



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

REPORTABLE

Case no: 1626/2024
1623/2024

In the matter between:

**SUNDAYS RIVER CITRUS COMPANY
(PTY) LTD**

First Intervening Applicant

SRCC HOLDINGS (PTY) LTD

Second Intervening Applicant

In re:

DANIEL JACOBUS BOUWER

Applicant

and

**LONETREE CITRUS CC
(REGISTRATION NUMBER: 2007/029280/23)**

First Respondent

**COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

Second Respondent

**STANDARD BANK OF SOUTH AFRICA LIMITED
(REGISTRATION NUMBER: 1962/000738/06)**

Third Respondent

JUDGMENT

Govindjee J

[1] This matter raises various inter-related questions of substance in the context of business rescue. It is uncontroverted that ‘affected persons’, including creditors, enjoy a right to participate in the hearing of an application to court for an order ‘placing a company under supervision and commencing business rescue proceedings’. But do those proceedings commence, for purposes of the Companies Act, 2008¹ (the Act), at the time an affected person applies to court for the order, or only when the court grants the application? Irrespective of the answer to that question, is there scope for a person who does not form part of the definition of an ‘affected person’ to participate in the hearing of an application for business rescue, based on a direct and substantial interest in the proceedings? And is the notion of ‘creditor’ confined, for purposes of business rescue applications and proceedings, to claims sounding in money and already due, as a gateway to participation?

[2] Rolust Sondagsrivierplase CC (Rolust) is a property-owning entity that owns several valuable farm properties from which the first respondent (Lonetree) conducts citrus farming.² Lonetree is indebted to the third respondent (Standard Bank) to the tune of some R30 million for credit facilities. Rolust entered into a suretyship agreement with Standard Bank and executed guarantees in favour of Standard Bank for this amount. Rolust’s indebtedness to Standard Bank also includes an overdraft and loan facility in the amount of almost R40 million. Standard Bank brought applications for the liquidation of Lonetree and Rolust during February 2024.

[3] The applicant is a member of Lonetree and its chief executive officer. On 7 May 2024, he applied to this court, in terms of s 131 of the Act, seeking an order placing

¹ Act 71 of 2008 (the Act).

² The sole member of Rolust and owner of 100% interest is the Lonetree Trust.

Lonetree under supervision and commencing business rescue proceedings, together with related relief (the main application). Simultaneously, an application to place Rolust under court ordered business rescue was instituted (under case no. 1623/2024) (the Rolust application), the affairs of Lonetree and Rolust being intertwined. In terms of the proposed business rescue plan, Standard Bank would receive payment through a combination of the proceeds of the sale of immovable property owned by Rolust, as well as monthly payments of R800 000 from operating income to be generated by Lonetree through its farming operations.

[4] The first intervening applicant (SRCC) entered into a production loan agreement with Lonetree, in terms of which Lonetree's operational costs for the 1 May 2023 to 30 April 2024 citrus season were financed. At the time the main application was instituted, Lonetree was indebted to SRCC in terms of the production loan agreement in an amount of R4,5 million. SRCC was notified of the application and listed as a creditor, with a 4,68% voting interest, in a schedule of creditors attached to the main application. Rolust bound itself as surety and co-principal debtor of all amounts due to SRCC by Lonetree.

[5] Less than two weeks earlier, on 26 April 2024, SRCC, having become aware of Standard Bank's liquidation applications, demanded repayment of the full amount due to it in terms of the production loan agreement.³ On 10 May 2024, three days after the main application was filed, Lonetree purported to repay the production loan to SRCC.⁴ Despite this, SRCC seeks to file an affidavit and to participate in both the main application and the Rolust application. Its first basis for doing so is that business rescue proceedings, once ordered, would have commenced on 7 May 2024. At that time, it was a creditor of Lonetree in terms of the production loan and, as such, an 'affected person' as contemplated in the Act. SRCC avers that the repayment was

³ In terms of the production loan agreement, the loan was to be repaid, without deduction or set-off, at the election of SRCC, in five equal monthly instalments, the first payable on or before the last day of July 2024, or by SRCC setting off against the loan the proceeds of funds received by SRCC or any other agent in respect of citrus fruit sold or marketed by SRCC or any other agent on behalf of Lonetree. SRCC triggered repayment of the full amount due based on Lonetree's offer of a compromise to Standard Bank.

⁴ Lonetree's attorneys paid the amount of R4,565,921,02 to SRCC's attorneys on 10 May 2024. A further payment of R2100,00 was made on or after 15 May 2024, purportedly to cover additional interest.

made after the commencement of business rescue proceedings. It was precluded by s 134(1) of the Act and not in the 'ordinary course of business', given that it was not made in terms of the ordinary repayment obligations contemplated by the production loan agreement. SRCC is also concerned that the payment is invalid or a voidable disposition, which may ultimately be set aside.⁵

Interpretation

[6] The issues at hand require statutory interpretation to be determined. The proper approach is as follows:⁶

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 ... 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 ... from the outset one considers the context and the language together [in the light of all relevant circumstances], with neither predominating over the other ... the enquiry is restricted to ascertaining the meaning of the language of the provision itself.'

⁵ This is on the basis that the repayment '...was likely achieved or procured by means of an unlawful payment, or promise of payment, of proceeds to [another company] FreshGro, or by an unlawful agreement to deliver their fruit to FreshGro'. SRCC complains that this would amount to the swopping of one creditor (SRCC) for another (FreshGro), and that it has been paid 'in circumstances of insolvency and the inability of Lonetree to pay at least one other creditor (Standard Bank)'.

⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (*Endumeni Municipality*) paras 18–20, 24. Also see *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC); 2019 (6) BCLR 749.

[7] The Act must be interpreted and applied in a manner that gives effect to the purposes set out in s 7. The purposes listed in that section include transparency and high standards of corporate governance, the efficient and responsible management of companies and the ‘efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders’.⁷ A purposive interpretation of the Act requires that the provisions relating to business rescue must be viewed holistically and in context.⁸ Achieving the goal of proper interpretation considering the text, context, purpose and surrounding circumstances is made difficult because of the manner in which the statutory provisions governing business rescue have been drafted.⁹

Court order to begin business rescue proceedings

‘There are two routes through which a company may enter business rescue, namely, by way of a resolution of its board of directors (s 129(1)) or by way of a court order (s 131(1)).’¹⁰

[8] Section 131(4)(a) provides that the court may ‘...make an order placing the company under supervision and commencing business rescue proceedings...’ (a s 131(4)(a) order).¹¹ By contrast, s 132(1)(b) states that ‘...proceedings begin when an affected person applies to the court for an order placing the company under supervision in terms of section 131(1)’.

[9] Interpreting provisions seemingly in conflict with one another requires a court to consider whether there is a sensible interpretation that can be given to the provisions that will avoid anomalies. Courts endeavour to give a meaning to all words

⁷ Sections 7(b)(iii), 7(j) and 7(k) of the Act. (All subsequent references to sections pertain to the Act, unless indicated otherwise.) ‘Stakeholders’ has been construed to refer to the creditors, shareholders and employees of the company: P Delpont *Henochsberg on the Companies Act 71 of 2008* (Service Issue 34) (May 2024) at 445; C Marumoagae “The rights of affected persons as stakeholders during business rescue proceedings in South Africa” (2018) 4(2) *JCCL&P* 117.

⁸ N Locke and K van der Linde “Business rescue and the fate of accessory security rights – recommendations for the improvement of the business rescue procedure in the Companies Act of 2008 (2018) *TSAR* 839 at 841.

⁹ *Panamo Properties (Pty) Ltd and Another v Nel N.O. and others* [2015] ZASCA 76; 2015 (5) SA 63 (SCA); [2015] 3 All SA 274 (SCA) (*Panamo Properties*) para 1.

¹⁰ Wallis JA in *Panamo Properties* above n 9 para 8. A third possibility also involves a court order, now in terms of s 131(7) during the course of any liquidation proceedings or proceedings to enforce any security against the company.

¹¹ Also see s 163(2)(c), repeating this wording in the context of a shareholder / director application to court for relief.

and sections in a statute and will not lightly decide that a provision has no practical effect. If possible, the provisions of the statute that appear to conflict with one another should be reconciled.¹²

[10] Is it possible to reconcile s 131(4)(a) and s 132(1)(b) without violating the language contained in these provisions? The wording of the two sections themselves, other provisions contained in chapter 6, the link between the point of commencement and supervision, and established principles of interpretation all point in a single direction. Before discussing each of those aspects, however, it is important to comment on the use of terminology in the relevant parts of the Act.

Terminology

[11] The phrase ‘during business rescue proceedings’ is used in a variety of places in the Act, including the heading of part C of chapter 6, in the definition of a ‘business rescue practitioner’ and in respect of protection of property interests.¹³ The phrase is used consistently to refer to a point in time subsequent to the ‘start’, ‘beginning’ or ‘commencement’ of business rescue proceedings.¹⁴ Each of these three words, in one form or another, appears in chapter 6. Ordinarily understood, they are synonymous. On my reading, there is no basis for considering any of the three words to mean anything other than the point at which a company enters business rescue, irrespective of the route taken to arrive at that point.

[12] Although this matter involves the ‘second route’ referred to in *Panamo Properties*, a glance at the provisions regulating the first is helpful for purposes of confirming this seemingly obvious assessment. Section 129 is headed ‘company resolution to begin business rescue proceedings’, and ‘begin’ is repeated in s 129(1), which explains that the board of a company may pass a resolution.¹⁵ Section 130,

¹² *Panamo Properties* above n 9 para 27.

¹³ S 134.

¹⁴ S 135(1)(a) appears to support this reading: during the company’s business rescue proceedings, money due and payable, but not paid, to an employee is regarded to be ‘post-commencement financing’. Cf *Mouton v Park 2000 Development 11 (Pty) Ltd and Others* 2019 (6) SA 105 (WCC) (*Mouton*) paras 65 – 69. Although the court referred to ‘commence’, ‘begin’ and ‘start’ synonymously, in the context of voluntary proceedings a distinction was drawn between the ‘factual’ and ‘legal’ point of commencement: para 67.

¹⁵ S 129(1): ‘Subject to subsection 2(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board

which deals with objections to such a resolution, explains when any director who voted in favour of the resolution may be saddled with a costs order. Now, however, the 'begin' of s 129 has been replaced seamlessly with reference to a resolution to 'commence' business rescue proceedings.¹⁶ Similarly, the heading of s 131 refers to the 'beginning' of business rescue proceedings, only for two of its subsections to refer to 'commencement'.¹⁷ The words 'begin' and 'commence', and their derivatives, along with the solitary use of 'start', appear to be used interchangeably and in accordance with their ordinary meaning, at least in chapter 6 of the Act.¹⁸ That construction also accords with the axiom of interpretation that 'the same words in the same statute bear the same meaning'.¹⁹ Absent clear indication to the contrary, the words used are to be understood in the same sense throughout the enactment.²⁰ As will be indicated, this principle is also significant in respect of the use of the word 'initiated' in the Act.

The sections themselves

[13] But that on its own does not resolve the conflict at hand. In the context of s 131(1), do court ordered business rescue proceedings begin at the time of the application for the order, as suggested by s 132(1)(b), or only when the court makes the order placing the company under supervision, in accordance with s 131(4)(a)?

[14] Section 132(1)(b) provides that business rescue proceedings begin, *inter alia*, when an affected person *applies* to the court for an order placing the company under supervision in terms of s 131(1). The heading of s 131 and the wording of s 131(4)(a),

has reasonable grounds to believe that ...'. That the resolution has no force or effect until it has been filed is not, on its own, a basis for altering the meaning of 'begin'.

¹⁶ S 130(5): '... the court – (c) if it makes an order under paragraph (a) or (b) setting aside the company's resolution, may make any further necessary and appropriate order, including - ... (ii) ... an order for costs against any director who voted in favour of the resolution to commence business rescue proceedings ...'.

¹⁷ 'S 131(1). Court order to begin business rescue proceedings. – (1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.' For the sake of completeness, it may be noted that s 131(6) refers to the commencement of liquidation proceedings.

¹⁸ See, for example, ss 136(2)(a), 142(1) and 142(3). Cf *Mouton* above n 14 para 65 – 69, dealing, *inter alia*, with the previous legislative position in the context of winding-up. For comments as to the inconsistent use of terminology in the Act, see A Loubser *Some comparative aspects of corporate rescue in South African company law* (2010) (unpublished LLD thesis, UNISA) at 331–332.

¹⁹ *Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29 para 63.

²⁰ See the judgment of Steyn JA in *Minister of the Interior v Machadodorp Investments* 1957 (2) SA 395 (AD) at 404D–E; *Chagi and Others v Singisi Forest Products (Pty) Ltd* 2007 (5) SA 513 (SCA) para 13.

literally construed, are perhaps the clearest indication that business rescue proceedings only begin once a court makes a s 131(4)(a) order. It cannot be ignored that, as the section heading suggests, s 131 is focused on the commencement of business rescue proceedings. The section also deals with the process leading up to an order and its immediate aftermath. Although s 132(1) also deals with when business rescue proceedings 'begin', the focus is in fact on its duration, including the possibility of extension. Significantly, however, s 132 itself contains reference to the court order, rather than the application, 'that began those proceedings'.²¹

'Initiation' and other provisions

[15] Section 141(2)(b), including the cross-reference to s 131, compounds the difficulty in accepting s 132(1)(b) at face value. To use the terminology of s 141(2)(b)(i), the application to court only 'initiates' the process that may lead to a court order, at which point business rescue proceedings begin.²² This provision accords with a sensible interpretation of the Act and the sequence of events. The meaning of 'initiates', as opposed to 'commencement', has been the subject of a detailed analysis.²³ To quote Sher J, the choice of word cannot be a linguistic accident:²⁴

'[I]t is "intended to refer to some act which precedes the publicly formal beginning or "commencement" of the legal process referred to therein ... ie it refers to a preceding act or conduct which sets the process in motion ... the word "initiate" is used to denote the factual, causative action by means of which the legal process which gives rise to the proceedings concerned is put into motion ... The word "initiated" in s 129(2)(a) is therefore intended to refer to a preceding act or conduct by which liquidation proceedings are set in motion and is not intended to signify the moment in time when the proceedings are deemed to have formally "commenced". In my view, therefore, the word "initiated" does not bear the same meaning as the word "commenced" in ss 348 and 352 of the previous Act, and it was never intended that it should have the same meaning ... the fact of the matter is that by deliberately referring in s 129(2)(a) to the "initiation" of proceedings rather than either the "beginning" or the

²¹ S 132(2): 'Business rescue proceedings end when – (a) the court – (i) sets aside the resolution or order that began those proceedings...'

²² On the initiation of liquidation proceedings, in the context of s 129(2)(a), see *Mouton* above n 14.

²³ *Mouton* above n 14 para 60 and following. Also see *Lutchman NO v African Global Holdings* 2022 (4) SA 529 (SCA) (*Lutchman NO*) paras 32, 33.

²⁴ *Mouton* above n 14 para 73 and following, although no mention is made of the use of the word in s 141(2)(b). The quotation appears in paras 75, 77 and 81.

“commencement” thereof the legislature clearly had something else in mind than what is meant by the use of either of the latter terms ...’

[16] Initiation of the process by way of application is not without significance. It is the application that must be served on the company and the Companies and Intellectual Property Commission (the Commission) and the time for notification of each affected person in the prescribed manner. Perhaps most importantly, it is an application, in terms of s 131(1), that will suspend any liquidation proceedings that have already commenced.²⁵ Considering s 141(2)(b), the application to court in terms of s 131 merely initiates business rescue proceedings. But that cannot be the moment that business rescue proceedings commence or begin.²⁶

[17] Furthermore, if liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of s 131(1), ‘...the application will suspend those liquidation proceedings until – (a) the court has adjudicated upon the application; or (b) the business rescue proceedings end, if the court makes the order applied for.’²⁷ This is separate to the general moratorium on legal proceedings against the company ‘during business rescue proceedings’.²⁸ The specific inclusion of a provision to suspend liquidation proceedings ‘at the time an application is made’ also suggests that business rescue proceedings have not commenced at that time. Had that been the point of commencement, there would have been no need for s 131(6) at all, given the general moratorium on legal proceedings against the company during business rescue proceedings contained in s 133.

Commencement and supervision

[18] ‘Business rescue’ refers to ‘proceedings to facilitate the rehabilitation of a company that is financially distressed’.²⁹ This is achieved through temporary supervision of the company, management of its affairs, a temporary moratorium on the rights of claimants and the development and implementation of a business rescue

²⁵ S 131(6). See *Lutchman NO* above n 23.

²⁶ R Sharrock *et al Hockly’s Insolvency Law* (9th Ed) (2021) at 280.

²⁷ S 131(6).

²⁸ S 133.

²⁹ The notion of ‘business rescue proceedings’ repeated throughout chapter 6 is, accordingly, tautologous, but will be repeated for the sake of consistency.

plan.³⁰ 'Supervision' means the oversight imposed on a company during business rescue proceedings.³¹ That oversight is the responsibility of a business rescue practitioner (the practitioner).³² It occurs 'during business rescue proceedings'.³³

[19] In the case of court ordered business rescue proceedings, a practitioner is only appointed after a court has made a s 131(4)(a) order.³⁴ The mere filing of an application is no guarantee that the court will make the s 131(4)(a) order to begin business rescue proceedings, or that a practitioner will be appointed. The sequence is logical. A creditor has initiated liquidation proceedings against a company. The company is financially distressed and requires supervision, but the board is unable to resolve to commence voluntarily business rescue proceedings.³⁵ A shareholder is an 'affected person' and applies to court for an order. The purpose of the order is two-pronged: commence business rescue proceedings and place the company under supervision. That order, by definition, imposes oversight and that oversight is the responsibility of a practitioner to be appointed. That appointment may only be made by the court as a 'further order', after a s 131(4)(a) order has already been made. Oversight is now the responsibility of the practitioner and is imposed on the company for the duration of the proceedings.

[20] By regulating the conduct of the practitioner at various stages *during* business rescue proceedings, it must be accepted that the legislature intended for the necessary supervision, in the form of the practitioner, to be in place during that time.³⁶ The notion of supervision by an appointed practitioner and the duration of business rescue proceedings are intertwined so that the purpose of the legislation is served by imposing oversight over a company during such proceedings. Considering business rescue proceedings to begin on the date of application, at a time when no practitioner could be appointed, therefore appears to conflict with this purpose.³⁷

³⁰ S 128(1)(b).

³¹ S 128(1)(i).

³² S 128(1)(d).

³³ *Ibid.*

³⁴ S 131(5) read with s 131(4)(a).

³⁵ S 129(2).

³⁶ See Loubser above n 18 at 83.

³⁷ See A Loubser "The business rescue proceedings in the Companies Act of 2008: concerns and questions (part 1) (2010) TSAR 501 at 513.

[21] Other provisions highlight the reality that a practitioner is appointed after commencement of business rescue proceedings by court order and performs their functions *during* these proceedings. To repeat, it is only if a court makes a s 131(4)(a) order that it may make a ‘further order’ appointing an interim practitioner.³⁸ This requires emphasis given that various sections contemplate actions on the part of a practitioner ‘during business rescue proceedings’.³⁹ The definition of ‘business rescue practitioner’ adds further weight to this reading: a practitioner is appointed ‘to oversee a company during business rescue proceedings’. During a company’s business rescue proceedings, each director must continue to exercise the functions of director. But this is subject to the authority of the practitioner.⁴⁰ Each director must also attend to the requests of the practitioner ‘at all times’ during a company’s business rescue proceedings.⁴¹ As soon as practicable after business rescue proceedings begin, each director must deliver to the practitioner all books and records relating to the affairs of the company in the director’s possession.⁴² Within five business days after business rescue proceedings begin, the directors must provide the practitioner with a statement of affairs.⁴³

³⁸ S 131(5). This is subject to ratification by the holders of a majority of the independent creditors’ voting interests at the first meeting of creditors, as contemplated in s 147.

³⁹ See, for example, s 132(3), which contemplates action by a practitioner after the ‘start’ of proceedings. Had proceedings started by way of an application, instead of by court order, there would be no appointed practitioner able to approach the court for an extension of time, if a delay of more than three months had occurred during the hearing of an application, and prior to a court order in terms of s 131(4)(a). The report envisaged in s 132(3) would not be possible. Similarly, s 133(1)(a) assumes the pre-existing appointment of a practitioner able to consent to the institution of legal proceedings ‘during business rescue proceedings’. If business rescue proceedings commenced on application there would be no practitioner appointed and able to provide written consent in respect of legal proceedings instituted prior to, at the earliest, the date of a s 131(4)(a) order. That interpretation would also deprive the company of the imposed oversight during a part of business rescue proceedings, seemingly in conflict with the purpose of the legislation. Likewise, affording the practitioner the power to suspend contractual obligations of the company during business rescue proceedings, or to apply urgently for cancellation of a company obligation, makes less sense if the proceedings in fact commenced some time before the practitioner was even appointed: s 136(2). S 134(1) also supports this approach. Leaving aside company disposal of property, or agreement to dispose, in the ordinary course of its business, the practitioner’s advance written approval is required unless the transaction is part of an approved business plan. That section also protects property in the lawful possession of the company during business rescue proceedings: the practitioner’s written consent is required before a person may exercise any right in respect of that property. That protection would also be negated if proceedings were deemed to have commenced at the time of application, at which time no practitioner could have been appointed.

⁴⁰ S 137(2)(a).

⁴¹ S 137(3).

⁴² S 142(1).

⁴³ S 142(3).

[22] Read together, this is suggestive of the date of commencement coinciding with the order placing the company under supervision, rather than either the date of application or, perhaps, retrospectively from date of order to date of application. Were that not the case there would be an indeterminate period, between the date of the application and the date of the order, where ‘business rescue proceedings’ were ongoing without the oversight imposed by the legislature ‘during business rescue proceedings’. This would also impact negatively on a director’s ability to comply with various statutory prescripts, as detailed above, during this time.

Principles of interpretation

[23] Although it is accepted that statutory drafters are not expected to use language unnecessarily, and that words are not lightly to be construed as superfluous, there are exceptions.⁴⁴ Sections 129 and 131 deal directly with the point in time at which business rescue proceedings begin. Section 132, which is focussed on the distinct notion of the duration of business rescue proceedings, re-engages the various possible points of commencement emanating from earlier provisions. At least in respect of the second route, the language used conflicts with what appears in the earlier section. To quote Du Plessis:

‘The interpreter should also be open to the possibility that, due to human error and fallibility, the draftsmen of an enactment “may have made a mistake ... or may have omitted a word or added what is mere surplusage”.’⁴⁵

[24] Hesitant though one may be, the present circumstances require such a finding to be made. The comments made by the SCA about the quality of the drafting of the Act offer further support for what is a seemingly drastic conclusion as to the words used in s 132(1)(b) and their meaning.⁴⁶ The reference in that section to business rescue proceedings beginning upon application is, for the reasons described, anomalous when considering the language used elsewhere in the Act. To make sense

⁴⁴ L du Plessis *Re-Interpretation of Statutes* (2002) (LexisNexis) 213–214.

⁴⁵ Du Plessis above n 44 at 214 quoting Wessels ACJ in *Ex parte the Minister of Justice. In re: R v Jacobson and Levy* 1931 (AD) 466 476–477.

⁴⁶ See, by way of example, *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA) para 43. In Loubser’s view, this ranks as one of the most ill-considered provisions in the Act: Loubser above n 18 at 83; A Loubser “The business rescue proceedings in the Companies Act of 2008: concerns and questions (part 2) (2010) *TSAR* 689.

of that provision requires, it seems, and as Mr *Nepgen* suggested, the addition of a word or words to confirm that business rescue proceedings only begin when the application referred to is successful, in the sense that the court has granted the order placing the company under supervision in terms of s 131(1).⁴⁷ To do so remains unsatisfactory in that the subsection, read as such, would amount to nothing more than a repetition of s 131(4)(a).

[25] Considering the context and purpose of the legislation, there are various reasons to support the conclusion that proceedings only commence, on the second pathway, when the court makes a s 131(4)(a) order. This outcome, which is supported by erstwhile judicial management provisions and comparative law,⁴⁸ is, ultimately, little more than a restatement of s 131(1). Unless a company has adopted a resolution contemplated in s 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings. It is the court's granting of the order which will be the point at which business rescue proceedings begin or commence.⁴⁹

Is SRCC an affected person by virtue of the production loan?

[26] The effect of the preceding analysis is that business rescue proceedings have not yet commenced and Lonetree's repayment of the production loan occurred prior to, not during, business rescue proceedings. That transaction, in the ordinary course of business or otherwise, does not appear to be regulated by chapter 6.⁵⁰ Section 134(1)(a), which deals with company disposal of property, only applies during a company's business rescue proceedings and is therefore inapplicable to the repayment.⁵¹ That being the case, it is unclear on what basis the repayment might be

⁴⁷ Also see Loubser above n 18 at 353.

⁴⁸ See Loubser above n 18 at 82–84, read with s 5(2).

⁴⁹ Cf s 81(4)(b): leaving aside certain occurrences, a winding-up of a solvent company by a court begins only when the court has made an order applied for in terms of various subsections of s 81; *Mouton* above n 14 65.

⁵⁰ See Loubser above n 18 at 85: contrary to the position in other jurisdictions, no provision is made in the Act for an interim moratorium that would protect the company before the official commencement of business rescue proceedings. Also see R Bradstreet 'The new business rescue: Will creditors sink or swim?' (2011) 128 SALJ 352 at 374.

⁵¹ S 134(1)(b) references an agreement made in the ordinary course of the company's business *before* the business rescue proceedings began, but this pertains only to property owned by the company and in the lawful possession of any person during business rescue proceedings.

set aside as invalid or a voidable disposition.⁵² At the very least that concern is premature. It may be added that Lonetree's cession and pledge to SRCC of its right, title and interest in the proceeds derived from the sale of citrus fruit up to the amount of the production loan was contained in the production loan agreement. As correspondence between the parties confirmed at the time of repayment, the cession and pledge came to an end upon repayment of the production loan and is irrelevant for present purposes.

[27] Does SRCC nevertheless remain an affected person on the basis that it was a creditor, in respect of the production loan, at the time the proceedings were initiated by way of the application in terms of s 131?

[28] An 'affected person', in relation to a company, is defined to mean 'a shareholder or creditor of the company', in addition to any registered trade union representing company employees and, absent union representation, each employee of the company or their respective representatives.⁵³ The word 'creditor' is undefined in the Act.

[29] Various stages of proceedings are contemplated by chapter 6 of the Act. Section 129 deals with a board resolution to begin business rescue proceedings. Section 131 includes reference to an application to court,⁵⁴ the hearing of such an application, a court 'order placing the company under supervision and commencing business rescue proceedings...' ⁵⁵ and 'a further order' appointing a suitable interim practitioner.⁵⁶ The appointment must be ratified by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors.⁵⁷ That meeting

⁵² S 136(2)(b) enables a practitioner to apply for an urgent order of cancellation of 'any obligation' emanating from an agreement to which the company was a party at the commencement of the proceedings, but this seemingly pertains to uncompleted contracts. For present purposes it is unnecessary to take the point further. See Loubser above n 18 at 87 and following. Also see E Bertelsmann *et al* *Mars: The Law of Insolvency in South Africa* (10th ed) (2019) at 405: a creditor is under no obligation to accept payment of their debt when such payment is offered at a time when the debtor is in insolvent circumstances if the payment would constitute a voidable or an undue preference.

⁵³ S 128(1)(a).

⁵⁴ Also see s 131(6).

⁵⁵ As indicated above, there can be little doubt that what follows occurs 'during business rescue proceedings', and the various references in the chapter to that phrase are interpreted accordingly.

⁵⁶ Ss 131(1), (3) and (4)(a). S 131 is headed 'Court order to begin business rescue proceedings'.

⁵⁷ S 131(5) read with s 147.

is convened by the practitioner within ten business days of their appointment.⁵⁸ A company that has been placed under supervision in terms of s 131 must notify each affected person of the order within five business days after the date of the order.⁵⁹ The bulk of the provisions contained in chapter 6 deal with events ‘during business rescue proceedings’⁶⁰ and s 132(2) indicates when business rescue proceedings end.

[30] An ‘affected person’ enjoys a right to participate in the hearing of an application for an order placing the company under supervision and commencing business rescue proceedings.⁶¹ That right is distinguishable from the ‘*rights of affected persons during business rescue proceedings*’ regulated by *Part C* of the Act. As the heading of the part suggests, those rights, including participation by creditors, are rights of affected persons after the commencement of business rescue proceedings.

[31] Business rescue proceedings are directed towards the development and implementation of a plan, if approved. This is to be achieved through restructure of company affairs, business, property, debt and other liabilities and equities in a way that maximises the chances of the company continuing its existence on a solvent basis. If that is not possible, the proceedings are directed towards achieving a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company.⁶² Five days after the business rescue proceedings begin, the company directors must provide the practitioner with a statement of affairs including ‘any creditors and their rights or claims against the company’.⁶³ Within ten business days after being appointed, the practitioner must convene a first meeting of creditors.⁶⁴ Notice of this meeting must be given to ‘every creditor of the company whose name and address is known to, or can reasonably be obtained by, the practitioner.’⁶⁵ Each creditor is entitled to participate during business

⁵⁸ S 147(1).

⁵⁹ S 131(8)(b).

⁶⁰ In some instances, such as ss 141(1) and 141(3), the Act references specific points in time after business rescue proceedings begin.

⁶¹ S 131(3).

⁶² S 128(1)(b)(iii).

⁶³ S 142(3)(f).

⁶⁴ S 147(1). At that meeting, the creditors may determine whether or not a committee of creditors should be appointed and, if so, may appoint the members of the committee: s 147(1)(b). Leaving aside agency and written authorisation, a person may be a member of a committee of creditors only if they are independent creditor of the company: s 149(2)(a).

⁶⁵ Ss 147(1) and 147(2).

rescue proceedings in the manner described in s 145. The practitioner is responsible for developing a business rescue plan after consulting the creditors and other affected persons.⁶⁶ Importantly, the plan must contain all information reasonably required ‘to facilitate affected persons in deciding whether or not to accept ... the plan ...’. The background part of the plan must include ‘... a complete list of the creditors of the company when the business rescue proceedings began ...’.⁶⁷ The practitioner must convene and preside over a meeting of creditors, and any other holders of a voting interest, to consider the plan.⁶⁸ Participation by creditors includes the right to vote to amend, approve or reject a proposed business rescue plan. If the plan is rejected and the practitioner fails to take any action contemplated in s 153, it is ‘...any affected person present at the meeting...’ that may choose to do so.

[32] It appears to be insensible to interpret these provisions to permit persons who are no longer creditors the right to participate in the proceedings, even if they were previously creditors. To do so requires ignoring or distorting the wording in a manner deprecated by the SCA.⁶⁹ The context and purpose of the legislation, including the nature of the meeting to determine the future of the company and the framing of the right to vote, supports only the participation of persons who remain creditors during the proceedings, in addition to other affected persons. Section 150(2)(a)(ii) offers strong support to this approach, referring specifically to a complete list of creditors at the point of commencement. There appears to be no basis to prefer a different interpretation, which would place the object of the proceedings at risk of inefficiency. Permitting unaffected persons to participate in the proceedings, with all that this entails, would not be businesslike.⁷⁰

[33] It may be added that this interpretation is supported, at least to some extent, by the decision in *Wescoal Mining (Pty) Ltd and Another v Mkhombo NO and Others*⁷¹ (*Wescoal*). In that matter, Wilson J held that the Act means to refer to creditors who

⁶⁶ S 150(1).

⁶⁷ S 150(2)(a)(ii).

⁶⁸ S 151(1).

⁶⁹ *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) para 8.

⁷⁰ *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 10.

⁷¹ *Wescoal Mining (Pty) Ltd and Another v Mkhombo NO and Others* 2024 (2) SA 563 (GJ).

have an interest in the business rescue process that is meaningfully comparable to those of other affected persons, and that these are persons who are 'affected' by the commencement of the business rescue process itself.⁷² In principle, a person who is not a creditor at that time would be unaffected by what is to follow. Permitting a non-creditor to vote at a meeting called in terms of s 152 could skew the outcome. Although the scenarios are very different, parts of the rationale expressed in *Wescoal* are equally applicable to those who may have been affected persons prior to the commencement of business rescue proceedings, but who are no longer creditors at date of commencement.⁷³

'This is in conformity with the overall purpose of business rescue: to preserve the social value of a business as a going concern and to avoid the destruction of that value that would come about if the company was liquidated. If just any creditor could vote an interest at a s 152 meeting) ... there would be little to stop speculators or asset strippers preying on business rescue proceedings, blocking the adoption of appropriate business rescue plans, and forcing liquidations where they could be avoided ... Creditors who vote an interest at a s 152 meeting must be pre-commencement creditors...'

[34] Just as the complete list of creditors of the company referenced in s 150(2)(a)(ii) of the Act has been held to exclude post-commencement creditors,⁷⁴ so too must that list, and those later permitted a voting interest, exclude those who were previously creditors of the company but who no longer are at the date of commencement of business rescue proceedings.⁷⁵ In fact, the case for exclusion appears to be far more compelling than the *Wescoal* scenario.⁷⁶

Direct and substantial interest

[35] SRCC and the second intervening party (SRCC Holdings) both claim to be parties with a direct and substantial interest in the proceedings, also in respect of Rolust, so as to justify their intervention. In the case of SRCC Holdings, the argument

⁷² Ibid para 21.

⁷³ Ibid paras 22, 27.

⁷⁴ Ibid para 23.

⁷⁵ Cf *Morris NO v Airomatic t/a Barlows Airconditioning Co* 1990 (4) SA 376 (AD) at 398J–399J, citing *Ex parte Kaplan and Others NNO: In re Robin Consolidated Industries Ltd* 1987 (3) SA 413 (W) at 427–8.

⁷⁶ An appeal against this decision was heard by the SCA on 30 August 2024 and judgment was reserved.

is that Lonetree is a shareholder of SRCC Holdings so that it has an interest in Lonetree complying with the provisions of its memorandum of incorporation.

[36] There are at least three related difficulties with these arguments. Firstly, and as already discussed, chapter 6 of the Act affords various participation rights to ‘affected persons’, as defined, not to ‘interested persons’ or an otherwise undefined group. Both ss 130 and 131 clarify that ‘each affected person’ has a right to participate in the hearing of applications in terms of these sections. This is a technical phrase specifically defined in the Act to encapsulate those potentially impacted by the business rescue application and process. Read with the provisions that follow, there appears to be no space for those who are not affected persons to enter the fray. During business rescue proceedings, it is the practitioner and affected persons that take centre stage. It bears repeating that the legislature has designed the proceedings to place a temporary moratorium on the rights of claimants against the company, to give effect to the rights of affected persons during the proceedings and to support the quest for the company to continue in existence on a solvent basis, alternatively to enhance the return for creditors or shareholders. That being the case, the context and the stated purpose of business rescue support the exclusion of other parties claiming an interest.⁷⁷ Limiting participation in this manner also finds support in foreign company law.⁷⁸ In addition, the court hearing an application in terms of s 131 is tasked with determining if the company is financially distressed, if it has failed to pay over any amount in terms of certain employment-related matters or if it is otherwise just and equitable to make a s 131(4)(a) order for financial reasons. The court must also be satisfied that there is a reasonable prospect for rescuing the company.⁷⁹ Permitting non-affected persons, acting in their self-interest, to intervene risks clouding and delaying the enquiry.⁸⁰

⁷⁷ Delpont above n 7 at 449. To the extent that this approach amounts to a limitation of the constitutional right of access to court, considering the purpose of the Act and s 36(1) of the Constitution, this is a reasonable and justifiable limitation by virtue of a law of general application. Cf *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Another* 2017 (4) SA 51 (*Booyesen*) paras 41 and following.

⁷⁸ S 5(2). Loubser above n 18 at 78.

⁷⁹ S 131(4)(a).

⁸⁰ *Booyesen* above n 77 para 48.

[37] Secondly, Uniform Rule 12, and the authorities upon which reliance is placed, pertains to intervention of persons as applicants or respondents in applications.⁸¹ This has been confirmed by the SCA.⁸² An application in terms of s 131 may be brought only by an affected person for an order placing the company under supervision and commencing business rescue proceedings. It follows that the affected person would be the applicant and the company the respondent. Section 131(2) provides that such an application must be served only on the company and the Commission. By contrast, other affected parties need not be served and must merely be notified of the application in the prescribed manner.⁸³ The legislation provides for their participation other than as a party to be cited and there appears to be no need for formal intervention.⁸⁴ As Rogers⁸⁵ AJ held in *Cape Point Vineyards v Pinnacle Point Group*:⁸⁶ 'In terms of s 131(3) each affected person has a right to participate in the hearing of an application in terms of s 131. In the circumstances, I do not think the legislature contemplated that an affected party would have to apply for leave to intervene in the proceedings. If the person is an "affected person" such person has a right to participate in the hearing.'

[38] Participation in a manner akin to participation by affected persons is what is sought by the SRCC parties. Considering the way participation by affected parties has been configured by the legislature, I am unconvinced that such participation is tantamount to participation as an applicant or respondent, so that reliance on Uniform Rule 12 is misplaced.

⁸¹ Uniform Rule 12, read with Uniform Rule 6(14).

⁸² *Smyth v Investec Bank Ltd* 2018 (1) SA 494 (SCA) at 511F.

⁸³ *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC) (*Cape Point Vineyards*) paras 13, 16. Regulations 123 and 124 of the Companies Regulations, 2011 (GG No. 34239) (26 April 2011). An applicant in court proceedings who is required, in terms of either s 130(3) or s 131(2)(b), to notify affected persons that an application has been made to a court, must deliver a copy of the court application, in accordance with regulation 7, to each affected person known to the applicant. The position is different in respect of an application to set aside a business rescue plan: *Absa Bank Ltd v Naude NO and Others* 2016 (6) SA 540 (SCA) (*Naude NO*). At least in the context of s 129 of the Act, a creditor who has not been given notice but who knows of the business rescue proceedings may apply to set aside the business rescue proceedings for want of compliance with the requirements of that section: *Eravin Construction CC v Bekker NO and Others* 2016 (6) SA 589 (SCA) paras 28 and 29.

⁸⁴ Joinder in the context of an application to declare an adopted business rescue plan invalid is a different matter: *Golden Dividend 339 (Pty) Ltd and Another v Absa Bank Limited* [2016] ZASCA 78; *Naude N.O.* above n 83. On the distinction in the case of business rescue applications, see *African Global Holdings (Pty) Ltd v Lutchman N.O. (Commissioner for the South African Revenue Services Party and Fidelity Security Services (Pty) Ltd Intervening Parties)* 2020 JDR 1794 (GJ) para 7.

⁸⁵ *Henri Viljoen (Pty) Ltd v Awebuch Brothers* 1953 (2) SA 151 (O) at 169.

⁸⁶ *Cape Point Vineyards* above n 83 para 21.

[39] The SRCC parties are also unable to rely on the common law or well-established, unique practice regarding intervention of third parties in insolvency proceedings. That approach favours the intervention of creditors and minority shareholders, with due consideration to the relevant legislative provisions.⁸⁷ Accepting that the production loan has already been settled, the SRCC parties are not affected persons and the business rescue context, considered with the purpose of the Act and the specific wording of chapter 6, closes the door to broader forms of intervention.

[40] Thirdly, it is accepted that a mere financial interest is only an indirect interest in litigation and is insufficient for intervention. It has been held, in a different context, that an aspirant intervener must demonstrate a material legal interest sufficient to affect the outcome of a winding-up application.⁸⁸ Bearing in mind the preceding determination regarding repayment of the loan, I am in any event unconvinced that the SRCC parties' interests qualifies as 'direct and substantial' in respect of the order the court is asked to make in the main application.⁸⁹

The packrights

[41] The preceding analysis puts paid to SRCC Holdings' application for intervention, and to SRCC's bid to participate in Rolust's application for business rescue.⁹⁰ In respect of the main application, however, there is at least one further string to SRCC's bow outside of the production loan. It claims to be an affected person by virtue of being a creditor in respect of 'packrights'.

[42] A packright may be understood as Lonetree's formal, contractual, right to pack with and to have marketed by SRCC a certain volume unit of citrus fruit. The packright system is designed to ensure that SRCC can market as large a volume of fruit as possible, to strengthen its negotiating position in the marketplace, and deliver what has been promised to the market. On the papers, it is common cause that Lonetree,

⁸⁷ *Levay and Another v Van den Heever and Others* NNO 2018 (4) SA 473 (GJ) para 23.

⁸⁸ *Absa Bank Ltd v Africa's Best Minerals 146 Ltd; in re Sekhukhune NO v Absa Bank Ltd* [2015] 2 All SA 8 (GJ) para 17.

⁸⁹ *Lebea v Menye* 2023 (3) BCLR 257 (CC) para 30.

⁹⁰ The argument, it may be noted, was that Lonetree's failure to validly repay the production loan debt meant that Rolust remained indebted to SRCC in terms of the cession and surety contained in the production loan agreement.

as a member of SRCC Holdings, was at least obliged to deliver citrus fruit to the SRCC packing facilities in accordance with any delivery schedules concluded for the particular fruit season. In addition, failure to deliver fruit representing 75% of the packrights per variety of citrus fruit held by Lonetree may result in additional charges.⁹¹ On my reading of the papers, the case made out by SRCC, both in respect of a possible interdict to compel Lonetree to deliver citrus fruit and in respect of the levying of additional charges, is linked to obligations emanating from the packright system.⁹²

[43] To exercise its packrights during a particular season, a packright holder must, by no later than 28 days before the commencement of the relevant variety packing season, negotiate and conclude a delivery schedule with SRCC. This is to enable SRCC to plan in advance the packing and / or marketing of the fruit of the owners of so-called 'linked units'.⁹³ It may be accepted for present purposes that Lonetree's obligation to deliver fruit is dependent upon the negotiation and conclusion of delivery schedules at the commencement of each season.⁹⁴ On Lonetree's own version:

'...bar one variety of fruit...no delivery schedules have been concluded by the parties for the 2024 season and there is thus no obligation on Lonetree to deliver any of the varieties of fruit

⁹¹ Schedule 1 to SRCC's Memorandum of Incorporation details the packright system, including the following provisions:

'2.4 Failure to utilise packrights in any citrus packing season in terms of actual deliveries of fruit owned by the packright owner to the extent of a minimum of 75% (seventy five per centum) of all packrights owned by a packright owner, may at the election and in the discretion of the board render the packright owner liable to the Company for additional charges calculated according to the following formula (which measure the Board shall apply reasonably and with due regard to climatic and other circumstances reasonably beyond the control of the packright holder) ...

2.6 The Board shall implement a procedure to allow packright owners who did not deliver their entire crops to the Company for packing and marketing during the season under review, and who have not utilised the required minimum number of packrights as determined in 2.4 above, to motivate to the Board why they should not become liable for the additional charges as calculated in terms of that paragraph.'

⁹² Properly construed, the founding papers cannot be read to support an undertaking to deliver fruit outside the packright system as a basis for participation. It was the alleged breach of obligations to deliver fruit, in terms of the packright system, as well as payment of additional charges, that formed the alleged alternative basis for participation in the main application. See para 18 of the application for intervention, dealing with *locus standi*, read with paras 53 and 54, headed 'conclusion as to standing'.

⁹³ This is defined in the memorandum of incorporation of SRCC Holdings as one share in SRCC Holdings, one packright, and the rights and obligations in terms of the service contract (between SRCC and the packright holder) related to the packright.

⁹⁴ Clause 43 of the SRCC Memorandum of Incorporation provides that 'the terms and conditions governing the packright and the service contract shall be as set out in schedule 1 hereto...'. Schedule 1 defines 'delivery schedule' to mean 'the negotiated schedule per packing season in terms whereof the packright holder concerned commits himself to exercise his packrights, and to deliver citrus fruit to the packing facilities, on the basis set out therein, which schedules shall form part of the service contract concerned'.

(except the one agreed to) to SRCC for the 2024 season ... Once a delivery schedule is concluded, a Packright holder is then obliged to deliver citrus fruit to the packing facilities in accordance with the relevant delivery schedule.’

[44] Lonetree attached to its answering papers the only delivery schedule concluded with SRCC, dated 21 June 2024, for the 2024 season, adding that it ‘fully intends complying with its obligations to deliver the nadorcotts as contracted for...’. This is in respect of 170 crates of a single variety of citrus (nadorcotts).

[45] Despite this acknowledgement, Lonetree maintained that SRCC’s case in respect of the nadorcotts was made out only in reply. I disagree.⁹⁵ SRCC’s locus standi was premised both on the production loan and packrights. It averred in its founding papers that ‘Lonetree was obliged to deliver citrus fruit to the packing facilities in accordance with the relevant delivery schedule...’, bemoaning Lonetree’s apparent intention to deliver its fruit to FreshGro from 2024. In response, Lonetree highlighted the absence of delivery schedules, other than in respect of the nadorcotts, for the current year.

[46] Loanetree’s only remaining contention in this respect is that the obligation to deliver the nadorcotts does not constitute a monetary debt and, therefore, does not result in SRCC being a creditor of Lonetree. Although the point was not addressed in argument, it also appears necessary to consider whether a party may be a creditor in respect of an obligation due in the future.

Is SRCC a creditor in respect of the obligation to deliver fruit

[47] The conclusion of a contract confers personal rights and imposes corresponding obligations on one or more of the parties. The person who acquires the right is called the creditor, and the one upon whom the obligation is imposed the debtor.⁹⁶ As already indicated, ‘creditor’ is undefined in the Act. The erstwhile

⁹⁵ Also see *De Polo and Another v Dreyer and Others* 1991 (2) SA 164 (WLD) at 178A–179A; *Baeck & Co SA (Pty) Ltd v Van Zummeren and Another* 1982 (2) 112 (WLD) at 119A–B: the approach of the court should always be to attempt to consider substance rather than form in the absence of prejudice to any party.

⁹⁶ F du Bois (ed) *Wille’s Principles of South African Law* (9th Ed) (2007) at 789.

Insolvency Act, 1916, defined the term to mean ‘a person who is a creditor in the usual sense of the word’.⁹⁷ Section 9 of that Act referred to a person as a creditor who has a liquidated claim and ‘whether or not the claim be payable at the date of the petition’.⁹⁸ Although the word is also undefined in the Insolvency Act, 1936,⁹⁹ the term has been interpreted, in that context, along the lines of the 1916 legislation. Various sections of the Insolvency Act, 1936, lend themselves to a broad interpretation.¹⁰⁰

[48] It has been said that the term creditor is not confined to one who has a claim against the estate sounding in money; any person to whom anything is owed from the estate is a creditor of the estate.¹⁰¹ More precisely, the words ‘creditor’ and ‘debtor’ are applied not only in respect of a claim for money but to a claim for anything else which is owing, whether unconditionally, conditionally or in the future.¹⁰²

[49] Consideration of the notion of a ‘debt’ supports the statement that a person may be a creditor even though the debt only becomes due in future.¹⁰³ Borrowing from the dictum of Holmes AJA in *Joint Liquidators of Glen Anil Development Corporation (in liquidation) v Hill Samuel (SA) Ltd*, in ordinary parlance, a debt is a firm obligation to

⁹⁷ Insolvency Act, 1916 (Act 32 of 1916); See *Ex Parte Vanqua* 1928 (WLD) 294; *Moosa v Olgar and Another* 1932 NPD 686. Cf *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD) paras 39–41, 47. In that matter, Olsen J drew a distinction between the interests of an owner denied possession of property in the possession of the company, and a creditor of the company owed money, in the context of s 133.

⁹⁸ *McLean v McLean’s Trustee* 1923 AD 141 at 148. Section 45 of the Insolvency Act, 1916 (Act 32 of 1916) referred to a person whose claim was dependent upon a condition as a creditor.

⁹⁹ Act 24 of 1936. Cf s 2 definition of ‘debtor’ in the Insolvency Act, 1936.

¹⁰⁰ Ss 48 (proof of conditional claim), 9(2) (a liquidated claim which has accrued but is not yet due): Bertelsmann above n 52 at 404; S 346(1) of the Companies Act, 1973 (Act 61 of 1973) does likewise: an application to court for the winding-up of a company may be made, inter alia, by one or more of its creditors, including contingent or prospective creditors. Also see *Simon and Another v The Assistant Master and Others* 1964 (3) SA 715 (T) at 719D–E.

¹⁰¹ *Grobler v Grobler’s Trustee* 1908 TS 423 at 427–8.

¹⁰² *MacMaster’s Trustees v Executor of Kruger* (1863) 4 Searle 205 at 210, as cited in Du Bois above n 96 at 790. On the wide meaning attached to the term ‘creditor in the Digest, 15.16.10, see *McLean v McLean’s Trustee* 1923 AD 141; *AF Philip & Co Ltd & Others v Adie, NO & Others* 1970 (4) SA 251 (R) at 254. SP Scott *The Civil Law* (1932), accessed at https://droitromain.univ-grenoble-alpes.fr/Anglica/D50_Scott.htm: ‘...it is established that creditors should be understood to be those to whom something is due and collectible by any action or prosecution, or under the Civil Law, ... whether the indebtedness is absolute, or is to be discharged within a certain time, or under some condition ... If, however, the claim should not be based upon money lent, but upon a contract, they are still understood to be creditors...By the appellation of “creditors”, not only those are understood who have loaned money, but all to whom anything is due for any reason whatsoever.’ Also see E Bertelsmann above n 52 at 404.

¹⁰³ Cf *Eravin Construction CC v Bekker NO and Others* 2016 (6) SA 589 (SCA), dealing with the notion of ‘debt owed’, as distinguished from when a debt falls due for purposes of prescription, in the context of s 154(2) of the Act.

pay, whether now or later.¹⁰⁴ Whether a debt is in existence is one question, when that debt is due another.¹⁰⁵ There is a difference in principle between the ‘arising’ of a debt and its exigibility or recoverability.¹⁰⁶ A person may, therefore, be a ‘creditor’, even though the cause of action is incomplete.¹⁰⁷ The parties to a contract may, for example, intend that the creditor is entitled to determine the time for performance, so that the debt only becomes due when demand is made as agreed. But this does not alter the creditor / debtor status of the parties.¹⁰⁸

[50] This interpretation appears to be supported by s 136(2)(a) of the Act:

‘Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may –

- (a) Entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, *any obligation of the company that –*
 - (i) *arises* under an agreement to which the company was a party *at the commencement* of the business rescue proceedings; and
 - (ii) *would otherwise become due during those proceedings...* (Own emphasis).

This section of the Act envisages the situation where the company is a party to an agreement at the commencement of business rescue proceedings, with one or more obligations only becoming ‘due’ during those proceedings. The practitioner to be appointed may decide to suspend, for the duration of the business rescue proceedings, any of Lonetree’s obligations that would otherwise (only) become due during those proceedings.¹⁰⁹ Should that occur in respect of the nadorcotts, SRCC

¹⁰⁴ *Joint Liquidators of Glen Anil Development Corporation (in liquidation) v Hill Samuel (SA) Ltd* 1982 (1) SA 103 (A) at 103, 110A – 111E.

¹⁰⁵ *List v Jungers* 1979 (3) SA 106 (A) at 121C–E. Also see *Union Share Agency & Investment Ltd v Spain* 1928 AD 74 at 80–81: the distinction between the indebtedness being subject to the happening of an event and the payment being so subject is a vital one that should not be overlooked. The date on which a debt becomes ‘due’ may not coincide with the date on which it arises: *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* [2017] ZACC 32 (*Trinity*) para 100. A debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor: *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* [2016] ZASCA 91; 2017 (1) SA 185 (SCA) para 24, as quoted in *Trinity* above para 66. Cf *Henque 3935 CC t/a PQ Clothing Outlet (in Business Rescue) v The Commissioner for the SA Revenue Service* [2023] ZAGPJHC 234; 2023 (6) SA 260 (GJ); 86 SATC136 para 18.

¹⁰⁶ *List v Jungers* ibid at 109B–C; *Truter v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 16. Also see *Apalamah v Santam Insurance Co Ltd and Another* 1975 (2) SA 229 (D) at 232F. The SCA has also held that to construe an ‘obligation’ to mean that a debt exists only when the debtor is required to do something, would be too limiting: *Duet and Magnum Financial Services CC (in liquidation) v Koster* 2010 (4) SA 499 (SCA) para 24.

¹⁰⁷ *The Master v I L Back and Co Ltd* 1983 (1) SA 986 (A) at 990D–E.

¹⁰⁸ *Trinity* above n 105 paras 47 and following, read with para 95.

¹⁰⁹ S 136(2)(a)(ii).

would be restricted to a claim for damages.¹¹⁰ That being the case, it would be prejudicial to SRCC to disallow its participation in the main application purely on the basis that Lonetree's admitted obligation to deliver nadorcotts would only arise sometime in the future. Adopting a broad understanding of the word 'creditor' also appears to be apposite when considering the Act's definition of 'financially distressed', which includes debts that only become due and payable within the immediately ensuing six months after the s 131(4)(a) order.¹¹¹

[51] During business rescue proceedings, no legal proceeding against Lonetree, or in relation to any property belonging to Lonetree, including its nadorcotts, may be commenced (or proceeded with) in any forum, other than in the circumstances described in s 133. Permitting SRCC to participate in the main application on the strength of Lonetree's obligation to deliver fruit accords with the legislature's intention. This, it has been held, is to allow the company in distress the necessary breathing space by placing a moratorium on legal proceedings and enforcement action in any forum, without interfering with the contractual rights and obligations of the parties to an agreement.¹¹² Granting this particular component of the application also contributes towards balancing the rights and interests of all relevant stakeholders.¹¹³ Adopting a broad interpretation of 'creditor' appears to accord with the accepted, ordinary meaning of the word in South African law. Bearing in mind the context of the Act and the purpose of participation, I am satisfied that SRCC is an affected person on this basis and, therefore, entitled to participate in the hearing of the main application. To conclude to the contrary would stultify the broader operation of the legislation, potentially resulting in the impractical, unbusinesslike or oppressive consequences cautioned against in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.¹¹⁴

¹¹⁰ S 136(3). Similarly, the draft business rescue plan provides that the practitioner 'will engage with parties who are presently contractually committed to the Close Corporation with a view to terminating or renegotiating onerous contracts that might be in existence.'

¹¹¹ S 128(1)(f)(i) read with s 131(4)(a).

¹¹² *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 40.

¹¹³ *FirstRand Bank Ltd v KJ Foods CC* 2017 (5) SA 40 (SCA) para 75.

¹¹⁴ *Endumeni Municipality* above n 6 para 26.

[52] In support of this approach and conclusion, it is interesting to note that the first draft of the Companies Bill¹¹⁵ introduced in Parliament contained a definition of a creditor for the purposes of business rescue proceedings.¹¹⁶ Loubser explains what transpired subsequently:¹¹⁷

'A creditor was defined as a person to whom the company owed money under any arrangement immediately before the start of business rescue proceedings, irrespective of whether the money was already due and payable ... In my submission on the Companies Bill to the Portfolio Committee on Trade and Industry, I pointed out that the definition was flawed in several respects: firstly, the definition referred only to persons to whom the company owed money although a person could also be a creditor as a result of services, products or property that the company was obliged to deliver in terms of a contract ... My recommendation that the definition should be removed was accepted by the Department of Trade and Industry and the Portfolio Committee, and the definition was accordingly scrapped.'

[53] While genetic interpretation is only of limited value in statutory interpretation, it may serve to confirm results arrived at through other methods.¹¹⁸ Loubser's explanation appears to do so in this instance.

The additional charges

[54] Given the conclusion that SRCC is a creditor in respect of the nadorcotts, it seems unnecessary, for present purposes, to determine if it is also entitled to participate in the hearing of the main application based on potential additional charges to be imposed. Any suggestion that SRCC may do so on this basis appears to be premature. While it may indeed be likely that the additional charges will be imposed, this had not occurred at the time the application was argued.¹¹⁹ Should the charges be lawfully imposed prior to the hearing of the main application, the position may be different to the extent that SRCC is a creditor on this basis at the time of commencement of business rescue proceedings and, as a result, entitled to

¹¹⁵ Bill B 61A – 2008.

¹¹⁶ As s 128(1)(e).

¹¹⁷ Loubser above n 18 at 53.

¹¹⁸ *S v Makwanyane* 1995 6 BCLR 665 (CC) paras 18, 25, 33 as cited in Du Plessis above n 44 267–269.

¹¹⁹ *Sideralloys International SA v Rahida Investment (Pty) Ltd* [2019] ZAGPJHC 227 paras 4, 102, 103. Also see *Rogal Holdings (Pty) Ltd and Another v Victor Turnkey Projects (Pty) Ltd and Others* [2022] ZAGPPHC 167 (*Rogal Holdings*) para 19 and following and para 34, explaining that it is not only creditors who have proven claims against the debtor that are to be regarded as affected parties.

participate in terms of s 145.¹²⁰ Although Lonetree appeared to concede this point, I make no finding in that regard, also considering that the issue was argued as part of SRCC's alternative claim for participation based on a direct and substantial interest.

Orders

[55] The following orders are issued:

1. In respect of the application to participate or intervene in the business rescue application under case number 1623/2024 (Rolust Sondagsrivierplase CC):
 - a) The application is dismissed with costs, to include the costs of Counsel on scale B.
2. In respect of the application to participate or intervene in the business rescue application under case number 1626/2024 (Lonetree Citrus CC):
 - a) The first affected person (Sundays River Citrus Company (Pty) Ltd) is granted leave to participate in the hearing of the business rescue application;
 - b) Any late filing of the answering affidavit is condoned;
 - c) The relief in part B is postponed, to be heard on the date when the business rescue application is heard;
 - d) Costs are reserved.

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JUDGE OF THE HIGH COURT

¹²⁰ See *Wescoal* above n 71. Lonetree indicates in its answering papers that it intends to make use of its right to motivate why it should not be levied with an additional charge, as contemplated in clause 2.6 of schedule 1 to SRCC's Memorandum of Incorporation. See *ABSA Bank Ltd v Scharrighuisen* 2000 (2) SA 998 (C); [2000] 1 All SA 318 (C) as cited in *Jeany Industrial Holdings (Pty) Ltd and Others v Zungu-Elgin Engineering (Pty) Ltd* [2019] ZAKZDHC 38; 2020 (2) SA 504 (KZD) para 19; FHI Cassim (Ed) *Contemporary company law* (3rd Ed) (2021) at ch18-p 1193. Cf *Ellerine Brothers (Pty) Ltd v Vestacor (Pty) Ltd*; *Rubenstein v Vestacor (Pty) Ltd & Another (KNS Construction (Pty) Ltd Intervening)* [2019] ZAGPJHC 85 para 4.

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