternative buyer was not found for some time. On 24 February in 2021, ABSA served Serfontein with a notice in terms of section 129 of the NCA. The notice advised him that he was in breach of the overdraft agreements and called upon him to remedy the default by making payments directly to ABSA. In response, the Serfonteins exercised their rights under section 129(1)(a) of the NCA and referred the matter to the Ombudsman for the Banking Services. One of their complaints was that the overdraft agreement between ABSA and Serfontein amounted to reckless credit. The referral was unsuccessful.

ABSA eventually concluded a deed of sale for the immovable property on 13 September 2021 for the sum of R6m. ABSA maintained that the purchase price was a market-related price, although the Serfonteins disputed this. ABSA advised Mr Serfontein

of the sale of the immovable property and demanded that, on registration of transfer, he should vacate the property to give vacant possession to the purchaser.

The Serfonteins brought an application seeking an order declaring the AOD/POA to be contrary to the NCA and void ab initio, declaring the deed of sale void and directing the Registrar of Deeds not to register the transfer of the immovable property to the purchaser. ABSA counter-claimed for a declaratory order to enforce the AOD/POA and for related relief.

The Serfonteins' main contention was that the AOD/POA was a supplementary agreement prohibited by section 89 of the NCA and was thus, in its entirety, unlawful and void. In the alternative, they argued that it was void in that it was a credit agreement, several provisions of which were prohibited under s 90(2). Further, having regard to the agreement as a whole, they contended that it would not be reasonable to sever the unlawful provisions from the remainder to render it lawful.

ABSA argued that the AOD/POA was not a supplementary agreement in that it added nothing to the overdraft agreements, which had been concluded years before the AOD/POA.

THE DECISION

It was evident that the AOD/POA dealt with the same subject matter as the main agreement. By its very nature, an overdraft agreement regulates the extension and repayment of credit between the credit provider and the consumer. There was no suggestion that the overdraft and surety agreements between ABSA and the Serfonteins were not governed by the NCA. One purpose of the AOD/POA was to record the Serfonteins' concession that they were indebted to ABSA under the overdraft and surety agreements, that they had defaulted on the debt, and that the amount outstanding was due and payable. A further purpose was to regulate the recovery of the debt by giving ABSA the irrevocable right to sell the immovable property. There could thus be no question that the underlying agreements and the AOD/POA were intrinsically intertwined, and that the latter supplemented the former. Both the underlying agreements and the AOP/POA involved a credit provider-consumer relationship, the regulation of which lies at the heart of the NCA.

Therefore, the AOD/POA was a supplementary agreement within the meaning of the phrase in section 91(2).

The next question was whether or not the AOD/POA contained provisions that would be unlawful if included in a credit agreement.

Two key provisions of the AOD/POA, namely clauses 2 and 13, were prohibited under section 90(2) of the NCA. The purposes of the NCA include the protection of consumers and the promotion of equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers. Section 90(2)(a)(i) prohibits provisions that have the effect of defeating the NCA's purposes. In permitting ABSA to execute against the immovable property immediately and without a court order the AOD/POA fundamentally defeated these central purposes of the NCA and was unlawful.

A third issue was whether the Serfonteins were required or induced to sign the AOD/POA.

It appeared that the Serfonteins were directly or indirectly required or induced to sign the AOD/POA. Consequently, the AOD/POA contravened provisions of the NCA and was unlawful.

The remaining issue was whether in consequence, the agreement of sale was void ab initio.

In the circumstances, the AOD/POA could not be saved through severance. As the AOD/POA was the basis on which ABSA entered into the deed of sale in respect of the immovable property, that agreement, too, was rendered void ab initio.

The appeal is dismissed with costs.

THE LOAN COMPANY (PTY) LTD v THE NATIONAL CREDIT REGULATOR

A JUDGMENT BY COPPIN JA (MOKGOHLOA ADP, KEIGHTLEY JA and PHATSHOANE and VALLY AJJA concurring)
SUPREME COURT OF APPEAL
28 APRIL 2025

2025 SACLR 178 (SCA)

Even though it is a part of any pawn transaction for goods to be given as security for the loan the pawn broker advances to the consumer and for the pawn broker to sell the goods upon the consumer's default, it would be harsh and unfair for the pawn broker to retain any amount from the sale in excess of what the consumer was owing to it. Consequently, it should not be permissible.

THE FACTS

On 1 March 2017, the National Credit Regulator (NCR) investigated the affairs of the Loan Company (Pty) Ltd after which it determined that the first time the Loan Company was registered as a credit provider with the NCR was on 31 March 2017. At the time of the investigation the Loan Company was not registered. It had previously applied for registration, but that application lapsed after it failed to provide the NCR with certain requested information within the stipulated time. The Loan Company re-applied for registration after its initial application had lapsed, and it was only then that it was registered on 31 March 2017.

The Loan Company did not expressly admit or deny that the Loan Company's first application lapsed and that it reapplied resulting in its registration on 31 March 2017. It averred that its application for registration was submitted on the 9th of June 2016. It started trading, after it was surmised that its registration would be successful.

All of the information required was provided to the NCR. Its application was never refused and since it had provided the relevant information to the NCR without delay, nothing was heard from it until it issued a registration certificate on 31 March 2017. The Loan Company also averred that the terms of section 89 of the Act, do not apply to a pawn transaction which was its business. At the time the Loan Company applied for the first time on 9 June 2016, the threshold was R500 000 but, on its version, it was not then obliged to register. However, the fact that it had to re-register indicated that something compelled it to do so. In its answering affidavit it found support in s 89(4) of the Act and in particular s 89(2)(d). That section provides that the provision, that a credit agreement entered into by an unregistered credit provider who is required to be registered, is unlawful, does not apply if the agreement was concluded after an application for registration was made, and the credit provider was awaiting the outcome of that application.

The NCR sought an order in respect of sample transactions that all amounts charged by the Loan Company over and above the capital amount it loaned in those matters be refunded to the affected consumers. It also sought orders that the Loan Company return all vehicles it held as security to the consumers. Alternatively, in instances where that was impossible because the vehicle had already been sold, that the Loan Company be directed to pay the affected consumer the difference between the gross proceeds from the sale of the vehicle and the loan amount advanced (less any amount the consumer had paid toward the loan). In one instance, the Loan Company advanced Mr Tselapedi a loan of R35 000.00. He was to pay back R42 000.00 by 3 August 2016. He gave his motor vehicle, a 2002 BMW X5 3 litre with an estimated value of R100 000.00 (which he had bought for R 70 000.00), as security. When he defaulted, the Loan Company sold his vehicle for R 65 000.00, which was almost double the amount it had loaned him initially and retained all the proceeds of the sale.

The National Consumer Tribunal declared that the Loan Company had repeatedly contravened several sections of the Act. It declared that those repeated contraventions were 'prohibited conduct' in terms of

the Act and that the sample transactions were all unlawful and void. It ordered the Loan Company to refund customers all amounts that they were charged in excess of the amount the Loan Company advanced to them as a loan. It also ordered the Loan Company to return to the customers the goods pawned as security for their loans, alternatively, to pay them the gross proceeds of the sale of the goods, less the balance outstanding on the amount loaned. The tribunal also levied an administrative fine on the Loan Company of R250 000.00.

The Loan Company appealed against these orders.

THE DECISION

Commissary agreements were prohibited in Roman times because they were harsh, unjust and unfair. That prohibition has endured for centuries and still applies in South African law. The same considerations which motivated the prohibition of the commissary agreements were also present in the present case. The example of Mr Tselapedi's case illustrated the point.

The language of section 1(c) of the Act accords with the common law position. To interpret it any other way would be to promote harshness and unfairness, and to undermine all the laudable objectives that the Act seeks to promote. If the interpretation of the Loan Company is to prevail it will not only defeat those objects, but undermine and render meaningless the Act's regulation of, for example, the charges that may or may not be levied by a credit provider. Even though it is a part of any pawn transaction for goods to be given as security for the loan the pawn broker advances to the consumer and for the pawn broker to sell the goods upon the consumer's default, it would be harsh and unfair for the pawn broker to retain any amount from the sale in excess of what the consumer was owing to it. And therefore, it should not be permissible.

The Loan Company had not shown that the tribunal did not consider the factors that it was obliged to take into account in terms of section 151(3) when it imposed the fine, or that it took into account factors that it was not supposed to have taken into account. The Loan Company's financial position was a matter that was peculiarly and exclusively within its knowledge. It could not seek to benefit from deliberately withholding that information to make the task of the tribunal difficult or even impossible. The Loan Company was acutely aware that the NCR wanted the tribunal to impose an administrative penalty. It had ample opportunity to disclose its financial position in its own interest. The lack of candour on the part of the Loan Company in that regard persisted in the high court and in the appeal court. Despite its arguments, it still did not provide any insight into its financial position. And more significantly, it had not shown that the penalty imposed on it exceeded the limits prescribed in section 151(1).

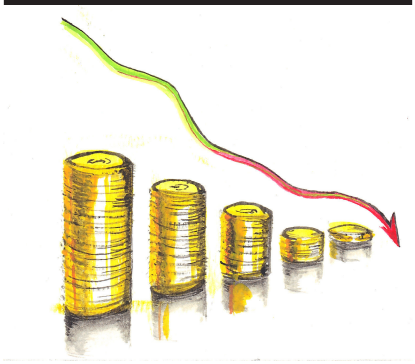
The high court correctly dismissed its appeal in respect of the administrative penalty. The appeal was dismissed.

MASHWAYI PROJECTS (PTY) LTD v WESCOAL MINING (PTY) LTD

A JUDGMENT BY DIPPENAAR AJA (MAKGOKA, SMITH AND KEIGHTLEY JJA AND HENDRIKS AJA concurring)
SUPREME COURT OF APPEAL
29 JANUARY 2025

2025 SACLR 119 (SCA)

Insolvency



Since the Companies Act (no 71 of 2008) does not draw any distinction between pre-commencement creditors and post-commencement creditors, as stakeholders, they deserve equal protection under section 7(k) of the Act. As such they are equally entitled to vote on the adoption of a business rescue plan.

THE FACTS

A meeting of creditors of Arnot Opco (Pty) Ltd, was held on 28 July 2023 under section 151 of the Companies Act (no 71 of 2008), convened by Arnot's business rescue practitioner (BRP) to adopt a business rescue plan . Creditors voted electronically via email or WhatsApp. The proposed plan afforded voting rights to both pre-commencement and post-commencement creditors. It proposed four options: Option A was to expend capital on refurbishing facilities and running Arnot's business; Option B was for the sale of its business as a going concern and the application of the free residue to creditors' claims; Option C was to reject the business rescue plan; and Option D was to abstain from voting. If Option B was approved, creditors had to vote on four alternative purchase offers, one of which was proposed by Ndalamo Coal (Pty) Ltd.

Wescoal Mining (Pty) Ltd and Salungano (Pty) Ltd (the Wescoal parties) voted in favour of Option B, supporting Ndalamo's offer. Mashwayi Projects (Pty) Ltd, a creditor of Arnot and a cessionary of the claims of various of Arnot's creditors voted against the adoption of the plan. After the counting of the votes cast at the meeting, the BRP declared that 75.4% of the voting interest present, 50% + 1% of whom were independent creditors, had voted in favour of Option B. After tabling the four offers, 88% of the parties present voted in favour of Ndalamo's offer. A forensic accountant, Makhuvele, appointed by the BRP after the meeting to verify the tallying of the votes, subsequently produced a report particularising some errors which had occurred during the tallying of the votes. Makhuvele, produced a report, reflecting that only 70.5% of creditors voting interests voted in favour of Option B.

On 4 August 2023, the BRP notified the voters of the errors, the effect of which, according to him, was that the threshold of 75% had not been achieved. He accordingly invited the creditors to inform him whether they objected to the proposed publication of a revised plan on the basis that the plan had not been validly adopted under section 152(2) of the Act. The Wescoal parties objected, contending that the statutory threshold had been met and that the plan had been validly adopted.

The Wescoal parties sought declaratory orders that the plan was validly adopted and Ndalamo's offer was accepted, and an order directing the practitioner to implement the plan. The Wescoal parties and Ndalamo contended that the plan had been validly adopted. Arnot, the BRP and Mashwayi contended the opposite. They brought a counter-application seeking declaratory orders that the plan was adopted and its offer accepted

It was common cause that had Mashwayi's vote been excluded, the relevant 75% threshold would have been met and the plan validly adopted. The high court held that 'the business rescue provisions of the Companies Act assign voting interests under section 152 of the Act only to those who were creditors of the entity under business rescue at the time the business rescue process commenced'. After considering the factual evidence, the high court declared that Option B was duly approved and finally adopted in accordance with s 152(2) of the Act. It further declared that Ndalamo's offer

was accepted and directed the BRP to implement the plan to give effect to Ndalamo's bid.

Mashwayi and Arnot appealed.

THE DECISION

The legal issue was whether on a proper interpretation of the relevant provisions of Chapter 6 of the Act, post-commencement creditors are entitled to vote on a business rescue plan.

In terms of s 152(2), in a vote called in terms of ss (1)(e), the proposed business rescue plan:

'. . . will be approved on a preliminary basis if –

(a) it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and

(b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.'

A unitary interpretation of the various sections of Chapter 6 of the Act does not favour the importation of a limitation of the word 'creditor' to mean only pre-commencement creditor. One cannot adopt such an interpretation without straining the meaning of the text. To interpret the section otherwise would be to ignore what the Act in the relevant provisions expressly provides in respect of creditors and their rights. Seen in context, the omission of a specific reference to post-commencement creditors, means that the legislature purposefully elected not to draw a distinction between pre- and post-commencement creditors.

Since the Act does not draw any distinction between pre-commencement creditors and post-commencement creditors, as stakeholders, they deserve equal protection under section 7(k) of the Act. As such they are equally entitled to vote on the adoption of a business rescue plan.

On the factual issue of whether the plan was properly adopted, the question was whether the statutory threshold under section 152(2) was met. Mashwayi's version that numerous other post-commencement creditors' votes were taken into account, was not challenged. It was further undisputed that there were various tallying errors in the voting, although there were irresoluble factual disputes on the papers regarding what voting percentages were achieved. Given the exclusion of the vote of only one post-commencement creditor, Mashwayi, it was by no means clear what the ultimate voting percentages would have been if all post-commencement creditors' votes were treated equally and the irregularities had not occurred. The matter should have been remitted to the creditors to vote afresh upon the changed landscape. It was common cause that if Mashwayi's votes were taken into account, the necessary statutory threshold under section 152(2) was not achieved.

On the evidence presented, it had to be concluded that the plan was rejected at the creditors meeting of 28 July 2023 as it was not approved as contemplated in section 152(3)(a).

The appeal succeeded and the declaratory order sought by the appellants was granted.

Cumulative Index 2025