



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal Case No: AR484/24

KZP Case No: 12601/2023P

In the matter between:

PATRICK JOHN VOLKAR N.O

FIRST APPELLANT

(In his capacity as co-trustee of the Volkar Revocable Trust)

SANDRA ANN VOLKAR N.O

SECOND APPELLANT

(In her capacity as co-trustee of the Volkar Revocable Trust)

SWISS SAFARI AND ECO TOURS (PTY) LTD

THIRD APPELLANT

(Registration No: 1995/001321/07)

and

BIG SKY TRADING 219 CC (IN BUSINESS RESCUE)

FIRST RESPONDENT

(Registration No: 2002/079700/23)

KARUN NAIDOO N.O

SECOND RESPONDENT

(In his capacity as business rescue practitioner
of BIG SKY TRADING 219 CC)

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Pietersen AJ, sitting as court of first instance):

1. The appeal is upheld with costs, such costs to be taxed on scale C of the applicable tariff, with such costs to include the costs of two counsel and senior counsel, where so employed, together with the costs in the Supreme Court of Appeal.
2. The order of Pietersen AJ is set aside.
3. The rule *nisi* issued by Marimuthu AJ on 24 August 2023 is confirmed, subject to the following amendments to paragraphs 1.2 and 1.3 which is to read as follows:

‘1.2 Pending the final determination of an application, to be made by the applicants within 20 days of this order being handed down, for a declaratory order determining their claims against the first respondent or for appropriate review relief, the second respondent is interdicted from convening a meeting of affected persons in terms of s 151 of the Companies Act, 2008 for the purpose of considering or voting on a business rescue plan or any amendment thereto.

1.3 The respondents are directed to pay the costs of the application on the attorney and client scale, such costs to include the costs of the reconsideration application.’
4. Should the appellants fail to institute proceedings within the period prescribed, the interdict in paragraph 3 of this order shall lapse automatically. The 20 day period referred to in par 1.2 is deemed to commence running on the date of handing down, being 13 March 2026.

JUDGMENT

Van Rooyen AJ (E Bezuidenhout and Nirghin JJ concurring)

[1] On 14 August 2024, the Supreme Court of Appeal (SCA) granted the appellants leave to appeal the order of Pietersen AJ dated 9 February 2024, wherein Pietersen AJ discharged a rule *nisi* issued on 24 August 2023 by Marimuthu AJ with

costs.¹ The latter order called upon the respondents a quo, to show cause on 29 September 2023, why the following order should not be made final as provided:

‘1.1 ...[T]o the extent required, the applicants are granted leave to institute this application in terms of s 133(1)(b) of the Companies Act 71 of 2008.

1.2 Pending a determination of the applicants' claims as against the first respondent and their voting interest in respect of the business rescue proceedings of the first respondent, the respondents are interdicted from proceeding with the reconvened meeting of creditors in terms of Section 151 of the Companies Act, scheduled to be held on Friday 25 August 2023 for the purposes of tabling and voting on the business rescue plan published on 30 June 2023 (the BR Plan) and the amendments to the BR Plan which were published on 15 August 2023, or any further meeting in terms of s 151 of the Companies Act intended to be held thereafter.

1.3 The respondents are directed to pay the costs of the application on the attorney and client scale.

2. Paragraphs 1.1 and 1.2 above shall operate as interim relief with immediate effect pending the final determination of this application.’

[2] The first respondent, Big Sky Trading 219 CC (in business rescue), is under supervision and in business rescue in terms of Chapter 6 of the Companies Act 71 of 2008 (the Act). The second respondent is its appointed business rescue practitioner. The first and second appellants are the trustees of the Volkar Revocable Trust (the Trust), which is the majority shareholder in the third appellant, Swiss Safari and Eco Tours (Pty) Ltd. The appellants were the applicants in the court a quo.

[3] Pietersen AJ sat as a court reconsidering the order of Marimuthu AJ in terms of the Uniform rule 6(12)(c). Rule 6(12)(c) provides that:

‘A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.’

[4] In *Competition Commission v Wilmar Continental Edible Oils & Fats (Pty) Ltd and Others*, Madondo DJP held that:²

¹ *Volkar NO and Others v Big Sky Trading (In Business Rescue) and Another* 2025 (3) SA 667 (KZP) (court a quo's judgment) para 55.

‘In an application for reconsideration under rule 6(12)(c) the court considers the matter *de novo*. See *Oosthuizen* above at 269C – D. As in the original application, the Commission as applicant bears the onus to justify the granting of the *ex parte* order.’

[5] In *Oosthuizen v Mijs*, the court held that:³

‘... [T]he court is free to *reconsider* the order initially given in the widest sense of the word. By direct implication, it is free to reconsider any *judgment* given in the urgent application, which led to the order. Thus it can most certainly, in a proper case, issue an order of rescission by way of a final judgment which disposes of the *case in toto* – as opposed to a rescinding order which merely restores the procedural *status quo ante*, reinstating the parties to the position in which they were prior to the rescinded judgment, with the merits of the main dispute still to be decided.’

[6] In *The Fonarun Naree: Afgri Grain Marketing (Pty) Ltd v Trustees, Copenship Bulklers A/S (in liquidation) and Others*,⁴ the SCA held that:

‘Rule 6(12)(c) does not prescribe how an application for reconsideration is to be pursued ... the party applying for reconsideration seeks relief against the order granted *ex parte* and in its absence. A party ... may deliver a notice ... and set the matter down, for argument and reconsideration, on those papers...’

[7] The respondents in the appeal delivered a notice in terms of rule 6(12)(c) dated 22 September 2023, requesting reconsideration and sought relief setting aside the order of Marimuthu AJ on the following grounds, as summarised:

- (a) The order of Marimuthu AJ was unenforceable as allegedly being contrary to the provisions of the Act. The contention goes that:
 - (i) The business rescue practitioner is solely responsible for the determination of the identity of creditors, their respective classes, the acceptance or recognition of their claims and the determination of the amount of such claims prior to publishing the business rescue plan;

² *Competition Commission v Wilmar Continental Edible Oils & Fats (Pty) Ltd and Others* 2020 (4) SA 527 (KZP) para 20.

³ *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 269C-D, quoting with approval from *Sheriff Pretoria North-East v Flink and Another* [2005] 3 All SA 492 (T) at 498f - 499f.

⁴ *The Fonarun Naree: Afgri Grain Marketing (Pty) Ltd v Trustees, Copenship Bulklers A/S (in liquidation) and Others* [2019] ZASCA 67; 2024 (1) SA 373 (SCA) para 12.

- (ii) Only a meeting of affected persons convened in terms of s 151 of the Act can authorise an amendment to the business rescue plan;
 - (iii) The business rescue practitioner had made his determination of the appellants' voting interests and was *functus officio* in respect of an amendment of the plan;
 - (iv) The order sought to interdict the meeting pending a determination of the appellants' claim and voting interests. Such a stay of the meeting, after publication of the plan, can only be achieved by affected persons voting at a meeting; and
 - (v) There is allegedly no statutory provision providing for a person or body to determine a voting interest prior to the publishing of the plan, save for the practitioner who had already done so. Accordingly, the order cannot be implemented.
- (b) The order of Marimuthu, AJ is unenforceable due to its vagueness. The order does not provide for any person or body to make the determination of the voting interest, it does not provide a time limit within which such determination must be made and does not prescribe a process for such determination. Significantly, it does not provide for the practitioner to reconsider his actions and decisions in respect of the appellants' claims and further does not direct the second respondent or any other party to recognise the claims in values contended for by the appellants.
- (c) Furthermore, the order of Marimuthu AJ is unenforceable as the appellants did not seek a review of the decision of the second respondent;
- (d) There was a fatal non-joinder of creditors affected directly and substantially by the granting of the interim order;
- (e) The appellants had alternative remedies, whereas, the business rescue plan provided for the review of the practitioner's decisions within 90 days, the adoption of the business rescue plan at a meeting creditors in terms of s 151 of the Act could be reviewed, albeit to a 'limited extent', and the Trust could and should have taken the matter to the s 151 meeting and exercised its rights in terms of s 152(1)(d) of the Act;
- (f) The founding and supporting affidavits were not properly commissioned nor were they properly authenticated in terms of rule 63; and
- (g) Further points taken were a lack of urgency in moving the *ex parte* urgent application and that the application constituted an abuse of process.

[8] In Pietersen AJ's judgment in the court a quo,⁵ he stated that:

'The respondents also raised further procedural points pertaining to the commissioning of affidavits, the authentication of foreign documents, urgency and an abuse of process, but these matters were not persisted with in argument and do not require further consideration due to my findings hereinbelow.'

However, during the appeal, Mr *Van der Walt* SC, appearing for the respondents, persisted in raising these procedural issues on the basis, as we understood it, that they had not been abandoned.

[9] We consider it appropriate to deal with these procedural issues prior to delving into the merits of the appeal.

[10] Rule 63(1) defines a *document* and *authentication* as follows:

"**document**" means any deed, contract, power of attorney, affidavit or other writing, but does not include an affidavit or solemn or attested declaration purporting to have been made before an officer prescribed by section *eight* of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963);

"**authentication**" means, when applied to a document, the verification of any signature thereon.'

[11] Rule 63(2) further prescribes the manner in which a document is to be authenticated at a foreign place in order for it to be used in the Republic. Rule 63(2) provides that:

'Any document executed in any place outside the Republic shall be deemed to be sufficiently authenticated for the purpose of use in the Republic if it be duly authenticated at such foreign place by the signature and seal of office-

- (a) of the head of a South African diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office abroad; or
- (b) of a consul-general, consul, vice-consul or consular agent of the United Kingdom or any person acting in any of the aforementioned capacities or a pro-consul of the United Kingdom;

⁵ Court a quo's judgment para 25.

- (c) of any Government authority of such foreign place charged with the authentication of documents under the law of that foreign country; or
- (d) of any person in such foreign place who shall be shown by a certificate of any person referred to in paragraph (a), (b) or (c) or of any diplomatic or consular officer of such foreign country in the Republic to be duly authorised to authenticate such document under the law of that foreign country; or
- (e) of a notary public in the United Kingdom of Great Britain and Northern Ireland or in Zimbabwe, Lesotho, Botswana or Swaziland; or
- (f) of a commissioned officer of the South African Defence Force as defined in section *one* of the Defence Act, 1957 (Act 44 of 1957), in the case of a document executed by any person on active service.'

[12] Rule 63(4) provides that:

'Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the office, to have been actually signed by the person purporting to have signed such document.'

[13] The objection raised by Mr *Van der Walt* to the authentication of the affidavits relied upon by the appellants, is that the affidavits were signed in the United States of America and that the signatures were not authenticated in compliance with the rule. No evidence on oath was put up explaining the manner in which the documents were signed, where, at best, the commissioner of oaths commissioned emailed copies.

[14] The attestation page of the founding affidavit shows a signature reflecting the full names of the first appellant. The commissioner of oaths, Ms Mapule Kathleen Mabitsela (Ms Mabitsela), who describes herself as a non-practising attorney in the Republic of South Africa situated at 1[...] B[...] F[...] Drive, Ferndale, Randburg, Johannesburg records that Patrick John Volkar, the first appellant, appeared before her at an indistinct place in the United States of America on 23 August 2023, by way of a Microsoft Teams conference meeting link, which was recorded. The second appellant, Mrs Sandra Ann Volker, who also attested to an affidavit, was present with Mr Volker. The link is provided in the affidavit, and we requested the appellants'

attorneys to provide us with a recording of the meeting, which they duly did. It is date stamped 23 August 2023.

[15] Appearing as participants in the link are Ms Mabitsela and Ms Kerisha Reddy (Ms Reddy), an attorney at Werksmans Attorneys, who purportedly deposed to a confirmatory affidavit after the fact.

[16] Ms Mabitsela required the first deponent appearing on screen to identify herself. She did so as the second appellant. The second appellant confirmed that she understood the content of the affidavit and that it had been explained to her. She further recorded that she had no objection to taking the oath and considered it to be binding on her conscience. Her affidavit in the record was initially unsigned.

[17] In the Microsoft Teams conference meeting the second appellant was taken through the process of initialling and signing the document. The witness held the document up to the screen and it was visibly the front page of the affidavit she was required to initial. The witness was requested to insert the name of the place at which she was signing the affidavit. The place mentioned and the name of the State clearly accord with the place name inserted in the first appellant's affidavit and the resolution of the board of directors of the third appellant which forms part of the record. The first appellant's signature appearing on the affidavit is remarkably similar to that appearing on the resolution dated 23 August 2023. The place of signature is recorded as being 'Coeur d'Alene, ID, USA.'

[18] Furthermore, an unidentified voice in the background highlights the difficulties which will be experienced in printing and scanning the annexures to the founding affidavit. A person then appears on screen, who is requested by the commissioner of oaths to identify himself. He identified himself by his full names as being the first appellant. He further confirmed that he knew and understood the content of the affidavit, that he had no objection to taking the oath and that he considered the oath to be binding on his conscience. He is requested by Ms Mabitsela to initial the bottom right-hand corner of the document, which has been done in the founding affidavit. After appearing to have initialled the affidavit he holds up the attestation page and enquires where he is to sign. He reads out the precise wording of the

bottom of the page in front of him which coincides exactly with the affidavit forming part of the record. He is requested to insert the place where the document was signed and, from the affidavit, the insertion is clearly in handwriting different to that of the other insertions contained in the paragraph. The name of the place is mentioned in the recording and coincides with that recorded on the affidavit. An unidentified third person (possibly the first appellant) again raises the difficulties envisaged in copying the annexures. After the progression of some time, the first appellant is then advised by Ms Reddy that there is no need to copy and initial the annexures.

[19] This instruction was clearly carried out as the annexures to the founding affidavit are not initialled.

[20] A discussion then ensues between Ms Reddy and Ms Mabitsela, wherein Ms Reddy enquires whether, now that the affidavits are signed, they can be forwarded to Ms Mabitsela by email. She responds in the affirmative.

[21] The legal position regarding the authentication of documents is succinctly summarised in *Blanchard, Krasner & French v Evans*:⁶

‘The Rules set out above are not exhaustive but are, as *Erasmus Superior Court Practice* B1-407B said, merely directory. They do not take away from the power of the Court to consider other evidence directed at the proof of a document executed in a foreign place, and to accept such a document as being duly executed.’

[22] In *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd*,⁷ Van Reenen J held that:

‘The prescribed formalities are not mandatory, and the genuineness of such documents may be proved on a balance of probabilities by means of direct or circumstantial evidence or both.’

⁶ *Blanchard, Krasner & French v Evans* 2004 (4) SA 427 (W) at 432G-H.

⁷ *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd* 2003 (6) SA 69 (C) at 74G-H; also see *Chopra v Sparks Cinemas (Pty) Ltd and Another* 1973 (2) SA 352 (D) (*Sparks Cinemas*) at 358C-D.

[23] In addition to rule 63(4), rule 27(3) provides that a court may, on good cause shown, condone any non-compliance with the rules. In *Sparks Cinemas*,⁸ Henning J held that:

‘I mentioned to counsel Rule 27 (3) which provides that the Court may, on good cause shown, condone any non-compliance with the Rules. Counsel were however, disinclined to address any argument with reference to this Rule, and confined their submission to the applicability or otherwise of Rule 63 (4). I am of the view that the two provisions stand side by side and that the one does not exclude the other. Under either of them the Court has a discretion which must, of course, be judicially exercised.’

[24] Having viewed the recording referred to hereinabove, and having compared it to the affidavit, particularly deposed to by the first appellant, we are satisfied that the appellants have established on circumstantial evidence and on a balance of probability, that the founding affidavit was in fact executed by the first appellant, that it is genuine and sufficiently authenticated by the commissioner of oaths and that it should be accepted in terms of rule 63(4).

[25] It appears to us that none of the parties had regard to the Microsoft Teams conference link that was recorded and nobody drew it to the attention of either Marimuthu AJ or Pietersen AJ. Consideration of the recording may have persuaded the respondents to not advance this as an issue in the appeal.

[26] Similar reasoning applies to the point taken that the affidavit, particularly that of the first appellant, was not signed in the presence of the commissioner of oaths. The deponent and the commissioner were clearly virtually in each other’s presence and the recording is date stamped 23 August 2023, which is a day before the urgent application was moved. In *Knuttel NO and Others v Bhana and Others*, the court held that:⁹

‘Non-compliance with the regulations does not *per se* invalidate an affidavit. The Full Court in *S v Munn* confirmed at 734H that the regulations are directory only and that non-compliance with the regulations would not invalidate an affidavit if there was substantial

⁸ *Sparks Cinemas* at 357A-B.

⁹ *Knuttel NO and Others v Bhana and Others* [2022] 2 All SA 201 (GJ) (*Knuttel*) para 53.

compliance with the formalities in such a way as to give effect to the purpose of obtaining a deponent's signature to an affidavit.' (Footnote omitted.)

[27] The issue as to whether a court should reject an affidavit because the deponent was not physically present in the same place as the commissioner, was considered in *CKN and Another v Villa Siesta Pet Retreat CC and Another*,¹⁰ where Baqwa J held that:

'The current position therefore is that the court will not reject an affidavit because the deponent was not physically present in the same place as the commissioner provided the deponent and the commissioner are "within eyeshot" of one another. There is therefore no reason why a person taking the oath over a video call in front of a commissioner should be regarded as less truthful than an affidavit deposed to in the conventional manner.'

[28] It has been recognised by our courts that the requirement that an oath be administered in person is to be relaxed under certain circumstances. There were many instances in the recent past where trials were conducted virtually and the presiding judge administered the oath to a witness virtually via video link.

[29] This issue was considered in *Knuttel* with reference to Canadian authority. Albeit that the Canadian matter proceeded under Covid-19 restrictions, the Canadian court found that an affidavit may be sworn electronically or by email using any reasonable method by which the person commissioning the affidavit can be satisfied of the identity of the deponent, that the deponent has read and understood the contents of the affidavit and is solemnly swearing or affirming as the case may be. The deponent and the person commissioning the affidavit need not be physically in each other's presence. In *Knuttel*, Katzew AJ held that:¹¹

'The point arose pertinently for decision in Canada in the matter of *Rabbat et al v Nadon et al* wherein the Superior Court of Justice, Ontario in paragraph 4 of the judgment permitted the virtual commissioning of affidavits "given the restrictions in place due to Covid-19". The order given by the court reads as follows:

¹⁰ *CKN and Another v Villa Siesta Pet Retreat CC and Another* [2024] ZAGPPHC 1230 para 11.

¹¹ *Knuttel* para 63.

“Any affidavit for use on the motion may be sworn electronically or by e-mail using any reasonable method by which the person commissioning the affidavit can be satisfied of the identity of the deponent, that the deponent has read and understood the contents of the affidavit and is solemnly swearing or affirming as the case may be. The deponent and the person commissioning the affidavit need not be physically in each other’s presence.” (Footnote omitted.)

[30] In *LexisNexis South Africa (Pty) Ltd v The Minister of Justice and Constitutional Development*¹² Keightley JA held as follows:

‘*Briedenhann* interpreted “in the presence of” to mean in the physical presence of the commissioner of oaths. This interpretation is compatible with the approach adopted in other high court judgments: *Knuttel N. O. v Bhana*, and *E D Foods SRL v Africa’s Best (Pty) Ltd*. In these cases, it has been held that while regulation 3 requires physical presence, the requirement may be satisfied if there is substantial compliance.’ (Footnotes omitted.)

[31] In *Firststrand Bank Ltd v Briedenhann*, Goosen J held that:¹³

‘[56] It follows from what I have said that I would be disinclined to receive the affidavits, given the elected non-compliance with the Regulations. However, the discretion with which I am vested must be exercised judicially, upon consideration of all the relevant facts and in the interests of justice.

[57] There can be no doubt that the evidence placed before me establishes that the purposes of reg 3(1) have been met. To refuse to admit the affidavits would, of course, highlight the importance of adhering to the principle of the rule of law. That point is, I believe, made plain in this judgment. To require the plaintiff to commence its application for default judgment afresh upon affidavits which would contain the same allegations but which are signed in the presence of a commissioner of oaths would not, in my view, be in the interests of justice. There is after all no doubt that the deponents did take the prescribed oath and that they affirmed doing so. It would therefore serve no purpose other than to delay the finalisation of this matter with an inevitable escalation of costs, not to receive the affidavits. In the circumstances, I accept the affidavits deposed to in the manner described in this judgment as complying in substance with the provisions of the Regulations.’ (Footnote omitted.)

¹² *LexisNexis South Africa (Pty) Ltd v The Minister of Justice and Constitutional Development* [2025] ZASCA 181; [2026] 1 All SA 293 (SCA) para 16.

¹³ *Firststrand Bank Ltd v Briedenhann* 2022 (5) SA 215 (ECGq).

[32] For the reasons set out hereinabove, we are satisfied that there was substantial compliance with reg 3(1) in the commissioning of the founding affidavit and that it was in the interests of justice to receive the affidavits.

[33] For the reasons which will become more apparent hereunder, there is no basis for the contention that the application was an abuse of process and that it lacked sufficient urgency to be dealt with in the manner in which it was.

[34] Although the facts applicable to the urgent application are dealt with at length in the judgment of Pietersen AJ, it is imperative that the factual basis be repeated in order for the conclusions drawn can be crystallised and based on fact.

Factual background

[35] As mentioned above, the first respondent is under supervision and in business rescue in terms of Chapter 6 of the Act, with the second respondent is its appointed business rescue practitioner. The first and second appellants are the trustees of the Trust, which is the majority shareholder in the third appellant. The first meeting of creditors had already been held on 9 March 2023.

[36] The management accounts of the first respondent for the year ended 28 February 2022, record the Trust to be a creditor in a sum of approximately R15 million. The sum comprises loans and an interest component. The third appellant contends that it is a creditor of the first respondent in a sum of approximately R3,5 million in respect of a loan advanced to the first respondent. The appellants contend that these claims were never disputed prior to the commencement of business rescue.

[37] On 26 April 2023, the second respondent informed the Trust's attorneys that he intended to publish a business rescue plan during the week of 8 May 2023. This was in response to various enquiries addressed to him regarding the convening of the first meeting of creditors, whether the Trust's claims have been recognised, the amounts due to creditors and whether the first respondent had any secured creditors.

[38] On 28 April 2023, the appellants' attorneys addressed a letter to the second respondent recording that they are creditors of the first respondent and thus entitled to participate in the business rescue proceedings. It was further recorded that the appellants had not been included in the process leading up to the formulation of a business rescue plan.

[39] On 12 May 2023, the second respondent responded and advised that the plan was being prepared, that he was awaiting confirmation of the valuation of certain assets and that there were matters which had come to his attention, which may require the restatement of the first respondent's financial statements, which impact on the appellants' claims against the first respondent.

[40] On 22 May 2023, a virtual meeting proceeded, attended by the first and second appellants, the appellants' attorneys, the second respondent and a number of his colleagues. At the meeting, the second respondent acknowledged that the Trust's claim had not been recognised, that there were inconsistencies recorded in the first respondent's financial statements regarding improvements effected by it on the game farm operated by it, which needed to be restated to reflect the correct position and that he was willing to enter into a negotiated commercial settlement regarding the appellants' claims against the first respondent. The appellants' attorneys cautioned against the rushed publication of a business rescue plan where there were disputes regarding their claims. The second respondent undertook to provide the attorneys with a draft business rescue plan after the meeting.

[41] On 26 May 2023, the second respondent addressed a circular to affected persons advising that the business rescue plan would be circulated on 30 June 2023. A draft business rescue plan was provided to the appellants' attorneys on 30 May 2023. However, he did not provide supporting documentation on which the draft plan was based.

[42] The second respondent circulated the business rescue plan to affected persons on 30 June 2023. On 5 July 2023, the second respondent notified affected persons that the business rescue plan would be tabled at a meeting convened in

terms of s 151 of the Act on 11 July 2023. On 6 July 2023, the appellants' attorneys addressed a letter to the second respondent identifying discrepancies between the draft business rescue plan and the plan published for the purpose of being voted on.

[43] On 10 July 2023, the appellants' attorneys notified the second respondent that the business rescue plan contained insufficient information for the appellants to properly consider it, as prescribed by s 150 of the Act.

[44] The meeting convened in terms of s 151 of the Act was adjourned on 11 July 2023 to 25 August 2023, in order for the second respondent to consider a without prejudice offer of settlement received from the appellants, to deal with issues raised by affected persons in respect of the plan and to amend the plan accordingly if required.

[45] An issue which was apparently raised at the meeting of 11 July 2023, was that the second respondent had obtained information which resulted in the reduction of the Trust's claim from approximately R15 million to R100. The appellants' attorneys, in an email dated 12 July 2023, required the second respondent to identify where in the business rescue plan reference to this information could be found.

[46] A virtual meeting was again convened on 18 July 2023, wherein the second respondent undertook to make reference to the settlement offer made by the appellants in the business rescue plan. He further undertook to convene a meeting of all stakeholders on 10 August 2023, to publish the amendments to the business rescue plan by 15 August 2023, and to re-convene the meeting for consideration of the plan on 25 August 2023.

[47] The 15 August 2023 circular directed by the second respondent to affected persons did not address any of these issues. On 19 August 2023, the appellants' attorneys addressed an email to the second respondent advising him that the proposed amendments to the business rescue plan did not deal with the proper recordal of the appellants' claims, that the plan contained factual and legal inaccuracies which had not been rectified by the proposed amendments and which had not included queries raised by the attorneys nor the terms of the proposed

settlement offer made by the appellants. The email further recorded that, if the issues were not addressed prior to the meeting of 25 August 2023, the appellants would urgently apply to interdict implementation of the business rescue plan.

[48] The threat of interdict proceedings was repeated on 21 August 2023, unless confirmation was received that the appellants' claims were properly recorded in the business rescue plan and that the appellants were accorded a proper voting interest at the meeting, the appellants would urgently apply to interdict implementation of the business rescue plan. The deadline set was 22 August 2023. The second respondent responded on 22 August 2023, informing the appellants that they were to present their proposed amendments to the plan at the meeting convened in terms of s 151 of the Act. Once seconded, the proposals would be voted on by affected persons.

[49] The second respondent's response elicited a further email from the appellants' attorneys on 22 August 2023, in which they record the following:

- (a) Correspondence has on numerous occasions requested that the appellants' claims be properly recorded in the business rescue plan and that they receive the correct voting interest as determined by s 145(4) of the Act. This the second respondent had refused to do.
- (b) The proposals for the amendment of the plan would be voted on by affected persons benefitting from the appellants' diluted voting interests and if the proposed amendments were not approved by those affected persons, the probability was that the plan would be approved.
- (c) The business rescue plan did not record the settlement proposal made by the appellants as it was required in terms of s 150(2)(a)(vi).
- (d) Should confirmation not be provided by 9h00 on 23 August 2023, that the meeting scheduled for 25 August 2023 would be postponed in order for an amended plan to properly record the appellants' claims and voting interests and their proposed settlement offer, urgent proceedings would be instituted to interdict the meeting on 25 August 2023.

[50] No such confirmation was provided by the second respondent.

[51] The published business rescue plan, which forms part of the record, records the following:

- (a) All authorised and mandated creditor representatives who filed the necessary documentation on time will be entitled to vote based on the amount owing to the creditor.
- (b) The business rescue practitioner would chair the meeting, follow the agenda set out in the plan and would invite discussion regarding amendments to the plan. Amendments must be proposed by a member or a creditor and must be seconded by a second attendee. The proposed amendment would then be voted on by creditors. All amendments and approvals of the plan would require 75% of the creditors present and voting to approve the amendment or the approval, of which 50% of the creditors must be independent.
- (c) A first meeting of creditors in terms of s 147 of the Act was held on 9 March 2023;
- (d) Investigations into the affairs of the first respondent by the business rescue practitioner revealed the following:
 - (i) He doubted the veracity of the annual financial statements and considered the need for them to be restated;
 - (ii) Improvements made to the farm owned by the third appellant, together with payments made by the first respondent on behalf of the third appellant and the cost of funding operations in the third appellant by the first respondent for the 2023 financial year needed to be restated. The restatements affect the value of the loan from the Trust;
 - (iii) Funds introduced by erstwhile or current investors were deemed by the business rescue practitioner to have become prescribed. The reason for this is that he could find no evidence of the interruption of prescription for the past three years; and
 - (iv) Improvements made to a property owned by the third appellant of approximately R33 million over a ten-year period were made more than three years ago and the majority of the claim that may have existed against the first respondent has prescribed.
- (e) Although the business rescue practitioner requested creditors to submit claims at the meeting in terms of s 147, the business rescue practitioner has allowed late claims and continues to allow late claims even after the plan is issued. All claims

submitted up to and including Saturday, 8 July 2023, which have been verified by the first respondent and accepted by the business rescue practitioner, will make creditors eligible to vote their corresponding voting interests at the meeting.

(f) All claims of creditors were to be dealt with in the plan as if the claims were against the insolvent estate of the first respondent and as if the first respondent had been placed in liquidation at the calculation date, in terms of and subject to the provisions of the Insolvency Act 24 of 1936 (Insolvency Act), the Companies Act 61 of 1973 (the old Act) and the Act. The business rescue practitioner shall prove, consider and adjudicate each creditor claim for the purpose of sharing in the distribution envisaged in the business rescue plan.

(g) Unless the creditor is able to prove the claim to the satisfaction of the practitioner, the claim is deemed a contingent claim and will be dealt with as set out in clause 2.3.1.4 of the plan.

(h) Claims shall be proved to the satisfaction of the business rescue practitioner as if they were the officers presiding at a meeting for the proof of claims within the meaning of s 44 of the Insolvency Act, as read with s 366 of the old Act.

(i) The business rescue practitioner's decision to reject a claim shall be subject to review by the high court upon the application of any party affected thereby, provided that any such review proceedings shall be brought within 90 days of receipt of advice of that decision in writing from the business rescue practitioner, acting in that capacity. Should the affected party fail to make such an application, they shall be deemed to have waived their right to dispute such decision and shall thereafter be debarred from bringing such review proceedings.

(j) Appendix 1 to the plan reflects the Trust's claim, as to the capital portion, to be R100 and the claim, as to the interest portion to be nil. The third appellant's claim is omitted *in toto*.

Discussion

[52] The Trust and the third appellant were quite clearly creditors of the first respondent at the commencement of business rescue. Their claims appear in management accounts and were allegedly subject to investigation by the second respondent prior to the publication of the business rescue plan. There is no doubt that the respondents played an intimate role in financing the operations of the first respondent and that their involvement was overt, transparent and recorded.

[53] The appellants were not notified of the first meeting of creditors convened in terms of s 147 of the Act. The stated purpose of s 147 of the Act is for the practitioner to inform creditors whether he believes that there is a reasonable prospect of rescuing the company and receiving proof of claims by creditors. The practitioner is obliged to give notice of the first meeting of creditors to every creditor of the company known to him, as each creditor is entitled to notice of and to participate in the business rescue proceedings in terms of s 145(1) of the Act.

[54] It is clear from a reading of the record that the appellants were never afforded an opportunity to prove a claim. Unfortunately, the Act is silent as to the manner in which a claim is to be proved in business rescue proceedings and does not contain provisions such as those contained in s 44 of the Insolvency Act.

[55] From a reading of the business rescue plan, the second respondent required compliance with the provisions of s 44 of the Insolvency Act, for the proof of claims to his satisfaction and who would consider the claims as if he were an officer presiding at a meeting of creditors within the meaning of s 44 of the Insolvency Act. It is not apparent from the record that the notice convening the first meeting of creditors recorded this procedure when inviting creditors to prove claims.

[56] The second respondent recognised the Trust's claim in Appendix 9 to the business rescue plan in the sum of R15,2 million. He then proceeds with his calculations by setting off the sum of R29,3 million, which includes a sum of R28,1 million for improvements allegedly made to the property owned by the third appellant, and writes off the entire interest portion of the loan of R4,6 million. This allegedly leaves the first respondent with a claim against the Trust of R18,6 million which he considers to be prescribed. From this calculation, he arbitrarily arrives at the conclusion that the Trust has a claim of R100 against the first respondent. The third appellant's claim vanishes in total, as allegedly having become prescribed.

[57] It is clear from the facts contained in the founding affidavit that the second respondent would not budge from this position.

[58] There is much to be questioned regarding the conduct of the second respondent and his treatment of the appellants as creditors. If he, in fact, considered himself to be in the position of a presiding officer at a meeting of creditors in terms of the Insolvency Act, in considering the claims of particularly the third appellant, it ought to have been apparent to him that such a presiding officer should not reject a claim submitted for proof on the basis that, *prima facie*, it is prescribed. In *Breda NO v The Master of the High Court, Kimberley*, the SCA held that:¹⁴

‘The rejection of a claim ... on the basis that prima facie it is prescribed, denies a creditor the right to furnish an answer to this conclusion.’

We are not called upon to determine the merits of the appellants’ claims but we do find it rather incongruous that creditors’ rights regarding claims are only spelt out at the late stage of a published business rescue plan. The position regarding claims and voting interests in our view ought to be crystallised, and not subject to dispute, when a plan is presented for approval.

[59] The second respondent’s conduct left the third appellant with no voting interest at all. The invitation to apply for an order reviewing his decision to reduce the voting interest to zero, contained in the published plan, rings utterly hollow and should have been communicated immediately, upon the decision having been made.

[60] As a consequence, the third appellant, being one of the applicants in the court a quo, was left with no *locus standi* to attend the meeting convened in terms of s 151 of the Act and to exercise its voting interest as a creditor and affected person.

[61] Focusing for the moment on the third appellant which was completely deprived of a voting interest, one must consider the finding of Pietersen AJ that, particularly the third appellant, had alternative legal remedies available to it in the form of a right to review the business rescue practitioner’s decision to expunge its claim and to attend the meeting convened in terms of s 151 of the Act and there to have exercised its rights in terms of s 152(1)(d) of the Act by proposing a motion to

¹⁴ *Breda NO v The Master of the High Court, Kimberley* [2015] ZASCA 166 para 23.

amend the published business rescue plan to provide for the full extent of its claim.¹⁵ The alternative was that the third appellant propose a motion to direct the second respondent to adjourn the meeting in order to revise the plan for further consideration in terms of s 152(1)(d)(ii) of the Act.

[62] The third appellant had no *locus standi* to do so. It was not considered an affected person by the second respondent.

[63] The question which requires consideration is whether those suggested remedies afford, particularly the third appellant, any coercive mechanism to preserve the *status quo*.¹⁶ This question, albeit in a different context, was considered in *Knox D'Arcy Ltd and Others v Jamieson and Others*,¹⁷ where Grosskopf JA held that:

'In the judgment *a quo* Stegmann J dealt with this topic as a part of the enquiry whether the petitioners' claims for damages "will not be a satisfactory remedy in the absence of the interlocutory interdict *in securitatem debiti*" ... In my view this is not a correct way of looking at the matter. It is often said that an interdict will not be granted if there is another satisfactory remedy available to the applicant. In that context a claim for damages is often contrasted with a claim for an interdict. The question is asked: should the respondent be interdicted from committing the unlawful conduct complained of, or should he be permitted to continue with such conduct, leaving the applicant to recover any damages he may suffer? That is not the question which arises here. In the present circumstances there is no question of a claim for damages being an alternative to an interdict. The only claim which the petitioners have is one for damages. There is no suggestion that it could be replaced by a claim for an interdict. The purpose of the interdict is not to be a substitute for the claim for damages but to reinforce it - to render it more effective. And the question whether the claim is a satisfactory remedy in the absence of an interdict would normally answer itself. Except where the respondent is a Croesus, a claim for damages buttressed by an interdict of this sort is always more satisfactory for the plaintiff/applicant than one standing on its own feet. The question of an alternative remedy accordingly does not arise in this sort of case. The interdict with which we are dealing is *sui generis*. It is either available or it is not. No other remedy can really take its place...'

¹⁵ Court a quo's judgment paras 42-48.

¹⁶ *Unathi Farming Project 02 (Pty) Ltd v Craig Neven Farm (Pty) Ltd* [2025] ZAKZPHC 128 paras 37-38.

¹⁷ *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 372I-373D.

[64] In *Fourie v Uys*,¹⁸ the court held that:

‘... where by refusing the interdict the applicant will, in fact, be compelled to part with his rights, the Court will be disposed to grant the interdict.’

[65] To suggest that the interim interdict ought to have been refused on the basis that the third appellant ought to have attended the meeting convened in terms of s 151 of the Act, and exercise its non-existent rights as an affected person, is simply nonsensical. Attending the meeting or instituting proceedings for the review of the second respondent’s decisions, does not provide the third appellant with a coercive mechanism to preserve the *status quo*. Only an interdict could have that effect.

[66] The consequences of the meeting proceeding in the absence of the third appellant and with the Trust having only a nominal voting interest are far reaching. A business rescue plan which has been adopted is binding on the company, on each of the creditors and on every holder of the company’s securities whether or not such a person was present at the meeting, voted in favour of adoption of the plan or, in the case of creditors, had proven their claims against the company. The company is thereafter required, under the direction of the practitioner, to implement the plan as adopted, this all by virtue of the provisions of ss 152(4) and 152(5) of the Act. If the plan is not adopted, it is thereafter only to be considered in terms of s 153 of the Act. The latter section affords affected persons and the business rescue practitioner remedies such as the acquisition of voting interests and institution of proceedings to have votes declared inappropriate. If no such steps are taken, business rescue proceedings are terminated in terms of s 132(2)(c) of the Act. Implementation of the plan deprives creditors of the right to enforce portions of their claims against the company in terms of s 154 of the Act.

[67] Interim relief was granted by Marimuthu AJ, pending a determination of the appellants’ claims against the first respondent and their voting interest in respect of the business rescue proceedings. It may be correctly suggested that the ambit of the

¹⁸ *Fourie v Uys* 1957 (2) SA 125 (C) at 129A-B.

relief is vague and final in effect in that it does not set the parameters of when, where and how the determination is to be made. In the absence of any other mechanism provided for in the Act or by agreement between the parties, such determination would naturally be made on application for a declaratory order to that effect or for a review of the second respondent's decision to reduce or expunge the claims and voting interests. Pietersen AJ was alive to the authorities which empowered him to consider the matter *de novo* and to grant an appropriate order which finally disposed of the application, or which restored the *status quo ante*.

[68] An order declaring the appellants' rights or reviewing the second respondent's decision is not an alternative to interdictory relief. An interdict bolsters an application for such relief and renders it more effective. It is an appropriate coercive mechanism to retain the status quo under the circumstances.

Non-joinder of affected persons

[69] Pietersen AJ held that the non-joinder of the first respondent's creditors to the application is fatal and that, as a result, the rule *nisi* must be discharged.¹⁹

[70] At the outset of argument before us, we enquired of Mr *Stais SC*, who appeared for the appellants with Ms *Acker*, whether affected persons, who are entitled to participate in the application in terms of s 145 of the Act, were given notice of the proceedings, since no proof of such notification forms part of the record. After deliberation with Mr *Van der Walt SC*, he reverted by stating that it was not in dispute by the respondents that affected persons received the requisite notification. This effectively disposed of the issue.

[71] In arriving at his conclusion, aforesaid, Pietersen AJ relied on a number of judgments which, to a large degree, hold that, in an application to set aside a business rescue plan, affected persons need to be joined as having a direct and substantial interest in the subject matter of the litigation, which may prejudice them

¹⁹ Court a quo's judgment para 41.

where they are not to be so joined.²⁰ The *ratio* in *ABSA Bank Ltd v Naude NO and Others*,²¹ as referred to by Pietersen AJ is understandable under the circumstances. A business rescue plan had been adopted and a setting aside of the plan would prejudicially affect affected persons as they had established rights to the payment of dividends in terms of the adopted plan.

[72] That position is to be distinguished from the first respondent's position where a business rescue plan had been published but not yet adopted.

[73] Furthermore, Pietersen AJ referred with approval to *Industrial Development Corporation of South Africa Ltd v Van den Steen NO and Others*,²² wherein the applicants sought an order staying the meeting convened in terms of s 151 of the Act, pending final determination of the application or an application for the removal of the business rescue practitioners, which application was to be launched within a certain period of time. We agree with the submissions made by Mr *Stais* that the finding in *Industrial Development Corporation*, that non-joinder of creditors was fatal to the application, was based on precedents, where in all cases, the published business rescue plan had already been adopted and creditors had secured substantive rights under those plans.²³ That situation is to be distinguished from the position *in casu*, where no business rescue plan has been adopted and where creditors have established no substantive rights in the published plan prior to its adoption. They have no right to a distribution and it does not become binding on the creditors in terms of s 152(4) until its adoption. This is when a legal interest in rescue-related litigation is established.

[74] Chapter 6 of the Act devotes considerable attention to creditors, their identification and their rights in business rescue proceedings:

²⁰ Court a quo's judgment paras 34-39.

²¹ *ABSA Bank Ltd v Naude NO and Others* [2015] ZASCA 97; 2016 (6) SA 540 (SCA) (*Naude*) para 10.

²² *Industrial Development Corporation of South Africa Ltd v Van den Steen NO and Others* [2018] ZAGPJHC 70 (*Industrial Development Corporation*).

²³ *Ibid* paras 10-12.

(a) The definition of an 'affected person' in s 128(1)(a)(i) of the Act includes a creditor of the company;

(b) Where business rescue proceedings are commenced by the adoption of a resolution by the company's board in terms of s 129 of the Act, an affected person may apply, prior to the adoption of a business rescue plan, for an order setting aside the resolution on various grounds in terms of s 130(1) of the Act. Section 130(3) requires service of the application on the company and the commission and notification of each affected person of the application in the prescribed manner. Each affected person has the right to participate in the hearing of an application in terms of the s 130(4) of the Act. In proceedings which could result in the termination of business rescue, the legislator saw it fit to only require notice to be given to affected persons in order for them to exercise their right to participate in the proceedings, if desired. The right is automatic and no intervention is required;

(c) Section 131(1)-(3) of the Act provides that:

'(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

(2) An applicant in terms of subsection (1) must-

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.'

(d) Again, the legislator saw it fit to require notice only and not joinder of affected persons under circumstances where a creditor's rights may be fundamentally impacted since it materially affects the right to commence legal proceedings. The proceedings include enforcement action, during business rescue proceedings in terms of s 133 of the Act, it suspends commenced liquidation proceedings in terms of s 131(6) of the Act, it restricts disposal of company property in terms of s 134 of the Act, it permits the business rescue practitioner to raise finance against security of the company's assets in terms of s 135(2) of the Act, it permits the business rescue practitioner, despite any provision of an agreement to the contrary, to suspend for the duration of business rescue proceedings, any obligation of the company that arises under any agreement to which the company was a party at the commencement of the business rescue proceedings and would otherwise become

due during those proceedings or to apply to court to entirely, partially or conditionally cancel on just and reasonable terms, any obligation of the company in terms of s 136(2) of the Act and permits the business rescue practitioner to apply for an order discontinuing the business rescue proceedings where there is no reasonable prospect for the company to be rescued in terms of s 141(2) of the Act;

(e) Section 145(1) of the Act is entirely devoted to creditors' rights to receive notice of and to participate in court proceedings and business rescue proceedings. Creditors are additionally entitled to informally participate in the business rescue proceedings by making proposals for a business rescue plan to the practitioner in terms of s 145(1)(d) of the Act, and to vote to amend, approve or reject a proposed business rescue plan in terms of s 145(2)(a) of the Act.

[75] The scheme of Chapter 6 of the Act clearly envisages notification to and participation by affected persons in litigation and business rescue proceedings. This view is fortified in *Naude*, where the court considered the question whether it was sufficient to give notice to creditors in terms of s 130(3) of the Act or whether joinder was required in an application to set aside an approved business rescue plan. Albeit obiter (in our view), the court held that notice in accordance with the provisions of s 130(3) is confined to matters where an application is brought prior to the adoption of a business rescue plan.²⁴ Notwithstanding the drastic consequences of an order setting aside the resolution by which business rescue proceedings were commenced, the SCA in *Naude* required no more than the statutory provision of notice to creditors before the adoption of a business rescue plan.

[76] We support the view expressed by Keightley J in *Cooper NO and Another v Knoop NO and Others*,²⁵ where the court dealt with an application in which the applicants sought an order, on an urgent basis, directing the respondents to forthwith withdraw a published business rescue plan, alternatively that the decision by the business rescue practitioners to publish the plan be reviewed and set aside. The point was taken that the applicant should be non-suited for failure to join all creditors

²⁴ *Naude* paras 7-8.

²⁵ *Cooper NO and Another v Knoop NO and Others* (Gauteng Division of the High Court, Johannesburg, unreported case no 43452/2019, dated 26 September 2020) (*Cooper*) paras 49-55.

where only notice was given to them. The business rescue practitioners argued that, on publication of the plan, all creditors acquired a vested right to vote on that plan at a meeting. The argument proceeded that this right is sufficient to constitute a legal interest in the subject matter of the litigation which may be affected prejudicially by the outcome of the urgent proceedings. In dealing with these points, the court held:

'49. Section 145 of the Act deals with participation by creditors. It provides, in [the] relevant part, that:

“145(1) each creditor is entitled to –

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

(b) participate in any court proceedings arising during the business rescue process ...”

50. The scheme established under s145(1) is that creditors need not be formally joined in all legal proceedings. They are entitled to notice and, should they wish to do so, they may participate by becoming an active party in the proceedings. The scheme is aimed at ensuring that creditors have a right to be apprised of proceedings and the right to elect to join them. To require the joinder of creditors in all legal proceedings would introduce an unwieldy element into the business rescue process.

51. Of course, s145(1) does not supersede the common law on joinder. There will be circumstances in which it is necessary to join all creditors in legal proceedings during business rescue. In *Absa Bank v Naude* the SCA held that once a business rescue plan has been adopted, all creditors must be joined in an application to have the business rescue plan set aside. This is because:

“If the creditors are not joined their position would be prejudicially affected: A business rescue plan that they had voted for would be set aside; money that they had anticipated they would receive would be set aside; money that they had anticipated they would receive for the following 10 years to extinguish debts owing to them, would not be paid; the money that they had received, for a period of 30 months would have to be repaid; and according to the adopted business rescue plan the benefit that concurrent creditors would have received namely a proposed dividend of 100% of the debts owed to them, might be slashed to a 5.5% dividend if the company is liquidated.”

52. It is not difficult to understand why the SCA found that joinder was necessary in those circumstances. Once a business rescue plan is adopted, creditors acquire legal rights under it. These rights are directly related to the satisfaction of their claims against the company:

they are substantive rights for the satisfaction of their claims, albeit that those claims may be compromised under the plan.

53. The right to vote on a business rescue plan is different. It is a statutory right to participate in a process. It is inherently a right of a procedural nature, albeit that once a business plan is adopted by the exercise of the vote, more substantive rights flow from the plan. The nature of the right to vote on a plan, and how it is exercised is determined under the Act. As its point of departure, the Act requires notice, and not joinder, in respect of all proceedings concerning business rescue. In this way, the rights of creditors are protected. They may elect to participate, as K2 has done in this case. Where the relief sought is simply to delay the exercise of the vote, in my view this would not ordinarily require the formal joinder of all creditors.

54. The situation before me is different to the situation that the court faced in *Absa v Naude*. The creditors do not yet have vested rights for the satisfaction of their claims under the proposed business rescue plan. That judgment is not authority for the need to join the creditors at this stage of the business rescue proceedings.

55. I am not persuaded that in this case Westdawn was required to join all creditors in the application. I point out, too, that the non-joinder point taken by the BRPs is somewhat at odds with its stance in objecting to the participation by the creditors' committee and K2 as parties in the proceedings. Be that as it may, I find no merit in the non-joinder point.' (Footnotes omitted.)

[77] The views adopted by Keightley J, which we endorse, were repeated by the same learned judge in *Blue Nightingale Trading 709 (Pty) Ltd v Nkwe Platinum South Africa (Pty) Ltd (In Business Rescue) and Others*,²⁶ in an interlocutory application for the joinder of all creditors of a company in the main proceedings. The submission was made that the creditors had a direct and substantial interest in the main application, which was aimed at setting aside the resolution by which business rescue proceedings were commenced. The submission was made that once a business rescue plan has been published, any order setting aside the business rescue proceedings would be prejudicial to the creditors' financial interests. For this reason, so the submission went, they have a direct and substantial interest in the

²⁶ *Blue Nightingale Trading 709 (Pty) Ltd v Nkwe Platinum South Africa (Pty) Ltd (In Business Rescue) and Others* (Gauteng Division of the High Court, Johannesburg, case no 28760/21, dated 18 August 2021) (*Blue Nightingale Trading*).

proceedings and should be joined. Reliance was placed on the judgment of the SCA in *Timasani (Pty) Ltd and Another v Afrimat Iron Ore (Pty) Ltd*.²⁷

[78] The learned judge proceeded to consider *Timasani*, which affirmed the rights of creditors to notification and participation in legal proceedings in terms of s 145(1)(b) of the Act.²⁸ The learned judge quoted the following extract from *Timasani*²⁹ with approval:

‘...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 ...*’ (Our emphasis.)

[79] Keightley J further held that the court in *Timasani* distinguished *Naude and Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd and Others*³⁰ on the basis that:³¹

‘... 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 submissions advanced.’

[80] The learned judge proceeded to conclude, ‘following the SCA in *Timasani*, that there is no general principle requiring the joinder of all creditors in an application under s 130 to set aside a business rescue resolution’.³² Joinder is required where creditors have already voted and adopted a business rescue plan in applications that involve the fate of the business rescue plan and the financial interests of creditors.³³

[81] It was submitted that the principles laid down in *Timasani* and *Naude* ought to be extended to cases in which the business rescue plan has been published, but not

²⁷ *Timasani (Pty) Ltd and Another v Afrimat Iron Ore (Pty) Ltd* [2021] ZASCA 43; [2021] 3 All SA 843 (SCA) (*Timasani*).

²⁸ *Blue Nightingale Trading* para 14.

²⁹ *Timasani* para 19.

³⁰ *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd and Others* [2017] ZASCA 131.

³¹ *Timasani* para 19.

³² *Blue Nightingale Trading* para 15.

³³ *Ibid.*

yet adopted. In dealing with this submission, Keightley J in *Blue Nightingale Trading* held as follows:

'20. Under the statutory scheme, publication of the plan alone has no effect on the substantive rights of creditors. It has procedural consequences in that, within 10 days of publication, the practitioner is required to convene and preside over a meeting of creditors for the purposes of considering the plan. The Act prescribes what must transpire at the meeting and how the voting process on the plan must take place.

21. In *Cooper NO & Another v Knoop NO & Others* a similar non-joinder point was raised by the practitioner. In the matter, as here, a business rescue plan had been published but not yet adopted. Some creditors sought an interim interdict to prevent the creditors' meeting at which the voting on the plan was to be conducted, pending a further application to place the company in liquidation. The matter came before me. I dismissed the non-joinder point...' (Footnotes omitted.)

[82] Reference is then made to the extract from *Cooper*, quoted hereinabove, dealing with the implications of *Naude*. In *Blue Nightingale Trading* it was held that:

'22. I handed down this judgment prior to the SCA's decision in *Timasani*. However, the principle is consistent with my understanding of what the SCA held in that case.

23. The essential point is that joinder is necessary post-adoption of the business rescue plan because if the litigation is successful it will have a directly prejudicial effect on the creditors' rights under the plan. The situation is different in a case like the present, where a party seeks to bring an end to the business rescue process before a business rescue plan has been adopted.

24. If the application is successful, the only effect there will be is on the creditors' statutory entitlements to participate in the business rescue proceedings that have been initiated. Critically, however, their substantive rights as creditors *vis-a-vis* Nkwe SA will be unaffected. They will retain, or more accurately, regain, their full entitlement to enforce their rights against the company, untrammelled by the business rescue proceedings that were instituted.

25. It is important to remember, too, that under the statutory scheme, creditors have a right to participate in the litigation. The notice requirement facilitates this process and is a safeguard for any creditor who may wish to support either the continuation of the process, or its termination. The fact that joinder may not be required is not destructive of their rights under the scheme. In fact, it is consistent with the overall scheme, which presupposes that, probably for pragmatic reasons, joinder will not, as a matter of course, be required.

26. It may be that there will be cases where, because of the particular facts involved, common law joinder of creditors is necessitated prior to the adoption of a business rescue plan. I have been referred to a recent decision of my Sister, Opperman J, in the matter of *EBM Project (Proprietary) Limited (in business rescue) & Another v Barak Fund SPC Limited*. The matter involved, in part, an *ex parte* application by the business rescue practitioner to discontinue the business rescue, and to place the company in liquidation. A creditor, Barak, who intervened in the proceedings, opposed the application, contending that the practitioner had acted unlawfully in approaching the court *ex parte*. The practitioner's *ex parte* application was instituted while decisions were pending in two earlier matters pertaining to the business rescue proceedings, and involving the same parties. Barak was an applicant in one of the pending applications. Notwithstanding this, the practitioner instituted his application *ex parte*. In this context, Opperman J found that the practitioner had acted unlawfully in proceeding *ex parte* without complying with the statutory requirement of notice. Opperman J noted that:

"The issue of notice is a distinct and separate issue but is to some extent inter-related to the question of joinder of parties who have a real and substantial interest in the outcome of the proceedings. It follows that if a party is entitled to notice it has a real and substantial interest in the outcome of the proceedings under consideration and in respect of which notice should be furnished."

27. She concluded that:

"... it is impermissible for a business rescue practitioner to approach a court *ex parte* and without having followed the prescripts of sections 141 and 145; to take it upon himself to deprive affected persons/creditors to not give them the notice that the New Companies Act requires; to approach a Court *ex parte* and without joining parties who have a real and substantial interest in the outcome of those proceedings."

28. It seems to me that in the circumstances prevailing in the *EBM* matter, this conclusion was warranted. The parties were already embroiled in a series of complex litigation when the *ex parte* application was launched. It is obvious that within that context the decision by the practitioner to proceed *ex parte* could not be countenanced. However, I do not read the judgment as laying down that creditors must, as a matter of course, be joined as parties in all legal proceedings once the business rescue process is under way, and regardless of whether or not a business rescue plan has been adopted. This would be counter to what the SCA held in *Timasani*, which Opperman J expressly cited, and quoted, in her judgment. I read *EBM* as being one of those cases where the particular exigencies of the case necessitated joinder.

29. However, that is not the situation prevailing in the present matter. Here, Nightingale contends that the fact there has been publication of the business rescue plan alone

necessitates joinder. For the reasons I have traversed above, it does not seem to me to make any difference that the business rescue plan has been published. As I have noted, the mere publication of a plan (without its adoption) does not itself bring about any alteration to the substantive rights of creditors. I can see no rational basis why publication of the business rescue plan should give rise to a direct and substantial interest on the part of creditors necessitating joinder under the common law principles.’ (Footnotes omitted.)

Keightley J dismissed the application for joinder, with costs.

[83] It is for these reasons that we find that the joinder of all the first respondent’s creditors is not required in proceedings to interdict a meeting convened in terms of s 151 of the Act, to consider a business rescue plan. Where creditors acquire rights to participate in business rescue proceedings generally, such rights are procedural. They are to receive notice, being an invitation to participate. This includes litigation of the type which is the subject of this appeal. Different considerations apply altogether where creditors have established substantive rights so as to give them a legal interest in the subject of the litigation, requiring their joinder at common law. On the assurance that all creditors received notice of the application, we are satisfied that the application was properly made.

[84] We are of the view that there is no merit in the non-joinder point taken before Pietersen AJ.

[85] With this in mind, it could never be said that the application was an abuse of process. It was notionally made *ex parte*, with notice to all creditors. The application was reasonably made on an urgent basis, particularly where the second respondent refused to budge an inch on his conclusion that the Trust had a nominal voting interest and the third appellant had none. This was despite reasonable requests that he reconsider his stance up to and shortly before the meeting convened to consider adoption of the business rescue plan.

Conclusion

[86] We are of the view that Pietersen AJ ought to have refused the reconsideration application and issued an order clarifying the interim interdictory

relief by setting time frames within which declaratory or review relief should be sought.

[87] Is there any point in keeping this application alive and remitting it to the court a quo in the form of a rule *nisi*, duly amended? Business rescue proceedings are now dragging on into their third year. There seems to be no prospect of a consensual resolution of the disputes concerning the appellants' claims and their voting interests. The meeting convened in terms of s 151 cannot reasonably proceed without the issues being resolved or determined through a court order. We propose making a final order disposing of the application to force a determination of the real issues. Business rescue proceedings are, after all, to be concluded expeditiously.

[88] We do not perceive prejudice to the respondents by making a final order. If the appellants do not make their application within the set time constraints, the interdict will lapse automatically.

Costs

[89] The issue of costs in the appeal was not addressed in great detail. We were urged by Mr *Stais* to permit costs of two counsel, where so employed. We are of the view that there is no reason why the general rule should not apply. The costs will therefore follow the result. The matter is furthermore of sufficient complexity to warrant the costs of two counsel, to be taxed on scale C, where so employed. As far as the costs order in par 1.3 of the *rule nisi* is concerned, none of the parties made any submissions in this regard. The issue was not raised in the respondents' notice in terms of rule 6(12)(c). We can find no reason to interfere with the order, save to add that it would include the costs of the reconsideration application, to avoid any uncertainty.

Delay in the handing down of the judgment

[90] The scribe of the judgment emailed the draft of the judgment on 2 February 2026 to one of the registrars who previously assisted him, with a request that it be circulated to the panel of other judges. On 5 February 2026, the registrar forwarded the draft judgment to the researchers for editing and formatting. This was completed on 11 February 2026 and emailed back to the registrar on the same day. Due to an

oversight, the edited judgment was not forwarded to the scribe, and it was only after enquiries were made on 2 March 2026 that the oversight was discovered. The judgment was thereafter distributed to the rest of the panel and finalised as quickly as possible. We apologise for the delay in the delivery of the judgment.

Order

[91] The following order is made:

1. The appeal is upheld with costs, such costs to be taxed on scale C of the applicable tariff, with such costs to include the costs of two counsel and senior counsel, where so employed, together with the costs in the Supreme Court of Appeal.
2. The order of Pietersen AJ is set aside.
3. The rule *nisi* issued by Marimuthu AJ on 24 August 2023 is confirmed, subject to the following amendments to paragraphs 1.2 and 1.3 which is to read as follows:

‘1.2 Pending the final determination of an application, to be made by the applicants within 20 days of this order being handed down, for a declaratory order determining their claims against the first respondent or for appropriate review relief, the second respondent is interdicted from convening a meeting of affected persons in terms of s 151 of the Companies Act, 2008 for the purpose of considering or voting on a business rescue plan or any amendment thereto.

1.3 The respondents are directed to pay the costs of the application on the attorney and client scale, such costs to include the costs of the reconsideration application.’
4. Should the appellants fail to institute proceedings within the period prescribed, the interdict in paragraph 3 of this order shall lapse automatically. The 20 day period referred to in par 1.2 is deemed to commence running on the date of handing down of this judgment, being 13 March 2026.

VAN ROOYEN AJ

I agree

E BEZUIDENHOUT J

I agree

NIRGHIN J

Case Information

Date of hearing: 28 November 2025

Date of judgment: 13 March 2026

Counsel for the appellants: Mr Stais SC

Ms Acker

Instructed by: Werksmans Attorneys

The Central

96 Rivonia Road

Sandton

Tel no: 011 535 8237

Email: elevenstein@werksmans.com;

psteyn@werksmans.com;

reddyk@werksmans.com

Ref: Dr E Levenstein/ Mr P Steyn/ kr/ VOLK43091.3

C/O Garlicke & Bousfield INC

La Lucia Office Estate

Durban

Tel no: 031 570 5423

Email: Victoria.mcdonald@gb.co.za

C/O Botha & Olivier

Peter Kirchoff Street

Pietermaritzburg

Tel no: 033 342 7190

Ref: S Harripersad/Jessie

Counsel for the respondents: Mr van der Walt SC

Instructed by: Konrad Gothe Attorneys

225 Miller Street

Queenswood

Pretoria

Tel no : 0825524642

Email: konrad@gotheattorneys.co.za

C/O Lister & Lister Attorneys

20 Old Howick Road

Pietermaritzburg

Tel no: 033 345 4530

Ref: Mr A Singh