



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2025-173474

- [1] REPORTABLE: YES
- [2] OF INTEREST TO OTHER JUDGES: YES
- [3] REVISED: NO

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SIGNATURE

DATE: 12 DECEMBER 2025

In the matter between:

TAMELA MEZZANINE DEBT FUND I PARTNERSHIP
(en *commandite* partnership)

Applicant

And

KT WASH DETERGENTS PROPRIETARY LIMITED
(in business rescue)
(Registration number: 2018/040804/07)

First Respondent

STEPHEN ULYSSES SMYTH N.O.
(in his capacity as a duly appointed joint business rescue
practitioner of the first respondent)

Second Respondent

ALISON MARY TIMME N.O.

Third Respondent

(in her capacity as a duly appointed joint business rescue practitioner of the first respondent)

TALIRA NAIDOO N.O.

Fourth Respondent

(in her capacity as a duly appointed joint business rescue practitioner of the first respondent)

AECI LIMITED

Fifth Respondent

CHEP SOUTH AFRICA PROPRIETARY LIMITED

Sixth Respondent

CIM CHEMICALS PROPRIETARY LIMITED

Seventh Respondent

DBC PACKAGING PROPRIETARY LIMITED

Eight Respondent

DYASON INC

Ninth Respondent

EKANGO SALT REFINERS PROPRIETARY LIMITED

Tenth Respondent

ELKA LOGISTIX PROPRIETARY LIMITED

Eleventh Respondent

MANUCHAR SOUTH AFRICA PROPRIETARY LIMITED

Twelfth Respondent

WALDICK INC

Thirteenth Respondent

PACK N STACK PROPRIETARY LIMITED

Fourteenth Respondent

SYNFINY ADVISORS DMCC

Fifteenth Respondent

WANG ON FIBRES PROPRIETARY LIMITED

Sixteenth Respondent

WAKELY SMITH LATTUCA ADVISORY PROPRIETARY LIMITED	Seventeenth Respondent
WAKELY SMITH LATTUCA INC	Eighteenth Respondent
ALOS INNOVATIVE WORKFORCE SOLUTION PROPRIETARY LIMITED	Nineteenth Respondent
D WHALLEY AND ASSOCIATES PROPRIETARY LIMITED	Twentieth Respondent
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	Twenty-First Respondent
AYMAN OSSAMA MOHAMMED ABDELMEGUID	Twenty-Second Respondent
PAUL TOOCH	Twenty-Third Respondent
THE REMAINING AFFECTED PERSONS OF THE FIRST RESPONDENT	Twenty-Fourth Respondent

SUMMARY

Business rescue – application to set aside a vote rejecting a business rescue plan as inappropriate in terms of section 153(1)(b)(i)(bb) read with section 153(7)(a) to (c) of the Companies Act, 2008 (“**the Act**”). Principles to be applied in undertaking a single enquiry and value judgment. The approach is informed by the reasons given for the rejection of the business rescue plan, weighed against any benefits of liquidation with due regard to the purpose of business rescue as contemplated in section 7(k) of the Act.

Business rescue plan - The level of detail required in a business rescue plan will depend on the nature and complexity of the proposed plan. A business rescue plan must contain all the facts necessary for creditors to make an informed decision on how to exercise their vote. *Ex facie* the business rescue plan it must appear that the rights and interests of all stakeholders have been considered and balanced.

Resumed meeting in terms of section 151 of the Act – the failure of an application in terms of section 153(1)(b)(i)(bb) read with section 153(7)(a) to (c) does not lead, automatically, to the practitioner being obliged to file a notice of termination of business rescue. At the resumed meeting, the creditors may instruct the practitioner to prepare a revised business rescue plan. In the event that the creditors do not do so, the practitioner will be obliged to a notice terminating business rescue.

In *casu*, the business rescue plan is predicated on the sale of the business of the company in business rescue as a going concern. *Ex facie* the business rescue plan, the proposed sale of business favours one creditor disproportionately in relation to other creditors. The facts necessary to establish whether calculation of the purchase price is fair and reasonable and the facts to support the calculation of a dividend not provided to the creditors. These facts were, similarly, not adduced in evidence. It cannot be determined in the circumstances whether the business rescue plan achieves a fair balancing of stakeholders' rights and interests. The vote against the business rescue plan was not inappropriate in the circumstances.

The application to set aside the vote is dismissed.

JUDGMENT

PULLINGER AJ

INTRODUCTION

[1] The applicant ("**Tamela**") approaches this Court, by way urgency, seeking relief in terms of section 153(1)(b)(i)(bb) read with section 153(7)(a) to (c) of the Companies Act, 2008 ("**the Act**"). It seeks to set aside as "inappropriate", the

vote of 19 September 2025 rejecting the proposed business rescue plan presented to creditors of the first respondent ("**Wash**") by its business rescue practitioners ("**the BRPs**").

- [2] Tamela has, since at least 2004, had a business relationship with Wash. In the time from the inception of this relationship to 27 March 2025, Tamela lent and advanced some R175 million to Wash. This is undisputed.
- [3] On 27 March 2025, Wash entered business rescue pursuant to a directors' resolution taken in terms of section 129(1) of the Act.
- [4] Between April and September 2025, Tamela lent and advanced a further amount of R70 million in post commencement finance ("**PCF**") to Wash. This is also not in dispute.
- [5] The PCF enabled the BRPs to meet Wash's monthly financial obligations of some R8.1 million comprising, *inter alia*, salaries and wages for Wash's 107 employees of some R3 million and the costs to maintain, insure and secure Wash's premises, plant and equipment in an amount of some R5 million.
- [6] Tamela continues to make PCF available to Wash to enable the BRPs to meet these monthly costs
- [7] Tamela contends for a secured claim of pre and post-commencement finance of some R238 million. Tamela's contention of it being a secured creditor in Wash, is vociferously challenged. This challenge occasions a dispute

concerning Tamela's *locus standi* and raises an issue of a material non-joinder. These disputes were not foreshadowed in the relevant answering affidavits.

- [8] The relief sought by Tamela is opposed by three creditors who voted against the adoption of the proposed business rescue plan. They are the fifth respondent ("**AECI**"), the twenty-second and twenty-third respondents being members of Wash's board of directors at the time the business rescue was commenced ("**the Management**") and the twelfth respondent ("**Manuchar**") being a further creditor in Wash.
- [9] The BRPs filed affidavits explaining their position but did not participate in these proceedings.
- [10] The background facts are uncontroversial. Wash and another entity described as its sister company, KT Wash Liquids (Pty) Ltd ("**Liquids**") entered business rescue on 27 March 2025. A business rescue plan for Liquids was approved. That plan is contingent upon a business rescue plan being adopted in Wash.
- [11] Wash and Liquids, historically, conducted business as a manufacturer of household detergent producing its own branded washing powder and liquid detergent products. They also manufactured and packaging of these products for various multi-national corporations.
- [12] For various reasons not directly material to this application, Wash and Liquids became financially distressed. Notwithstanding Tamela's substantial capital

injections into these businesses, they unable to re-establish a sound financial footing and led to these companies entering voluntary business rescue.

[13] On 5 September 2025 the BRPs published a proposed business rescue plan ("**the Proposed Plan**") in Wash. A creditors' meeting as contemplated in section 151 of the Act was held on 19 September 2025 at 09h00 to consider and vote on the Proposed Plan.

[14] The meeting of 19 September 2025 was attended by certain "Affected Persons" (as defined in section 128(1)(a) of the Act). They participated in the meeting in person and via an online platform. Several addresses were made by the Affected Persons to the attendees.

[15] The Management and AECI sought a postponement of the meeting which the BRPs declined to entertain. A motion for postponement was not put to the vote. Rather, the Proposed Plan was put to the vote.

[16] Only 50.73% of the votes cast were in favour of the Proposed Plan. This resulted in the threshold set in section 152(2) of the Act not being achieved and the consequently, the rejection of the Proposed Plan.

[17] The section 151 meeting was postponed for Tamela to bring this application.

[18] In the end, the numerous affidavits filed of record, the parties' heads of argument and supplementary heads of argument comprise some 900 pages of

factually dense material and complex legal argument on, at least, two novel issues.

[19] At the outset I express my gratitude to counsel for their comprehensive and thorough heads of argument. These have assisted me greatly in the preparation of this judgment.

[20] During the very able argument presented by counsel on behalf of the parties to this application, two central issues crystallised. They are:

[20.1] was the rejection of the Proposed Plan "inappropriate" as contemplated in section 153(1)(b)(i)(bb) of the Act? and

[20.2] does it follow from a finding that the rejection of the Proposed Plan was not "inappropriate" necessitate in the BRPs filing a notice terminating the business rescue in Wash as contemplated in section 153(5) of the Act?

[21] The parties agree that a finding that the rejection of the Proposed Plan was not "inappropriate" leads to a dismissal of this application.

[21.1] As I understand Mr Daniels SC, who appeared with Mr Vetter for Tamela, Tamela's case is that should this application fail, the creditors' meeting that was adjourned for the purposes hereof will be reconvened and, at that meeting, the BRPs will be constrained to

advise the Affected Persons that the business rescue in Wash has failed. This accords with the position expressed by the BRPs.

[21.2] The BRPs express the view that absent ongoing PCF, the liquidation of Wash and Liquids is inevitable.

[21.3] The Management and AECl disagree with Tamela's view on the consequences of this application failing as being the end of the business rescue in Wash.

[21.4] Mr Hoffman, who appeared with Mr Sila for the Management, argues that, at the reconvened meeting, Wash's creditors may may table a motion requiring the BRPs to prepare and publish a revised plan. If no such motion is tabled, the provisions of section 153(5) will become applicable and oblige the BRP's to file a notice of termination of business rescue proceedings. If, however, the motion passes, then section 153(3) finds application. In that event, the BRPs must close the meeting, prepare and publish a new or revised plan within 10 days and the provisions of Part D of Chapter 6 of the Act will commence start afresh.

[21.5] The position taken by Mr Amm SC, who appeared with Ms dos Santos for AECl, similar to that of the Management. They argue that only in the event of none of the remaining creditors exercising their rights in terms of section 153(5), that the BRPs must proceed in terms of

section 153(3) and file a notice of termination of the business rescue proceedings in Wash.

[21.6] In this regard, AECI and the Management are aligned. They do not see the failure of this application necessarily resulting in Wash's business rescue coming to an end.

[21.7] Mr Aldworth, who appeared for Manuchar, did not engage in this debate or file supplementary heads of argument on the issue.

[21.8] Manuchar takes the point on urgency and attacks the Proposed Plan as failing to provide facts to support the contentions advanced therein.

[21.9] Manuchar's perspective of the matter is the liquidation of Wash holds various advantages and may lead to better dividend to creditors.

[22] Prior to dealing with the central issues, there are preliminary issues raised by AECI that require determination.

[22.1] AECI contends that Tamela does not enjoy *locus standi* in this matter. This is intertwined with its contention Project Sparkle Security SPV (RF) (Pty) Ltd ("**Project Sparkle**") is a necessary party to these proceedings.

[22.2] AECI contends that Project Sparkle is the true secured creditor in Wash, therefore, so the argument goes, Tamela does not enjoy the

right in section 152(1)(b)(i)(bb) to seek an order setting aside the creditors' rejection of the Proposed Plan.

[22.3] AECI contends further, that this application ought not to have been brought by way of urgency and raises issues of prejudice and Tamela's non-compliance with the applicable practice directives.

[22.4] As a result, AECI seeks an order striking the matter from the roll or dismissing it if it finds success on any one or more of these preliminary points.

[22.5] AECI also seeks an order striking out portions of Tamela's affidavits as being hearsay or advancing new facts in reply.

[22.6] To the extent that Tamela's evidence is inadmissible, or that new facts are inappropriately advanced in reply, I shall follow the approach in **Associated Institutions Pension Fund**,¹ to the extent that it is not permissible rebuttal evidence as discussed in **Nkengana**.²

[23] I commence with the issues raised by AECI in accordance with the principle in **Makhubela**³ which holds that a court cannot proceed to hear a matter in the

¹ **Associated Institutions Pension Fund and Others v van Zyl and Others** 2005 (2) SA 302 (SCA) at [35].

² **Nkengana v Schnetler** [2011] 1 All SA 272 (SCA) at 276 H – I.

³ **Makhubela v Khampepe and Others** [2024] ZAGPJHC 352 (10 April 2024) at [17].

absence of a person or entity whose rights stand to be affected by the relief sought in the proceedings and the principle in **Chung-Fung**⁴ which holds that in cases presented to a court as an urgent application, the case for urgent relief must be determined on its own merits, due regard being had to the requirements of an absence of substantive redress in due course, the right in section 34 of the Constitution, and the reasonableness of the abridgment of time periods.

JOINDER, *LOCUS STANDI* AND URGENCY

[24] AECL's contentions on joinder and *locus standi* depart from the premise that Project Sparkle is "the direct security holder under the Tamela / KT Wash funding transaction". AECL contends further that Project Sparkle appears to be a creditor of Wash and an Affected Person in Wash's business rescue.

[25] For this proposition AECL relies on the principle in **Kilburn**⁵ that the existence of a valid underlying *causa* is a requisite for the registration of a notarial bond.

⁴ **Chung-Fung (Pty) Ltd and Another v Mayfair Residents Association and Others** [2023] ZAGPJHC 1167 (13 October 2023) at [29] to [31].

⁵ **Kilburn v Estate Kilburn** 1931 AD 501 at 505 to 506. This principle was applied in **Land and Agricultural Development Bank of South Africa v Impande Property Investments (Pty) Ltd** [2013] ZAGPJHC 398 (9 April 2013) with reference to **Albert v Papenfus** 1964 (2) SA 173 (E) at 721 E – H and **Bay Loan Investment (Pty) Ltd v Bayview (Pty) Ltd** 1972 (2) SA 313 (C) at 316 E – G. These matters concerned whether a mortgage bond was given as security for an unlawful underlying agreement. In **Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa** 2016 (1) SA 202 (SCA) the question before the court was whether, in the context of a finding that an underlying agreement was void, whether the mortgage bond registered pursuant thereto was enforceable. The court accepted the general principle in **Kilburn** (at [28]) but found the mortgage bond to be valid and enforceable because of the specific terms thereof (at [25] and [39] to [46]). Therefore, while the general principle holds true that a

So AECl reasons, Project Sparkle is a necessary party to this application and, on the basis that Tamela is not a secured creditor, AECl asserts Tamela lacks the necessary *locus standi* to pursue relief in terms of section 153(1)(b)(i)(bb) read with section 153(7)(a) to (c) of the Act.

[26] As these points were not raised by AECl in its answering affidavit, and consequently certain documents that may have been relevant to the issue have not been placed before me. I am constrained to interrogate that which has been filed of record to test whether the propositions advanced by AECl may hold true.

[27] The proposed business rescue plan records that

- "15.4. Tamela's debt (pre-commencement of business rescue plus the PCF) is secured by way of a debt guarantee provided by [Project Sparkle] in respect of [KT Wash]'s obligations to Tamela and who in turn has provided an indemnity to [Project Sparkle] for any claims made by Tamela against [Project Sparkle].
- 15.5. ABSA, previously the first ranking senior creditor, has since been settled in full, with the result that the obligations of [Project Sparkle] to Tamela (in respect of both their pre business rescue commencement debt and PCF debt) are now first ranking to Tamela.
- 15.6. On or around the end of May 2025, as part and parcel of the PCF (and future PCF) and in order to provide the necessary security, the BRPs agreed to the perfection of the GNB in order that PCF be released for future security payments and to facilitate the ultimate rescue of the business. In agreeing to the perfection of the GNB, the BRPS agreed with the with the bond holder [Project Sparkle] on condition that [KT Wash] remain in possession of the relevant movable assets

mortgage bond will be unenforceable if the underlying *causa* is unlawful, the terms of the bond will be decisive.

and continue to utilise such assets to trade and fund the business rescue proceedings to the extent possible. [Project Sparkle] approached the court on an unopposed basis on 29 May 2025, with the application subsequently being made an order of Court on 3 June 2025."

[28] It provides, further, at paragraph 26.4 that

"It is also specifically noted that with reference to the above, no discharge of the debt as envisaged will in any way impact or negate "(i) the Guarantee provided by Harold Toooh in favour to Tamela and/or the Security SPV [a reference to Project Sparkle], (ii) the Guarantee provided by Trustees for the time being of the Harold Toooh Family Trust, Prominent Sites Proprietary Limited and/or KT Wash Proprietary Limited in favour of Tamela and/or the Security SPV; (iii) the Cession in Security of surplus proceeds provided by Harold Toooh and the Harold Toooh Family Trust in favour of Tamela and/or the Security SPV; and (iv) any other security provided by any third party in favour of Tamela and/or the Security SPV (or any other Surety/Guarantees provided to any Creditor for that matter)."

[29] At face value,

[29.1] Tamela holds security for the monies it has advanced to Wash. That security is in the form of a guarantee from Project Sparkle. It appears that, as a result of a mezzanine finance arrangement, ABSA advanced funds to Wash through the Project Sparkle vehicle and the debt to ABSA having been settled, Tamela as the only creditor in Project Sparkle;

[29.2] Project Sparkle has taken security from Wash in the form of, *inter alia*, a General Notarial Bond ("**the GNB**") over Wash's movable assets, which bond has been perfected;

[29.3] the GNB provided by Wash to Project Sparkle secures a principal amount of R300 million and an additional amount of R60 million over Wash's immovable assets;

[29.4] The effect of the GNB is that

"The bondholder does not acquire any real right over the hypothecated movables. There is nothing to prevent the owner dealing freely therewith and the bondholder may not pursue them into the hands of a third party or prevent their attachment in execution. Under the perfection clause that is a common feature of such bonds, the bondholder will be entitled to take possession of the movables and thereby constitute a pledge over the movables. When that happens the bondholder acquires a real right of security over the movables."⁶

[29.5] The effect of the transaction between Tamela, Project Sparkle and Wash, I can infer, without the benefit of the agreements, that Project Sparkle guaranteed Wash's obligations to Tamela on certain terms;

[29.6] Ordinarily, the guarantor takes security for the obligation it has undertaken, realisable upon the happening of an event, which event would, generally, be a default by the party whose performance of its obligations to the third party is guaranteed;

⁶ **FirstRand Bank Ltd v Land and Agricultural Development Bank of South Africa** 2015 (1) SA 38 (SCA) at [4].

[29.7] For these purposes, Project Sparkle took security from Wash in the form of, *inter alia*, the GNB. As a result of the GNB being perfected, the real rights in Wash's assets now vest in Project Sparkle;

[29.8] Accordingly, the obligation secured by the GNB is Wash's obligation to Project Sparkle, being the *quid pro quo* for the guarantee issued by it to Tamela. This is the lawful *causa* contemplated in **Kilburn**;

[29.9] The effect of the guarantee is, for purposes of a distribution to be made in an insolvent estate, not considered to be "security" because a creditor who holds a guarantee from a third party is not holding "security" over any part of the insolvent estate;⁷

[29.10] In the insolvency context therefore, Tamela's claim against Wash is not "secured", as the guarantee is not security held over any of Wash's assets;

[29.11] Whether this holds true for purposes of business rescue need not be decided here⁸ because there is nothing to suggest that Tamela's

⁷ **Green & Co v Froming** (1906) 23 SC 600 at 601; **Maltz's Trustee v National Bank of SA Ltd** 1916 CPD 430 at 431 and **Hunt, Leuchars & Hepburn v J E Vorster & Co** 1930 WLD 261 at 265/266.

⁸ In Levenstein, *South African Business Rescue*, the learned author makes the point at 9-67 that the meaning of a "secured creditor" for purposes of section 151 of the Act is unclear, at least in so far as the meaning of thereof is relation to the phrase "a secured or unsecured creditor" means for purposes of section 145(4) is concerned. He suggests, with reference to the view expressed in *Delpont et al, Henochsberg on the Companies Act 71 of 2008*, that the ordinary meaning of "unsecured creditor" should be followed. Insofar as the meaning of "secured creditor" is concerned, I see no reason to depart from that approach. Accordingly, and I accept that that said in Bertelsman

position as a creditor in Wash is affected by the transaction I described above; the fundamental nature of a guarantee is such that it requires a debtor- creditor relationship between the holder of the guarantee and the person or entity whose performance in terms of that relationship is guaranteed. In *Schmitthoff, The Law and Practice of International Trade*⁹ the learned authors explain this proposition as follows,

"In the common law the guarantee, or suretyship, is an arrangement involving three parties: the principal debtor, the creditor, who has a claim against the principal debtor, and a third party, the guarantor (the surety), who undertakes to be liable to the creditor if the principal debtor fails to, discharge his obligation to him. **The arrangement between the creditor and the guarantor is the contract of guarantee. It is a secondary obligation, subsidiary to the contract between the creditor and the principal debtor. ...**

Since the contract of guarantee is accessory in nature, it follows that an agreement may only be a guarantee if there is another, principal, obligation to which it is subsidiary. In the words of Lord Selborne:

'There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters ex post facto and need not be so at the time, but until there is a principal debtor there can be no suretyship. **Nor can a man guarantee anybody else's debt unless there is a debt or some other person to be guaranteed**.'" (emphasis added; footnotes omitted)

et al, Mars The Law of Insolvency in South Africa, 10th ed at 20.3.1 where the learned authors opine that a "secured creditor" for purposes of the Insolvency Act is one who enjoys security for is claim, being a preferent right over the insolvent's property by virtue of a special mortgage and the like and that, as expressed at 20.3.1.2, it is only the bondholders over movable property who have secured claims with reference to the definition of "special mortgage" as contemplated in section 2 of the Insolvency Act.

⁹ Murray *et al*, *Schmitthoff, The Law and Practice of International Trade* 12th ed at 12-001

[29.12] Then, but for the preference afforded in section 135(1) read with subsection 3(a) of the Act to providers of PCF, Tamela is at the very least, a concurrent creditor in Wash.

[30] As I have described above, Tamela lent and advanced some R238 million to Wash from 2024 to date. The advances made by Tamela to Wash are not in dispute. Nonetheless, the fact of these advances become material when I address AECL's *locus standi* point below.

[31] Mr Daniels SC complained that neither AECL's joinder point, nor its *locus standi* point were squarely taken in AECL's answering affidavit. He contends further, that had they been raised, Tamela would have been able to properly address these points. Mr Daniels SC placed reliance on the principle in **Bato Star**¹⁰ which holds that the facts alleged by a litigant must make be clear as to what underpins its case. This is fair enough, particularly, in the context of a review of administrative action, as was the case in **Bato Star**, where the relevant provisions of the Promotion of Administrative Justice Act, 2000 had not specifically been identified. However, reliance on **Bato Star** may miss the point

¹⁰ **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** 2004 (4) SA 490 (CC) at [26] and [27].

AECI seeks to make. The real point, as I understand it, is that made in **Quartermark Investments**¹¹ which holds:

"It is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence. They serve to define not only the issues between the parties but also to place the essential evidence before the court. They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out. Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit." (footnotes omitted)

[32] Arguably, the primary facts upon which Tamela relies for the conclusion that it is a "secured creditor" and the documents that support that conclusion should have been adduced in evidence. I say "arguably" because it appears that Tamela's status was never been challenged before this litigation commenced. I have not seen any suggestion of resistance in the affidavits filed of record, to Tamela's participation in the meeting of 5 September 2025. At the very least, this signals a general acceptance that Tamela is a one of Wash's creditors.

[33] The further point made by Mr Daniels SC is that non-joinder of a necessary party and an objection to *locus standi* are usually taken by way of a special plea¹² which alerts the litigant against whom such points are taken not only of

¹¹ **Quartermark Investments (Pty) Ltd v Mkhwanazi and Another** 2014 (3) SA 96 (SCA) at [13].

¹² In regard to *locus standi*, **Trustees for the time being of the Legacy Body Corporate v BAE Estates & Escapes (Pty) Ltd** 2022 (1) SA 424 (SCA) holds that:

"[35] Significantly, this point was not even pleaded. In [8] – [10] above I have set out fairly comprehensively the points in the trustees' answering affidavit upon which they rested their defence to the application. This was not one of them. The point was raised for the first time in the application for leave to appeal. **Ordinarily, a point of lack of locus standi should have been pertinently raised in the answering affidavit to enable Bae Estates to meet it, and for the High Court to pronounce on it.**

the points, but also the factual basis upon which they are taken. AECI did not do so. This led to Tamela not being afforded the opportunity to deal therewith as aforesaid. It also occasioned the exercise undertaken above to dissect, from the available facts, the relationship between Wash, Tamela and Project Sparkle.

- [34] Mr Amm SC's retort, with reference to the principles in **Eagles Landing**¹³ and **Rosebank Mall**,¹⁴ was that an applicant, such as Tamela, must make the necessary allegations, in its founding affidavit, to found its *locus standi* and, ensure that relation to parties who have a direct and substantial interest in the outcome of litigation are properly joined. He argued that where there is a party whose rights may be detrimentally affected by any decision made by the court, its joinder is so essential that the court may *mero motu* make an order joining that party – even on appeal – and give appropriate further procedural directions.

[36] It is so that the mere fact that a point of law is raised for the first time on appeal is not in itself a sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, a court may in the exercise of its discretion consider the point. It would be unfair to the other party if the point of law and all its ramifications were not canvassed and investigated at trial. In this case, the point was neither covered in the affidavits, nor was it canvassed and investigated in the High Court. It is, therefore, patently unfair to Bae Estates to have to be confronted with the point for the first time on appeal. For this reason alone, the locus standi point must be dismissed. But, in any event, as I show below, there is no merit to the point." (emphasis added, footnotes omitted)

In regard to joinder, **Skyline Hotel v Nickloes** 1973 (4) SA 170 (W) holds at 171 H, that a point of joinder (non-joinder or misjoinder) is usually taken by way of a special plea. **Anderson v Gordik Organisation** 1960 (4) SA 244 (D) holds, at 247 D that, "I consider it to be clear beyond question that the usual procedure by which to raise a question of joinder, whether it be misjoinder or non-joinder, is by way of plea in abatement."

¹³ **Eagles Landing Body Corporate v Molewa N.O and Others** 2003 (1) SA 412 (T) at [36]

¹⁴ **Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd** 2004 (2) SA 353 (W) at [11]

[35] I consider these principles and their application to the facts of this matter below.

Joinder

[36] The proposition advanced by Mr Amm SC is undoubtedly correct in so far as the general principles of joinder are concerned. The Constitutional Court made this plain in **SARDA**¹⁵ which dealt with the right of intervention as a party of necessity – the opposite side of the proverbial coin of joinder. **Makhubela** explains the underlying rationale for the joinder of parties who are the bearers of rights that may be affected by the outcome of the litigation.¹⁶

[37] **SARDA**¹⁷ holds that:

"What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant [for intervention] must show that it has a right adversely affected or likely to be affected by the order sought."

[38] The application of the **SARDA** principle requires an enquiry as to whether the third party, that is not party to the pending *lis*, enjoys rights that may be detrimentally affected.

¹⁵ **SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others** 2017 (5) SA 1 (CC)

¹⁶ *ibid* at [9] to [16]

¹⁷ *ibid* at [9]

[39] In **Naude**,¹⁸ the Supreme court of Appeal held that mere notice to creditors of legal proceedings that materially affect the business rescue plan they voted on and approved is insufficient. Here the court applied the "direct and substantial interest" test with regard to the rights of creditors in relation to the business rescue plan they approved. It concluded that, on the facts of that case, the creditors concerned were directly affected by the proposed changes to the business rescue plan because their rights could be detrimentally affected by the order sought.

[40] The **Naude** decision was followed in the Supreme Court of Appeal's later decision in **Kransfontein**¹⁹ which holds that, in an application to set aside an approved business rescue plan, the joinder of those creditors who voted in favour thereof was necessary. It too held that the relief sought, the effect of which was to reduce the concurrent creditors' dividend, affected their rights under the plan approved by them.

[41] There is, then, very little room for debate on the issue of joinder where there are third party rights that are directly implicated and affected by the relief sought in proceedings²⁰ or that an order cannot be given effect without the participation

¹⁸ **ABSA Bank Ltd v Naude N.O and Others** 2016 (6) SA 540 (SCA) at [10] and [11]

¹⁹ **Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd** [2017] ZASCA 131 (29 September 2017) at [15]

²⁰ **SARDA** at [10]

of that party. In these instances, joinder of that party must be ordered. And, joinder of that party is a requisite to the matter proceeding.²¹

[42] In each case where the question of joinder arises, care must be taken to ascertain the right concerned, whether the party said to be affected is the holder of that right and whether that right is implicated and could be detrimentally affected by the relief sought.²²

[43] In ascertaining whether, in a business rescue context, a creditor has rights that could detrimentally be affected by the relief sought in any litigation, the departure point is section 145(1) of the Act which requires that "notice of court proceedings" be given to creditors.

[44] The Supreme Court of Appeal's decision in **Timasani**²³ considers the proper interpretation of section 145(1).

[45] The factual context of **Timasani** is legal proceedings for the recovery of a deposit held on behalf of the company in business rescue. These proceedings were brought against that company by the party that paid the deposit.²⁴ The Supreme Court of Appeal drew the distinction between instances where a

²¹ **MV Smart: Minmetals Logistics v Owners of MV Smart** 2025 (1) SA 392 (SCA) at [14]

²² **United Watch & Diamond Co and Others v Disa Hotels Ltd and Another** 1972 (4) SA 409 (C) at 416 H; **SARDA** at [9]; **Sundays River Citrus Co (Pty) Ltd and Others v Lonetree Citrus CC and Others** 2025 (1) SA 529 (ECGq) at [40]

²³ **Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd** [2021] 3 All SA 843 (SCA)

²⁴ *ibid* at [12]

creditor has a direct and substantial interest in the proceedings which would require joinder, and where they did not have such an interest and their joinder not required, as follows

- "[17] Two points are required to be made. First, s 145(1) sets out in some detail the rights and obligations of creditors when participating in business rescue proceedings as a whole, in addition to the rights conferred on creditors as 'affected persons' by specific provisions of Chapter 6 of the Act. **Subsection 1(a) is a general notification requirement to creditors of court proceedings, decisions and meetings concerning the business rescue. It has nothing to do with the joinder of creditors in legal proceedings involving a company in business rescue.** Having regard to the language, context and purpose of s 145, this is underscored by ss 145(2) and 145(3). Subsection (2) provides that in addition to the rights in subsection (1), each creditor has the right to vote to amend, approve or reject a proposed business rescue plan and if that plan is rejected, to propose an alternative plan or make an offer for the interests of other creditors. In terms of subsection (3), creditors are entitled to form a committee to be consulted by a business rescue practitioner in the development of a business plan.
- [18] Second, and consistent with the text, context and purpose of s 145, **subsection (1)(b) confers on creditors a statutory right to participate in any legal proceedings that arise during the business rescue proceedings of a company.** In this respect s 145(1)(b) stands on an equal footing with s 131(3) of the Act, in terms of which each affected person has a right to participate in an application to place a company in business rescue. In both cases the leave of the court to intervene in the proceedings is not required, but the court may need to regulate the procedure to be followed if the affected person or creditor wishes to file affidavits.
- [19] Inasmuch as a company in business rescue must be cited in legal proceedings against it, the duty to give notice to creditors in terms of s 145(1)(a) rests on the business rescue practitioner. **Being a general notification requirement, the purpose of s 145(1)(a) is to inform creditors of court proceedings brought during business rescue: it does not require the joinder of every creditor in such proceedings.** This is hardly surprising as the business rescue practitioner

has full management control of the company during business rescue proceedings; is obliged under the Act to keep creditors abreast of developments in the business rescue, and knows who the creditors are and which of them may wish to participate in the relevant legal proceedings. **Two cases were cited in support of the submission that s 145(1)(a) required the joinder of all creditors in any legal proceedings involving the company in business rescue. However, both these cases involved the fate of the business rescue plan and contentions that directly affected the financial interests of creditors. They were not authority for the submission advanced.**" (emphasis added; footnotes omitted)

[46] The cases to which the court in **Timasani** had regard in reaching its conclusion on the point were **Naude** and **Kransfontein**. It found that neither **Naude** nor **Kransfontein** were authority for the proposition that all the creditors of a company in business rescue were necessary parties to all litigation involving the company in business rescue.

[47] I now proceed to examine Project Sparkle's right that AECl contends will be detrimentally affected by the order Tamela seeks. In its heads of argument, couches its contention as follows,

"72. Project Sparkle is the direct security holder under the Tamela / KT Wash funding and security transaction. It is also, by all accounts, a creditor of KT Wash and an affected person in KT Wash's business rescue.

73. The aforesaid is legally and factually unavoidable because an essential requirement for the registration of a notarial bond is that there must be a legal valid (underlying) causa or cause of debt to which the hypothecation (notarial bond) is accessory.' Otherwise, where no cause of debt exists or is owed to the (purported) bond holder, there cannot be a validly registered bond.

74. Accordingly, because Project Sparkle is the direct real security holder - and a true creditor of KT Wash (as opposed to Tamela - because the notarial bond claimed by

Tamela could only have been registered over KT Wash's movables in favour of Project Sparkle' in order to secure a debt owed by KT Wash to Project Sparkle)."

[48] I have quoted above extracts from the Proposed Plan.

[48.1] It appears to me, without the benefit of the issue of Project Sparkle's rights and interests being traversed in the affidavits filed of record, that its position is unaffected by this application.

[48.2] Paragraph 26.4 of the plan specifically preserves all the rights in and to the security it holds, if the Proposed Plan is approved.

[48.3] Said differently, Project Sparkle held security before the vote on the Proposed Plan and will continue to do so irrespective of the outcome of this matter.

[49] As a result, I find that Project Sparkle does not have a direct and substantial interest in the outcome of this application, as contemplated in the authorities, that make it a necessary party.

[50] Notwithstanding the conclusion to which I have come, a party may waive its right to joinder.

[51] The *locus classicus* decision of **Amalgamated Engineering**²⁵ considers the position of a party in the position of Project Sparkle. It postulates the test as being whether notice of legal proceedings, without more, establishes waiver and holds that waiver cannot be established in circumstances where a party that is not cited as a party to the proceedings simply takes no action.

[52] The more recent decision in **Watson**²⁶ holds that even in circumstances where there is a waiver of the right to joinder, it is desirable that the party be heard on whether it would submit to a judgment.

[53] In this matter, there is correspondence filed of record by Project Sparkle signed by one Candice Rachel Risi, its director of the company and addressed to Tamela and the BRPs. Under a heading identifying this application, it records:

"I refer to the above mentioned Application and can confirm that the Security PSV, **PROJECT SPARKLE SECURITY SPV (RF) PROPRIETARY LIMITED** – as referred to in paragraphs 45 and 46 of the founding affidavit of the Application – has been furnished with a copy of the Application, does not wish to participate in the Application and instead hereby gives notice that it will abide the decision of the Court."

[54] I am satisfied that Project Sparkle is aware of this application and that, by giving notice of its intention to abide, the test in **Amalgamated Engineering** as restated and expressed in **Watson** is met and it has waived its right to joinder.

²⁵ **Amalgamated Engineering Union v Minister of Labour** 1949 (3) SA 637 (A) at 659 and 662 to 663

²⁶ **Watson N.O v Ngonyama and Another** 2021 (5) SA 559 (SCA) at [51] and [52]

Notice to abide a decision, as I see it, is a considered and informed election not to participate in the proceedings.²⁷

[55] Consequently, the position is the opposite of that in **Selborne Furniture**²⁸ and **Pretorius**²⁹ where, in each instance, the court's concern was about a party that may have the requisite interest in the proceedings and should be afforded an opportunity to be heard. Here, Project Sparkle has indicated that it does not require the opportunity to be heard.

Locus standi

[56] *Locus standi* concerns legal standing to seek relief before a court. It asks generally, the question of whether an applicant or plaintiff, as the case may be, is the bearer of the right it seeks to enforce. In **Firm-O-Seal**,³⁰ the Supreme Court of Appeal expressed itself on the issue as follows:

"Locus standi in iudicio is an access mechanism controlled by the court itself. Generally, the requirements for *locus standi* are these: the plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one. Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency

²⁷ **Laws v Rutherford** 1924 AD 621 at 623; **Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)** 2001 (3) SA 893 (CC) at [62]

²⁸ **Selborne Furniture Store (Pty) Ltd v Steyn N.O** 1970 (3) SA 774 (A) at 780 G

²⁹ **Pretorius v Slabbert** 2000 (4) SA 935 (A) at 939 C - F

³⁰ **Firm-O-Seal CC v Wynand Prinsloo & van Eeden Incorporated and Another** [2023] JOL 59780 (SCA) at [6]

of a litigant's interest in the proceedings. The sufficiency of the interest depends on the particular facts in any given situation. The real enquiry being whether the events constitute a wrong as against the litigant."

[57] The starting point is an examination of the relief Tamela claims. For these purposes, it is convenient to quote relief claimed by Tamela from the notice of motion. Tamela seeks relief as follows:

- "1 Dispensing with the rules relating to service and time periods and disposing of this application as one of urgency in accordance with the provisions of Rule 6(12).
- 2 The applicant is granted leave to serve this application on all the respondents and affected persons by way of e-mail.
- 3 To the extent necessary, the applicant is granted leave to institute these proceedings pursuant to the provisions of section 133(1)(b) of the Companies Act 71 of 2008 (as amended) (the **Companies Act**).
- 4 The result of the vote by the holders of voting interests rejecting the business rescue plan of the first respondent as published on 5 September 2025 (the **Plan**), at the meeting convened in terms of section 151 of the Companies Act held on 19 September 2025 (the **Meeting**) is set aside on the grounds that it was inappropriate.
- 5 The costs of this application shall be paid by any party opposing this application, jointly and severally with every other party that opposes, including the costs of two counsel, to be taxed on scale C."

[58] The relief in paragraphs 1 to 3 and 5 is procedural and not directly implicated by the challenge to Tamela's *locus standi* to apply for the substantive relief claimed in paragraph 4.

[59] In paragraph 4 of its notice of motion, Tamela seeks relief in terms of section 153(1)(b)(i)(bb) of the Act. The section provides for any Affected Person,

present at the meeting convened for purposes of a vote on the proposed business rescue plan, in circumstances where that proposed business rescue plan has been rejected, an Affected Person may apply to court for an order setting it aside as inappropriate in circumstances where the business rescue practitioner does not exercise any of the powers in section 153(1)(a) of the Act.

[60] Properly understood, section 153(1)(b)(i)(bb) affords a statutory right to an Affected Person who was present at the meeting where a proposed business rescue plan was rejected, pursuant to a vote, to approach the court to have the vote set aside.

[61] Section 128(1)(a) defines an Affected Person as being, *inter alia*, a "creditor".

[62] The Act does define the term "creditor", nor does it refer to a "secured creditor". The reference to an "independent creditor" in section 128(1)(g) affords little elucidation.

[63] Tamela, given the absence of any dispute that it lent and advanced monies to Wash prior to business rescue commencing and thereafter, as PCF, is clearly a creditor of Wash irrespective of how it has described itself. It falls within the ambit of "Affected Person" as a result.

[64] Notwithstanding, it is Tamela's description of itself as a "secured creditor" in Wash that is the nub of AECL's contention as to the reason Tamela lacks *locus standi*.

[65] Much like AECl's point on joinder, this is not a point squarely raised in the answering affidavit. It is also not raised in its initial heads of argument. It was raised in oral argument before me.

[66] In AECl's supplementary heads of argument, its contention on this point is couched as follows:

"9. Tamela's self-claimed status as a secured creditor of KT Wash serves as the underlying foundation of the rejected plan, and so too the basis upon which Tamela pursues this application. Tamela asserts that it is secured for both KT Wash's pre-business rescue monies lent and advanced debts, and in respect of post commencement finance.

10. Additionally, Tamela's self-claimed status as a secured creditor of KT Wash has caused the business rescue practitioners to defer to Tamela. This deference has manifested itself (i) in the business rescue practitioners' rejection of competing business rescue offers for KT Wash's business and assets, and (ii) in their formulation, proposing and pursuit of the rejected plan.

11. ...

12. However, Tamela is not a creditor, let alone a secured creditor, of KT Wash. Tamela's own founding affidavit reads:

"45. As security for the applicant's claims against the first respondent, the first respondent caused a general notarial bond to be registered in favour of Project Sparkle Security SPV (RF) Proprietary Limited (the Security SPV). The Security SPV was utilised to implement a sharing of security between the applicant and Absa Bank Limited (Absa)."

13. ...

14. ...

15. ...

16. Because (i) Project Sparkle is the holder of the general notarial bond, Tamela therefore cannot factually nor legally be a creditor, let alone a secured creditor, of KT Wash; be it within the context of the pre-business rescue debts, or the post commencement finance debts because both heads of debt are secured under the same perfected general notarial bond.
17. The ineluctable consequences of the aforesaid, for purposes of this application include: (i) Tamela is not an affected person for purposes of KT Wash's business rescue; (ii) Tamela has no say, let alone any vote in KT. Wash's business rescue, including in respect of the adoption of a business rescue plan; (iii) Tamela has no locus standi in this application; and (vi) Tamela must fail in this application.
18. Even if we are wrong in the aforesaid regards and Tamela is actually the holder of the general notarial bond and as such a secured creditor of KT Wash, we nevertheless maintain - for the reasons already traversed in our primary heads of argument - that given the timing and insolvent circumstances in which the aforesaid security was furnished (i.e. disposed of by KT Wash), the general notarial bond is liable to being impeached and voided within the context of sections 29 and 30 of the Insolvency Act, read with section 339 of the Companies Act, 2008 and/or acted upon by the business rescue practitioner as a "voidable transaction" of the type contemplated by section 141(1)(c)(ii)." (footnotes omitted)

[67] I have difficulty with AECL's reasoning. The true question is whether Tamela is a creditor in Wash; this informs whether it is an Affected Person. If it is an Affected Person, it necessarily enjoys the statutory right in section 153(1)(b)(i)(bb) of the Act.

[68] The Supreme Court of Appeal's decision in **Zungu-Elgin**³¹ would appear to support the approach I have taken in relation to Tamela's *locus standi* being determined by asking whether it is Wash's creditor. **Zungu-Elgin** concerned a surety's right of recourse against the company in business rescue arose after business rescue commenced. The proposition advanced, with reference to section 154(2) of the Act, was that the debt to the surety became due before

³¹ **Zungu-Elgin Engineering (Pty) Ltd v Jeany Industrial Holdings (Pty) Ltd & Others** [2020] ZASCA 160 (3 December 2020) at [10] to [14]

business rescue commenced, was not included in the approved and implemented business rescue plan and should consequently not be enforceable. This proposition was rejected. The court held:

"The question is whether s 154(2) of the Act expressly or by necessary implication varied the common law principle that a debt based on the surety's right of recourse arises upon payment to the creditor. It did nothing of the sort. On the contrary, in terms of s 154(2) the question whether any debt was owed by the company at the specified point in time, is to be determined in terms of existing law, including the common law."

[69] As I understand the point made in **Zungu-Elgin**, the meaning of the word "creditor" is answered by asking the question whether there is a debt owed by the company in business rescue to that person or entity claiming to be a "creditor" of that company. If yes, that person or entity is necessarily a "creditor".

[70] I have already concluded that the GNB, upon its perfection, has afforded Project Sparkle real rights of the immovable assets that were hypothecated by Wash. I have also concluded that Tamela is, at the very least, preferent or concurrent creditor in Wash, regard being had to a proper understanding of the legal relationship created by the guarantee.

[71] Any controversy arising from **Wescoal**³² concerning the meaning of the term "creditor" was put to rest on appeal in **Mashwayi Projects**.³³ **Wescoal**

³² **Wescoal Mining (Pty) Ltd v Mkhombo N.O and Others** 2024 (2) SA 563 (GJ) at [17] and the conclusion at [20] that a "creditor" for purposes of section 152 of the Act, means "creditors" of the entity in business rescue at the time business rescue commences.

³³ **Mashwayi Projects (Pty) Ltd and Others v Wescoal (Pty) Ltd and Others** [2025] ZASCA 5 (29 January 2025)

concerned the question whether, for purposes of voting rights in a business rescue, post commencement creditors are excluded.

[72] **Mashwayi Projects**, with reference to grammatical, contextual and purposive approaches to interpretation espoused in **Cool Ideas**,³⁴ and the principle in **Thomas**³⁵ holds that, unless the legislature specifically defined a word thereby assigning a special meaning to it, which is not the ordinary meaning, the ordinary meaning is generally the meaning to be ascribed thereto. The Supreme Court of Appeal concluded that:

"[t]he absence of a specific definition of 'creditor' is an indication that the Legislature did not contemplate a specific meaning other than the ordinary grammatical meaning of the word; that is a person or entity to whom an unpaid debt is due. Unless the Act has classified creditors and given them different or unequal rights, there is no basis to import, via interpretation, any such different or unequal rights. **Any interpretation which draws distinctions between different categories of creditors, without express legislative sanction, would fall foul of the equality provisions of the Constitution and the obligation to interpret statutes through the prism of the Bill of Rights and the Constitution as required by s 7(a) of the Act. No absurdity would result if the word were afforded its ordinary meaning.**" (emphasis added)

³⁴ **Cool Ideas 1186 CC v Hubbard and Another** 2014 (4) SA 474 (CC) at [28]

³⁵ **Minister of Defence and Military Veterans v Thomas** 2016 (1) SA 103 (CC) at [20]

[73] A "secured" creditor and a "concurrent" creditor is, necessarily, a sub-set of the broader genus of "creditor". For these purposes, therefore, it is irrelevant how Tamela describes itself.

[74] Finally, the question of whether the GNB may be impeached does not arise for. This may become an issue if Wash is placed into liquidation, but it does not change the fact that Tamela is a creditor of Wash and consequently an Affected Person for the purposes of Wash's business rescue and those provisions of the Act under consideration.

Urgency

[75] There is, in this Division, a dedicated Insolvency Court that has been created to provide for an expeditious hearing of matters concerning insolvency and business rescue.³⁶ In the ordinary course, a hearing date can be expected within four weeks of a matter becoming ripe for hearing.³⁷ The Insolvency Court sits, only during the normal court terms, save for the last week of every term.

[76] There are, however, matters where the delay occasioned by the ordinary time periods prescribed in the Rules of Court followed by an interregnum between the matter becoming ripe and a hearing date being allocated is simply too long to afford an applicant a meaningful remedy. This is the point made in **Chung**

³⁶ Dedicated Insolvency Court Directive, 10 March 2025 at paragraph 3

³⁷ *ibid* at paragraph 6 read with paragraph 8

Fung.³⁸ When a litigant approaches the urgent court is required to present a fully reasoned explanation for the prejudice a delay in a hearing will occasion to establish the "absence of substantial redress" requirement in Rule 6(12) of the Uniform Rules of Court.

[77] The Insolvency Court Practice Directive sets out further, a guideline as to the threshold an applicant must establish when seeking urgent relief before the Insolvency Court.³⁹

[78] In so far as the abridgement of time periods is concerned, **Luna Meubels**⁴⁰ holds that the abridgement of time periods for the filing of papers must be commensurate with the exigencies of case demands.

[79] For the purposes of urgent applications before the Insolvency Court, legal practitioners are required to have due consideration to the consequences that may befall an applicant should it not be afforded a hearing outside of the normal expedited process.

[80] As part of this consideration, regard must be had to the length of the papers that will serve before the Court. This an important consideration because urgent

³⁸ *ibid* at [24]

³⁹ *ibid* at paragraph 10

⁴⁰ **Luna Meubel Vervaardigers (Edms) Bpk v Makin & Another (t/a Makin's Furniture Manufacturers)** 1977 (4) SA 135 (W) at 137 F

applications in the Insolvency Court are heard by a judge to whom numerous unopposed and ordinary opposed applications are allocated.⁴¹

[81] The materiality of this consideration should not be glossed over; there will be an inevitable time constraint when it comes to oral argument and, when the issues are complex or novel and by their nature necessitate a lengthy hearing, the question of appropriateness in setting the matter down for hearing in the Insolvency Court arises.

[82] In certain instances, it will be more appropriate that directions from the Deputy Judge President be sought before the matter is enrolled. Instances where directions should be sought include those where the papers are voluminous, numerous parties are involved or the issues, factual and/or legal, are complex.⁴²

[83] Regard should also be had to the time it would reasonably take for a judgment to be written. Common sense dictates that the more voluminous the papers, the more parties involved and the more issues requiring determination together with the complexity thereof, the greater the time required for these to be properly considered and a judgment produced.

[84] So, when delay in obtaining relief is such that an incurable prejudice will result, a litigant has the right to approach an urgent court and to abridge of time periods

⁴¹ *ibid* at paragraph 3

⁴² *ibid* at paragraph 14.2

for the filing of affidavits. In doing so, it must be cautious to limit the time afforded for the filing of papers as little as the facts will allow. And, in setting the matter down for hearing, it must be cognisant of the considerations referred to above.

[85] **Chung-Fung** refers to the earlier decisions of **Koen**⁴³ and **Matshazi**,⁴⁴ that recognise, in business rescue proceedings, a hearing is ordinarily required on an urgent basis. In **Koen**,⁴⁵ the court observed that

"It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight time lines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings — however dubious might be their prospects of success in a given case — materially affects the rights of third parties to enforce their rights against the subject company."

[86] In **Copper Sunset**⁴⁶ the High Court remarked that the respondents had properly conceded the urgency of the matter. Such a concession would have been appropriate in this matter; Tamela is advancing substantial sums of money each

⁴³ **Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd** 2012 (2) SA 378 (WCC)

⁴⁴ **Matshazi and Others v Mezipoli Melrose Arch (Pty) Ltd and Another** [2020] ZAGHJHC 135 (3 June 2020)

⁴⁵ *ibid* at [10]. This approach has been adopted in numerous matters including **AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and others (Marley Pipe Systems and Another intervening)** 2012 (5) SA 515 (GSJ) at [30] and **Booyesen v Jonkheer Boerwynmaakery (Pty) Ltd and Another** 2017 (4) SA 51 (WCC) at [47] albeit in the context of the proper interpretation of the business rescue provisions in the Act.

⁴⁶ **Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd and Another** 2014 (6) SA 214 (LP) at [19].

month to Wash. These monies are essential to enable the BRPs to meet Wash's financial obligations to employees, security, insurance, and the maintenance of Wash's plant and equipment. The decision on whether the vote on the proposed business rescue plan was appropriate or not, impacts Tamela which has undertaken to meet these financial requirements for so long as Wash is in business rescue. A hearing on an urgent basis is warranted; this matter is time sensitive and of great importance to Tamela to Wash's employees and, I would expect, to AECl.

[87] Insofar as the Management is concerned, the decision herein, and particularly a decision on the consequences of it being found that the vote on the proposed business rescue plan is not to be set aside, impacts heavily on what they intend to propose to the BRPs at a reconvened meeting. They very properly conceded that this matter requires a hearing on an urgent basis.

[88] AECl is the most vocal party to these proceedings in asserting prejudice by the abridgement of the time periods. It asserts that it could not properly answer the founding affidavit in the time available to it. It is, however, silent on what it would have traversed if more time had been afforded to it. This does not ground a meaningful case for prejudice.⁴⁷ As will become more apparent below, its

⁴⁷ **Chung-Fung** at [28]

fundamental attack on this application is that Tamela seeks to place itself in an unduly advantageous position when compared with Wash's other creditors.

[89] AECI complains further that the prescripts of the Practice Directive have not been satisfied, fully or at all. This may be so, but it overlooks a fundamental principle. The decision to enrol a matter as one of urgency is one of judicial discretion. The Appellate Division decision in **Safcor**⁴⁸ holds that:

"... it is for the Court to decide whether the matter is really one of urgency and whether the circumstances warrant a departure from the normal procedures. To hold otherwise would, in my view, make the Court the captive of the Rules. I prefer the view that the Rules exist for the Court, rather than the Court for the Rules."

[90] I have previously expressed in **Sasol**,⁴⁹ reliance upon less than perfect procedural steps in the absence of real prejudice is to be eschewed. The proper function of a court is to try disputes between litigants who have real grievances and prevent unjustifiable delay in so doing. To the extent that further support for this proposition is required, the decision in **DF Scott**⁵⁰ holds that

"Rules of Court are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right (s 34 of the Constitution)".

⁴⁸ **Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission** 1982 (3) SA 654 (A) at 675 H

⁴⁹ **Sasol South Africa Ltd t/a Sasol Chemicals v Penkin** 2024 (1) SA 272 (GJ) at [56] and [57]

⁵⁰ **DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket** 2002 (6) SA 297 (SCA) at [9]

- [91] As is pointed out by Tamela (and the BRPs), it remains undisputed that Wash requires "*ongoing and significant post-commencement finance*", and there are no other parties willing and able to provide such finance. They are then, correct in stating it would be unreasonable and unjust for Tamela to continue funding Wash for an extended period in circumstances where uncertainty surrounding the Proposed Plan exits.
- [92] While the Management did deposit R4 million into the trust account of its attorneys to cover the costs of employees' salaries and wages, this is only sufficient to meet Wash's obligations to its employees for approximately one month. This has no real effect on the on-going prejudice to Tamela if it were to fail in this application.
- [93] Manuchar commendably, filed a short answering affidavit dealing with the pertinent issue of the "appropriateness" of the vote on the proposed business rescue plan.
- [94] Manuchar takes the point, in its heads of argument, that the abridgment of time periods by Tamela is not supported by the facts, regard being had to the time Wash has already been in business rescue. To my mind, this makes the necessity of an urgent hearing even more acute.⁵¹

⁵¹ Consider in this context **DH Brothers Industries (Pty) Ltd v Gribnitz N.O and Others** 2014 (1) SA 103 (KZP) at [27] that insofar as business rescue proceedings are concerned, the business rescue

- [95] I do not agree with the contention advanced by AECl and Manuchar that this matter should be delayed; had Tamela brought this application in the ordinary course and all affidavits filed in accordance with the Uniform Rules of Court by the middle of November 2025, with heads of argument having all being delivered five weeks later,⁵² there was no prospect of a hearing during 2025 much less, one before late February or March 2026.
- [96] During this time, Tamela would have an ongoing exposure to Wash that impacts upon its position both in business rescue and, should a liquidation ensue, in such proceedings.
- [97] Ultimately, a court deciding whether to hear a matter on an urgent basis asks what prejudice will be suffered by an applicant between the date on which it approaches the urgent court and the date of a hearing in due course. If, as a general proposition, there is prejudice that cannot be undone in due course, an approach to the urgent court is warranted.
- [98] In circumstances where Tamela is, if not the only party exposed to the cost of keeping Wash out of liquidation in the interim, it is the party carrying the greatest of these costs and therefore it is entitled to approach the court by way of

provides limited window of opportunity for a plan to be published. This is to prevent creditors' rights being delayed indefinitely.

⁵² Revised Consolidated Practice Directive of 12 June 2024, paragraph 25.1.1.

urgency. Given the interests involved, the necessary exceptional circumstances contemplated in the Practice Directive are present.

[99] I conclude that it is appropriate for this matter to be heard as an urgent application.

THE PROPOSED PLAN

[100] In the discussion that follows, I have regard to the content of the Proposed Plan and the narrative given by the BRPs on their approach to the Proposed Plan. Tamela's founding affidavit addresses the proposed Plan and motivates the reasons it should have been adopted. As this is not a review of the BRPs' conduct in preparing the Proposed Plan, I have no regard to those allegations which suggest that Tamela unduly influenced the Proposed Plan. To the extent that any of Wash's creditors had, or may continue, to harbour concerns about the BRPs, they have remedies available to them.

[101] The BRPs, in their narrative, set out the structure of the proposal with reference to paragraph 22 of the Proposed Plan.

[102] The BRPs explain that the proposed business rescue plan involves the disposal of the businesses of Wash and Liquids to an entity related to Tamela and known as the Tamela SPV Admin (Pty) Ltd ("**the Newco**") for an approximate purchase price of R123.1 million. Wash's assets will be disposed of to Newco as part of the transaction.

[103] The purchase price is split into a cash and credit component. The cash component is split between Wash and Liquids to allow for a 3 to 4 cent in the Rand dividend to concurrent creditors in each of the companies, the settlement of the PCF and a portion of Tamela's pre-commencement debt. The employees of both Wash and Liquids would be transferred to the Newco, thereby preserving their ongoing employment.

[104] I understand that this proposal is the same proposal that was approved by the creditors in Liquids and, as previously recorded, the approval of the business rescue plan in Liquids is contingent on the approval of the proposed business rescue plan in Wash.

[105] *Ex facie* the Proposed Plan, the value of Wash's assets, as at 5 September 2025, informs the purchase price.

[106] The immovable properties, said to be valued at fair market value as appraised by WH Auctioneers is stated as being R 42.1 million. The movable property, valued as before, is stated as being R 61.5 million. The book debts are valued on a net estimate of the realisable amount thereof drawn from Wash's latest unaudited financial statements and are stated as being in the region of R 1.1 million (but expected to be nil in the future). The stock, valued at its net realisable value is approximately R 16.9 million and cash on hand (which is decreasing) is R 1.5 million. Transferring IP and contracts are valued at nil.

[107] The Proposed Plan records, further, that

"22.9 Furthermore, in acquiring these assets Tamela inherits a significant need for working capital financing, a backlog of capex for maintenance and repairs plus further plant improvement required by the insurers (and which is currently resulting in higher interim insurance costs/deductibles until remedied)."

[108] This conclusion appears to be correct. There has not been any cognisable challenge thereto.

[109] An analysis of Wash's recent trading and financial positions for the period ending 28 February 2023, 2024, and 2025 (as stated in the proposed business rescue plan) reveals cost of sales between 75% and 83% of revenue and operating expenses between 22% and 38% of revenue. Salaries and wages comprise between 23% and 26% of operating costs.

[110] Applying the formula working capital = total current assets (R34 385 991,00 as at 31 July 2025) – total current liabilities (R290 400 730,00 as at 31 July 2025), Wash currently requires working capital in the region of R136 million. If I understand the Proposed Plan correctly, this will be funded by Tamela. As to how this funding will flow to Newco, this is not stated.

[111] The BRPs provide a calculation as to the dividend that may be expected in liquidation. Although subject to several key assumption including the discounted prices that Wash's assets may achieve, the recoverability of debts due to Wash and the rate at which inventories may be recovered, a net amount of between R1 838 560.00 and R2 423 200.00 will be available for distribution - before payment to employee retrenchments costs and SARS - in the cumulative sum of R70 449 887,00. This leaves a nil dividend to creditors.

[112] In the Proposed Plan, the BRPs explain the benefits of adopting the plan as follows

- "32.1. On the basis that the Rescue Plan is adopted at a meeting held for that purpose and thereafter substantially implemented, the objectives of business rescue as set out in section 128(1)(b)(iii) of the Act will have been met. Key benefits of adopting this Rescue Plan include, inter alia:
 - 32.1.1. the preservation of approximately 107 direct jobs and on average 82 outsourced staff (with a potential opportunity to further create jobs given sub-scale operations currently and expectations for future growth) — these in turn impact a number of households;
 - 32.1.2. specifically for the town of Nigel, KTWD provides gainful employment and contribution to the local environment and economy;
 - 32.1.3. protection of the underlying IP and skill sets (including detergent development and production/operating skills);
 - 32.1.4. continued and increasing production (following the planned re-commencement of production), benefiting suppliers in both the continuity of off-take of goods and services from them and providing customers with diversified choice, market segments ultimately for the benefit of consumers;
 - 32.1.5. depending on production mix, a key community of lower-income households may benefit from production of blended product not available elsewhere; and
 - 32.1.6. possibility, given well-established research and development team, of finding new product markets or types to further enhance the business and industry as a whole.
- 32.2. From the perspective of benefit to the South African economy as a whole, there are real advantages and benefits both at a macro- and microeconomic level for locally produced detergent goods;

- 32.2.1 tax revenues will be created in the future for the benefit of the South African fiscus;
 - 32.2.2. additional South African products will be produced and these will again fill up shelf space resulting in removal of foreign-produced products from the shelves, enhancing the local economy and pride in South African products;
 - 32.2.3 proceedings are expected to result in a better recovery to creditors as applicable than that which would result in the event if an immediate liquidation; and
 - 32.2.4. the Company will be left with no debt.
- 32.3. By stark contrast, a liquidation will likely permanently result in the loss of remaining skills in this sector meaning that South Africa is unlikely at any time in the future to be competitive in this industry but worst still, given the current isolationist policies prevailing globally, be beholden to other countries and states for these vital capabilities. The import of such products is costly and inefficient and significantly less ecologically acceptable than a domestic, South African manufactured product. Some of the KT Wash Detergent's products serve a lower LSM market, who are already beleaguered by price inflation which would only be worsened if a competitor like the business of KT Wash Detergents is lost."

[113] The BRPs explain the effect on Wash's employees as follows

- "33.1 This Rescue Plan (and the Proposal contained herein) provides for the disposal of the Company's Business as a going concern to the Purchaser. As a result, all employment contracts, together with the associated rights, obligations, and conditions of employment, will be transferred to the Purchaser in accordance with Section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995).
- 33.2. This transfer ensures that the employment relationships of all affected employees are automatically continued with the Purchaser on terms and conditions that are not less favourable than the current terms, subject to any lawful agreements reached through consultation between the parties.

33.3. The transfer will furthermore preserve employees' continuity of service and accrued benefits.

33.4. The above remains subject to adoption of this Rescue Plan and subsequent implementation of the Proposed Transaction."

[114] The effect on Wash's shareholders is explained as follows

"34.1. This Rescue Plan does not alter nor impinge on the rights of the holders of any class of securities in the Company.

34.2. Consequently, the approval of this Rescue Plan by the Creditors in terms of Section 152(2) of the Act constitutes final adoption of this Rescue Plan."

[115] The BRPs identify certain risks to the proposed plan that are material to this application

"40.2.2 loss of PCF from the PCF Lender were this Rescue Plan not to be adopted;

40.2.5 unforeseen litigation of whatsoever nature;

40.2.7. inability of the BRPs to secure sufficient PCF, for whatever reason(s) during the period from Rescue Plan adoption to implementation. If the BRPs are unable to cover all necessary costs, they will be obliged to convert the rescue Proceedings into liquidation, notwithstanding an adopted Rescue Plan;

40.2.8. inter reliance of the [Wash] business rescue plan with that of [Liquids] given that both are separate legal entities, however, at an operating level they are co-located and interwoven in relation to suppliers, customers and staff."

[116] In the affidavit filed by the BRPs they place particular emphasis on PCF. They state

- "16. The importance of PCF cannot be understated. As in most business rescues, PCF was and remain crucial for purposes of rescuing [Wash] and [Liquids], not least of all to retain all staff and skills in this instance, cover the vital insurance renewal of all assets and to cover 'mothball' operating fixed costs such as electricity and 24/7 security as well as the brief production run referred to below.
17. As [Tamela] has correctly indicated in paragraph 42.2 of the founding affidavit, that PCF, up to date of publication of the BR Plan, extended to some c.R 65 million across [Wash] and [Liquids]. The PCF was utilised for purposes of funding the initial production runs at the start of the business rescue (including the purchase of raw materials and pack materials), the holding costs of the operation during the temporary mothballing (which ranged from electricity through to security and insurance expenses) as well as to pay staff to ensure these vital skills and experience were preserved. This in turn allowed for the BRPs to develop the BR Plan, investigate the affairs of [Wash] in terms of section 141 of the Act, preserve value in the company and embark on an expedited sales process, which I will return to.
18. Without the PCF, the BRPs would have had little choice but to conclude that both [Wash] and [Liquids] were not capable of being rescued ... and we would have likely had to apply for the conversion of business rescue proceedings into liquidation proceedings ..."

[117] Wash's PCF requirements are not an issue in these proceedings.

[118] Rather, two central controversies emerge from the creditors' answering affidavits. They concern the value placed upon Wash's assets by the BRPs and with the calculation of the expected dividend in liquidation. The value placed on Wash's assets is central to this matter because it informs the price at which Wash's business is being bought. It also informs whether the Proposed Plan favours Tamela to the disadvantage of Wash's other creditors. Seen from this perspective, the dividend calculations assume a great importance.

AECI's central contentions

[119] AECI contends, based on a desktop valuation of the insurance replacement costs of Wash's plant, equipment and immovable properties it caused to be undertaken, that the asset value of Wash was approximately R750 million.

[120] The desktop valuation considers the acquisition of the business and assets by the Newco for a purchase consideration of "only" R123.1 million, to be "relatively paltry". It suggests that this acquisition represents an 84% discount on the value of the replacement costs of the plant and properties which, even with Tamela "writing-off" some R129.6 million of its pre-commencement claims, Tamela will realise "a staggering nett financial gain of approximately R497.95 million" while, at the same time requiring Wash's other 66% of its creditors to be satisfied with a dividend of only 3 cents in the Rand.

[121] Thus, it contends, the Proposed Plan (and this application) is brought with the ulterior purpose of securing "a sweetheart deal" whilst irreparably prejudicing and short-changing Wash's concurrent creditors.

The Managements' central contentions

[122] The Management, who take issue with the manner in which Tamela provided PCF, contend that this has led to the decision to mothball the plant. They take issue further with the BPRs for failing to consider other bids for the acquisition of Wash's plant and equipment and identify "defects" in the Proposed Plan.

[123] The Management regard the dividend concurrent creditors will receive from the Proposed Plan compared with that Tamela which will receive a far greater as disproportionate and not leading to a balancing of all relevant stakeholders' rights and obligations.

Manuchar's central contentions

[124] The position adopted by Manuchar is that the dividend to current creditors "is so negligible as to not be materially different from a nil return". It contends that there are patent defects in the calculation of expected dividend to concurrent creditors in liquidation as compared to that in business rescue.

[125] It contends, that a very "real possibility" exists that Wash's business may be sold as a going concern for a better value through a liquidation process, while highlighting that there have not been independent valuations undertaken of Wash (and Liquids) business, meaning that the creditors have no means of determining the reasonableness of the offer made by Tamela.

**THE APPROACH TO THE QUESTION WHETHER THE VOTE WAS
"INAPPROPRIATE"**

[126] The departure point on this part of the discussion is, necessarily, that the business rescue process is creditor driven. The Supreme Court of Appeal in

Oakdene,⁵³ in the context of section 131(4) of the Act and in considering what "reasonable prospects" for the purposes of whether a financially distressed company can be "rehabilitated" (as contemplated in section 128(1)(b) of the Act) said,

"As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. **If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or mala fide.** By virtue of s 132(2)(c)(i) read with s 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the court in terms of s 153. But that, of course, will take time and attract further costs. **Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable.** In these circumstances I do not believe that the court a quo can be criticised for having regard to the declared intent of the major creditors to oppose any business rescue plan along the lines suggested by the appellants."⁵⁴ (emphasis added)

⁵³ **Oakdene Square Properties (Pty) Ltd v Farm Bothasfontien (Kyalami) (Pty) Ltd and Others** 2023 (4) SA 539 (GJ)

⁵⁴ *ibid* at [38]

[127] There is no reason that these principles should not form the starting point of an enquiry whether a vote on a business rescue plan is appropriate.

[128] As previously discussed, section 153(1)(b)(i)(bb) affords an Affected Person the right to approach a court to have the result of a vote on a proposed business rescue plan set aside on the ground that it was "inappropriate".

[129] Section 153(7) empowers a court to set aside such a vote. The subsection provides:

- "(7) On an application contemplated in subsection (1)(a)(ii), or (1)(b)(i)(bb), a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to -
- (a) the interests represented by the person or persons who voted against the proposed business rescue plan;
 - (b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and
 - (c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated."

[130] In **KJ Foods**,⁵⁵ the Supreme Court of Appeal considered the divergent approaches taken by courts in their interpretations of section 153(1)(b)(i)(bb) read with section 153(7) of the Act.

⁵⁵ **FirstRand Bank Ltd v KJ Foods CC** 2017 (5) SA 40 (SCA) at [78] and [79]

[131] Its discussion leads, at the outset, to two guiding principles.

[131.1] The first of these guiding principles is that the term "inappropriate" means "not suitable or proper in the circumstances".

[131.2] This indicates that the approach to matters of this kind requires cognisance be had of the reasoning for the proposals contained in a business rescue plan and of the competing rights and interests that that arise in each matter which must be balanced i.e. the proposal must be fair and reasonable in conceptualisation and execution.

[131.3] The second guiding principle is that creditors' rights to exercise their votes freely and only to their benefit is attenuated by those competing rights and interests.

[131.4] This conclusion finds support in the **Cool Ideas**⁵⁶ principle of purposive interpretation, regard being had to section 5(1) read with section 7(k) of the Act.⁵⁷

[132] A deeper analysis of **KJ Foods KJ Foods** and those decisions that follow upon it, lead to a definitive framework as to the proper approach to the question whether a vote on a business rescue plan should be set aside.

⁵⁶ *ibid*

⁵⁷ **KJ Foods** at [75] and [76]

[133] The majority judgment in **KJ Foods** refers to the earlier Limpopo High Court decision in **Copper Sunset** where the High Court approached the question of "appropriateness" solely from the perspective of the creditors that voted against the plan. It is in this context that it said:

"[30] The purpose of the business rescue plan need not be to save the company from liquidation and thus return the business to solvency. If the goal is just to ensure a better return for creditors than would be achieved in liquidation, such goal is a valid goal in terms of the Act. In the present case it is common cause that in the event of liquidation of the applicant only the first respondent, as a secured creditor, will get a dividend of R0,45 in the rand and the rest of the concurrent creditors totalling about R8 million will get no dividend at all. The question then arises as to whether a business rescue plan is not an option worth trying."

[134] The High Court in **Copper Sunset** found the attitude of certain creditors to be "unreasonable" or "irrational" where the major creditors, being the two respondents, voted against the adoption of the proposed plan. In liquidation, the first respondent, as a secured creditor, would receive a dividend of R 0,45 in the Rand and the concurrent creditors, which included the second respondent, would not receive any dividend.⁵⁸ The failure of these creditors to have regard to the position of the applicant's employees featured strongly in the High Court's criticism. On this basis, it found the rejection of the business rescue plan to be inappropriate.⁵⁹

⁵⁸ *ibid* at [30] and [37]

⁵⁹ *ibid* at [38]

[135] The subsequent Gauteng High Court decision in **Berryplum**⁶⁰ disagreed with the approach taken in **Copper Sunset**. The Court in **Berryplum** held:

"The purposes of business rescue, broadly stated, are to revive faltering companies or achieve improved dividends for those companies which cannot be revived; in short, to put more money in the pockets of affected persons in general. **In this context the interests of creditors, whose own money is at risk, are predominant. Whether either of these results can be achieved in a particular case depends on a forecast, which itself is based on one or more assumptions; in short on an assessment of risk.** The business of companies and their creditors, in the present context, is the pursuit of monetary profit. **I do not think that the purposes of the new Companies Act will be advanced by vesting in the courts a power to impose upon business people financial risks which they, on honest reflection, judge ill advised.**"⁶¹ (emphasis added)

[136] **Berryplum** holds then, that the factors listed in section 157(7)(a) to (c) of the Act should be viewed purely from the perspective of those creditors who voted against the plan. Inferentially, the interests of non-creditor stakeholders, which include the employees, ought not to be directly considered.

[137] The minority judgment in **KJ Foods** preferred the two-step process in **Berryplum** that a court should first decide whether the vote was inappropriate and then move on to decide whether it is reasonable and/or just to set it aside.⁶²

⁶⁰ **Shoprite Checkers (Pty) Limited v Berryplum Retailers CC and Others** [2015] ZAGPPHC 255 (11 March 2015)

⁶¹ *ibid* at [38]

⁶² *Ibid* at [29]

[138] The majority judgment in **KJ Foods**, did not discuss the decision in **Berryplum** directly but disagreed on the two-step process.⁶³

[139] The majority in **KJ Foods** requires a single enquiry and value judgment to be undertaken by the court.⁶⁴ They hold that a court is required to consider the matter from the perspective of those who voted against the business rescue plan and consider whether the rights and interests of all relevant stakeholders (which necessarily includes the employees) are balanced. In that balancing, the position of creditors where the distressed company continues in business rescue or goes into liquidation.⁶⁵

[140] Accordingly, the approach taken in **Berryplum** is not consonant with that taken in **KJ Foods** because **Berryplum** does not consider whether a business rescue plan appropriately balances all the relevant rights and interests.

[141] The majority in **KJ Foods** went on to find that the basis upon which the vote against the business rescue plan had been rejected was unfounded. It considered it reasonable and just that the vote be set aside.⁶⁶

⁶³ *ibid* at [50]

⁶⁴ *ibid* at [80]

⁶⁵ *ibid* at [75]

⁶⁶ *ibid* at [86]

[142] In the later Supreme Court of Appeal decision in **Ferrostaal**⁶⁷ the approach taken was to consider the appropriateness of the vote from the perspective of the majority creditor that had voted against the implementation of the plan. In **Ferrostaal**, there were no employees whose interests needed to be considered.⁶⁸

[143] The Supreme Court of Appeal's reference to employees in **Ferrostaal** is further strong support for the conclusion I have reached in relation to **Berryplum** not being readily capable of support to the extent that it excludes any consideration of the rights and interests of non-creditor stakeholders from the single value judgment the court is required to make.

[144] I take further guidance from the High Court decision in **Reiscor Two**⁶⁹ which holds, with reference to **Ferrostaal**, that the meaning to be given to the term "inappropriate" should be one that gives effect to the wider context and objects of business rescue in a manner that balances the rights and interests of shareholders.⁷⁰ This is consonant with the approach of the majority in **KJ Foods**.

⁶⁷ **Ferrostaal GmbH and Another v Transnet Soc Ltd t/a Transnet National Ports Authority and Another** 2021 (5) SA 493 (SCA)

⁶⁸ *ibid* at [19]

⁶⁹ **Reiscor Two (Pty) Ltd (in Business Rescue) v Anheuser-Busch Inbev Africa (Pty) Ltd and Others** 2025 (1) SA 315 (GJ)

⁷⁰ *ibid* at [27]

[145] The court in **Reiscor Two** identified that there is an important distinction between "rights" and "interests" concluding that:

"Even where rights are not implicated but interests are, this may be sufficient to tilt the conclusion on appropriateness of a business rescue plan."⁷¹

[146] I understand the High Court to say that, while it is the creditors' rights that are most squarely under consideration in cases such as this, stakeholder interests may be such that more weight should be afforded to them when, when appropriate, to balance the rights and interests of all relevant stakeholders as **KJ Foods** requires.

[147] I conclude then, that the correct approach to the value judgment (or discretionary power) that falls to be exercised by the court is informed by the reasons given for the rejection of the proposed business rescue plan, weighed against any benefits of liquidation with due regard having been had to the purpose of business rescue as contemplated in section 7(k) of the Act. This requires that a business rescue plan be fair to all stakeholders. For this purpose, the position of employees must form part of the balancing exercise.

[148] The authorities I have reviewed above demonstrate that the application of these principles will depend on the facts of a particular matter.

⁷¹ *ibid* at [27]

WAS THE VOTE TO REJECT THE PROPOSED PLAN INAPPROPRIATE IN THE CIRCUMSTANCES?

[149] I summarised the position taken by AECl, the Management and Manuchar above. In accordance with **KJ Foods** and **Reiscor Two**, I approach the question whether the rejection of the Proposed Plan was inappropriate in the circumstances from the perspective of AECl, the Management and Manuchar.

[150] The primary basis upon which they voted against the Proposed Plan is an absence of facts to support it. The criticism primarily, is that Wash's assets are understated in the Proposed Plan and the comparative dividend between the business rescue and liquidation scenarios are incorrect or deficient.

[151] AECl sought a postponement of the meeting. Its answering affidavit does not state the basis upon which it intended seeking that postponement recording only that the BRP summarily refused to entertain this postponement without enquiring as to the reasons for the request. I agree with Mr Daniels SC that an unmotivated request for a postponement is insufficient for it to be tabled for a vote.

[152] The Management had, some days prior to the meeting, also requested a postponement of the meeting. They addressed, through their attorneys, a lengthy letter to the BRPs' attorneys setting out various matters arising from the Proposed Plan that concerned them. This was met by an equally lengthy letter

from the BRPs' attorneys. The gravamen of the response to the Management was that they had failed to properly understand the Proposed Plan.

[153] At the meeting, the Management presented a motivated motion for the postponement of the meeting citing, *inter alia*, that the Proposed Plan is materially incomplete and incapable of meaningful assessment on the because it does not contain an operational turnaround or restructuring strategy; it provides no detail on how Wash (or Liquids) will achieve solvency post implementation in the absence of a forward looking business model; a delayed or inadequate disclosure of material information including cash flow projections and the comparative analysis between a business rescue and liquidation scenario; the absence of an explanation as to how the assets, liabilities, operational continuity or creditors' rights created by the separation of Wash and Liquids' businesses through the separate business rescue processes would be affected; and that they believed that further alternative rescue proposals and funding arrangements are being finalised and will be put to the BRPs.

[154] A further creditor, that does not participate in these proceedings, Aleka Logistics (Pty) Ltd, also sought a postponement to allow it to comment and make recommendations to the BRPs on amendments to the proposed business rescue plan.

[155] The BRPs refused to table a motion for the postponement of the meeting. The reason given by the BRPs was informed by their interactions with creditors who sought a greater dividend payment. The BRPs say that the creditors, in so

doing, did not have regard to the wide and inclusive nature of the proposed business plan that would ensure the preservation of jobs, ongoing trade and Wash's business status. The BRPs indicate further that the dissenting creditors appear to have been approached by a third party claiming that the offer the third party proposed making to the BRPs could offer the creditors a better return.

[156] In this context, the BRPs said:

"74. It is on this basis that we understood that block creditors or at least the bulk of them, where in favour a postponement of the s151 meeting. What was however not considered by them in our view where the viability and executability of any such offer. More importantly is a lack of clarity on the timing of such offer(s) coupled with the consequences of any such offeror being unable or unwilling to provide PCF which would have left an unfunded business for an indeterminable period time and which would have led to staff retrenchments and a possible reconsideration by us as BRPs as to whether [Wash] remained capable of being rescued. It is my and my fellow BPR's view that these block creditors were, as late as in the actual s151 meeting, misinformed [by the alleged hire offer] and indeed that funding had been secured to immediately support it."

[157] They state, further:

"85. At the time of the s151 Meeting and the conducting of the vote, we as BRPs had no other executable transaction to propose to creditors that would result in the successful rescue of the [Wash] business. I have demonstrated above that any purported alternative offer was simply not an offer at all, lacked proof of available funding and that we could not, in line with our duties, propose any such offer.

86. Moreover, we were faced with the situation where further PCF funding of approximately R7 million to R8 million per month for employee and critical operational costs would be necessary to sustain the business and ensure the safeguarding of employment."

[158] The Management, relying on **Reiscor Two**,⁷² contends that the creditors enjoyed an absolute right to have the motion for a postponement put to the meeting for the creditors vote thereon.

[159] The point that the Management simply makes is the BRPs acted unlawfully in not putting the motion/s for an adjournment to the creditors for a vote.

[160] AECI makes a similar point. It contends that the BRPs violated its rights in terms of section 151(2)(d) of the Act, and for this reason, it considers the vote to reject the proposed business rescue plan appropriate and reasonable in the circumstances.

[161] In argument, Mr Daniels SC advanced a proposition along the line that the creditors had some notice of the meeting, that they had been in possession of the Proposed Plan since well ahead of the meeting and had not come forward with comments or proposed amendments prior to the eve of the meeting. So, as I understood him, there would have been nothing to gain from a postponement of the meeting.

[162] In respect of this issue, I take guidance from the decision in **Reiscor Two**.

⁷² *ibid* at [55]

[163] In **Reiscor Two** the court discussed the postponement of creditors' meetings called for purposes of considering a business rescue plan as contemplated in section 152 of the Act and said:

"[55] What is, however, of considerable importance is how a postponement is to be secured and whose decision that is. **The process is quite evidently creditor driven and what the major creditors overlooked is that the permission of the business rescue practitioners is not required. The creditors have the absolute right to adjourn the meeting in terms of section 152(1)(d)(ii) of the New Act. If a motion is moved to adjourn the meeting to revise the plan for further consideration the business rescue practitioners are obliged to entertain it and to conduct a vote on it.** It follows from the express wording of section 152(1)(d)(ii) that the business rescue practitioners have no 'right of veto' and that they must postpone the meeting if the creditors vote in favour of such an adjournment.

[56] One wonders why the major creditors did not postpone the meeting. The business rescue practitioners suggest that it is because the major creditors had no intention of coming up with solutions that would address their concerns but were intent on putting the company into liquidation to conduct enquiries which would be funded by all proved creditors. It is difficult not to conclude that this is the most plausible reason why this powerful tool, one where a postponement was there for the taking, was not utilised." (emphasis added)

[164] In my view, the BRPs' refusal to entertain motions for a postponement and insistence that the Proposed Plan be put to a vote is not just a procedural irregularity; it is a substantive issue which goes to the core of this matter.

[165] At issue is whether the critical information the creditors contend is material to proper decision-making was available to them. This includes facts as to whether a proper valuation of Wash's business and assets was conducted and whether

the dividend calculations (the last mentioned being a requirement the Act) is correct and sustainable.

[166] I am acutely aware of the nature of a business rescue plan as described in **Reiscor Two** as not being a pleading or legal document rather a document prepared for consideration by business people where the hearsay rule and similar evidentiary rules do not find application.⁷³ The difficulty, as I understand the position, is that the Proposed Plan sets out the BRPs' findings and conclusions without an explanation as to how these findings and conclusions were reached.

[167] The creditors' issue is that the facts which underpin these findings and conclusions are not available to them to test. As a result, each of the creditors contend that their vote against the proposed business rescue plan was appropriate in the circumstances. Those circumstances being the absence of facts that they required for their decision-making.

[168] In the circumstances of this matter, the creditors are correct.

[169] I find support for this conclusion in section 150(2) of the Act which stipulates that a business rescue plan must contain *all* the information reasonably

⁷³ *ibid* at [61]

required to facilitate Affected Persons decision-making in relation to whether or not the proposed plan ought to be accepted or rejected.

[170] The level of detail required in a business rescue plan will depend on the nature and complexity of the proposed plan.

[171] In **Beginsel**,⁷⁴ the Western Cape High Court held that section 150(2) sets out the requirements of a business rescue plan in general terms, that the content will differ from case to case and that the acid test is whether there is “sufficient information, along the lines envisaged by s 150(2), has been provided to enable interested parties to take an informed decision in considering whether a proposed business rescue plan should be adopted or rejected”. In that matter, it was found that “the proof of the pudding is in the eating” as 99% of those present at the meeting voted in favour of the plan.

[172] If that logic is applied to the present case, the Proposed Plan is *prima facie* problematic. The Proposed Plan garnered only a little over 50% of the vote.

[173] The Proposed Plan contemplates the sale of Wash's business, as a going concern, to Tamela. To my mind, an independent valuation of Wash's *business* was required. The BRP's cannot be criticised for seeking out a suitor to purchase this business through an expedited sale. It is commendable that they

⁷⁴ **Commissioner, South African Revenue Service v Beginzel N.O and Others** 2013 (1) SA 307 (WCC) at [37] to [39]

have achieved this. But, the creditors cannot be left in the dark as to how the sale price was determined. A business rescue plan must of necessity, set out how the rights and interests of stakeholders have been balanced for the purpose of section 150(2) to be achieved.

[174] Tamela deals with this as follows in its replying affidavit

- "20.7 The suggestion that the R123 million purchase price represents an "84% discount" or a "bargain-basement" acquisition ignores both the context and the realities of a distressed sale. The notional replacement values cited by AECl bear no relation to achievable realisations in a business rescue or liquidation scenario. In any distressed process, assets are valued on a going-concern or forced-sale basis, and not on theoretical new-build or insured replacement figures.
- 20.8 The proposed consideration of R123 million cannot be viewed in isolation. The contention that Tamela would somehow benefit at the expense of other creditors ignores that Tamela has already advanced more than R70 million in post-commencement funding to sustain KT Wash, and that it will write off in excess of R130 million of its pre-rescue debt under the Plan.
- 2.9 Tamela's offer was the only one that was fully funded, approved by the competition commission, and capable of immediate implementation. It included not only a cash purchase consideration but also the assumption of operational costs, working capital support, and ongoing post-commencement funding. The Plan, as approved by the Practitioners, provides for the extinguishing of significant secured debt and the preservation of employment (all of which contradict AECl's characterisation of the transaction as a "financial windfall").
- 20.12 AECl's characterisation of Tamela's bid as an attempt to acquire the KT Wash business at a "embarrassingly discounted price" is incorrect and misleading. The offer was made at a fair market value in the prevailing context which was aligned with the value arrived at by an independent expert appointed by the Practitioners, as recorded in the Plan. The fair market value was not determined by Tamela, but by that independent valuation process, which considered the financial position of the company, the prevailing market conditions, and the distress context in which would occur. Tamela's proposal therefore reflects a fair and

commercially reasonable value, consistent with the objective of achieving the best outcome for all affected persons compared with liquidation."

[175] The only indication of an "independent" valuation that I can find in the founding affidavit or the Proposed Plan is the valuation of Wash's assets that was conducted by WH Auctioneers. This is not a necessarily valuation of Wash's *business*.

[176] Tamela does not adduce any facts in its founding affidavit as to how the purchase price came to be calculated. This is the *lacunae* that permeates through this entire matter. In my view, the case Tamela was required to make out in its founding affidavit was that the Proposed Plan fairly balanced all stakeholder rights and interests. The focus in the Proposed Plan on the benefits thereof to employees and the greater economy of the area in which Wash operates, whilst important and laudable, without showing how it is fair to all the creditors, does not satisfy the underlying principle.

[177] To the extent that the purchase price was determined on an asset-based approach it is unclear whether that is the correct approach to the valuation of a business being sold on a going-concern basis. I cannot find any explanation why the other accepted approaches to business valuation, which include the discounted cashflow approach, the market approach, utilising price to earnings ratios or revenue revenues or an earnings-based approach using industry-appropriate multiples were not followed. This is not traversed in Tamela's founding affidavit. The BRPs do not deal with this issue either.

[178] One can readily understand, in the circumstances, the scepticism expressed by AECl, the Management and Manuchar. On the facts, I cannot find any support for the basis upon which the sale price of Wash's business to Newco was determined.

[179] In these circumstances, the criticism of the dividend calculation is well-made. The calculation which forms part of the Proposed Plan contemplates, only, a dividend that may be achieved through a fire-sale of Wash's assets. The difficulty is that none of the facts which underpin the values utilised in that calculation are apparent.

[180] The learned authors of *Henochsberg*, in their commentary on section 153(7), and with reference to **Reiscor Two** opine that:

"It is 'inappropriate' to vote against a plan that would obtain a better result for the company's creditors or shareholders than a liquidation would produce if the basis is that more information is required, as a failure by the major creditors to have postponed the meeting and their failure to have suggested amendments to the plan to deal with their concerns, all of which contribute to the conclusion that voting against the implementation of the plan was inappropriate. The concerns could and should have been dealt with by way of postponing the meeting and by making constructive suggestions to address their concerns."

[181] The view expressed, aforesaid, cannot be considered a general rule. In the ordinary course, where deficiencies in a business rescue plan are identified and require attention from the practitioners, a postponement for these purposes is apposite. But, in the instant case, a postponement was not tabled for

consideration and a vote against a business rescue plan in such circumstances cannot be said to be *per se* inappropriate.

[182] In respect of the Management's complaint that further offers were not considered by the BRPs and a further potential offer was in the offering; I consider the potential "new" offer to be *res inter alios acta*. It may or may not have eventuated and may or may not have had the necessary financial backing to afford the necessary PCF to Wash. As at the date of the meeting, that "new" offer was no more than a *spes*.

[183] Accordingly, where there are not facts to support the basis upon which the sale price of Wash's business was established and the basis of the dividend calculation made clear, I am unable to find that the vote against the Proposed Plan was inappropriate; that which is contained in the Proposed Plan, without more, makes it very difficult to understand how the Proposed Plan can be said to properly balance the rights and interests of Affected Persons.

THE CREDITORS' RIGHTS AT THE RESUMED MEETING

[184] The final issue that I am required to determine, having found against Tamela on the issue of appropriateness, concerns the resumed section 152 meeting.

[185] In Tamela's supplementary heads of argument, Mr Daniels SC contends, with reference to the Supreme Court of Appeal's decision in **Vantage**,⁷⁵ that the only issue before me concerns whether the vote on the proposed business rescue plan was appropriate; the proposition being that any consideration of the parties position at the resumed section 152 meeting would be "a regrettable overstep of judicial powers."

[186] As a general proposition a court should not stray beyond the dispute it is required to determine. In this issue the law is clear. The Supreme Court of Appeal's decision in **Fischer**⁷⁶ is instructive on that with which a court may competently engage. It held

"[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also

⁷⁵ **Vantage Goldfields SA (Pty) Ltd and Others v Argomanzi (Pty) Ltd** [2022] ZASCA 185 (22 December 2022) at [16]

⁷⁶ **Fischer and Another v Ramahlele and Others** 2014 (4) SA 614 (SCA)

be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

[15] This last point is of great importance because it calls for judicial restraint. As already mentioned Gamble J 'required' the parties to argue as a preliminary issue what he described as two issues of legality. Although he added that the parties were amenable to these proposals, counsel who appeared in this court and in the court below confirmed that the judge's own description, that he 'required' the points to be argued, was accurate. They were not asked for their submissions on whether this was an appropriate approach to the matter, or even (which was more pertinent) whether either question was in issue in the case. Nor were they asked whether their clients agreed to broaden the issues to encompass these points. The authority on which the judge relied in adopting this approach was not in point. That was a case where the court, *on the application of one of the parties*, held that it could dispense with the hearing of oral evidence, notwithstanding the case having been referred for the hearing of such evidence, because the questions raised on the papers could be determined without hearing such evidence and the evidence could not affect the resolution of those issues. It is a far cry from that for a court to raise issues that do not emerge from the papers

and have not been canvassed in the affidavits and require that those be argued instead of hearing oral evidence and deciding the issues raised by the parties."
(footnotes omitted)

[187] Mr Daniels SC's point, in Tamela's supplementary heads of argument, is

"37 None of the other parties have launched an application to set aside the decision by the [BRPs] to the effect that there was "not a proper motion" for postponement under section 152(2)(d)(ii), or the refusal to put the postponement motion to the vote."

[188] As a statement of fact, Mr Daniels SC is correct. There is no challenge to the BRPs' refusal to put the motion for a postponement to a vote. In my view, however, both the reliance on **Vantage** and the proposition surrounding the BRPs' failure to have entertained the motion for a postponement, misses the point.

[189] It is Tamela's case that, if it fails in this application, the BRPs will be constrained at the resumed section 152 meeting to notify Affected Persons that business rescue has failed and proceed to file a notice in accordance with section 153(d).

[190] In its founding affidavit, Tamela says in relation to the consequences of the Proposed Plan being rejected, that

"138. The [BRPs] communicated to the affected persons that in their view, there would not be any merit in seeking a vote to prepare and publish a revised business rescue plan, as envisaged in section 153 of the Companies Act.

139. The applicant then communicated its intention to proceed with this application. As such, and in accordance with section 153(2)(a), the [BRPs] adjourned the Meeting for a period of five days to enable the applicant to institute this application.

140. Had the applicant not communicated this intention, the [BRPs] would have been left with no alternative but to "promptly file a notice of the termination of the business rescue proceedings" as provided for in section 153(5) of the Companies Act and the liquidation of [Wash] will follow. This will have all the devastating consequences outlined in this affidavit."

[191] The issue of the consequences of Tamela's application failing is squarely raised in the papers.

[192] Mr Hoffman, in the Management's first heads of argument, advanced a proposition in opposition to Tamela's contention that the BRP's are required to give notice of termination of the business rescue proceedings in Wash. Mr Hoffman argues that the premise of Tamela's conclusion is incorrect because the meeting was only adjourned and not closed. So, he reasons, the BRP's may seek approval from those Affected Persons, entitled to exercise a vote, to publish a revised business rescue plan and that the meeting may further be adjourned, at the behest of creditors, for the preparation of a revised plan and further consideration. Mr Hoffman's argument is founded on the language employed in section 153(1)(a)(i) and 153(1)(b)(i) of the Act.

[193] In the Management's supplementary heads of argument, Mr Hoffman expands on this proposition by arguing that, in the event of Tamela failing in this application, the meeting reconvenes at which time the Affected Persons may table a motion requiring the BRP's to prepare and publish a revised plan. If no such motion is tabled, it is only then that the provisions of section 153(5) will be applicable and oblige the BRP's to file a notice of termination of business rescue proceedings. If, however, the motion passes, then section 153(3) finds

application. In that event, the BRP's must close the meeting, prepare and publish a new or revised business rescue plan within 10 days and the provisions of Part D of Chapter 6 start afresh. Again, if the motion fails, section 153(5) is applicable.

[194] Then, with reference to the decision in **Louis**,⁷⁷ Mr Hoffman argues that Tamela's reliance on the principle in **Louis** is incorrect because the facts in this case differ materially from that in **Louis**.

[195] Mr Hoffman argues that **Louis** concerned an entirely disparate situation where the appellant, having exercised its rights in terms of section 153(1)(b) of the Act was held not to have an entitlement to exercise a different right because, if this were correct, a never-ending loop of proposals, rejections, and revisions would arise.

[196] Mr Hoffman reasons that the Affected Persons, having been deprived of an opportunity to vote for the adjournment of the meeting, have not exercised their right to table a motion calling for the BRP's to prepare and publish a revised business rescue plan. He argues, further, that a conclusion which prevents such an opportunity leads to an absurdity that could not have been

⁷⁷ **Louis N.O and Others v Fenwick N.O and Others** 2023 (6) SA 400 (SCA)

contemplated. In short, the legislation has failed to cater for the scenario that has arisen.

[197] The stance taken by AECl, in relation to **Louis**, is that it neither concerned nor considered the consequences of a dismissal of an application under section 153(1)(b)(i)(bb).

[198] Mr Amm SC, in AECl's supplementary heads of argument makes the point that **Louis** only dealt with the scenario of the *same* Affected Person seeking to exercise multiple remedies under section 153(1)(b) of the Act. He argues that the *ratio* in **Louis** is not to the effect that once one Affected Person has exercised and exhausted their remedy under section 153, that all other Affected Persons are automatically precluded from exercising their rights. The proposition he advances on behalf of AECl is as follows:

"67. In fact, Louis acknowledges that *"once...the parties have unsuccessfully exhausted their remedies as provided for in section 153(1)(b), business rescue must come to an end"*. We submit however that the "exhausting of remedies" must be understood and interpreted fairly and equitably meaning that each affected person must be afforded the opportunity to exercise their statutory rights and options, if they so wish. If they do not wish to exercise their remedies under section 153(1), then the practitioner must proceed, as expressly provided for, in terms of section 153(5).

68 We submit that to interpret Louis or section 153 of the Companies Act, 2008 as meaning that the dismissal of one affected person's 153(1)(b)(i)(bb) application automatically brings the entire business rescue to an end would unfairly deprive the remaining creditors and affected parties of their rights to act under section 153. That interpretation would unfairly close the door on them prematurely and would be inconsistent with the participatory spirit and purpose of business rescue

proceedings, particularly in large and complex business rescues involving numerous creditors and affected persons.

- 69 We submit that it cannot have been the intention of the legislature that only one affected person may exercise a right under section 153 to the exclusion of all others. Such an interpretation would be illogical and unbusinesslike."

[199] Mr Amm SC's construction of section 153 is substantially the same as that advanced by Mr Hoffman. Mr Amm SC encapsulates, in succinct terms, the consequences of Tamela failing in its application as follows:

- "79. In summary, we submit that if Tamela's application is dismissed, then the section 151 meeting must resume and (i) the business rescue practitioners must report on the outcome of the application; and (ii) the remaining creditors and affected persons (but not Tamela — who has already exercised its section 153(1)(b) rights) must be afforded an opportunity to exercise their section 153(1)(b) rights.
80. In closing, we submit that it is only if none of the remaining creditors or affected persons wish to exercise their section 153(1)(b) rights, that the business rescue practitioners must then proceed in terms of section 153(5) and file a notice of termination of the business rescue proceedings."

[200] Mr Daniels SC argues that the construction placed on section 153 of the Act by the Management and AECI is incorrect. He advances a proposition that section 153(1) provides for two options, being for the practitioner to take certain steps, filing which, for an Affected Person to take those steps. And, on the strength of **Louis**, that the interpretation contended for by AECI and the Management is

unsustainable. In this regard, particular emphasis was placed on paragraphs [11] and [12] of **Louis** together with the conclusion in paragraph [14] that

“...once a business rescue plan has been put to the vote and rejected as contemplated in s 152 of the Act and, the parties have unsuccessfully exhausted their remedies as provided for in s 153(1)(b), business rescue must come to an end.”

[201] Mr Daniels SC referred, further, to **Landosec**⁷⁸ and **Rogal Holdings**⁷⁹ in support of the proposition he advances.

[202] None of these decisions to which Mr Daniels SC refers appear to deal with that which has arisen in this matter.

[203] The decision in **Louis**, as I understand it, deals with an instance where a binding offer to acquire a voting interest has been rejected leading to voting rights being unaltered. The real point in **Louis** is that an absurdity would arise if the relevant creditor whose binding offer had been rejected could call for the approval of a revised plan or apply to court to set aside the original vote. The premise being that the voting rights that would otherwise have occasioned a new vote have not changed. This informed the conclusion that

“[15] In sum, it could not have been the legislature's intention that a party whose voting interests remain unaltered, as a result of the rejection of a binding offer, would be entitled to a further opportunity to exercise one of the alternatives

⁷⁸ **Landosec (Pty) Ltd v McLaren** 2017 JDR 1492 (ECP) at [6] and [8]

⁷⁹ **Rogal Holdings (Pty) Ltd and Another v Victor Turnkey Projects (Pty) and Others** [2022] ZAGPPHC 176 (28 March 2022) at [37] and [42] and [43]

provided for in s 153(1)(b)(i) of the Act. The interpretation contended for by the appellants simply does not amount to a sensible and businesslike interpretation of s 153(4), and would cause, as pointed out by this court in *FirstRand Bank Ltd v KJ Foods CC*, a 'never-ending loop'. For these reasons we conclude that s 153(4) of the Act only finds application when a binding offer in terms of s 153(1)(b)(ii) is accepted." (emphasis added, footnotes omitted)

[204] **Landosec** concerned a practitioner's powers after a business rescue plan was rejected and no instructions given to the practitioner who, after having given notice terminating business rescue proceedings continued to act *qua* practitioner. Here the court found that the practitioner was *functus officio* upon giving the notice of termination.

[205] **Rogal Holdings** deals with a situation where a business rescue plan was rejected and the rights or remedies in section 153 were not pursued. This decision refers to **Agri Oil Mills**⁸⁰ which deals with the same situation. Here it was held that, because no person took any action contemplated in s 153 (1), the practitioner was obliged to file a notice of termination. Neither decision deals with what happens where an application to set aside a vote in terms of section 153 is unsuccessful, the meeting has not been closed and further directions not given to the practitioners.

[206] I agree with the interpretation of section 153 advanced by Mr Hoffman and Mr Amm SC. There is no reason that the meeting cannot be resumed, the creditors'

⁸⁰ **The Land and Agricultural Development Bank of South v Agri Oil Mills (Pty) Ltd** 2021 JDR 1238 (KZP)

difficulties addressed and, to the extent necessary the BRPs instructed to prepare a revised plan. Should this not eventuate, the BRPs will be required to perform their statutory duties and terminate the business rescue in Wash.

[207] The outcome postulated above prevents Affected Persons' rights to participate fully in business rescue proceedings being denuded. I do not see any absurdity in the outcome contended for by the Management and AECL. To my mind, it gives effect to the purpose of the statutory arrangement.

CONCLUSION

[208] In the course of this lengthy judgment, I have set about to extract principles from earlier decisions to inform a jurisprudentially sound approach to the novelties and complexities that have arisen in this matter.

[209] The single value judgment I have been called upon to make, based on the principles I have found to have been established, has required and resulted in an overall evaluation of the Proposed Plan and an interrogation of whether the conclusions set out therein can and should, simply, have been accepted at the meeting by Wash's creditors. I have concluded that the Proposed Plan does not set out the basis for the findings and conclusions set out therein. As such, it cannot be determined, *ex facie* Proposed Plan, that a proper balance has been achieved.

[210] I have concluded, further, that Wash's creditors are entitled to insight of the facts that led to the conclusions embodied in the Proposed Plan and which form the basis of the case made out by Tamela in its founding affidavit.

[211] Tamela's founding affidavit is, substantially, a narrative advancing the same conclusions in the Proposed Plan. It does not provide insight into the conclusions set out in the Proposed Plan. And, even if it had, the question whether this would not have been of any real assistance because the "appropriateness" of the vote must be adjudicated at the time the vote took place and with regard to the facts that the parties had at the time, still arises. But this is an issue for another court in due course.

[212] Very substantial time and effort has been dedicated, in this judgment, to the two *in limine* points that were taken, improperly, having not been traversed in answering affidavits and for the detailed reasons advanced, are unsustainable if not ill-conceived. These points distracted from and took away from the expeditious and efficient determination of the two real points that arose in this matter.

[213] Accordingly, and while this is a matter where costs follow the event, the costs that AECl should be entitled to recover fall to be limited to two-thirds.

[214] In the result, I make the following order:

1. Condonation for the late delivery of affidavits and the delivery of supplementary affidavits is granted.
2. The application is dismissed.
3. The applicant is directed to pay the respondents' costs, including the costs of two counsel where so employed, on scale C, save that the costs of the fifth respondent's payable by the applicant is limited to two-thirds of that allowed by the Taxing Master.



A W PULLINGER

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 12 December 2025.

DATE OF HEARING: 16 OCTOBER 2025

DATE OF JUDGMENT: 12 DECEMBER 2025

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